TECHNOLOGY POLICY INSTITUTE

Reassessing the Need for Antitrust Legislation

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[00:00:04.070] – Sarah Oh

Good morning. Thank you for joining today's TPI antitrust conference. This panel is entitled, “Reassessing the Need for Antitrust Legislation.” We have a great group of experts today, including Robert Crandall, adjunct senior fellow at the Technology Policy Institute. He was previously a nonresident senior fellow in the Economic Studies program at the Brookings Institution. He served as a consultant to the Antitrust Division, the FTC, and the Treasury Department. We have Michael Katz, Professor Emeritus at the Haas School of Business and Department of Economics and former chief economist of the Antitrust Division at the DOJ. We have Maureen Ohlhausen, partner at Baker Bots and chair of the firm's global antitrust and competition practice. She was former acting chairman of the Federal Trade Commission. We have Randal Picker, James Parker Hall Distinguished Service Professor of Law at the University of Chicago Law School. And I'm Sarah Oh Lam, moderator and senior fellow at TPI. So I just wanted to start off this discussion with a question and maybe get everyone's takes on their answer and go into some more discussion. So in President Biden's State of the Union address on Tuesday, February 7, he said one of his lines was, we want to pass bipartisan legislation to strengthen antitrust enforcement and prevent big online platforms from giving their own products an unfair advantage.

[00:01:34.090] – Sarah Oh

So among a few different antitrust points he made or tech policy points, he talked about bipartisan legislation. What do you all think of this policy goal? Is there a need to strengthen enforcement, and do you think self-preferencing is an unfair advantage?

[00:02:01.170] – Robert Crandall

Well, first of all, I don't think there's any general conclusion from the literature that antitrust has been under-enforced. We need stronger enforcement of antitrust. I think that's more of a political conclusion that one would have. As for new legislation, we're going to talk about this, I assume, in a few minutes, aimed at large digital platforms engaging in self preference in activity. I'm skeptical of such legislation, and I will suggest a little bit later that we can use traditional antitrust policy under existing statutes to address any problems that those self-preferencing arrangements provide.

[00:02:52.610] – Michael Katz

Can I jump in? Sorry. Can I just check one thing because I'm not getting any feedback. Can you hear me? This is Michael Katz. Yeah, so I guess I have three problems with this. What the President is saying and others is they want to ban self-preferencing or limit it in order to have fair competition. The problem is they're not clear what fairness means. And Samuel Johnson meant to say fairness is the last refuge of the scoundrel. I mean, fairness is what you decide you want it to mean on a given day, at least according to some people. And in fact, a lot of people think a very internally inconsistent use of fairness, let alone there being a consensus on that. And I think that's a big problem. I think economists have tried, to the extent that they think of it as antitrust, is about fairness. That said, well, let's look at fairness of process as opposed to outcome. And at least some of us think of competition as a measure of fairness being a fair process. And that has a bunch of implications that maybe we'll get into later. But people who talk about wanting to have fair competition really have something else in mind and it's never clear exactly what that is.

[00:04:14.430] – Michael Katz

The second problem is I think it's not clear what they mean by competition. And I actually think that's a huge part of the debate on the consumer welfare standard actually is that different people in the debate have different conceptions of what it means for a market to be more competitive or less. Proponents of the traditional consumer welfare standard I think use it as a way to say well, market is more competitive. We have some we look at. But one of the main ways we decide is well, is it better for consumers when it's moved in whatever direction is? I think there are other people whose conception is it's more competitive if they're more competitors or if small firms have larger market shares? And in my view, at least, those things can be antithetical to one another. You can have leading firms have price umbrellas that's a way to have more little competitors with higher shares. That's not good for consumers and I don't think that's any reasonable notion of being more competitive as I say. Second problem is they want fair competition. What do they mean by competition? And then, of course, we get to what's meant by self-preferencing, in a sense, you're saying, well, we don't want the benefits of integration because integration efficiencies are about things you can do.

[00:05:39.380] - Michael Katz

That you wouldn't be able to do arm's length. And so does that mean anytime you get efficiencies from integration, you're engaged in self-preferencing? Or turn to more specific things, what have you run ads for yourself? Well I guess if you don't charge yourself for ads on your platform, you're self-preferencing, but what if you do charge yourself? Then are people going to come back and say well, but the fact that whatever you say the transfer prices are, the real price is marginal cost and that's not what you charge anybody else---that's actually false by the way. The real cost view is the opportunity cost, but that will get lost. What happens then if you---I think some of these bills which will come to it's not clear what would happen if you charge for advertising if you're running a search service and whether that's viewed as preferencing your business partner. So I think that I'd say---a lot of issues with every part of this and I think the vagueness is a problem for multiple reasons. It's not just, I mean, the sort of standard thing we say is the vagueness is bad, it can discourage investment because you're not sure what the returns are, there's more risk but also I think it discourages innovation.

