Technology Policy Institute

Antitrust: The Next Four Years

2024 TPI Aspen Forum

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Tom Lenard:

Well, that, that was a uh, that was a great panel. A bit, a little bit of a hard act to follow, but we will try. Um, the title of this this panel is antitrust, uh, the next four years. Um, as Yogi Berra said, it's difficult to make, uh, predictions about the future, or especially about the future, but we have a a great panel assembled here today that is going to make a valiant effort to to try. Um, Bob Crandall is an adjunct senior fellow at TPI and was a longtime senior fellow at the Brookings Institution. Ginger Jin is a professor of Economics at the University of Maryland and served as director of the FTC's Bureau of Economics from January 2016 to July 2017. Uh, you've already met Bill Kavas and Michael Katz, who has made a young man's effort to get here today since he was kind of under the weather, so I really appreciate that. He is a professor. But Michael at 90% is better than most of us at 100%. Um, Michael is a professor of Meritus at the High School of Business and the Department of Economics at UC Berkeley. He's a former deputy Assistant Attorney General for economics at the antitrust division, as well as a former, uh, Chief Economist at the FTC.

So, let me start by providing a little context. Um, uh, the current antitrust team at the FTC and the Department of Justice, uh, came into office saying that the, uh, the previous four years of antitrust enforcement had been a failure. Uh, they targeted big tech, uh, explicitly and criticized the consumer welfare standard, which had previously been the, the basic standard, uh, for antitrust enforcement. And they adopted a much more, uh, aggressive merger enforcement policy, among other things. But Republicans have also been harshly critical of big tech. Some Republicans, the Republican Vice-Presidential nominee, JD Vance, has praised the policies of, uh, FTC chair, uh, Lena Khan and called for breaking up big, big tech companies. And there's even a new name, conservatives for conservatives, who support, uh, that point of view. So, my first question is, oh, kind of two related questions. Um, does this increasing populist sentiment on both the left and the right, including a distrust of, uh, big tech, mean, uh, there's a convergence of views on antitrust enforcement? And kind of related to that, uh, is b- is big is big tech a, uh, the type of problem that should be singled out? Should the big tech companies, uh, be targeted? So let me, let me just, uh, start by, let me start by going down, start with Bob and just go down.

Robert (Bob) Crandall:

Well, much of the criticism of the big tech platforms addresses issues outside of the realm of antitrust, uh, and as many people have observed in the past, uh they deal with misinformation, uh, all kinds of, uh, political issues that are not easily addressed by antitrust. But the second thing is, it's not clear how antitrust can be successful in addressing the market power of the large platforms, whether there are any remedies that are available for instance. I guess we'll probably talk about the Google decision, uh, which can reduce their power, given the econ, the platform economies, uh, which govern, uh, their operations. So, I'm skeptical that antitrust is a solution,

and I think a lot of other people are as well, and that's why they're looking for regulatory solutions, which we can also, uh, talk about later.

Tom Lenard:

Ginger?

Ginger Jin:

Um, yes, thanks so much for having me. Um, I guess my answer is, um, we're far from a consensus. Um, not just the political type of view, but also even in the, um, economic perspective. I think there's three questions that are probably subject to a long-time debate. Um, one is, how should we think about big versus small? Um, it's not just big tech; I think the, um, exactly whether big is bad versus big is efficient and how big firms and small firms interact with each other in the innovation space. I think that's a very important question to address. The second, um, um, I want to add on, um, Bob's point of, uh, other things outside of antitrust. We have seen a lot of consumer behavioral bias, including the default, um, bias in the Google search case. Um, I sort of disagree that, um, we should view those non-antitrust views, uh, non-antitrust, say, completely out of antitrust. We see more and more interaction and blurry boundaries, um, between, um, those kinds of behavioral biases and antitrust. I think the second question we need to address is, how should we think about consumer behavioral bias in antitrust enforcement? And the third one, and as you mentioned, I think the consumer welfare standard is still very much subject to debate: exactly what we mean by consumers. What if some consumers get harmed by this practice, but others don't? What if one side of the business got harmed by this practice, but the other side benefits from it? And how to tradeoff between all of those? I I think that's the question that has to be addressed in the welfare standard.

Tom Lenard:

So, Bill, maybe you could address the question but also talk a little bit about, uh, kind of this, uh, influence, this kind of populist, uh, influence in in antitrust, as well as obviously other things, but we're here to talk about antitrust.

