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Reexamining Antitrust in a Digital Economy

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>> DUSTIN LOUP: All right, everyone. I see you trickling in from the break. I hope you had a restful break because we're moving to a great discussion on antitrust so without further words, I'm going to hand this over to Ben Brody, Senior Report at Protocol who will be moderating this discussion.

>> BEN BRODY: Thank you so much, Dustin. I appreciate it. Hello, everyone. Welcome to Re-examining Antitrust in the Digital Aid and Dustin said I'm Ben Brody, Senior Reporter of Protocol

specializing in tech policy and I'll be the moderator. I have an exciting panel on the hottest issue in tech policy. In 1990s antitrust was a sleepy area of law yet as the power of tech giants in particular has grown more obvious competition policy has become increasingly high profile and would-be reformers are everywhere on both sides of the aisle and they suggest everything from increasing enforcement to going back to mid-century jurisprudence to incorporating workers' policy and politics of Silicon Valley. The government work product if you call it that has been remarkable. Google is facing three or four law suits by states and the federal government depending how you count. The FDC Facebook layout was dismissed soon and the agency is likely to soon refile and Amazon and Apple are under investigation. The House Judiciary Committee advance adds a major overhaul focused on four companies. In the broader economy the White House issued a sweeping order on competition last week and senators are working on all-sector proposals. Some view the develops as charter of economic liberties on par with the Boston Tea Party and others as a hatchet of the free system at the behest of failing competitors.

And we're going to get to all of those issues and explain how the fight reverberates in law, policies, politic, and business, but I want to get us started with a discussion with two experts to define some of the nuances and tensions on this issue. Elyse Dorsey is a Professor at the Law School at George Mason University and Justice Department Antitrust Division and FTC, and Rachel Bovard is Director of Policy at the Partnership Institute having spent years as top staffer in the Senate and House. Welcome to you both.

>> ELYSE DORSEY: Thanks, Ben.

>> RACHEL BOVARD: Thanks.

>> BEN BRODY: I would like for you to start how you think we got to this moment and how you hope it will go from here. Rachel, why don't you kick us off with that.

>> RACHEL BOVARD: Thanks, Ben, and everyone for having me. It's a great question because I think had you posed it five years

ago on the right, in particular, everyone would have just said, what? What is antitrust? What are we doing here? And I think, you know, largely the right has woken up to the threat of corporate power acting at scale because they've seen it in their perspective wielded against them and primarily through the big tech platforms. That's the perspective that many people have, but I think that that has triggered a lot of curiosity around how concentrated power operates in our market beyond tech. You know, you're seeing republican senators now talk about concentrated markets in pharma, in ag, in all of these places that I think, you know, before many of these republican senators would never have met a merger they didn't like. And so, I do think that there has been a little bit of a sea change. And you know, I think primarily it's also a philosophical change for the right because a lot of times, you know, for the last 30 years, I think the heuristic has been that you know this very sort of libertarian emphasis on no bigger threat to liberty than the government, and I think that that outlook has changed slightly to say that, you know, concentrated corporate power acting at scale with can also be a threat to liberty, particularly when it comes hand and glove with the government in an ideological fashion. So that is I think a motivating factor for many on the right who are now interested in antitrust enforcement. You know, whether or not it needs to be updated or does it simply need to be more robustly enforced, I think that is the sort of internal debate at the right at the moment.

>> BEN BRODY: Elyse, take it away.

>> ELYSE DORSEY: Yeah. Yeah. I think it's certainly a very interesting time to be in antitrust. Absolutely, when I first started working in the area several years ago now right, when I told people I did antitrust it was a lot of glazed looks with little interest, and that has changed pretty dramatically even within just the last handful of years. And you know I think a lot of us tend to see these kind of sea changes in antitrust, you know, throughout the last over a century now, right, since at least the Sherman Act was enacted we see the waves of populism in the country, and you know

each time we see that, we've also kind of seen a corresponding discussion within the antitrust world as to, okay, what is it that we should really be doing and with businesses how is it that we can make the free market work for us the way we want it to.

I think it's a combination of that plus these tech companies, you know, have really changed the market and the economy over the last several years. You know, so much of our economy now is focused on these tech areas and, you know, it's been expanding and we haven't kind of seen a populous wave yet that also has included, you know, all of the tech companies because these are some recent revelations, and so I think it's kind of a bit of a perfect form of a lot of, you know, Angst that you tend to see come up throughout history, and again all of these new tech companies doing a lot of different things and a lot of things, you know, that the public didn't necessarily know they were doing, doesn't necessarily understand very well, and a lot of kind of feeling like the government maybe isn't necessarily handling it the way it should be. So, I think it's a really interesting time to kind of try to figure out, okay, what is it that we're doing here and how do we continue to make sure that we get the innovation that we need from the economy, you know, that has been a reason that the U.S. economy has been so successful in the last several years. How do we preserve that? And I think that's come to the forefront of the discussion in a public way outside of just the antitrust part that's very interesting.