[00:06:48.690] - Michael Katz

because now if you're a firm that's subject to these rules, you wonder, if I introduce a new product or improve a product I have, am I going to be accused of self-preferencing? So it's raising the cost of innovating for a covered platform. It's also just generically giving you incentives to be nicer to your competitors so that they won't bring a lawsuit against you, whether or not you think they're ultimately going to prevail. So I think there can be real cost to this sorts of policies in terms of innovation and efficiencies. And then just to echo what Bob said, I think this move to single out a handful of firms is a real mistake for a variety of reasons, which I'm sure we'll come to later in the session.

[00:07:34.270] – Maureen Ohlhausen

Great, Sarah, I'll just jump in to say---so your question has two parts. The first is, should we strengthen antitrust enforcement? And my view is that we should always seek to improve antitrust enforcement.

Right. And what are some of the ways we can make antitrust enforcement better? I think is to really have an understanding… There's a lot of allegations that---it has been a failed 40-year experiment and nothing good has been done… Those kinds of things which I don't think really hold up to scrutiny. But to the extent that there are these questions being raised, might it make sense to expend some money or devote some money to doing things like some accurate merger retrospectives? Right? Were there problems that weren't sufficiently addressed? When I think about, for example, how the FTC, after losing a bunch of hospital merger cases, did a hospital merger retrospective and then used that learning to help convince courts that anticompetitive things were happening, I think that's a really good model. Right? To understand better if people are saying antitrust has been missing something, to delve into that, but not to sort of give a diagnosis, prescribe a cure before we know what the diagnosis is.

[00:09:06.200] - Maureen Ohlhausen

One thing that I would say, but I am in favor of continuous learning and trying to improve. But the other part of this is the idea of preventing big online platforms from giving their own products an unfair advantage. Well, the antitrust laws have long paid attention to some of the challenges of having a competitor control entry to a market. I actually wrote a paper calling “Brother, may I?”—it was called, “Brother, may I? The challenge of competitor control over market entry.” And there are some issues that can arise there, occupational licensing being one of the primary concerns, and I'm delighted to see it. That was a big focus of my signature project when I was the acting chair. I did an economic liberty task force to really focus on the problems with occupational licensing. And it's something that the states have taken up and actually, the President's executive order on competition mentioned as a goal. So I think that's a good thing. But there are other things like exclusive dealing. Think about the FTC's McWane case. I was a supporter of that. I think that came out well. I think what we're running into and others have mentioned this, like, what do we mean by fairness?

[00:10:25.630] - Maureen Ohlhausen

Is, what is the issue? Is there a general duty to deal? Right? Do you have an obligation to deal with all comers or competitors in the US? We haven't seen at least the Supreme Court adopt an essential facilities doctrine, but there seems to be an essential facilities doctrine flavor in a lot of this. But also, I think we need to pay a careful attention to what's competition on the merits, right? What's fairness? I think Michael mentioned that. But also, if your product is better and consumers like it and you are not doing it solely for any competitive reasons, we have said generally in US antitrust law, well, that's what antitrust is supposed to do. It's not supposed to pick winners and losers or make sure everybody plays nice on the playground. It's to make sure that consumers get basically the best outcomes there. So is this competition on the merits, or is there something happening, kind of looking back to the Aspen skiing line of cases to say, well, the only explanation for this behavior is the anti-competitive one, and if that's the case, then antitrust has been able to take action. So I think those are the kinds of questions that we really need to unpack when we're talking about fair competition by big platforms.

[00:12:05.730] – Randy Picker

So I think I may be the left end of this panel, which is not my usual posture. So that's sort of amusing. But let's try to run out this a little bit, I guess. So look, I think when you look at the big platforms, the thing to start with is, they built successful products that the public loved, and that's how they got to those

positions. I want to make sure we see that. I think everyone almost certainly sees that. And US antitrust law says you're allowed to go into the marketplace and succeed and win. US antitrust law is mainly based on fault. Maureen mentioned essential facilities. Yeah, that's sort of at the edge. Supreme Court won't even tell us whether it exists. So the question is, and I think this is the question the President was confronting in the State of the Union is, when we have these large, successful platforms that have competed legitimately in one, what do we do, if anything? I think what you're seeing there then is the desire to switch maybe from antitrust to something much more directly regulatory. Public utilities--the antitrust record in these industries, I think Europe has gone the farthest.

[00:13:14.710] – Randy Picker

They chased Google for a decade, billions of euros in fines, and I think have accomplished nothing on the ground. Google's market share has been a flat 95% across that timeline. That doesn't seem like a successful record for antitrust and we're at early days on the US cases, we'll see where those goes. So I understand the instinct that if I want to do something, maybe I want to pass new laws. Whether those are antitrust laws, I don't know. That's a labeling issue. I do think these laws, which are situated in things like discrimination and duties to deal, as Maureen was talking about, those really are the kinds of regulations we see in public utilities. If you go back and look at the Interstate Commerce Act in 1887, it was obviously talking about discrimination. If you talk about the Energy Policy Act of 1992, which opened up the electricity grid, again, duties to deal on the same thing with the 1996 Telecommunications Act, that kind of market engineering is really, really hard to do, and we're going to see a version of that in Europe. But I understand why one might I get tempted myself. “I can do better.”

