# Wake Round 5 Wiki

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#### The affirmatives drive toward antitrust intervention adopts neoliberal assumptions of politics and economics which concentrates power in the hands of a few

Vaheesan 18 – Policy Counsel at the Open Markets Institute. Former regulations counsel at the Consumer Financial Protections Bureau

Sandeep Vaheesan, “The Twilight of the Technocrats’ Monopoly on Antitrust?,” The Yale Law Journal Forum, 6/4/18, <https://www.yalelawjournal.org/pdf/Vaheesan_ir9dchg8.pdf>.

Over the past forty years, technocrats have dominated antitrust law.44 Leadership at the Department of Justice and Federal Trade Commission as well as Supreme Court Justices have rewritten much of antitrust law.45 They have ignored or distorted the legislative histories of the antitrust laws and have even overridden Congress’s legislative judgments.46 By restricting private antitrust enforcement, the Supreme Court has also limited the ability of ordinary Ameri- cans to influence the content of antitrust law.47

While the antitrust technocrats have been on the march, Congress has been dormant. Its antitrust activities have been confined to secondary issues.48 This combination of technocratic hyperactivism and legislative lethargy has created, in the words of Harry First and Spencer Waller, “an antitrust system captured by lawyers and economists advancing their own self-referential goals, free of political control and economic accountability.”49 Although proponents of technocratic antitrust may characterize it as “pure” or “scientific,” the reality is quite different as big business interests and their representatives dominate debate within this cloistered enterprise.50

#### Elite capture locks in civilizational collapse, but it’s not inevitable. Try or die for putting political and economic power in the hands of the citizenry, and reorienting government decision-making toward the public good.

MacKay 18 – Professor of Sociology, Mohawk College

Kevin MacKay, also a union activist & executive director of a sustainable community development cooperative, The Ecological Crisis is a Political Crisis, 2018, https://www.resilience.org/stories/2018-09-25/the-ecological-crisis-is-a-political-crisis/

With each passing day, reports on global climate change become increasingly bleak. Recent research has affirmed that the glaciers are melting faster than anticipated1, and that acidification, with its catastrophic effect on ocean ecosystems, is also proceeding faster than feared2. As the concentration of atmospheric carbon continues to rise, so does the likelihood we’ve passed the tipping point for irreversible climate change.3

When one looks at other critical earth ecosystems, the danger is equally apparent. Soil is being destroyed.4 Fresh water shortages are wracking several continents and leaving billions of people without reliable access to clean drinking water.5 Fish stocks are plummeting.6 Oceans are clogged with plastic garbage.7 Biodiversity is disappearing at an alarming rate.8 In the face of this full-spectrum ecological assault, a growing number of scientists have been saying that the collapse of civilization is now unavoidable.9

Stopping the destructive effects of industrial, capitalist civilization has now become the defining challenge of our age. If we don’t radically change our society’s course within the next 30 years, then a deep collapse and protracted Dark Age are all but assured. In order to confront this challenge, we need to understand what is causing civilization’s crisis, and most importantly, how the crisis can be resolved. At stake is nothing less than a viable future on this planet.

The Five Horsemen of the Modern Day Apocalypse

In my book, Radical Transformation: Oligarchy, Collapse, and the Crisis of Civilization, I argue that industrial civilization is being driven toward collapse by five key forces – related to terminal dysfunction within its ecological, economic, socio-cultural, and political sub-systems:

Dissociation: globalized production and distribution systems disrupt people’s ability to put their own actions, and the actions of elites, into a coherent causal and ethical framework. Actions by individuals, institutions, and systems of governance are therefore disconnected from their effect on the natural world and on other peoples. Without this critical feedback, even well-intentioned actors can’t make rational and ethical choices regarding their behaviour.

Complexity: the world-spanning nature of industrial capitalist civilization, and the massive number of interrelationships it represents, make predicting the effect of any given change on the system as a whole devilishly difficult. Disastrous tipping points loom in several of civilization’s systems – from the collapse of ocean ecology to the threat of nuclear war. In addition, because the crisis cannot be contained in one part of the globe, the dysfunctions can’t be dealt with in isolation.

Stratification: a profoundly unequal distribution of wealth – both globally and within nations – leads to mass human poverty, displacement, and to premature death through disease and continuous warfare. Stratification also leads to political instability, eroding a society’s social cohesion and undermining decision-making structures.

Overshoot: the economic practices of industrial capitalism are exceeding ecological limits. Our civilization is critically degrading the biosphere, burning through non-renewable energy sources, and shifting the entire climatic balance.

Oligarchy: in states worldwide, political decision-making is controlled by a numerically small, wealthy elite. This form of government serves to lock in patterns of conflict, oppression, and ecological destruction.

Societies as Decision-Making Systems

Each of the horsemen presents a significant threat to civilization’s viability. However, oligarchy is particularly important as it deals with a society’s decision-making systems. In his 2005 book Collapse: How Societies Choose to Fail or to Succeed, geographer Jared Diamond argued that many past civilizations have collapsed due to their inability to make correct decisions in the face of existential threats.10 Diamond drew on the work of archaeologist Joseph Tainter, who in his 1998 book The Collapse of Complex Societies, argued that civilizations fail due to a constellation of factors.11

To Tainter, the ultimate mistake failed civilizations made was to continually solve problems by adding social complexity, and as a result, increasing the society’s energy needs. Eventually, Tainter argued that civilizations encounter a “thermodynamic crisis” in which they are unable to sustain an energy-intensive level of complexity. The result is collapse – ecological devastation, political upheaval, and mass population die-off.

The tendency for societies to collapse under excessive energy demands is an important insight. However, what Tainter and Diamond failed to appreciate is how oligarchy is an even more fundamental cause of civilization collapse.

Oligarchic control compromises a society’s ability to make correct decisions in the face of existential threats. This explains a seeming paradox in which past civilizations have collapsed despite possessing the cultural and technological know-how needed to resolve their crises. The problem wasn’t that they didn’t understand the source of the threat or the way to avert it. The problem was that societal elites benefitted from the system’s dysfunctions and prevented available solutions.

Oligarchic Control in “Democratic” States

Citizens in countries such as Canada, the United States, Australia, or the Eurozone members, would generally consider themselves to be living in democratic societies. However, when the political systems of Western democracies are scrutinized, clear and pervasive signs of oligarchy emerge.

A 2014 study by American political scientists Martin Gilens and Benjamin Page revealed that the great majority of political decisions made in the United States reflect the interests of elites. After studying nearly 1,800 policy decisions passed between 1981 and 2002, the researchers argued that “both individual economic elites and organized interest groups (including corporations, largely owned and controlled by wealthy elites) play a substantial part in affecting public policy, but the general public has little or no independent influence.”12

Today, oligarchic control over decision-making, and its catastrophic ecological effects, have never been clearer. In the U.S., Donald Trump and his billionaire-dominated cabinet are seeking to dismantle the Environmental Protection Agency13, to question climate science14, and to pursue a policy of “American energy dominance” that will dramatically expand production of fossil fuels.15

U.S. energy companies are also having a profound impact on domestic energy policy by accelerating the development of hard-to-access fuel sources through hydraulic fracturing, deep-sea oil drilling, and mountain-top removal coal mining.16 At the same time, fossil fuel oligarchs are working overtime to dismantle green energy initiatives, such as the Koch brothers’ war on the solar industry in Florida, and in other cities across the continent.17

In Canada, often thought of as more progressive than its southern neighbor, the situation hasn’t been much different. Under prime minister Stephen Harper’s two terms, the Canadian state became an unapologetic cheerleader for extracting some of the world’s dirtiest oil –Tar Sands bitumen. Harper accelerated Tar Sands production, leading to the clear-cutting of thousands of acres of boreal forest, the diversion of millions of gallons of freshwater, and the creation of miles of toxic tailings ponds, filled with water contaminated by the bitumen extraction process.18

Like the Trump administration, the Harper government silenced federal climate scientists.19 The government also targeted environmental charities and non-profits, using funding cuts and the threat of audits to undermine climate advocacy.20 When a movement of national outrage swept Harper from power in 2015, Canadians were hopeful that climate change would once more be taken seriously. However, the new government of Justin Trudeau, while embracing the international discourse on global warming, has shown a continued allegiance to the fossil-fuel oligarchy by committing over $7 billion in federal funds to purchase the failing Kinder-Morgan Trans Mountain pipeline.21

What is To Be Done?

To create a sustainable future, we must first learn the lessons of the past, and what archaeological research shows is that throughout history, civilizations that have been captive to the interests of an oligarchic elite have all collapsed.22 Today’s industrial, capitalist civilization is trapped in this same deadly cycle.

As long as a self-interested elite controls decision-making in modern states, we will be far too late to avoid the effects of steadily contracting ecological limits. In addition, we will be unable to avert the downward spiral of economic crisis, conflict, and warfare that will result as oligarchs scramble to maintain their wealth and power in the face of dwindling resources and mounting crisis.23

Breaking free from this destructive pattern will require us to take political and economic power back from the 1% and return it to the hands of citizens. This means that advocates for ecological sustainability must move far beyond individual actions, lobbying, or reform of existing political and economic institutions. If we are to have a chance, we must ensure that governments make decisions based on the public good, not on private profit.

Radically transforming industrial, capitalist civilization won’t be easy. It will require movements for environmental sustainability, social justice, and economic fairness to come together, and to realize their common interest in dismantling the system of oligarchy and building a democratic, eco-socialist society.24 This “movement of movements” must put aside sectarian squabbles, and finally realize that the goals of economic justice, human rights, and ecological sustainability are all intrinsically linked.

Such changes may seem like a tall order, but hope can be found in the deepening struggle being waged to protect our fragile ecosystems. First Nations groups are leading this charge and beginning to win some important victories. The inspiring Water Protectors of Standing Rock were able to disrupt the Dakota Access Pipeline in the face of intense government oppression.25 In Canada, Several British Columbia First Nations recently won an impressive court victory in their opposition to the Trans Mountain pipeline.26

If successful grassroots struggles can be linked with equally hopeful movements for real political change, then there is hope for the future. However, if we continue on with “business as usual” – hoping that change will come from lifestyle choices and the interchangeable representatives of elite political parties, then the future looks grim indeed.

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#### Text: The fifty states and all relevant United States territories should **prohibit unilateral exclusion that reduces competition significantly.**

#### States have the right to enforce federal antitrust law and enact and enforce their own antitrust laws---those state-level laws are not inherently Congressionally preempted.

HLR 20 – Harvard Law Review

“Note: Antitrust Federalism, Preemption, and Judge-Made Law,” Harvard Law Review, Vol. 133, June 2020, LexisNexis

I. THE ANTITRUST FEDERALISM LANDSCAPE

Antitrust federalism, meaning the space carved out for the states in the more generally federal antitrust arena, can be thought of as made up of two "swords" -- the first the states' ability to bring suit under federal antitrust law and the second their ability to enact and enforce their own state antitrust laws -- and one "shield" -- immunity from federal antitrust law for state actions. The swords allow states to attack antitrust offenders, while the shield allows states to defend against federal antitrust action.

All three elements of antitrust federalism find their roots in congressional action or the courts' interpretation of congressional inaction. The power to enforce federal antitrust law as parens patriae for full treble damages -- the first sword -- was granted to the states by Congress in Hart-Scott-Rodino. On the judicial front, the Supreme Court acknowledged state immunity from federal antitrust actions -- the shield -- in Parker v. Brown, noting that the Sherman Act did not explicitly mention its application to state action. Finally, when the Court confirmed that states' ability to make their own antitrust laws -- the second sword and the one discussed in this Note -- was not preempted in California v. ARC America Corp., it considered the same Sherman Act silence.

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**Defense merger markets are opening now---that allows opportunities for firms to invest in new lines of innovation**

**Aaronson et al. 20** – Matt Aaronson leads BCG’s Aerospace and Defense practice globally; Doug Belair is the former Senior Vice President of Strategy and Corporate Development for BAE Systems, Inc., and current Senior Advisor for the Boston Consulting Group; Paul DeLia is a Senior Advisor at The Boston Consulting Group; Drosten Fisher is a Partner in BCG's New York office; Stephen O’Bryan is Senior Advisor for the Boston Consulting Group; Mel Wolfgang serves on Boston Consulting Group's Industrial Goods practice leadership team and the North American management team

Matt Aaronson, Doug Belair, Paul DeLia, Drosten Fisher, Stephen O’Bryan, and Meldon Wolfgang, "Building Beachheads in the US Defense Market Through M&A," Boston Consulting Group, 7-23-2020, <https://www.bcg.com/publications/2020/building-beachheads-us-defense-market-through-mergers-acquisitions>

Despite the serious economic pain that the coronavirus pandemic has created for some defense companies—sapping their ability to undertake acquisitions—**all is not lost**. Defense M&As are **still an option**. Historically, industry **consolidation** occurs when US defense spending is on the decline, and, given the trajectory of such spending today, the industry could well be on the **cusp** of another **period of consolidation.**

Of course, some formidable challenges await companies that want to tap into the enormous US defense market, as well as for companies that hope to expand an established presence. A wave of consolidation over the past decade has cemented positions, leaving a relatively small number of large players that would be logistically difficult to acquire. Any major deal would surely face careful regulatory scrutiny. With those caveats in mind, companies should plan now for how they could seize opportunities to establish new platforms and beachheads in the US defense market.

The Next Consolidation Wave?

US defense spending tends to go in waves, and we may be about to enter **another downturn** with **aggressive cuts** similar to those proposed by the Budget Control Act in 2011. (See Exhibit 1.) While the President’s FY21 defense budget requests an annual 2% increase, our modeling suggests an increase is **unlikely**, given the size of the **stimulus package** to counter COVID-19. We forecast a range of scenarios, with the best case being essentially a flat budget, and the worst being a steep decline. If the worst case occurs, it’s likely that new programs will be postponed, R&D cut for all but the most strategic efforts, and current procurements will slip. There could also be pressure to keep existing programs in service longer than planned—which could increase their sustainment costs and modernization requirements.

[[figure omitted]]

Such downturns have historically been **periods of consolidation** in the industry, a chance for **stronger companies** to buy firms in financial distress and either **establish a beachhead** in the US or **expand their presence**. (See Exhibit 2.) This presents a **near-term opportunity** for companies—whether they are foreign firms, domestic commercial aerospace companies, private equity investors, or existing players looking to create new platforms.

[[figure omitted]]

For example, BAE Systems took advantage of the downturn in the 1990s to acquire the Sanders electronics business from Lockheed Martin. This put BAE on the path to building a $12 billion business in the US, accounting for 50% of the group’s revenue and making it a major prime contractor. The Sanders acquisition helped BAE establish a Special Security Agreement with the US Department of Defense (DOD), which eventually regarded the company’s US business as a domestic company. Using this as a foundation, BAE went on to acquire United Defense and the Bradley Fighting Vehicle franchise in 2005. The company followed up this acquisition in 2007 with the purchase of Armor Holdings a provider of tactical vehicle and soldier protection equipment. The land vehicle acquisitions proved highly lucrative in the Iraq and Afghanistan wars.

While it’s true that few companies have the financial resources of a BAE, or the risk appetite for multibillion dollar acquisitions, we still see **many opportunities** to create **custom plays**—to **assemble** what a company wants in a **few steps** instead of one fell swoop—and at a **lower cost** than buying a large firm (and with less regulatory scrutiny).

Become A **Conduit Of Innovation**

It’s important to understand that while the prime contractors (aka, “the primes”) are huge, their R&D budgets are **relatively constrained**—typically **just 2%** or so of revenue. They tend to focus on winning new programs and developing existing programs but **not pure innovation**. As a result, their “cash cows” can sometimes get shortchanged on the R&D front. The primes still value these programs, but they must prioritize and often **cannot spare the resources** to upgrade them.

This **creates opportunities** for others. A prime might **happily divest** a seemingly stagnant component business (in order, hypothetically, to focus on system integration) but would be very interested if the new owner of that component business **pursued R&D** and did the **necessary conversion work** to help extend the life of the prime’s existing system integration program. In addition, the Pentagon is looking to **diversify its sourcing** to more creative and flexible vendors who will assume more of the financial risk of system **modification and development.**

With that mind, we believe that **ambitious companies** should consider **M&A strategies** that help them become “**conduits of innovation**” for the main players. The aspiring company may need to **acquire several subunits** from existing players to build a **cohesive whole**, then marry **industry knowledge** (such as where to find certain expertise or anchor capabilities) together with an **analytical understanding** of where the leading edge of the industry is trending. This approach requires a coherent vision for what a successful player will look like in three to five years. (See the sidebar, “Six M&A Success Factors.”)

**Increased antitrust scope sends chills throughout the industry---changes in substantive antitrust deter defense mergers**

**Carroll 21** – Partner in the Antitrust & Competition Practice Group in the Washington, D.C. office, former member of the Mergers I Division of the Federal Trade Commission’s Bureau of Competition

John D. Carroll, "How a New Era in Antitrust Enforcement May Impact Government Contractors," The National Law Review, 2-24-2021, https://www.natlawreview.com/article/how-new-era-antitrust-enforcement-may-impact-government-contractors

With a new presidential administration promising vigorous antitrust enforcement, and a new Democratic majority in Congress seeking to make **drastic changes** to U.S. **antitrust laws**, the technology and healthcare industries have found themselves the main targets of increased antitrust scrutiny. Though companies engaging in government contracting, particularly in the **aerospace and defense industries**, already have had to deal with a **range of antitrust issues** – for example, the Department of Justice, Antitrust Division (the “DOJ”) launched the Procurement Collusion Strike Force (“PCSF”) in 2019 (discussed in more detail here), which focused on “deterring, detecting, investigating and prosecuting antitrust crimes … in government procurement, grant and program funding” – they may find themselves subject to **increased antitrust enforcement** in 2021. In fact, on February 23, 2021 PCSF Director Daniel Glad confirmed he is “focus[ed] on three things in 2021: expanding our platform with PCSF building out our data analytics program; and bringing investigations to the recommendation/disposition stage.”

Antitrust enforcement is not typically a “hot button” issue in modern American politics, nor is it at the top of agendas for new administrations’ enforcement priorities. In fact, historically antitrust enforcement has not changed materially when new presidential administrations or Congressional majorities have come into power, even when those administrations or majorities are from a different political party. Recently, however, antitrust has become a prominent issue, as there has been a growing concern among academics, practitioners, and elected officials that U.S. antitrust enforcement is not adequately addressing competition issues and needs major changes.

While it only has been a month since the 117th Congress and the Biden administration have come into power, and many key antitrust positions at the DOJ and Federal Trade Commission (“FTC”) have yet to be filled, the government already has suspended Early Termination (“ET”) for all mergers and acquisitions reportable under the Hart-Scott-Rodino Act, over the objections of two FTC Commissioners – meaning that all such deals now must undergo the full 30 calendar waiting period. In Congress, Senator Amy Klobuchar (D-MN), the Chair of the Antitrust Subcommittee of the Judiciary Committee, introduced the Competition and Antitrust law Enforcement Reform Act on February 4, 2021, that seeks to overhaul U.S. antitrust enforcement, by among other things, placing significant restrictions on businesses that have more than 50% market share in their relevant markets.

Given concerns by some regarding increased concentration in certain aerospace and defense industries – after all, in January 2021, the Pentagon raised concerns about “drastic consolidation” in the defense sector in its annual Industrial Capabilities report to Congress – companies may find their **transactions and personnel practices** under **even more scrutiny** by the DOJ and FTC.

With respect to transactions, companies’ proposed mergers or acquisitions of competitors have received close looks by the government in recent years, especially in concentrated industries, with the Department of Defense (“DOD”) playing a crucial role in determining the scope and result of review by the FTC or DOJ. **Teaming agreements,** which the DOD and antitrust enforcement agencies recognize **can be pro-competitive**, may be **even more closely examined** by government, and it is possible that the **current guidance** from the government regarding its antitrust evaluation of such agreements **could be changed**.

Because government contractors often operate in industries where there is a **limited supply of potential employees** with the necessary skills and credentials, they should be especially careful about **restrictive provisions** in their transaction and employment agreements, such as non-competes and non-solicits. Also, government contractors should be wary about engaging in discussions or **sharing** confidential compensation information sharing with competitors, particularly in light of the government’s recent **criminal antitrust actions** against “**no poach” agreements** entered into between competitors.

