2023 TPI Aspen Forum
Antitrust & Competition: Is the Neo-brandeisian Approach Working?

Thomas Lenard:

This is the panel on Competition and Antitrust: Is the Neo Brandeisian Approach Working. We've got a great group to discuss it. One of the members of our panel is remote and three of them are here. The Biden administration has staffed the leadership of the antitrust agencies with enforcers who identify themselves as Neo Brandeisians and whose stated purpose is to correct the purported failures of antitrust over the last several decades.

The purpose of this panel is to discuss what the Neo Brandeisian revolution or perhaps more accurately counter revolution means in terms of change in practice at the agencies and what that change has produced and is likely to produce as we go forward. Again, we have a great panel. I'll give brief introductions for the benefit of people who might want to watch this after the fact and don't have the programs. Svetlana Gans is a partner at Gibson Dunn, as you can see. She formerly was Chief of staff to FTC chair Maureen O'Hausen. John Kwoka is a professor of economics at Northeastern University whose research has focused on the effectiveness of merger policy and he's the author most recently of Controlling Mergers and Market Power, A Program for Reviving Antitrust in America.

He has most recently in government did a stint as chief economist to the chair of the FTC. Carl Shapiro is a professor at Berkeley in the business school in the Department of Economics. In government he has served as a member of the Council of Economic Advisors and twice as Deputy Assistant Attorney General for economics at the antitrust division. Howard Shilansky is a partner at Dave Polk and also professor of law at Georgetown and in government he has served as director of the Bureau of Economics at the FTC and Administrator of the Office of Information and Regulatory Affairs at OMB. Let me just start with a basic question, maybe directed to Carl. How has the new leadership at the FTC and DRJ changed antitrust enforcement and are they just strengthening enforcement within the same basic parameters and framework, or are they changing the framework?

Carl Shapiro:

Well, I think as your introduction pointed out, Tom, the goal, the stated goal of the current leadership, this would be Jonathan Canter at the antitrust division and Lena Kahn at the FTC, is to really change in a dramatic way what they see as a failure of antitrust over roughly 40 years. And so that's a big goal. That does not involve incremental changes, that involves major changes. We see it in part in the tech sector as a particular focus, but it's really throughout the whole economy since antitrust covers the whole economy. That's what their stated goal is. The fundamental problem is that these are law enforcement activities, and so it's very hard to make dramatic changes anytime soon without legislation because you are following existing law and not just the statutes of course, but case law. So that's the challenge they're facing. I think they see it as a long game.

Thomas Lenard:

Not to interrupt it, when I listen to some of their statements, they say they're just enforcing the law.

Carl Shapiro:

Well, what else could they say really? Sure they say that, and I didn't say whether they were or weren't. I just said, that's a problem if you want to make dramatic changes quickly because the law doesn't move quickly. Hence the tension and the very great difficulty of showing real progress in a rapid way given the sluggishness of antitrust cases by their nature and the inertia of the case law.

Thomas Lenard:

Does anybody else want to weigh in on that? Yeah, John.

John Kwoka:

I don't want this whole panel to go by without my debating Carl here.

Carl Shapiro:

I wasn't planning to let it go by.

John Kwoka:

So I speak only for myself of course. But I think that Tom has it right, that the agencies believe, Lina Khan believes in Jonathan Cantor as well, that the full extent of the law has not been used. Also, I think it's fair to say, at least in my view, that the full extent of modern economics has also not been brought to bear. There may be frontiers out there somewhere that we reach where we debate whether there is new legislation to be required. The book that I wrote, not that I'm touting that, but made the argument that there is a great deal of antitrust policy to be reclaimed antitrust territory to be reclaimed long before we get to the issue of Neo Brandeisian objectives and other things. There are matters, for example, like potential competition, labor markets, monopsony effects, vertical integration issues, entrenchment, all of which were flagged by the agencies in their original requests for information as areas where the preceding enforcement has really atrophied.

