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Technology Policy Institute

Major Developments in Antitrust Policy

Aspen Forum 2022 Panel Discussion

Panelists:

**Dennis Carlton**, David McDaniel Keller Professor of Economics Emeritus, The University of Chicago Booth School of Business

**Judy Chevalier,** William S. Neinecke Professor of Finance and Economics, Yale School of Management

**Wolfgang Kopf**, Senior Vice President, Group Public and Regulatory Affairs, Deutsche Telekom

**Hal Varian,** Chief Economist, Google

**Joshua Wright,** Executive Director, Global Antitrust Institute and Professor of Law, Antonin Scalia School of Law, George Mason University

Moderator:

**Thomas Lenard**, Senior Fellow and President Emeritus, Technology Policy Institute

Monday, August 15th, 2022

10:45AM – 11:45 AM

Event page: <https://www.youtube.com/watch?v=eQ62AR-hhdY>

**Tom Lenard:**

This is the panel on major developments in antitrust policy. I think it's fair to say that this is an unsettled time for antitrust policy. What had for many years seemed to be a fairly broad consensus about the methods and goals of antitrust now appears to be perhaps disintegrating. In a recent speech, FTC Chair Lina Khan stated that that broad government inaction has allowed too many markets to become uncompetitive with consolidation and concentration now widespread across our economy, resulting in higher prices, lower wages, declining entrepreneurship, growing inequality, and a less vibrant democracy. She indicated that this was the result of a choice made 40 years ago to follow the misguided philosophy of people like Robert Bork.

**Tom Lenard:**

And that declining competition is now a systemic, not an isolated, feature of our economy. And it is attributable to a set of ideas and policy decisions. Two years ago, the House antitrust subcommittee issued a controversial report on competition in the tech sector, which has formed the basis for a number of legislative proposals targeting the largest tech platforms in addition to DOJ, FTC, and the state AGs, as we've just heard, have investigations or cases underway against all four of the big tech platforms and similar developments are taking place in the European Union, which has also brought major cases against the largest tech platforms and has recently finalized the Digital Markets Act, ushering in a new era of EU digital regulation for big tech. So there's a lot to discuss and we have a really great panel of experts to discuss the implications of these developments, and two of them are virtual.

**Tom Lenard:**

Dennis Carlton is a professor at the University of Chicago Booth School of Business and a former Deputy Assistant Attorney General for Economics at the Antitrust Division. Judy Chevalier is a professor of finance and economics at Yale. Wolfgang Kopf is Senior Vice President for Group Public and Regulatory Affairs at Deutsche Telecom, where he is also responsible for competition-law, media, and spectrum policy. Hal Varian is chief economist at Google and an emeritus professor at UC Berkeley. And finally, Josh Wright is Executive Director of the Global Antitrust Institute and a professor at the Scalia Law School at George Mason and a former FTC commissioner.

So the new leadership at the FTC and the Justice Department Antitrust Division has indicated that it considers the last 40 years of antitrust enforcement, which actually is almost equally divided between Democratic and Republican administrations, to be a failure. So my first question is, has the last 40 years of antitrust been a failure, and if so, why? And if it's not been a failure, also, if so, why? So let me start in reverse alphabetical order and maybe go down the line on this, since this is kind of a fundamental question. Josh?

**Josh Wright:**

Sure. Thanks. And thanks for having me. And I wish I could be there with you in person. I think the answer is no. The last 40 years have not been a failure. I think there's a couple of ways to look at this and I'll—there are quite a few of us, and I want to leave room for everybody. So I'll sort of give the quick hits. I think there are a couple of ways to look at the claim that there's been systematic failure in the antitrust enforcement for the past 40 years. The first is to look at whether we see sort of a crisis or failure in markets. And people like to point to big, aggregate, sector-level concentration statistics or the markup data. But I think what the evidence shows is while you have rising sector-level concentration, you've also got, you know, if you look at that markup data, most of the reasons markets have gone up is sort of papers digging in at a deeper market level and showing, you know, it's 60 or 70% attributable to marginal costs falling, right?

**Josh Wright:**

And that's—it's hard to make a systematic market-power argument over that. Lots of interesting economic questions: why haven't prices fallen more, distributional effects, and all sorts of things. And most of the recent follow-up work suggests that what you're seeing is local market concentration falling or the sector-level concentration increases. There are markets where there are anticompetitive problems. I think one of the things that the sort of new group at the FTC and DOJ have done successfully is call more attention to labor markets. I think that's a good thing. I think they've called more attention to problems that might arise out of common ownership. They've asked us all to sort of reevaluate priors. I think that's an excellent thing. But I think if you look at the data as a whole, it'd be hard for us to tell a widespread sort of market-failure story across markets. Not just sort of picking our favorite ones over the past 40 years, I think antitrust enforcement over the past 40 years has gotten better over time.

