Are Competition Officials Abandoning Competition Principles
Maureen K. Ohlhausen and John M. Taladay*

I. Introduction

Competition experts disagree on many things, especially in the current environment. But competition agencies, courts, and experts have universally endorsed certain core tenets of competition law over decades of experience—for example, the protection of competition, not competitors; tailoring remedies to underlying harms; the importance of sound economic evidence; the need to protect due process, and non-discrimination. These are the mantras that competition officials have chanted for many years—the guardrails that keep competition from running off the road of objectivity and crashing into non-competition motives that would distort markets for the benefit of other competitors or other special interests. In short, these are the principles that keep competition, and competition enforcement, honest.

At the same time, there has been a recent push for enforcers to acquire new ‘tools’ in the form of legislation, enhanced authority, or changed means of evaluating competitive effects in response to the rapid advance of technology. This is particularly so in the area of digital markets and the ‘Big Tech’ players where rapid advancement has caused some officials to suggest that competition enforcement cannot keep pace. Although genuine concern in quarters of the antitrust world underpins some proposals for ex ante regulation, the flame is being fanned by political, social, and industrial quarters that stand to benefit from such changes. In short, both prudent and imprudent incentives are behind the proposals. This issue takes on particular import in the current climate, where governments and agencies are considering the adoption and implementation of laws that would provide unprecedented ability to control and intervene into key segments of the economy.

Key Points

• Enforcers have universally agreed that competition laws should protect competition rather than competitors, rely on sound economics and evidence, protect due process, tailor remedies to the underlying harm, and avoid discrimination on non-competition grounds.

• While competition officials have a duty to safeguard these principles, examination of new regulatory proposals aimed at platform markets (including those in the EU, US and Germany) shows that they may be failing to do so.

• Competition officials should insist that competition-related regulatory proposals fully respect fundamental principles before endorsing proposals that threaten to advance political, social engineering or industrial policy objectives.

We offer no view in this article on whether these concerns justify a revision of competition laws or regimes. But in light of the conflicting bases on which these proposals are being advanced we do ask, and evaluate, the critical question that objective competition enforcers should be asking: if these are the principles that competition officials have agreed are necessary to protect competition, are the new proposed laws and regulations adhering to these core principles and serving competition, or are they in conflict with these principles and more likely to hinder competition? Or, put a different way, how can one distinguish between changes to legal regimes that are likely to promote, rather than stifle, competition?

In answering that question, we identify several core, universally accepted, competition principles as a litmus test for assessing whether proposed changes to antitrust law and practice are likely to advance competition. By comparing new legislative and regulatory proposals to these core principles, one may be able to identify proposals, or aspects of proposals, that risk stifling competition.

* Partners and Chairs of the Antitrust and Competition Practice at Baker Botts, LLP. This article reflects the views of the authors, which may diverge from those of colleagues and clients. The authors currently have an on-going relationship with some large technology platform companies, but they were not compensated specifically for this article. The authors would like to thank Christine Ryu-Naya and Jane Antonio of Baker Botts for their assistance in preparing this article and James F. Rill for providing insightful comments.
and, potentially, ways to rethink or modify proposals to avoid such a risk.

We recognise that legislators sometimes regulate markets to implement public policy choices despite the fact that such regulation may stifle competition, such as market regulation schemes for state-sponsored or ‘natural’ monopolies in areas such as telecommunications or electricity. But that is not what is happening here. The stated objective of these regulatory regimes is competition based, i.e., to facilitate competition and entry where markets are perceived to be distorted, not to accept the market distortion that advance other values as a matter of state policy. In any event, where regulation is being implemented to pursue non-competition policy choices, those objectives should be stated clearly and should not be disguised as measures that purport to serve the ends of competition. A disguised approach both undermines public confidence in competition enforcement and usurps the role of legislatures in making such choices. But most importantly, competition enforcers should work to safeguard fundamental competition principles even within regulatory schemes. Thus, there is no scope to argue that fundamental competition principles should be ignored in this setting.

After reviewing each core tenet below, we briefly consider certain current proposals to modify existing competition laws and whether they align with the core principle. This exercise is not intended to be an exhaustive examination of proposed changes to competition laws, nor is it intended to be a condemnation of them all. It is intended to serve as a means of considering whether the changes serve the objective of advancing competition.

A. Competition laws should be applied to protect competition, not competitors

Perhaps the most oft-quoted principle in competition law is the idea that competition laws are designed to protect the competitive process—‘competition’ itself—rather than specific, individual competitors. As noted by the OECD, ’It is widely agreed that the purpose of competition policy is to protect competition, not competitors’. The European Commission’s guidance on abuses of a dominant position clearly states that ‘what really matters is protecting an effective competitive process and not simply protecting competitors’. Likewise, DG Competition has stated clearly that ‘[w]ith regard to exclusionary abuses the objective of Article 102 is the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources’ and that ‘it is competition, and not competitors as such, that is to be protected’. The U.S. Supreme Court also firmly established this principle decades ago: ‘The antitrust laws... were enacted for “the protection of competition, not competitors”’.