[00:14:29.250] - Randy Picker

I don't know if we really can.

[00:14:35.250] – Sarah Oh

That might be a good segue into our next question, where we can talk about one of the recent attempts in the last congressional term to legislate that definition of which firms to go after. In the American Innovation and Choice Online Act---it went through markup, but it didn't get to the Senate floor. In that legislation, it was a defining kind of exercise of which covered platforms would be under scrutiny. So maybe we can talk a little bit about that line drawing that was attempted there. To define a covered platform that was publicly traded, they said it would be 50 million monthly active users or 100,000 business monthly active users, a company that had more than $550 billion in annual sales or $550 billion of market cap with a billion monthly active users over the last twelve months. But if it was a private firm, the numbers would be adjusted smaller to smaller levels of earnings. $30 billion of earnings, 1 billion monthly active users. You know, there are a lot of other provisions in that bill. Self-preferencing bans on using data to inform sales, like the integration point that was made earlier rules about not sharing data, search and ranking how they used their internal data, or how they searched and ranked their own products within their own platforms.

[00:16:19.740] – Sarah Oh

And then this covered platform designation would last for seven years, and the DOJ and FTC would have to put out guidelines every four years. So it does sound like a regulatory regime with very bright lines. What are your all's takes on this attempt? What kind of exercise is this?

[00:16:46.590] – Robert Crandall

Let me start by pointing out that 55 years ago, President Johnson set up a commission to study stabling concentration in highly concentrated industries and the growth of big firms. And the Neal Commission, chaired by Phil Neal, dean of the University of Chicago Law School, put out a report which suggested what we ought to do is set up a commission to break up concentrated industries as long as those industries couldn't show that the concentration was required by economies of scale and to ban mergers between leading firms and large firms and large firms and leading firms in various industries. Now contrast that with what we're doing now talking about this Online Choice Act which is going to apply apparently to about five firms and set up what Randy referred to as essentially public utility regulation of these firms. It's a very small matter and suggests an answer to our previous question was that there must not be much major concern about the strength of antitrust policy. As for the details of this, I think it's very hard to generalize across different kinds of platforms with different market shares in different areas and to suggest that the practices they engage in, whether it's shipping their own products at preferential rates,

[00:18:11.040] - Robert Crandall

whether it's positioning of the positions on their platform as being discriminatory. It's very difficult to know whether those are anti-competitive unless you have some sort of legal procedure under maybe Section 1 of the Sherman Act. Even Amazon now, which now I guess is approaching or maybe passing 50% of all retail online sales with online retail sales only meeting about 15% of all retail sales may not have that much market power and it may not have market power equally distributed across all the things they do. So I think passing a statute like this setting up regulation of their practices without any legal intellectual inquiry into what the problem is, is a big mistake.

[00:19:02.730] – Michael Katz

So I guess not surprisingly I agree with the assessment. It's a big mistake. Actually, Randy, I was going to try to be the left-wing member of today's group. Look, my belief is we do need antitrust legislation. I would say though I base that on what I see happening in specific cases going through courts, not based on what I consider to be pretty low-quality studies that are looking at the overall performance of the US economy and then a lot of criticism of studies that I won't repeat here. But I do think we need antitrust legislation. I also think we need tech legislation, deal with some issues with privacy and content moderation, if anybody can come up with them. But at the same time, I think we definitely should not have Big Tech antitrust legislation. This firm specific legislation I think is a recipe for trouble. First off, I think it's clear if you look what's going on in Congress a lot of this is about using antitrust as a means of exacting political retribution and trying to shape private conduct in a way that antitrust is really not supposed to be used for. I mean the thing of saying we're going to have a legislation against you because we don't like what you're saying or what the firm's public policy positions are, I think it's a real corruption of antitrust and I think that is a big motivator or motivation behind what we're seeing.

[00:20:33.270] - Michael Katz

I think moving to very specific firms being covered is bad because we tend to forget general principles. And if you look at the quality of antitrust analysis done at the antitrust agencies as opposed to the specialized agencies, and I was chief economist of one of them, the Federal Communications Commission, and they're great economists there. But if you look at the quality of the work, it's nothing like what comes out of DOJ and the FTC. And it's not because of the people, in my view. It's because there's some real problems with having specialized agencies and what happens in terms of influence and the politics. And then, as Bob mentioned, there's some real problems with his criteria. If the conduct is bad, how come it's only bad when it's done by these firms? What's the principle that says the same conduct by a smaller firm doesn't count? Particularly when we're talking about size in terms of these absolute measures. We're not saying things like, oh well, a dominant firm versus a non-dominant because, yes, conduct can have different implications, but we're talking about here the total size of the firm without any reference to markets. I think that from the perspective of economics, makes no sense.