William (Bill) Kovacic:

Yeah, I, uh, I think there is, uh, certainly a great deal of, uh, spoken concern on both sides of the political spectrum. Uh, but it's, it’s not clear that they have a common view about precisely what the problem is or what to do about it. I, I think, uh, Senator Schumer found at the end of 2020 is there was a great deal of, uh, of, of support for giving time on the legislative calendar to consider legislation. I think his view was there’s, there are a lot of people who want to do something, left and right, but I can't write a bill that says, "the act of something." I need, uh, a, a specified menu of specific interventions, and there is no agreement about that. I'm not going to give you precious real estate on the Senate calendar to talk about something. And I think that remains a, a concern that is: where do they agree to do something? That's why we don't have a digital markets act; it's

why we don't have a digital services act; it's why we don't have a national act dealing with AI yet, uh, so, or even a national, uh, data protection act. So, uh, lots of anxiety, and maybe it's the anxiety focused on AI in particular that it's a bit like the Sorcerer's Apprentice. Uh, that it runs out of control and defies effective human oversight. Maybe that's a shared concern, but, uh, not coalescing around a specific set of proposals. And, and, and indeed, as you mentioned, we've seen uh, the emergence of a, a, a remarkable new literature and coalition that begins building in the early 2000s. It's reinforced by the global financial crisis—8 million people lose their jobs, 6 million people lose their homes— uh, a, a basic social concern about whether the economy works effectively, whether regulators work effectively. Uh, that, that is transmitted into powerful political movements. Uh, Bernie Sanders and Donald Trump had a lot in common in 2016, appealing to the same audience, the same concerns. Uh, and, and then through the election in 2020, uh, Joe Biden makes a fateful promise to Elizabeth Warren and says, “you'll be the gatekeeper on key economic regulatory appointments.” He fulfilled that. I mean, that, that, that stratum of underlying concern, broad-based in society, uh, I think had a major role in propelling this new literature to the fore—a literature, as you say, uh, Tom, depicted the period before 2020 as a period of calamitous policy failure.

Tom Lenard:

Michael?

Michael Katz:

I was doing fine until you got to asking me the question. Um, look, I think it's pretty clear there is no consensus. JD Vance said that Amazon funded Black Lives Matter to destroy competing retailers. Um, I'm pretty sure that's not a Democratic Party position. Um, no, I think there's a huge difference. I mean, look, consistently—actually, I shouldn't say consistent. Across the board—there's certainly a strain of, um, people on the right whose concern with big tech is really about what they claim as censorship and that they're not allowed to have their message on. And that the claim that big tech is colluding with the Democratic administration, again, there's not a consensus on that with the Democrats. Now, there is also a strain of rep- of Republicans now who are in favor of sort of more traditional, you might think of more traditional antitrust, um, against big tech, and they do have concerns. And Vance is actually even in that category as well. I mean, he introduced a bill that, um, wanted to change the tax treatment of certain large mergers, and that was going to be across the board. So, I mean, I think we are seeing a change, and at some level there's convergence, and they want action. But the reasons for wanting action, I think, are just wildly different. I don't see that this is going to, um, lead to legislation.

As to whether we should have it, I guess I would say a few things. As, as Bob said, a bunch of the problems with big tech—and I agree there are problems with big tech—and I should also say I've worked for and against them. Um, I should disclose that. But, um, you know, a lot of things like privacy, um, concerns about whether they're dist- you know, promoting misinformation, disinformation, it's not at all clear. In fact, I think there's a lot of reason to believe that increased

competition would make that problem worse. And so, antitrust is not going to be a solution. And I think we do need some form of regulation. But then it raises the question: okay, and we're going to need legislation to get there, and we'll see whether the Supreme Court allows it. Um, but there's also the question of, well, “do we need legislation for antitrust, and do we need to do something?? And then I think you have to ask yourself, “why.” And I don't think there's anything wrong with the Sherman Act, or how you could think it's outdated, given how incredibly vague it is. I mean, it could cover anything. And so, people are saying that I think if you think there's a need for legislation in antitrust, what you're really saying is you don't like the way comm- the common law has evolved and what the Supreme Court's doing, and you want a legislative reset to, you know, again, to undo what the Supreme Court has done. Again, I don't see there being any consensus in, um, Congress to do that.

And the other thing that concern—and I think there is some reason to want to have that sort of reset—but it does concern me a lot that I think some people want to move to regulation because they say, look, “it's just too hard to bring an antitrust case; we always lose; it's too hard to prove things.” “So, let's just have something where we get to just impose the answer.” But you should ask yourself, “why it's too hard to lose?” And if it's because you think the courts have, you know, put in a set of rules or the, you know, the common law has gotten sort of out of control, that's one reason. But if you think, well, these things are really hard to know which way it goes, and so we shouldn't have to prove it; let's just decree the answer, I think that's the wrong reason to regulate.

Tom Lenard:

Okay, um, so, uh, again, on this question of targeting big tech, the FTC, as we all know, the FTC and the DOJ have, have major cases underway against all the, uh, the big tech platforms, and the case against Google Search was, was decided, uh, a few a few weeks ago in what is considered to be a major victory for the government. Although obviously there's lots, lots more to go before we know what, uh, what the final resolution will be. Uh, the Google opinion found that Google had acted illegally to maintain its monopoly in general search, and the opinion focused on Google's agreements with Apple, sam- Samsung, and, uh, other, uh, distribution channels, uh, to be the exclusive pre-installed search engine. Um, well, let me, let me first ask whether you think—and this is also something that, uh, Commissioner Holyoak was talking about in the previous panel—um, do you think the opinion gives sufficient weight to the, I mean, to the interests of consumers? I mean, what, what is, what, if anything, does the, uh, does the opinion say about the status of the consumer welfare standard? Does anybody want to take that to start with?