>> BEN BRODY: Yeah. I think you make actually exactly the point I was going to kind of follow up on, which is the Sherman Act was passed actually to tackle railroad trust and potentially never envisioned platform economics, multi-sided markets, zero price offerings, consumer nudges, dark patterns, so maybe, Elyse, you could start to tell us do you think the law is up to the digital economy, and is that maybe a difference between Rachel and you?

>> ELYSE DORSEY: Yeah. You know, I'll have to -- you know, I can respond and then Rachel can tell you if she disagrees with anything or what -- if she agrees with anything, maybe.

So, yeah, I think that's really important. So, kind of again going back to the Sherman Act in the very beginning, right, it's not necessarily a statute that in the same way that we think of modern one, right, where it's very detailed and explicit and a clear intent of what Congress intended to do. Right. There was a ton of legislative history and there is a discussion around what in the legislative history matters, but the statute itself is pretty bare bone, and so intentionally left a lot to the courts, really, to help be deciding the contours of the law to, you know, effectuate and make this very broad statute workable.

And I think, you know, the Court struggled with that for a while, like having that broad mandate. You know, like there was twists and turns. There was a lot of struggle within the courts early on to be consistent and figure out how can we develop a standard that is coherent and has predictable outcomes, outcomes that are predictable and not just in Justice Stewart's terms that the government always wins in these cases and how do we effectuate the rule of law here. There was a lot of that when the cases were in the courts. I think one of the things that's kind of gotten us to the present situation is, you know, over the last several years, the FTC and the DOJ, and I think this is in line with, you know, broader trends outside of the antitrust, right, but the agencies have put a lot of enforcement and used dissent decrees and internal killing deals and getting sent and cases before they ever got to the courts so that's part of the problem we see now is that the courts haven't had much of an opportunity to address these kind of cases so folks are kind of equating what may be problems with how much the FTC or DOJ are enforcing with what they can actually accomplish in courts. Some of these are really tricky issues, so when they do get to the courts, I think it will take some time to sort it out. I think there is a rush right now to have everything sorted and have it figured out, and I think a question of whether we're going to continue to let the courts play this really important role that they have traditionally served within antitrust, and you know as fact finders and using their comparative

advantages in the spaces, if we're going to allow that to continue, or if regulators will step in and try to bypass some of the courts.

>> RACHEL BOVARD: I do agree that I think the current standard can apply to a lot of current problems. I will say I'm will go to be convinced otherwise. This is the crux of the debate right now. Does the current standard actually apply? I would say I agree with kind of how Elyse laid it out in a sense that the statutes themselves are so value that prior to Bork and the Chicago School you saw enforcement swing wildly and there was no ballast and the consumer welfare standard arose to build that void and I do think antitrust enforcement needs an anchor and economic office and consumer standard applies that, but I will say I'm not a practitioner in the space and when I wondered into it I was a little taken by an the totem worship that I see around the idea of the consumer welfare standard that can't be challenged and at the end of the day it's a policy and we revisit policies and say the current harm is expandable under the standards we've been enforcing and I think in many cases what I think is a very good development in antitrust, which is again the anchor of the consumer well fair standard, has been almost very narrowed to this sort of fixation on price when you now have markets that are zero price markets, so how do we take -- I think the question is how do we take that sort of coherence that I think Elyse rightly pointed out, and translate it to the modern markets that we have. And I think I tend to agree that the current standard can do this and you do need a framework like it provide, but do we need a situation where we now start bringing cases where, you know, in zero-price markets, we're now saying, okay, there is no price but is there something else of value? What is the value in the transaction? Is it data? Is it privacy? Is it things like that, that I do think that the consumer welfare standard can act upon but it's going to take a little more novel legal theories and testing out and making more robust effort at enforcement than we've currently seen, because to Elyse's point, I think a lot of frustration that I hear from members of Congress is that while we haven't enforced, and we look back at what is it 750

mergers and acquisitions over the last 20 years in digital space and none actually received any critical review and is that something that should continue, can we continue under the current standard, or do we need to upgrade it in certain areas, and that's where I think you're seeing some agreement across the right, everybody from Josh Holly to Amy and Mike Lee saying the current status quo isn't work so what do we need to do to update it, and they have markedly different proposals to see that but I do think you see consensus around the idea that we may not need to upend the framework but we need to tweak it to make sure it's applying in the full remit and full capacity.

>> BEN BRODY: Elyse, I wonder if you could weigh in as our sort of top legal practitioner in the state of the welfare consumer standard as practiced or annunciated or just if there are other changes that you would make, resources, merger filing fees, clearance processes. There are a lot of things in the bureaucracies we may not think of but that you think could bring out more fair competition or more robust enforcement if that's what is needed?