[00:21:48.030] - Michael Katz

And I'll cut myself off mercifully for the rest of you, but it's just really not clear that antitrust is the right tool also for a bunch of the ills that people diagnosed. And I mean, I think there are concerns with privacy, there are concerns about false information, but these are things that competition may make worse, not better.

[00:22:09.430] – Maureen Ohlhausen

Yeah, look, I agree with the concerns that my fellow panelists have already raised. And I think some of the real telltale parts of that were the fact that it would have prohibited conduct in markets in which there was no allegation that the platform was dominant. Right. Once they had that status, it applied across all markets, even if they were kind of the Johnny come lately to the scene. And I do think it was an attempt to not name certain companies, but only have it be aimed at certain companies. And I think, as we've seen how dynamic markets are and what happens in the stock movement, a lot of that doesn't really make much sense to do it that way. I think it's been one of the great benefits of the antitrust laws has been that they're not industry specific. Right. Because we do see these big changes in industries over time. Also, some of the provisions, the requirements, were very much in tension with some of the other concerns that were being raised, particularly about privacy and the idea and data security and security of platforms, kind of having the obligation to share access to your platform with all commerce.

[00:23:37.060] - Maureen Ohlhausen

And the burden, the risk was on the platform. If they tried to keep somebody out for security reasons, and that included, because of the way the definitions were written, it could be foreign state-owned enterprises, right, that could demand access. And if the platform got it wrong, couldn't justify it because it was an affirmative defense, they would be on the hook for huge fines. So I think it created some rather odd incentives there. But that's not to say that there aren't issues that should be addressed. And I have been actually a proponent of federal privacy law, which is not just aimed at a few handful of companies, but that would be more broad based. And I think that that could be a useful step forward to address some of these concerns. But I think one other thing to mention is, I think a lot of people who were initially kind of

supportive of this legislation thought that the focus would only be limited to those companies. But from the actions that we're seeing the FTC take in unfair methods of competition and in the non-compete rulemaking, you can see, and whatever the merger guidelines are going to look like when they get proposed, that these changes, this focus, these sort of new standards are not going to be limited to that handful of companies that this was.

[00:25:09.620] - Maureen Ohlhausen

So I called it the thin end of the wedge. I think that this is an approach that, if accepted in that legislation, would proliferate through the government's approach throughout the whole economy.

[00:25:24.050] – Randy Picker

So I got up to pick up Amy Klobuchar's book. I don't know if you can see that. I mean, she's a true believer. We went to law school together. We were on law review together. So I don't want to cast aspersions on motives. I think she believes. So I think the question is, I think, a couple of things. So, again, I understand the motivation behind the legislation, which is to say, defining markets, defining market power. Doing that in the context of the antitrust case is time consuming. It takes a long time. They're going to be appeals. If you've made either a political judgment or a democratic judgment that a response on some time frame that matters is required, then I understand why you would take the approach that this bill took. You've got a set of firms that you think matter. Let's try to address those firms. So I don't have a problem with that. The process that got there, the House did a report. We can talk about that. Is that good enough for congressional work? I don't know. I'm not here to cast aspersions on that either. I think much more problematic is the actual terms of the legislation.

[00:26:37.010] – Randy Picker

Right? So I think that there are things that are ripped from the rules if they'd been passed, which consumers have told us through their choices that they value the choice between a phone that gives you multiple app stores, which is what you get if you choose Android and a Android based handset versus what Apple does. Those are market choices, and there are security issues associated with those. Let people decide and the market has sorted that, I think, to some extent. The question as to whether you could continue to pre install software, whether that would be seen as self-preferencing, all of those were things that I think consumers I think consumers were going to find this incredibly disruptive or at least there's a risk that they would. As to devices that for better or for worse, we have in our hands all the time. I think from my perspective it's the substance of the legislation that I would focus on first and foremost. And less on the question of whether it's got the right companies or whether the process that got us here was a good process or a bad process. I do think it is completely fair to say, as Bob did, that there was basically no hearings on whether or not the substance of this legislation would have addressed the problems that I think they see.

[00:27:57.010] – Michael Katz

I just say---to respond to that in a couple of ways. First off, actually Klobuchar is not one of the people whose motives I'm imputing. But I think if you look at the coalition for a lot of this stuff as strange bedfellows and I think some of those people are in that bed because they want to screw tech and not in a

good way. But the other thing is, I think that you underestimate the fact that the bad process and, in some cases, bad motivations is one of the reasons why the bills end up not being very good or having problems. And I think these have to be more general and apply to firms across the economy. You get more pushback about having general principles and people say…but look, I agree with you. Obviously, what matters in the end is what actually happens and what the bills actually say. But I do think that--holds motivations aside--that just a matter of process and structure or whatever, having very firm specific legislation I think almost inevitably leads to bad legislation.