In short, this premise has permeated competition law enforcement and dialogue for many years without dispute, and for good reason. Competition on the merits is, and is supposed to be, a destructive process where companies pit themselves against their rivals and try to win customers, win market share, and win the battle to innovate. Indeed, ‘winning’ can only be defined by reference to a company’s success relative to its rivals, which means that some must also lose. Of course, this is not meant to include ‘winning at all cost’ or ‘winning by any means necessary,’ but rather winning by being better. Or, as the U.S. Supreme Court has put it, ‘growth or development as a consequence of superior product [or] business acumen’ is not a violation of the antitrust laws.

This principle is ubiquitous in the international competition community. The International Competition Network (ICN) has stated, ‘The objective to enhance efficiency strongly supports, and is closely related to, the objectives of protecting the competitive process and promoting consumer welfare’ and that ‘[t]hese three objectives are interdependent’. Specifically, the ICN noted that certain economic tests (the profit sacrifice test, the no economic sense test, and the as efficient competitor test) ‘seek to protect the competitive process, rather than the consumer directly, and are therefore closely related to the
objective of ensuring an effective competitive process’. 9 The ICN later noted, ‘Competition law does not exist to insulate firms from competition, but rather to protect the competitive process from efforts to sabotage it’. 10

The OECD has stated that ‘there is broad agreement among competition agencies from OECD countries that the purpose of competition policy is to protect competition, not competitors’. 11 In 2021, the OECD likewise affirmed this concept of ‘protect competition, not competitors’ in its Recommendation on Competitive Neutrality, stating ‘that competition promotes efficiency, helping to ensure that goods or services offered to consumers more closely match consumer preferences, producing benefits such as lower prices, greater choice, improved quality, increased innovation, and higher productivity’. 12

Some recent legislative and regulatory proposals appear to be in tension with this basic premise. Rather than focusing on protection of competition itself, they appear to impose requirements on some companies designed specifically to facilitate their competitors, including those competitors that may have fallen behind precisely because they had not made the same investments in technology, innovation or product offerings. For example, the Digital Markets Act (DMA) would force a ‘gatekeeper’ company to provide business users of its service, as well as those who provide complementary services, access to and interoperability with the same operating system, hardware, or software features that are available to or used by the gatekeeper. 13 While this would restrain gatekeepers and presumably facilitate the interests of the gatekeeper’s rivals, it is not clear how this would protect consumers, as opposed to competitors.

There are two principal concerns. The first is that imposing an ongoing requirement for a platform to facilitate interoperability will tend to lock technology platforms into their existing forms, because an innovation to those platforms might undermine the interoperability requirement. 14 The second concern is that interoperability, designed to facilitate easy portability of information, will undermine consumer data privacy protections that otherwise may be unique to a gatekeeper’s platform. 15 The DMA, like similar proposals geared toward forcing data transfer, does not appear to consider these two potential harms. Interoperability benefits competitors directly but benefits consumers (if at all) indirectly; in contrast, the risks created by the proposal could harm consumers directly. In other words, it appears to create a framework in which benefits to competitors are prioritised over risks to consumers, without weighing or balancing these effects, including consumers’ interests in making decisions about control over their own data. 16

Another example of protecting competitors rather than competition are proposals that would ban ‘self-preferencing’ outright. The rationale for banning self-preferencing is that because the platform is an important (though not ‘essential’ in the antitrust sense) outlet for goods, its ability to self-preference creates an unbalanced playing field that allows the platform to tilt sales of its own goods to itself. This distorts competition, the argument goes, denying competitors the chance to access customers and depriving customers of choice. But, again, the direct benefit of such a ban goes to competitors, not necessarily consumers or competition itself. 17 The benefit to consumers is harder to gauge as it is based on the premise that competitors offer better solutions than the platform itself. That may be true in some cases. But the issue is not as simple as, for example, matching search terms with product offerings; many other variables often come into play (such as product quality, speed of delivery, ease of returns, customer reviews, etc.). Because negative customer experiences impact a platform across all of its offerings, it has a vested interest in the satisfaction