>> ELYSE DORSEY: Yeah. So, you're hitting often all of these very important questions that, you know, the courts, legislatures and agencies are struggling with right now. I will say that I feel like there is a bit of a persistent misconception about the consumer welfare standard and what it does and alleged fixation on price, so I spent the last few years at the agencies and, you know, a few years before that in private practice, and you know the whole time, right, the price is a very important thing and I don't want to undersell the importance of it because it's where we have a lot of -- you can often get a lot of value out of price evidence, right, so it often tells us a lot about what we think a merger is going to happen, and if we're also talk about redistributive effects within the economy, you think about, you know, the price effects on say like a grocery store merger or hospital merger. And if those are going to make prices go up, then the people who are most hurt by that are the folks with the least household income with the least amount of wealth, you know, who can't afford really any kind of

increase in prices. So, it's very important and like there is certainly you see this reflected a lot in the case law, and there is a lot of discussion about prices. But when the agencies are looking at these cases, it is far from the only thing they're considering, and so you know I worked in the front office of the DOJ and FTC over the last few years and saw a lot of cases come through, and just in my experience, there wasn't a single one where the staff came to us and, you know, were presenting a case in their analysis and only looked at prices. They're always looking at kind of what else is going on, how do we think these companies are actually competing in the market today, and what does that look like? Like what's driving the competition? Is it on quality terms or is it on innovation and introducing, you know, new updates or what be it? And so I will say kind of to that point, I also took a look at, you know, public merger complaints that the DOJ filed over about a 20-month period, and you know just to have some publicly available data on this. And there wasn't a single one of them that relied solely on alleged price effects and every single one of them included other alleged harms like decreases in quality, reduced innovation, R&D, lower services, that consumer choice was going to go down, and so I think that there is a bit of a struggle in some things getting lost in translation when this is, you know, coming to legislators and folks outside of the antitrust world because you know the consumer welfare standard really does do a lot more, and again to get back to the point we've been discussing a little bit so far, right, the courts don't necessarily see all of those cases. So in the cases that I mentioned, the merger complaints that were filed, I forgot the total, but there were only a handful, only a couple I think actually, that actually got to the court and most were filed simultaneously with a consent decree, so you don't see court cases where the courts themselves are grabbing with what does the consumer welfare standard mean, and in this case where innovation is, you know, we think innovation is the crux of the problem so how do I address that as a court and what are the limitations and how do I decide whether there is a violation.

So, I think part of that is, you know, the real struggle here is that it's not necessarily obvious of exactly what the consumer welfare standard is capable of because you know, some of these things are either ending before they get to the courts or you know the agencies are letting them through and there is not, you know, in the public arena this like really, you know, robust discussion that you see in the courts where you can figure out some of the contours. So, I think that's part of what's been lacking in leading to a lot of discussion that we're currently having.

>> BEN BRODY: Rachel, I'm going to put you on the spot a little bit here. What are some of the changes that you might want to see whether it's in the consumer welfare standard, the bureaucratic setup of the two agencies, the legal focus and standards that enforcers are dealing with?

>> RACHEL BOVARD: So, I think, you know, with when we talk about this kind of price fixation perhaps it gets inflated with an overall concern of sort of privacy of economics, right, when we look at how that's antitrust cases are assessed and then brought. And I think there was a lot of frustration maybe to highlight this in sort of when all of the documents were leaked from the FTC, when we actually saw how the sausage was made and why the FTC decided not to bring a complaint against Google in 2013 and I think that highlighted for people the remit antitrust law is law enforcement. If anticompetitive intent and harm is taking place the laws are supposed to address that. Yet what a lot of people took away from that is that you have this privacy of speculative economics, basically, you know, speculative case claims being made that ended up being wrong about the mobile market, about how search -- how data add tracking would work and all of these things that didn't actually pan out. That is what sold the FTC commissioners over and above actual evidence of anticompetitive intent. You had actual emails from Google executives saying, quote, we're going to own the market, you know, things like that. And so, it's interesting to see legislators respond to that because I think that's when, you know, we talk about the fixation on price, you know, and Elyse is right

that there is -- we need to be specific about it and I think it does conflate with overemphasis on economics which was never the intent. If you go back and read Judge Bork, he warned about the economic extravaganza where we over-rely on the speculation which is what it is, completely speculative about what will happen in the market. Mic Lee, actually when he introduced his antitrust bill, I think one of the maybe undersold parts of it is that I think it's Section 509 which basically says that look, if you have actual evidence here, and doesn't use the term email, but he was talking about anticompetitive intent, and that is presumed, the Court will deem it anticompetitive and we take you at your word because in his mind, that's not happening in these cases right now.

And so that's one change that I think would be very helpful. And then another thing that I think is built out is that it says, look in concentrated markets we're going to presume and make an assumption that these are illegal under antitrust laws and I think putting that into statute would be helpful. And then I think his bill also sort of goes toward this idea of making sure that, you know, if we are going to keep the consumer welfare standard it's maxed in full, we're actually putting it in the statute because the consumer welfare standard, the Congress never voted on it, Congress never wrote it, it sort of became the judicial theory that we now apply in the cases, but I actually I think taking it and putting it in statutory form gives it the full remit. There are other senators that disagree with that. You have Josh Holly on the other side that would have been the consumer welfare standard completely and put in a competition standard and I would like to see the senators make a case for that because, again, it goes back to the idea and actually Dan Oliver, Ronald Reagan, FTC Chair wrote an essay about this that antitrust; again, it's public policy and we constantly need to be going back to see if the public policy is doing what we want it to do, so that's the debate that the right needs to have. I'm sort of open to all of these proposals, and I tend toward keeping the current system in place, but if it's not actually -- if current harms are not cognizable under the standards

we have in place, we need to ask why and we need to make those changes.