Though it is early, it is clear that the Biden administration is going to make antitrust enforcement a priority, and we can expect they may be enforcing **new, more rigorous laws** passed by Congress. Government contractors should therefore **be prepared** to face increased scrutiny of their operations. Antitrust enforcement can have **profound consequences** on a company’s business, as it can place **limitations on transaction strategy** and potentially **expose a company** to **significant** civil or even criminal **liability**.

**That causes global war---defense mergers are critical to maintaining the US’s advantage over Russia and China**

**Marks 19** – Former Senior Policy Advisor to the Under Secretary for Security Assistance, Science and Technology at the U.S. Department of State

Michael Marks, "Strengthen US industry to counter national security challenges," American Military News, 10-10-2019, https://americanmilitarynews.com/2019/10/strengthen-us-industry-to-counter-national-security-challenges/

While U.S. defense budgets have recently been on the rise, it is likely that we will see a spending decline in the coming years as competition for non-defense federal budget dollars increases and deficits grow. The United States, therefore, must **take action** to ensure that we **maintain our technological edge** against our adversaries by **empowering the private sector** to provide cost-effective **innovation** for America’s defense.

Since the end of the Second World War the U.S. has relied on **qualitative superiority** over its potential adversaries, especially those like the Soviet Union/**Russia and China**, who enjoyed comparative quantitative advantages. These qualitative advantages were **vital** to maintaining **global stability** and helped enable our nation to become the preeminent **global economy**, but they have been eroded over the last few decades.

In 1960, the U.S. share of global research and development (R&D) spending stood at 69%. U.S. defense-related R&D alone accounted for 36% of total global expenditures. Soon thereafter other nations recognized the need to increase their R&D expenditures and build their own defense industrial bases to compete with the United States. From 2000-2016, China’s share of global R&D rose from 4.9% to 25.1% while the U.S. share of global R&D dropped to 28%. U.S. defense-related R&D meanwhile now makes up a **mere 4%** of global R&D spending.

There can be no doubt that Russia and China are **determined** **to challenge America’s qualitative advantage**. From the rebirth of Russian military power under Vladimir Putin to the ever-growing Chinese military prowess across the board, their efforts show **no sign** of slowing down.

Russia has been and continues to undergo a **major modernization** of its armed forces. For example, they are in the midst of a ten-year program to build hundreds of **new nuclear missiles** and have set a goal of modernizing 70% of the Russian Ground Force’s equipment by 2020.

One of the most frightening examples of Russia’s resurgence is its development of a **hypersonic missile** that could be ready for combat as early as 2020. Worryingly, the US is currently **unable to defend** against this type of missile. To accompany these developments came the emergence in 2017 of Russia as the world’s second-largest arms producer, ready and able to support nations hostile to US interests.

China, on the other hand, used to be a country that only manufactured cheap products and knockoffs, but that is no longer true. **Technology development** and **innovation** figure prominently in all of China’s national planning goals, with plans to make the country the **global leader** in science and innovation and the preeminent **technological and manufacturing power** by 2049, the 100th anniversary of the Chinese communist revolution.

This, of course, has huge implications for China’s military capability. The country now has the second-largest national defense budget behind the U.S. and wants to be Asia’s preeminent military power. Beijing is developing next-generation **fighter jets, ICBMs** and shorter-range **ballistic missiles**, as well as advanced naval vessels.

The People’s Liberation Army has reached a **critical point of confidence** and now feel they can **match competitors** like the United States in combat. This has implications for the **security of Taiwan, Japan, other US allies** in the region as well as to America itself. To make matters worse, there are a growing number of experts that see China developing **asymmetric technologies**, combined with **conventional and nuclear systems** that could create an **existential threat** to the U.S. pacific based assets.

It is in the wake of these growing threats to our national security American industry will likely be expected to shoulder an even **larger responsibility** concerning investment in **defense-related R&D**.

One of the ways we can empower companies to make these additional investments and lead next-generation defense innovation is to **allow commonsense mergers** between important defense and aerospace companies. Horizontal consolidation **eliminates the redundancy** of enormous fixed costs, **leading to savings** passed down to customers. Mergers can also create **economies of scale** and **existing synergies** that help the combined company realize access to **larger numbers** of engineers and innovators, while keeping cos**ts low** and **improving the timeline** for taking a product from concept to development.

A recent example of how this can work is the proposed Raytheon and United Technologies merger. The two parties project that the new combined company will employ more than **60,000 engineers**, hold over **38,000 patents** and invest approximately **$8 billion per year** in research and development. This will allow the development of **new, critical technologies** more quickly and efficiently than either company could **on its own**. Such private sector investments in innovation will be **critical** in the face of the **growing challenges** to American **military dominance**.

America’s **R&D advantage**, crucial to **maintaining military superiority**, is increasingly **at risk**. As China and Russia continue to challenge America’s military dominance and pressures on the defense budget continue to mount, the federal government will likely turn more and more to contractors and commercial companies to develop **next-generation defense capabilities**. Strengthening U.S. industry, therefore, will be **critical** to countering our **national security challenges.**

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Public Enforcement Counterplan---

#### Text: The United States federal government should

#### allow relevant agencies to sue to **prohibit unilateral exclusion that reduces competition significantly;**

#### provide requisite resources for the public enforcement of its antitrust laws by relevant agencies.

#### Counterplan avoids private enforcement---private suits are an inextricable part of antitrust liability---public enforcement is sufficient

McCarthy et al., GC & Chief Legal Officer of Womble Bond Dickinson (US) LLP, ‘07

(Eric, Allyson Maltas, Matteo Bay and Javier Ruiz-Calzado, “Litigation culture versus enforcement culture A comparison of US and EU plaintiff recovery actions in antitrust cases,” <https://www.lw.com/upload/pubContent/_pdf/pub1675_1.pdf>)

In comparison, in the European Union, private enforcement actions are rare and play less of a role than public enforcement in the fight against anti-competitive behaviour. Several obstacles hinder actions for damages in member state national courts, including a plaintiff’s limited access to evidence, the unavailability of class actions and the potential that the plaintiff may have to pay the defendants’ costs if the plaintiff loses the case. To address these obstacles and the great diversity of damages actions among the member states, the European Commission recently published a green paper on Damages Actions for Breach of the EC Antitrust Rules.3 The green paper examines those aspects of EU litigation practice that have led to a pronounced underdevelopment of private damages actions in the EU. Since its publication in December 2005, the green paper has sparked significant debate within the international antitrust community about the role of private enforcement of EC Treaty competition law and about damages actions in particular. The general expectation is that private damages actions will emerge (albeit slowly) in the European Union. This article compares the state of plaintiff recovery actions in antitrust cases in the US with that of the EU and explores why the United States is more litigious than the EU.

Private antitrust damages actions in the US

Rightly or wrongly, the United States has earned the reputation of having a ‘litigation culture’ that permeates its entire legal system.4 If that is true, it certainly earned its stripes this past year in the area of antitrust litigation. Although the number of civil cases filed in the United States dropped by 10 per cent from 2004 to 2005, the number of antitrust civil filings, almost all of which were initiated by private plaintiffs, rose by 8.8 per cent.5 In the first six months of 2006, the number of antitrust class actions doubled over the same period in 2005.6 Some experts speculate that “[h]ard-charging regulators, a more aggressive plaintiffs[’] bar, and the implementation of [CAFA]” may contribute to the increase in antitrust litigation.7 But in all likelihood, the explanation is far more elementary. As discussed in greater detail below, the pot of treble damages available to plaintiffs in the United States, as well as pro-plaintiff discovery and procedural rules, make private damages extremely easy and attractive to pursue.

The treble damages remedy

In 1914, the US Congress passed the Clayton Act, codified at 15 USC sections 12-27. Section 4 of the Act extends the Sherman Act’s prohibitions on anti-competitive behaviour and, most notably, allows “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws” to sue for and “recover threefold the damages by him sustained”.8 Treble damages were designed to deter illegal conduct, deprive antitrust violators of the “fruits of their illegal activities” and provide compensation to victims of wrongdoing.9

The Clayton Act’s treble damages provision is not without its critics.10 Many practitioners and policy makers contend that trebling damages creates too great an incentive for plaintiffs to sue. Additionally, they argue, treble damages actions can result in a windfall to plaintiffs. Furthermore, some believe that large fines and the potential for criminal penalties create just as much of a deterrent against violations, without the need for treble damages.11 Nonetheless, the ability of a US private plaintiff to recover treble damages is so sacred and well protected that earlier this year the First Circuit held in Kristian v Comcast Corp12 that, although Comcast could contract with its subscribers to arbitrate antitrust claims, the arbitration agreements could not bar treble damages because “the award of treble damages under the federal antitrust statutes cannot be waived”.13

Although exceptions to the treble damages provision remain few and far between, congress enacted the Criminal Penalty Enhancement and Reform Act (CPERA) in June 2004. CPERA eliminates the treble damages remedy for corporations that qualify for amnesty under the Department of Justice’s Amnesty Programme.14 Under CPERA, a corporation must report its own anti-competitive behaviour to the DoJ and enter into the Corporate Leniency Programme.15 If a private plaintiff sues the corporation for the same behaviour, the civil court may assess single damages against the participating corporation, but only if the judge in the civil action determines that the corporate defendant is cooperating with the civil claimant by providing a full account of the conduct, furnishing all potentially relevant documents, and securing testimony, depositions and interviews from employees.16

Discovery and evidence

Plaintiffs enjoy broad discovery rights in the United States under the Federal Rules of Civil Procedure. These rules provide significant incentives for plaintiffs to file damages suits, even if they have very little factual bases for the underlying claims. At the outset of a case, the parties are obliged to make certain disclosures to one another, including the name of each individual “likely to have discoverable information” and a description by category and location of all documents in the party’s possession or control that it may use to support its claims or defences.17 Thereafter, during the fact-finding or discovery period, plaintiffs may seek a defendant’s business documents through written requests18 as well as answers to questions through written interrogatories.19 Plaintiffs may also ask questions of a defendant’s employees (regardless of seniority), who must sit for depositions and testify under oath.20 Moreover, plaintiffs may seek documents and testimony from non-parties with relative ease.21

Armed with such easy access to a defendant’s or non-party’s documents and employees, plaintiffs with limited evidentiary bases for their lawsuits may be inclined to sue and go on ‘fishing expeditions’ to discover facts to support their case.

Contingent fees

Plaintiffs that file antitrust damages actions in the United States routinely do so on a contingent fee basis. Under such an arrangement with counsel, the plaintiff client does not pay any fees to his or her attorney unless and until the plaintiff collects damages either by settling with the defendant or prevailing at trial. Typically, plaintiffs’ attorneys demand 33 per cent of the recovery as the fee.22 The result is a win for both client and attorney. The fee arrangements allow plaintiffs with limited funds the freedom to pursue their lawsuits without having to fund the litigation along the way. The plaintiffs’ attorney, on the other hand, is attracted to the prospect of treble damages, and thus a larger fee, and therefore is willing to front the litigation costs in the hopes of earning a sizeable fee at the conclusion of the suit.

Class actions

Class actions are the procedural device that enable one or more plaintiff members of a proposed class to sue on behalf of all similarly situated members of the same proposed class.23 Courts in the US have recognised that class actions can be appropriate mechanisms for promoting private enforcement of the antitrust laws.24 In this way, large numbers of potential claimants can prosecute their claims in a cost-efficient manner.25 The objective of any class action lawyer is to get the class certified. To do so, the court must find that the proposed class is “so numerous that joinder of all members is impracticable”, that there are “questions of law or fact common to the class”, that the “claims or defenses of the representative parties are typical of the claims or defenses of the class” and that the proposed class representatives “will fairly and adequately protect the interests of the class”.26 In addition, in most antitrust cases, the court must determine that the “questions of law or fact common to the members of the class predominate over any questions affecting only individual members” and that “a class action is superior to other available methods for the fair and efficient adjudication of the controversy.”27 Under rule 23, proposed class members are afforded the opportunity to decline to join or to ‘opt out’ of the class. But if the class is certified, all class members who do not affirmatively opt out are bound by the decision in the case and cannot pursue their claims individually. Class actions remain a popular means among plaintiffs’ lawyers to litigate antitrust conspiracy claims because they are regularly certified.

State indirect purchaser actions

In Illinois Brick Co v Illinois,28 the US Supreme Court held that, in order to maintain a claim for damages under section 4 of the Clayton Act, a plaintiff must have purchased the product in question directly from the alleged defendant-antitrust violator. The landmark decision thus precludes plaintiffs in a federal court from seeking alleged damages that were ‘passed through’ from the defendant down the chain of distribution in the form of overcharges. In direct response to Illinois Brick, many US state legislatures passed antitrust statutes that permit indirect consumers (ie, below the direct purchaser in the distribution chain) to sue the alleged violator. Today, 29 states permit such suits, or, alternatively, allow the state attorney general to pursue antitrust claims on behalf of indirect consumers.29 In these ‘Illinois Brick repealer’ states, as they are known, defendants face the real prospect of defending against lawsuits that mirror direct purchaser lawsuits pending against them in a federal court.

Huge jury verdicts and settlements

One natural result of the ease with which plaintiffs can pursue treble damages actions in the United States is huge jury verdicts in private antitrust cases. In Conwood v US Tobacco, the plaintiff manufacturer of moist smokeless tobacco (snuff) sued a competitor, the manufacturer of Copenhagen and Skoal, for unlawful monopolisation in violation of section 2 of the Sherman Act, among other claims.30

The jury awarded plaintiffs approximately US$350 million in damages, which, when trebled, resulted in an award that exceeded US$1 billion. The award is thought to be the largest antitrust jury verdict ever recorded.31

Additionally, the several aspects of US litigation highlighted above are a catalyst to settlement. Even before discovery begins, some defendants, confronted with the promise of invasive and expensive discovery, will choose to settle with plaintiffs in order to spare their employees from intrusive discovery and to save on exorbitant legal fees. Plaintiffs routinely extract large settlements from defendants after gaining access to corporate documents and information that, although not dispositive of any wrongdoing, are damaging or embarrassing enough to justify settlement. Similarly, class actions may contribute to settlement of private damages actions because, if certified, defendants do not want to risk losing at trial and therefore pay treble damages. The same is true for state indirect purchaser actions. Defendants often settle these suits in order to avoid duplicative litigation costs.32 Settlement is also preferable for many defendants in this situation who rightly fear the application of collateral estoppel if they are adjudicated liable in even one state.33

The ultimate risk of large jury verdicts inspire settlements even if the defendants litigate the cases for years and at great expense. In 1998, in In re NASDAQ Market-Makers Antitrust Litigation, MDL Docket No. 1023, plaintiffs settled with 37 defendants for a total of US$1.027 billion.34 And in 2003, on the eve of trial, defendant Visa USA settled with plaintiffs in In re Visa Check/Mastermoney Antitrust Litigation, 297 F Supp 2d 503, 506-508 (EDNY 2003) for approximately US$2 billion. Two days later, defendant MasterCard settled for approximately US$1 billion. The combined US$3.05 billion settlement has been described as “the largest antitrust settlement ever”.35 Private damages actions in the EU

In stark contrast to the United States, private damages actions in the EU are few in number and have never played much of an antitrust enforcement role. Although the European Court of Justice (ECJ) in 2001 explicitly recognised a right to damages for breaches of EC competition law,36 plaintiffs have pursued very few damages claims for violations of competition rules. According to a 2004 study (the Ashurst Study), private damages actions based on the violation of either EU or national antitrust rules are in a state of “total underdevelopment” due to various obstacles in bringing such lawsuits.37

To address these obstacles, the EC recently published a green paper, in which the Commission has sparked significant discussion on the present and future role of private enforcement in the EU. This section explores that role.

EU antitrust laws and enforcement

In the EU, there are two levels of antitrust laws and enforcement. The Commission enforces EU antitrust rules at the EU level, which is limited to public enforcement. At the member state level, however, national antitrust authorities and national courts apply both EU and national antitrust laws. Member states permit private enforcement, including damages actions, through national courts.38 Within this two-tiered system, national antitrust authorities and national courts may apply both EU and national antitrust laws, though substantively there is often little difference between the two.

Articles 81 and 82 of the European Community Treaty govern antitrust enforcement. The ECJ long ago decided that these provisions create rights for private parties that national courts must safeguard.39 In Courage v Crehan, the ECJ held that these rights include the right to damages,40 and recently it clarified that such a right includes compensation not only for actual loss, but also for loss of profit plus interest.41 Moreover, with the adoption of Regulation 1/2003,42 the Council of the European Union ‘modernised’ antitrust enforcement by including new procedural rules for the application of articles 81 and 82. In particular, by devoting specific provisions to national courts, the EU legislative branch has recognised the fundamental role that national courts play in the private enforcement of EU antitrust law for the first time since the inception of EU antitrust enforcement in the early 1960s.

The green paper

These developments, however, have not been sufficient to ensure an effective system of private antitrust enforcement, particularly damages actions, throughout 25 jurisdictions with very different legal traditions and markedly diverse substantive and procedural rules. According to the Ashurst Study, to date there have been only 28 successful private actions for damages for violations of the antitrust laws in the EU.43 More often than not, only single large companies that allege anti-competitive behaviour by dominant competitors have pursued private damages actions. For these well-financed plaintiffs, the damages that they seek are large enough to offset the trouble and costs of private litigation before a national court.

In light of the obstacles to private enforcement in the EU, the Commission published its green paper in 2005 to facilitate damages actions, enhance the overall effectiveness of antitrust enforcement and, ultimately, increase compliance with antitrust laws. In response to criticism from those practitioners who fear the adoption of a USstyle system that could lead to ‘excessive litigation’, the Commission has stated that the objective is that of building “an enforcement culture, not a litigation culture”, in which private enforcement would complement public enforcement.44 For each obstacle to damages actions, the green paper proposes several solutions, although the Commission has not yet indicated how it intends to implement any of these solutions (eg, by means of an EU Directive harmonising certain aspects of national law, or thorough ‘soft law’ such as Commission guidelines).

Amount of damages

Treble damages are not available in the EU. It is also not likely that they will be any time soon; the Commission notes that the US treble damages system can lead to “unmeritorious or vexatious litigation”.45 Instead, compensation is limited to the harm suffered, without the possibility of obtaining punitive or exemplary damages. Plaintiffs may thus usually recover only the loss actually incurred, as well as, in some countries, the loss of profits.46 The Ashurst Study, however, revealed that this system of limited recovery provides disincentives to private litigation.47 To provide balance, the Commission proposes to maintain the rule of single damages, while contemplating the possibility of awarding double damages in cartel actions.48 On this issue, it recognises that the addition of double damages will require the implementation of appropriate measures to avoid jeopardising the effectiveness of leniency programmes (eg, successful immunity applicants would be exposed to single damage recovery only).49

#### Expanding liability to private plaintiffs is bad---turns case and undermines solvency

Nuechterlein, JD, partner and co-leader of Sidley's Telecom and Internet Competition practice, and Muris, George Mason University Foundation Professor of Law, served from 2000-2004 as Chairman of the Federal Trade Commission, ‘21

(Jon and Timothy J., “Private Antitrust Remedies: An Argument Against Further Stacking the Deck,” March, <https://instituteforlegalreform.com/wp-content/uploads/2021/03/March-2021-Antitrust-Paper-FINAL.pdf>)

Advocates of expanding private antitrust remedies begin with the premise that “private enforcement deters anticompetitive conduct” and conclude, in the words of the Report, that legal “obstacles” to recovery by “private antitrust plaintiffs” should be eliminated to maximize deterrence.24 But even if the premise is true,25 the conclusion would not follow. The Report appears to assume that the more deterrence the law provides, the better, and that any “obstacles” to private recovery should thus be removed.26 But that position ignores the consequences of overdeterrence, including the prospect that firms will respond to the threat of draconian penalties in ways that reduce the threat of liability but that ultimately harm consumers.

Overdeterrence is a particular concern in antitrust doctrine because the line separating lawful from unlawful conduct can be blurred and much of the conduct falling on the lawful side of the line is socially beneficial. As economists William Baumol and Alan Blinder explain: One problem that haunts most antitrust litigation is that vigorous competition may look very similar to acts that undermine competition …. The resulting danger is that courts will prohibit, or the antitrust authorities will prosecute, acts that appear to be anticompetitive but that really are the opposite. The difficulty occurs because effective competition by a firm is always tough on its rivals.27

For example, excessive antitrust remedies for predatory pricing may not only deter firms from engaging in conduct that would ultimately be deemed unlawful, but also induce them to keep prices well above their costs and, in effect, hold a price umbrella over smaller, potentially litigious rivals. Such a regime would result in less competition and higher prices for consumers—the very outcomes the antitrust laws are designed to prevent.