The idea has been to reclaim some of that territory. It requires not necessarily new legislation, though that might be helpful in some respects, but it requires returning to some matters that the agencies and their actual enforcement practices had largely abandoned. There's nods to various of these things in the past, but for the most part, these are areas that had suffered from atrophy for many reasons, resources, the judiciary past guidelines, which emphasized different things. Part of the challenge now is to return to some of what the law arguably permits challenging and what modern economics can bring to bear on those questions.

Svetlana Gans:

Can I just weigh in?

Thomas Lenard:

Yeah.

Svetlana Gans:

Sorry, I'm remote so it's hard for me, but first, thanks so much for having me and great to be on this panel. Just to echo, I just want to take a step back perhaps and just talk a little bit about what the folks want to accomplish and what the stated goal of this administration's competition policy is in my mind. I think it's threefold. One as stated is to return to the broader goals of

antitrust. The second one is to update the tools the agencies need to analyze to combat new forms of market power. The third is to take seriously the link between industrial concentration and political influence. The administration is seeking to accomplish these objectives in two ways. One, by shifting antitrust doctrine and second by changing agency process. [inaudible], we're seeing several shifts that we'll probably talk more about later today, but we're seeing a shift away from consumer welfare to the protection of broader societal goals.

For example, the competitive process, the protection of small arrivals, the protection of workers and working conditions, even collective bargaining, the preference for presumptions, the distrust of efficiencies, broad interpretations of FTC's standalone section five authority, and the focus on excipient threat to competitive conditions, which does not necessarily require the showing of actual harm. Because the agencies are looking to fulfill a wider mandate, their investigations will be broader and more time-consuming. Because of that, they are looking for ways procedurally to reduce agency burdens in investigations and litigations to save both time and potentially to win more cases. In addition to doctrinal changes, they're looking at process reforms.

Some of these process reforms that are hopefully going to help the agency in their minds accomplish some of these broader goals is to shift away from case by case enforcement to broader rulemaking efforts that are designed to be faster to implement and have wider application, streamlining [inaudible] rulemaking on the consumer protection side, but given more power to the chair's office to oversee proceedings, changing the role of administrative law judges, adopting omnibus resolutions that authorize just one commissioner to approve broad antitrust investigations into high priority areas and indefinitely suspending early termination of waiting periods for benign mergers and acquisitions to allow the agencies more time for review.

I agree with Carl. At the end, the goal is not simply to maintain competition as has been historically stated in FTC mission statements for example. The goal is really to protect fair competition as a means to produce a thriving and democratic society through the creation of opportunity and the redistribution of wealth and power as stated by Tim Wu and many others. Given these goals, there also has been a rethink about the trade-off between regulatory action and inaction. The agencies have stated that inaction is actually more costly than erroneous action. The agencies are predisposed to act irrespective of costs or loss. Neither the [inaudible] or process rules are satisfied by mere incidental change. This is why the antitrust agencies do not see a court loss as losing so long as it continues the momentum to accomplish the overarching goals that are broader than a single win in litigation or a settlement.

Thomas Lenard:

You mentioned the consumer welfare standard, which has been central to antitrust enforcement for a long time, and that's obviously been changing now. Jonathan Canner says there's no broad agreement on what the consumer welfare standard means and that the new regime over there is trying to create more clarity. He says the goal is to promote competition and the competitive process. I think you mentioned that Svetlana. I guess I have a couple of questions. One is, does that provide more clarity and predictability and how does that differ from consumer welfare? Howard, do you want to-

Howard Shelanski:

Sure. I mean, consumer welfare can mean a lot of different things. And thinking back to Matt Gens, Scott's opening address to this conference. It could have to do with our wellbeing and the state of political polarization. It could be how products and services that we consume may affect our mental health and wellbeing. For a variety of reasons, antitrust came to settle on a very specific definition of consumer welfare, which was lower prices and higher outputs of goods and

services. If antitrust enforcement achieved that goal, it was achieving the most broad-based and democratic goal it could achieve. What that did is it enabled the antitrust agencies to focus on outcomes of process as opposed to the process itself or the particular number of competitors or the way that the process was constructed.