>> BEN BRODY: It might be worth it for our audience and Mike Lee is of course the top republican on the antitrust committee in the senate and previously chaired it, so what he says, obviously carries a lot of weight. Elyse, I know we're going to lose you in a minute, so I'm going to give you the last word here. What, (Laughing), what is the thing you think policymakers, judges, lawyers, enforcers, companies themselves, what is the worst thing that they could do in the near future, maybe the worst sort of plausible thing it they could do to up end free enter prays and competition.

>> ELYSE DORSEY: I think in the antitrust space in particular my biggest concern right now is really ignoring the history here. Right. So there is, you know, Rachel mentioned the privacy of economics and I think there is a couple of different things going on in at least what I heard you were describing, and some is that all of this is speculative. When we talk about mergers FTC and DOJ are constantly trying to predict what they think is going to happen, so there is that side of it. The part that I'm concerned about is, you know, when antitrust was trying to do more than figure out the economic harms, when it was trying to achieve sociopolitical goals, it So, really was a whole mess, even Milton Handler an antitrust advisor for FDR, who was you know the trust buster, criticized the holdings of antitrust law at the time being quote embarrassing holdings which no one theory can fully explain short of regarding the cases as fundamentally opposed to each other, end quote, so I think when the Congress and legislature and policymakers are thinking about what to do here, it's really critical that we keep in mind what antitrust has proven that it is capable of doing and what it's not capable of doing. And the struggle with, you know, trying to weigh economic values against socio and political values in the same space. Right. If you're at court and you're getting, well, it's going to help these economic values and maybe hurt these sociopolitical values, you know, how do you as a court weigh them in

a way that is, you know, what the public makers want and vindicates what Congress and the legislators and the policymakers are trying to achieve. I think it's a lot of really complex and really important questions.

>> BEN BRODY: Well, I want to thank you both so much for being here. Rachel, we're going to hold on to you for the next section. Elyse, thank you so much for being here.

>> ELYSE DORSEY: Yes. Thank you so much for having me.

>> BEN BRODY: All right. I want to bring on two more panelists to the discussion, Dr. David Teece is an economist with more than three decades of experience in industrial organization, competition, and technology who served as Chairman of the Berkeley Research Group, and Ling Ling Ang is Associate Director at Economic Consulting and one of the original economists at the Consumer Financial Protection Bureau. We're really glad to have them both, and while they're getting situated, I'm going to encourage you all to add your own questions. And again, for our panelists, I'll try to get to them as we go; although I think they'll have a lot to say, and put aside a little time to discuss.

So, welcome to you both. David and Ling Ling, I'm actually just going to start you off with a phrase that Rachel used earlier on, if again, you were watching, the privacy of speculative economics. That's one of the big criticisms of current antitrust practice from left and right, it gives too much power to economists, makes enforcement expensive, justifies conduct that lawmakers sought to ban and subjects courts to unresolved sort of speculative debates. So, since the economists actually outnumber us here, I wanted to ask how do you make sure economists are contributing to really healthy competition and is there something that you would do to help improve the practice? Maybe we can start with you, David. You're on mute. David, I think you're on mute. Should be on the lower left for you. If I'm capable of unmuting you, I will. Ling Ling, do you want to pick that up while we work on the mute button?

>> LING LING ANG: So, you know, of course as economists we do

think we add value, and I think that in terms of the analysis, my work is primarily been in litigation; although, I do some merger work as well. What I would say is that the value that economists add is an intellectual framework as well as applied rigger. I'm not going to beat around the bush. What we do gets expensive, but part of that is, honestly, the vast amount of data work that we do, I would say particularly in financial services. If you think about the data we're working with and just how you interact with let's say your credit card or bank account, that's multiple transactions a day, potentially, across years and years. And this is data that is large and not evenly spaced. So, part what have we do is we figure out what the story is and piece it together empirically. David, I'm going to throw it over to you. It looks like we have you back on the line.

>> DAVID TEECE: Yes. Thank you very much. It's a very important point here, and I don't think the problem is speculative economics per se. I think the problem is what I call static economics. I've been beating the drum for at least a couple of decades saying that the economists need to breathe innovation into their models because the primary driver of competition in any case is innovation. And the whole economics framework that we inherited from Chicago and post-Chicago folks and so forth is inherently what I call equilibrium economics, the stuff that economists are familiar with, but it's not the stuff that is useful for understanding the digital economy or the innovation economy.

