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Harry First

A Global Vision for Competition Law

Liber Amicorum

Adi Ayal, Darren Bush, Stephen Calkins, Michael A. Carrier, Peter C. Carstensen, Erika M. Douglas, Ariel Ezrachi, Albert A. Foer, Eleanor M. Fox, Mark Glick, Jamie Ha, Jonathan Jacobson, Wolfgang Kerber, John B. Kirkwood, Robert H. Lande, Marina Lao, Ioannis Lianos, Gabriel A. Lozada, Melissa H. Maxman, Barak D. Richman, Tadashi Shiraishi, Daniel Sokol, Erica Straus, Maurice E. Stucke, Sean P. Sullivan, Simonetta Vezzoso, Ronald F. Wick, Diane P. Wood, Angela Huyue Zhang

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Competition vs. Regulation

Jonathan Jacobson*
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Abstract

Harry First is one of the great competition law thought leaders over the past few decades. He has championed aggressive, but thoughtful, enforcement both in his role as a sought-after professor at a great law school and as the Chief of New York's Antitrust Bureau. Harry has advocated for greater rulemaking and some regulation to reign in perceived excesses of "big tech," and we part company there. This paper traces the failed history of regulation in the U.S., and the rise of the consumer welfare standard (and its close variants) in its place. With the consumer welfare standard, we have witnessed enormous economic growth and innovation – in no small part attributable to the workings of "big tech." Now, however, heavy regulation in Europe and elsewhere, combined with a neo-Brandeisian approach is the U.S., threaten that growth – reducing and even removing many of the incentives that led to this great economic expansion. We should return to consumer welfare so that innovation can thrive.

* Member N.Y. Bar. Retired partner at Wilson Sonsini Goodrich & Rosati. Many thanks to Keith Klovers for very helpful comments – although all mistakes continue to be mine. Given my prior cases representing Google, I will not address the specific pending litigations against it. The cases on which I worked are addressed in my memoir, My Life in Antitrust (2024), *available at* https://www.wsgr.com/a/web/89YbdCjKoDr4dUfacfGkU4/jacobson-memoir.pdf.

38. Harry First stands as one of the competition greats of the past many years. His many students, his colleagues at NYU, and his past colleagues at the New York Attorney General's Antitrust Bureau will attest to his brilliance, his many insights, and his compassion. Harry has long championed aggressive antitrust enforcement, rulemaking, and even some regulation to cabin the market power of leading firms, especially in tech.[1] His views are largely in line with the current heads of the enforcement community, federal and state. Despite my deep admiration for Harry, we part company on some of these issues. This paper addresses the suggestion of regulation or rulemaking to "rein in" Big Tech.

39. The current hostility to Big Tech in some quarters is accompanied by a view that the current lodestar for competition analysis – the "consumer welfare" standard – should be discarded or at least revised. The arguments all boil down to "big is bad." And sometimes "big" firms do indeed have opportunities to behave very badly. Yet, in the almost 40 years in which the consumer welfare standard has prevailed, what have we seen? The greatest leap in innovation in world history, accompanied by enormous increases in U.S. GDP, especially compared to the rest of the world. And what is the suggested replacement for the consumer welfare standard? There is none, just a desire to make sure the remarkable successes of the "big tech" firms cannot be replicated again.

40. This short paper will discuss the history of agency regulation in the U.S., describe the current movement to abandon the consumer welfare standard, address the illogic of weakening or punishing the firms that have led the innovations we enjoy today, and then mention the few studies that have addressed these issues.