If you had two or three firms in a marketplace that were highly efficient and competing with each other and had economies of scope and scale and were producing more goods at lower prices, that was good. That was consumer welfare. Nowhere in that picture at a certain point was the competitive structure in the market important in and of itself. It was important as a tool to determine whether or not there would be the competitive outcomes that would lead to lower prices and higher output. What's left out of this? Small businesses who might be trying to compete with those two or three large players. That was an important part of antitrust law up until shortly after World War II, I'd say up until the fifties, sixties, and then it started to erode rapidly. There were famous cases that said even a highly efficient large company that was doing things that were good in terms of price and output for consumers could be, for example, liable under the antitrust laws for monopolization if it was making life difficult for its competitors.

What the consumer welfare standard came to mean was lower prices, higher output for consumers. Competitors didn't really matter in and of themselves. I think if you want to ask what the big pushback is that is animating the Neo Brandeisians, it's the macro trends towards more concentration in the marketplace. One can debate the extent to which those trends really exist, but that is a baseline article of faith. I don't know how much a 50 firm concentration ratio or 20 firm concentration ratio really means from an antitrust standpoint, but it is true. If you look at the top 50, top 20, top dozen firms in a lot of industries, there's been concentration over the last 50 years, fewer small businesses in certain industries, more concentration of capital. What the current antitrust folks have said, "Wait a minute." And as Svetlana said, there were broader goals. We used to care about that, not just lower prices and higher output and efficiency.

Now there is a pushback to return to a broader base notion of consumer welfare that includes the wellbeing of laborers. Labor isn't just an input that then becomes part of your production function, which gets counted as a cost that if reduced leads to lower prices and higher output. Labor is in itself something that we want to be concerned about so that laborers have money as consumers to participate fully in the economy. Similarly, small businesses, competitors are not just inert things or things that are out there as part of a process to generate lower prices and higher output. They have value in and of themselves as breaking up the bigness and the concentration of capital.

Now, to come back to your question, Tom, no, that does not add clarity at all. That adds a variety of criteria. They may be right, they may be socially good, we can debate that for hours here, but they do not make more clear in a particular case what the particular outcome should be or what the agencies will do because the same deal that might lead to lower prices and higher output might concentrate buying power upstream for labor and might make life difficult for small firms that wish to enter the marketplace. Which of those values will predominate and how do you trade them off?

It's very fashionable to throw Bork under the bus, but Bork was not a foolish person. He was a deeply smart person who had a valid critique of the old form of antitrust. You're hearing this from an Obama era enforcer. I used to be sort of in the center left. Now I've been defenestrated as not what the program, and I find that to be a very liberating place to be. What I will say is go back and read why Bork adopted the consumer welfare standard and pushed for the consumer welfare standard of prices and output, so you didn't have to trade off these alternative values of labor, small business access, political power. Those are things that legislatures should do in his view, not an assistant attorney general for antitrust, not an unaccountable independent commission, but legislature. To basically restore what is the most broad-based democratic

outcome for antitrust, we should focus on that which benefits most people. Let's focus on lower prices and higher output.

A lot of clarity came with that, but also some not so great things in terms of enforcement. What we're seeing now is a philosophical rejection of that clarity and a desire to return to older cases that have not in some cases been formally overruled, certainly not by the Supreme Court itself. And the agency can point to those, to Tom's first question and to John's point and say, well, we're just enforcing the law that hasn't been overruled. So it is in some sense a real throwback that cuts away the underbrush of a lot of lower court opinions to achieve broader base goals. Clarity does not come with that.

Thomas Lenard:

Carl, you said something at the end. You said it also achieved some not so great outcomes. What did you mean by that? I know Howard just said that. Yeah.

Howard Shelanski:

Look, there are cases that embed doctrine that is objectively wrong from a standpoint of economics in my view. These are supreme court cases that make certain cases almost unwinnable for plaintiffs. If you think about price predation, cutting your prices so low that you can squeeze competitors out of the market in a durable way such that you can eventually recoup your investment in price cutting, I think economists understand that there are tools that can be used by companies without actually going below marginal cost in their pricing to deter entry and to have a sort of long-term control over a marketplace by chasing people out of the market. You can have above cost predation. You can't win a case arguing above cost predation, just for example. That is embedded in Supreme Court doctrine. That came about by this view that we have an incredibly strong presumption against saying anything that is price cutting is bad. Why?

