ICLE International Center for Law & Economics

Antitrust Statutorification
July 15, 2021
Nicolas Petit

[***TOTM**: The following is part of a symposium by TOTM guests and authors marking the release of Nicolas Petit's "Big Tech and the Digital Economy: The Moligopoly Scenario." The entire series of posts is available here.*

This post is authored by Nicolas Petit himself, the Joint Chair in Competition Law at the Department of Law at European University Institute in Fiesole, Italy, and at EUI's Robert Schuman Centre for Advanced Studies. He is also invited professor at the College of Europe in Bruges.]

A lot of water has gone under the bridge since my book was published last year. To close this symposium, I thought I would discuss the new phase of antirust statutorification taking place before our eyes. In the United States, Congress is working on five antitrust bills that propose to subject platforms to stringent obligations, including a ban on mergers and acquisitions, required data portability and interoperability, and line-of-business restrictions. In the European Union (EU), lawmakers are examining the proposed Digital Markets Act ("DMA") that sets out a complicated regulatory system for digital "gatekeepers," with *per se* behavioral limitations of their freedom over contractual terms, technological design, monetization, and ecosystem leadership.

Proponents of legislative reform on both sides of the Atlantic appear to share the common view that ongoing antitrust adjudication efforts are both instrumental and irrelevant. They are instrumental because government (or plaintiff) losses build the evidence needed to support the view that antitrust doctrine is exceedingly conservative, and that legal reform is needed. Two weeks ago, antitrust reform activists ran to Twitter to point out that the U.S. District Court dismissal of the Federal Trade Commission's (FTC) complaint against Facebook was one more piece of evidence supporting the view that the antitrust pendulum needed to swing. They are instrumental because, again, government (or plaintiffs) wins will support scaling antitrust enforcement in the marginal case by adoption of governmental regulation. In the EU, antitrust cases follow each other almost like night the day, lending credence to the view that regulation will bring much needed coordination and economies of scale.

But both instrumentalities are, at the end of the line, irrelevant, because they lead to the same conclusion: legislative reform is long overdue. With this in mind, the logic of lawmakers is that they need not await the courts, and they can advance with haste and confidence toward the promulgation of new antitrust statutes.

The antitrust reform process that is unfolding is a cause for questioning. The issue is not legal reform in itself. There is no suggestion here that statutory reform is necessarily inferior, and no correlative reification of the judge-made-law method. Legislative intervention can occur for good reason, like when it breaks judicial inertia caused by ideological logjam.

The issue is rather one of precipitation. There is a lot of learning in the cases. The point, simply put, is that a supplementary court-legislative dialogue would yield additional information—or what Guido Calabresi has called "starting points" for regulation—that premature legislative intervention is sweeping under the rug. This issue is important because specification errors (see Doug Melamed's symposium piece on this) in statutory legislation are not uncommon. Feedback from court cases create a factual record that will often be missing when lawmakers act too precipitously.

Moreover, a court-legislative iteration is useful when the issues in discussion are cross-cutting. The digital economy brings an abundance of them. As tech analysist Ben Evans has observed, data-sharing obligations raise tradeoffs between contestability and privacy. Chapter VI of my book shows that breakups of social networks or search engines might promote rivalry and, at the same time, increase the leverage of advertisers to extract more user data and conduct more targeted advertising. In such cases, Calabresi said, judges who know the legal topography are well-placed to elicit the preferences of society. He added that they are better placed than government agencies' officials or delegated experts, who often attend to the immediate problem without the big picture in mind (all the more when officials are denied opportunities to engage with civil society and the press, as per the policy announced by the new FTC leadership).

Of course, there are three objections to this. The first consists of arguing that statutes are needed now because courts are too slow to deal with problems. The argument is not dissimilar to Frank Easterbrook's concerns about irreversible harms to the economy, though with a tweak. Where Easterbook's concern was one of ossification of Type I errors due to stare decisis, the concern here is one of entrenchment of durable monopoly power in the digital sector due to Type II errors. The concern, however, fails the test of evidence. The available data in both the United States and Europe shows unprecedented vitality in the digital sector. Venture capital funding cruises at historical heights, fueling new firm entry, business creation, and economic dynamism in the U.S. and EU digital sectors, topping all other industries. Unless we require higher levels of entry from digital markets than from other industries—or discount the social value of entry in the digital sector—this should give us reason to push pause on lawmaking efforts.

The second objection is that following an incremental process of updating the law through the courts creates intolerable uncertainty. But this objection, too, is unconvincing, at best. One may ask which of an abrupt legislative change of the law after decades of legal stability or of an experimental process of judicial renovation brings more uncertainty.

Besides, ad hoc statutes, such as the ones in discussion, are likely to pose quickly and

dramatically the problem of their own legal obsolescence. Detailed and technical statutes specify rights, requirements, and procedures that often do not stand the test of time. For example, the DMA likely captures Windows as a core platform service subject to gatekeeping. But is the market power of Microsoft over Windows still relevant today, and isn't it constrained in effect by existing antitrust rules? In antitrust, vagueness in critical statutory terms allows room for change.[1] The best way to give meaning to buzzwords like "smart" or "future-proof" regulation consists of building in first principles, not in creating discretionary opportunities for permanent adaptation of the law. In reality, it is hard to see how the methods of future-proof regulation currently discussed in the EU creates less uncertainty than a court process.