William (Bill) Kovacic:

I, I would say the decision does not anchor the decision in that framework. I think there's a, a view that maybe the vocabulary doesn't work well in these settings; that there has to be a redefinition because to say "consumer welfare" in many events, uh, provokes a fistfight. Uh, before you go through a definition of what you mean. So, I think, in many ways, a key premise

of his decision is that the, the concern, perhaps, is certainly for consumers, but it's forward-looking, uh, that, uh, but for the restrictions that he spoke about, you'd have a more vibrant, innovative environment in which you'd have new products, new services that would be attractive. So, I, I think ultimately, he is concerned, beneath his discussion, with consumer interests, but the premise of the decision is that if you ask, "how are they ill-served here?" They're ill-served by forestalling the emergence of other possibilities that would serve them well. So, it takes into account the innovation dynamic, uh, market effect. I think it is consumer-oriented, but that, that is the orientation: that there is something better on the horizon were it not for these controls.

Tom Lenard:

So, I mean, obviously a lot of people—uh, a lot of people have said this is an extremely significant, obviously it's the first case, uh, you know, the first big monopolization case after the Microsoft case. So obviously for that reason alone, it's a significant case. But people are saying it's a very significant case is— I mean, what will be the implications outside of, you know, for Google itself, uh, of this case? But, Ginger, you.

Ginger Jin:

Um, yeah, I just want to add to that. Uh, I feel like the, um, the judge's decision is implicit about the future innovations but does not give a clarity on what the counterfactual world would be. And if you look at economic literature, both theoretical and empirical, the number of firms does not necessarily increase monotonically with, um, R&D investment or innovation outcome. And it's also not necessarily that big firms always invent worse or, uh, slower than small firms.

Actually, if you look at the ecosystem, there are very complicated interactions between big firms and small firms. I mean, big firms sometimes fund small firms for their innovations, and sometimes the prospect of being acquired by some future big firms would motivate the small firm to innovate more. And in the case, we see a lot of like big firms competing with each other in innovation, not just in the traditional technology of search engines but also in say um, ChatGPT type of for future um, search engine models. Um, I, I think the counterfactual world of innovation is very complicated and was not explicitly considered at all in the judge's decision. But it sort of implied that, okay, "if we remove these contracts, the future world of innovation would be better." I, I wish it had been more explicit and probably coupled with some quantitative analysis on what that would look like.

Tom Lenard:

Well, I mean, I guess what I was getting out a little bit is —did you have something to say, Michael or were you—

Michael Katz:

No, go ahead.

Tom Lenard:

Or did that, it seems to me that one of the, one of the basic ideas in the opinion is that you know, if we make life a little bit, a little, a little bit more difficult for consumers by not giving them the default that we think they prefer, then that will produce more competition, which will produce these good results in the long run. Maybe that's how I'm reading it. Uh, so in that way, yeah. So, Michael?

Michael Katz:

So was— I have to admit I haven't read every page of the decision, and I also have to admit even if I had, I wouldn't remember it. But looking through the decision, I can't figure out actually what the judge has said is the illegal conduct. In particular right, an issue I'm told—I wasn't there—a trial is whether or not you have a but for a world. And it seems to me that, whether you think of it as a legal requirement, it's a logical requirement. You can't say what the conduct is unless you can say what it would mean for the world to exist without the conduct. Right, because you say, "okay." Now the judge sided with the Microsoft standard—which I'll do my amateur lawyering, I interpret it more to say, "look, it's difficult to predict the future and you can't require the plaintiff to say, "Oh, here's exactly what would happen." Or, you know, maybe even "here's what would happen with any specificity." But it still seems to me you say what it is you think should've been done differently. And then you can say here's why it would matter. But what the judge seems to be saying is, well these contracts that they had denied being in others um, scale. A there's certain features of those contracts you could see going after, under traditional antitrust and the extent to which Google demanded that they'd be exclusive. And they wouldn't let—allow them to be broken up.

But in other parts of the decision, you read it, it's just like, well the fact is they paid for the default is bad. But then he never really says it's bad. And so, I think it's going to be an interesting issue when we get to remedy, given that they haven't really defined what it is that Google should have done differently. You could have imagined a different case where they said, "Apple, you know, you and Google are both you're co-conspirators —maybe we're going to bring the case against Apple." "Apple shouldn't be allowed to sell the default." But they didn't bring that case. They seem to saying it's fine to sell the defaults. So, was Google not supposed to bid on them? So, that's my concern with the case is it, it just wasn't clear enough about what they're really doing and what they think is the precise conduct. Um, and so that's where I think it's, you know, could maybe fall down in terms of protecting consumers. It's not that the judge did think he was trying to protect consumers. It's just I think the wrong framework.