**Josh Wright:**

I think it's hard to point to the courts and find a crisis. The agency win rate is, you know, somewhere up in the 80% range. Maybe optimal is 100, but I doubt it. The agency wins cases when they bring cases [unintelligible] anticompetitive effect. I’m sure, you know, sort of favorite cases they've lost that they think they should have won and vice versa. But I think looking as the data as a whole, the big move in the courts over the past 40 years was to move to the consumer-welfare standard, move to a system that said the plaintiff's got to put on evidence of an anticompetitive effect to win. Agencies and private plaintiffs do that all the time. And I largely think antitrust laws have, while imperfect, moved us in the right direction. And certainly I am not persuaded by any of the evidence that there's a widespread failure of competition in markets or, much less, that it was caused by lack of antitrust enforcement.

**Tom Lenard:**

Hal, you want to weigh on this?

**Hal Varian:**

Yeah, yeah. I'll say a few words on this. One is it's not a failure. It hasn't been a failure. There's a much better economic foundation for antitrust now than there was years ago. Just as one example—the merger guidelines, which have conveyed in a clear way to firms what is permissible and what is not. And that predictability is really helpful from the viewpoint of both businesses and policy.

**Tom Lenard:**

Wolfgang?

**Wolfgang Kopf:**

Well, from outside view, I'm the only European here. I think the, the U.S. policy in the past 40 years was rather role model than a failure. I'm not sure about the past six to seven years where some of the concentration was not tackled, but comparing to with the European approach, which was always pretty interventionist and following also per se rules until 2003. I think the much more economic approach in the U.S. was the role model for the rest of the world. So and Europe took that up in 2003, developed same approaches, but stayed, in many industries, especially old industries, rather interventionist. And that was to the detriment of those industries. Especially if you look at the, the globalization process in the past 20 years.

**Tom Lenard:**

Judy?

**Judy Chevalier:**

Sure. So I'll also be quick. I mean, I think when we talk about antitrust policy, you know, the three pillars are cartels, mergers, and monopolization. I don't know that we have any serious—I mean, perhaps people do—but I don't know that this is really an argument that our cartel policies have been fundamentally flawed. Perhaps in looking forward, we’ll, you know, fail to handle algorithmic collusion or other new threats, kind of, in that area, but looking backward, I don't think we can say that's a concern. I think monopolization—probably much of the new proposed legislation has to do with, you know, unilateral acts by firms and monopolization. And there, I would say, actually, a disciplined approach that we've had, you know, I don't, I don't see evidence of under-enforcement, particularly in the U.S. We can talk more about that.

**Judy Chevalier:**

I think on merger policy, I probably might deviate from my panelists, co-panelists, and say we've been probably a bit too lax in merger policy, though most of the glaring examples that I might point to are—since we're here at the Technology Policy Institute, we're probably implicitly thinking about tech. But most of the examples I might think of are outside tech. So, you know, have we had too many hospital mergers. Yeah. I'm pretty sure we have. So I think that you know, it is time to think about merger policy and what we've done right and what we've done wrong.

I pick up on Josh's point where he says, you know, it's been helpful that the agencies have been helpful in kind of pushing us to reevaluate our priors.I think that we can think a little bit about the question of type-one and type-two errors with merger policy, right. So we often think, is this really a harmful merger? And, you know, what is the cost of getting it wrong? If we allow a merger that ex post turns out to be harmful versus we don't allow a merger that actually wouldn't have been harmful. And I think, you know, there's some—I think that I have heard a lot of argument recently that I think we should consider that, you know, we should think about, okay, if we over-enforce and we don't allow some mergers that maybe wouldn't have been so bad to go through, how terrible is that, right. And, you know, AT&T and Time Warner makes me think that maybe, you know, not every merger, you know, not every efficiency argument is indeed so compelling. And so, you know, we should think about this type-one/type-two error issue. So I would say the place I have the most concerns is merger policy, looking back. But I would not say that merger, I mean, that antitrust enforcement on net has been a big failure.

**Tom Lenard:**

Dennis, do you want to weigh in on this question about the last 40 years? <Laugh>We can't hear you.

**Dennis Carlton**

Okay. Yeah. I hope that's better. So glad to be able to speak to you. I'm sorry I can't be there in person. Well, what can I say about the last 40 years? I think economics has made antitrust policy considerably better than it was. I don't think—I can't conceive of anyone debating that point. The use of economics has improved our understanding and the court's understanding of what are relevant issues. Just to give one example, the distinction between a harm to competitor and a harm to competition. And now, crystal clear. And in terms of asking whether there are ways to improve antitrust—there's no question, sure there are, but looking back comparing to basically people using their gut reaction as to whether they want to allow a transaction or not, I think there's been an improvement.