[00:29:03.050] – Robert Crandall

Could I add one thing too? I'm responding to Randy's assertion that this is one approach to avoiding a legal morass of enforcing the antitrust laws. You have to keep in mind that this legislation also provides the possibility of mandating interconnection of platforms. And we went through an exercise like that in the Federal Communications Commission after the 1996 Telecom Act and Michael knows quite well how that came out. We had ten years of intense dispute in the courts and when it finally resolved itself, it only resolved itself by the entrance essentially all failing because the market had changed so dramatically. So it's very difficult to legislate interconnection of platforms or to regulate interconnection of platforms in a rapidly changing business.

[00:30:03.850] – Randy Picker

And Bob, the way you just described that is exactly how I teach it in my networks course. That is what that decade looks like. There's no question.

[00:30:15.640] – Sarah Oh

Before we move on from this topic, what do you all think? Randy, you mentioned it's not about identifying particular firms, but how would these principles work without kind of focusing on the big platforms?

[00:30:35.120] – Randy Picker

Well, look, I agree with what Michael said, which is, you change the political dynamics of this type of legislation when you narrow the focus to a handful of firms. So he's dead right about that. And that made it easy, I think, for people to say, that's not me, I don't need to worry, I'm going to go do what else I usually do when I get up in the morning. But that is true, I suspect, and Bob knows the Telecommunications Act history. We had not passed major legislation in the telecommunications area from 1934 to 1996, basically. Right. And so even specialized industry regulation can be extremely hard to get through. And look, obviously these bills you mentioned, Sarah, upfront, these bills really never got to a meaningful vote. And that was in good situation where there was bipartisan---I'm skeptical of that word and how we apply it, but there was at least a hint of that in these situations. Again, people had different motives. Michael is right about that, there's no question about that. But at least they had a common target that they were chasing.

[00:31:50.040] – Sarah Oh

Great. So there's another act that was up last term called the Open App Markets Act, which would have focused on app stores, the Apple and Google app stores, the in-app payments, purchases, interoperability provisions, self-preferencing. And there's litigation ongoing right now, *Epic v. Apple*. It's on appeal at the Ninth Circuit, I believe, in *Epic v. Google*, which will have a jury trial in November of 2023. And DOJ is ramping up their Apple App store investigation. They might bring us to it soon. How about this set of concerns? Do you think legislation or litigation are appropriate?

[00:32:38.480] – Robert Crandall

Do you want me to start? Well, I think this suffers from the same problems we discussed in the previous open markets discussion legislation. We now have two major app stores associated with two operating systems on mobile devices. There's no reason to think that this situation is going to continue forever, ad nauseam. And drafting legislation to deal with them now, in very specific terms, essentially substitute again utility regulation for antitrust, it seems to me is a big mistake. Let the investigations of DOJ go forward, let the antitrust investigations go forward to either DOJ or FTC and see what comes on them. But I don't think we need legislation for that purpose.

[00:33:29.900] – Michael Katz

I say something that's out of order at the very beginning, but I've worked for both Apple and Google as public that I've done that. I just want to disclose I have various engagements that are confidential, sort of for and against various firms that are waiving Big Tech. So I just want to disclose that. As always, I would say to people, you shouldn't believe things because I say them, you should believe them because you've checked up on them and they're true. Anyway, so I just wanted to disclose that. I may be missing the point, but nearly until the act is really about just shifting the burden to Apple and Google, right, to say they have to be able to defend themselves as opposed to the plaintiff, they would have to show that they were guilty of something. Again, it seems to me sort of odd to do a shift like that just for this, although maybe there's something to it. But I think what I was saying before by thinking about specific legislation mistake, I'll stick to that here. I'll also say I think that some of the motivation behind this bill shows a complete lack of understanding of the economics and business model, because a lot of this certainly is true of the private litigation.

[00:34:50.820] - Michael Katz

And the lobbying for this act is saying, well, we don't like it. There's a 30%--we meaning app developers--there's a 30% commission, and we don't want to have to pay it. And the reason we have to pay it, we're forced to use Apple's in app purchasing mechanism. Well, actually, I think that's not the reason you have to pay 30%. The reason you have to pay 30% is because Apple has created an incredibly valuable platform. And if Apple says, fine, use anybody's payment mechanism you want, but by the way, you owe us 30% of any transactions if you're using our platform and our intellectual property just to be able to do an Apple native app, in terms of the money, you're going to get the same outcome. So I think a lot of this focus on, well, this is a way to stop the companies from charging high fees, I think is completely misguided because there are plenty of other ways they could charge those fees if they want to. And so I think that's actually another reason to be concerned about such specific legislation, because I think points like that just completely missed in the debate, as far as I can tell, and it's central to understanding the economics.