Proposals to slap another layer of deterrence on top of existing private remedies are particularly perverse because, as discussed above, the current U.S. regime is already overdeterrent, in that it subjects firms to unusually severe liability risks even for overt conduct subject to the rule of reason. If anything, Congress should consider aligning private antitrust remedies with remedies for analogous common law torts by, for example, limiting treble damages and one-way fee-shifting to cases involving hard-core violations that may elude detection, such as price-fixing cartels. In all events, Congress should not make a bad situation worse by ratcheting up the level of overdeterrence.

### 1NC

#### The United States federal government should:

--provide additional weeks of unemployment insurance and raise the weekly benefit level

--raise the maximum SNAP benefit level and ensure unemployed adults have access to food assistance

--provide state fiscal relief by reducing the percentage of Medicaid spending for which states are responsible and localities flexible funding to maintain needed services such as education

-- Providing cash assistance to people facing economic insecurity through monthly or one-time cash payments

-- Implementing a subsidized jobs program for low-income workers

--Increasing housing assistance

--create a permanent paid family and medical leave program and increase financial assistance for child care centers

#### --massively increase investment in research in artificial intelligence

#### Provides the fiscal stimulus needed to solve long-run slow growth

**Stone 20** – Chief Economist at the Center on Budget and Policy Priorities, PhD in Economics from Yale

Chad Stone, 4-16-2020, "Fiscal Stimulus Needed to Fight Recessions," Center on Budget and Policy Priorities, https://www.cbpp.org/research/economy/fiscal-stimulus-needed-to-fight-recessions

The following are among the most important policies that meet the criteria for effective fiscal stimulus:

* Providing additional weeks of unemployment insurance and raising the weekly benefit level;
* Raising the maximum SNAP benefit level and ensuring that unemployed adults have access to food assistance;
* Providing state fiscal relief by reducing the percentage of Medicaid spending for which states are responsible (by increasing the federal matching rate) and giving states, tribes, and localities temporary block grants or other flexible funding to maintain needed services such as education;
* Providing cash assistance to people facing economic insecurity through monthly or one-time cash payments that can help address both emergencies and ongoing basic needs, as well as through expansions of refundable tax credits;
* Implementing a subsidized jobs program for low-income workers, although the special circumstances of COVID-19 require waiting until after the health crisis diminishes and such programs can be undertaken safely; and
* Increasing housing assistance to prevent a sharp rise in evictions and homelessness.

A recession stemming from COVID-19 also requires additional measures to deal with unique circumstances, but for many of the measures above, policymakers should design them not only to provide robust immediate stimulus but also to permanently strengthen their function as automatic stabilizers that trigger on early in future recessions, provide stimulus appropriate to the magnitude of the downturn, and do not trigger off prematurely. Such trigger mechanisms can ensure that needed stimulus measures are timely and that they neither end prematurely nor remain in effect too long.

As noted above, if a recession turns out to be deeper or last longer than initially anticipated, policymakers should be prepared to increase the size and/or duration of their fiscal policy response, including, if needed, following up with additional discretionary stimulus.

#### And solves AI innovation

**Tajdeh 21** – Senior Editor for National Defense Magazine

Yasmin Tajdeh, “Commission: AI Dominance Requires Bold Action,” National Defense, 3/16/21,

https://www.nationaldefensemagazine.org/articles/2021/3/16/commission-ai-dominance-requires-bold-action

The United States must pump billions of dollars into artificial intelligence research if the nation wants to be “AI-ready” by 2025 and successfully compete with great power competitors China and Russia, according to new findings from a congressionally chartered panel.

The National Security Commission on Artificial Intelligence — which was established under the fiscal year 2019 National Defense Authorization Act to examine ways to advance the development of AI for national security and defense purposes — recently released its final report to Congress in March after two years of work.

“To win in AI, we need more money, more talent [and] stronger leadership,” said Chairman Eric Schmidt, the former head of Google’s parent company Alphabet.

The 700-plus page report includes recommendations to the Biden administration and Congress that will require sweeping changes to better posture the nation for competition with other AI-enabled nations, such as China and Russia.

The technology will impact the United States profoundly in the coming years, but despite some “exciting experimentation” and a few small programs, “the U.S. government is a long way from being ‘AI-ready,’” according to the report. The Defense Department and intelligence community must be AI-ready by 2025 to avoid falling behind, the commissioners said.

Reaching that goal will require the government to create a Technology Competitiveness Council akin to the National Security Council, said former Deputy Secretary of Defense Robert Work.

“The U.S. has no mechanism to organize for a tech competition,” he said. The National Security Council was created at the beginning of the Cold War to manage a long-term competition with the Soviet Union, he noted.

“We need the same type of approach [for the current era of great power competition] at the White House level by establishing the Technology Competitiveness Council, [which] we believe should be chaired by the vice president and includes all the cabinet secretaries to develop and oversee a strategic national approach to emerging technologies like AI,” he added during a public meeting where the commission voted on the report before transmitting it to the Biden administration and Capitol Hill.

The government will also need to make major investments in research to spur domestic AI innovation, Schmidt said. “We do need more money, particularly in AI R&D, so that by 2026 we get to $32 billion per year,” he said.

Schmidt has previously said that China is rapidly catching up to the United States in AI, noting that the nation is only a year or two ahead of Beijing.

China has made “a massive investment in this area with many, many, many smart people working on it. We have every reason to think that the competition with China will increase,” Schmidt said during the meeting.

The commission’s report is split into two parts: “Defending America in the AI Era” and “Winning the Technology Competition.”

The first focuses on implications and applications for AI for defense and national security, Schmidt said. The second recommends actions that the government must take to promote AI innovation to improve national competitiveness and protect critical U.S. advantages in the bigger strategic competition with China.

The report features four pillars of action including leadership, talent, hardware and innovation.

“If I’ve learned anything in studying the way the government works, leadership — especially from the top — is critical to get the bureaucracy to move to the next challenge and the next opportunity,” Schmidt said.

Meanwhile, there is a “huge talent deficit” in the federal workforce, he said.

“We need to build new talent and expand existing programs in government,” Schmidt said. “We need the world’s best to come and stay to cultivate homegrown talent.”

One key recommendation of the report is to scale up digital talent within the government. This includes establishing new talent pipelines, including a U.S. Digital Service Academy to train current and future employees. The commissioners also called for a civilian National Digital Reserve Corps to recruit skilled employees including industry experts, academics and college graduates. Additionally, there needs to be a Digital Corps, which would be modeled on the Army Medical Corps.

When it comes to hardware, it is critical the nation stays ahead, Schmidt said. However, it is very close to losing its edge when it comes to microelectronics — which underpin some of the Defense Department’s key capabilities including artificial intelligence, advanced manufacturing and space systems — because of the United States’ reliance on Taiwan.

“We need to revitalize domestic semiconductor manufacturing and ensure that we’re two generations ahead of China,” he said.

Work noted that Taiwan is potentially vulnerable. If “China absorbed Taiwan — which is the source of many of the world’s hardware — that would really be a competitive problem for us,” he said.

Fostering domestic innovation will come with a high price, Schmidt said.

“AI research is going to be incredibly expensive,” he said. “We need the government to help set up the conditions for accessible domestic AI innovation.”

The commission worked on its report with a great sense of urgency, Work said. Each of the 15 commissioners believe that AI-enabled systems will pose a threat to free and open societies in the future.

“AI tools will be weapons of first resort, particularly between great powers,” he said.

The U.S. armed services’ competitive military technical advantage could be lost within the next decade if the nation does not accelerate the adoption of artificial intelligence and other advanced technologies across its missions, Work said.

“Our major military rivals are really all-in on military AI applications,” he said. “Defending against AI-capable adversaries without employing AI is an invitation to disaster. AI-enabled applications will operate at machine speeds and humans simply will not be able to keep up with them without help from their own algorithms and their own AI.”

Speaking during a plenary meeting discussing a draft version of the report in January, commissioner Chris Darby, president and CEO of In-Q-Tel, an independent, non-profit strategic investor for the CIA and the broader U.S. intelligence community, said the United States faces five AI-related threats which illustrate a new society level of conflict that the United States must organize and defend against.

The first is AI-enabled information operations.

“AI applications and associated technologies will increase the magnitude, the precision [and] persistence of maligned information ops,” he said. The government should create a joint interagency task force within the Office of the Director of National Intelligence to lead and integrate public-private efforts to counter foreign-sourced maligned information.

The second is targeted data harvesting, Darby said. Information security and integrity must be viewed through a national security lens. The government must protect its own data from adversarial interference or theft by defending against attacks.

The third threat is AI-enhanced cyber capabilities.

“Though the threats are still developing, in the future, AI-automated and enabled malware could make compromises such as the SolarWinds cyber attack orders of magnitude more effective, delivering greater precision, tailoring speeds, stealth and persistence at scale,” he said, referring to a massive hack that rocked the government and was discovered in December. Government agencies have pointed the blame at Russia, and it is believed that the breach went undetected for many months.

To close gaps in the nation’s cyber defenses, the United States should continue to adopt recommendations suggested by the U.S. Cyberspace Solarium Commission, which last year released a major report to Congress, Darby said.

The document — which featured 80 recommendations to lawmakers — broke its recommendations into six pillars, including: reform the U.S. government’s structure and organization for cyberspace; strengthen norms and non-military tools; promote national resilience; reshape the cyber ecosystem; operationalize cybersecurity collaboration with the private sector; and preserve and employ the military instrument of national power.

Additionally, to head off future threats and accelerate countermeasures to current threats, the government should develop and deploy AI-enabled information sharing, anomaly detection and malware mitigation across its networks, Darby said.

A fourth threat the United States must be aware of is adversarial AI against U.S. platforms, Darby said. These types of acts are here today and already impacting commercial machine learning systems, he added.

“Among other moves to improve AI assurance, the government should create government-wide red teams to attack and harden our own AI applications,” Darby said.

The fifth threat is more troublesome against the backdrop of the COVID-19 pandemic: AI-enabled biotechnology. New technologies such as clustered regularly interspaced short palindromic repeats — more commonly known as CRISPR — enable gene editing and make biology programmable, he said.

“Biotech, sadly, can also have a dark side,” Darby side. “AI may enable the engineering of genetically targeted pathogens or the mental and physical bio-enhancement of … adversary combatants.”

To address this, the government should increase the profile of biosecurity issues within U.S. national security agencies, as well as update the National Biodefense Strategy to include a wider vision of biothreats, Darby said.

Commissioner Katharina McFarland, chair of the National Academies of Science Board of Army Research and Development, said the application of biotechnology can protect the United States against some threats as well as create new ones.

“As we see the democratization of biotechnology and the expansion of … dual-use applications, we need to be of course sensitive to ... nations that don’t share our values, but work with the nations that do share our values to strengthen our ability to use these technologies appropriately and defend against when they’re not used appropriately,” she said.

Commissioner Safra Catz, CEO of Oracle Corp., said the report is meant to be a wake-up call for the government.

“There are some very, very bold actions we’re asking for,” she said. “This is pretty much the critical moment for our country and the investment that’s necessary.”

Jim Shaw, executive vice president of engineering at the Crystal Group, a Hiawatha, Iowa-based manufacturer of high-performance computers, artificial intelligence systems and rugged computing platforms, said the commission’s report is a good start, but more work needs to be done.

“We’re late to the game,” he said. “That’s one of the things that we probably need to just recognize right away. This is becoming an urgent need for us to spend resources to gain skill sets and talent … through universities and industry to try to, frankly, catch up with China and Russia.”

The Pentagon and Congress should get on board with the commission’s recommendations, and take them even further, he said.

“My hope is that it will snowball into quite a bit of activity,” Shaw said. “That’s essential for us to preserve” the nation’s edge.

### 1NC

#### The plan forces tradeoffs in FTC enforcement efforts – they’re in a merger tsunami and barely staying afloat, but the plan drowns them

Rose ’19 - Department Head and Charles P. Kindleberger Professor of Applied Economics in the MIT Economics Department. She served as Deputy Assistant Attorney General for Economic Analysis in the Antitrust Division of the DOJ from 2014 to 2016, and was the director of the National Bureau of Economic Research Program in Industrial Organization from 1991 to 2014.

Nancy Rose, FTC Hearing #13: Merger Retrospectives, April 12, 2019, <https://www.ftc.gov/news-events/events-calendar/ftc-hearing-14-merger-retrospectives>

So I want to start with the last question that was on the set that Dan and Bruce circulated for this panel. Should the FTC devote more resources to retrospectives, even at the cost of current enforcement? And I was delighted to see Commissioner Slaughter be so passionate in her defense of the need for more resources. This goes to what I feel is the most significant, and yet still largely invisible message, in the ongoing debate over competition policy, which is that antitrust enforcement in the United States is chronically and substantially underfunded.

For years, the appropriation requests have been modest in their increases. Oversight hearings and interactions with the Hill have too often featured the mantra, “when business picks up, our talented and hardworking staff just do more with less.” I will say I think the career staff at both the FTC and the DOJ Antitrust Division are among the most dedicated, highly-skilled, and hardest-working professionals.

It was my great privilege to work with a number of them at DOJ, and I know that colleagues who have worked at the FTC feel the same way. They deserve our greatest appreciation and applause and not just from those of us who work in antitrust policy, but from the entire American public, on whose behalf they tirelessly work.

But there is a limit to the number of hours in a day and the number of days in a week and the well below market compensation for the lawyers and economists who work in the agencies, which is another significant problem, is insufficient to demand that staff give up all rights to leave their buildings, occasionally see their families, or catch up on sleep.

So I think it’s inevitable that if we’re asking agencies to reflect on the effectiveness of their decision-making through programs like retrospective programs, it is going to come out of someplace else. And I fear that given the ongoing intensity of the merger wave, that’s going to come out of enforcement.

We are amid an ongoing sustained, what’s been called by some, tsunami of mergers. Each year there are thousands of mergers noticed to the agencies and thousands more below the HSR thresholds, that work by Thomas Wollmann at the University of Chicago suggests, skate through to consummation with practically no probability of review or action, the occasional consummated merger enforcement action notwithstanding.

The dollar volume of mergers is at historic levels and that suggests that there are a lot of mega mergers competing for enforcement resources. In addition, litigation costs continue to climb, both for challenging mergers or bringing Section actions, especially as parties with especially deep pockets escalate litigation defenses, correctly calculating that even adding some tens of millions of dollars in antitrust litigation costs would be just rounding error in their merger financing.

And, finally, I would say it’s inconceivable to me that there are not at least some counsel that are advising parties that a good time to bring marginal mergers forward is when the agencies are stretched thin by major investigations or multiple litigations.

#### Despite short resources, FTC is effectively regulating hospital mergers – the plan halts that progress

Muris ’20 – Professor of Law at George Mason, former Chairman of FTC, Senior Counsel at Sidney Austin LLP, JD from UCLA,

Timothy Muris, “Response to Subcommittee on Antitrust, Commercial, and Administrative Law Committee on The Judiciary U. S. House of Representatives” April 17, 2020, <https://judiciary.house.gov/uploadedfiles/submission_from_tim_muris.pdf>

Finally, the Committee asks about agency resources and performance. The last section below briefly addresses the continual need for the antitrust agencies to address business practices as they evolve, as well as their own performance record. Such evaluation is necessary: ever a UCLA Bruin, I remain devoted to legendary coach John Wooden‘s maxim that “when you are through learning, you are through.” The section thus offers multiple examples of successful and bipartisan FTC efforts to improve enforcement to the benefit of consumers. In the key healthcare sector, American consumers continue to benefit from the FTC’s hard work. After losing seven consecutive hospital merger challenges before I arrived, upon my direction the FTC worked to devise a new enforcement plan by incorporating fresh economic thinking and issuing retrospective case studies showing that several hospital mergers had indeed harmed consumers. This plan resulted in a successful challenge to a consummated hospital merger that served as a template for future enforcement, leading to Obama administration victories in three separate courts of appeal endorsing the FTC’s approach. Such success did not require abandonment of the consumer welfare standard, nor a dramatic increase in agency resources. Indeed, as discussed below, my predecessor as FTC chairman, Bob Pitofsky, did much more for American consumers using the consumer welfare standard with just 1,000 staff than did the agency in the 1970s when it had far greater resources (1,800 staff by the turn of the decade), but was motivated by an antitrust policy that was, instead, at war with itself.

#### Declining amount of health organizations collapses rural healthcare

Alemian 16

David Alemian, Vice President of Capital Crest Financial Group, Rural Healthcare Is a Matter of National Security, NOVEMBER 08, 2016, <http://www.mdmag.com/physicians-money-digest/contributor/david-alemian-/2016/11/rural-healthcare-is-a-matter-of-national-security>

Rural health organizations are already struggling with enormous turnover rates and costs that run up into the millions of dollars each year. The additional financial burden of penalties from Medicare and Medicaid will put many rural health organizations at risk of going out of business. If too many rural health organizations go out of business, it then becomes a matter of national security and here’s why:

In most rural communities, the healthcare organization is the largest employer. When the largest employer goes out of business, the community collapses and people move away. What was once a thriving community then becomes a ghost town. Rural America produces the food that feeds the rest of the country.

What will happen when our amber waves of grain turn to desert wastelands because there is no one to work our great farmlands? As the source of food dries up, and store shelves empty, the price of food will go through the roof. As food prices go up, hyperinflation will become a reality, and our printed money will become worthless. Almost overnight, Americans will begin to go hungry because they won’t be able to afford to put food on the table.

#### Nuclear war

FDI 12, Future Directions International, a Research institute providing strategic analysis of Australia’s global interests; citing Lindsay Falvery, PhD in Agricultural Science and former Professor at the University of Melbourne’s Institute of Land and Environment, “Food and Water Insecurity: International Conflict Triggers & Potential Conflict Points,” <http://www.futuredirections.org.au/workshop-papers/537-international-conflict-triggers-and-potential-conflict-points-resulting-from-food-and-water-insecurity.html>

There is a growing appreciation that the conflicts in the next century will most likely be fought over a lack of resources. Yet, in a sense, this is not new. Researchers point to the French and Russian revolutions as conflicts induced by a lack of food. More recently, Germany’s World War Two efforts are said to have been inspired, at least in part, by its perceived need to gain access to more food. Yet the general sense among those that attended FDI’s recent workshops, was that the scale of the problem in the future could be significantly greater as a result of population pressures, changing weather, urbanisation, migration, loss of arable land and other farm inputs, and increased affluence in the developing world. In his book, Small Farmers Secure Food, Lindsay Falvey, a participant in FDI’s March 2012 workshop on the issue of food and conflict, clearly expresses the problem and why countries across the globe are starting to take note. . He writes (p.36), “…if people are hungry, especially in cities, the state is not stable – riots, violence, breakdown of law and order and migration result.” “Hunger feeds anarchy.” This view is also shared by Julian Cribb, who in his book, The Coming Famine, writes that if “large regions of the world run short of food, land or water in the decades that lie ahead, then wholesale, bloody wars are liable to follow.” He continues: “An increasingly credible scenario for World War 3 is not so much a confrontation of super powers and their allies, as a festering, self-perpetuating chain of resource conflicts.” He also says: “The wars of the 21st Century are less likely to be global conflicts with sharply defined sides and huge armies, than a scrappy mass of failed states, rebellions, civil strife, insurgencies, terrorism and genocides, sparked by bloody competition over dwindling resources.” As another workshop participant put it, people do not go to war to kill; they go to war over resources, either to protect or to gain the resources for themselves. Another observed that hunger results in passivity not conflict. Conflict is over resources, not because people are going hungry. A study by the [IPRI] International Peace Research Institute indicates that where food security is an issue, it is more likely to result in some form of conflict. Darfur, Rwanda, Eritrea and the Balkans experienced such wars. Governments, especially in developed countries, are increasingly aware of this phenomenon. The UK Ministry of Defence, the CIA, the [CSIS] US Center for Strategic and International Studies and the [OPRI] Oslo Peace Research Institute, all identify famine as a potential trigger for conflicts and possibly even nuclear war.

### 1NC – Case

#### The Big Four have increased innovation and *driven down* prices – no correlation between market power and innovation

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(Robert Litan, “A Scalpel, Not an Axe: Updating Antitrust and Data Laws to Spur Competition and Innovation, September 2018, <https://www.progressivepolicy.org/wp-content/uploads/2018/09/PPI_AntitrustandDataLaws_2018.pdf>)

Nonetheless, fears have been expressed from across the political spectrum about the growing power of the major tech platforms – especially The Four – for stifling innovation. It is important in assessing any such claims to distinguish between the factors that have led to tech platform successes, and subsequent activities of certain platforms once they have gained some measure of market power or influence.