**Dennis Carlton**:

On the cartel side, I think the leniency program has been a great innovation. On the merger side, I think merger policy is now much more focused. I've been involved with revising many of the guides since 1984, and I think they bring clarity to what are the relevant topics. I think it is improper, inaccurate, to say that people don't pay attention in merger policy to anything other than price. I don't think any economist would debate that innovation is important, that labor market power being created or monopsony power against labor being created and used are important issues. But the economic framework to evaluate mergers seems right to me—could be improved a little, but seems right. And to bring in, as some have suggested, other criteria, you know, the promotion of democratic values, the effect on income distribution, I think, would be misguided in the sense that it would detract from the focus of antitrust.

And once you make everything a policy issue that a merger authority must take into account, you have no predictability as to what they might do. And I think that you would have a merger policy that's untethered from the principles, because you don't know how to trade off various types of goals that have been put forward in the vertical area.

And so even if Judy believes—and I might have some agreement with her—that merger policy perhaps could have been a little tighter based on evidence we have so far, I would raise two issues. The merger policy over time can be improved as your study of past mergers allows you to assess what you've done right and what you've done wrong. You don't need to change antitrust policy for that. It's changing your views. It's changing assumptions in light of the evidence. That seems perfectly consistent.

**Dennis Carlton:**

In terms of the emphasis on vertical, there's been a lot of criticism that there haven't been enough vertical cases. I think you’ve got to go very carefully on vertical cases. The contribution of, say, the last several decades has been recognition that vertical practices have efficiencies. And unless you take into account of those efficiencies, you will get the wrong answer. And some of the suggestions in various types of antitrust bills that are floating around kind of make me nervous that they're not taking account of all the economic effects of various vertical policies. Well, I would like to talk about the evidence that Josh referred to, but I'll save that for perhaps another question, because I've talked long about that.

**Tom Lenard:**

So we have a lot of things to talk about, but let me follow up on basically questions about the goals of antitrust and the consumer-welfare standard, which has obviously become very controversial in recent years in recent talks. Since I quoted FTC Chair Khan, I'll give the Assistant Attorney General Kanter equal time. In recent talks, he indicated that the goal of antitrust enforcement is to protect competition and the competitive process and explicitly rejected the consumer-welfare standard, saying, if you ask five antitrust experts what the consumer-welfare standard means, you get six different answers. Is this just a question of semantics or are we seeing a major change in the goals for antitrust? And obviously you alluded to this, Dennis, but are the agencies pursuing different goals than in the past? And what do you think the Assistant Attorney General meant by that statement? And if you ask five different antitrust experts what it means, you get six different answers.

**Dennis Carlton:**

Is that for me to answer? Are you asking me, Tom? Yeah. Oh, okay. Well, I have thought about this. I wrote a paper about this. I think, you know, words can mean whatever you define it. And attorneys are very good at being more careful than economists sometimes at defining words. But I wouldn't have no objection with saying that the antitrust laws should preserve the process of competition. The question is, what does that mean? To me as an economist, when firms compete against each other, a lot of good things happen. They compete to become efficient. That drives down costs. That then drives down prices. They compete for labor. That drives up wages. So people get compensated. Wealth, innovation occurs. All of those are good things, and I don't care whether you want to call those the consumer-welfare standard or make up whatever word you want, but the competitive process produces that. And that's why I'm in favor of competition.

**Dennis Carlton:**

As far as this big distinction between consumer surplus and total surplus. You know, I've done a lot of consulting over the years, and I was in the government for a while. I have never seen a merger case in the United States—I have in Europe and in Canada, but not in the United States—but much turns on this difference between total surplus and consumer surplus. Anyone who says that the antitrust laws should be concerned only with consumer surplus, I think, is just making a fundamental error in the sense that a cartel of buyers is something that I think most economists would condemn yet that would improve those buyers’ wealth, those consumers’ wealth. So it can't be that you are for consumer surplus only. I just think this is a [unintelligible]. In terms of—and just semantics.

**Dennis Carlton:**

In terms of asking the question, do I think other goals other than protecting the competitive process should be considered. That I think is what's being raised. Should you be concerned about distribution of income. Should you be concerned that a poor person is trying to buy a firm. Should that be given special dispensation in contrast to that person being a rich person? I hope not. From my point of view, I like to treat everybody equally, and I want to maximize—I've used the word economic wealth. Well, okay. What, people would ask me, what do I mean? I don't think total surplus is so bad. But what I do mean is to say that the competitive process produces desirable goals. That doesn't mean there's any theory that says it's right, that says that will occur. There's a lot of imperfections in the world.

**Dennis Carlton:**

And it's just an empirical fact that regulation seems to work in many markets, much better than regulation and intervention. And that's why I'm in favor of using the antitrust laws, not industry regulation, to try and attack what some people might call economic failure, market failure.

And just want to end by pointing out one thing. People who are criticizing our laissez-faire system are big on pointing out market failure. Harold Demsetz, years ago, made mention of what's called the nirvana fallacy. Don't think just because theoretically you could make things better off in a perfect world, that if you allow governments to try and do that, they will do that. Our history, history of regulation in, you know, going back 40, 50, 60 years has told us just the reverse—that you give people power to intervene in markets that could work pretty well themselves. You wind up harming and doing a much worse job than those markets would've done.

