

# **McCarthy Institute IP-Con 2022**

**In the Trenches: Antitrust Enforcement and Regulation Affecting  
Companies with Innovative Products**

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# Panelists

- David Gelfand, Moderator – Professor of Practice, Antitrust, Sandra Day O’Connor College of Law; Senior Counsel, Cleary Gottlieb
- Nikhil Shanbhag – Vice President and Associate General Counsel, Competition and Telecommunications Law, Meta
- Pam Petersen – Vice President of Litigation, Axon
- David Hyman – Scott K. Ginsburg Professor of Health Law & Policy, Georgetown Law
- Gary Marchant – Professor of Law, Law, Science and Innovation, Sandra Day O’Connor College of Law

# Antitrust Enforcement vs. Ex Ante Regulation

- How effective are existing antitrust laws in addressing innovative product markets?
- How effective are the antitrust agencies in enforcing those laws?
- Is ex ante regulation needed to address the challenges of modern technology-focused markets?
- What form should that regulation take?
- What are the potential impacts on innovation in those markets?

# Enforcement Example 1: FTC v. Facebook

- Filed in U.S. District Court in D.C. on December 9, 2020; dismissed on June 28, 2021, [https://scholar.google.com/scholar\\_case?case=4326393359618118237&q=Federal+Trade+Commission+v.+Facebook&hl=en&as\\_sdt=4,130,140](https://scholar.google.com/scholar_case?case=4326393359618118237&q=Federal+Trade+Commission+v.+Facebook&hl=en&as_sdt=4,130,140)
- Amended Complaint filed on August 19, 2021; motion to dismiss denied on Jan 11, 2022, [https://scholar.google.com/scholar\\_case?case=1796995842216741162&q=Federal+Trade+Commission+v.+Facebook&hl=en&as\\_sdt=4,130,140](https://scholar.google.com/scholar_case?case=1796995842216741162&q=Federal+Trade+Commission+v.+Facebook&hl=en&as_sdt=4,130,140)
- Key issue: whether FTC adequately alleged that Facebook has monopoly power in a properly defined market for Personal Social Networking services
- Conduct at issue includes (1) prior acquisitions of Instagram and WhatsApp, and (2) adopting policies that allegedly prevented interoperability
- Only the prior acquisitions claim allowed to proceed
- “Although the agency may well face a tall task down the road in proving its allegations, the Court believes that it has now cleared the pleading bar and may proceed to discovery.” (Emphasis in original.)

# Enforcement Example 2: FTC v. Axon

- FTC alleges that Axon's acquisition of VieVu for \$13 million in May 2018 lessened competition in market for body-worn cameras and digital evidence management systems sold to large metro police departments
- Filed as FTC administrative enforcement action on January 3, 2020
- Earlier that same day, Axon challenged the FTC's process in U.S. District Court in Arizona, seeking preliminary injunction and arguing violation of due process and separation of powers; dismissed for lack of subject matter jurisdiction on April 8, 2020, 452 F.Supp.3d 882 (D. Ariz. 2020)
- Ninth Circuit affirmed, holding that challenge must be brought after completion of administrative proceeding, 986 F.3d 1173 (9th Cir. 2021)
- Supreme Court granted cert on January 24, 2022, on issue of whether Congress impliedly stripped district courts of jurisdiction over constitutional challenges to FTC structure and procedures

# Axon's Structural Constitutional Challenges

1. The FTC's structure combining investigative, prosecutorial, adjudicative, and appellate functions violates due process;
1. The uncodified, black box "clearance" process by which the FTC and the DOJ divvy up merger investigations arbitrarily subjects similarly situated companies to vastly different rights, standards, and consequences in violation of due process and equal protection; and
1. The dual-layer for-cause removal protections enjoyed by the FTC's ALJ who presides over administrative cases violates Art. II separation of powers.

# Dual Jurisdiction – Vastly Different Rights

## DOJ – Federal Court

- Impartial Art. III Judges
- Fed. R. Evid. & Civ. P.
- “Substantially Lessens Competition” Standard
- Direct Appeal Circuit Court
- “Clear Error” Review of Fact Findings

## FTC – Administrative Option

- FTC appointed/paid ALJ
- Don’t apply
- “Unfair Competition” Standard
- Appeal to FTC Commissioners who voted to sue you and can change/disregard ALJ findings before Circuit Court appeal
- Fact Findings “Conclusive” if any evidence

# FTC Quarter-Century Admin Win Streak

## FTC 100% Success Rate

- When ALJ ruled in favor of FTC staff, Commission affirmed liability 100% of the time.
- When ALJ found no liability, the Commission reversed 100% of the time.
- “This is a strong sign of an unhealthy and biased institutional process.”