I. Regulation in the United States 1887–1980s

41. Regulatory agencies began in the United States. The first was the Interstate Commerce Commission (ICC), created in 1887 to regulate railroads and, later, other surface-based common carriers. Regulation was viewed as an effective way to resolve the interstices of otherwise unclear statutory commands and, in the case of the ICC, to make sure fares were not too far out of line. For many decades, regulation was favored with minimal controversy. The New Deal, following the Great Depression, led to the creation of many regulatory agencies, and there are roughly 100 at present. The most important today include the Food and Drug Administration (1906), the Federal Communications Commission (1934), and the Securities

1 *See, e.g.*, Eleanor Fox & Harry First, *We Need Rules to Rein in Big Tech*, CPI Antitrust Chron. (Oct. 2020); Harry First, *Antitrust and Regulatory Alternatives: How the Past Points the Way to the Future*, 11 J. Antitrust Enf'T. 173 (2023).

and Exchange Commission (1934). The very existence of regulatory agencies is being challenged today, however, by the right with what seems to be the support of at least some Justices on the Supreme Court.[2]

42. Congress created the Federal Trade Commission (FTC) in 1914, but although the Commission was eventually given rulemaking powers, it was and is essentially an enforcement agency rather than a "regulator." Its ability to make competition regulations is today in dispute and is one of the issues being litigated in connection with the FTC's 2024 rule against covenants not to compete.[3] The FTC's ability to set procedural rules, such as the contents of the Hart-Scott-Rodino (HSR) form, has more support.[4]

43. Antitrust enforcement became quite aggressive in the second New Deal under Thurman Arnold, with extensive successes in the motion picture industry and other fields of business. There was a push to go after vertical integration generally, but the Supreme Court rejected that argument in the 1948 *Paramount* case.[5] The courts occasionally pushed back on merger enforcement (as in the *Columbia Steel* case, also 1948),[6] but the Celler-Kefauver Act of 1950[7] amended section 7 of the Clayton Act and stopped all that. It made successful merger challenges much easier, and made clear that the Act would apply to vertical and conglomerate mergers as well as horizontal consolidations. Merger challenges abounded afterward, including challenges to what today would be viewed as trivial transactions. As Justice Stewart later pointed out, the "sole consistency … in litigation under § 7, [was that] the Government always wins."[8] That was true from 1950 all the way to 1974.[9]

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2 *See* Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024), *see* Dion M. Bregman, Julie S. Goldemberg, Meaghan Kent, William R. Peterson & Stephanie L. Roberts, *The US Supreme Court Overrules the* Chevron *Doctrine Ending the Requirement for Courts to Defer to Agency Interpretation of Law* (Loper Bright / Raimondo), E-Competitions June 2024, art. no 119501, www.concurences.com/119501.

3 *See* Bryan Koenig, *FTC, Challengers, Their Backers Vie for Noncompetes' Fate*, Law360 (July 29, 2024), https://www.law360.com/articles/1862555/ftc-challengers-their-backers-vie-for-noncompetes-fate; David Minsky, *FTC Regroups After Noncompete Setbacks in Florida, Texas*, Law360 (Aug. 23, 2024), https://www.law360.com/competition/articles/1872990/ftc-regroups-after-noncompete-setbacks-in-florida-texas.

4 The statute actually provides for broad rule-making powers. 15 U.S.C. § 57a(1):

Except as provided in subsection (h), the Commission may prescribe –

(A) interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title), and

(B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title), except that the Commission shall not develop or promulgate any trade rule or regulation with regard to the regulation of the development and utilization of the standards and certification activities pursuant to this section. Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices.

5 United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

6 United States v. Columbia Steel Co., 334 U.S. 495 (1948).

7 Pub. L. No. 81-899, 64 Stat. 1125 (1950).

8 United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

9 *See* United States v. Marine Bancorp., Inc., 418 U.S. 602 (1974).