Well, we have the consumer welfare tests and low prices and high output are good. If you're cutting price below marginal cost, you probably will never recoup your investment. It's a gift to consumers. We should have very strong doctrine against finding that to be anti-competitive. Well, unfortunately, I think they missed the boat on the way that some of those above cost predatory strategies can really harm competition and ultimately in the long run affect the very consumer welfare that motivated the doctrine. That's bad doctrine. That's very hard to reverse. There has been some bad doctrine. They're not wrong that there have been some developments that don't, as John said, match modern economic thinking but that are very hard to reverse.

Thomas Lenard:

Carl?

Carl Shapiro:

Yeah, so I want to pick up on a couple of points Howard made first. There's going to be a lot of lack of clarity from the way things are going now. What's happened is that the agencies are looking back to Supreme Court decisions largely from the 60s such as the Brown Shoe case and a merger case and others. There was a very good reason the court and agencies moved away from that. There was a lot of incoherence in that and there was kind of what's often called the Harvard Chicago consensus. This was Phil Arida. This wasn't just Bork. Right? This was a lot of other people, Herb Hoeven camp that has followed, taken that mantle in recent decades.

That was this approach that didn't work in multiple ways and we've learned a lot since then in terms of the economics as well as the case laws move.

Simply going back to that is going to create a lot of confusion and also seems to me involve a certain amnesia about why we moved away from that. That was the time when, what do you call it, consumer welfare. I don't really like using that term so much because it's a little narrow. The point being we want firms to compete to better serve their customers. If competitors get hurt in that, because I'm competing effectively, that's not a cause of action in antitrust. That's kind of a necessary part of a competitive process, including smaller firms losing out to bigger firms who are more efficient. The current thinking is much more back to that. It's kind of incoherent at times and certainly seems to ignore the mistakes that were made and errors and all sorts of learning we've had since then.

This is one reason we're going to have turbulence and I think moving in the wrong direction. The other thing is if you start to bring it, and this would come up in the merger guidelines, which we'll talk about the draft that was recently released by the agencies. If you look at 2010, the more recent horizontal guidelines, they're very focused on and they say the unifying theme is to protect customers from enhanced market power, higher prices, lower products, less innovation. That's the goal. How do we diagnose that? It's just relentlessly going about how to do that. Well now that's gone. Okay, that's not the goal that stated anymore. It's not quite clear. There's a number of goals and some of them are quite structural. Okay, we want markets to remain less concentrated. Well, first off, there's multiple goals. So it's much less clear how this analysis is going to go, hence less guidance.

But also it really is fundamentally saying the mission is not to protect customers, real people from harm, it's to do something else or a number of different things, including keeping markets unconcentrated, which is how it said if it's three firms knocking each other out and that's good for customers. My way of thinking, I think most economists would say, that's all good. We don't want them colluding. You have to be careful, et cetera. We don't want them merging when there's the three of them most likely. But the fact that there's three of them is not per se bad. What we are really concerned is the effect on real people and customers. And that's what you don't get anymore. To me, that's sad. That's unfortunate.

Thomas Lenard:

Let's shift for a while to the new merger guidelines proposal. John, you've been doing a lot of work on mergers in the past few years and you've published a book that is subtitled a new framework for antitrust policy. I think I read that right? Is the new draft of the merger guidelines, is that consistent with, I have unfortunately not read your book. Is it consistent with your ideas with your proposals?

John Kwoka:

I'm in an odd circumstance on this panel because I did work for Alina Khan up until six months ago. The guidelines that have come out evolved since the time that I last saw them. Even if that weren't the case, I wouldn't be here to either explain what parts of them perhaps I had a hand in drafting and what parts of them perhaps I did not so fully agree with. Suffice it to say that I really don't want to speak to the guidelines in that respect. Let me also say that I agree with a good deal of what Carl said. I haven't turned it back my PhD in economics and thrown it away. I do think, and I agree with him that a enforcement framework that relies on 60 year old case law is not the best foundation to go forward.