William (Bill) Kovacic:

I, I thank you put your finger on the element that he would have said where a judge maybe here on the panel, he would have said, "yes, you've captured it more precisely—it's a demand for

exclusivity." But, but that's not that theme is not perhaps emphasized enough through the opinion. There are points in which he says, "well you bid so much for the precious spot on, on the iPhone" and you wonder if you look at that and isolation—are you saying you shouldn't have bid? You should have bid less, shouldn't have been so aggressive. What, what is as you put at the counterfactual, I think it's the it's the, the sometimes uh, not emphasized theme of exclusivity which is what he would say that's the bad.

Tom Lenard:

So, both Michael's comment and Slido suggests that we move on to the question of remedy in, in uh, in the Google case. So, I mean, what do you think? What—There are obviously a bunch of remedies that have been proposed from divesting Chrome and Android to just uh, saying you can't continue to do what you were doing with these particular contracts and the Apple type contract. Or uh, you know providing a, a menu of choices or so a variety of providing, providing access to uh to AI technologies and data—some people have suggested. So, what I'm curious, I'm curious to the panel's views on what they think DOJ will propose, whether or not, and what they think a good remedy would be?

Robert (Bob) Crandall:

Um, well, first of all, it's absolutely clear that after a 268-page opinion, that the judge focuses only and solely on the exclusive distribution agreements. Uh, and as if they are uh, either too long or the uh, people uh, supplying the exclusive uh, distribution agreement, Samsung uh, iPhone uh, don't see an uh, advantage in this exclusivity. But even if you don't get exclusivity, as they don't get on the Windows platform—Google gets 80% of the search on uh, on Windows. Uh, you can go in immediately and change the default from uh, uh, Bing to uh, Google search, and uh, and that's what most people do. So, it's not clear how uh, uh, what remedy you, you could propose. Divesting them of Chrome and Android uh, would seem not to help given that they don't own the operating system or the browser on the iPhone, and yet they get huge share—90% to 95% share of that uh, to require. I'm not sure they can require that Samsung and Apple not offer exclusivity because they're not litigants in this process. So, I don't know what the solution could be.

Ginger Jin:

I, I think the remedy will depends on how we view consumer behavioral biases. In this case, the preference for default, right. If we think that's okay, that's what consumers want, we should respect that preference. And then maybe the remedy is okay. We allow the default contract it just somehow prohibit the exclusive part of it. Or it could be that we think that consumers don't know what they're doing, we should give them the choice or even force them to choose—even if some of them will prefer to have a default without a choice. And if that's the philosophy, then maybe the remedy would be a choice screen, as what you has been doing—

Robert (Bob) Crandall:

How do you for with Apple and Samsung to not offer an exclusive default? They're not litigant of this process. You can't force them to do that.

Michael Katz:

Well, well one issue though and again, I don't know the facts though that supposedly there were times when Google did want the scope to be broader than other companies wanted. And that Google wanted to be exclusive in a way that Apple didn't. And so, there, there is a place where you it would be, be behavioral, you could say to Google, you can't demand these things in negotiation, although that seems somewhat limited relative to what I would guess are the DOJ's ambitions.

William (Bill) Kovacic:

Yeah, uh, just, just one thought on consumer welfare. First, you know, in, in the Microsoft case, the harm to consumers was all future oriented. Uh, the, the court say, "what was the harm to them right now, in terms of price, quality" — none. It's future oriented. So, it's the longer-term effect but it was within a consumer, consumer framework. Uh, I'd say, here, uh, there, there'd be, there'd be three options for the Department of Justice to pursue: one is uh, as, as, as Mike uh, has just suggested—that one is: "stop!" And Ginger— that is: "stop it, don't do that anymore, don't demand the exclusives." Uh, second would be "stop it" plus, which includes maybe a choice screen, maybe it includes access to data, access to information. The third, is, is structural relief. Um, my intuition is that the DOJ, indeed will offer the second and the third. At the minimum say, "we want to prohibit the demand for exclusivity." But, but we want more than that. Uh, we want something that's more restorative, which means either stop it plus other concessions related to, to the to the to the choice of of alternatives that consumers have. And, and the last, uh, would be some form of structural remedy. Why do I think they'll give this—and I, I, I'm observing in part, conversations with several of you who follow this. Uh, a view I agree with Judge Mehta uh, I think is very thoughtful. But he also sees himself as positioning his work in a mainstream, that's very careful. Uh, in a way to, to frame—notice in the opinion, he framed his decision in a careful way. He didn't give the government plenum everything they wanted. He cast the state claims aside. He didn't give the government the finding on monopoly power and dominance that they wanted in, in a larger span of markets. It was more limited, more measured so, that's one way of saying, "See? I was measured. I was careful" — a way to do that on remedy is to have the larger menu in front of him. And to say, "I'm not going to pick the divesture. I'm going to pick 'stop it' plus something else, that's the one I'm going to choose that makes it more imper- impervious to, to effective challenge." I think DOJ offers the structural option as a way to provide the frame in which he can say, "I'm going to pick the one in between."

