UNITED STATES OF AMERICA

Federal Trade Commission

Opening Address of Commissioner Noah Joshua Phillips[1]

Competition Policy in a Changing Political Landscape: Time for a Reset?
Chatham House

November 10, 2020

I'd like to thank Chatham House for the invitation to participate in *Competition Policy 2020*. Chatham House has an incredible history of bringing people together to address issues of international concern. Competition law and policy are now among such issues, and I'm humbled to join this excellent group of friends and colleagues from around the globe, including Fred Jenny, Andreas Mundt, Michael Grenfell, Olivier Guersent, and, of course, Assistant Attorney General Makan Delrahim. I will keep my remarks brief, but I hope they will stoke conversation.

The sub-heading of this conference asks whether it is time for a reset in competition law and policy. My answer to that question is, emphatically, "yes, but". **Yes**, there are aspects of competition law that have needed another look—and, in many respects, competition enforcers are resetting already. **But**, many of the

[1] The views I express today are my own, and not necessarily those of my fellow commissioners or the Federal Trade Commission.

arguments being made about competition law can and should remain outside its purview; and many of the policy proposals being pushed based on those arguments simply are not warranted—and will not help.

The state of competition law circa three years ago was not perfect. But nor does it reflect some sort of massive policy failure. For example, while the massive American technology firms that are the topic of constant international conversation warrant competition (and other) scrutiny, the soup of tinkering and investment whence they emerged remains a policy *achievement*, not a failure. The world—and America—needs more Silicon Valleys, not fewer.

First, the reset. While concerns about and the discussion regarding competition are by no means limited to the technology sector, it goes without saying that the conversation is preoccupied with tech. At least in the U.S., there is reason to believe the conversation in general would not be nearly as loud—or as far along, so to speak—were the tech sector not the object of conversation. Enforcers and policymakers should focus more on issues characteristic of technology markets: acquisitions of nascent competitors, two-sided markets, zero price markets, and so forth. But let's take a look at the past two years: with the U.K.'s Competition and Markets Authority, the FTC blocked Illumina's acquisition of PacBio; last week, the DOJ sued to stop Visa from buying Plaid; the week before, they sued Google; and the FTC is in court suing Surescripts, a case involving two-sided markets in electronic health records. Not everyone will agree on every case, and I'm not

endorsing every one. But the focus is resetting already. That may not be enough for some, including some here today; but it matters.

Second, the risk of dramatic and harmful over-correction is real. And one reason for it is what strikes me as a fairly obvious distinction between the facts alleged and the remedies sought—a bad recipe for policymaking generally. Take the report on digital markets recently released by the House Subcommittee on Antitrust, Commercial and Administrative Law. The Report is a searing indictment, of four companies. It lacks, for example, any real recognition of some of the benefits the companies in question bring to consumers, which we saw in report after report from this side of the Atlantic. While the report focuses on four companies, the policy proposals at which it arrives cut across the entire economy. That is categorically different from, for example, the Sherman Act, a wide-ranging law based on concerns that targeted a form of organization ranging widely across the U.S. economy at the time. That distinction, between the facts and the remedy, should give us pause.

Consider also proposals to change competition law to address income inequality, racial injustice, consumer data privacy, the relationship between labor and capital, the proper allocation of rights to govern a corporation—everything but competition. The point is not that such issues do not warrant conversation. They surely do. But it is not at all clear to me that they are issues that stem from competition problems, and so it seems counter-intuitive that competition solutions

will solve them.[2] Too much of our international conversation combines a desire for massive government intervention in the economy paired quite oddly with a naïve belief that firms will compete away every societal ill imaginable. That doesn't even make *internal* sense, and it neglects the roles that taxation and regulation play.

By the same token, it makes little sense to view competition law as a mechanism to hurt companies that, for reasons unrelated to competition, some people—notably, not speaking *as consumers*—don't like. In the U.S., it seems like once a week when some politician, expressing displeasure about one tech giant or another, professes exasperation and says "break them up!" What, precisely, is that supposed to solve, and how? Take privacy. It *might* very well be that more competitors will lead to greater privacy for consumers. But the profit motive hardly dictates that outcome; and in some cases, increased privacy could limit the ability of firms to compete.[3] Or take content moderation. If you don't like a label Facebook has slapped on a post or a click-through requirement Twitter has applied to a Tweet, it's not clear to me what breaking one or both of them up will do.