The third objection is that we do not need more information, because we now benefit from economic knowledge showing that existing antitrust laws are too permissive of anticompetitive business conduct. But is the economic literature actually supportive of *stricter rules* against defendants than the rule-of-reason framework that applies in many unilateral conduct cases and in merger law? The answer is surely no. The theoretical economic literature has travelled a lot in the past 50 years. Of particular interest are works on network externalities, switching costs, and multi-sided markets. But the progress achieved in the economic understanding of markets is more descriptive than normative.

Take the celebrated multi-sided market theory. The main contribution of the theory is its advice to decision-makers to take the periscope out, so as to consider all possible welfare tradeoffs, not to be more or less defendant friendly. Payment cards provide a good example. Economic research suggests that any antitrust or regulatory intervention on prices affect tradeoffs between, and payoffs to, cardholders and merchants, cardholders and cash users, cardholders and banks, and banks and card systems. Equally numerous tradeoffs arise in many sectors of the digital economy, like ridesharing, targeted advertisement, or social networks. Multi-sided market theory renders these tradeoffs visible. But it does not come with a clear recipe for how to solve them. For that, one needs to follow first principles. A system of measurement that is flexible and welfare-based helps, as Kelly Fayne observed in her critical symposium piece on the book.

Another example might be worth considering. The theory of increasing returns suggests that markets subject to network effects tend to converge around the selection of a single technology standard, and it is not a given that the selected technology is the best one. One policy implication is that social planners might be justified in keeping a second option on the table. As I discuss in Chapter V of my book, the theory may support an M&A ban against platforms in tipped markets, on the conjecture that the assets of fringe firms might be efficiently repositioned to offer product differentiation to consumers. But the theory of increasing returns does not say under what conditions we can know that the selected technology is suboptimal. Moreover, if the selected technology is the optimal one, or if the suboptimal technology quickly obsolesces, are policy efforts at all needed?

Last, as Bo Heiden's thought provoking symposium piece argues, it is not a given that antitrust enforcement of rivalry in markets is the best way to maintain an alternative

technology alive, let alone to supply the innovation needed to deliver economic prosperity. Government procurement, science and technology policy, and intellectual-property policy might be equally effective (note that the fathers of the theory, like Brian Arthur or Paul David, have been very silent on antitrust reform).

There are, of course, exceptions to the limited normative content of modern economic theory. In some areas, economic theory is more predictive of consumer harms, like in relation to algorithmic collusion, interlocking directorates, or "killer" acquisitions. But the applications are discrete and industry-specific. All are insufficient to declare that the antitrust apparatus is dated and that it requires a full overhaul. When modern economic research turns normative, it is often way more subtle in its implications than some wild policy claims derived from it. For example, the emerging studies that claim to identify broad patterns of rising market power in the economy in no way lead to an implication that there are no pro-competitive mergers.

Similarly, the empirical picture of digital markets is incomplete. The past few years have seen a proliferation of qualitative research reports on industry structure in the digital sectors. Most suggest that industry concentration has risen, particularly in the digital sector. As with any research exercise, these reports' findings deserve to be subject to critical examination before they can be deemed supportive of a claim of "sufficient experience." Moreover, there is no reason to subject these reports to a lower standard of accountability on grounds that they have often been drafted by experts upon demand from antitrust agencies. After all, we academics are ethically obliged to be at least equally exacting with policy-based research as we are with science-based research.

Now, with healthy skepticism at the back of one's mind, one can see immediately that the findings of expert reports to date have tended to downplay behavioral observations that counterbalance findings of monopoly power—such as intense business anxiety, technological innovation, and demand-expansion investments in digital markets. This was, I believe, the main takeaway from Chapter IV of my book. And less than six months ago, *The Economist* ran its leading story on the new marketplace reality of "Tech's Big Dust-Up."

More importantly, the findings of the various expert reports never seriously contemplate the possibility of competition by differentiation in business models among the platforms. Take privacy, for example. As Peter Klein reasonably writes in his symposium article, we should not be quick to assume market failure. After all, we might have more choice than meets the eye, with Google free but ad-based, and Apple pricy but less-targeted. More generally, Richard Langlois makes a very convincing point that diversification is at the heart of competition between the large digital gatekeepers. We might just be too short-termist—here, digital communications technology might help create a false sense of urgency—to wait for the end state of the Big Tech moligopoly.

Similarly, the expert reports did not really question the real possibility of competition for the purchase of regulation. As in the classic George Stigler paper, where the railroad industry fought motor-trucking competition with state regulation, the businesses that stand

to lose most from the digital transformation might be rationally jockeying to convince lawmakers that not all business models are equal, and to steer regulation toward specific business models. Again, though we do not know how to consider this issue, there are signs that a coalition of large news corporations and the publishing oligopoly are behind many antitrust initiatives against digital firms.

Now, as is now clear from these few lines, my cautionary note against antitrust statutorification might be more relevant to the U.S. market. In the EU, sunk investments have been made, expectations have been created, and regulation has now become inevitable. The United States, however, has a chance to get this right. Court cases are the way to go. And unlike what the popular coverage suggests, the recent District Court dismissal of the FTC case far from ruled out the applicability of U.S. antitrust laws to Facebook's alleged killer acquisitions. On the contrary, the ruling actually contains an invitation to rework a rushed complaint. Perhaps, as Shane Greenstein observed in his retrospective analysis of the U.S. *Microsoft* case, we would all benefit if we studied more carefully the learning that lies in the cases, rather than haste to produce instant antitrust analysis on Twitter that fits within 280 characters.

---

[1] But some threshold conditions like agreement or dominance might also become dated.

View Article