## Contrast DOJ ~50%

But when district court antitrust decisions are appealed to federal circuit courts, the win rate is much closer to 50%.

Former FTC Commissioner  
Joshua D. Wright

[https://www.ftc.gov/system/files/documents/public\\_statements/626811/150226bh\\_section\\_5\\_symposium.pdf](https://www.ftc.gov/system/files/documents/public_statements/626811/150226bh_section_5_symposium.pdf)

# Case Example 3: FTC v. Altria/Juul

- FTC alleges that Altria's acquisition of 35% of Juul and non-compete agreement lessened competition in market for closed-system vaping devices
- Filed as FTC administrative proceeding on April 1, 2020; administrative trial held in June 2021
- ALJ ruling on February 15, 2022, finding in favor of Altria and Juul, [https://www.ftc.gov/system/files/documents/cases/d09393altriainiti\\_aldecisionpublic.pdf](https://www.ftc.gov/system/files/documents/cases/d09393altriainiti_aldecisionpublic.pdf)
- Internal "notice of appeal" to Commission filed by complaint counsel on February 16, 2022

# Regulation Example 1: Europe



*We've come to a point where we have to take action. A point where the power of digital businesses—especially the biggest gatekeepers—threatens our freedoms, our opportunities, even our democracy . . . So for the world's biggest gatekeepers, things are going to have to change.*

Margrethe Vestager,  
**EU Commissioner for Competition**  
October 2020

# Regulation Example 1: Europe

- In December 2020, the European Commission proposed a regulation known as the DMA (Digital Markets Act) for gatekeeper platforms
- “Gatekeeper platforms” are providers of core platform services like search, video sharing or social networks that (1) have significant market impact, (2) constitute a gateway for businesses to reach end users, and (3) have an entrenched and durable position
- Rules include interoperability, equal ranking of first and third party services, prohibitions against self-preference in payments, restrictions on sharing data across owned services, obligations to share data with others, etc. See Appendix.
- Regulations may apply regardless of competitive effects and without scope to justify practices
- Violations can be addressed by substantial fines and other remedies
- Likely adoption this year with obligations starting in 2023

# Regulation Example 2: Proposed US Legislation

“As dominant digital platforms – some of the biggest companies our world has ever seen – increasingly give preference to their own products and services, we must put policies in place to ensure small businesses and entrepreneurs still have the opportunity to succeed in the digital marketplace.”



– Senator Amy Klobuchar

# Regulation Example 2: Proposed US Legislation

- American Innovation and Choice Online Act (AICOA) voted out of Senate Judiciary Committee 16-6 on January 20, 2022; no current timeline for full Senate vote
- Applies to platforms of a certain size; current definition would cover Google, Amazon, Apple and Facebook
- Prohibits self-preference in manner that materially harms competition, discrimination between similarly situated businesses, bundling of products as condition of access, and use of third-party data to improve own competing products and services
- FTC authorized to promulgate regulations
- Remedies include civil penalties up to 15% of US revenue, injunctive relief, and forfeiture of compensation by corporate officers for repeat violations