---

[2] *See* Noah Joshua Phillips, *Is antitrust the next stakeholder capitalism battleground?*, FORTUNE (Sept. 26, 2020, 7:00 AM), https://fortune.com/2020/09/26/ftc-antitrust-laws-corporations-stakeholders.

[3] Noah Joshua Phillips, Commissioner, Fed. Trade Comm'n, Should We Block This Merger? Some Thoughts on Converging Antitrust and Privacy 11-16 (Jan. 30, 2020), https://www.ftc.gov/system/files/documents/public_statements/1565039/phillips_-_stanford_speech_10-30-20.pdf; Noah Joshua Phillips, Commissioner, Fed. Trade Comm'n, Remarks at the Mentor Group Paris Forum 11-17 (Sept. 13, 2019), https://www.ftc.gov/system/files/documents/public_statements/1546405/phillips_-_paris_forum_9-13-2019.pdf.

Too frequently, these calls to break up large firms are framed as a type of ultimate punishment for companies that have done wrong, in the same way that a harsh prison sentence is punishment for an egregious crime. But antitrust is a not a morality play, and divestitures are not about punishing the wicked or bringing low the mighty. They are, rather, an intervention to remedy specific competition harms and leave consumers better off. In addition to ignoring the notion that remedies are intended to address harms—and that not every kind of harm warrants the same kind of remedy, especially where businesses have little in common—this rhetoric ignores the poor track record of breakups actually working.[4] As Professor Herbert Hovenkamp recently wrote, "[for] most antitrust problems that do not involve recent acquisitions, structural breakup is not promising . . . [and] [t]he history of structural relief in American monopolization cases is not pretty."[5]

Another example of a sweeping "solution" in search of problem is the merger ban proposed by several US lawmakers this past spring. The lawmakers justified the ban proposal by spinning a harrowing tale of antitrust agencies overwhelmed by the COVID-19 pandemic, and of dominant companies and opportunistic private equity firms exploiting that weakness to jam mergers through with minimal oversight. Missing from the tale, however, were a few important details. First, the

[4] Noah Joshua Phillips, Commissioner, Fed. Trade Comm'n, We Need to Talk: Toward a Serious Conversation about Breakups (Apr. 30, 2019), https://www.ftc.gov/system/files/documents/public_statements/1517972/phillis_-_we_need_to_talk_0519.pdf.

[5] Herbert Hovenkamp, *Antitrust and Platform Monopoly* 58, (Univ. of Pa. Carey L. Sch., Inst. for L. & Econ. Research Paper, Paper No. 20-43, 2020), https://ssrn.com/abstract=3639142.

U.S. antitrust agencies adapted quickly to address anticompetitive mergers. Second, the factual premise for the purported solution did not exist—reality was the *opposite* of what proponents claimed. The number of filings fell, dramatically, as we would expect during a global pandemic and economic crisis. Finally, the ban's proponents ignored the positive role mergers could play in a downturn, by keeping companies afloat and aiding economic recovery.[6] Rhetoric and ideology, not facts and data, drove those proposals—a sort of nihilistic view of the market for corporate control that said a great deal more about its proponents than anything. It's worth considering other proposals from the same proponents in a similar light.

I, for one, do not view the past 40 years of U.S. antitrust policy as a story of failure. The law gained in coherence and effectiveness, safeguarding competition while allowing tremendous innovation and investment, with limited governmental interference. Those are good things, not bad ones. Still, as I began with regard to the reset: yes, but. Something being in the main good does not make it perfect, and that is the real project to which we ought to devote ourselves. With that in mind, I'm thrilled to take part in this excellent conference, and thank Chatham House again for convening it.

---

[6] Noah Joshua Phillips, *The case against banning mergers*, N.Y. TIMES DEALBOOK (Apr. 27, 2020), https://www.nytimes.com/2020/04/27/business/dealbook/small-business-ppp-loans.html; Noah Joshua Phillips, *Let's (NOT) Stop All Mergers: The Case for Letting the Agencies Do Their Jobs*, TRUTH ON THE MKT. (May 5, 2020), https://truthonthemarket.com/author/noahphillipstotm/.