So, I think a lot of dumb decisions were made by the agencies in part because they've been looking with a wrong lens, so it's a very important point because I don't think there is as much wrong with the law as there is with the economics. I think the antitrust laws are actually sufficiently flexible as was already pointed out, but I think if we put innovation front and center and favor innovation and favor the future at the same time, we'll end up with much better policy, and that goes to the consumer welfare standard. I think it's salvageable if we adopt a long-run consumer welfare standard. I mean I know that there was a statement earlier that,

well, actually under consumer welfare the agencies look at innovation, but I can tell you that it's my experience that it's always as an afterthought, and if they see a price effect for an 18-month period or what have you, that really gets the whole exercise and they should focus instead on innovation and what's going to drive innovation the most whether it's from big tech or small tech, it's innovation which drives competition and I think if we had a new economic framework, we wouldn't necessarily have to monkey around with the law. And I think there is a lot that our profession of economics has to answer for. We stick with static approaches because they're the easiest ones to work with, not because they're the right ones to work with. So, I think it is kind of a shame that we are where we are and looking to change the law when the real culprit is the economics.

>> BEN BRODY: Well, we'll have you say that at the next economist meeting.

>> DAVID TEECE: No, it's not popular amongst economists, but I can tell you that there is a growing beat, a growing drum beat to recognize that, you know, when you're dealing with a digital economy, most of the operators and tools and insights are of the past and not particularly useful, and there is talk referring more money to the agencies. I don't think we need more money to the agencies. We need different economics. Just reallocating the same money to a different intellectual framework would all be better off.

>> BEN BRODY: Let's talk about some of the newer stuff that's happening. I think one of the particular advantages that we have here is we're coming right after the Biden Executive Order last week, and so much of the conversation in the antitrust over the last couple of years focused on the big four tech company, but this order is about telecom, FinTech, health, it's about the whole really federal rulemaking apparatus. So, Ling Ling, maybe you can take us through this initially, but I want to hear from everybody. What do you think might be the biggest result of this order that we had last week, and do you think it points us in the right direction or not?

>> LING LING ANG: So, I think obviously it's going to focus

more attention on financial services. We have seen things moving in that direction already, particularly with the DOJ's, financial services, FinTech, and banking section coming into effect over the past few months. One of the things that I want to say about what direction it's moving us in is when looking at the Executive Order, something that really caught my eye is the data portability discussion around banking and FinTech.

So, the way that I read, and I'll admit the summary and it's been a busy couple of weeks, but Ben, thank you for giving us homework.

>> BEN BRODY: I always wanted to be a professor. (Laughing).

>> LING LING ANG: I mean it brings this out of the weeds, and thank you that was a really good read. So, something that struck me about it is the comparison of FinTech to banking, and I suspect that was oriented toward the consumer. I think the actual role of FinTech is more complex, given the complex way in which financial services are, basically produced. So, you have FinTech at the consumer level, which you can think of as things like non-bank lending where the FinTech is front and center to the consumer. But there is also a lot of backend in FinTech, which is basically B to B, and so I don't know how much attention that we'll see in the future, but it's important to note that that is there too.

Also, I think that the dichotomy between banks and FinTech isn't exactly right. In fact, many banks partner with FinTech to expand their capacity. So, in terms of financial services, it's obviously a heavily regulated industry. You have both the Prudential regulators like the Fed, the OCC and the FDIC, and you also have the CFPV in certain instances as well as state regulators. So, there is potentially a lot of tech in the background, particularly given the compliance requirements. A small bank may decide to use vendors rather than build out its staff, and I think that's something that will potentially receive more scrutiny in the future.

I'm going to continue talking in consumer welfare world, but something that's I think particularly interesting about financial

services is that, and I think there is an analogue to this in big tech as well, but the products are relationship products in a sense that you open a bank account and a credit card and it's not just about that tiers moment of contact with the consumer, but there is this lengthened relationship where you make your monthly payments and so -- like let's just use the example of a loan because I think that that is something that most people are familiar with and can digest. So, let's say you have a mortgage, you're not only concerned that you made the initial loan but you're also concerned about the flow of payments, as well as what happens if that loan prepays. So, it's not only about initial contact but it's about what happens over the duration of the relationship. And one risk is that the relationship ends before one expects it to, and that can happen through default, that can happen through prepayment, but there is essentially this valuation of the relationship. And I think that when we think about concepts like data portability, something to keep in mind is what that does to expectations about the relationship both from the consumer perspective as well as from the firm perspective.

>> BEN BRODY: Rachel and David, I want to bring you into this. Do you think this Executive Order components on FinTech or telecom and other areas, are they pointing out in the right direction? Is it a good first step toward something or is it pedaling backwards?

>> DAVID TEECE: Well, this is David. I'll just say a few remarks. One, I did like in the Executive Order the emphasis on innovation as a driver of competition. But when it comes to data and data portability, I don't think people have thought through very carefully what the implications of this might be.

If big tech, whether it's European, American, or whatever has to open up and make data portable, the incentive to collect it is going to go way down, the incentive to compete with proprietary datasets is going to go way down, and data security problems are going to go way up. So, I don't think anyone's really thought very hard about this. This is not quite acting on it and something

that's way more complicated and guaranteed to have enormous disputes over the data and who should pay who and how much, and I think that to quote Sam Palmisano the former executive at IBM, the person is probably pleased with all of this as Binge because it's likely that we give away the lead in AI if we stop fragmenting big data and dampening the incentive to collect it as a nation then we're more likely to lag in AI and there are consequences of that that go way beyond competition policy.