9 Ibid., at para. 40.
10 International Competition Network, ICN Unilateral Conduct Workbook, Chapter 2—Analytical Framework For Evaluating Unilateral Exclusionary Conduct (May 2017), para. 25, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG_UCW_Ch2.pdf accessed Feb. 23, 2022.
11 OECD, Competition on the Merits (n 2) 17.
12 OECD, Recommendation of the Council on Competitive Neutrality, OECD/LEGAL/0462 (May 2021), https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0462 accessed Feb. 23, 2022.
13 Note that the DMA is not a competition tool under Article 102 of the Treaty on the Functioning of the European Union (TFEU). Instead, the DMA is a regulatory proposal under Article 114 of the TFEU, which addresses the harmonisation of national rules.
14 OECD, Data Portability, Interoperability and Digital Platform Competition (2021) https://www.oecd.org/daf/competition/data-portability-interoperability-and-digital-platform-competition-2021.pdf accessed Feb. 23, 2022.
15 Bennett Cyphers and Cory Doctorow, ‘Privacy Without Monopoly: Data Protection and Interoperability’, Electric Frontier Foundation (12 February 2021) https://www.eff.org/wp/interoperability-and-privacy accessed Feb. 23, 2022 (‘policies designed to increase interoperability may weaken the tools that companies currently use to protect their users’).
16 See, e.g., Maureen K. Ohlhausen, ‘Privacy and Competition: Friends, Foes, or Frenemies?’, CPI Antitrust Chronicle (February 2019) https://www.competitionpolicyinternational.com/wp-content/uploads/2019/02/CPI-Ohlhausen.pdf accessed Feb. 23, 2022.
17 An outright ban on ‘self-preferencing’ also fails to consider that such behaviour is not immediately self-evident. In the European General Court’s decision in the Google Shopping case, the Court determined that a finding of abusive self-preferencing requires a consideration of ‘the particular circumstances of the practices in question’. Case T-612/17, Google & Alphabet, Inc. v. Comm’r, EU:T:2021:763, para. 261. The Court considered, among other factors, the importance of Google’s search traffic, the behaviour of internet users, and the various ways in which Google and others positioned and displayed search results. Ibid., at paras 261–262.
of its customers across the board, and self-preferencing in some cases can be a means of maximising consumer satisfaction. Notably, self-preferenced products are often less expensive than rival products, much like ‘private label’ brands in grocery stores. Thus, even if the platform may obtain higher profits in some cases from self-preferenced products, consumers will be the winner and only the rival may be the loser. 18

As one critic has noted:

Regulators and legislators often act as if the more open and neutral, the better, but customers have repeatedly shown that they often prefer less open, less neutral options. And critics of self-preferencing frequently find themselves arguing against behavior that improves consumer outcomes, because it hurts competitors. But that is the nature of competition: what’s good for consumers is frequently bad for competitors. If we have to choose, it’s consumers who should always come first. 19

Finally, even if self-preferencing in some cases results in higher profits and worse outcomes for consumers, this might make the practice illegal but would not appear to justify an outright ban on the practice—indeed, this is why per se and rule of reason concepts were created. A ban will clearly benefit the platform’s competitors, but it places those concerns above the interests of consumers in convenience and lower prices.

B. Antitrust enforcement should rely on sound economics and evidence

Antitrust and economics have evolved as co-dependent fields, a ‘long and fruitful interdisciplinary collaboration’. 20

Although the requirement of sound economics is not written into leading antitrust laws directly, it has been recognised as an indispensable element of competition law enforcement by courts and enforcers for decades. Indeed, most enforcement agencies now employ a special stable of economists, often including many Ph.D. economists, as an essential part of their mission. Those that do not have a separate economics division typically are staffed with a substantial number (sometimes a predominance) of economists.

Courts, agencies, and international organisations are unanimous in declaring that competition enforcement should be based on sound economics. In the 2017, Antitrust Guidelines For International Enforcement and Cooperation, the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) stressed their commitment to cooperation with foreign authorities with a view to promoting ‘convergence on substantive enforcement standards that seek to advance consumer welfare, based on sound economics, procedural fairness, transparency, and non-discriminatory treatment of parties’. 21 They added:

What matters is not the label applied to a competitive effects analysis, but rather whether the analysis is clearly articulated and grounded in both sound economics and the facts of the particular case. 22

More recently—connecting economics to the theme of remedies that we will explore below—the 2020 DOJ Merger Remedies Manual confirms that ‘[a]ny remedy must be based on sound legal and economic principles and be related to the identified competitive harm.’ 23 And as a former FTC Chair stated, ‘good policy based on sound economics and profound respect for fundamental legal principles is essential’ 24 and ‘[a]ntitrust relies on sound economics, both theoretical and empirical’. 25

At least since the adoption of Regulation 1/2003, the European Commission has likewise been ‘all in’ on grounding competition decision in sound economics.

