CLIENT ALERT

House Antitrust Digital Markets Report Proposes Vast Overhaul of Antitrust Law and Enforcement

Oct.09.2020

On October 6, 2020, the majority staff of the House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law released a long-awaited report on the state of competition in digital markets titled *Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations* ("Staff Report"). The 450-page Staff Report is the capstone of a year-plus investigation of digital markets, the conduct of the largest online companies, and the effectiveness of current antitrust laws and enforcement. The Staff Report lodges heavy criticism of the state of competition in the digital economy and antitrust enforcement, and recommends an array of legislative proposals—including specific reforms to address anticompetitive conduct in digital markets, as well as strengthening merger and monopolization enforcement and significant revisions to the antitrust laws generally—that would arguably represent the largest overhaul of antitrust law and enforcement in history, not just in digital markets but across all industries. A group of Republican Subcommittee members issued a separate report, *The Third Way: Antitrust Enforcement in Big Tech*, which supports bipartisan efforts to reform antitrust enforcement to address competitive harm in digital markets, but disagrees with some of the majority staff's recommended proposals.

The Staff Report contains recommendations in two broad categories: (1) proposals to restore competition in digital markets and (2) proposals to strengthen antitrust law and enforcement. The recommended changes are highlighted below.

Proposals to Restore Digital Competition

The Staff Report seeks to remedy perceived deficiencies in digital competition through six proposals to reform antitrust law and enforcement to address conduct and transactions in the digital marketplace.

Conduct Reforms

1. Structural Separation and Line of Business Restrictions

According to the Staff Report, the major online platforms are integrated across different lines of business, which creates conflicts of interest when they compete with rivals that depend on the platform for access to users. For example, the majority staff concludes that this integration leads to the misappropriation of data to harm rivals, using market power in one business line as leverage in negotiations in a second business line, tying products and services to lock in users and insulate the platform from competition, and using supra-competitive profits from one business line to subsidize other business lines.

The Staff Report recommends legislation requiring (1) structural separations (prohibiting a platform from operating in markets where that platform competes with firms dependent on it, either through ownership separation and divestitures, or corporate-structure restrictions) and (2) limiting the markets in which a platform can engage.

2. Prohibition on Self-Preferencing or Discriminatory Treatment

The Staff Report identifies numerous instances where dominant platforms engaged in self-preferential or discriminatory treatment to benefit their own products and services, which allowed the platform to pick winners and losers in the marketplace. This conduct allegedly distorted competition and made it difficult for rivals to expand, even with highly popular products, leading to less innovation.

The majority staff recommends that Congress establish nondiscrimination rules that prohibit dominant platforms from engaging in discriminatory treatment and require them to offer equal terms, including price and access, for equal service. The majority staff points out that nondiscrimination requirements have been applied to other network industries, such as those found in the 1887 Interstate Commerce Act (prohibiting discriminatory treatment by railroads) and the Federal Communications Commission's 2015 Open Internet Order (prohibiting internet service providers from discriminating among content providers).

3. Interoperability and Data Portability

The Staff Report notes that digital markets have certain traits that make them prone to tipping in favor of a single dominant firm or platform, including network effects, switching costs, and other entry barriers. For example, because platforms may not be interoperable with other platforms, users and sellers on a platform may face very high switching costs, leading to lock-in on the dominant platform.

The Staff Report recommends legislation facilitating (1) data interoperability, which would allow competing platforms to interconnect with dominant platforms, and (2) data portability, which would allow users and businesses to port their social graph, profile, or other relevant data among competing platform. The majority staff finds that the effect of these changes would be to lower entry barriers for competitors and switching costs for consumers.

4. Collective Negotiation Safe Harbor for the Press

The Staff Report contends that the rise of market power online corresponds to a significant decline of trustworthy news sources and that news publishers are “beholden” to dominant digital platforms.

To remedy this perceived “imbalance of bargaining power,” the majority staff recommends a broad set of reforms, including legislation to provide news publishers and broadcasters with a “narrowly tailored and temporary safe harbor to collectively negotiate with dominant online platforms.”

5. Prohibition on Abuse of Superior Bargaining Power

The Staff Report concludes that dominant platforms enjoy and abuse “superior bargaining power” over third parties that depend on their platforms to access users and markets. These platforms allegedly use their leverage to extract more money, more data, or better terms than parties would be willing to provide in a competitive market.