>> BEN BRODY: Rachel, is this the right direction?

>> RACHEL BOVARD: So, I do think that, you know, more critical analysis of concentration in the economy is a good thing. What I'm concerned about is the way I see this Executive Order is it's not going to do that in a way I think is appropriate, which is again bringing antitrust cases and actually just window dressings for regulatory effort on a lot of fronts, I see them as distinct. There is an effort to conflate regulation and antitrust but I think it's quite distinct and I think antitrust is a much better tool, you know, around I don't want to throw too much So, shade on the economists because I do think that economics is a actually really big important part of antitrust because it does give that very sort of very specific analysis that is very important when you do bring these cases and it's why I think antitrust is almost a better tool to address concentration because it can be very specific and designed to be that way. Regulation on the other hand is sort of one-size-fits-all broad bite at some of these problems and so if it goes in that direction, I don't think will be nearly as helpful as if it was instead sort of focused on bringing the enforcement cases through the lens of antitrust, and I think that remains to be seen.

>> BEN BRODY: Great. I'm going to grab actually a question from the audience, from Susan. She asks, how can antitrust address the opaque business practices firms used to collect and then monetize troves of personal data, taking data not central to functions, et cetera, is that an antitrust problem, is privacy and data collection antitrust problems? Is it a personal data protection problem or inadequate governance problem? That's a jump

ball for whoever wants to take it.

>> RACHEL BOVARD: Maybe I'll give my two cents and let the real experts weigh in here. I sort of mentioned this in the beginning. I do think that this notion of data can be particular to antitrust, and I think perhaps with the big tech companies it should be. I don't think it currently is. But what we're talking about is with these zero-price markets, the parcel of exchange is your data. It's what's driving the transaction. You give your data, which is monetized into ad revenue, in exchange for the ability to post your content and view the content of your friends.

You know, in our contract law, right, we say that anything of value that's traded is the basis for enforcement, so why is that not the case here in our antitrust law? So I do think that's going to require more novel legal theories and people to bring cases under that and I don't think anyone has, but I do think that antitrust can work around these data markets, you know, and perhaps get at some of how these big tech companies operate and bring sort of, you know, if there is anticompetitive actions around that, they can address that.

Now, data privacy at large, I think that is a question of policy. Right. I don't think antitrust can actually address what I think has to be a policy question for lawmakers and that's a separate one.

>> BEN BRODY: David, Ling Ling?

>> LING LING ANG: So, I'm going to lead into what I've just been doing for the past decade and go back to financial services which I think is an interesting area because there is interest in actually more data versus less data in that area, particularly for underwriting. So there have been discussions about using alternative data which differs from standard credit scores and standard information that the banks have, and it really opens up a bunch of questions. The first is, let's say that consumers have full data portability, what does it mean or what signal does it send when you don't want to share your data and you kind of want to leave your last bank account behind you, or your history with your last

bank account behind you. I think that that introduces a lot of interesting effects that will involve careful analysis, but that's kind of a question that I want to raise.

Also, I think that it would be helpful to think about what it is. Like does this additional data element necessarily change prices or attributes for a consumer, or is it just more data? And what's the tradeoff? I know that there has been a history of, well what happens in your data is wrong, and does it positively affect you or negatively affect you?

I just think there are so many questions that are, basically, about the effect of data in corporate decision-making, and I know we go back to this and the role of economists, but I think that it's valuable to think through these questions and to also hopefully dig into it as well.

>> BEN BRODY: David, do you want to take a swing at that?

>> DAVID TEECE: No. Only to say I think it's a deep quagmire and not willing to step into it right now. Anyone that thinks it's simple and straightforward is wrong.

>> BEN BRODY: Fair enough. I want to turn your attention to the recent package of six antitrust bills that the House Judiciary Committee advanced a couple of weeks ago and to remind everyone, let's see if I have the list right. Bill on venues to state forces, filing fees, data portability, interoperability, discrimination requirements by big platforms, one that clamps down on mergers and all but bans them really by the biggest platforms and perhaps the most controversial one that allows government to seek split-ups when there is a conflict of interest by these major platforms.

So, there were a lot of questions about how wide these should go, should they focus on the big four or go bigger? Were they already focusing on more companies? So maybe, David, we'll kind of start with you. Do we need competition rules for big tech only, or should they go broader? And if these were to pass, what do you think some of the provisions would be that would affect other sectors, and a maybe how or who would be fitting it split-ups as a result?