To this purpose the Commission has in recent years revised the totality of its block exemptions regulations and produced guidelines on main

---

18 Jorge Padilla, Joe Perkins and Salvatore Piccolo, ‘Self-Preferencing in Markets with Vertically-Integrated Gatekeeper Platforms’ (2020) CSEF Working Papers 582 http://www.csef.it/WP/wp582.pdf accessed Feb. 23, 2022. Oxera, ‘How Platforms Create Value For Their Users: Implications For the Digital Markets Act (12 May 2021) https://www.oxera.com/wp-content/uploads/2021/05/How-platforms-create-value.pdf accessed Feb. 23, 2022. D. Bruce Hoffman and Garrett D. Shinn, ‘Self-Preferencing and Antitrust: Harmful Solutions for an Improbable Problem’, CPI Antitrust Chronicle (June 2021) https://www.clearygottlieb.com/-/media/files/cpaihoffman--final-pdf.pdf accessed Feb. 23, 2022 (‘the most likely explanation for platform self-preferencing is procompetitive, benefiting both buyers and sellers on the platform and increasing overall output’ at 7; ‘Indeed, many of the complaints levied at vertically integrated platforms are, on their face, complaints about practices that benefit consumers by providing better products (though competitors, of course, don’t like those products). Broadly prohibiting platform vertical integration to avoid the risk that in some rare cases vertical integration might be anticompetitive would be like amputating your leg to treat a mosquito bite.’ at 10; ‘While some such firms have managed to capture the popular imagination (and politicians’ ire), there is good reason to expect self-preferencing by vertically integrated platforms is more likely to benefit competition than to harm it.’ at 11).

19 Sam Bowman and Geoffrey Manne, ‘Platform Self-Preferencing Can Be Good for Consumers and Even Competitors’, Truth on the Market (4 March 2021) https://truthonthemarket.com/2021/03/04/platform-self-preferencing-can-be-good-for-consumers-and-even-competitors/ accessed Feb. 23, 2022.

20 Jonathan B. Baker and Timothy F. Bresnahan, ‘Economic Evidence in Antitrust: Defining Markets and Measuring Market Power’, in P. Bucciroassi (ed), Handbook of Antitrust Economics 1 (2008) The MIT Press, Cambridge, Massachusetts.

21 U.S. Department of Justice and Federal Trade Commission, Antitrust Guidelines For International Enforcement and Cooperation (13 January 2017), 37 https://www.justice.gov/atr/internationalguidelines/download accessed Feb. 23, 2022.

22 U.S. Department of Justice and Federal Trade Commission, Commentary on the Horizontal Merger Guidelines (2006), 17 https://www.justice.gov/atr/file/801216/download accessed Feb. 23, 2022.

23 U.S. Department of Justice, Merger Remedies Manual (2020), 2 https://www.justice.gov/atr/page/file/1312416/download accessed Feb. 23, 2022.

24 Timothy J. Muris, ‘Principles for a Successful Competition Agency’ (2005) 72 U. Chi. L. Rev. 165, 165.

25 Ibid., at 170.
types of business practices and agreements that can be caught by competition rules. In making this revision, we have shifted from a legalistic approach to an interpretation of the rules based on sound economic principles.26

This commitment to economic analysis has been echoed by later European Commissioners for Competition, e.g.,

I would like to emphasise that it is not our intention to propose a radical shift in enforcement policy. We simply want to develop and explain theories of harm on the basis of a sound economic assessment for the most frequent types of abusive behaviour to make it easier to understand our policy, not only as stated in policy papers but also in individual decisions based on Article 82. . . . A pure market share focus risks failing to take proper account of the degree to which competitors can constrain the behaviour of the allegedly dominant company. That is not to say that market shares have no significance. They may provide an indication of dominance—and sometimes a very strong indication—but in the end a full economic analysis of the overall situation is necessary.27

The Court of Justice of the European Union (CJEU)’s 2017 judgment in the Intel case is a key example of the conquest of economic, effects-based analysis over a formalistic approach based on mere presumptions of harm to competition.

[The Commission is not only required to analyse, first, the extent of the undertaking’s dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market.28

Following suit with these examples, international competition fora have adopted this refrain in earnest.29

The reasons for this ‘interdisciplinary interdependence’ between competition law and economics also have been well-explained by experts. Professor Hovenkamp has noted that when antitrust policy is unmoored from economic analysis, it exhibits highly problematic contradictions:

The result is goals that are unmeasurable and fundamentally inconsistent, although with their contradictions rarely exposed. Among the most problematic contradictions is the one between small business protection and consumer welfare. . . . Although the movement antitrust rhetoric is often opaque about specifics, its general effect is invariably to encourage higher prices or reduced output or innovation, mainly for the protection of small business or those whose technology or other investments have become obsolete.30

As one commentator noted in the FTC Hearings on Competition & Consumer Protection in the 21st Century:

The truly progressive approach to antitrust—the one that acknowledges that progress made in our understanding of the most beneficial role of antitrust, with the greatest potential to advance our economy and improve society—is one that focuses on testable economic hypotheses underpinned by solid empirical evidence. This approach, adopted after more than a century of contradictory enforcement actions and judicial decisions, provides clarity and avoids the whims of politically motivated parties.31