**Tom Lenard:**

I'd like other people to comment. And when I read the statement by Kanter, I thought, well, maybe what he really means is—what he's talking about is protecting, you know, competitors. Small, you know, other competitors, rather than any distinction between consumer welfare and total welfare, consumer surplus and total surplus.

**Judy Chevalier:**

So if he meant that, that would be bad. <laugh>

**Tom Lenard:**

<Laugh>

**Judy Chevalier:**

So—sorry I interrupted you if that's what he meant, which it's not at all clear, that would be bad. And I think probably the other economist would agree.

I'll just quickly mention. I think, you know, I think that when people criticize the consumer-welfare standard, they're often criticizing a sort of a straw-man version of the consumer-welfare standard. I think that—we think that—if I'm thinking about the question of whether this merger is okay, I want to think about the question of, you know, the present discounted value of all future surplus, right? The consumer-welfare standard, or, you know, a standard looking at the effect on consumers would be thinking about not just consumers tomorrow but consumers in the future.

When I read many of the criticisms of the consumer-welfare standard that have been put forth, many of them are saying, well, we don't—that current antitrust doesn't think about innovation, or it doesn't think about the future effects. But the future effects and innovation—that's part of welfare and consumer welfare. So I think it's just a straw-man version of consumer welfare, the consumer-welfare standard, that's being attacked, not actually the consumer-welfare standard.

**Hal Varian:**

Yeah, as I interpret Kanter's remark there, it says, competition is an end in itself. Whereas we think that generally competition increases consumer welfare, as Dennis said. And there are rare occasions where they're distinct. And one example of these rare occasions are when you're looking at competition for standard setting, ‘cause it's useful to have one standard for things. Remember VHS and Beta? Huge loss there. Remember Nokia had made Symbian open-source but didn't really support it in any given way, and you ended up with this huge proliferation of different operating systems. Every phone had a different operating system, so it was a mess. So there are cases where you see a distinction between competition and welfare maximization, but they're relatively rare, I would say.

**Tom Lenard:**

So several of you have talked about merger policy, and as obviously you all know, the agencies are in the middle of a proceeding to revise, perhaps in a major way, the merger guidelines. So I guess my—the threshold question is, do you think the guidelines need to be revised? And then, if so, how?

**Hal Varian:**

Yeah, so I would say in Silicon Valley, the name of the game is “acqui-hires,” where you're acquiring a firm in order to hire their engineers and their creative development. And when you look across acquisitions by tech companies, they're often—in fact, I might even say typically—very small companies. So there's a FTC study of this, where they showed that this was—most of the companies that were acquired were, in fact, small companies. Same thing, the competition market authority in England also had a report on this topic.

Let me give you an example. How many engineers came with the Android acquisition? Okay. You can think about your number. Well, the answer is four. There were four engineers that came with the acquisition. And what was the software product? They had no software product at the time. They had a prototype. They had ideas. They had very, very interesting—might even say, brilliant—ideas about a way you could make open-source software that set a standard for the telecommunications industry and led to, I think, dramatic increases in consumer welfare.

So as you look across these acquisitions, you have to remember, they're not acquisitions generally of big firms that are horizontally or vertically related, but in lots of cases, they're just a way to acquire talent. And that is the critical ingredient for Silicon Valley.

**Tom Lenard:**

Well, one of the concerns that's been expressed by some of the new enforcement regime is acquisitions of nascent competitors.

**Hal Varian:**

Well, let me respond to that. It turns out when you look at Silicon Valley Bank. Silicon Valley Bank does a survey of small firms. And what they found is 50% of them—50% of the small firms—see their exit opportunity as acquisition, not as IPO. And we look at the IPOs, you have to look at them not just before acquisition, but you have to look at them after acquisition. And if you fail to integrate the engineers, the talent that you've acquired through this acquisition, then you'll often see a de-acquisition, or it just didn't work out. So you should look at this as a labor-market issue, not really an industrial-organization issue.

**Tom Lenard:**

Anybody else want to weigh in on the revision of the merger guidelines?

**Josh Wright:**

I'll say something quickly, if I might, on merger policy. I think I'm gonna co-sign, if I might, Judy's earlier statement that, you know, we're talking usually, the criticisms of the consumer welfare standard, about a straw-man version. I don't think that the premise of the earlier question, Tom, is look, there's all this controversy around the consumer-welfare standard. I don't think so. I don't think there’s controversy in the courts. You know, not all the applications are perfectly harmonious, but I don't think there's all that much controversy among economists. We quibble with each other about, you know, total- and consumer-surplus questions.

**Tom Lenard:**

Let me, let me—not to interrupt, but just—one of the slide-out questions is—see what your view is—is, should Congress codify the consumer-welfare standard?