As for their success, there is no evidence – nor do I detect any serious argument – for the proposition that any of the major tech platforms earned their positions through anti-competitive means. Even when the Department of Justice twice sued Microsoft in the 1990s – initially for abusive licensing practices in 1994, which was settled by a consent decree, and then again in 1998 for unlawfully maintaining its Windows operating systems (OS) monopoly for personal computers, ending in certain restrictions on Microsoft’s behavior – the Department never argued that the company achieved its OS monopoly unlawfully. Likewise, each of The Four has achieved its success through superior products or services that consumers or users clearly want (shortly, I address arguments that the success of Facebook and Google is attributable, at least in part, to mergers that should not have been approved).

Moreover, in each of these cases, the tech platforms have taken advantage of economies of scale given the high fixed costs (but low to zero marginal costs) of serving additional users/ customers, or “network effects” arising from the fact that the value of their networks or platforms increases with the number of users, or both. Put differently, tech platform markets (for perfectly legitimate and well-understood reasons) tend toward monopoly – “winner take all” – or at least a high degree of market concentration.8

Competition has not somehow been “lessened” when successful platforms invent a product or service that did not previously exist. Furthermore, despite their dominance in one market or sector (which may not constitute a “relevant market” for antitrust purposes) – social media (Facebook), online commerce (Amazon), Internet search (Google), premium smartphones (Apple) – the platforms are invading each other’s turf and, in turn, creating new kinds of competition against each other. Witness Facebook’s competition with Google for online ads, which Apple is just joining. Likewise, while Google may dominate general Internet searches, its chief competitor for product searches is Amazon.

Speaking of Amazon, though businesses in various parts of the economy are fearful of that company’s business model, recent research documents that online commerce, which Amazon has pioneered, has kept consumer product inflation in check – and, in many cases, helped drive prices downward. This clearly benefits consumers.9 The Chairman of the Federal Reserve Board, Jerome Powell, has pointed to the “Amazon effect” as potentially a major reason the overall inflation rate has not accelerated even as the unemployment rate has fallen to historic lows.10 It is hard to square these developments with claims that competition has weakened in consumer product markets. All of this is good for consumers and workers since, other things being equal, less inflation at any given level of unemployment enables the Fed to permit the economy to run “hotter,” with less unemployment, than might otherwise be the case.

Amazon, Apple and Alphabet also have entered the entertainment business, joining another tech platform, Netflix, and the traditional Hollywood studios – in the process, providing much stronger competition in the content generation market. Significantly, the tech companies’ entry into content is de novo, or from scratch, rather than through acquisition of existing firms, except for Alphabet’s acquisition of YouTube – a content site Google (later Alphabet) beefed up after it was acquired.11

Each of the tech platforms already has entered (or is looking to enter) other lines of business – either creating new markets or adding to competition in existing ones. Examples include Alphabet’s Waymo division that is working hard to commercialize driverless vehicles, and Amazon’s apparent intention to enter the transportation market – not only to make the company independent of third-party transporters such as FedEx, UPS and the U.S. Postal Service, but eventually to compete directly against them, potentially bringing down transportation costs as Amazon has done in other markets it has entered.

#### Big tech is the single largest host for startups and sustains productivity growth

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(Robert Litan, “A Scalpel, Not an Axe: Updating Antitrust and Data Laws to Spur Competition and Innovation, September 2018, <https://www.progressivepolicy.org/wp-content/uploads/2018/09/PPI_AntitrustandDataLaws_2018.pdf>)

But what about the market power of the tech platforms? Don’t they inhibit competitors – new and existing companies – from challenging them? A recent article in The Economist warns that the tech platforms have become so powerful and threatening that they have established “kill zones” around their markets – arenas where startups know they will be squashed if they try to compete with the existing platforms, and thus can only sell out to them. “Ninety percent of the startups I see are built for sale, not for scale,”12 one venture capitalist told the magazine. In addition, the article worries about the absence of new platforms to challenge (and ideally disrupt) the incumbents.

There are several responses to this critique. First, each of the major tech platform companies acts as a host for startups and smaller existing businesses – creating markets for their services or products where none may have existed before, or extending their reach far beyond where they may be physically located. As already noted, **Amazon hosts more than 1 million businesses** selling all kinds of goods on its platform, including used books and other items that compete with Amazon’s own offerings. Indeed, more than 50 percent of the non-food items sold on the Amazon platform are derived from independent merchants’ sales.13 Apple and Google collectively host millions of applications on their mobile platforms (iPhone and Android). Facebook’s advertising model, despite the criticism it has drawn, has spawned a whole industry of advisers on social media advertising and marketing to companies, large and small.

Second, the pattern of the decline in startups is also inconsistent with the rise of the tech platforms being the villain in the overall startup decline. As a recent Brookings study documents, the drop of startup activity is spread across all major industry categories14 and is not concentrated in tech, as one would expect to see if the tech platforms were principally to blame for the overall drop in startup activity.

Third, my own research with Ian Hathaway, which documents the decline in the startup rate (the percentage of the total number of firms that are less than five years old) in all but one of the roughly 350 metropolitan areas in the United States, identifies two other potential explanatory factors that are statistically related to startup trends. The decline in startup rates is steeper in metro areas where population has not been growing (suggesting both supply and demand factors at work), and where the concentration of firms at the local level regardless of industry is relatively high.15

In other work, we also found – as did the later Brookings study just noted – that firms are “aging” in America, with a greater percentage of firms being at least 15 years old.16 We did not find the age increase to be related to measures of local business consolidation, and we didn’t have the data to link it at that time to measures of industry concentration. Nonetheless, the aging of the firm structure in the economy could help explain some of the decline in productivity growth about which many economists have worried – and which I discuss in the next section – in at least two ways.

Firms may be like individuals, being less innovative as they grow older (past a certain point) – reflecting the stifling effects of growing bureaucracy, with multiple approvals and associated delays and second-guessing of anything new. In addition, the increasing share of businesses represented by older firms may reflect advantages of incumbency, which may have resulted from superior efficiency, but may also reflect the fact that the growing numbers and compliance costs of local, state and federal rules put a disproportionate burden on newer firms – historically the source of much disruptive innovation.

President Obama’s Council of Economic Advisers has pointed to similar factors in its attempt to explain the decline in startup activity:

“The reasons for declining firm entry rates are not well understood, but a partial explanation is that barriers to entry may have increased in many industries. These barriers could be in the form of federal, state, or local licenses or permits, including occupational licenses … While such regulations serve a valuable role in protecting public well-being, they can also add fixed costs to an entrepreneur wanting to open a new business. Barriers to entry may be related to various advantages that have accrued to incumbent firms over time. For example, economies of scale may mean that incumbent costs are far below those of new entrants, making it difficult for entrants to compete. Or demand-side network effects may tip the market to a single provider of the network good. But incumbent advantages could also be political in nature; for example, if existing firms successfully lobby for rules protecting them from new entrants.”17

Fourth, whatever impacts the tech platforms may be having in their markets, they do not appear to have adversely affected annual venture capital funding, which, by 2017, had almost tripled from levels before the dot-com crash (from $55 billion to $150 billion).18 It may be true that the power of tech platforms has diverted VC funding into spaces away from platforms and their surrounding markets (though the launch of companies for “sale” rather than “scale” is inconsistent with that claim), and toward other unrelated markets, such as electric vehicles, blockchain apps, e-sports, robotics, or synthetic biology. But this redirection of venture money is not necessarily a bad thing. It may portend breakthrough innovations in other markets of greater potential value to the economy and society that may never have occurred – at least, not as rapidly – had VC money continued to fund more Web-based platform companies.

Finally, even if the tech platforms are using their “kill zones” to deter or buy new competitors, that doesn’t warrant their breakup. It does, however, call for a change in merger law that will tilt the existing platforms to entering new markets on their own rather than through acquisition, which should encourage innovation by the platform companies

#### Antitrust will be overused to crack down on tech which dooms innovation

**Rosoff 21** – Matt Rosoff, Editorial Director, Digital at CNBC

Matt Rosoff, “Op-ed: This week showed how the Big Tech antitrust campaign is totally misguided,” June 30, 2021, CNBC, <https://www.cnbc.com/2021/06/30/op-ed-antitrust-crusade-against-big-tech-is-misguided.html>

On Wednesday, the tech industry saw five companies debut on public stock markets. One of them, Chinese ride-hailing giant Didi, is worth nearly $70 billion. Two others, Taboola and Integral Ad Science, compete in the online advertising industry -- one of the markets that has supposedly been ruined by Alphabet (in particular) and Facebook.

More generally, this year has seen the hottest IPO market in years, and investors continue to pile into start-ups at a record pace -- Q1 saw more than $64 billion in venture funding, a record.

This does not look like a deserted wasteland of stifled innovation and broken dreams.

Meanwhile, the general public doesn’t see tech power as a particularly pressing issue. In a survey funded by a tech industry group, 44% of respondents ranked tech industry regulations as the lowest priority on a list of five options, behind the economy, public health, climate change and infrastructure. Yes, 53% of the respondents thought some legislation was a good idea. But that does not mean the public wants Congress and the courts to aim the antitrust cannon at these giants.

As I wrote four years ago, antitrust is the wrong approach here.

None of these companies have monopolies over meaningfully defined relevant markets -- you really have to stretch and squeeze the market definitions for their dominance to come into clear view. The real state of the tech industry is an all-out business war between the five giants, a constantly shifting landscape of rivalries and backbiting -- think Great Powers Europe before World War I -- with numerous well-funded competitors of all sizes waiting to seize any opportunity and fill any gap they leave open.

For instance:

Google dominates search and Facebook is the biggest social media company by far. But the main source of their revenues is online advertising, and they compete bitterly for every available online ad dollar, with Amazon coming quickly up behind. And yet, there’s still enough space for TikTok, Twitter, Snap and a dozen small ad-tech competitors to build sustainable, thriving ad-supported businesses.

Amazon, Microsoft and Google are locked in a hard-knocking three-way war for supremacy in cloud computing infrastructure. And yet, there are dozens of companies delivering thriving cloud services on top of or alongside these platforms, including Snowflake, which debuted last year and is now worth more than $70 billion, and Zoom, which went public in 2019, and is worth almost $115 billion.

Facebook hates Apple and complains about its control over iPhone apps every chance it gets -- except, Mark Zuckerberg now admits that Facebook might actually be stronger after Apple’s recent privacy changes to the iPhone. Meanwhile, Apple’s iOS is actually a minority competitor, as Google’s Android operating system is the dominant mobile platform in the world -- and Microsoft just signed a deal with Amazon to support Android apps on Windows.

To be perfectly clear: Yes, it is in the public interest to regulate these tech giants more strictly.

For instance, Facebook and Google’s YouTube exercise an enormous amount of influence over public discourse and politics by allowing misinformation to spread almost unchecked.

Amazon and Apple control extremely valuable marketplaces that reach hundreds of millions of people, and can use this control to pit suppliers against each other and extract arguably onerous fees.

Union advocates allege Amazon illegally interfered in a recent attempt to unionize in Alabama, and many workers have complained about working conditions in warehouses and delivery vehicles.

All of the companies have used acquisitions to enter adjacent markets and, arguably, to stifle potential competitors before they got too big -- a tactic also used by companies outside the Big Five, such as Oracle in past years and Salesforce more recently.

Several of their founders are now centi-billionaires, a perfect example of the runaway income inequality that many progressives believe must be curbed.

But all of these activities can be addressed with targeted regulations or stricter enforcement of existing laws. Antitrust is a blunt instrument meant to address major market distortions created by true monopolists. Being big, in itself, is not illegal. Applying antitrust law to these companies is misguided, wrong, and will not have the desired effect of curbing their power in meaningful ways.

#### Large firms are better for innovation – enhanced access to capital

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(Dakota Foster and Zachary Arnold, “Antitrust and Artificial Intelligence: How Breaking Up Big Tech Could Affect the Pentagon’s Access to AI,” May 2020, https://cset.georgetown.edu/publication/antitrust-and-artificial-intelligence-how-breaking-up-big-tech-could-affect-pentagons-access-to-ai/)

If R&D spending drives innovation, firms that can spend more on R&D— presumably large ones—will generally hold an edge in innovation. A post-breakup AI sector could be less innovative as a result. Large tech companies do in fact spend more on R&D both in absolute and relative terms. According to PricewaterhouseCoopers, in absolute terms, Amazon and Alphabet were the world’s top two corporate R&D spenders in 2018, with Samsung, Intel, Microsoft and Apple in the top ten.62

In terms of relative R&D spending—the percentage of total firm expenses spent on R&D—large tech companies remained among the highest spenders, led by Facebook (33 percent) in fifth place globally.63 Alphabet and Microsoft, which each spent 20 percent, and Amazon (13 percent) ranked among the top thirty. The smallest firm (based on total operating expenses) of the top 100 global relative R&D spenders was NXP Semiconductors, a Dutch firm with $6.8 billion in operating expenses.64

Because larger firms tend to spend more on R&D, breaking them up would likely reduce their R&D spending. Increases in spending at smaller firms could counter this decline, but the amount and efficacy of that spending are uncertain—both at the individual firm level and in the aggregate across the post-breakup AI ecosystem.65 That said, broken-up firms would remain very large, with sizable R&D budgets to match. Imagine a break-up of Alphabet, whose operating expenses amounted to $110 billion last year; a spin-off company with one-fourth of Alphabet’s current R&D budget would still be larger than 77 of the 100 leading global relative R&D spenders.

#### That’s specifically true in tech – data and cloud capability can only be accessed at scale

Tucker 20 – Technology editor for Defense One

Patrick Tucker, “Busting Up Big Tech is Popular, But Here’s what the US May Lose,” Defense One, July 2020, https://www.defenseone.com/technology/2020/07/busting-big-tech-popular-heres-what-us-may-lose/167326/

From the Pentagon’s perspective, American tech giants do offer a unique technological resource, one that does produce innovation and that arguably would not exist if they were broken up. Consider the Pentagon’s JEDI cloud program. Smaller cloud providers complained that the program’s requirements were tilted toward Amazon, the only company that many believed could meet them. Part of the reason that the JEDI contract came down to a race between Microsoft and Amazon (after Google pulled out) is because those are the companies with the largest cloud offerings, able to provide the highest level of security. It was only after visiting them that former Defense Secretary James Mattis realized that what American’s private big tech firms were doing with cloud computing was decades ahead of what the government was doing with smaller, patchwork capabilities. He also realized that cloud computing at enterprise scale was essential to real innovation in AI.

The size of that cloud capability and the amount of data available plays a big role in a company’s ability to develop next-generation AI products. Google’s compute power, and access to a massive dataset of online video footage via YouTube, was vital to the development of deep learning technologies. Facebook’s compute power and its access to billions of biometric facial records — pictures of faces — allowed it to create unique facial recognition technology to rival the human brain.

These companies developed the world’s largest compute capabilities in order to become the world’s largest companies. Busting them up could eliminate something that doesn’t exist anywhere else and actually is a driver for innovation, one that arguably requires more regulation and oversight but also that can’t be replicated at a smaller scale.

#### And big tech is expanding into blockchain now

Jones and Ozcan 21 – Head of Finance, Strategy and Planning at retirement FinTech; Smart, headquartered in London, Professor of Entrepreneurship and Innovation at Saïd Business School, Oxford University

Ryan Jones and Pinar Ozcan, "Rise of BigTech platforms in banking," Saïd Business School at the University of Oxford, Industry Paper 1, 2021, <https://www.sbs.ox.ac.uk/sites/default/files/2021-02/Rise%20of%20BigTech%20Platforms%20in%20Banking%20-%20Oxford%20White%20Paper%20Final%20%28002%29.pdf>

Banks, and in particular current accounts, can be viewed in many ways as a platform model of the 20th century. Incumbents, who provide free current account services to consumers, have long boasted of their number of products per customer (PPC) – quoted as high as 6 for premier account customers of leading UK banks. This has been fostered by a relationship built around the current account platform from which additional services are bundled to create both economies of scale and scope. This in turn has **become the expectation** of consumers who want a **one-stopshop** for financial needs, creating a barrier for new entrants. This barrier has proven hard to navigate for FinTechs whose innovation focuses in one area of the banking ecosystem.

While all informants agree that the traditional disruptive path is significantly constrained and reshaped by the regulatory context, it is also clear that a platform business model is particularly suitable for financial services.

Having seen the impact of BigTech in other industries, the banking industry is understandably keeping an eye on the **potential for BigTech** to deploy their platforms in banking. Amongst our informants, some saw this as a matter of time, whilst others doubted it would happen at all, with the cost of regulation commonly cited as the largest barrier. Interestingly, even among those who saw entry as a certainty, **none considered that it was already happening** – this is supported by the fact that no BigTech company has yet acquired a full banking license in the UK. However, **this should not fool anyone**. Over recent years there has been **significant activity** from BigTech players in **banking-related services**, resurfacing and reiterating the question of where banking **starts and ends.**

As shown in the table above, BigTech are **actively broadening** their platforms into a **number of areas** of the financial ecosystem, in particular payments. This may partly be due to the lower regulatory burden of payments; as one insider put it – e-money license holders can ‘zip around like bugs’ compared with more heavily regulated deposit-takers. Another potential reason is datafication. Access to the payments network provides a vast amount of new data on consumer preferences and buying habits, which can be coupled with existing platform data to enrich BigTech’s understanding of its customers and create new opportunities for monetisation and lock-in.

As well as acquiring new sources of data, activity in financial services to date is also offering BigTech the opportunity to **further monetise** their existing data stacks. Amazon’s extension of credit to businesses on the platform via Amazon Lending, launched in the US in 2012 and in the UK in 2015, is a prime example. Amazon already has **unrivalled access to data** on its seller community. As the sole source distributor for many of its merchants, Amazon already knows product type, quantity and, importantly, revenue generation of each seller per month. This information can be used to profile sellers’ ability to pay and extend credit on a targeted basis, **far better** than a bank could without access to similar data. From this advantage, Amazon can begin to use this data to learn more about risk modelling and other core areas of banking. The same dynamics are true of Facebook and the social media platforms, who capture **swathes of data** on individuals that can be collated with payments and other financial data to create new and innovative bankingproducts.

Entry into these, perhaps peripheral, areas of the banking bundle could be the extent of BigTech’s ambitions in banking. However, they appear to be the start of a **broader envelopment**. While troubled in its execution, Facebook’s closed libra ecosystem has the mission to ‘enable a simple global payment system and financial infrastructure that empowers billions of people’3 . It has since attracted a significant amount of debate and regulatory attention from both the Federal Reserve Bank and the Bank of England, among others. Similarly, Google has announced it ambitions to enter the US ‘checking account’ market with an anticipated consumer launch during 2021. This **gradual participation** in banking services in many ways **mirrors the classic disruptive path** described by the innovator’s dilemma (Christensen, 2003). BigTech’s acquisition of elements of the banks’ bundle could represent a **similar path to market domination**. Ceding markets that they previously dominated may leave incumbents open to a fuller platform envelopment by BigTech in their most profitable services, such as mortgages and consumer credit. This trend is also evident in the table above by the number of lending and credit services already offered by BigTech.

#### Antitrust scrutiny deters investment in finance---wards away big tech

Pedersen 20 – Brendan Pedersen covers federal bank regulation and fintech policy for American Banker

Brendan Pedersen, "Congress's scrutiny of tech giants could be blessing and curse for banks," American Banker, 10-13-2020, https://www.americanbanker.com/news/congresss-scrutiny-of-amazon-google-could-be-blessing-curse-for-banks

WASHINGTON — A Democratic proposal to reform antitrust law to limit the reach of the largest technology firms may hearten banks, but analysts say the financial services sector is not immune from a revived focus on breaking up megacompanies.

In the sweeping 400-page report by the House Judiciary Committee’s antitrust law subcommittee, lawmakers laid out a sweeping case for reforming laws that allow the colossal growth of just a handful of tech giants: Amazon, Apple, Facebook and Google.

“To put it simply, companies that once were scrappy, underdog startups that challenged the status quo have become the kinds of monopolies we last saw in the era of oil barons and railroad tycoons,” the report said, adding later that “the totality of the evidence produced during this investigation demonstrates the pressing need for legislative action and reform.”