Professor Hovenkamp is less restrained in his commentary. His retort to those objecting to the use of econometric methods to assess market power of large digital platforms was stark:

This amounts to subordination of science to ideology and threatens to divorce antitrust policy from economic analysis. The objection is reminiscent of Stalin’s objections to the theory of evolution and modern genetics because he regarded them as anti-socialist.32

Finally, an anecdote might also be illuminating. A decade or so ago, the OECD held a roundtable session on abuse of dominance where delegates were asked to identify the indica of a firm as dominant.33 While most agencies talked about market share thresholds, the ability to
exclude competitors, and related economic analysis, the Russian delegate was more succinct: ‘We have a list of dominant firms! If a firm is on the list, then it is dominant.’ The other delegates—particularly those from the more-developed agencies—could not help but laugh out loud at the notion.

Yet now a number of jurisdictions have proposed or enacted laws that would basically do just that. They would apply a dominant firm ‘tag’ to a list of companies, and thereby impose a vast array of obligations and restrictions, with little or no analysis required. These proposals allow the enforcing agency to designate firms as ‘gatekeepers’, or similar tags such as being ‘undertakings of paramount significance to competition across markets’, a ‘covered platform’ with at least 50 million active monthly users and a certain market cap, or having ‘Strategic Market Status’. But these designations do not involve a dynamic analysis based on economic rigor. For instance, under the DMA, a gatekeeper is a ‘core platform service provider, identified either by specified quantitative metrics or qualitatively through a market study. Under either approach, a company becomes a gatekeeper and that is that, unless it can convince the Commission that it is not.

Such a designation would open the door to a host of obligations, limitations, and remedies, without requiring any showing of dominance or anticompetitive effects by established standards, dispensing with decades of antitrust precedent. While such regulation certainly would curtail the behavior of the designated firms, it is difficult to reconcile this approach with core competition principles, which would demand that robust economic analysis be applied to identify the sphere within which the firm might exercise dominance, the scope of any anticompetitive effects, and the appropriate remedy for those effects.

The DMA has been roundly criticised in this regard by thoughtful scholars:

In short, in proposing this kind of ex ante regulation the European Commission wants to be able to prohibit some of the practices it has examined in the past without having to define relevant markets, to assess market dominance or to bear the burden of establishing that these practices are capable of restricting competition. This is definitively a move away from an economics-based approach to competition law enforcement.

In a similar vein, the American Innovation and Choice Online Act, introduced by Senator Klobuchar in the United States, would impose liability on companies operating covered platforms that ‘unfairly preference’ the company’s own products, ‘unfairly limit’ the ability of other businesses to compete on the platform, or discriminate in application or enforcement of the platform’s terms of service in a way that would ‘materially harm competition’. The Act would similarly prohibit companies from ‘materi ally restrict[in]’ access to data. The proposal does not designate a threshold for materiality, giving it the dual effect of eviscerating economic analysis as well as prioritising competitors over competition. Similar proposals have arisen elsewhere through a prohibition on ‘unfair’ or ‘exploitative’ contract terms on rivals. The clear point is that an economic assessment is essential to determining whether market power exists while crude metrics (like market capitalisation or the number of average monthly users) are not a substitute and are prone to error and to promote non-competition objectives.

34 Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act), COM/2020/842 final (15 December 2020), 5 https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM:2020:842:FIN accessed Feb. 23, 2022 [hereinafter DMA].

35 American Innovation and Choice Online Act, S. 2992, 117th Congress (2021) https://www.congress.gov/bill/117th-congress/senate-bill/2992/text accessed Feb. 23, 2022.

36 A New Pro-Competition Regime for Digital Markets, CP 489 (July 2021), para. 6 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003913/Digital_CompetitionConsulta tion_v2.pdf accessed Feb. 23, 2022 [hereinafter UK Proposal].

37 While the UK regime is still awaiting formal legislation, it is expected to comprise of three pillars: (i) enforceable codes of conduct that set out how each designated ‘Strategic Market Status’ (‘SMS’) firm should behave; (ii) competitive intervention tools to help address the sources of SMS firms’ market power (e.g., data mobility; interoperability) and (iii) SMS-specific merger control rules. Ibid., at pt. 4–7.

38 DMA, art. 3(2) (’a’ where the undertaking to which it belongs achieves an annual EEA turnover equal to or above EUR 6.5 billion in the last three financial years, or where the average market capitalisation or the equivalent fair market value of the undertaking to which it belongs amounted to at least EUR 65 billion in the last financial year, and it provides a core platform service in at least three Member States; (b) where it provides a core platform service that has more than 45 million monthly active end users established or located in the Union and more than 10,000 yearly active business users established in the Union in the last financial year; for the purpose of the first subparagraph, monthly active end users shall refer to the average number of monthly active end users throughout the largest part of the last financial year; (c) where the thresholds in point (b) were met in each of the last three financial years’).