**Josh Wright:**

I think it's a horrible idea. And the reason I think it's a horrible idea is because I've seen draft attempts to do this, right, and they say something like, we've got a hundred-something years of decisions where courts—remember what both the Sherman Act and the Clayton Act projects were? Congress wrote, hey, courts, figure this out. Figure out what it means to restrain trade or create market power or substantially lessen competition. And we go through a hundred, sometimes painful, years of decisions to sort of come up with a framework where—look, I counsel clients in front of the agency. With all due respect to Jonathan Kanter, I don't have much problem telling them, advising on, what runs them afoul of the antitrust laws and what doesn't, what creates antitrust exposure and what does not. And I suspect neither did he when he was in practice.

**Josh Wright:**

So for me, I think codifying into a sentence a hundred years of sort of common law of antitrust is just asking for trouble. And it's based upon the premise that we don't know what it means now, but I think we do. I think we know that conduct that creates market power and makes and distorts the competitive process that Dennis mentioned and harms consumers, creates antitrust exposure.

To me, the consumer-welfare standard mostly means the plaintiff wants to win an antitrust case under the modern antitrust laws. They've got to show that the conduct at issue created some market power and harmed competition and consumers. That, I think, is pretty easy to counsel. It means different things in different settings. But people—lawyers—advise on this all the time. Economists do work on this all of the time. The agencies have experts who think about this all of the time. And judges do a pretty decent job at it.

**Josh Wright:**

We all get to sort of sit back and throw rocks about different, you know, footnotes and their opinions and whatnot. But I don't think this, sort of, you know, this rush to codify the standard, you know, sort of fixes it before we're establishing that something's broken is a perfect example of what Dennis described—it's very rare on a panel where someone beats me to a UCLA reference, but Dennis did it—of the nirvana fallacy sort of in action.

That doesn't mean there aren't areas where we can improve, but the way we improve is sharpening our toolkit. The way we think about—the hospital mergers are great example. The agency wins a ton of hospital merger cases. If we think they're not winning enough, you know, we go and we look at—we can talk about budget for the agencies, et cetera.

**Josh Wright:**

But the claim that there's something systematically malfunctioning in the antitrust laws, when the agencies win, you know, 90% of these cases—maybe that means they ought to be bringing more. Let's see. Maybe we ought to be studying the outcomes of the cases more closely that we don't bring and trying to learn something from them.

But sort of jumping to legislative language, whether it's codifying the welfare standard, you know, sort of codifying a hundred years of case law on a sentence, or whether it's something else with merger policy, I think, is a couple hop, skips, and leaps ahead of where we are or should be.

**Dennis Carlton:**

Yeah. I just wanted to add one or two points. I agree with it, just about everything that was said. In terms of the bill—of what the current administration is pushing on nascent competitors. you know, this has been a topic that's come up repeatedly. There were hearings that the FTC held in the late 1990s that I testified at. And I made a very simple point then, and I would repeat it now. The ability of the agencies, or anyone, to predict who is going to be a future successful competitor, who is going to come up with a great new product, is pretty limited when you look at the evidence. And to promulgate a merger policy in which you are saying you can't buy any of these nascent competitors, you're too big already—I think it's very dangerous in part, for a variety of reasons. One, you're going to be, you're often, wrong. And two, you're going to prevent this—Hal was saying—the hiring, the efficient way to hire labor.

**Dennis Carlton:**

You will also stamp out the incentive for entrepreneurs to start. Because a lot of entrepreneurs, especially in high tech, can come up with great ideas, but then they may not know how to monetize it. And that's what a lot of these big companies help them do. And if you remove that possibility because of a merger policy that doesn't allow nascent competitors to be purchased, I think you can run into deep trouble.

To return to something—I have to return to something. I want to return to something Josh said, which is to improve our tools, the way to improve our tools of merger policy—and not just to do mergers retrospectively, which I like doing, but—it's to have the agencies, the economists of the agencies. And there are more industrial-organization economists at—between the FTC and the Department of Justice and probably anywhere else in the world. They should be keeping track of the models and tools that they're using to evaluate a merger. And then what they should do is see what happens and see, were those tools good or bad? And if they were bad, why?

**Dennis Carlton:**

So Judy mentioned the AT&T-Time Warner case. I happened to be AT&T's expert. I think it was appropriate we won the case. I have an article on that. But here's the point, what I do in the article. I look at the models they used and I show how wrong they turned out—I testified, I thought, they would be wrong. But if you go back and actually look at the evidence, they were wrong. And when you go out a year or two—that's what we need to do. That's what, to improve our tools of merger policy, the government economists to be saying, listing, what are they assuming at the time they're making the decision about whether to allow a merger or not allow a merger? What do the models say? And then what happens two years hence. Let them look at the data, what models worked, what didn’t. That's a way to improve our tools.

**Dennis Carlton:**

But I am worried where—you know, I have no idea what new merger guidelines might say. I think the existing ones are fine. I think they could add more about labor market concerns. And they want to say something about common ownership. I think the evidence on that is a lot less clear right now, which way that will go, but it's certainly something that [unintelligible] keep their eye on.