The U.S. banking industry has long worried about the financial ambitions of leading tech firms and even the possibility that one of the four Big Tech giants could charter or acquire a bank with significant competitive advantages at the expense of traditional financial services firms. While none of the four companies have applied for banking powers, past reports have circulated of Google and Amazon being among those having engaged with bank regulators.

The report authored by subcommittee staff did not specifically focus on the tech giants' financial services aims, but rather on how their global reach and impact on sectors like the news media could threaten democratic norms.

But observers said tighter restrictions on acquisitions by tech leaders could put them on more equal footing with banks and even discourage their potential interest in acquiring financial technology startups. The report also appears to validate the regulatory regime for bank parents as a potential model for reining in growth of the tech sector.

“A more aggressive antitrust stance would reduce the likelihood that those companies get even deeper into financial services, so it protects some turf for banks that don't have to compete with a Bank of Amazon or an Apple Bank,” said Jeremy Kress, an associate professor of business law at the University of Michigan.

## 2NC

### CP Private Enforcement

#### Public enforcement with SINGLE damages is enough

Italianer, Director-General for Competition, European Commission, ‘13

(Alexander, “Fighting cartels in Europe and the US: different systems, common goals,” October 9, <https://ec.europa.eu/competition/speeches/text/sp2013_09_en.pdf>)

Since the first cartel decision of 1969, the Commission has imposed a total of over €19 billion in fines to 820 companies. A question we often get from members of the public is: why are your fines so large? To this I always respond: what is large? Beauty is in the eye of the beholder. Are the fines still large when compared to, for instance, the annual turnover of the company in question? Under the 2006 fining guidelines, around twelve per cent of companies received the maximum fine of ten per cent of turnover. But fifty per cent of the fines amounted to less than one per cent of turnover.

Are the sums still large when we look at private enforcement? In the US, courts can award treble damages to victims in antitrust cases. Such damages are generally seen in the US as a form of deterrence. If damages are awarded in Europe, courts generally award single damages, in other words, compensation for harm suffered.

Our proposal for a directive on private enforcement of antitrust damages is based on the principle of full compensation, which has been recognised in the case-law of the Court of Justice. Damages actions before civil courts are, in our view, are about compensation. Deterrence is achieved through public enforcement proceedings, in which fines can be imposed.

#### That achieves optimal deterrence because agencies can sue to stop bad conduct without creating zealous liability regimes

Juška, PhD candidate, Leiden Law School, Leiden University, Leiden, ‘18

(Žygimantas, “The Effectiveness of Antitrust Collective Litigation in the European Union: A Study of the Principle of Full Compensation,” IIC - International Review of Intellectual Property and Competition Law volume 49, pages63–93)

The deterrent function is pursued through the imposition of competition fines, which punish the infringer (in other words, specific deterrence). It also deters other persons from engaging in or continuing behaviour contrary to competition rules (in other words, general deterrence).Footnote9 According to the EU, public enforcement is considered to have sufficient means for achieving deterrence.Footnote10 In this respect, it must be borne in mind that EU competition law focuses exclusively on imposing fines on infringing businesses, but Member States are given space to introduce other types of penalties.Footnote11 In order to combat cartels, a majority of EU Member States have incorporated criminal sanctions on individuals (such as imprisonment or criminal fines) in their antitrust enforcement schemes.Footnote12 However, these sanctions have very rarely been imposed in practice.Footnote13 Therefore, public authorities in the EU jurisdictions have failed in setting an example for criminal penalties being effectively utilized in public enforcement.

Achieve Corrective Justice When the Infringement Has Taken Place

This goal can be pursued if two conditions are met.Footnote14 First, corrective justice is achieved if the monetary remedy deprives the wrongdoer of any benefit gained from illegal conduct. This measure may be used when public enforcers impose a sub-optimal fine. As such, the enforcement may be reinforced by imposing additional fines on the wrongdoer in order to fully remedy the anti-competitive situation. Second, corrective justice is achieved when victims are compensated for the harm suffered. According to the Directive on damages actions, the objective of compensation is fulfilled when victims effectively exercise the right to claim and to obtain full compensation for the harm suffered. However, this objective should not lead to overcompensation of the claimants, whether by means of punitive, multiple or other kinds of damages.Footnote15 For this reason, the enforcement of the first condition may not comply with the principle of full compensation, as additional fines (besides damages on fully compensating victims) may be required to ensure corrective justice. As a consequence, only the second condition will be further discussed in this paper.

#### An expansion of the scope of the antitrust laws requires private suits—CP is germane because it’s a distinct model

Kenneth Ewing, JD, Steptoe & Johnson LLP, Private anti-trust remedies under

US law, 2007, <https://www.steptoe.com/images/content/1/7/v1/1731/2804.pdf>

One of the most important features of anti-trust enforcement in the US is the large and complicated role played by private remedies. Unlike most jurisdictions around the world, in which only governmental enforcement must be considered, the US grants private parties (and all state governments, acting on behalf of their citizens) a wholly independent right to seek:

Monetary damages.

Court injunctions to order potentially far-reaching changes in anti-trust defendants’ conduct.

In addition, special rules, such as the automatic trebling of damages, award of attorneys’ fees and costs, and aggregation of hundreds to thousands or more claims within a single action on behalf of a class of similarly placed claimants, dramatically increase both the attractiveness of bringing private claims and the stakes for defendants.

#### Margins---no reason the aff is net better---the system is already overdeterrent, adding another layer only has downside for innovation

Nuechterlein, JD, partner and co-leader of Sidley's Telecom and Internet Competition practice, and Muris, George Mason University Foundation Professor of Law, served from 2000-2004 as Chairman of the Federal Trade Commission, ‘21

(Jon and Timothy J., “Private Antitrust Remedies: An Argument Against Further Stacking the Deck,” March, <https://instituteforlegalreform.com/wp-content/uploads/2021/03/March-2021-Antitrust-Paper-FINAL.pdf>)

A defendant’s conduct in such cases generally lacks the features that could possibly justify punitive damages. In most, there was nothing surreptitious about the defendant’s conduct; indeed, it may have been common knowledge to everyone in the relevant business community. Like defendants in many negligence cases, defendants in rule-of-reason antitrust cases could not have predicted with any reasonable degree of certainty that their conduct would later be deemed unlawful. “The line between winning and losing may be exceedingly fine in such cases,”16 but “no matter how close the case, the winner gets a bounty and the loser gets a penalty” in the form of treble damages.17

The leading antitrust treatise describes that outcome as “an embarrassment to antitrust policy,” given “the law’s usual discomfort with imposing unforeseen liability.”18 Moreover, “[t]he practical effect of mandatory trebling is to tilt the settlement process in the plaintiff’s favor because mandatory trebling so inflates the defendant’s cost of losing and the plaintiff’s value of a victory in a rule of reason case.”19

#### “Toxic cocktail” of procedural benefits---magnifies unpredictable negative effects

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(John Deq., “Re-Designing the American Antitrust Machine Part I: Treble Damages, Contribution and Claim Reduction,” <http://awa2018.concurrences.com/IMG/pdf/re-designing_the_american_antitrust_machine.pdf>)

Other regimes, most notably the Chinese, the United Kingdom and the Europeans (through the European Commission) have spent years3 studying these matters and have tended to come to relatively clear points of view that are not consistent with the American approach, which itself was the product of a very different time when the Sherman Act was a misdemeanor, the maximum fine was $5,000, no funds were budgeted for enforcement of the antitrust laws and public enforcement was toothless in various ways and focusing often in fact on labor unions as unlawful combinations. 4 Since the advent of this century, most of the world’s governments have addressed the matters above and more. In doing so, they have fled from many of the most familiar features of the American antitrust machine. Indeed, when the European Commission was deeply focused on encouraging private actions, many of the papers and speeches expressed a desire to create a viable damages remedy without the “excesses” of the American system5 and without the “toxic cocktail”6 of procedural benefits that flow to the claimants, and perhaps often to an even greater extent, their lawyers. The principal elements of this “toxic cocktail” seem to refer to many features of the American legal system, but especially:

The mandatory award of one-way attorneys’ fees for plaintiffs, but not for prevailing defendants, which is wholly inconsistent with the applicable rule in most all other countries. The wide open, expensive and extraterritorial documentary and deposition discovery available in cases brought in the courts of the United States, but not generally elsewhere; along with the openness of US courts to exercise vast extraterritorial jurisdictional discovery against foreign persons and companies even before any jurisdiction is established.7

The existence of joint and several liability without any right of contribution or meaningful claim reduction.

The fact that federal clearance of transactions or conduct does not preempt or preclude any or all of the individual states, or any individual, from attacking those transactions or conduct that have been approved or cleared at the federal level.

The policy chaos that has ensued in the wake of the Supreme Court’s decision in Illinois Brick, 8 which generated state legislative or judicial repealers such that indirect purchaser actions prohibited under the Sherman Act are nonetheless available under the laws of more than half of the states and are pursued in federal courts alongside the direct purchaser claims by virtue of diversity jurisdiction.9

Whether taken wholly together, in small clusters, or even individually, these uniquely American procedural features of our competition system have a powerful impact on the companies everywhere and also on the economy of the United States. The wealth transfers generated by this system are enormous. One result is that the lawyers have come to have a truly outsized role in the American economy, a role unlike and far grander than the role they play outside the United States. The purpose of this modest paper is to put some focus upon those features of private damage litigation that seem to be an essential component of any rethinking of American antitrust and competition law and policy. This paper will address these issues at a relatively high policy level while bearing in mind the far larger context set forth in these introductory pages.

#### Settlements---private suits lead to tons of costly settlements, but don’t result in judgements which means companies can keep doing the bad practice

McCarthy et al., GC & Chief Legal Officer of Womble Bond Dickinson (US) LLP, ‘07

(Eric, Allyson Maltas, Matteo Bay and Javier Ruiz-Calzado, “Litigation culture versus enforcement culture A comparison of US and EU plaintiff recovery actions in antitrust cases,” <https://www.lw.com/upload/pubContent/_pdf/pub1675_1.pdf>)

Additionally, the several aspects of US litigation highlighted above are a catalyst to settlement. Even before discovery begins, some defendants, confronted with the promise of invasive and expensive discovery, will choose to settle with plaintiffs in order to spare their employees from intrusive discovery and to save on exorbitant legal fees. Plaintiffs routinely extract large settlements from defendants after gaining access to corporate documents and information that, although not dispositive of any wrongdoing, are damaging or embarrassing enough to justify settlement. Similarly, class actions may contribute to settlement of private damages actions because, if certified, defendants do not want to risk losing at trial and therefore pay treble damages. The same is true for state indirect purchaser actions. Defendants often settle these suits in order to avoid duplicative litigation costs.32 Settlement is also preferable for many defendants in this situation who rightly fear the application of collateral estoppel if they are adjudicated liable in even one state.33

#### Kills solvency---private litigation conflicts with and undermines public enforcement so both fail

Crane, Frederick Paul Furth Sr. Professor of Law, Michigan Law, ‘19

(Daniel A., “Toward a Realistic Comparative Assessment of Private Antitrust Enforcement,”

*In Reconciling Efficiency and Equity: A Global Challenge for Competition Policy*, edited by Damien Gerard, and Ioannis Lianos, 341-54. Cambridge: Cambridge University Press, 2019)

The private-injunction action, like the treble-damage action under s 4 of the Act, supplements Government enforcement of the antitrust laws; but it is the Attorney General and the United States district attorneys who are primarily charged by Congress with the duty of protecting the public interest under these laws. The Government seeks its injunctive remedies on behalf of the general public; the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served. These private and public actions were designed to be cumulative, not mutually exclusive.30

The EU Directive also shows sensitivity to the relationship between public and private enforcement, asserting the need for “coordination of these two forms of enforcement in a coherent manner,”31 and proposing mechanisms for preventing private enforcement from undermining public enforcement, such as limiting private access to self-incriminating materials received as part of leniency applications.32 The reality, however, is that private enforcement cannot help but have spillover effects on public enforcement – not all in the direction of making public enforcement more effective. To the contrary, the US experience shows that a swell of private enforcement can subtly undermine public enforcement, or even choke it off altogether.33 Particularly if private enforcement in particular areas comes to significantly outstrip public enforcement in frequency, with the governing liability norms being predominantly created in private litigation, public litigation can become laden with the baggage of private litigation to the point if ineffectiveness or practical disappearance.

US monopolization law is a case in point. Historically, public antitrust enforcement of s. 2 of the Sherman Act has declined since a high in the 1970s, when the agencies were bringing over three cases a year,34 to the last several administrations where very few monopolization cases have been brought. Over the eight years of the Bush administration, the Justice Department filed no monopolization cases. While running for office in 2007, Senator Barak Obama singled out this ostensibly weak enforcement record for condemnation, characterizing the failure to pursue monopolization cases as “lax enforcement” that harmed consumer interests.35 His Antitrust Division immediately withdrew a report on monopolization offenses disseminated by the Bush administration and promised that the Justice department would be “aggressively pursuing” monopolization cases.36 But, then, over seven and a half years, the Justice Department brought only one monopolization case. The case, against United Regional Health Care System of Wichita, Texas, was hardly a blockbuster antimonopoly action of the earlier Standard Oil, IBM, AT&T, or Microsoft variety. The Justice Department alleged that the relevant market was for the sale of inpatient hospital services to insurance companies in a geographic area “no larger than the Wichita Falls Metropolitan Statistical Area.”37 The government’s theory – that United had a 90% market share in acute inpatient services and used exclusive dealing contracts with insurance companies to stifle competitors – broke no new theoretical or practical ground.

What happened to public enforcement against monopolization? Among the several contributing factors is the dramatic rise of private monopolization actions in the later part of the twentieth century. Figure 17.2 below provides a statistical summary of public and private monopolization cases in the federal appellate courts in the post-war period. From the 1950s to the 1970s, the federal agencies filed a modest number of monopolization cases during each five-year period – far fewer than private monopolization cases, but still enough to make a significant impact on the formation of legal norms and market circumstances. But, as private monopolization litigation skyrocketed from the mid 1970s to the early 1990s, public monopolization enforcement receded, both proportionally and absolutely. With a few notable exceptions such as the DC Circuit’s en banc Microsoft decision, the monopolization law made from the 1970s forward was made in the context of private litigation. As the courts reacted to the dramatic rise of private monopolization cases by announcing new restrictions on a variety of exclusion theories – from predatory pricing, to tying, to duties to deal – private monopolization cases began to recede, reaching an apparently stable equilibrium at about half of their peak levels for the last two decades. This dramatic rise and then significant reduction of private monopolization litigation left in its wake public monopolization enforcement, which all but disappeared.

#### Frivolous litigation---private companies stick their competitors with the cost---turns case

Dorsey et al., Associate at Wilson Sonsini Goodrich, ‘18

(Elyse, Rosati. Jan M. Rybnicek is a Senior Associate at Freshfields Bruckhaus Deringer, and Joshua D. Wright, JD, PhD, University Professor and the Executive Director, Global Antitrust

Institute, Scalia Law School at George Mason University, Former FTC Commissioner, “Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent Seeking,” CPI Antitrust Chronicle, April)

Additionally, the incredibly costly nature of antitrust proceedings exacerbates its vulnerability to rent seeking.39 Antitrust cases and investigations can drag on for years, entail the collecting, processing, and production of millions of documents, and involve tremendous attorneys’ fees. Remedies (or consent terms) can be invasive, last for years, and impair a defendant’s ability to adapt to changing circumstances and thus to remain competitively viable. Looming in the background is the possibility of trebled damages at the end of the day. Consider that an unhappy competitor could embroil a rival in an antitrust quagmire via its own litigation, or by complaining to a government agency and potentially triggering an investigation, that would divert significant amounts of that rival’s resources for years — thereby crippling a rival and diminishing the amount of competition it faces. With so much at stake, conditions are ripe for actors to engage in just such rent-seeking activities in an attempt to appropriate some of this vast wealth for themselves. The empirical evidence and historical record of antitrust actions — particularly during the era when antitrust was explicitly governed by a vague, multi-faceted standard — provide ample support for public choice theory and the economic theory of regulation, while tending to reject the public interest account of regulatory behavior.40

Finally, given this reality, what can be done to mitigate rent seeking? Public choice economics instructs that rent seeking opportunities are diminished when agencies have less discretion (e.g. when rules are clearer) and when another body (e.g. the public, a court, Congress) can more easily hold them accountable for their actions — factors that tend to go hand-in-hand.41 The rule of law thus diminishes incentives for rent seeking and corruption. When these constraining factors are in place, agencies have lowered ability to depart from what is required of them or to otherwise manipulate outcomes to respond to rent-seeking incentives. As such, what antitrust enforcement craves is a clear, well-established standard by which the public and the courts can evaluate agency decisions and identify and correct any deviations that undermine consumer outcomes.

### Case

#### They’re wrong about productivity, its increased because of tech firms

**Petit 21** – Nicolas Petit European University Institute, Florence. David J. Teece, Institute for Business Innovation U.C. Berkeley and Berkeley Research Group Institute

Nicolas Petit and David Teece, “INNOVATING BIG TECH FIRMS AND COMPETITION POLICY: FAVORING DYNAMIC OVER STATIC COMPETITION,” July 2021, https://ssrn.com/abstract=3229180

The rise of Big Tech firms is having the welcome effect of causing a resurgence of interest in industrial organization. The emerging scholarship is mixed. On the one hand, there is a tendency to treat big tech firms as different because innovation in general (both technological and business model), and technical inputs in particular (big data, intelligent algorithms, and skilled engineers), clearly impact market structure and economic performance. On the other hand, industrial age explanations like monopoly power, anticompetitive leveraging, and predatory mergers are often used to supply theories for the durability and diversification of big tech firms. There is little or no mention of the role of entrepreneurship and management or of new operating models which deliver value in new and better ways.

We are skeptical about the power of these narratives to account for the totality of the competitive circumstances at hand. Our skepticism is aroused by the record of the big tech firms.2 There are many indicators suggesting that dynamism, not a base of monopoly power, is what is at work. The digital economy shows unprecedented productivity growth, rapid innovation, and new firm entry. In consumer digital goods and services in telecommunications and broadcasting, output has risen, quality has increased and prices have declined (Byrne and Corrado, 2020). This state of affairs could not reasonably exist if big tech firms were dominant players that suppressed competition by using scale, supposedly like the large iron, oil and steel trusts of the industrial age. Admittedly, it is theoretically possible that absent big tech firms, the development and growth of the digital sector would be even higher, and welfare benefits greater. However, proponents of the monopoly argument are yet to articulate the “but for” ideal world that they imply would otherwise exist.3 Our intuition thus, strays, from the monopoly explanation. Instead, we might be observing a group of diversified big tech firms coexisting and competing in oligopoly with each other vigorously, and with new and adjacent firms entering the fray from time to time. One of us referred to this broad-spectrum competition as the “moligopoly” hypothesis (Petit, 2020). A similar interpretation was given in 2021 by The Economist, which noted that monopoly explanations were “getting harder to sustain” as digital markets in the US are “shifting towards oligopolies in which second and third firms compete vigorously against the incumbent” (The Economist, 2021).

#### Digital monopolists face *constant* competitive pressure – and break ups reduce competition

**Dolmans 18** – LLM, Columbia Law School. Partner at Cleary Gottlieb.

(Maurits Dolmans and Tobias Pesch, “Should we disrupt antitrust law?” 2018, https://www.clearygottlieb.com/-/media/files/should-we-disrupt-antitrust-law-pdf.pdf)

Indeed, so-called “digital monopolists” do not enjoy a “quiet life” like classical monopolists. The constant innovation suggests there is plenty competitive pressure.29 This suggests that there could in fact be both strong competition (between online firms, and between online and offline firms) and increased concentration. If so, intensified competition enforcement based on an assumption of inadequate competition may not be the answer. Breaking up online firms may not increase competition either.30

First, large platforms engage heavily in R&D and release new features constantly.31 If we (threaten to) break them up, we reduce incentives to keep innovating.

Second, under the modern consumer welfare standard, competition law is primarily concerned with controlling abusive conduct. “The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices–at least for a short period–is what attracts “business acumen” in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.” 32 A concentrated market structure alone does not warrant intervention.

Third, it is by no means clear how a break-up could be achieved without undermining two-sided business models (for instance, when separating advertising from a service) or even undermining the benefits of vertical integration; or whether breaking up would have any effect (where there are no causal links between market power in one area and activities in another). A split could in fact reduce competition, for instance, if a market platform provider like Amazon were prohibited from itself selling products online.