We've learned a lot in the meantime, and a lot of those cases had some pretty crazy stuff in them because the courts at that time were just beginning to think about how do we interpret

1918 laws and some of the first cases that they found before them were adjudicated in ways that we would not recognize today. I think that there's some hazards in going too firmly on that route. I also don't recognize, and what all of my three distinguished colleagues here have said, exactly the document that did come out. The document that did come out has as is guiding principle to defend against the lessening of competition. That appears throughout, it appears in almost every one of the 13 guidelines that are the headline parts of the merger guidelines. Throughout, it is a lessening of competition. I might point out that that is really what the law says. The law does not say consumer protection or consumer welfare or market power. The law says lessening competition. I think that economists do understand what that means.

Now, my own view just personally is that consumer welfare standard has its place, but it has not served us well for certain types of markets and issues. It has not served us well in thinking about monopsony power, not just worker welfare for income distribution reasons, but where mergers have depressed artificially wages to workers for pure market power on the buy side. That should be part of what the law prevents.

Thomas Lenard:

Well, hasn't it been?

John Kwoka:

No. There's only a handful of cases up until the last three years, two or three out of the Justice Department that have looked at that. But worker wages have not been an integral part of the merger enforcement process. There have been a few monopsony based cases, particularly in meat packing on that side, but the agricultural sector is rife with monopsony power issues that have been not adequately enforced as well. What I'm saying is that the consumer protection has focused our attention on price and on consumer products. It has not paid sufficient attention to non-price issues and has not paid sufficient attention to monopsony power on the buy side. It does have a place, I don't want to monopolize this or monopsonize this. Well, I do. I mean we've raised enough issues to take the rest of the afternoon, but Howard and I both have planes to catch.

We're standing between you and lunch, which is always a dangerous position for anybody to be. But, let me say that I do think that for certain types of competitive concerns, the price-based and output focus is perfectly appropriate. I think that when we deal with mergers where unilateral effects are the concern, work by Carl and others have made very clear how it is that we can translate that into operational guidance. But the consumer welfare standard does not do as much good in zero price markets. Talking about turning this into small but significant deterioration in quality is really not very helpful. It does not help us much where data acquisition is the fundamental purpose of a merger. Consumer welfare standard is not much help there and it's also not much help where in markets or concerns where the effects are very long delayed, potential competition, for example, where we have mergers that involve the elimination of a potential competitor, a product that doesn't yet exist, or maybe it's an innovation market, a product that doesn't yet exist.

Trying to think about what the product will look like, what the demand curve will look like, what the price effect and consumer effect will be on that is quite speculative and has been a non-starter in the courts. Lessening of competition brings us to an earlier stage in the process. The outcome is the price or welfare or whatever you wish, but the process of competition is what the law has said to focus on. That's an earlier stage. If we can see distortions in the process of competition that significantly lessens competition, it is predictable that there will be distortions in the outcome variables that may not actually merge for 5 years or 10 years. I think that that's a

suitable focus. I would say that for certain types of outcomes, lessening of competition is a enormously helpful way of thinking about the competitive process and what the law protects. For other concerns, consumer welfare standard is quite appropriate.

Carl Shapiro:

You're quite right John, that the draft merger guidelines more than a hundred times they refer to lessening of competition. They don't talk about harm to customers. The goal is no longer harm to customers or workers based on enhanced market power. The key thing is I think you're taking the position and that is the statutory language lessening of competition. Then what does it mean if we're going to implement this? Let me give an example where there be a divergent, you have an industry where scale economies are going up, larger firms are efficient. We're seeing some larger firms gain share. The market's becoming more concentrated. Two of the smaller firms go to merge in order to do so, to compete more effectively against the bigger firms, they establish that by merging they can achieve synergies and scale that they couldn't otherwise achieve and they will lead to lower prices and better outcomes for consumers.

Under the traditional approach. That merger would be okay, even though it leads to an increase in concentration in the market because it is better for customers and I would say is an increase in competition because the smaller firms combined to be a more effective competitor together. Under the current guidelines, this is guideline eight, for those of you following at home, this merger would be blocked or challenged because it increases concentration. Again, if the concentration increase was large enough, there's a threshold. Furthermore in this situation, efficiencies that I just talked about and effects would not count even if they were established. That's another part where they say this would not be cognizable efficiencies in the language of the merger guidelines because it would further a trend to concentration.