39 This occurs because the quantitative metrics, or qualitative designation, creates a presumption of gatekeeper status. The presumption is rebuttable, but the burden falls on the putative gatekeeper to convince the Commission otherwise.

40 Frederic Jenny, ‘Competition Law and Digital Ecosystems: Understanding the Issues, Facing the Challenges and Moving Forward’, Concurrences N° 3–2021, para. 177 https://www.concurrences.com/en/review/issues/ no-3-2021/articles/competition-law-enforcement-and-regulation-for-dig ital-ecosystems-understanding-en accessed Feb. 23, 2022.

41 Ibid., at sec 2(a).

42 UK Proposal, (n 37), para. 82.
C. Due process is fundamental to sound competition law enforcement

Adherence to basic principles of due process is recognised as an essential aspect of proper competition law enforcement. The adoption of this concept has been robust. As of August 2021, seventy-three members of the ICN have ascribed to the ICN Framework for Competition Agency Procedures (CAP) committing not only to ‘adhere to the substantive Principles on procedural fairness set forth in the CAP’ but also ‘to participate in the Cooperation Process and the Review Process under the CAP’. The CAP template incorporates commitments relating to non-discrimination, transparency, investigative process, notice and opportunity to defend, decisions in writing and other essential procedures. It builds on years of other ICN work, including the ICN Guiding Principles for Procedural Fairness and the ICN Recommended Practices for Investigative Process. UNCTAD has similarly advocated that ‘states, in their control of restrictive business practices, should ensure treatment of enterprises which is fair, equitable, on the same basis to all enterprises, and in accordance with established procedures of law. The laws and regulations should be publicly and readily available’.

Of course, most agencies are bound—in their competition assessments—by their own legal regimes and the due process requirements imposed by their courts. One essential role of courts is to guarantee that due process is respected. The U.S. Supreme Court has explained, ‘An elementary and fundamental requirement of due process . . . is notice reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections’. Similarly, the Court has stressed, ‘The fundamental requisite of due process of law is the opportunity to be heard’ at ‘a meaningful time and in a meaningful manner’.

One element of concern related to multiple legislative proposals is that due process and procedural fairness protections are absent. For example, under the DMA and the German Act Against Restraints of Competition (GWB), the ability to designate a firm as a ‘gatekeeper’ or of ‘paramount significance to competition’ is entirely within the remit of the enforcer, with the DMA providing no ability (and the GWB providing limited opportunity) for the subject company to review the basis for the decision, or introduce clarifying or contrary evidence.

Other proposals would ban—outright—acquisitions by large platform companies or acquisitions beyond a certain size. This subverts due process entirely, as subject companies do not even have the chance to offer pro-competitive justifications, no matter how compelling (or not) they might be.

D. Competition remedies should be tailored to the underlying harm to competition

Courts and antitrust enforcers have long agreed that once a competitive harm is identified, any remedy must be directly related to that identified harm. EU law establishes the right to an ‘effective remedy’ as a general principle; any remedy imposed must ‘be clear and precise so that the undertaking may know without ambiguity its rights and obligation and may take steps accordingly’. The ICN Merger Working Group echoes that: ‘tailoring the remedy to the harm allows competition authorities to require the least intrusive remedy without compromising effectiveness’. The International Chamber of Commerce recommends that courts review a proposed remedy to determine ‘that it is appropriate and consistent with similar judgments and that the remedy is justified based on actual, measurable consumer harm and/or a demonstrated need for deterrence’. As one U.S. FTC official explained, carefully tailoring a remedy not only increases