Fourth, international law and comity stand in the way: could a US authority break up Baidu or the EU break up Facebook? This extraterritorial exercise of jurisdiction would create legal issues and international tension.33 Breaking up Western IT firms while leaving Chinese or Indian firms untouched is not a solution either, since it could skew online competition in the long term.

Finally, and most importantly, it is unclear whether breaking up digital companies would be a solution at all. If it is true that they benefit from network, scale, and scope effects, and “winner takes all” or “tipping” dynamics, one of the successor entities would simply regain the market share of their former parent company.34 That process of eliminating efficiencies is at best inefficient with little social and political benefits, and at worst leads to capital destruction and undermines trust in Government.

#### Every measure of tech competition runs counter to monopolistic behavior

**Lane 19** – JD, University of Florida. Bachelor’s from UF. Senior Director, InSight Public Affairs.

Matthew Lane, 7-29-2019, "How Competitive Is the Tech Industry?," https://www.project-disco.org/competition/072919-how-competitive-is-the-tech-industry/

How competitive is the tech industry?

These traits of the tech industry make measuring competition challenging. By some metrics, competition is poor. By others, competition is robust. Some tech companies tend to be very different from each other as a whole but can compete vigorously in different product or service categories. For example, Android has by far the biggest overall install base, but Apple seems to own the high income market. This could be why average app revenue has been much higher on iOS. This nuance means that there is much stronger competition for app developers than one would expect from looking purely at shares of mobile operating system installs.

New companies have also been able to carve out successful markets and challenge established tech firms in specific categories. The Atlantic called TikTok the biggest star of YouTube’s VidCon, and perhaps for good reason. It’s the third most installed app worldwide. Indeed, it was TikTok that gave us the summer’s biggest hit – Lil Nas X’s Old Town Road. The song was originally released independently and gained its popularity on TikTok. That led to a deal with Columbia Records, and now the single is dominating worldwide.

Other young companies are bringing fierce competition to narrow products that may generally be seen as features in other companies’ offerings. Dropbox, for example, is a successful cloud backup and file sharing company. There are cloud storage services provided by Apple, Google, and Microsoft as part of other products, and yet Dropbox still managed to double its revenue to $1.2 billion from 2015 to 2018. Slack is also doing well providing what is essentially just a messaging platform, something that has been offered as part of other services since AOL Instant Messenger. But Slack focused on a new experience, providing the simplest and easiest way for teams to collaborate and engage in high volume chat. Microsoft has made a strong push to compete by bundling its messaging service with Office 365, but Slack CEO Stewart Butterfield said he wasn’t worried and compared the effort to Bing or Google+.

Tech doesn’t display the typical symptoms of monopolies

There is one other problem with writing big tech off as simple monopolists. Monopolists are generally known for their laziness, it’s one of the key consumer harms antitrust laws seek to protect against. Their quality drops, their prices rise, and they innovate less. There is very little motivation for a company to develop and release a new product when consumers have no choice but to buy their current product.

However, the biggest R&D spenders worldwide are fairly consistently large tech companies. Amazon and Alphabet top the list with Apple, Microsoft and Facebook not far behind. What’s more, many of these companies greatly increased their R&D spend from 2017 to 2018. Amazon’s R&D spend jumped from $16.1 billion to $22.6 billion, and Facebook’s from $5.9 billion to $7.8 billion. So if these companies face no competition, what are they spending to get ahead of? Amazon and Google are also the most loved brands of 2019, which doesn’t seem to indicate that they are skimping on quality or charging outrageous prices. Michael Mandel of the Progressive Policy Institute found that tech seemed to outperform the rest of the private sector on certain competitive factors.

What does this data tell us? One answer could be that big tech is afraid of being replaced by the next big thing. New technologies can claim markets in ways that are hard to predict and the innovation process usually brings disruptive new products and services to the markets. Voice assistants, for example, could replace many searches that consumers would ordinarily do through the search bar. [1] [2] Or maybe they won’t, and it will be a different technology that incumbents have to worry about. It could even be something that seems straight out of science fiction, like Elon Musk’s company that promises to build direct computer-brain interfaces.

BBC writes about another rising competitor – applications. Many companies are creating apps with new ways of interacting with data, like Tinder’s swipe function or Netflix’s recommendation engine. Companies like Uber and Lyft use their own algorithms to match drivers and riders. These applications allow access to information directly and used without any assistance from other internet onramps like Google Search, meaning less search bar searches are needed.

Maybe the main reason big tech seems so unbeatable is that they continue to compete based on the fear that they will get replaced in the same way they unseated other companies to get where they are now. Whether real or imagined, having companies compete to stay where they are isn’t a bad thing for consumers as long as they aren’t blocking new companies from getting their chance to try to win the market.

#### Their stats underestimate the *inherent instability* of tech dominance

**Murray 18** – Iain Murray, Vice President for Strategy and senior fellow at the Competitive Enterprise Institute, Master of Business Administration from the University of London and an Master of Arts from the University of Oxford. Ryan Khurana, research associate.

Iain Murray and Ryan Khurana, 2-21-2018, "Competition In Technology Is More Vibrant Than It Looks," Investor's Business Daily, <https://www.investors.com/politics/commentary/competition-in-technology-is-more-vibrant-than-it-looks/>

At first glance, digital markets do seem fairly concentrated in just a few companies. Facebook owns the top three social media apps: Facebook, WhatsApp, and Messenger, all of which exceed 1 billion unique monthly active users. The company captures 20.9% of total U.S. digital ad revenue, putting it only behind Alphabet's 42.2%. And given the fast growth rate of Amazon, this looks like it is only a matter of time before the three control the entire market.

Viewing these numbers in perspective, however, makes the picture a lot more complicated.

Apple's native iMessage service, which does not show up in social media download statistics, shows much higher user engagement than Facebook Messenger, especially among younger demographics. Facebook is actually competing in messaging with a company whose interface it depends upon to gain access — and Facebook is losing.

This reveals one of the difficulties in seeing who is competing against whom online. Facebook competes not only against other social media sites like Snap, but also against the likes of Google, Apple, and Microsoft in various domains. Online competition requires the firm to provide for a variety of user demands — or cede ground to rival startups. Unless a firm like Apple can provide a messaging service that its users enjoy, it would allow Facebook to gain ground, which weakens the long-term prospects of Apple's business.

These "platform wars" mean that competition between tech giants takes place over many different products and services, at various tiers. To understand the level of concentration properly, one cannot specify the market too narrowly. While Snapchat has less than one third of Instagram's users, those under the age of 25 use Snapchat much more heavily.

Taking a snapshot of one moment does not tell you about how demographics will affect market position in the next.The competition is fierce. Today's startups are tomorrow's giants, just like Facebook and Amazon once were — and not very long ago.

That means the current market positions of Big Tech firms are inherently unstable, despite the best efforts of these firms to prepare for the future. Facebook's attempt to kill off Snapchat with its Camera app is now regarded as a failure, as is Google's attempt to kill Facebook with Google Plus, and Amazon's attempt to branch into mobile with the Fire phone.

Having lots of data and users is not enough for these companies to branch out into new territories. If platforms fail to develop ecosystems that adapt to user demands, they can fall from seemingly dominant positions rapidly — as recent history amply demonstrates.

When the competitive pressure on these firms is put into perspective, they look less dominant. Amazon currently makes 2.5% of U.S. digital ad revenue compared to Alphabet and Facebook's near 70%, but looking at total U.S. ad revenue shows these firms together make only 20%.

Just consider that if tech giants are increasing their revenues to the detriment of newspapers, it still exaggerates the concentration to neglect newspapers' print ads entirely. It is also possible that some recent decisions, such as Facebook's news feed changes, will drive away users in the long-term. This is a dynamic market.

#### Tech startups have massively increased in the squo

Wu and Atkinson 17 – Economic analyst at the Information Technology and Innovation Foundation; Founder and president of the Information Technology and Innovation Foundation

John Wu and Robert D. Atkinson, "How Technology-Based Start-Ups Support U.S. Economic Growth," Information Technology and Innovation Foundation, 11-28-2017, <https://itif.org/publications/2017/11/28/how-technology-based-start-ups-support-us-economic-growth>

The number of technology-based start-ups surged 47 percent in the last decade. These firms still account for a relatively small share of all businesses, but they have an outsized impact on economic growth, because they provide better-paying, longer-lasting jobs than other start-ups, and they contribute more to innovation, productivity, and competitiveness.

#### Big tech is working with the gov to develop military solutions now – the plan ruins that

CCIA 2021 – The Computer and Communications Industry Association is an international non-profit advocacy organization based in Washington, DC, United States which represents the information and communications technology industries.

The Computer and Communications Industry Association, 2021, “NATIONAL SECURITY ISSUES POSED BY HOUSE ANTITRUST BILLS,” https://www.ccianet.org/wp-content/uploads/2021/09/CCIA-KS-NatSec-White-Paper.pdf

Reducing the Effectiveness of Threat Information to Law Enforcement Major U.S. technology companies and online platforms work with U.S. law enforcement, military, and intelligence agencies to combat a variety of national security and criminal threats. The head of U.S. Cyber Command in 2020 discussed the importance of the U.S. government’s engagement with the tech industry, noting that “many leading U.S. companies find themselves on the frontlines of competition in cyberspace. Working collaboratively where we can allows us to improve collective defense and stay a step ahead of our adversaries.” The nature and scale of these platforms gives them a broad and deep view of the threat landscape. This allows those companies to secure U.S. data and infrastructure against foreign threats with an agility, speed and thoroughness that is not feasible for smaller, fragmented companies that have limited apertures. The critical missions of national security and law enforcement agencies, of course, also benefit from this security proficiency. Not only are the threats more rapidly detected and mitigated, but trend and threat analysis can be quickly shared with these agencies in multiple matured fora that have evolved over the last 10 years. This also means that government agencies can more effectively and confidently use the legal tools available to investigate threats posed by hostile foreign adversaries, including terrorists, proliferators, spies, and cyber actors. At a moment in history when it has never been more clear that cyber threats are very real and can impact the daily operation of the economy as well as essential services, the provisions in the House bills that seek to reduce the size, scale, and integration of a handful of leading U.S. tech firms, especially H.R. 3825 and H.R. 3816, could significantly hinder the ability of the agencies to fulfill their missions to defend against such threats. A scattered group of smaller, isolated platforms with scant perspective of the threats they each face, and fewer resources, will be unable to engage in the same level of threat detection, investigation, mitigation and information sharing. The loss to U.S. government efforts will be further significantly compounded if, as should be expected, foreign companies step in to take at least some of customers previously served by U.S. companies. Not only will these companies be less inclined to work with U.S. agencies, they will be outside the scope of statutory legal authorities granted to U.S. agencies to compel the production of information.

#### They also boost the amount of small firms – can access newfound investment oppertunities

**Jamison 21** – Mark Jamison is a nonresident senior fellow at the American Enterprise Institute. He is concurrently the director and Gunter Professor of the Public Utility Research Center at the University of Florida’s Warrington College of Business. PhD in Economics.

Mark Jamison, 4-26-2021, "Senator Hawley’s ‘trust-busting’ bill would actually bust consumers and small business," American Enterprise Institute - AEI, https://www.aei.org/technology-and-innovation/senator-hawleys-trust-busting-bill-would-actually-bust-consumers-and-small-business/

Small business would also suffer if the legislation succeeded in creating less innovative and less aggressive Big Tech companies. Big Tech benefits small businesses in at least two ways. One way is that entrepreneurs can build businesses on platforms built by Facebook, Google, Apple, and Amazon. These companies created the app economy, and — according to ACT | The App Association — 82 percent of app developers are small businesses, some of which reached over $1 billion in valuation in less than five years. And college graduates in the app economy earn more than twice what the average college grad makes.

Big Tech also helps small businesses expand their markets: In 2019, 95 percent of small businesses planned to increase their digital marketing. According to Deloitte, more of this is needed: Digitally advanced small businesses earn twice the revenue per employee and experience four times the annual revenue growth of their less digital counterparts. These benefits shrink if new laws hamper the effectiveness of Big Tech.

#### Case studies prove – most historical innovation occurs in incumbent firms NOT start ups

Garcia-Macia et al. 19 – Garcia-Macia, International Monetary Fund; Hsieh, Booth School of Business, University of Chicago and National Bureau of Economic Research; Klenew, Department of Economics, Stanford University and National Bureau of Economic Research

Daniel Garcia-Macia, Chang-Tai Hsieh, and Peter J. Klenew, "How Destructive Is Innovation?," Econometrica, Vol. 87, No. 5 (September, 2019), 1507–1541, September 2019, <http://klenow.com/DestructiveInnovation_GHK.pdf>

Likewise, when a new product replaces an existing product, one would like to identify whether the new product is owned by another firm (“creative destruction”) or the same firm (“own innovation”). Based on case studies, Christensen (1997) argued that innovation largely takes the form of creative destruction, and almost always from new firms. Akcigit and Kerr (2018) looked at whether patents cite earlier patents by the same firm or by other firms. The case studies and the sample of patenting firms, however, may not be representative of firms in the broader economy. Many innovative firms, particularly outside of manufacturing, do not patent.

In the absence of more direct evidence, we try to infer the sources of growth indirectly from the patterns of job creation and job destruction among all private sector firms in the U.S. nonfarm economy. We use data from the U.S. Longitudinal Business Database (LBD) from 1983 to 2013. The seminal work of Davis, Haltiwanger, and Schuh (1996) documents the magnitude of job flows within U.S. manufacturing, and these flows are commonly used as proxies for the intensity of creative destruction. For example, Decker, Haltiwanger, Jarmin, and Miranda (2014) pointed to the decline in U.S. job reallocation since the 1970s as evidence of a decline in the rate of creative destruction.

We view the LBD data through the lens of an exogenous growth model featuring creative destruction, own innovation, and new varieties. For industries such as manufacturing, the object of innovation may be products. For services and retail, which make up the bulk of the LBD data, innovation may take the form of new and improved establishments. For example, Walmart opening a new store may be akin to adding a new product. A new Walmart store arguably gains market share by offering a distinct variety (the store format, including all the items for sale within it) and/or by offering low prices (due to high process efficiency) relative to existing stores in the local market.

We reach four conclusions from our indirect inference based on LBD data. First, most growth appears to come from incumbents rather than entrants. This is because the employment share of entrants is modest. Second, most growth seems to occur through quality improvements rather than brand new varieties. Third, own-variety improvements by incumbents loom larger than creative destruction (by entrants and incumbents). The contribution of creative destruction is around 25 percent of growth, with the remainder mostly due to own innovation by incumbent firms. Fourth, the contribution of entrants and creative destruction declined from 1983–1993 to 2003–2013, while the contribution of incumbent firms, particularly through own innovation, increased.

#### Cooption – large firms will coopt the aff’s new regulation to burry startups that compete with them in legal fees

Dorsey et al., Associate at Wilson Sonsini Goodrich, ‘18

(Elyse, Rosati. Jan M. Rybnicek is a Senior Associate at Freshfields Bruckhaus Deringer, and Joshua D. Wright, JD, PhD, University Professor and the Executive Director, Global Antitrust

Institute, Scalia Law School at George Mason University, Former FTC Commissioner, “Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent Seeking,” CPI Antitrust Chronicle, April)

Additionally, the incredibly costly nature of antitrust proceedings exacerbates its vulnerability to rent seeking.39 Antitrust cases and investigations can drag on for years, entail the collecting, processing, and production of millions of documents, and involve tremendous attorneys’ fees. Remedies (or consent terms) can be invasive, last for years, and impair a defendant’s ability to adapt to changing circumstances and thus to remain competitively viable. Looming in the background is the possibility of trebled damages at the end of the day. Consider that an unhappy competitor could embroil a rival in an antitrust quagmire via its own litigation, or by complaining to a government agency and potentially triggering an investigation, that would divert significant amounts of that rival’s resources for years — thereby crippling a rival and diminishing the amount of competition it faces. With so much at stake, conditions are ripe for actors to engage in just such rent-seeking activities in an attempt to appropriate some of this vast wealth for themselves. The empirical evidence and historical record of antitrust actions — particularly during the era when antitrust was explicitly governed by a vague, multi-faceted standard — provide ample support for public choice theory and the economic theory of regulation, while tending to reject the public interest account of regulatory behavior.40

Finally, given this reality, what can be done to mitigate rent seeking? Public choice economics instructs that rent seeking opportunities are diminished when agencies have less discretion (e.g. when rules are clearer) and when another body (e.g. the public, a court, Congress) can more easily hold them accountable for their actions — factors that tend to go hand-in-hand.41 The rule of law thus diminishes incentives for rent seeking and corruption. When these constraining factors are in place, agencies have lowered ability to depart from what is required of them or to otherwise manipulate outcomes to respond to rent-seeking incentives. As such, what antitrust enforcement craves is a clear, well-established standard by which the public and the courts can evaluate agency decisions and identify and correct any deviations that undermine consumer outcomes.

#### Agency enforcement — they’ll choose aggrandizement over public interest

Dorsey et al., Associate at Wilson Sonsini Goodrich, ‘18

(Elyse, Rosati. Jan M. Rybnicek is a Senior Associate at Freshfields Bruckhaus Deringer, and Joshua D. Wright, JD, PhD, University Professor and the Executive Director, Global Antitrust

Institute, Scalia Law School at George Mason University, Former FTC Commissioner, “Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent Seeking,” CPI Antitrust Chronicle, April)

Third, public choice theory elucidates various factors that may contribute to rent seeking in the antitrust context. Some relate to traditional public choice insights regarding bureaucratic incentives. For instance, agency employees will generally seek to increase the importance of their agency and themselves — which often translates to more government activity intended to, among other things, justify higher budgets; carve out a larger jurisdictional territory; and, in many cases, maximize individual employees’ exit options into the private sector.38

[Begin fn 38]

38 See Posner, supra note 31, at 85-86 (“George J. Stigler proposes as a reasonable assumption that regulators act so as (to) retain their jobs and (b) to obtain greater appropriations for their agency as a way of increasing personal power (and frequently remuneration as well). This assumption seems reasonable in regard to commissioners who seek reappointment and those staff members who make a career of government service. The self-interest of such individuals would appear to dictate the avoidance of controversy and the conciliation of well organized economic interests and influential Congressmen. . . . A commissioner concerned with his future success at the bar will have no greater incentive to promote the consumer interest fearlessly and impartially than one whose guiding principles are job retention and agency aggrandizement. He will receive no bonus upon entry (or reentry) into private practice for the vigorous championing of the consumer interest. . . . On the other hand, the enmity of the organized economic interests, the trade associations and trade unions, that a zealous pursuit of consumer interests would engender may do him some later harm, while making his tenure with the Commission more tense and demanding than would otherwise be the case.”); Shughart II, Don’t Revise the Clayton Act, Scrap It!, 6 Cato J. 925, 928 (1987) (“Bureaucratic incentives run strongly in the direction of producing visible output . . . The more work there is for government, the more opportunities there are for the attorney staff to build the human capital that is rewarded when they subsequently take jobs in big antitrust law firms, and the larger and more secure are the antitrust bureaus.”).