What I’m worried is that they'll stick things in the merger guidelines, oh, of a hundred different things you have to take into account. And that will gut the merger, the principal focus that we now have of the merger guidelines that is, I think, very helpful to the courts.

**Hal Varian:**

Let me just repeat a point that you said, Dennis, ‘cause I think it's a critical point. That is, if you make exit harder, you're going to reduce entry, just to paraphrase your earlier statement. And if you go telling Google, Amazon, Facebook, Microsoft, whatever, they cannot compete to hire a five-person firm, that is a perversion of the whole idea of making innovation, because talent is the critical factor.

**Tom Lenard:**

Well, let me—we're soon gonna run out of time, so we have, we need to discuss some of the legislative proposals that are under consideration. And obviously, as we know, the antitrust bills are aimed at the four or five largest tech platforms, the ones that have been introduced—most notably, the American Innovation and Choice Online Act and the Open App Markets Act. Obviously their prospects are, at this stage, uncertain. And these bills, I think, have a considerable amount in common with the EU’s Digital Markets Act. Both enact what I would consider to be kind of common-carriers-style, non-discriminatory, open-access types of requirements for the major digital platforms.

So, a couple of questions. First, do we need new antitrust legislation? And second, you know, should the large tech platforms be treated, you know, be required to have non-discriminatory open access to their platforms. And maybe, Wolfgang, since I think there are, there is a lot of similarity with what's going on in the EU, if you'd like to comment first.

**Wolfgang Kopf:**

Yes, pleasure. I think the European discussion in the beginning was rather similar to the U.S. discussion despite you are having in here—and we just discussed this—rather fundamentalist views on welfare standard and issues like that. From a lawyer's perspective, looking at cases on the tight deadlines, the welfare standard in Europe often deteriorated to, is there a higher price or not, and this was not really the measurement you would expect. And the same applies to the type-one/type-two errors. It was all a fear of type-one errors in the end, and there was little reflection what could lead to that application because [unintelligible] case really didn't reflect anymore.

So suddenly politicians came up and said this is going wrong. And one of the main reasons was the duration of cases like the Google case—almost nine years—and some other cases where the widespread feeling was, antitrust is not delivering its purpose anymore. And so the responsible people at the EU Commission came up with a new tool. But that was in terms of interventionism and it led to an outcry throughout all industries.

**Wolfgang Kopf:**

So what should one do then? And the European answer there is regulation. I mean, we have a much more regulatory tradition than the U.S., despite the fact that many of these regulatory ideas were born in U.S. They were never implemented over here, but they were implemented in Europe, like these common-carrier type of access and rate regulation.

**Wolfgang Kopf:**

And so where did we end up? We ended up in an outstandingly fast legislative process where the Digital Market Act was implemented, and it's now been in place and will be enforced next year. So there's a time period where the potential core platform service providers, as they are called, have some time to adapt.

And so what is it about? I mean, the thresholds are pretty similar to what has been discussed in the U.S. It's, you need an annual European take, turnover of 7.5 billion in the last three financial years or market tab, cap, which is above 75 billion euros. And you need active end users of the service which exceeds 45 million, the U.S. [unintelligible] said 50, I think. And you need to provide the service in at least three member states of the European union.

**Wolfgang Kopf:**

This was more or less agreed to within record speed. And then the big question was, what should be regulated? And there they went into a number of obligations which they think are self-executing. But I think that's wishful thinking. So the idea was that the platforms adapt automatically to those rules, but any lawyer knows how you can interpret such rules. So I have very much doubt that they're self-executing.

So just to give you some example, there's an obligation to ensure data portability for end users. So a gate keeper has to provide end users with effective portability of data. For example, Facebook has to allow its social network users to move the data they generated on Facebook to another social network. I mean, that's a big burden, especially in terms of make this operational.

Then there's an obligation to allow interoperability with hardware and software that prevents, for example, Apple to provide Apple Pay as the sole payment service.

**Wolfgang Kopf:**

Then there's an idea that side loading is prohibited. That means that on the operating system, especially the app stores, you're no longer allowed to prevent that apps can be downloaded separately from the website of an app developer or whatever.

And then self-preferencing is a big theme. So this is, in essence, the idea—and the idea was to limit this to big platforms, be it U.S. or European platforms.

And we will see how that will be enforced. I mean, it needs a whole of lot of new thinking. And so far the European Commission only has about 100 posts to handle this whole new thing. And if you go to Brussels, I think there's hardly any law firm to be found, which was not working for big tech. So you can imagine the balance—

**Tom Lenard:**

Everything is always good for the lawyers. So, but obviously as you indicated, these provisions, the self-preferencing provisions, the provisions on side loading, are major elements of the bills that are currently under consideration.

So let me ask the rest of the panel, first of all, are these good ideas? <laugh>

**Hal Varian:**

No.