44. Intense antitrust enforcement was in no way limited to mergers. Although horizontal cartel agreements (such as bid rigging, price fixing, and customer allocation) were and are considered without controversy as per se illegal, by the mid-1970s there were per se rules for things like vertical exclusive territories, tying arrangements, and resale pricing agreements. These rulings had the virtue of providing somewhat clear rules on what could or could not be done, but they lacked the flexibility to recognize and approve activities that would enhance competition. One example was the 1972 *Topco* decision,[10] where small grocers formed a co-op to produce private-label grocery products that the small grocers could not afford to produce on their own. Each member would have an exclusive territory in which its private-label products could compete against the large grocery chains. Exclusivity was necessary to induce the required investment. But the member grocers were technically "competitors," and the Supreme Court ruled that this was a horizontal division of territories and so illegal per se. Another example was the "nine no-nos,"[11] a string of intellectual property licensing practices that could be harmful but were just as likely to be benign. One example was package licensing. There were even some *criminal* prosecutions for price-cutting under section 3 of the Robinson-Patman Act.[12]

45. This rigid approach began to change in the mid-1970s. Prior aggressive enforcement was founded on the "structure-conduct-performance" paradigm, which held (and holds) that the more concentrated an industry's *structure*, the more the firms' *conduct* is likely to be lackluster (with less innovation and tacit collusion), such that the industry's *performance* would suffer. This focus on industry concentration naturally led to more intensive anti-merger enforcement as well as conduct rules designed to mitigate the effects of concentration. But pushback began. One main event was the 1974 Airlie House Conference, co-chaired by Eleanor Fox and Robert Pitofsky.[13] The research presented there suggested that concentration could be and very often was the result of intense and successful competition, not its opposite. At the same time, concerns were being expressed that the U.S.'s harsh competition rules were making the country less competitive internationally. Consumer electronics, long a U.S.-driven industry, was basically lost to Asia. Even automobile manufacturing, a source of so many U.S. jobs, was contracting due to competition from firms like Toyota and Mazda. The production of steel,

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10 United States v. Topco Assocs., Inc., 405 U.S. 596 (1972).

11 *See* Deputy Assistant Att'y Gen. Bruce Wilson, Patent and Know-How License Arrangements: Field of Use, Territorial, Price and Quantity Restrictions (Nov. 1970). They were abandoned in 1981. *See* Deputy Assistant Att'y Gen. Abbott B. Lipsky, Remarks Before the American Bar Ass'n Antitrust Section: Current Antitrust Division Views on Patent Licensing Practices (Nov. 5–6, 1981).

12 *See* United States v. National Dairy Products Corp., 372 U.S. 29 (1963).

13 The papers presented are collected in Industrial Concentration: The New Learning (Harvey J. Goldschmid, H. Michael Mann & J. Fred Weston eds., 1974).

a field long dominated by the U.S., was becoming lost to Asia and Europe. Many worried that this trend would continue. Some blamed U.S. antitrust enforcement.[14] An irony was that by beating down large and successful U.S. companies, we inadvertently led to the creation of large and successful foreign companies.

46. The very aggressive U.S. antitrust rules of this period were enabled by the lack of any coherent standards. Antitrust was deemed to support multiple goals, such as "fairness," the preservation of small businesses, and the dispersion of economic power. Although this approach made it much easier to slap down large firms, it was internally inconsistent and hard to administer. As one example, small businesses can be well preserved by allowing them to fix prices and allocate customers. No one thinks that this would make any sense.

47. Chicago School writers, most prominently Robert Bork, proposed a single economics-based standard that Bork called "consumer welfare." And the Supreme Court used that verbiage (without the associated baggage) in 1979 in *Reiter v. Sonotone*.[15] It quickly became clear, however, that this was not *consumer* welfare; it was *total* welfare, including producers as well as consumers. Under total welfare, a practice that injured consumers (such as by raising prices) would be considered lawful if the profits of the suppliers increased by the same amount. Although none of the Chicagoans supported such a result, it was the logical outcome of a strict application of their approach. Chicagoans had more luck with vertical restraints, with the 1977 *Sylvania*[16] decision upholding (in the context of applying the rule of reason) vertical exclusive territories and, 30 years later, the *Leegin* decision overruling 88 years of vertical resale price maintenance precedents.[17] Bork was right in saying that the choice of legal or welfare standard would both drive outcomes and lead to greater consistency in administering antitrust law.