[End fn. 38]

#### China cooption – Chinese companies remain exempt from U.S. antitrust scrutiny which allows them to pull ahead after the plan

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Robert Cardillo, Dan Coats, Admiral James Foggo III, Richard H. Ledgett Jr, John D. Negroponte, Leon E. Panetta, Vice Admiral Jan E. Tighe, Frances Townsend, Susan M. Gordon, Dr. Michael Vickers, Michael Morell, and Admiral James “Sandy” Winnefeld Jr, September 15 2021, “National Security Letter on Antitrust,” https://s3.documentcloud.org/documents/21062393/national-security-letter-on-antitrust.pdf

We are writing to you today in an effort to help America maintain its position as the global technology leader. Throughout our careers, we have supported leveraging America’s distinct advantage in technological innovation to help ensure that our nation’s military and intelligence capabilities remain unmatched. Such capabilities are integral to our national security as we confront China’s aggressive ambitions to undermine U.S. influence and shape the global order. The Chinese Communist Party (CCP) knows that to achieve this goal, China must become the world’s leading innovator. To this end, the CCP continues to employ industrial policies in order to create and support “national champion” technology companies, providing them with an economic advantage over Western counterparts. We strongly believe it is in the best interest of our national and economic security to prevent China from achieving its objective of becoming the global leader in technological innovation. The recent U.S. Innovation and Competition Act (USICA) has the potential to put us on strong footing to compete with China. This bipartisan effort demonstrates the central role Congress continues to play in supporting U.S. investments in areas critical to maintaining America’s technological edge. The U.S. should adopt policies to ensure we can lead in research and development (R&D), innovation, standards setting, and secure production and supply. Yet just as competition with China enters a critical phase, Congress risks undermining America’s key advantage vis-à-vis China by pursuing domestic legislation that threatens to impede U.S. companies and their ability to pursue such innovation. Recent congressional antitrust proposals that target specific American technology firms would degrade critical R&D priorities, allow foreign competitors to displace leaders in the U.S. tech sector both at home and abroad, and potentially put sensitive U.S. data and IP in the hands of Beijing. We agree that there are substantial policy debates to be had regarding the scope and power of U.S. technology companies, and that legislative efforts could play a role in balancing the needs of consumers and protecting the marketplace in a rapidly changing tech ecosystem. However, we believe more deliberate analysis is needed to examine the detrimental impact these bills could have on our strategic competition with China. Congress should not proceed with current legislative proposals before understanding the full range of potential consequences. At the very least, legislation intended to ban new acquisitions and force break-ups of some of the largest U.S. tech companies – and, in particular, those focused on consumer markets – deserves more study. Provisions in these bills that target a narrow group of U.S. companies without requiring similar oversight of Chinese tech giants such as Huawei, Tencent, Baidu, and Alibaba would place these already formidable competitors in a better position to assume global preeminence. For this reason, we believe Congress should establish a congressional study that works collaboratively with the Administration and other stakeholders on both protecting American innovation and developing a comprehensive strategy to counter the growing challenge posed by China and its authoritarian approach to digital governance. This study would allow the U.S. to develop a long-term plan to strategically compete against the rising power of Beijing. As part of this, relevant experts could analyze how regulation should be updated to reflect the increasingly globalized nature of America’s tech sector, and better understand the role it plays in supporting the U.S.’s economic and national security interests. Such a study would also complement bipartisan China-focused legislation already being considered in Congress, and provide recommendations on how efforts to regulate U.S. technology companies domestically could be done in a more strategic manner. The current effort to regulate the U.S.’s largest technology companies should not be done at the expense of U.S. economic and national security. Rather than passing bills that cede U.S. tech leadership to China, we must build on America’s key advantages and ensure that the United States remains a technological powerhouse for decades to come.

#### Rent seeking – skilled lawyers will use the plan to force companies into settlements which chills investment

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Second, requiring a defendant to prove that a restraint is the least restrictive means of achieving its goal makes it nearly impossible for the defendant to succeed. This rule not only would impose on antitrust defendants the titanic burden of proving a universal negative,3 it also would empower antitrust plaintiffs to invalidate virtually all collaborations, no matter how procompetitive, merely by dreaming up marginal ways to make them slightly more competitive. See Smith v. Pro Football, 593 F.2d 1173, 1215 (D.D.C. 1978) (MacKinnon, J., concurring in part, dissenting in part) (“In evaluating less restrictive alternatives as a matter of law, it is difficult to imagine what kind of draft would be valid if the existence of a less restrictive alternative would automatically render the present draft unreasonable. Some less restrictive alternative can always be imagined.”) Indeed, “[a] skilled lawyer would have little difficulty imagining possible less restrictive alternatives to most joint arrangements.” Philip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 1913b (4th ed. 2018). And a skilled plaintiffs’ lawyer would have little difficulty finding attorneys’ fees and treble damages to be sufficient incentive to challenge virtually all such collaborations, thus ensuring that the most direct consequence of the Ninth Circuit’s application of the Rule of Reason would be a flood of antitrust litigation, followed by a reduction in collaborative enterprises and the negative effects of that reduction.

This consequence follows from the fact that the Ninth Circuit’s ruling is not limited to the NCAA’s “amateurism” rules. Instead, the Ninth Circuit’s opinion as written applies to all forms of joint ventures and procompetitive collaborations and thus is likely to disincentivize those arrangements. See, e.g., U.S. Dep’t of Justice & FTC, supra, at 1 (2000) (warning that making it too easy to condemn “agreements among actual or potential competitors may deter the development of procompetitive collaborations”).

The Ninth Circuit’s decision has sweeping implications for antitrust enforcement and may call into question collaborations and joint ventures across a host of areas including healthcare, pharmaceutical development, information technology, consumer electronics, and manufacturing. According to the Ninth Circuit’s approach, any court is empowered to re-write the rules of any industry before it so long as the plaintiff can conjure a slightly less restrictive alternative to the conduct being challenged, including, for example, asserting that a joint venture’s product is priced too high. But see Texaco Inc. v. Dagher, 547 U.S. 1, 6–7 (2006) (“As a single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells, including the discretion to sell a product under two different brands at a single, unified price.”). The potential exposure to treble damages for such conduct is likely to chill otherwise procompetitive arrangements, thus contradicting the ultimate goal of the antitrust laws: promoting competition.

#### They would massively hurt innovation

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(Dakota Foster and Zachary Arnold, “Antitrust and Artificial Intelligence: How Breaking Up Big Tech Could Affect the Pentagon’s Access to AI,” May 2020, https://cset.georgetown.edu/publication/antitrust-and-artificial-intelligence-how-breaking-up-big-tech-could-affect-pentagons-access-to-ai/)

All else being equal, smaller AI firms have less data. While the relationship between the quantity of data inputs and the quality of algorithmic outcomes is not linear, a correlation is usually evident. For example, recent experiments by researchers at Google found a logarithmic relationship between the amount of data fed into an image recognition model and the model’s performance.42 If more data means more innovation, a post-breakup AI sector could be less innovative overall.

Antitrust action would likely reduce the amount of data held by large companies. This might hurt innovation, especially in application areas requiring exceptionally high amounts of data for acceptable performance.43 In short, the impact of antitrust action on data-driven innovation may hinge on the size of broken-up companies and their data holdings. Google Search or Amazon Web Services, for example, would be large corporations in their own right.44 AWS, one of Amazon’s larger divisions, achieved revenues similar to Raytheon’s company-wide revenues in 2018,45 demonstrating the possible size of spin-offs.46

#### Data is the ONLY thing that matters in the development in AI – startups will lead to a bunch of half-baked solutions that CAN’T solve

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Willem Sundblad, October 18 2018, “Data Is The Foundation For Artificial Intelligence And Machine Learning,” Forbes, https://www.forbes.com/sites/willemsundbladeurope/2018/10/18/data-is-the-foundation-for-artificial-intelligence-and-machine-learning/?sh=6640b85251b4

Artificial intelligence (AI) and machine learning (ML) are going to have a huge impact on manufacturing. With these technologies, manufacturers will gain the computational power needed to solve problems that humans can’t possibly solve. They will ultimately be able to provide prescriptive answers to production issues manufacturers have been asking for centuries. Namely, how do we make our product as efficiently as possible, with zero waste and the least amount of downtime.

As with most reports about groundbreaking technology, this discussion of the ‘holy-grail’ is way ahead of industry practices. The vision serves a useful purpose in suggesting what’s possible. But with many manufacturers lacking the data infrastructure necessary to obtain real AI and ML capabilities, the journey towards perfect production can also be so abstract that it confuses the very people looking to achieve it. I’m often asked by corporate leadership, “Where and how do we adopt AI technology?”

Begin with data

While the sci-fi-sounding AI scenarios highlight the technology’s incredible computational power, the practical, effective applications begin with data. Indeed, data is both the most underutilized asset of manufacturers and the foundational element that makes AI so powerful. Think of [Maslow’s Hierarchy of Needs](https://www.simplypsychology.org/maslow.html), a theory of motivation that is depicted as a pyramid, with the most basic, most important needs at the bottom, and the most complex needs at the top.

The Data Science Hierarchy of Needs Pyramid

 SOURCE: “THE AI HIERARCHY OF NEEDS” MONICA ROGATI.

Similarly, [Monica Rogati’s Data Science Hierarchy of Needs](https://hackernoon.com/the-ai-hierarchy-of-needs-18f111fcc007) is a pyramid showing what’s necessary to add intelligence to the production system. At the bottom is the need to gather the right data, in the right formats and systems, and in the right quantity. Any application of AI and ML will only be as good as the quality of data collected.

When beginning to adopt AI, many manufacturers discover that their data is in many different formats stored [throughout several MES, ERP, and SCADA](https://www.forbes.com/sites/willemsundbladeurope/2018/10/03/beyond-digital-transformation-how-industry-4-0-benefits-your-customers-employees-and-culture/#1704f40f29fc) systems. If the production process has been manual, very little data has been gathered and analyzed at all, and it has a lot of variance in it. This is what’s known as ‘dirty data’, which means that anyone who tries to make sense of it—even a data scientist—will have to spend a tremendous amount of time and effort. They’ll need to convert the data into a common format and import it to a common system, where it can be used to build models.

Once good, clean data is being gathered, manufacturers must ensure they have enough of the right data about the process they’re trying to improve or the problem they’re trying to solve. They need to make sure they have enough use cases and that they are capturing all the data variables that are impacting that use case.

For example, gathering only one variable about revolutions per minute of your machine is not going to be enough to tell you why a failure happened. However, if you add vibration, temperatures, and data about many conditions that contribute to machine failure, you can begin to build models and algorithms to predict failure. In addition, as more data is collected, you can create accuracy requirements, such as This algorithm will be able to predict this failure within one day’s time, with 90% accuracy.

If this all sounds complicated, solutions are available to automatically collect the data from a variety of devices and systems, then automatically clean the data or format. This allows engineers to focus on building models and algorithms, rather than spend time cleaning the data.

Start by solving a simpler problem

Starting an AI journey with a data first approach allows manufacturers to start understanding and controlling their processes from the beginning. This not only helps manufacturers get to a controlled process and begin reaping some relatively quick benefits like eliminating process variations, it will improve the types of analytics they can do in the future, with more advanced AI and ML models.

Remember: If your process is out of control, adding AI to it won’t magically fix it.

Another crucial reason to start with gathering data and solving immediate production problems is to gain first mover advantage in your industry. Companies like Google, Amazon and Facebook dominated their industries because they were the first to begin building data sets. Their data sets have become so large, and their data collection and analysis so sophisticated that they are able to grow their competitive advantage.

For manufacturers, the equation is similar. The sooner a manufacturer starts the journey toward AI, the sooner they will build large data sets that will enable them to execute advanced AI and ML models. With each iteration, they’ll put more distance between themselves and the competition.

#### Investment – the speculative nature of AI requires huge investments to reap rewards, means only large companies can

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Dakota Foster, 6-2-2020, "Antitrust investigations have deep implications for AI and national security," Brookings, https://www.brookings.edu/techstream/antitrust-investigations-have-deep-implications-for-ai-and-national-security/

In late March, Attorney General William Barr announced that “decision time” was looming for America’s leading tech firms. By early summer, Barr expects the Department of Justice to reach preliminary conclusions about possible antitrust violations by Silicon Valley’s largest companies. The DOJ’s investigation is just one of several probes scrutinizing potential abuses by Facebook, Google, Amazon, Apple, and Microsoft. While concerns over consumer protections, anti-competitive practices, and industry concentration have fueled these antitrust investigations, their results will almost certainly have national-security ramifications.

Secretary of Defense Mark Esper has argued that artificial intelligence is likely to shape the future of warfare, and the national-security community has largely backed that conclusion. The most recent National Defense Strategy, released in 2018, highlights AI’s importance, noting that the Pentagon will seek to harness “rapid application[s] of commercial breakthroughs…to gain competitive military advantages.” With defense officials arguing that U.S. military superiority may hinge on artificial intelligence capabilities, antitrust action aimed at America’s largest tech companies—and leading AI innovators—could affect the United States’ technological edge.

But the effects of such action are highly uncertain. Will a less concentrated tech sector comprised of slightly smaller firms fuel innovation and create openings for a new generation of tech companies? Or will reductions to scale significantly hurt leading tech firms’ ability to leverage the traditional building blocks of AI innovation—like computing power and data—into breakthroughs? The answers to these questions aren’t clear cut but offer a way to begin thinking about how antitrust enforcement could impact artificial intelligence innovation and national security more broadly.

Unlike some earlier national-security technologies, the commercial sector plays an outsize role in AI development. As a result, government access to both AI products and innovation hinges, in large part, on industry. While academia, private research labs, and AI start-ups offer important contributions to AI development, major American technology companies have traditionally led the field. Last year, Microsoft, Facebook, Amazon, Google, and Apple ranked among the ten largest recipients of U.S. artificial intelligence and machine learning (ML) patents.

Changes to the composition of America’s tech sector might boost net AI innovation. From 2013-2018, 90 percent of successful Silicon Valley AI start-ups were purchased by leading tech companies. This is a potentially worrisome trend for AI innovation. After all, incumbent firms and emerging companies can have very different incentives. Entrenched tech giants may be more focused on maintaining market share than disrupting markets altogether.

As Big Tech increasingly moves to acquire AI start-ups, individual firm dynamics also shift. Instead of “building for scale,” start-ups begin to “build for sale,” adopting a mentality that may be ill-suited for moonshot innovations. Would a company like DeepMind (now owned by Google parent-company Alphabet), for example, have developed AlphaGo—the ground-breaking computer program that became the first to beat a human player in Go—if the firm’s primary goal was to be acquired by a bigger player?

Antitrust action could shift these incentives and spur competition, potentially opening the door for new AI innovations—and for a new wave of AI companies. With their smaller statures, some of these firms might focus on more niche AI applications, including defense-related products, as start-ups like Anduril and ShieldAI have done. Today’s tech giants have every financial incentive to cater to foreign markets and the average consumer, not to the U.S. federal government. Indeed, with its global user-base, it is hard to imagine Google tailoring its AI innovation decisions to U.S. defense needs. The same may not hold within an AI ecosystem where some companies built, for example, in the mold of Palantir (a data-analytics company with clear national-security applications) consider government their primary customer and subsequently concentrate on its demands.

National-security agencies, from the Pentagon to the U.S. intelligence community, could stand to benefit from more targeted innovation—and from an industrial base better attuned to their needs. As Christian Brose points out, only a fraction of the U.S.’s billion-dollar tech “unicorns” have operated in the defense sector, leaving the U.S. military “shockingly behind the commercial world in many critical technologies.”

As Silicon Valley’s largest companies consolidate AI talent and novel ideas through acquisitions, these companies gain an ever-larger say in the future of AI. This consolidation, which antitrust action could disrupt, may not favor innovation. But breaking up major tech firms also has potential pitfalls for AI innovation. With scale comes resources, and AI innovation is resource-intensive, requiring large quantities of data, diverse datastores, and vast computing power—known as “compute” in industry jargon.

American tech giants’ huge revenues uniquely equip them to fund costly AI research. Google’s DeepMind, arguably the world’s leading AI-research organization, is billions of dollars in debt and lost over $500 million in 2018 alone. Google’s fortress-like balance sheet can easily absorb the costs associated with such cutting-edge research, but smaller firms likely cannot. The economics of compute offer a concrete example of this dynamic. The rapidly increasing volume of compute required for deep learning research, coupled with compute’s prohibitively expensive prices, creates significant barriers to entry and innovation for smaller AI firms. As Microsoft co-founder Paul Allen noted in 2019, the “exponentially higher” costs of compute may leave the U.S. with only “a handful of places where you can be on the cutting edge.” Even the most well-funded independent AI organizations rely on Big Tech’s compute resources. OpenAI’s billion-dollar compute partnership with Microsoft, reached after OpenAI spent millions renting compute from leading tech firms, offers one example.

Changes to firms’ scale also may impact their access to data, another key resource required for AI innovation. Studies have linked the performance of deep learning models to the quantity of data fed into them. At present, tech giants have access to unprecedented volumes of data about their users. Google, for example, can harness data from Google Search, Maps, YouTube, Gmail, and other sources. If antitrust enforcement leads to divestment or broader break-ups, access to data may diminish, lessening innovation.

#### Bureaucracy – small firms cant navigate pentagon contracts

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(Dakota Foster and Zachary Arnold, “Antitrust and Artificial Intelligence: How Breaking Up Big Tech Could Affect the Pentagon’s Access to AI,” May 2020, https://cset.georgetown.edu/publication/antitrust-and-artificial-intelligence-how-breaking-up-big-tech-could-affect-pentagons-access-to-ai/)

Contracting with the Pentagon is difficult, expensive, and time-consuming. Smaller AI firms may be less able to navigate the federal procurement process, effectively preventing the Pentagon from accessing their technology. The few DOD programs that do partner with smaller firms are under scrutiny for their efficacy.

The high barriers of entry, coupled with an unstable budgetary environment and the high certification costs of federal contracting, favor larger companies.148 Simply put, large firms have more resources and deeper institutional knowledge to bring to the federal contracting process.

## 1NR

### M&A DA

**Healthcare consolidation is booming now and has momentum for the future**

**Diamond et al. 21** – Brandee Diamond is an M&A partner at Foley & Lardner LLP; Louis Lehot is an emerging growth company, venture capital, and M&A lawyer at Foley & Lardner; Eric Chow is an M&A lawyer with Foley & Lardner LLP

Brandee Diamond, Louis Lehot, and Eric Chow, "Healthcare Shines in M&A’s Major Comeback So Far In 2021," Healthcare Innovation, 4-12-2021, https://www.hcinnovationgroup.com/finance-revenue-cycle/mergers-acquisitions/article/21218175/healthcare-shines-in-mas-major-comeback-so-far-in-2021

In 2020, everything changed. Jobs were cut, businesses were shuttered, and too many people lost their lives. But the global pandemic also triggered a response that is creating new jobs, stimulating innovation, and **forging new business models**. The market for mergers and acquisitions has **weathered the storm** of COVID-19 and is **surging** into the second quarter of 2021 with **all pistons firing**, particularly in **healthcare**.

Today, there is so much more besides COVID testing and vaccinations happening behind the doors of healthcare providers worldwide. Think about it. Your town's family doctor's office down the street might now be part of a giant healthcare system. Or, your local urgent care center may be considering a merger with a leading healthcare corporation. These are unprecedented times in virtually every facet of the word in every nook and cranny on the planet, and **healthcare is at the forefront** when it comes to M&A.

In 2020, the healthcare industry was **beaten down** from the **overflowing** of COVID patients causing the **ripple effect** of non-emergency procedures' **postponements**. Looking forward, however, healthcare M&A activity is **set to increase** with the return of non-urgent **medical interventions** and healthcare companies **betting on growth** to get stronger and healthier.

The 2021 rebound

Early in 2020, there was a massive drop-off in M&A deals compared to the prior-year period, particularly for more significant transactions. However, the M&A market still had plenty of **potential for momentum**. Tragically, as the coronavirus's **full impact hit** by late March, most deal-making came to a screeching halt. Since companies put their resources into transitioning staff to working from home, reviewing finances, and maximizing dollars, many **paused** any pre-planned M&A deals and stopped filling the top of the funnel for a new pipeline.

As companies, investors and bankers adapted to virtual deal-making over the last year, M&A in sectors unaffected or boosted by the lockdown slowed. By summer 2020, transactions grew each month with key announcements in technology and **healthcare** corporate **consolidations**. Despite a slowdown for deals in the second quarter of 2020, activity increased in the second half, triggering an annual volume above $3 trillion for the seventh year in a row. And by winter, the pace of M&A deals **exceeded the historical average** with a fourth-quarter record of 1,250 global M&A transactions, equal to over $1 trillion.

This year, there is already **significant growth** on the horizon. In fact, 53 percent of U.S. executives said their companies plan to **increase M&A investment** in 2021. And, according to Morgan Stanley, “**All the elements** **are there** for an active M&A market in 2021, from corporations looking for **scale and growth** to private equity firms and SPACs looking to **invest capital**.” For some, growth will come from market leaders finding strength in a recovering economy. In contrast, others that have seen business models destroyed by the pandemic will explore how smaller deals in complimentary sectors can help innovate their businesses. Overall, targets will come from sellers, including businesses that have **struggled during the recession**, private investors, and companies that are reassessing assets.

M&A activity in healthcare to watch

As 2021 unfolds, there will an increase in **urgent care M&A activity**. We will likely see urgent care systems **buying smaller urgent care systems**, healthcare companies that don't have much to do with urgent care making **mergers and acquisitions**, and urgent care buying companies that complement their services. For example, retail chains like Walmart and CVS are opening more healthcare clinics. These days, urgent care clinics are not just used for emergency or immediate problems but are now also giving out vaccines and even doing annual physicals.

