

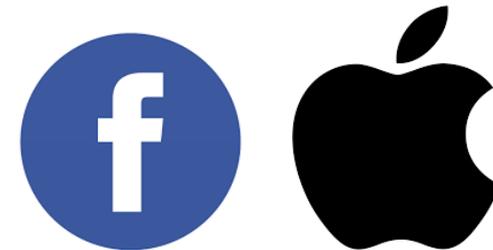
# Disruptive Forces: Antitrust in 2018

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# Disruptive Forces

- Netflix – a threat to broadcast and cable TV operators?
- Amazon – a threat to grocery and retail more broadly?
- Apple and Facebook – a threat to would-be rivals?
- Google – a threat to newspapers and everyone else?



# Disruptive Forces

- *Barry Lynn: “In America today we are witnessing a **whole new level of concentration—of wealth, power, and control—in the hands of the people who control Amazon, Google, and Facebook and a few other giants** that grew to power on the Internet. These corporations have captured a level of control over our commerce, and over the flow of information and news, that is unprecedented in our history.”*
- *Joe Nocera: “**Five years from now, will the networks have taken the steps they need to prevent Netflix from dominating television?** Will they have improved their technology, withdrawn most of their shows from Netflix or embraced streaming without sacrificing too much of their current profits? Or is Netflix in the process of “disintermediating” them, offering consumers such an improved viewing experience that the networks will instead be pushed to the sidelines? Matthew Ball, a strategist for Otter Media, who writes often about the future of television, thinks the latter is more likely.”*
- *Lina Khan: “Amazon’s purchase of Whole Foods will . . . enable **Amazon** to extend its online dominance into physical retail—using stores for pick-up, for example—and to use physical stores to entrench its power online. By bundling services and integrating grocery stores into its logistics network, the company **will be able to shut out or disfavor rival grocers and food delivery services.**”*

# Disruptive Forces

- Are these concerns valid? Consider:
  - With the advent of Netflix, the quality of television is greater than ever before, with new competition from Disney, HBO, Amazon, Prime Video, Hulu, Sony's Crackle, and others.
  - Is anyone complaining about low prices and fast, reliable delivery from Amazon?
  - Is anyone complaining about finding what you want so quickly on Google, or reconnecting with all your friends on Facebook?
- Antitrust law is about the welfare of consumers. To date, consumers have not been harmed, and there is no reason to believe that will change.
  - Okay, I'll give you one exception: iPhone battery life. C'mon Apple!



# Disruptive Forces

- What company did I not mention?
  - Microsoft!
  - The concern, not so many years ago, was that Microsoft would take over everything. But that has not happened, and the antitrust remedies Microsoft faced had little to do with it.
- Why? Because progress always wins, and the dominant firm today is rarely dominant tomorrow.
- Consider the overwhelming dominance of MySpace.
- Or Fortune's 1999 question: "Long Live the King. Will Yahoo! Ever Be Dethroned from its Leadership in Search?"
- The phrase "gale of creative destruction," coined by Joseph Schumpeter, captures the point. As he put it, "economic progress means turmoil."
  - We should welcome that turmoil, while offering our best to the old as it is swept away.



# Government Antitrust in 2018

- Should we expect the DOJ or FTC to bring proceedings to break up any of the companies?
  - Highly doubtful. The agencies haven't sought to break up any monopolies since IBM (1969) and AT&T (1974). There was a half-hearted effort to separate Windows from Microsoft Office in the late 1990s but that got nowhere. All monopoly suits since have sought to enjoin specific conduct.
  - One caveat. Rupert Murdoch has a very aggressive hostility to all things Google, and has very significant influence with the current President.
  - But the FTC investigation was dropped because the Commission – which would have loved to have sued – knew it had no case and would get killed in court. There was no proof of consumer harm, just plenty of consumer benefit. None of that has changed.