Now, we could ask ourselves, all right, which of those is the approach we want to take? If we're thinking about consumers and real people and effects the approach we've been taking. If we take a purely structural approach, that's what we've got here. I don't think that's a reasonable interpretation that that merger would lessen competition. It causes two firms to come together, be more efficient, compete more effectively against bigger firms to the benefit of customers. But that's what these guidelines say. If they're going to go back to lessening of competition and that's going to be their interpretation, count me out.

Thomas Lenard:

Let me shift the discussion a little bit since I want to make sure to get some of this stuff in before we run out of time, which is really how much of what they're doing is going to stick. Svetlana, you mentioned, and from casual casual observation, it seems they don't really care about bringing losing cases. I'd like to get the opinion, but first of you and others, what the effect is of bringing losing cases. You want to start Svetlana, and then go to the others?

Svetlana Gans:

Well, I think from the agency standpoint, every little bit helps. Although they have lost some cases, they have won others. And even when they have lost, the courts have sided with the agencies on certain matters in certain cases. I think those are little wins for the agency. I think in terms of why losing is bad, I think there's three issues why there's a bad effect on losing cases. One is that it sets bad precedent for the agencies, which is never good. Number two, it wastes agency resources, which are scarce. The agency should focus on winnable cases. The third issue is that it is detrimental to staff morale. There've been several instances where the staff had

recommended against bringing in enforcement action and the leadership decided to proceed. That definitely is a hit to staff morale who are working on the underlying cases.

Thomas Lenard:

Also one thing I'd like to maybe you can talk about a little bit, I think we focused a lot on the FTC, but are there significant differences between the FTC and DOJ, Howard? Do you want to-

Howard Shelanski:

Yeah, I think if you look at the broad enforcement priorities, there are some things that fall more naturally to the FTC, but I think it's fair to say that the FTC and the DOJ are very much in sync on what they're doing. The DOJ does criminal, the FTC doesn't. You see wider ranging criminal enforcement actions, some of them quite ill-considered as a long string of recent losses in criminal collusion cases shows. Cases that when you look at them, you wonder what they were thinking to bring the cases. Other cases that might not have been bad cases, they just didn't win them. On the FTC, They have a broader sort of enforcement mandate under section five. So there's some things they can do that the D O J doesn't. But I think these are largely, I would not distinguish between the FTC and the DOJ particularly when it comes to the specific aspect of the merger guidelines.

Will the merger guidelines stick? Will these enforcement priorities stick? To answer your question, look, I think whenever the final guidelines come out, I don't think they're going to be radically different from what we've seen in the draft guidelines. There may be some nips and tucks here, there may be some clarifications. There definitely need to be in some of the particular guidelines that they issued. But I think it's going to be largely similar. I think the bigger question is will it affect conduct in the marketplace? Will it affect enforcement outcomes? What's going to happen when the next administration gets into place or a different administration? So first of all, here's what I'm seeing. I'm seeing that there's a little bit of a throwing up the hands, these new guidelines or a laundry list of the things that could be wrong with mergers. We agree that some of these are things that have been talked about as possibly being wrong with mergers, but it is really a shift to a precautionary approach to mergers.

It is an emphasis on the language of section seven that says may tend towards a substantial lessening of competition. Well, may is very big. What does that mean? What is substantial? How do you make all of these terms and the statute work together? If you look at the guidelines, they're looking at all the possible ways that you might, or many possible ways you might find that lessening of competition, but without a heck of a lot of guidance or analytic backup for how at least some of those things will be thought about and analyzed. They did keep some of the analytic structure of the 2010 guidelines and Carl and I have a deep vested interest in those as two of the six co-authors of those guidelines. But there are a lot of areas where you read them and you say, "Okay, how are they going to analyze this?"