In healthcare, a merger's primary goal is to improve the quality of care while concurrently driving efficiencies that should lower costs. The reality is that today, it’s becoming more challenging to **stay in business** when your company is only known for one thing. Oftentimes, larger companies **offer more services**, which helps the patient and the provider’s pocket. Most of the time, consolidation happens because **customers prefer to combine trips**. The **fear of exposure** to the virus and **aiming to limit outings** will likely **push healthcare** companies to **make moves in M&A** as it relates to consolidation.

As of late, youth sports activities have become more sophisticated, with more businesses catering to them. As popularity grows, unfortunately, sports-related injuries grow too - creating **more opportunities** for healthcare companies. Ultimately, the pandemic is another reason for healthcare companies to offer **all-in-one** facilities. Despite the factors fueling deals, healthcare companies are going to see **more M&A activity** is due to the **growth vector** it can bring to a business.

M&A trends triggered by COVID-19

Several significant trends may characterize a robust M & M&A market for the rest of 2021 and beyond. First of all, we can expect **more megadeals** (transactions of at least $5 billion) in 2021, from pharma companies acquiring early-phase products and private equity acquisitions. With larger companies leading in this area, this activity will come even as company valuations have increased from their COVID-19 lows. The increase in megadeals in the second half of 2020 helped total U.S. deal value bounce back strongly going into 2021.

In addition, companies pursuing stock-for-stock mergers to gain scale comprised many of the largest corporate M&A transactions. Scale has always been important, and the pandemic has proven that you have to be **large enough** in order **to survive**. **Scale** and **more access** to capital markets have been a **considerable benefit** for larger companies. As the pandemic rages on, corporates remain focused on accessing capital, strengthening positions, and **investing in scale**, and consolidations **should continue** in sectors powered by technology and **healthcare**.

Private equity firms should continue to contribute to 2021 M&A volume meaningfully. In 2020, sponsor-backed transactions comprised 26 percent of M&A activity - the highest since before the financial crisis. In fact, by the end of 2020, financial sponsors had a record $2.9 trillion of capital. Last year, we saw many traditional private-equity funds investing across the capital structure to provide companies with cash during a challenging time.

Looking ahead

Looking later in 2021 and beyond, as vaccinations increase and business conditions in COVID-impacted sectors improve, companies will likely focus more on spending to accelerate growth, scale, and digitize their businesses.

As the global economic rebound aims for more growth this year, those **low-interest rates** will continue to make borrowing cheaper than ever before. This, along with the prospect for companies’ **renewed confidence** to spend, could create **more deals**, especially in **healthcare**-related business. So, M&A remains one of the most attractive ways to achieve growth, which should make 2021 a busy year…

**Consolidation is necessary to preserve rural hospitals, but antitrust expansion deters and prevents necessary mergers**

**Kaufman 20** – chair of Kaufman, Hall & Associates LLC

Ken Kaufman, "Removing Antitrust Barriers to Solve the Rural Health Care Crisis," Morning Consult, 1-2-2020, https://morningconsult.com/opinions/removing-antitrust-barriers-solve-rural-health-care-crisis/

Almost 120 rural hospitals have closed since 2010, and an estimated **21 percent** of rural hospitals are at **high risk of closure**.

The high number of financially stressed hospitals is creating a **crisis of access** for rural communities and a potential **crisis of quality** and patient safety, as these hospitals **struggle to secure** **sufficient** clinical and technological **resources**. These struggles can be even more difficult in towns that could once support two hospitals but can **no longer do so**.

A **solution** to the rural health crisis that promotes **partnerships** with larger health systems addresses two critical needs. First, it enables a **rational, equitable approach** to a fundamental restructuring of rural health care resources. Second, it provides **access to sufficient financial resources** to ensure that rural communities are able to benefit from the same resources available elsewhere.

Antitrust impediments to a system-based approach

Current **antitrust law makes it difficult** for individual hospitals or health systems to **collaborate on efforts** to restructure delivery of essential services within a rural health care market. These efforts can, however, be pursued among facilities owned by a **single health system**, enabling a rational and equitable distribution of services across the health system’s network of facilities and the communities they serve.

The Federal Trade Commission and Department of Justice have themselves acknowledged the **value** of a **system-based approach** to rural health. In their 1996 “Statements of Antitrust Enforcement Policy in Health Care,” the agencies created a **safe zone** for mergers of certain hospitals with a low bed size and low patient census with other hospitals.

The agencies recognized that these hospitals often “will be the only hospital in the relevant market” and that “mergers involving such hospitals are **unlikely** to **reduce competition substantially**.” They also recognized that “rural hospitals … are unlikely to achieve the efficiencies that larger hospitals enjoy. Some of these cost-saving **efficiencies** may be **realized** … **through a merger**.”

The situation becomes **more difficult** when a community has two hospitals that do not fall within the safe zone and it can **no longer support both**. Such markets will be considered highly concentrated, and an attempt to merge the hospitals **likely will be challenged** by the federal agencies.

Several states have tried to overcome the likelihood of an antitrust challenge by granting certificates of public advantage to health systems that want to come together to more effectively pool resources and rationalize services within a rural market. But these efforts also are being challenged by the federal agencies.

The **threat** of **antitrust enforcement** actions **throws a chill** over health system-led efforts to make the **rural health care** delivery system **more rational**, economically viable and equitable. For example, the systems that combined to form Ballad Health went through a two-year process to secure the COPA that ultimately allowed their merger.

They willingly accepted state oversight of their efforts to rationalize health care delivery. Yet, they now face an order by the FTC to provide extensive information for a study on the impact of COPAs, even though long-term benefits will not be apparent just a year after the merger. The effort and **ongoing scrutiny** these systems take on certainly might **dissuade other health systems** from pursuing a **similar route**.

Rethinking competition in rural health care markets

The FTC and DOJ must revisit an approach that prioritizes competition over access to care and the quality and financial sustainability of the rural health care delivery system. The agencies have themselves acknowledged that competition among hospitals may not be a **practical reality** in rural communities.

The rural health care crisis is **happening now**; there is not time for multiyear studies of the impact of efforts to rationalize and improve rural health care. Health systems that **understand** and **are willing** to take on the challenges of rural health care markets should be **given the opportunity** to do so.

#### FTC Deference---DoD recommendations historically have trumped FTC antitrust concerns---recent executive action has preserved that dynamic, but future changes tilt the scales toward the FTC

**Eichelberger 21** – Curtis Eichelberger covers mergers and acquisitions for MLex in Washington DC

Curtis Eichelberger, "Confluence of government actors likely to place Lockheed-Aerojet deal under greater US scrutiny," MLex Market Insight, FTC Watch, 8-9-2021, https://www.mlexwatch.com/articles/12982/print?section=ftcwatch

The DOD and FTC each perform an **antitrust analysis** of defense-related mergers. But since the Pentagon is usually the **sole customer** of US defense contractors, **if it supports a merger**, the FTC will be **hard-pressed** **to convince a court** that the **merger is harmful**. So when the DOD finds that a deal **benefits national security**, the FTC **tends to defer** **even if** it regards a deal as **anticompetitive**.

The **FTC’s concerns** about the **DOD’s outsized influence** have been illustrated by comments and analysis from past FTC executives and commissioners.

Will the Biden administration **continue** to let the DOD have its way, or will it **prioritize competition**? Biden issued an executive order July 9 calling for a government-wide effort to improve competition in all sectors of the economy, suggesting a change **might** be coming.

“The Congress frequently has created overlapping agency jurisdiction in the policing of anticompetitive conduct and the oversight of mergers,” the executive order says. “Where there is overlapping jurisdiction over particular cases, conduct, transactions, or industries, agencies are encouraged to coordinate their efforts, as appropriate and consistent with applicable law … in the case of major transactions, soliciting and giving significant consideration to the views of the Attorney General or the Chair of the FTC, as applicable.”

The president also ordered the Secretary of Defense to submit a review of the state of competition within the defense industrial base, including areas where a lack of competition may be of concern.

This would **seem** **to signal** where the administration will **land in conflicts** between the FTC and DOD, **though for now**, **how much weight these words will carry isn’t clear.**

**New antitrust rules and theories disrupt FTC deference to the DoD---that collapses the industry’s ability to innovate**

**Kazianis 21** – Senior Director at the Center for the National Interest

Harry J. Kazianis, "National Security Experts, Not Lawyers, Should Decide Fate of Defense Mergers & Acquisitions," The National Interest, 9-1-2021, https://nationalinterest.org/feature/national-security-experts-not-lawyers-should-decide-fate-defense-mergers-acquisitions-192868

The U.S. defense industrial base is a **unique sector** of the American economy. It’s the **foundation for the technological edge** that gives our warfighters the **best possible tools** to prevail in any potential **future conflict**. Indeed, future military advantage in competition with China and Russia relies upon the **technology and innovation** that comes from this **critical industry**. And yet, the Federal Trade Commission’s new lead Commissioner, Lina Khan, has begun her tenure by **considering an experiment** to break up successful enterprises and let **academic theory biased against vertical mergers** in the defense industry **guide the FTC’s early decision making** as it considers acquisition proposals such as Lockheed Martin’s acquisition of Aerojet Rocketdyne. The stakes are **too high** to not give the Defense Department the primary voice in any acquisition approval decision that could impact **national security** and our **future competitiveness** with China and Russia in the crucial rocket propulsion sector.

What History Tells Us

When evaluating mergers and acquisitions in the defense industrial base, such as the pending Lockheed Martin acquisition of rocket manufacturer Aerojet Rocketdyne, it’s important to consider the historical context, the evolution of the defense industrial base, and consider its inherently collaborative nature.

Prior to World War II, America relied on an arsenal system, where the government designed and produced most weapons and munitions. Our entry into World War I required rapid mobilization, but there was no way to quickly accelerate production.

We learned from the shortcomings of the arsenal system in World War II, with America fully engaged as the “Arsenal of Democracy.” The U.S. industrial base churned out weapons and munitions at a dizzying rate to help win the war.

Since then, this model of collaboration and necessary consolidation among the defense industrial base and the Department of Defense has endured, resulting in **continuous innovations** that have given the American warfighter the **technological edge**, while keeping the specialized requirements in the sector affordable for taxpayers.

We see the fruit of this collaboration all around us, such as GPS, Aegis phased-array radar systems, Patriot missiles, stealth aircraft, and unmanned aerial vehicles. That same collaboration is now **surmounting the challenge** of developing and fielding the next generation of weapon platforms and advanced technologies, such as hypersonics, directed energy, artificial intelligence, and more, to maintain and extend America’s **technological edge over potential adversaries.**

In all these endeavors, the government has held great sway over industry by virtue of its status as sole buyer and through underwriting research and development efforts and sharing forecasts about future needs.

The defense industry differs from much of the economy in the way it interacts with government, and in how competitors frequently collaborate with one another in support of national security. The industry is distinct from the likes of Apple and Google. Prime contractors often collaborate on one project while competing fiercely on others. All of the major contractors **depend on one another** for the supply of critical sub-systems and components. Competitors supplying and depending on one another is a **common feature** of today’s defense industrial base.

General Dynamics and Huntington Ingalls Industries, for example, are known as fierce competitors for shipbuilding contracts. Yet when our nation needed submarines to be developed and produced, they collaborated on building the next-generation attack submarine, the Virginia-class, and have worked together on the new Columbia-class submarine.

The current defense industrial base model originated ten years ago, when then-Undersecretary of Defense for Acquisition, Technology, and Logistics Ashton B. Carter laid out how the Defense Department would work with a scaled-down, post-Cold War defense industry.

He prioritized “**long-term innovation**, efficiency, profitability, and productivity growth,” and emphasized that we must rely on “**normal market forces** to make the most efficient adjustments to the defense industrial base.”

This system is largely transparent, open, and fair, notwithstanding the expressions of concern that some companies voice when new mergers or acquisitions in the sector are proposed.

With the handful of remaining primes today, the government neither needs nor wants consolidation at the top tier of the defense industrial base. But there are thousands of defense industrial base suppliers, mostly small and medium-sized specialty producers. For those companies, mergers and acquisitions can **result in a win-win** for government and the economy.

These consolidations can create **greater efficiency and innovation**, assure the enduring health of key American suppliers and manufacturers of critical defense products and technologies, and promote strong balance sheets. Such transactions **should be welcomed.**

What Happens Now?

Such is the case with the proposed Lockheed Martin acquisition of Aerojet Rocketdyne, a merger that would not alter the competitive landscape in any appreciable way. In fact, it enhances and restores a competitive playing field in the crucial rocket propulsion sector that has tilted dramatically towards well-financed vertically integrated primes such as NG-OATK, SpaceX, and Blue Origin. LM and AJRD have virtually no overlap in terms of market position or the types of systems and services they offer, and the number of rocket propulsion providers would not change.

If the transaction is approved, Aerojet Rocketdyne would benefit from greater stability and would be able to pour more resources into technology, research and innovation. Post-acquisition, Aerojet Rocketdyne’s products will still be available on the open market the same as if the company remained an independent merchant rocket manufacturer. Strong oversight mechanisms available to the Defense Department and the FTC such as consent decrees and 3rd party monitoring have been used to great effect in the Defense industry for decades. That’s good for the taxpayer and the entire defense industrial base. It is also in **complete alignment** with the goals of the President’s recent **executive order** on competition in the economy.

Academic Theory or Common Sense?

#### Now is not the time to apply academic antitrust theory to vertical mergers and acquisitions in the defense sector without deference to the deep expertise of the Defense Department in these matters. Especially when the Russians and Chinese are threatening to leap ahead technologically. The rules of the road were laid down years ago, and the defense sector has dutifully followed them with a formula that works. Let’s focus on the competition and collaboration among defense contractors demanded by our national security as the prime consideration.

#### Expanding scope of antitrust liability brings that to a halt—undermines dynamism and global competitiveness

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(Adam Thierer, 2-25-2021, "Open-ended antitrust is an innovation killer," TheHill, https://thehill.com/opinion/technology/540391-open-ended-antitrust-is-an-innovation-killer)

Antitrust reform is a hot bipartisan item today, with Democrats and Republicans floating proposals to significantly expand federal control over the marketplace. Much of this activity is driven by growing concern about some of the nation’s largest digital technology companies, including Facebook, Google, Amazon and Apple.

Unfortunately, the calls for more bureaucracy and regulation emanating from all corners of the political world could have an unintended consequence: discouraging the sort of vibrant innovation and consumer choice that made America’s tech companies household names across the globe.

Sen. Amy Klobuchar (D-Minn.) is leading one charge. Klobuchar, who chairs the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, recently introduced the “Competition and Antitrust Law Enforcement Reform Act.” This sweeping measure seeks to expand the powers and budgets of antitrust regulators at the Federal Trade Commission and the Department of Justice. It also includes new filing requirements and potentially hefty civil fines.

The most important feature is the proposed change to the legal standard by which regulators approve business deals. It would allow the government to stop any deal that creates an “appreciable risk of materially lessening competition,” and it also defines exclusionary behavior as, “conduct that materially disadvantages one or more actual or potential competitors.”

These may sound like simple, semantic tweaks, but – much like some of the other policy ideas currently circulating – they would upend decades of settled law and create a sea change in U.S. antitrust enforcement. This change could undermine business dynamism, innovation and investment in ways that inhibit the global competitiveness of U.S. businesses.

Critics of merger and acquisition (M&A) activity by large tech firms include not only Sen. Klobuchar but also Republicans such as Sen. Josh Hawley (R-Mo.). Hawley recent offered an amendment to a budget bill that would preemptively prohibit mergers and acquisitions by dominant online firms. Klobuchar and Hawley believe that M&A skews the market in favor of today’s largest firms, entrenching their market power and discouraging innovation.

History teaches a different lesson. Consider DirecTV and Skype, both once considered innovative market leaders in their respective fields of satellite TV and internet telephony. Both firms stumbled, however, and they might not even be with us today without creative business deals. DirecTV has been partially or fully controlled by Hughes Electronics, News Corp., Liberty Media and now AT&T. Skype has swapped hands multiple times, moving from eBay, to a private investment firm and now to Microsoft.

These were complex deals, and some didn’t work, leading to divestitures. But each was a learning experience that illustrated how dynamic media and technology markets can be with firms constantly searching for value-added arrangements that serve their customers and shareholders. If we make this type of activity presumptively illegal, we’re imagining that government bureaucrats are better suited to make these calls than businesspeople and the consumers who choose whether or not to buy the product.

Worse yet, legal tests like those Klobuchar proposes – “conduct that materially disadvantages potential competitors” – are remarkably open-ended and could be easily abused. The system will be gamed by opponents of deals for business reasons. They will claim that their own failure to attract investors or customers must all be the fault of more creative rivals. That’s a recipe for cronyism and economic stagnation.

Those who worry about today’s largest tech giants becoming supposedly unassailable monopolies should consider how similar fears were expressed not so long ago about other tech titans, many of which we laugh about today. Just 14 years ago, headlines proclaimed that “MySpace Is a Natural Monopoly,” and asked, “Will MySpace Ever Lose Its Monopoly?” We all know how that “monopoly” ceased to exist.

At the same time, pundits insisted “Apple should pull the plug on the iPhone,” since “there is no likelihood that Apple can be successful in a business this competitive.” The smartphone market of that era was viewed as completely under the control of BlackBerry, Palm, Motorola and Nokia. A few years prior to that, critics lambasted the merger of AOL and TimeWarner as a new corporate “Big Brother” that would decimate digital diversity and online competition.

GOP divided over bills targeting tech giants

Today, we know these tales of the apocalypse ended up instead becoming case studies in the continuing power of “creative destruction.” New innovations and players emerged from many unexpected quarters, decimating whatever dreams of continued domination the old giants once had.

Today’s biggest players face similar pressures, and it’s better to let rivalry and innovation emerge organically, not through the wrecking ball of heavy-handed antitrust regulation.

#### Perception—companies do not expect immediate statutory/legal changes—enforcement only affects a small slice of deals

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Brandon Zero, "Antitrust Deal Scrutiny More Storm Than Fury," Mergers & Acquisitions, 8-4-2021, <https://www.themiddlemarket.com/news-analysis/threat-of-antitrust-deal-scrutiny-seen-more-storm-than-fury>

What’s the forecast for regulatory scrutiny of deals so far this year? There may be more cloud cover than storms on the M&A horizon. New antitrust scrutiny and a longer review time are potential looming threats, but they lack the lightning needed to actually block deals.

Let’s look at these twin threats and the risks they pose to dealmaking. President Biden’s executive order has spurred the Department of Justice and Federal Trade Commission to increase scrutiny of deals in a move that, “if implemented by regulators and upheld by the courts…could lead to the most robust antitrust enforcement in decades,” writes Debevoise & Plimpton lawyers in a recent note. But that’s a big ‘if.’ The attorneys write that actually intensifying competition review standards would require acts of Congress and/or litigation. Both regulatory agencies have mixed records in courts. And it’s unclear if Democrats will defy the political gravity that has historically weighed down incumbent presidents’ party performance in midterm elections to win a mandate to rewrite antitrust laws.

What about the other lingering storm cloud on the periphery? A frenetic M&A pace has overwhelmed oversight body the Federal Trade Commission to the extent that it’s warned companies the expiration of the standard 30-day waiting period is no longer an implicit approval of a deal, Bloomberg reports. That creates a threat of enforcement even after deals have closed.

Amidst the merger deluge, a few high-profile deals have been challenged, but context is king: the handful of challenged deals represent a small slice of the year’s record value of announced transactions.

For starters, some of the highest profile deals challenged by the new administration’s antitrust regime represent merger dynamics that have always drawn intense scrutiny. Aon Plc’s proposed $30 billion takeover of Willis Towers Watson (Nasdaq: WLTW), announced only five years after Willis Group’s $18 billion merger with Towers Watson, was challenged by the DOJ as taking the industry from three competitors to two. So called “3 to 2” mergers have always been a bright line for regulators. And the insurance investment bankers I’ve spoken to for a decade about industry consolidation have long steered clear of attempts to marry those players or Marsh & McLennan (NYSE: MMC) out of fear of this precise outcome.

There are wild cards that could skew my forecast. It’s true that zealous enforcement of vertical merger review guidelines has created unexpected scrutiny of some sectors, and that agencies’ evolving theories of harm could disproportionately put tech deals at risk. But on the whole, the latest policy announcements may well be more thunder than lightning**.**