Michael Katz:

Actually, I think agree with everything you said. And then actually I guess listening to you—

William (Bill) Kovacic:

By the way, I haven't spoken to Judge Mehta uh, about this. So, I don't know.

Michael Katz:

… lead me to predicted something like the mandatory data sharing, you could easily see as an outcome. Because um, right, judges are people and the thought that you would spin off um, Chrome or potentially Android and who knows what's going happen to them. That's a pretty big decision to ask a judge to make. Data sharing seems a lot safer because to the, the public generally won't see what's really happening. And you do have this rationale that what you're doing is you're trying to restore the competitive conditions. That the allege- the conducts allegedly destroyed.

Robert (Bob) Crandall:

So, I, I think one thing you know we mentioned—the European framework with DMA yesterday. One thing I suspect DOJ will be thinking of is, "I'm going to look at everything Google has basically said it will do already in Europe. Uh, "and if you've shown the feasibility of that including data sharing, we want that as well here, you've shown you can do it." Uh, and I, I suppose the other thing they have one eye on is what remedy are they going to seek in the ad serving case in Virginia. Uh, that is same defendant, if you look at both of them together what is your larger remedial plan? I don't know what that broader vision is but I would think that would have to affect what they ask for in this case, too.

Tom Lenard:

So, speaking I mean speaking of the of the DMA. I mean the DMA really tried. That's why — tries to accomplish uh, through kind of ex anti- regulation. A lot of what US antitrust enforcers are trying to accomplish by bringing cases. I mean is, and obviously most of these companies have to comply with the, with the DMA. I mean is this going to make US antitrust less and less important because it's super it's superseded by a regulatory regime that uh that requires them to do to, do a lot of things that might be in a in a remedy in an antitrust case.

Robert (Bob) Crandall:

Not only, not only that but the, the DMA is going to be regulating large digital platforms—gateway platforms, none of which reside within the EU, EU. And you wonder what the political economy of that is going to be and whether that leads to any kind of optimal regulation.

Ginger Jin:

Yeah, yeah I feel like the EU has been very hands-on on the um, I guess seven gatekeepers they designated under. And DMA, they're sort of in the um the ruling against Apple or Meta or the ongoing investigation about um, Apple's other um, business is, is like okay, they're saying, "you have to provide this service and free of charge" um, right? That that's like very hands down sort, of they're kind of running the platform in product design and I'm kind of very concerned of that

kind of utility type of approach. What's the impact of that on innovation? That's the fact that we see those big US firms very successful globally is because they are able to invent a lot in products and services to address consumer demand in a very swift way. But with this really having hands on their product design—I mean right now it's probably restricted to EU and if the US remedy following that. It could be much broader than that. I'm quite skeptical in that approach.

William (Bill) Kovacic:

Yeah. The, the, the DMA is based upon powerful presumptions based on their assessment of their past experience. I mean these are per se rules. Uh, there's no flexibility for, for, for, for adjustment. I think if we gave true serum to our European colleagues who are applying those rules now, they would say that uh, um, we don't have a lot of room there for adaptation. We're learning a lot from what's going on in these US cases. Uh, the benefit of having the, the, the big monopolization case is that there's a massive amount of information that comes into the public domain that they did not know about—uh, uh arguments justifications they didn't account for. I think the US cases are going to have the indirect effect of moderating, to some extent what happens in the elaboration of the DMA. But the DMA concepts at the same time, in the way that you know that Bob would Bob and Ginger was just mentioning. Uh, they don't have precise adopters across the world that as other jurisdictions have not quite said, "I'll take that off the shelf and apply it." But it has been very influential uh, how much will it cause companies to change their behavior globally is still a bit, bit hard to tell. But, but the DMA experience uh, does provide— I think some effort some, some support for plaintiffs here to say, "these are prohibitions that have been, been, been imposed." Uh, companies seem to be able to live with them, so far— although that's a we don't have a lot of experience with that. Uh, and in that respect it supports the effort of the US agencies uh, to develop the larger factual record that has more flexibility build into to get remedies that are more nuanced than the ones you'd get uh in the European experience. so there's a there's a real symbiosis is so—

Michael Katz:

I don't often disagree with Bill, but when he said there's no room for adaptation in the DMA I have to disagree because they're making it up on the fly. So, they're adapting plenty. Um, and I realize, you mean something different. But I think that's a real problem though. The DMA is, you know, it's a lifestyle choice or something. Um, but there— I think comp- you, companies I think are having a lot of trouble um, with it. And I guess you could say to their credit, the Europeans said, "well, we know we're doing this and we want to work it out with the companies." I think it's turning out to be a pretty painful process and we don't know where it's going to end up. um as to you know whether this— what this is doing to the US influence, I think a lot of that depends on whether the DMA ends up having companies do things that they find sufficiently costly to deal with, that they just decide to have different regimes in different parts of the world. And you know, there's pretty strong pressures against doing that for some of these companies—is they

really try to have global strategies, or they may even have globally mobile um, customers. But I think you know there is a possibility that is what we'll see, there'll just be fragmentation of the, the tech policies.