45 See, e.g., Douglas H. Ginsburg and Taylor Owings, ‘Due Process in Competition Proceedings’ (2015) 11 Competition L. Int’l 39; Christine Varney, ‘Procedural Fairness’ (13th Annual Competition Conference, Fiesole, 12 September 2009) https://www.justice.gov/atr/file/519876/download accessed Feb. 23, 2022.
46 ‘ICN Framework for Competition Agency Procedures (CAP)’, International Competition Network https://www.internationalcompetitionnetwork.org/frameworks/competition-agency-procedures/ accessed Feb. 23, 2022.
47 See ‘CAP Templates’, International Competition Network https://www.internationalcompetitionnetwork.org/frameworks/competition-agency-procedures/cap-templates/ accessed Feb. 23, 2022.
48 ICN Guiding Principles for Procedural Fairness, (n 29).
49 International Competition Network, ICN Recommended Practices for Investigative Process (2019) https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/RPs-Investigative-Process.pdf accessed Feb. 23, 2022.
50 United Nations Conference on Trade and Development, The United Nations Set of Principles and Rules on Competition, U.N. Doc. TD/RBP/CONF/10/Rev.2 (2000) 15 https://unctad.org/system/files/official-document/trdprconf10r2en.pdf accessed Feb. 23, 2022 [hereinafter UNCTAD Principles on Competition].
51 Mullane v. Central Hanover Bank & Trust Co., (1950) 339 U.S. 306, 314.
52 Goldberg v. Kelly (1970) 397 U.S. 254, 267 (quoting Grannis v. Ordean (1914), 234 U.S. 385, 394 and Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).
53 See, e.g., Trust-Busting for the Twenty-First Century Act, S.1074, 117th Congress (2021) https://www.congress.gov/bill/117th-congress/senate-bill/1074 accessed Feb. 23, 2022.
54 Case C-35/15P(R), Comm’n v. Vanbreda Risk and Benefits, EU:C:2015:275, para. 38; Joined Cases 92 and 93/87, Comm’n v. French Republic et al., 1989 ECR 405, para. 22.
55 International Competition Network, Merger Remedies Guide (2016), 3 https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RemediesGuide.pdf accessed Feb. 23, 2022.
56 International Chamber of Commerce, Recommended Framework For International Best Practices In Competition Law Enforcement Proceedings (2010), 8 https://iccwbo.org/content/uploads/sites/3/2017/06/ICC-International-Due-process-08-03-10.pdf accessed Feb. 23, 2022.
the likelihood of curing the competitive harm, it also ensures the preservation of any benefits stemming from the conduct at issue. 57

The U.S. Supreme Court has viewed this link as essential to ensure that the relief relates to the anticompetitive effects. In a Clayton Act Section 7 action, the Court has declared that relief ‘necessarily must “fit the exigencies of the particular case”’. 58 In considering Sherman Act violations, the Court likewise has written, ‘The test is whether or not the required action reasonably tends to dissipate the restraints and prevent evasions’. 59

The U.S. DOJ’s Antitrust Policy Guide to Merger Remedies instructs, ‘Before recommending a proposed remedy to an anticompetitive merger, the [Division] should satisfy itself that there is a close, logical nexus between the remedy and the alleged violation—that the remedy both [cures the competitive harm] and flows from the theory of competitive harm’. 60 And, despite claiming for itself ‘a pretty expansive remedial toolbox,’ the FTC has similarly recognized that ‘remedial provisions must bear a reasonable relation to the violation charged’ and that Commission orders ‘must avoid unreasonable overbreadth and impermissible vagueness’. 61

Many of the reform proposals aimed at Big Tech apply remedies or restrictions with a broad brush irrespective of the origin of the perceived harm or even the applicability of the remedy to the platform. For example, every company deemed a ‘gatekeeper’ under the DMA is subject to a host of restrictions on its conduct, including a restriction on ‘self-preferencing’ that would apply company-wide to the gatekeeper. This restriction is clearly targeted at certain of the platform companies but is largely irrelevant to others. It is well understood that the large platform companies are quite distinct in their service offerings, platform configurations, and the scope of their market influence. 62 But none of these distinctions appears to matter under the DMA, which offers one broad ‘cure’ for all complaints.

The German GWB also drastically lowers the thresholds for intervention for those companies that have previously been designated as having ‘paramount significance to competition’. The scope for intervention includes prohibition of conduct that leads to the expansion of the firm into markets in which it is not even present, let alone dominant. Although the firm can justify its conduct, the burden of proof is reversed, with the firm itself having to provide evidence that its conduct does not restrict competition.

E. Competition law and enforcement should not discriminate on the basis of non-competition factors

With rare exceptions, most notably in China and South Africa, most competition laws do not allow competition authorities to introduce non-competition factors—such as industrial policy—into competition decisions. Moreover, in international fora, the dictate has been clear that agencies should not use competition laws to achieve non-competition objectives.

The OECD Recommendation of the Council on Competitive Neutrality adopts a principle that enforcers should not favour some market participants over others. It requires ‘ensuring that the legal framework applicable to markets in which Enterprises currently or potentially compete is neutral and competition is not unduly prevented, restricted or distorted’, and that agencies should ‘subject competing activities to the same regulatory environment and enforce regulations with equal rigour, appropriate deadlines and equivalent transparency with regard to all current or potential market participants’. 63

Likewise, UNCTAD’s Principles and Rules on Competition provide, ‘The provisions of the Set of Principles and Rules shall be universally applicable to all countries and enterprises regardless of the parties involved in the transactions, acts or behaviour’. 64

Even Robert Pitofsky, when advocating for incorporation of policy concerns in antitrust prior to becoming FTC Chair, noted that certain non-economic concerns ‘can play no useful role in antitrust enforcement’:

These include: (1) protection for small businessmen against the rigors of competition, (2) special rights for franchisees and other distributors to continuing access to a supplier’s products or services regardless of the efficiency of their distribution operation and the will of the