**Tom Lenard:**

I think I know, I think I know the answer, but—

**Judy Chevalier:**

So, I mean, I'll jump in on that. I might be a little less conflicted than Hal, but—I, you know, and I think the Europeans will see this too—I think it's very difficult to single out specific companies, essentially single out specific companies, for specific roles.

You know what, it's hard to imagine—what is the principle whereby private-label Band-Aids are a bad idea at Amazon but they're a good idea at Walmart? You know, I just, you know—I don't know, right? But the self-preferencing rule applied to Amazon in a way that, I think, could be interpreted to limit their ability to introduce and promote their private-label products—you know, there's a decent economics literature now looking at private-label products but also, you know, the self-preferencing behavior of Amazon, like the buy box. And it's, you know, it’s just not very convincing that this behavior has thus far harmed consumers.

**Judy Chevalier:**

So I think singling out particular companies in this broad-brush way strikes me as, you know, problematic. It's hard to imagine what is the principle for a data portability rule that applies to Facebook but doesn't apply to Epic, right? Or, you know—so singling out particular companies in this way, I think, you know, just ultimately, you know, in three years is going to lead us to—if we thought these were good regulations, many of which I think are challenging and problematic—you know, in three years deciding, oh, we actually regulated the wrong, you know, we regulated the wrong companies. So I am quite skeptical about the legislation.

**Tom Lenard:**

So if these laws do not get enacted, do people think that the FTC will try to enact those major provisions like prohibitions on self-preferencing by regulation? They seem to be pretty aggressive about trying to promulgate regulations. Maybe I'll ask that of Josh since he's got the most inside view of the FTC.

**Josh Wright:**

So, so yes, yes, and yes. I think, I'm glad that everyone else handled the reason that the legislation was just sort of generally a poor idea. I also think that they will not pass.

But I think a useful way to think about the FTC’s agenda is, you know, if you don't like the consumer-welfare standard, if you don't like having to prove competitive harm in court, what do you do to evade judicial review? And your answers are, get legislation—well, that's not gonna pass—and then rulemaking.

There's a third answer, which I won't talk about, which is, see how much sort of merger review—see how much you could muck up the process to deter activity without going to court or without passing rules. Can I take your merger through a sort of burdensome review process? And I encourage you on your drink breaks in Aspen to go ask practicing lawyers how much of that is going on at the agency, ‘cause it's quite a bit.

On rulemaking, now that they've got three votes with Commissioner Bedoya confirmed, I suspect that you'll see attempts to replicate something like a self-preferencing rule, something on non-compete, something, you know, maybe to do with nascent acquisitions or in the merger space as well, through Section 5/unfair-methods-of-competition rulemaking—a whole controversial area about whether the agency has authority to promulgate substantive competition rules under that section of the statute. I think the answer is no, and I've written about it.

**Josh Wright:**

But I suspect that attempts to do, kind of replicate [unintelligible] and other pieces of legislation as rules will be an important battle. One, I think my friends in the antitrust bar, you know, sort of been preparing for a while, but administrative law is a foreign beast, most antitrust lawyers. But I think that fight will be a big one, a time-consuming one, and a really important one for the future of competition policy in the country, because very quickly many in the room are sort of been through the net neutrality battles and the ups and downs and changes of administration and court challenges. And I think the FTC shifting its focus to competition rulemaking in the shadow of what really is unclear authority of its own power to do so—it's gonna make the FTC look a lot more like the FCC and the policy space look pretty similar, if the FTC gets its way. Mark me down, by the way, as betting that the FTC loses its attempt to pass substantive competition rules as sort of promulgating regulation. But that they will try, that they will vote it out, and that it is coming soon, I think absolutely, yes.

**Dennis Carlton:**

One simple point, which is—I don't want to get into any specifics since I’ve worked in the past for and sometimes against some of the companies involved—but a very simple point. The high-tech industry is rapidly changing, and whenever you have regulation or try and have regulation of a rapidly changing industry, it's just too hard for the regulators to keep track of what's going on. And they wind up causing delays in innovation. And innovation is one of the strongest ways we improve our products and our standard of living.

It makes me very nervous when you target specifically an industry or—and as Judy said—make exceptions to other industries without any underlying economic criteria and without any attempt to show that this would produce a benefit, not a harm. So it makes me nervous, these proposals.

**Tom Lenard:**

So I'm trying to think of which of these—maybe, I don't know if people want to opine on this or if they have a view, but it's a question that's come up here. It’s, how will Noah Phillips’ resignation affect the FTC and its actions? One could speculate, but obviously nobody knows who's going to replace him, I guess.

**Josh Wright:**

I'm happy to do FTC-commissioner-exiting questions. This is an area which I'm familiar. Look, I mean, one, Noah has done a fantastic job and should be applauded for his public service. But—and he will be missed at the agency, no doubt. So from the perspective of the agency, I worry about a time period with his voice sort of missing from the agency. Even when I'm sort of duty-bound to believe the following, but even when outvoted at work every day, I think dissenting and having opposing views at the agency is important to improving its work product. And I think Noah and Christine do quite a bit of that.