48. At the same time, there developed a broad consensus favoring deregulation. President Carter appointed Fred Kahn as his deregulation czar, and he and many others were able to reduce the level of regulation. The main concern was that regulation of prices meant higher prices and carried with it the danger of "regulatory capture," i.e., undue agency coziness with the regulated – with personnel often going in and out of the agencies to private companies or law firms. So, a pushback against heavy regulation began.

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14 *E.g.*, Malcolm Baldridge, *Halting the LTV-Republic Steel Merger: How to Ruin an Entire Industry*, N.Y. Times, Mar. 11, 1984, at F2, *available at* https://www.nytimes.com/1984/03/11/business/business-forum-halting-the-ltvrepublic-steel-merger.html. Baldridge was commerce secretary at the time, and the *LTV-Republic* merger challenge by the Department of Justice (DOJ) was blocked at his instigation.

15 442 U.S. 330 (1979).

16 Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

17 Leegin Creative Leather Products, Inc., v. PSKS, Inc., 551 U.S. 877 (2007), *see* Peter J. Carney & Kristen J. McAhren, *The US Supreme Court Overturns Its Long-Standing Prohibition against Vertical Agreements between Manufacturers and Their Dealers Setting Minimum Resale Prices* (Leegin Creative), e-Competitions June 2007, art. no 38050.

One example was the replacement of the Civil Aeronautics Board with the Federal Aviation Administration. It remained important, of course, to maintain airline safety through regulation, but the change enabled greater competition among airlines with significant new entry by the likes of Jet Blue. Extras such as decent meals in coach declined or were eliminated, but airfare costs declined significantly. Another example was the 1995 abolition of the very first regulatory agency, the ICC, leading to wider opportunities in surface transportation. As Wilson and Klovers have explained, the overall outcome was that "[a]fter deregulation, prices fell, output expanded, and firms innovated."[18]

49. Consumer welfare got its true birth in the 1980s. "Post-Chicagoans," such as Steve Salop, developed an economic alternative focusing on what economists call "consumer surplus," but not in a wooden fashion.[19] The essence of this approach was the consideration of price and output effects, quality, and innovation. "Consumers" would include middlemen and others in a distribution chain. Basically, anything that increased market output (properly measured) was good. Reductions in output were bad. At the same time, Reagan's head of the Antitrust Division came out with revised Merger Guidelines in 1982. Despite a fear that the new Guidelines would rule out many otherwise sound merger challenges, the opposite proved true. The then-new Guidelines articulated and adopted the hypothetical monopolist test for defining markets,[20] which resulted in increasingly tiny markets and more merger challenges as a direct result. More broadly, the consumer welfare approach led to a consistent approach to the problems in issue and led to a remarkable consensus on antitrust standards for the first time. Until it did not.

II. The Current Movement

50. Most prominently in Europe, but increasingly in the U.S. too, the consumer welfare standard is being ignored or simply rejected in favor of an approach that condemns large tech companies from competing to gain sales. Hyperbole? Not really.

51. A key example is the iPhone. Apple has succeeded with a closed system in which apps, messages, and payments must be sourced from Apple only.

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18 Christine Wilson & Keith Klovers, *The Growing Nostalgia for Past Regulatory Misadventures and the Risk of Repeating These Mistakes With Big Tech*, 8 J. Antitrust Enf't. 10 (Mar. 2020), https://doi.org/10.1093/jaenfo/jnz029.

19 *E.g.*, Steven C. Salop, Avoiding Error in the Antitrust Analysis of Unilateral Refusals to Deal, Statement before the Antitrust Modernization Commission (Sept. 21, 2005), https://govinfo.library.unt.edu/amc/commission_hearings/pdf/Salop_Statement_Revised%209-21.pdf.

20 U.S. Dep't of Just., 1982 Merger Guidelines § II.A, https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11248.pdf.