>> DAVID TEECE: Well, I don't think we need special rules for big tech, but we do need to rethink the nature of competition. The standard sort of industrial age view of competition and markets being defined by industries is kind of all wrong, in my view. You know, it's usually ecosystem to ecosystem competition and it's what I call broad spectrum, so Google is competing with Amazon and Apple and the companies, the big companies are not really staying in their swim lane, so folks have sort of tabulated traditional concentration ratios and in my view, are not doing a meaningful exercise of what's going on. In general, they underestimate the amount of competition there is and the amount of, quote, monopoly there supposedly is. I think many of these companies are profitable only because they stay good and they stay efficient. A company like Amazon is profitable not because it's engaging in monopoly pricing, but because it has an incredibly efficient operating model that is very much driven on AI, and it's able to run its delivery mechanism and whole production system, if you will, so much more efficiently than the companies it's competing with. So, I think we have to really look hard at the way in which we calibrate competition, and I think with we do so we'll find that there is a lot more competition than most people think. That's not to say there aren't issues because there clearly are, and I think that mergers have been mishandled in part because we don't have a good theory of potential competition, and that may be what you're referring to earlier with the speculative nature of economics, and in my view, you know, you need to kind of understand capabilities of firms to understand their likely future trajectory, so a lot of the speculative mistakes that were made are because we've got the wrong theories about firms and enterprises, and that comes back to my point at the beginning, that we need innovation economics to inform a marketplace where digital competition and innovation are front and center, and until we do that, we're going to keep making mistakes after mistakes.

>> BEN BRODY: Ling Ling, Rachel, do we need competition for big tech and are other people going to get swept in here?

>> LING LING ANG: Please go ahead, Rachel.

>> RACHEL BOVARD: So it's sort of interesting to look at the house and senate approach at the same time because the House, I think in a well-meaning effort was trying to deal with big tech potentially or unintentionally to the big economy and that's why some of the senate approaches put out reforms for the entire economy, but what was striking to me about the House bills is I think they almost tried to split the baby too much because I think Congress has a choice and they can either go in and very aggressively dictate how they want the companies to act, perform, and be in the market and be very clear about it, which these bills were not, or they can, you know, update the antitrust laws such that those laws will do it for them, which they sort of tried to get at but didn't. I think they have to choose one or the other for this to be an effective approach. I do think, personally, I don't think you can go after one sector effectively without it rippling into the entire economy, so you might as well just look at the whole state, you know, of our antitrust laws versus the economy and reform it there which I think is what the senate is trying to do.

But you know I think people forget to, when you were looking at these House bills, our legislative process is iterative and we haven't seen it in so long that we forget that this is an iterative process and what they put out is not going to be the final product and I think it's the first time in decades that you see Congress grapple with a private policy which implies when they were trying to break up the holding companies that was the last real public policy analogue we have for this. They didn't get it perfectly right I don't think in this effort, but I do think that, you know, it was interesting to me that this wasn't party line and you had a lot of cross partisan effort to try to get this done which tells me that, again, this is an iterative product and this is step one and I tend to think you're get to a whole-of-economy approach before you get to a single-sector approach but this is going to be an ongoing battle for them over the next several years.

>> LING LING ANG: I think something that was interesting in a set of six items was the increased focus on states, and what we're

seeing more and more of, and this is by no means a representative sample of essentially things like when I'm looking at recent case filings is cases that are filed exclusively understate antitrust laws, which is something that I don't think I've personally seen until probably the past year or so, and I think that that is potentially something that we'll see more in the future. One of the cases that comes to mind is the (?) coffee versus visa which is basically a cartel case that alleges Visa and Mastercard are using market share to keep credit and debit card fees high that has similarities to U.S. versus Visa from about 20 years ago, and something that strikes me about the contrast of the two cases is just the time that has passed, and the fact that industries outside of big tech are evolving and there is the potential for entry due to changes in the underlying technology, like if you were to look at a payment terminal in the 90s, it would literally be wired to the network, but now there is a potential to do things completely wirelessly, and so that potentially changes the landscape and I think that financial services is not the only place that we're seeing that evolution, and like David said, we have to think about innovation and I think that the key here is to really think about the applied problems that we see and for the folks who do the policy and economics but they're not intertwined, to look towards what is actually happening in tech and how that might change, how we think about particular applied antitrust problems.

>> BEN BRODY: Great. I'm actually going to take another question from the audience but it's something that we all discussed a little bit before. What is the greater risk? Over or underenforcement? We obviously want dynamic and innovative economies, so what is the greater risk and which way do you think enforcers have been leaning more in recent years?

>> DAVID TEECE: I'll have a go at it if I may. I think the greater risk is that we're going to go too far too quickly. It's like we did nothing for a long time, and then all of a sudden, we're trying to do everything, and you know if I'm right that the underlying intellectual framework is inadequate in economics and not

up to the task, we really need some serious research that's, you know, around dynamic competition and really understanding it and operationalizing it.

So, you know, I would sooner see some small steps here, but vigilance and serious effort to really come to understand the nature of digital transformation in the economy and the new forms of competition that are ecosystem based that are emerging. I see economists have all jumped on to what is all about platforms, isn't it, so 95% of the profession is jumping in and redefining the antitrust problem as a platform issue, and platforms just want a piece of it. And I see that in Europe where, you know, the UK they're talking about let's set up a digital platform division or whatever of their antitrust agency or competition agency, and no, let's infuse another state of innovation through the entire agencies, whether it's a federal trade commission or Department of Justice. You know, setting something up in the corner and not letting it sort of impact the entirety of what we do is not the right approach; although, it may be or could be a temporary first step. But I do think that there is a real serious danger, a policy error when we don't really know what we're doing.