[00:36:06.250] – Maureen Ohlhausen

Let me make a similar disclosure as to Michael's. I have clients in the tech industry, and none of them are directing what I say today, but I certainly do have representations. But look, on that, I don't really have anything to add on the Open Markets Act other than to say, again, kind of going back to, I think some of the tensions with the privacy and security issues that I think are really important to keep in mind, and that direct privacy regulation might be a good way to move forward. But also, you can't sort of undervalue or just kind of understand the complexity, I think, of allowing more free access to platforms, their needs at the FTC, certainly while I was there, you see the scamming and the data risks, data security risks or security risks that can occur. And I think that's one of those values that maybe is better addressed through direct regulation than through antitrust.

[00:37:19.490] – Randy Picker

So a couple of thoughts to repeat something I said before, I think. So, look, we have had competition in the smartphone space. And that competition really started from a point where we had two firms that were the leading firms, maybe even dominant firms, if you like. Those would have been Nokia and Rim with the BlackBerry. When Steve Jobs announces the iPhone in January of 2007, he's crystal clear on what his fantasy is. That Apple will, in the year 2008, get 1% of the market. That's his hope: sell 10 million phones. And so, a better model came along, and that competition took place. And part of that competition, again, is this question of whether or not or you get a secure device. Nokia, what does Nokia do these days? Well, they're really sort of in the telecom space. They issue these security reports. They say the prevalence of malware on the Android platform is much higher than it is on Apple. There are choices there. Okay. And why we would then insist that the regulation eliminate that competition and take us to the Android model, I just don't understand. On the 30%, I agree with Michael completely, though,

[00:38:34.510] - Randy Picker

I have a question for Michael. So, look, we have seen situations where in Korea, for example, where Korea passed legislation limiting what Google could make in charges for these payment fees. Google said, fine, here's a 26% extra charge. We've seen a move like that in the Netherlands, with regard to dating apps, and Apple, and Apple said, fine, here's a 27% charge. So, so, this was never about the payments. It was always about charging, as Michael says, for the IP. And so there just no reason to think this is going to make progress on that. But then here's my question for Michael. Spotify and Epic have to get that--I presumably—right? They understand what's going to happen here. So why is it they think this is the path they're trying to pursue Spotify in the EU? And then obviously, as Sarah said, Epic with joint lawsuits against Apple and Google. I just sort of don't get it. If the 30% is the focus, they are not going to fix that.

[00:39:38.910] – Michael Katz

So I think it's a mystery to me in some ways about in the US. I mean, I think in Europe what they may hope is basically they'll then start going after the charges for IP. And there's actually sort of a disturbing line in Judge Gonzalez Rogers opinion and Epic in the US where she says, well, Apple says they can charge these prices because they have their IP, but I didn't see them anywhere in court justify that it could

be this high. I would be tempted to say, with all due respect to the judge, I don't see anywhere in US antitrust law that says they have to justify how high it is, given it's whatever market power they have is lawfully obtained. But I think where it may be is that sort of the next step is they'll go after in the US, these fees in some other form. But I agree with you. You would think that they see this coming, but they have some sort of plan, but I don't know what they think the next move is in the US.

[00:40:40.980] – Randy Picker

Yeah.

[00:40:46.050] – Sarah Oh

Before we move on from this point, I thought maybe we could talk a little bit more about self-preferencing. So, the whole definition of an app store or like a third-party marketplace is to have--well, not the whole definition--but retail practices. You can have your own generic products next to other products. So, in Walmart and Kroger's, is there a way, just to play devil's advocate, can you differentiate self-preferencing in an online space versus a marketplace like a grocery store?

[00:41:26.110] – Robert Crandall

Let me start by saying I don't know why you'd want to. You mentioned Walmart. I mean, why would we want to go after Walmart for self-preferencing when they have something like 6% of online retail sales? It seems to me ridiculous to do that. And certainly no one would think about bringing a Section 1 antitrust suit against them for doing that.

[00:41:53.210] – Randy Picker

Yeah, I would have thought the short answer to your question was no.

[00:41:59.450] – Michael Katz

Yeah, I would say, well, except the longer answer is, I think they thought you could do it. But why would you want to make the distinction? But I think that also comes back to this point. I think all of us been making or most about concerns with specialized legislation because we have had shelf space cases. Not just about self-preferencing, but these acts go beyond that about what? About favoring a particular business partner. And we've had a litigation of that in the past. So, the question is why do we need--or a question, is why do we need additional very specific legislation? But I will say-- but as part of trying to reclaim the position on the left, I think there can be abuse of some of this. You can have exclusionary display policies in a retailer if you have enough market power. But again, I think antitrust already covers that.