And you don't know when you go to the appendix where the analysis is, so here's what I think's going to happen. I think that on the front lines, you're going to see firms say, "Look, they're going to come at us one way or the other. We'll try the deal." The losses in court embolden firms to put in their merger agreements that they will litigate a challenge. We're seeing a lot more willingness to litigate on the part of merging parties. I don't know that the deterrence effect that the agencies clearly want to have is really going to bear out. That may depend on some additional cases that come forward. There has been some bad precedent that they've gotten from some very ill-considered cases that have now locked in an ability to do what's called litigating the fix. If you go ahead and announce your remedy before the agency challenges you, the court will make the

agency prove that, okay, the merger with your remedy is now the one they have to prove is anti-competitive and that's a lot harder.

One can debate whether that's doctrinally right, but that's the way the courts have gone and it was a bad gamble by the agencies to go for that. I think one just has to be very direct about that. The final thing is look at the guidelines experiment that has occurred over the last 40, 50 years. Guidelines were stable. They lasted a long time. When we sat down in 2009 to write what became the 2010 guidelines. The guidelines have been in place for 17 years, and here we are 13 years after the 2010 guidelines. They have time to be acted on, to create certainty and genuine guidance to industry and to be incrementally built in to court decisions through the common law process that is antitrust law. I worry that the shift that we are seeing in these guidelines, and frankly the lack of clear guidance that comes in, some of those will lead to a withdrawal or rapid change. If we start getting into a cycle every four or eight years changing the guidelines, they're not useful.

Thomas Lenard:

Some of the members of the panel have to leave fairly soon to catch planes. I wanted to give the audience, if there are any, and I have other questions too, but I wanted to give the audience a little chance to ask a question or two if there are any questions. Svetlana is on the screen in front of me.

Speaker 5:

[inaudible] you ask a question.

Thomas Lenard:

All right, we haven't talked about monopolization cases. How has that been changed? Anybody.

Carl Shapiro:

Well, the major monopolization cases that both agencies are bringing are in the tech sector. Right? These take a long time to percolate through the case against Google and Case against Facebook, now Meta, were both brought into the Trump administration, so those aren't really sort of owned, if you will, by the Biden administration. The antitrust division brought another case against Google this year that looks like it's going to move more quickly. I'm not going to say anything about the merits of those cases, I just say it's going to take a long time. The case law is not very friendly to the plaintiffs. I think it's been excessively unfriendly myself, particularly to the Supreme Court. Again, this is something that's going to take a long time and it's hard to move things quickly.

Thomas Lenard:

Howard, did you want to?

Howard Shelanski:

I agree with Carl. If we look at how long the Brooke group, 31 years of the Brooke group decision, 30 years, which I think is a very hostile precedent. I think the AmEx decision was very badly decided. I think that's hostile to plaintiffs. I think there's a lot of work that needs to be done there. That's a tougher road for the agency to go down than mergers. We may need some legislation there, but I think you'll see the agencies trying to push the envelope there as well. And it will be an uphill battle, but I think there's some noble battles to be fought there.

John Kwoka:

If I could just second all of that and point out that the merger guidelines, for example, in the merger area, but also agency policy is just one piece of a much larger puzzle. Agency resources constrained what agencies can do. Big cases take a lot of resources. For being in the agency, as all of my colleagues have been, it's sometimes frustrating if not painful to see the decisions that the agencies have to make when decisions triage has to be done on investigations that in some sense ought to be pursued or cases to be brought. Also the judiciary, the judiciary has over time, at least in my view, and many people's view, become much more demanding of what can not be established by economists or by the facts in particular cases has raised the bar what substantial means or what may mean in the language of Clayton Seven. As a result, the merger guidelines by themselves can not break the log jam for some things. For those of us who believe that that should be done, that's just one piece of a much larger puzzle.

Thomas Lenard:

How do maybe as a final question, ask everybody if they want to weigh in on how you think the agencies measure themselves at this stage, kind of a midpoint of the Biden administration. Svetlana, do you want to start out?