>> RACHEL BOVARD: I mean I think right now we're living in consequences of underenforcement. I think that's been it for the last 30 years or so, and I think unprecedented levels of concentration, particularly in the tech sector are the result. So underenforcement, I think, is a risk, but I think to the point that David just made, the pendulum is swinging wildly right now, and no one knows where it's going to stop yet. And I think, you know, obviously if you -- you know, if you listen on both sides. If it stops underenforcement, the world is going to end and in other way the world is going to end. So, I think probably hopefully it will stop somewhere in the middle because where I sit, we have antitrust laws for a reason and they work and there designed to protect the marketplace. So, I think getting that enforcement right is paramount and whether that comes with a number of statutory policy changes that sort of govern the outer bounds of what that looks like

that's where we could see a lot more top-down control than a lot of us are comfortable with. But robust antitrust enforcement is a due process policies, right. It's a matter of law, and so I think if we are -- the right step is to enforce the laws as they exist. Turning our back and ignoring that, I think will be detrimental to the free market as we've known it.

>> DAVID TEECE: I would agree with that 100%. I do think that we have to enforce the laws as they exist, and there is less wrong with the laws than there is with our understanding of competition in my view. So that's why the focus should be less on legislative change, more on doubling down, tripling down on understanding the nature of competition, and that may involve some experimentation with cases that we can learn from, but it's sort of a whole change in the law I think would be a big mistake.

>> BEN BRODY: Ling Ling, did you want to add anything?

>> LING LING ANG: Yeah. So, I do think that it's possible for us to operate under the current framework, but I think another thing that will be interesting over the next few months, if not years, is seeing where the focus is on industries beyond big tech. I think that the choice of cases can be driven by basically what's hot and what's top of mind, so I hope that there is also an intellectual motivation behind what cases are of interest in addition to a focus on what's top of mind and what's in the news.

>> BEN BRODY: There you go. We have just a few minutes left, so I'm going to put the same question to you three that I put to Elyse before she left. So, what would be the worst thing or worst reasonably plausible things that lawmakers, enforcers, courts, and businesses, could do to antitrust policy in the coming years and really overturn our fair competition system?

>> RACHEL BOVARD: So, I actually agree with what Elyse said at the end. You know, I think her point about using antitrust to enforce socioeconomic goals and sort of anything in that vein, I think that that's -- that would be a very bad outcome here. Right. Antitrust, again, is competition law. I think any time you try to infuse more than that into it, you're going down sort of a path

where you're subverting the point of what the laws exist to do. So, and in many ways, I think a lot of people think or characterize sort of the brand era as that where you had judges sort of pushing their own progressive policy goals into enforcement. There is obviously debate about whether or not that's a correct characterization, but I think a lot of conservatives view it that way so any attempt to do that would be a very negative outcome in my view. I think we can still update the law and make sure that it's actual enforcement goals are being met without doing that, so I don't see this as a binary, but I agree with her that that would be a very bad outcome.

>> DAVID TEECE: Yes. And I think that there are really two things going on at once and we need to separate them out. And that is that there has been a challenge to the Constitutional rights of everybody of Americans by big tech. And to confuse that as a competition issue, rather a free speech issue, I think is a major problem, so we need to move that clutter, very importantly, to one side and deal with it and not confuse it as a competition policy. It's not the consequence of a quote, big tech monopoly. It's a consequence of, in my view, you know, excessive controls by big tech on free speech that is not fully balanced and representative of the American people and of the Constitutional rights. So dealing with those issues so they don't cloud competition policy issues is very important, and I think they need to be the priority and give us a little bit more time to figure out the true competition policy questions to recognize that those competition policy questions do interact with technology policy and industrial policy, and we can no longer compete globally in a world where other countries are using competition policy in an integrated way with the technology policy and industrial policy, and we'll be incredibly naive if we don't look at the international dimensions of what's involved here. But so far, I see almost no attention to it by anybody, and I think that's also a huge policy mistake or potentially lays the foundation for a policy mistake and potentially a national security mistake.

>> LING LING ANG: So, I agree with David about taking a broader international view. I mean, we're dealing with

multinationals here and I think that understanding how U.S. policy fits into a broader global framework is extremely important. I also think that given the complexity of various sectors, I hope that we don't lose sight of how deep the institutional detail is as well as how important it is to not only be empirical but update the empirical analysis with the times both in terms of innovation as well as in terms of breathing in new economics into the analysis or new economic techniques into the analysis.

>> BEN BRODY: All right. Well, I think that is our hour, or that's our hour exactly on the clock. I want to thank Rachel Bovard, Ling Ling Ang, Dr. David Teece for being part of this panel and thank you all for viewing.

>> RACHEL BOVARD: Thanks.

>> LING LING ANG: Thanks.

>> DAVID TEECE: Thank you. Bye.

>> MELINDA CLEM: That was an exciting panel and fresh perspective because we've never taken that sort of approach on an antitrust panel here at IGF USA, so I really appreciate the different perspective. So close to innovation and stepped away at some of the traditional looks of how we measure antitrust so really informative.