The majority staff recommends that Congress prohibit “the abuse of superior bargaining power” by targeting anticompetitive contracts and introducing due process protections for individuals and businesses dependent on dominant platforms. The Staff Report does not indicate what constitutes superior bargaining power, anticompetitive contracts, or dependency on dominant platforms.

Merger Reforms

6. Reducing Market Power Through Merger Reform

The Staff Report explains that the largest platforms owe part of their dominance to numerous acquisitions that either built dominant lines of businesses or neutralized competitive threats. The majority staff criticizes the antitrust agencies for not blocking a single merger by these platforms between 2000 and 2019, and questions whether the antitrust agencies have the analytical tools necessary to challenge anticompetitive deals in digital markets.

In response, the majority staff recommends two of its most significant proposals, intended to reduce large platforms' market power:

- Requiring "dominant platforms" to report all transactions to the antitrust agencies, regardless of whether the Hart-Scott-Rodino Act (HSR) thresholds are met, while eliminating the HSR deadlines for agency pre-merger reviews, to give the antitrust agencies more time to conduct their merger review.
- Shifting the burden of proof to the merging parties by creating a presumption of harm unless the parties can show (a) that the merger would benefit the public interest and (b) that similar benefits could not be achieved through internal growth and expansion.

Proposals to Strengthen Antitrust Law and Enforcement Generally

Apart from the specific proposals targeting digital markets, the Staff Report proposes a series of changes to strengthen the antitrust laws and antitrust enforcement generally.

Conduct Reforms

1. Restoring the Goals of the Antitrust Laws

The Staff Report contends that the courts have significantly weakened the antitrust laws and made it harder for antitrust enforcers and private plaintiffs to bring successful lawsuits. The majority staff also criticizes the Supreme Court's narrow construction of the "consumer welfare" standard as the sole goal of the antitrust laws, contrary to legislative history and intent.

The majority staff recommends that Congress reassert the "original intent and broad goals of the antitrust laws by clarifying that they are designed to protect not only consumers, but also workers, entrepreneurs, independent businesses, open markets, a fair economy, and democratic ideals."

2. Rehabilitating Monopolization Law

According to the Staff Report, courts have significantly heightened the legal standards that plaintiffs must overcome to prove monopolization under Section 2 of the Sherman Act. It recommends a vast array of reforms, including with respect to:

- *Abuse of Dominance*. Extend the Sherman Act to prohibit the "abuse of dominance," and create a statutory presumption that a market share of 30% or more constitutes a rebuttable presumption of a seller's dominance, and 25% or more constitutes a rebuttable presumption of a buyer's dominance.

- *Monopoly Leveraging*. Override case law that requires actual monopolization of a second market to prove monopoly leveraging.
- *Predatory Pricing*. Clarify that proof of recoupment is not necessary to prove predatory pricing or predatory buying conduct.
- *Essential Facilities and Refusals to Deal*. Revitalize the "essential facilities" doctrine, and consider overriding case law that makes essential facilities and refusal-to-deal claims difficult to prove.
- *Tying*. Reaffirm the tying doctrine.
- *Self-Preferencing and Anticompetitive Product Design*. Make it a violation of Section 2 for a dominant platform or service to make a design change that excludes competitors or that "otherwise undermines competition," even if the design change is an improvement for consumers.
- *Other Measures*. Override *Ohio v. American Express Co.* to allow a plaintiff to establish competitive harm based on only one side of a two-sided market; override *United States v. Sabre Corp.* to clarify that multi-sided platforms compete with firms operating on only one side of the platform; and clarify that market definition is not required to prove an antitrust claim where there is direct proof of market power.

3. Encouraging Private Antitrust Enforcement

The majority staff emphasizes that private enforcement plays a critical role in antitrust enforcement and recommends a number of changes to make it easier for private antitrust plaintiffs to bring suit. Proposed changes include: eliminating court-created requirements that plaintiffs show antitrust injury and antitrust standing; reducing procedural obstacles to litigation including banning forced arbitration clauses and lifting limits on class action formation; and lowering the heightened pleading requirement introduced in *Bell Atlantic Corp. v. Twombly.*

Merger Reforms

4. Invigorating Merger Enforcement

In addition to the reforms specifically intended for digital markets noted above, the Staff Report recommends changes to enhance merger enforcement generally, including:

- *Bright Lines and Structural Presumptions*. Make mergers presumptively unlawful if they result in an "outsized market share,"— such as the 30% threshold established in *Philadelphia National Bank*—or a "significant increase in concentration." This presumption would shift the burden of proof to merging parties to show that the merger "would not reduce competition." Further, efficiencies would not suffice to overcome this presumption.
- *Protect Potential and Nascent Competitors*. Prohibit "acquisitions of potential rivals and nascent competitors" by overriding case law to clarify that the antitrust agencies do not have to prove that a potential or nascent competitor would have to be a successful entrant in a but-for world (*i.e.*, absent the acquisition); codify a presumption against dominant firms' acquisitions of startups, even those in an adjacent or related market; and prohibit acquisitions that "may *lessen competition* or tend to increase *market power*," not just acquisitions that "may [ ] *substantially* lessen competition, or [ ] tend to create a *monopoly*." (emphasis added)

- *Strengthen Vertical Merger Doctrine*. Explore presumptions against vertical mergers, such as deeming them anticompetitive when either of the merging parties is a "dominant firm operating in a concentrated market," or presumptions relating to input and customer foreclosure.

Antitrust Enforcement

To strengthen antitrust enforcement generally, the Staff Report makes additional recommendations:

5. Congressional Oversight

The majority staff recommends that Congress stop deferring to courts and the antitrust agencies to develop substantive antitrust policy, and instead reinvigorate its oversight of the antitrust laws and enforcement, including through ongoing market investigations and legislative activity.

6. Agency Enforcement

The majority staff concludes that the antitrust agencies have failed to sufficiently police monopolists from establishing or maintaining their dominance through anticompetitive conduct and mergers, criticizing in particular the FTC for not making greater use of its FTC Act Section 5 power—which prohibits "unfair methods of competition" and, according to the majority staff, was established to serve as a stop-gap measure for all the other antitrust statutes.

The Staff Report recommends several reforms, including increasing the budgets of the antitrust agencies, requiring the agencies to solicit and respond to public comments during merger reviews, and requiring the agencies to publish written explanations for their enforcement decisions.

Third Way Report Recommendations

Republican Representative Ken Buck (R-CO), with support from three other Republicans, released a response to the Staff Report entitled The Third Way: Antitrust Enforcement in Big Tech. Although this "Third Way Report" does not support all of the majority staff's conclusions, it supports bipartisan efforts to bring about targeted antitrust reforms and endorses certain reforms.

Areas of Agreement. The Third Way Report agrees with several recommendations of the Staff Report, including: increased resources for the antitrust agencies; rules for data portability and interoperability; shifting the burden of proof to the merging parties in acquisitions involving digital markets; and clarifying that market definition is unnecessary if there is direct proof of market power. The Third Way Report authors share many of the concerns in the Staff Report, but need further clarification and expert feedback on the majority staff's recommendations regarding: monopoly leveraging and predatory pricing; the essential-facilities doctrine; product improvements constituting monopolization; overriding *Ohio v. American Express*; merger presumptions; and banning acquisitions of potential and nascent competitors.

Areas of Disagreement. The Third Way Report disagrees with several aspects of the Staff Report, including: efforts to create legislation requiring structural separation and delineating a "single line of business" for companies, claiming that this is "a thinly veiled call to break up Big Tech firms"; private antitrust enforcement changes, including the elimination of forced arbitration

clauses and lifting certain barriers to class creation in class actions; non-discrimination rules regarding equal terms for equal service; facilitating private enforcement; and creating additional regulatory schemes.

Conclusion

While it is highly unlikely that the Staff Report's recommendations will be implemented by the current Congress, it is conceivable that certain reforms could be implemented by the next Congress—particularly considering the bipartisan support for several of the recommendations. While the Staff Report focused on conduct and transactions involving the largest digital platforms, many of the proposals are not limited to digital markets and therefore have the potential to significantly change antitrust law and enforcement across all industries, as well as make it easier for antitrust agencies and private plaintiffs to bring—and win—antitrust cases or extract settlements.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Jeane A. Thomas, CIPP/E
Partner – Washington, D.C., Brussels
Phone: +1 202.624.2877, +32.2.282.4082
Email: jthomas@crowell.com

Alexis J. Gilman
Partner – Washington, D.C.
Phone: +1 202.624.2570
Email: agilman@crowell.com

Juan A. Arteaga
Partner – New York
Phone: +1 212.803.4053
Email: jarteaga@crowell.com

Angel Prado
Associate – Los Angeles
Phone: +1 213.443.5548
Email: aprado@crowell.com

Eric Fanchiang
Associate – Orange County
Phone: +1 949.798.1338
Email: efanchiang@crowell.com