The European Commission (EC) is trying to force Apple to allow third parties to have their own app downloads and payment systems. Apple today has a very secure platform, but the security is necessarily in doubt if third parties are given such broad access. Or take Amazon. Amazon uses the data it collects from sales on its site, including sales of third-party sellers, to improve its own offerings. Preventing Amazon from doing so would do little to help third-party sellers, but it would hamper Amazon's efforts to improve its own sales.

52. Europe has doubled (maybe quintupled) down on its attack on tech through the Digital Markets Act (DMA). The DMA imposes obligations and prohibitions on "gatekeepers" that provide "core platform services" and are designated as such by the Commission. To date, the designations are as follows:

- U.S.-based Facebook: Facebook Marketplace, Facebook, Instagram, WhatsApp, Facebook Messenger, and Meta Ads
- U.S.-based Google: Google Play, Google Maps, Google Shopping, Google Search, YouTube, Android, Chrome, and Alphabet's online advertising service
- U.S.-based Amazon: Amazon Marketplace and Amazon Advertising
- U.S.-based Apple: App Store, iOS, and Safari
- U.S.-based Microsoft: LinkedIn and Windows PC OS
- U.S.- or China-based ByteDance: TikTok
- Netherlands-based Booking.com: online reservations

53. The level of protectionism is apparent. Booking.com was the very last of the designees; it is headquartered in Amsterdam. Everyone else is a U.S. company, save perhaps ByteDance, which can be considered either Chinese or U.S.-based. The consequences of a designation are horrific. "Gatekeepers" are barred from tactics that would increase their market shares on "core platform services," such as "self-preferencing." This approach would render it illegal for a firm to prefer its own properties on its own platform – again making competition itself illegal. Promoting your product over those of rivals used to be known as competition. Now, you must promote your competitors instead. I have called out this theory as especially absurd in a recent paper.[21]

54. There is a movement, hopefully now stopped, for similar treatment in the U.S. The American Innovation and Choice Online Act (AICOA), introduced in 2022 by Democratic and Republican sponsors, would impose obligations similar to the DMA on tech firms, but without the

21 Jonathan Jacobson & Ada Wang, *Competition or Competitors? The Case of Self-Preferencing*, 38 Antitrust 13 (Fall 2023).

formal regulatory apparatus. It stalled and was not enacted. But the federal agencies and numerous state attorneys general are taking a similar approach, suing the large tech firms using theories that would have been laughed out of court not so very long ago. One of these is EU-styled "self-preferencing." Ugh.

55. Using competition rulemaking is less intrusive than relying on a regulatory agency. But how much less intrusive depends on the specific rules in issue. Rules such as AICOA's coming from legislative acts or agency action mitigate the problem of industry capture but would prevent competition just as effectively.

III. Potential Impact

56. The critical policy question is whether this new regulatory approach will improve the economy. On a theoretical level, the debate is quite similar to the age-old debate that began with Schumpeter and Arrow. Schumpeter famously was of the view that large firms with market power had more to spend on R&D and would contribute greater innovation than smaller firms. Arrow countered that greater innovation could be expected from small firms, as their survival was dependent on it. The debate rages today with no global answers. Both sides can point both to theory and anecdotal evidence supporting their position.[22]

57. In our present context, however, finding the answer is not difficult. The chief concern about large firms with market power is that they will no longer compete effectively, and that they will retard innovation and progress, choosing "the quiet life," as many have explained.[23] Here we *know* that is not the case. While that is what happened with Microsoft and Internet Explorer 5, we *know* that we will see amazing, continued innovation from Amazon, Apple, and Google. They demonstrate that every day. We hear that these firms have excluded rivals. That is half true. The untrue part is that these firms have adopted tactics designed to hinder rivals rather than enhance their own products or services. None of the cases contain a single such allegation that would survive scrutiny under current law. The true part is that entry or expansion in these markets is difficult. But that effect is attributable to competition. People do not want to enter these markets because there are no profits to be had. Nothing inhibits entry more than the improbability of making a dime.