57 See Deborah L. Feinstein, ‘The Significance of Consent Orders in the Federal Trade Commission’s Competition Enforcement Efforts’ (GCR Live, New York, 17 September 2013), 5–6 https://www.ftc.gov/sites/default/files/documents/public_statements/significance-consent-orders-federal-trade-commission%289%29-competition-enforcement-efforts-gcr-live/130917gcrspeech.pdf accessed Feb. 23, 2022 (‘if broad proscriptions for specific prohibited conduct sweep in conduct that is procompetitive or efficient, more narrowly tailored language may allow the beneficial conduct to continue’).
58 Ford Motor Co. v. United States (1972) 405 U.S. 562, 575 (citing In’t Salt Co. v. United States (1947), 332 U.S. 392, 401).
59 United States v. Bausch & Lomb Optical Co. (1944) 321 U.S. 707, 726.
60 U.S. Department of Justice, Antitrust Division, Antitrust Policy Guide to Merger Remedies (October 2004), 3–4 https://www.justice.gov/atr/page/file/1175136/download accessed Feb. 23, 2022 (emphasis added).
61 Ian Conner, ‘Fixer Upper: Using the FTC’s Remedial Toolbox to Restore Competition’ (GCR Live 9th Annual Antitrust Law Leaders Forum, Miami, 8 February 2020), 3 https://www.ftc.gov/system/files/documents/public_statements/1565915/conner_gcr_live_conduct Remedies_2-8-20.pdf accessed Feb. 23, 2022.
62 Nicolas Petit, Big Tech and the Digital Economy (OUP 2020).
63 OECD Recommendation on Competitive Neutrality, (n 12).
64 UNCTAD Principles on Competition, (n 50) 11.
But some recent proposals seem designed to put a finger on the scale in favour of certain market participants or market outcomes.

Current FTC Chair Lina Khan’s recently announced plan to address consolidation in the oil and gas industry directly implicates the first of Pitofsky’s non-economic concerns. In an August 2021 letter to the director of the National Economic Council, Chair Khan announced she would direct FTC staff to ‘identify additional legal theories to challenge retail fuel station mergers where dominant players are buying up family-run businesses’.

This plan suggests enforcement decisions based primarily on an acquired party’s identity as a family-run business irrespective of any competition concerns. This is not the only new FTC initiative that appears to introduce non-competition factors. The FTC’s recent announcement of a revised approach to merger investigations notes that the agency may focus on ‘labour markets, the cross-market effects of a transaction, and how the involvement of investment firms may affect market incentives to compete’.

Of perhaps even greater concern are proposals that would allow for the introduction of industrial policy or protectionist objectives. These may be less evident on the face of the proposed legislation or regulation, but inherent in its intent or operation. For example, in discussing proposed legislation that would limit ‘predatory acquisitions’, a French Secretary of State to the Minister for the Economy and Finance justified the proposal on the basis that it would help European businesses acquire tech start-ups without having to compete with the ‘GAFA’ companies, a clear case of industrial policy in the guise of antitrust regulation.

The DMA proposal does not seem to aim at solving the competition issues raised by gatekeepers in the digital sector in general but limits itself to the sub-set of those problems raised by a small number of very large platforms without providing a clear rationale for this choice. Thus, it is difficult to avoid the impression that this proposal is driven more by the political desire to act against these large platforms than by the desire to promote competition and innovation in the digital sector in general.

The inclusion of non-competition objectives in the DMA should be avoided but may be unavoidable. The heated political climate in the EU and intensive lobbying of interested parties seems to have influenced the proposal from the start. For this reason, the potential for non-competition factors to bias the proposed legislation should be carefully considered. This background also places a premium on ensuring that the act is objectively tested against the full range of core competition principles.
II. Conclusion

The drive to modify competition laws to address digital markets does not justify an abandonment of core competition principles. In fact, many of the proposals are not targeted solely to the handful of digital players that are frequently mentioned but would apply broadly or ubiquitously and alter competition law enforcement as we know it. Before such sweeping changes are adopted, the broader implications for competition should be considered. So far, it doesn’t appear that the most fundamental questions are being asked: Are consumers or competitors being protected? Is there a sound economic underpinning for the proposed approach? Is due process being preserved? Is the regulatory action tailored in a way that will not unnecessarily distort markets?

Are discriminatory, non-competition objectives ruling the day?

If core competition principles are not guiding the changes to these laws, then one must ask: ‘what is the driver?’ Politics? Social engineering? Industrial policy? If those are the objectives, they should be stated and adopted by legislatures, not wrapped in competition garb that distorts the proper functioning of markets. Competition officials, above all, should be insisting that legislative or regulatory proposals fully respect the fundamental principles of competition law. By endorsing these changes without doing so, competition officials effectively would be abandoning competition policy.

https://doi.org/10.1093/jeclap/lpac033