

BRIEFLY NOTED

of the courts ignoring an APA provision, this time by the D.C. Circuit. For many decades, courts have wrestled with the following question: If a statutory provision says that one may seek, within a certain number of days, pre-enforcement review of the validity of a regulation, is that period exclusive? Or may one wait to challenge the regulation until one is accused of violating it?

Courts have been all over the map on this question, struggling to weigh various factors. The D.C. Circuit, for example, invented this doctrine, later crystallized in its 1994 decision in *JEM Broadcasting v. FCC*: Where the opportunity provided by a statute for pre-enforcement review of a regulation's validity is "adequate," that period is exclusive as to "procedural" invalidity arguments but not exclusive as to "substantive" invalidity arguments.

But in all the decades that appellate courts have wrestled with this question, never once have they recognized that a provision of the APA speaks directly to it, and in a manner inconsistent with their judge-made doctrines. The third sentence of APA § 703 states: "Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement." The provision means, in essence, that when one is accused of violating an agency regulation, one may challenge its validity unless the pre-enforcement challenge avenue is not only "adequate" but "exclusive." *JEM Broadcasting*, in contrast, does not require that the pre-enforcement provision state that it is exclusive.

One would think that courts, of all institutions, would assiduously pay attention to such a statute if it were cited prominently to them and adjust their doctrines accordingly. A recent case indicates that not all courts will. In an Occupational Safety and Health Administration case in which this writer was counsel, an invalidity question came before the D.C. Circuit. The court requested supplemental briefs on whether *JEM Broadcasting* had foreclosed it. The defendant, an employer, responded that,

among other things, APA § 703 "directly addresses this issue" and that, unlike *JEM Broadcasting*, the mere adequacy of a pre-enforcement challenge provision "cannot alone prove that it is 'exclusive'—or 'exclusive' would ... be effectively read out of the statute." The employer acknowledged that its argument "treads a different path than the doctrine developed" in circuit precedents but observed that they had "not indicate[d] ... that this Court [had] examined this matter in light of APA section 703."

Although the court stated that it was resolving the issue in favor of the employer on the basis of clear legislative history in the Occupational Safety and Health Act, the court indicated that its holding might not apply to all OSHA standards. That indicator directly contradicts APA § 703's third sentence, which despite its prominent mention by the employer, the court never cited.

Courts are not the only institutions to

have ignored APA § 703's third sentence. Scholars and even the Administrative Conference of the United States (ACUS) have been guilty of this, too. In 1982, ACUS adopted a recommendation on the subject of exclusivity of pre-enforcement challenge provisions that failed to mention APA § 703's third sentence. The recommendation was based on a study by a prominent administrative law scholar that briefly mentioned the provision but inaccurately: it stated that APA § 703 "specifically recognizes ... that enforcement review can be deemed precluded if an adequate opportunity for pre-enforcement review is presented." That is inaccurate because it ignores § 703's other key criterion: exclusivity.

Despite these decisions, counsel has the responsibility to continue urging courts to apply the rights provided by the APA. Hence, counsel must be familiar with the APA and cite it prominently, lest the rights provided by the APA fall into desuetude. R

Congress's Anti-Innovation, Anti-Consumer Big Tech Antitrust Proposals

BY THOMAS M. LENARD

Antitrust in the United States has evolved over time as we learn from cases and research. Reforms should enhance competition to make our economy stronger and consumers better off. Unfortunately, a package of bills approved by the House Judiciary Committee earlier this year, along with companion bills introduced more

recently by Sens. Amy Klobuchar (D-MN) and Chuck Grassley (R-IA) and by Klobuchar and Tom Cotton (R-AR), would do exactly the opposite.

If these bills become law, consumers would almost certainly lose access to many popular and routinely used online services, while others would become less useful. For example, if you like being able to buy both independent retailer

and Amazon products on Amazon's platform, you might be out of luck. Amazon might have to choose between its third-party platform business and its Amazon-branded business. Either way, prices would be higher, choices fewer, and consumers would lose. So, likely, would many small companies that built their businesses on the Amazon platform.

The legislation could also prevent Google from offering Gmail and Google Maps, and Microsoft and Apple from

THOMAS M. LENARD is president emeritus and a senior fellow at the Technology Policy Institute.



offering competing services. Apple might not be able to put any apps on its iPhones. Amazon, Google, and Microsoft might no longer be able to operate their cloud services, which compete vigorously with each other and support thousands of small businesses.

The proposals would make it unlawful for a platform to “discriminate among similarly situated businesses.” What would this imply for a search engine, which, by definition, must make choices if it is to provide useful information to users? Consider, for example, a search for restaurant reviews. Without some algorithm for sorting the many businesses offering reviews—such as the review sites Yelp and Gayot, as well as reviews in newspapers, Facebook, Google, and more—it becomes impossible for those sites to provide useful search results.

One legislative proposal would bar an acquisition unless the acquiring company shows the acquisition wouldn’t enhance its “market position.” But *the point* of an acquisition is to enhance the business’s market position in some way, so the law would seem to effectively bar all acquisitions. The law would prevent dominant businesses from blocking competition via

acquisition, but it would also effectively eliminate perhaps the most important reason entrepreneurs enter markets in the first place: most startups say their most achievable goal is to be acquired.

From individual review to blanket prohibition / To be sure, there are legitimate antitrust complaints regarding product or firm discrimination and acquisitions. And, in fact, such cases have been filed under current law. But these behaviors can also bring—and have brought—enormous benefits. That is why, under current law, they are examined on a case-by-case basis, not banned outright, as the new legislation would do.

The proposed laws also make institutional changes that would hamper innovation by turning the Federal Trade Commission into a digital regulator that must grant platforms permission to change how competitors can access data. The “technical committees” envisioned by the legislation would almost certainly slow the pace of platform development, as every proposed change could be challenged by competing firms and perhaps also by the government.

Finally, the criteria for whether the rules apply to a given firm are not based

on any apparent reasoning except to make sure they apply to Google, Amazon, Apple, Facebook, and possibly Microsoft. The bills define “covered platforms” as any firm that:

- has at least 50 million U.S.-based monthly active users, or 100,000 U.S.-based monthly active business users;
- has net annual sales or a market capitalization greater than \$600 billion; and
- “is a critical trading partner for the sale or provision of any product or service offered on or directly related to the online platform.”

Notably, the first two criteria are unrelated to antitrust. Size alone says almost nothing about whether a given behavior is anticompetitive. The third, at least, is related to antitrust arguments, but could be part of a challenge under existing laws.

Rather than reforming antitrust, the congressional proposals can more accurately be described as creating a new regulatory regime. Before taking such a step, Congress should consider the lessons from previous regulation, including of network industries. Communications regulation slowed innovation and the introduction of new services, such as mobile telephony, at great cost to consumers. Most regulation of surface transportation and airlines was dismantled in the 1970s, with bipartisan support, when evidence showed that regulation largely served to protect incumbents at the expense of consumers and slowed the pace of change and innovation in those industries. It is naïve to think the results would be different now. At a minimum, Congress should seek evidence that new rules will produce the intended benefits.

Even if one agrees with the widespread sentiment that “big tech” is too big and powerful, the congressional proposals are not the answer. Had such laws been in place for the past 20 years, consumers and businesses wouldn’t know what they were missing. And the United States would not be the world leader in technological innovation. R