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22 *See* Jonathan Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 Antitrust L.J. 575 (2007), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2128&context=facsch_lawrev; Jonathan Jacobson, Merger Policy & Innovation, Presentation to the New York State Bar Association, Antitrust Section, Annual Meeting (Jan. 25, 1996), https://www.wsgr.com/PDFSearch/jacobson_merger.pdf.

23 The phrase dates back to J. R. Hicks, *Annual Survey of Economic Theory: The Theory of Monopoly*, 3 Econometrica 1 (1935) ("The best of all monopoly profits is a quiet life").

58. Digital competition today is often "diagonal" rather than vertical or horizontal. By that, we mean that a firm in one market may not compete directly with firms in another, separate market, but may need to innovate to avoid incursions from those other firms. Facebook and Amazon provide one of many good examples. The two do not compete directly, but Amazon must innovate to avoid incursions by Facebook and Facebook must innovate to avoid losing too many users to Amazon. Properly considered, this means they are in the same market, but even if they are not, their diagonal competition forces both to continue to innovate to maintain or expand their sales. This may not help their smaller rivals, but consumers surely benefit. The upshot is that there can be no reasonable fear that these firms will stop competing and enjoy the quiet life.

59. The argument is sometimes made that "yes, but in the long-term competition will thrive better if small firms can face an equal playing field." Sounds nice, right? But how do you level the playing field? Is it by making the smaller players better? Would that we could. No, leveling the playing field means handicapping successful firms, which would be crazy, the EC approach notwithstanding. Consider the EC requirement that Microsoft offer a version of Windows without Windows Media Player. Did that improve Windows? Of course not; it made it worse. Consumers and the economy generally would suffer if Apple had to deal with more malware by being forced to "open" the iPhone's system, or if Amazon could not promote itself as the most reliable seller and shipper. Knee-capping the firms that have provided the greatest enhancements to the economy makes no sense at all.

60. So, what is leading this push? It will be denied, but the driving force is a desire to protect competitors at the expense of competition. The only beneficiaries of the EC and current U.S. agency approach are firms that have failed to compete successfully without regulatory help. Consumers do not benefit from a rule of law that promotes an inferior outcome they choose to avoid.

61. Remedies are also problematic. How would it help consumers to force Amazon to promote third-party sellers over its own? Or, worse, to promote inferior methods of delivery over Prime? What would you advise Amazon to do?

IV. Empirical Evidence

62. There are almost no empirical analyses of the impact of regulation on competition and consumer welfare. The DMA is too new and the heavy regulation that prevailed from the 1940s through much of the 1970s in the U.S. is not especially relevant. But there is some recent scholarship.

63. One paper is Antitrust Platform Regulation and Entrepreneurship: Evidence from China, by Ke Rong, D. Daniel Sokol, Di Zhou and Feng Zhu The authors there studied the implementation of China's Anti-Monopoly Guidelines for the Platform Economy as a "quasi-natural experiment" to evaluate the effects of antitrust regulation on platform competition. The authors used a difference-in-differences approach to look at the impact on the degree of investment and the entry of startups in platform markets. They concluded: "The results show that the Platform Guidelines did not increase competition in these affected markets. Rather, competition weakened in these markets, with less venture capital investment flowing into them and fewer startups entering these markets."[24]

64. China's Anti-Monopoly Guidelines for the Platform Economy resulted in the designation of a number of "digital giants": Alibaba, Tencent, ByteDance, DiDi, Meituan, and JD. Several fines have been issued: Alibaba's amounted to some 4% of its total sales. The authors identified "41 industries that were deeply influenced by the affected platforms prior to platform antitrust regulation, along with 127 uninfluenced industries."[25] Their study analyzed the differences in the creation of startups and the level of research investment. The econometric results were that "the monthly number of investments in the affected industries is 26.73% lower than that in the other industries. Similarly… the monthly number of newly established companies in the affected industries is 18.72% lower than that in the other industries as a result of the platform antitrust policy."[26]