Svetlana Gans:

Yeah, I mean, I think that they would rate themselves as successful, and I think that they have been successful in a variety of ways. I think they've been successful in hiding the awareness of antitrust law and what they perceive as problems in antitrust. I think they've been successful in that the executive branch and the democratic political establishment have embraced several of their reform policies, which is no small feat given that President Biden was in the White House during eight years of the so-called 40-year antitrust failure. If you look at President Biden's full of government executive order, it adopts many of the policies outlined as goals in the neo Brandeisians in the Utah statement from 2019, including the focus on labor protection, bans on non-compete provisions, and the concerns over vertical mergers and so forth. I think some may argue that they have spurred discussions of antitrust reform in Congress, and some may argue that they have for greater confluence of US and European competition approaches, which some may say is a positive development. I think they may view all of those things as wins in their book.

Howard Shelanski:

I'll just say my snarky answer would be tweets from professional progressives like the Open Market Institute. If they get a lot of those, they're happy. But that's only the snarky answer. Look, how can they not have been successful when we're having this panel? When they are the conversation? When as Svetlana said they're having major impact and some of it crossing the aisle in Congress. They would count themselves successful as becoming the conversation, shifting the conversation, and having the ability to make people really pay attention to what they're doing because affecting things that are actually happening in the economy and in the business world. In that sense, I think hats off to Lina Kahn, who's incredibly intelligent and knows exactly what she's doing, and to Jonathan Cantor and all the people working with them, they've changed the debate.

Carl Shapiro:

I see it the same way. If you think about it this way, suppose you came into power and you want a dramatic change in this area and think there's been 40 years of abject failure, but you know

the courts are, from your point of view, quite right leaning and there's a lot of bad case law over 40 years. What can you do? What can you do? I think what you do is you speak up, you try to change the debate. You move the Overton window, if you will. We're talking about more left stuff in that side. You talk about going back to where things were in this 40, 50 years ago when you think they were better, and you get everybody talking about that.

They've succeeded at that. There's a lot of journalists have been supportive of this, a lot of politicians are. Of course, it feeds into a nice attractive political story about big businesses have gained more power, loss of trust of elites or attacking elites and loss of trust of institutions. They're doing a lot on that front. Now whether that will deliver results to people in their lives, not so much.

Thomas Lenard:

John.

John Kwoka:

This has been a target rich discussion and there's not enough time to deal with all of these things. I'm sure my fellow panelists feel the same way, but I think it's fair to say that the way that at least the FTC measures its success is by whether the agency is now bringing the cases that ought to be brought. And I think that even in the strictest narrowest most traditional sense, we saw that the agencies over the past 25 years had simply ceased to bring cases against consolidations, mergers involving five to four companies, six to five companies. My book has some of this data. This is the FTC's own data mind you. It has shown how the agency overtime has narrowed its focus to the cases that are easy to win. Very few mergers to monopoly are not anti-competitive. You can bring all of those cases and have it outstanding one loss record, but you're not bringing the cases that ought to be brought.

There's been this progressive narrowing of antitrust both in issues but also in most traditional merger measures. And I think the agency feels that its obligation is to bring more of them. I'm not a Neo Brandeisian, and I do not believe an antitrust is the right mechanism for social and political objectives, which is the way the Neo Brandeisian doctrine was interpreted. I think most recently it's now been viewed, the Neo Brandeisian label has been attached to almost anything that people don't like, but it used to mean something much more specific. I think the agency's view that this is their mission and that it has not been pursued adequately, and this is part of what they want to do.

That is why I signed up even as a very, in some sense, traditional economists to assist Lena Kahn in rethinking how the guidelines approached it. I do not want to characterize my views of what the draft guidelines look like or what it is that I may have prevailed or what arguments I may have lost. But I do think that this has been a moment where a revision of the guidelines has very much been in order.

Thomas Lenard:

Okay. Well there's obviously a lot-

Svetlana Gans:

Can I just stand up for the enforcement record of the prior administrations? If you actually look at the number of enforcement actions between the Trump administration, the Biden administration, merger enforcement has actually fallen in the Biden administration from 31 cases to 12 cases, and consumer protection cases have fallen 79 to 31. I'll let those numbers speak for themselves.

Thomas Lenard:

Okay. I promised several of our panelists have a plane to catch. I promised to end this by 12:45, which actually it's not the most accurate to watch, but I think I'm a minute or two early. Let's thank the panel for a great discussion. Lunch is outside. Right? Outside in the courtyard. Yeah.