William (Bill) Kovacic:

Yeah, Mike. I think they are making it up as they go in a in a very difficult setting. And I think also that uh, there is more flexibility than I suggested in how you apply the definitions. That is you decide that this behavior is covered by this prescription. And you have some you have some room there in this neg- negotiation with companies to say, uh, "maybe that's not exclusive dealing." So…

Robert (Bob) Crandall:

And we also have to keep in mind that uh, one of one of the reasons Europe has done these large digital platforms, probably is the regulatory environment there. Not only do they not have large digital platforms, they have much less R&D uh, than we do given uh, and they're an equally advanced society with an even larger population.

Tom Lenard:

Do you think uh, uh, well to what extent do you think the, the remedy that uh, is proposed and perhaps adopted will be kind of driven by a desire— obviously Google's just one company, but there's obviously this you know, this concern that the, the large incumbents will have too much of an advantage in in the AI race. Uh and we should do something to maybe uh, uh take a little bit of that advantage away. Do you think that will be a driving force in in the remedy?

William (Bill) Kovacic:

I think unmistakably, I— a theme I, I've heard from so many senior enforcement officials, both in the US agencies but also in Europe is the lament that uh, we failed 10 15 years ago to forestall the development of firms that had extraordinary power. That that was part of the 40 years of failure, that was the grievous failure; the failure to control mergers, the failure of the FTC to at least get a settlement with Google. And in 2012, 2013 that, that was a grave policy default. And I have, I have heard them and I think these are texts that are available in public. A phrase they use is, "we're not going to let it happen again." And I think that by that they mean, "we're not going to let these same enterprises control the evolution and development of this technology." I don't think there's a complete awareness about how to avoid that result. But there's a sense, for example, mergers— joint ventures have to dig in and scrutinize each one and resist. Uh, that's how it happened before. I think unmistakably, Tom there's a view that uh, that it I think it will affect the formulation of remedies because there is this, this deep belief— correct or incorrect that policy failed so badly before and this is another opportunity to redeem that failure by imposing more controls.

Robert (Bob) Crandall:

I'd like to descend a bit from that uh, Tom Hazel and I published an article in the Journal Law Economics a couple of years ago, which showed the large platforms are not that merger intensive compared to other technology firms. Uh, I don't think in this case the judge suggested that any mer- mergers that the DOJ could have stopped would have prevented uh, Google from assuming its current position in search— it was superior uh, de- development of a superior service uh, and uh, and these contracts— the alternative to which we can't uh, figure out.

William (Bill) Kovacic:

That will be the theme in the Virginia case. Yes.

Robert (Bob) Crandall:

Yeah.

William (Bill) Kovacic:

Google double click—

Robert (Bob) Crandall:

Well in the case of Virginia case, at least there is one major acquisition and that's double click.

William (Bill) Kovacic:

Yeah, yeah.

Tom Lenard:

Well, also one of the questions in Slack, which I think has disappeared now. But it was that uh, the major aspect of the, of the I guess of the rationale for the uh, government's case was to help Microsoft. Is there any, is there any, is that a, is that a credible uh, a credible idea?

Robert (Bob) Crandall:

I think to encourage more uh, development of competitive search engines. But how you do that is a, is, is the the puzzle.

Tom Lenard:

Um so, I can—

Michael Katz:

I think that question if I remember was saying, you know, why—I thought had the flavor, why would you need to help Microsoft? They have so much money already. But I think the answer is, doesn't matter how much money you have and ultimately, you're only going to succeed as a competitor if you can be profitable. And while Microsoft apparently was willing to lose a lot of

money for a long time to try to succeed, that it's limited how much they're going to do that. And that's—I think was the basis of the government's case.

Ginger Jin:

But, but to just to play Devil's advocate here. and probably because it's very hard for Microsoft to compete in exactly same technology as Google's current search engine, that we now have a differentiated approach in Chat GPT and other ways, right? I mean Microsoft has invest heavily in that and other big techs are investing heavily in that as well. So, it's, it's unclear to me that the counterfactual of say, Microsoft was helped by the court five years ago, and the, and the innovation outcome would be better than what we have today.