65. An April 2024 analysis of the effects of digital regulation in Europe by David Evans reached a similar result.[27] This was not econometrics, but Evans observed that "Europe has given birth to few leading digital businesses over [the past] three decades" in which U.S. and Chinese companies – China's before the new regulatory regime just discussed – created many dozens. He noted: "Of the 69 digital businesses worth $10 billion or more as of December 2023, Europe, which accounts for 21% of global GDP, had spawned just five [7%]: Spotify, Adyen, Revolut, Adevinta

24 Ke Rong, D. Daniel Sokol, Di Zhou & Feng Zhu, Antitrust Platform Regulation and Entrepreneurship: Evidence from China (Harvard Bus. School Working Paper No. 24-039, Jan. 2024) at 1.

25 *Id.* at 3.

26 *Id.* at 9.

27 David S. Evans, Why Europe Must End Its 30-Year Digital Winter to Ensure Its Long-Run Future (Apr. 18, 2024), https://ssrn.com/abstract=4799197 or http://dx.doi.org/10.2139/ssrn.4799197.

and Checkout.com. Together they account for less than 1% of the total value of the 69 businesses. None is based in Germany, France, Spain or Italy, the four largest EU economies."[28] In addition, "Private consumption inclusive of government social benefits in 2019 was substantially lower than the U.S.: 72% for Europe and 78% for the five largest economies (Germany, [the] U.K., France, Italy and Spain) as a percentage of the comparable metric for the U.S." Moreover, "[b]etween 1995 and 2019, private consumption inclusive of government social benefits declined, relative to the U.S., [by 8%] for the five largest economies and [by 13%] for the 15 members of the EU in 1995."[29]

66. These are just two analyses, understandable given how recently the heavy regulatory regimes began. And the economies studied are not identical to the U.S. But the conclusions are troubling. And there are no studies reaching a contrary result.[30]

V. Concluding Observations

67. The large Internet companies today are just that, large. But when we ask how they got there, it is difficult to see the current enforcement moves as anything other than punishing success. Apple invented the iPhone, the iPad, the Apple Watch, Apple TV, Oculus, and more. Amazon made shopping easier for hundreds of millions of consumers, and its amazing online delivery capabilities proved especially important during the pandemic. Google made it so easy to find stuff on the Internet that it became a verb, and constructed an advertising system that allows advertisers to provide and consumers to see the most relevant ads in nanoseconds. Each of the companies innovates every day and regards innovation as critical to their survival. The benefits to consumers have been monumental. They have been achieved, at least in the U.S., because a faithful application of the consumer welfare standard has made it possible – by avoiding interference and intervention absent evidence of actual or likely consumer harm.

68. Why in the world would we want to stop that?

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28 *Id.* at 3.

29 *Id.* at 5.

30 There is a House subcommittee report: Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations, Subcomm. on Antitrust, Com. & Admin. L. of the Comm. on the Judiciary (2020). But it does not purport to examine the economic effects of digital regulation on consumers.

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Harry First

A Global Vision for Competition Law

Liber Amicorum

This *Liber Amicorum* celebrates the remarkable career and lasting influence of Harry First—a scholar, mentor, and leader in competition law. In 21 insightful essays, distinguished academics and practitioners reflect on Harry's contributions and the pressing challenges in antitrust law and policy today.

The volume begins with personal tributes, revealing Harry's role as a mensch, mentor, and visionary in the field. It then explores foundational questions in antitrust, from the impact of megamergers to the evolving intersection of law, policy, and politics. A deep dive into statutory interpretation follows, shedding light on key debates circling around the FTC Act, the Clayton Act, and market definition. The final section concludes with major players, including Microsoft, Apple, and the pharmaceutical industry, examining their role in shaping competition law.

Together, these chapters provide a rich mosaic of Harry's many accomplishments and interests and the qualities that make him a very special person, teacher, scholar, enforcer, lawyer, and friend. Spanning history, policy, and enforcement, this collection is both a tribute to Harry First's extraordinary legacy and a thought-provoking exploration of the future of antitrust law.

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