But look, on the substantive stuff coming down the road, just sort of counting votes—three to two or three to one—I don't think it affects too much what happens. The important things coming are enforcement decisions, which, you know, there'll be some three-ones instead of three-twos. More work for Commissioner Wilson after Noah leaves, whenever that is.

**Josh Wright:**

And the substantive rules get done either which way. I think it is critically important that there are opinions written about the unfair-methods-of-competition rulemaking authority by sitting commissioners. You know, those cases will go sort of somewhere to the Court of Appeals. And I think it'll be imperative for, whether it's Noah or Christine or both, to sort of write in those cases.

But I think on what we actually see as sort of work product coming out from the agency—same, they're going to do the same. They told us what they were going to do when they came in. They were going to bring more cases. They were going to second request every merger that came through. They were going to litigate more and that they were going to do it both inside big tech and out. And they're, I think that's what's coming.

Interestingly enough, so far, if you look at the scoreboard, you know, comparing this administration's antitrust agency sort of across—you know, not a lot more action so far, plenty of talk about using, you know, criminal authority for Section 2, plenty of talk, but not much more in terms of wins on the scoreboard. To be fair, FTC didn't have the majority, but that's coming.

**Tom Lenard:**

All right. Well, you've kind of started answering my wrap-up question, which is, looking beyond the rhetoric, are we in fact witnessing a major change in in antitrust policy?

**Wolfgang Kopf:**

Certainly for Europe. I mean and that's a big experiment in a way. Right. But the feeling in Europe is I think not that we are seeing such a big change because I would oppose to the notion single firms are targeted. It's more the market power in some of these platform markets. And there are also European firms targeted. But the change we are seeing there and we at least in industry have mixed feelings, is that regulation should do the job again rather than antitrust. And I mean, if this isn't overall development, that's detrimental to the overall economy, that's what I believe.

**Tom Lenard:**

So I'd like everybody to have a chance to answer this question.

**Hal Varian:**

Well, I would add “attempted” to your sentence—namely, it’s certainly going to be an attempt to radically change antitrust.

**Tom Lenard:**

Right. I was actually trying to see if people think it would be successful. <Laugh> What the result will be. Yeah.

**Judy Chevalier:**

I mean, I'll just quickly note that I, I think, you know, we all know this, but I kind of share Josh's view that there may not be that much substantive change in the U.S., but of course, especially for these technology industries, you know, the EU regulations, you know, are going to play an important role on their conduct in the U.S. And I think Doug Peterson mentioned this at the prior session, that you know, if California implements a bunch of different antitrust rules or rules that are separate from the rest of the country, it will affect all of us. So I think I might predict bigger change, but maybe like Josh, not through the route that we've been talking about.

**Tom Lenard:**

Dennis?

**Dennis Carlton:**

I tend to agree with what Judy said, that even if the bills are unsuccessful, because Europe is so interventionist, that will have an effect on what happens in the United States. I also think it's unfortunate that when I was at the Justice Department, I had the feeling that it was a fight between European interventionist policy and American antitrust policy. And I thought we should be doing more around the world to convince people that our way in the U.S. was a better way of doing it, regulation and intervention. And I'm not sure. I feel we fail. And therefore I hope we, the United States don't go down the road of increasing in bills aimed at specific industries, because I think that would really harm our competitive system. I do think there will be some harm to our system from what people are doing around the world, because it will have an effect.

**Dennis Carlton:**

And finally, I do believe our antitrust statutes are sufficiently flexible, sort of like interpretation of the common law, to adapt to the circumstances that evolve over time, that are very hard to predict, and that economists and lawyers can use the knowledge of what's happened to date to make presumptions as to how merger policy or antitrust policy should be handled. And I don't think we should short-circuit that process for the sole exception of maybe you want to speed some things up in industry, in, you know, antitrust proceedings in industries where the industry moves quickly.

**Josh Wright:**

I'll just say quickly, I think, the answer, if we sit here in fall of ’23, in fall of ’24, well, I agree with what Dennis and Judy said about effects, sort of, indirect effects here in terms of changing the shape in the court or in the legislature. It appears that they are not going to win in Congress. And so you've got to win in the court, either by bringing cases and evidence or through rulemaking. I don't think they have the authority to do the latter. And it appears so far both in the way that the merger guidelines’ revisions are sort of shifted, in the way that the agencies are talking, I don't think you're going to see much more success in the court or any noticeable, real difference between this administration and others. So a serious attempt, I don't think it will be successful, but still plenty to fear because there's a lot of damage an agency can do in deterring economic behavior. So just inside the agency itself, both the merger review and other informal means.

**Tom Lenard:**

Okay, well, this was a great discussion. Thank you all very much. <Applause> We are now going to lunch in the courtyard, and there'll be a keynote address there. And so you should all proceed to the courtyard. Thank you very much.