[00:42:59.230] – Maureen Ohlhausen

Yeah, look, I agree with that. I guess I've been characterized as being on the right side, not surprisingly. But my position is not that behavior can never violate the antitrust laws. I think it can. Right. But I think it

really has to show that it is exclusionary and that it hurts competition and reduces consumer welfare. Right. I think those are the things not rather than like a more generalized well, is it fair? Right. Does every player in the market have the exact same access and choices and positioning? And I think those are two very different propositions. But I do think that this idea of fairness, when you see some of the speeches by the FTC commissioners and Commissioner Bedoya heavily recently along these lines, they're pursuing a somewhat different vision of this that is more focused on. And even Jonathan Cantor had some remarks recently about whether a small player can have the same access to the market as a large player. Right? And again, that's a different focus than saying anti-competitive behavior that reduces consumer welfare and that is only explainable based on the anti-competitive value of it. Again, going back to something like the Aspen skiing test.

[00:44:40.510] – Sarah Oh

Great. So, for this final section, I thought we could talk about enforcement. And so there have been recent developments in FTC, DOJ enforcement news. Meta-Within--so the FTC withdrew their administrative suit on Friday after losing in district court on a nascent competition theory. Bloomberg reported Thursday evening that DOJ plans to sue to block the Adobe-Figma merger or acquisition. And then there's ongoing Microsoft-Activision litigation. And then other news too, Representative David Cicilline is leaving Congress, so he was kind of head of the charge for Big Tech legislation. Do you guys have any thoughts about these different actions or developments?

[00:45:29.390] – Maureen Ohlhausen

I'll jump in on the Meta-Within and obviously everyone should feel free to weigh in also. But this was the idea of the potential competition. Would the acquirer have entered the market but-for the acquisition of the smaller player? And that is a theory that has been raised before. I was at the FTC when we brought the Steris/Synergy Health, but I think it is one that really requires--so theoretically it is not a faulty theory. Right? But I think the question is, do you have the facts to support it? And I think the Steris case faltered on this. I think the Meta-Within case also. That I think courts are kind of hesitant to say we are going to presume that the business would have taken these actions to enter unless there's contemporaneous evidence that they were planning to do so, rather than kind of theorizing that, well, maybe they would have or if the government enforces you, that would have been a good idea or something like that. So I think while there's been some suggestion that Meta-Within broke new ground by recognizing this theory, I don't think so. But I think it just founded on the same difficulties that the other similar cases have found it on, which is this presumption that they would have entered and doing that.

[00:47:15.680] - Maureen Ohlhausen

Now I think one thing to take that's of great interest here is-- so the FTC, which has its Part Three administrative litigation authority, and it goes into court to get a preliminary injunction in aid of that administrative litigation. Generally, it gets the same standard applied to it, though there's been as DOJ, because DOJ can't bring an administrative child, they can only go into federal court. So there's been this question over time whether the FTC standard is different or lower or easier. My experience has been generally the same, but I think it was interesting that it took the FTC a while to then go ahead and dismiss the administrative litigation. It just did it on Friday. Because there has been this discussion of, well, should they just forge ahead, right, even though the party closed, can close the deal. And there has been

legislation proposed over time called the Smarter Act, that is based on this concern that the FTC has an advantage over DOJ, that it has an easier standard for getting a preliminary injunction and then can kind of take two bites at the apple and that there's concerns that that is not fair. Right.

[00:48:38.810] – Maureen Ohlhausen

That's the due process issue there. So I think it was actually very wise for the FTC not to try to take that second bite at the apple, because I think the FTC is under a lot of scrutiny right now. You've got the Axon case. There's questions about the FTC's administrative litigation to begin with. So I think that in some ways it seemed like a foregone conclusion that they wouldn't proceed. But I'm glad to see that they didn't take that opportunity because I think it would have created additional scrutiny of the FTC's administrative litigation process.

[00:49:19.410] – Michael Katz

I guess I'll just say that I agree. I'm sort of baffled where I have seen some of the things in the press where they say, yes, this is really a victory for the FTC because it broke new ground in terms of recognition, the actual potential competition doctrine, whereas the decision itself essentially says that's false. Facebook tried to claim, oh, this is a crazy theory the Supreme Court never adopted. And the Court said, no, we've seen this multiple times. It has been accepted by the lower courts. It's not something new. So I don't-- in any event, I'll do my amateur lawyering-- this is not presidential. So I don't see how this is a victory for the FTC. To me it seemed like they lost on the facts. I think there is a question about whether the potential entry cases are just too hard to bring because the standards require the facts you have to come up with are just too much. But I don't think this case really does much to advance the ball on that. Maybe it raises the issue because they think they're right and they lost, but it seems that we still have this problem that's very hard.

[00:50:34.250] - Michael Katz

It's sort of increasing the level of difficulty of predictions beyond even what we typically see in mergers, and something I would like to see us collectively give more thought to. But again, I just don't see how this case really advanced.

[00:50:53.350] – Robert Crandall

When we talk about enforcement, one aspect obviously is merger policy. And there is a belief, and indeed some intellectual studies that suggest that.