Tom Lenard:

Um, you—

Michael Katz:

Add one thing. It seems to me a lot of what's going on, is that with the digital industries that have just phenomenally large economies of scale—some of these things just have huge, fixed costs—and think about autonomous vehicles. One, we're just going for decades losing money to do it. There are also products where they're really important compliments and the compliments can also have huge economies a scale and be expensive to develop. So, we're going to have this—I think there's a philosophical question is, do you then let firms say, "we're going to promote an ecosystem and that we're going to enter into providing these compliments that are expensive and you know hard to do, but really valuable when you do it" or do you say, "no, no you're getting too much control so we're going to keep you out of those things even though that may mean that you don't get these very valuable compliments." And you I think that's something we're going to have to confront, because there people who basically want to say, "you have your innovation in your lane. Stay in your lane, don't try to go into a neighboring thing." And I want—even when it's organic growth, and I do want to be clear that, I'll distinguish that between if you did go in just through merger or there's these questions, now I guess FTC is asking about with AI. About what some of these partnerships look like. That seems to me is a different thing, but I think even with organic growth there are a lot of people nowadays— I'm not one of them, who would say, "okay, you guys are too big already, you shouldn't be able to grow into— even organically into this neighboring market." And I think that's going to be a serious problem.

Tom Lenard:

I mean, so do you think it's uh, even aside from the Google case, I mean obvi- obviously the agencies are kind of targeting AI, You know, presumably under the theory that the next— they want to assure that you know, that these companies don't have too much of an advantage on the next, next round of competition. Is that— do you think that's an appropriate policy? Slot—lots investigate, investig—

Robert (Bob) Crandall:

I'm not sure. I'm not sure how they create a credible case that they can do that. You know since the first uh, antitrust action was brought in late 2020, against the digital platforms, they've grown by 77% in terms of stock market value. While the overall markets uh, increased by 54%. Clearly the Cognis Senti who are trading these securities. These companies don't think that antitrust is going to have a major impact on reducing their, their, their size or scale uh, and operating in the digital economy.

William (Bill) Kovacic:

Certainly, a question that uh, again to go back to one of Mike's points earlier, that hasn't been answered. Uh, by, by the advocates of severe restrictions on the platforms participation in AI, either individually or collaboratively, is what would you like them to do otherwise? Do you want them to be spectators? Uh, do you want them not to form collaborative ventures with other enterprises that might have a role to play? I mean I'm accustomed to hearing uh, the, the leading participants— that is the large firm say, "at this moment are interested to have the broadest possible participation, that's how we're framing this." Uh, we're seeking to have uh, a fairly open environment, in which there's large participation by as many as possible." Uh, that they're welcoming that as a, as a, as, as a business model. But alternatively, what are you telling them to say— you can work in isolation uh, or are you supposed to stand down and, and, and allow things to develop— perhaps more slowly or by others. Uh, it's not clear what, what the, what the uh acceptable alternative role is for these firms.

Robert (Bob) Crandall:

If we think back to Microsoft, uh, would it have made any difference if uh, the approach would have been to ban mi- Microsoft from investing heavily in wireless operating systems? Given that they invest heavily and didn't succeed.

William (Bill) Kovacic:

No, I mean you, can't you, can't—

Robert (Bob) Crandall:

I don't think you can foresee how AI is going to develop. And in fact, I think Google is more afraid of a- AI, than they are of the federal government in these two cases.

Michael Katz:

Less is the AI, I think is though in some way it's going to come back same thing as you're saying about privacy or disinformation. if you're concerned about AI, your primary concern is it may wipe out the human race. Then it's not at all clear that you should be promoting competition in AI and try to have the wild w—and so, and I actually mean that seriously. Because people they think, oh you know, somehow small firms are always virtuous. And you know, there's an

expression, “Fly by Night” now. What it would be a small AI firm would still be huge. But having a lot of different firms out there all competing and trying to get an edge, possibly at any cost, actually has some—raises some real issues. And so, I think we need to be thinking about what we think is the right overall industrial and regulatory structure for AI. But the mantra you know, “we need to really promote competition,” [is] not clear to me that's should be at the top of the list.

William (Bill) Kovacic:

I'm much more interested in what we were talking about yesterday— about the possibility of regulatory frameworks that demand more vetting of specific AI applications over time. I mean I, I, I think when you look at other tech experiences, where you've had the massive rapid deployment of new, nascent and, and somewhat untested technologies. That's where you get the greatest surprises around the corner. Uh, a more substantial process of vetting, I think would be useful. That's not an antitrust issue.

Tom Lenard:

Yeah?