# Government Antitrust in 2018

- Mergers

- One area where we might see the agencies go after the large tech firms is in mergers.
- Acquisitions by Google and Facebook were investigated aggressively under Obama, and we can expect that to continue.
- Amazon's purchase of Whole Foods was cleared quickly under the current administration – but there was no viable theory for a challenge. This is not 1966, when Procter & Gamble was blocked from buying Clorox. Today, there must be some evidence of likely consumer harm, and in Amazon/Whole Foods there just wasn't any.
- So deals will be looked at. But don't expect a dramatic shift because the agencies know they must prove their case in court – and that requires proof of consumer harm.

# Government Antitrust in 2018

- Both in mergers and more generally, we should not expect much of a change in agency antitrust enforcement under the current administration.
- Republican administrations challenge fewer deals than Democrats, but the differences are largely at the margins.
- Makan Delrahim at Justice and Joe Simons, who is expected to be nominated for FTC chair, are very experienced and capable enforcers. They are here to enforce the laws, not dismantle the agencies or their missions as we have seen in some other appointments.



# Government Antitrust in 2018



- Europe will continue to be different.
- The EC has not yet sought dissolution but has aggressively pursued U.S. tech companies for practices that would not come close to being an antitrust violation in the U.S.
  - Forced Microsoft to sell a version of Windows without Windows Media Player.
  - Has fined Google a fortune for dominance in shopping, defining an online shopping market that excludes Amazon and eBay, and finding that favoring one’s own properties (a charge that is factually inaccurate) is a competition abuse – a view the U.S. has rejected.
  - Favors the welfare of rivals over consumers.
- These views may begin to affect merger evaluations too. Commissioner Vestager has said that having lots of data “can foreclose the market,” and the WSJ writes that, when “reviewing mergers or monopolies [the EC wants] to ensure that rivals aren’t prevented from competing because they lack access to that information.”
  - How such a perspective might affect mergers and merger remedies has not been explained.

# Government Antitrust in 2018

- One area to expect change in the U.S. is in intellectual property antitrust.
- Under prior administrations, Republican and Democrat, practices surrounding standards essential patents were scrutinized carefully.
  - Under Bush 2, in fact, Joe Simons brought an important SEP case against Rambus.
- Do not expect that from DOJ while Makan is in charge. On IP/antitrust issues generally, he is sympathetic to rights holders.

# Government Antitrust in 2018

- Another area, very important, that may change significantly is merger remedies, at least at DOJ.
- Makan Delrahim has opposed behavioral remedies for the 15 years I've known him. So his rejection of a non-discrimination injunction as a remedy for AT&T/Time Warner was not any kind of political fix. That's just his view.
- But this could cause some serious problems in tech industries in particular. Relationships in tech are rarely purely vertical or horizontal. Frequently, tech firms seek to make acquisitions to add new functionalities to their existing platforms.



# Government Antitrust in 2018

- Standard vertical remedies are important and can be critical in these transactions. And blocking a deal that could have been fully fixed by nondiscrimination or a firewall can be highly problematic – preventing transactions that would yield substantial consumer benefits.
- Behavioral remedies in tech mergers appear to be working, solving competition concerns:
  - Intel / McAfee: The FTC voted to clear, but only after the EC demanded an interoperability remedy, specifically, that Intel not discriminate against competitive CPU vendors by making McAfee less interoperable with other CPUs, and that Intel not discriminate against competitive anti-virus vendors by making it more difficult to interoperate with Intel’s CPU.
  - Broadcom/Brocade: The current FTC required Broadcom to put up firewalls to ensure that it would not use information from Brocade competitors to improve the performance of Brocade’s fibre channel switches.
  - Intel/Altera: The FTC voted to clear, but again, only after the EC demanded an interoperability remedy. Here, Intel had to agree not to discriminate against Altera’s FPGA (customizable circuits) rivals by making it more difficult for them to interoperate with Intel’s CPU.
- So let’s hope for some continued flexibility in these cases.



Because flexibility is a good thing



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