[00:51:12.910] – Robert Crandall

Growth of the large platforms has been facilitated by two lacks of merger policy. Tom Hazlett and I will have a piece out in the Journal of Law and Economics this fall. It shows that the big platforms have not been particularly acquisitive other than those two big acquisitions by Facebook, which are under litigation right now. And that going after mergers in order to stop the development of these large platforms. And the growth of their market position is probably not going to be a very successful enterprise and also runs the risk of discouraging innovation because of the inability of large firms to buy out the aspiring new ventures.

So I think it's a mistake to think that more aggressive merger policy would deal with the problem of the large digital platforms.

[00:52:20.060] – Maureen Ohlhausen

I see Ginger Jin is in the audience, and I would commend some of her work also on that question about the acquisitions by the Big Tech players not sort of being anything particularly notable, at least the nonreportable ones that were studied by the FTC recently.

[00:52:41.040] – Randy Picker

So I guess a few thoughts about all of that. So I was going to open my slides, but PowerPoint was not behaving. So I'm doing Google and Antitrust today, and I certainly do a sweep of their acquisitions that I think are relevant. So they buy a firm that they then build out to build maps. They obviously buy Android, build that out. They buy YouTube, they buy DoubleClick. So there's a window of time. And all of those acquisitions happen between, I want to say 2005 and maybe 2007. There's a series of acquisitions there that build in the infrastructure that turns into the Google that we know today. So I don't lose track of that, even though I agree that there are some mergers that have gotten a lot of attention-- Instagram and WhatsApp. On the Within case, Maureen's obviously run the FTC, so I'm really interested to hear her perspective. For me, this case came out just in time so I could teach at this quarter, which was fantastic timing. For me, it felt like when a student turns in a first draft of a paper and you give them comments on it, and then the second draft is the interesting one.

[00:53:56.540] – Randy Picker

Yes, we have potential competition, but there are some critical issues that the Supreme Court left open in Marine Bancorporation in '74 and **in Falstaff** before that. So this is an effort. Let's see if this doctrine has legs today. And so I'm interested in the next case of this. Maybe they didn't really care about this one so much, but the next one is the one that interests me. Sarah, you mentioned that David Cicilline had leaving Congress. Boy, when I saw that on the Wall Street Journal, that really jumped out at me, too, because he was such a big driver behind what was going on the House side in the last Congress. I don't know if that tells us that he knows what's going to happen going forward in terms of control of the House. Is that what that represents? But you're right to flag that. I thought that was very interesting.

[00:54:58.460] – Sarah Oh

I guess just one last point about nascent competition. I mean, one musing that I've had is the ChatGPT connection with Microsoft. And so, you have AI coming up. How is that not foreseeing a merger that would be anticompetitive? I don't know. Is there an idea there? Can you predict the future? Is that the YouTube acquisition of the past?

[00:55:30.420] – Maureen Ohlhausen

So, just to mention, I don't think that was an acquisition. I think it's an investment by Microsoft. But I think one of the other things we're seeing is that a bunch of other players also have similar projects and not just

the biggest names. I think it's more an example of how you can't predict these markets as competition being static through the same channels that there do seem to be these sort of leaps that change things quite-- not just an incremental change, but like a very large change. So I think that just suggests how it's hard to predict where things are going. And so having sort of a structuralist viewpoint may make you miss the forest for the trees there. Randy, you also asked about what I thought about Meta/Within. I mean, the complaint itself was sort of the original complaint was very internally inconsistent and then they got rid of half of it. It's important to try to move case law forward and to bring some cutting-edge cases. I myself brought killer acquisition merger challenge and CDK/Automate. And the parties eventually abandoned that deal. There's nothing wrong with doing that if you have strong facts, strong legal theory, and strong economics, right?

[00:57:07.700] - Maureen Ohlhausen

Because that's going to move the needle forward. I have concerns on two fronts. One, when you don't have that and you risk negative case law, that makes the next case harder to bring. And then secondly, there's the opportunity costs, right? We live in a world of constrained resources. And if the FTC is spending a lot of resources going after all cutting edge or all highly theoretical things or very aggressive things, we've got them operating a whole bunch of fronts. There's only so many lawyers, economists, economic or research dollars to fund the economic studies, things like expert stuff to go around. So I think you need to pay close attention to sort of how to balance those resources to make sure the bread and butter type of enforcement is able to continue. And it's not all on the outer edge.

[00:58:16.210] – Randy Picker

Final note, just briefly on that. I keep pitching my slides for class today, so I also do an arc on Microsoft and search. So this goes back to like MSN Live in 2004 and Windows Live in 2007 and Bing in 2009. So I think they are so desperately happy to finally have a product, maybe, that will do something to Google. But you're right, it's hard to forecast and they've been chasing them for a very long time. Completely unsuccessfully so far.

[00:58:53.700] – Sarah Oh

Great. Well, on that note, thank you so much for your time and your thoughts and we'll invite you back again. Thank you.