Audience Member:

Thank you. I—we need to have a level set for this conversation. there is global consensus, there is Republican and Democratic consensus about the problems in antitrust and big tech. There was bipartisan agreement about what to do. At the end of 2020, Chuck Schumer did not say, “you didn't come to me with anything to do so, I'm not going to give you time in the legislative calendar.” Indeed, we published a report in 2020, that highlighted the abuses that have seen we've seen in the big tech market. A report that has been published in similar terms, by other countries around the world including Australia, South Korea, Japan, the UK, the EU, Brazil, Canada, and the US. These bills that were later developed had that report were bipartisan. They were supported by Republicans and Democrats— that is consensus. Attorneys General across the country supported these proposals, that's consensus. I also think that it's wrong to mischaracterize um, disagreement with the common law um, as, as something that Congress shouldn't be doing anything about. If we disagree with Congress—

Michael Katz:

Oh, no, no. I think it should do it, I think they won't do it. I think they don't do their job. That's not the that the constitution structure is that the courts interpret the statutes they make common law and then at any point that Congress wants to reset Congress should act.

Audience Member:

And they did. They introduced bills. They passed them out a committee. They were bipartisan.

Michael Katz:

Okay, you have a different—

Audience Member:

I, I also think that it's not helpful to be re- restating misinformation about Amazon and Black Lives Matter at a panel like this. I also don't think it's—

William (Bill) Kovacic:

Can you, can you tell me what the misinformation is?

Audience Member:

It was Michael Katz saying that Vance said that Amazon had something—

Michael Katz:

The Christian, Christian Science Monitor reported that he said it, I think in 2020, to a group and—

Audience Member:

That doesn't make it any less misinformation.

Robert (Bob) Crandall:

Let's be absolutely clear about that.

Audience Member:

And I also want to note that we changed the merger filing guidelines. We changed the merger rules because of two reasons: one, we elected a president that called on us to do that and two, Congress passed laws that instructed the agencies to do exactly this. Further, the Biden-Harris Administration did not come in saying that we have done badly for the last 40 years. Because if you say that, that one, negates the Google case where we just had a, a, a positive—

William (Bill) Kovacic:

But the, but President Biden

Audience Member:

… and the Microsoft decision. Also, I wonder what this panel would do? How are you supposed to use consumer welfare standard for things that do not have consumer prices?

Michael Katz:

Okay, that shows you don't understand the consumer welfare standard.

Robert (Bob) Crandall:

Le- Let’s be clear the standard consumer wel— standard consumer welfare…

Tom Lenard:

Yeah. I think we—

Audience Member:

The consumer welfare is determined by prices.

Michael Katz:

No, it’s not. See you don’t…

Audience Member:

If you don't pay for search, you don't do

Tom Lenard:

I do— you’re… excuse me.

Audience Member:

And that was only— that was not written in statute. That just came out of some, some academics 40 years ago. This not what Congress in…

Tom Lenard:

We need to wrap up this panel. And I do have one more question.

Audience Member:

So, how do you use the consumer welfare standard to address the pro problems of the…

Tom Lenard:

We're not that's…

Audience Member:

When companies are big enough to bully entire countries…

Tom Lenard:

This is the end.

Audience Member:

We need to do something.

Tom Lenard:

This is the end of this panel, not the beginning.

Robert (Bob) Crandall:

Yeah, I want, I want to point out one thing. There is no consensus that antitrust can solve the problem of the big, big platforms Dominus. There's none. And, and the most of the expert reports have been issued, come to that conclusion and therefore, suggests establishing a regulatory framework spe- specially designed to go after uh, problems in the digital sector. So, what we're saying up here is, we don't know what remedies uh, could bring about uh, through—we could bring about through antitrust, given the platform economies that these uh, uh, four or five companies are able to exploit.

Tom Lenard:

Notwithstanding the fact that, we're already over time. I want to ask one wrap-up question of Bill. Since it's the title of a book that he, I guess recently edited or wrote. It's what makes a great antitrust enforcer?

William (Bill) Kovacic:

I, I guess uh, several things that I'd look for in an appointee. Um, maybe most important, I want broad economic knowledge of the economy. I want a broad understanding of the economy. Uh, second, I'd love to have someone who's had management experience and an institution. So that you know all the practical administrative difficulties you face going in. Uh, third, uh, somebody who has a demonstrated willingness uh, to work in a collegial way, and to listen and surround themselves with skills that complement their own, and to listen to them very carefully to decide; but to listen to them. Uh, fourth the person who builds who who's defined success in terms of how, how well policy will evolve over the, over the next decade or so. To make uh, the direction of policy better not to engage in short-term credit claiming. Uh, uh, another attribute that I think is uh, extremely uh, valuable is to, to have a deep sense of uh, the history of the development of the regulatory scheme— historical awareness so you can situate what you're doing now. Uh, and uh, I suppose last uh, someone knows a lot about competition law is nice. I used to think that was at the top of the list now. I think it's nice to have because you can pick it up along the way uh, all of the other things I think are, are, are, are, are more fundamental to being an effective leader.

Tom Lenard:

Okay. Well, this was a great panel. I appreciate, I appreciate everybody's contribution.

William (Bill) Kovacic:

I, I'd welcome the further conversation by the way. I, I think uh, I mean you, you raised some, some fabulous interesting points. But uh, love to talk about this more.

Tom Lenard:

So uh, let me let join me in thanking the panel.

[Applause]