# Regulation Example 3: Do-Not-Call

## **Regulating Big Tech: Lessons From the FTC's Do Not Call Rule**

William E. Kovacic  
George Washington University Law School

David A. Hyman  
Georgetown University Law Center

Included with Panel Materials

# **Appendix**

## **Do's and Don'ts Under EU Digital Markets Act**

# Article

## 5

5	<i>Summary</i>
(a)	<b>Combining personal data.</b> Prohibits gatekeepers from combining personal data obtained by a CPS with data obtained by any other 1P or 3P services, absent express user consent
(b)	<b>MFNs.</b> Requires online intermediation services to allow their business users to offer the same products or services to end users at different prices or conditions on other online intermediation services
(c) & (ca) - New	<b>Anti-steering provisions.</b> Gatekeepers will be banned from restricting app developers from promoting offers to users through alternative sources and from contracting with users outside the app store. Gatekeepers must allow users to access and use, through the gatekeeper's CPSs, content, subscriptions, features and other items acquired without using the relevant CPS (i.e., sideloading)
(d)	<b>Raising issues with public authorities.</b> Prohibits gatekeepers from restricting business users' ability to raise issues with any relevant public authority
(e)	<b>Use of identification [or payment services / any ancillary services].</b> Prohibits gatekeepers from requiring business users to use a gatekeeper's identification or payment / any ancillary services.
(f)	<b>Bundling with other CPSs.</b> Prohibits gatekeepers from conditioning business or end users' access to one CPS on the users subscribing or registering with another CPS
(g)	<b>Disclosure of ads prices/rev shares.</b> Require gatekeepers to disclose granular pricing information and revenue share information to advertisers and publishers upon their request, if this information is also available to the gatekeeper.

# Article

## 6

6(1)	<i>Summary</i>
(a)	<b>Use of business data to compete.</b> Prohibits gatekeepers from using non-publicly available data generated by the business users on its CPS and the end users of those business users, to compete with the business users.
(aa)	<b>EP amendment - Data combination for targeted ads.</b> Prohibits gatekeepers from combining personal data for targeted or micro-targeted advertising unless the end user has given consent in a clear, explicit, renewed and informed way. Personal data from minors should never be combined for such purposes, even if the minor consents
(b)	<b>Possibility to uninstall preloaded apps.</b> Requires gatekeepers to allow end users to fully delete preinstalled apps. It would not be sufficient for gatekeepers to allow users to merely disable apps. The provision includes an exception for apps that are considered to be essential to the functioning of the OS or the device.
(c)	<b>Installing 3P apps and app stores.</b> Requires gatekeepers to allow 3P apps and app stores to be installed on their OSs. These 3P apps and app stores must be accessible via means other than the CPS of the gatekeeper.
(d)	<b>Non-discriminatory ranking [and other settings].</b> Requires gatekeepers to rank 1P and 3P services equally. While Article 6(1)(d) speaks only of equal ranking, Recital 48 indicates that the provision also requires equality in terms of formats and display.
(e)	<b>No restrictions on multihoming or switching on an OS.</b> Prohibits gatekeepers from imposing technical restrictions on end users' ability to switch or multi-home across apps and services (in particular browsers) on an OS.
(ea)	<b>EP amendment - No restrictions on end users ability to unsubscribe.</b> Prohibits gatekeepers from imposing restrictions or carrying out practices that limit the end user's ability to unsubscribe from the gatekeeper's service.
(f)	<b>Enable interoperability.</b> Requires gatekeepers to give business users and 3P ancillary services the same access and interoperability with OS, hardware, and software features as 1P ancillary services.

# Article

## 6

6(1)	<i>Summary</i>
(fa)	<b>EP amendment - Interconnection with communication services.</b> Requires gatekeepers to allow 3P providers of messaging/ communication services to interconnect with their own messaging/communication services, free of charge and in the same conditions and quality available to users of the gatekeeper’s own service
(fb)	<b>EP amendment - Interconnection with social networks.</b> Requires gatekeepers to allow 3P providers of social networking services to interconnect with their own social networking services, free of charge and in the same conditions and quality available to the gatekeeper or its other services.
(g)	<b>Ads performance measurement tools.</b> Requires a gatekeepers' online advertising services to provide advertisers and publishers, upon their request, access to relevant information and performance measuring tools that the gatekeeper itself uses so that they can independently verify the performance of the advertisements.
(h)	<b>Data portability.</b> Requires gatekeepers to provide businesses and users of their CPSs the ability to port over their data to other platforms, as well as tools to facilitate data portability, in line with GDPR. Under the Council text, the clause would only apply to end users
(i)	<b>Data access.</b> Requires gatekeepers to provide businesses with “continuous and real time access” to data on their use of their CPS and the users interacting with their products
(j)	<b>Search data sharing.</b> Requires online search engines to share anonymized ranking, query, click, and view data with rival search engines, for both free and paid search results.
(k)	<b>Fair Access to [app stores/all CPSs].</b> Requires gatekeepers to provide app developers with fair and non-discriminatory access to app stores
(ka)	<b>Council amendment - Ease of termination.</b> Prohibits gatekeepers from imposing contractual or technical restrictions to termination (e.g., unsubscribing, or terminating a service contract more generally) on its business users and end users