

Makan Delrahim
Assistant Attorney General
Department of Justice, Antitrust Division
950 Pennsylvania Ave, NW
Washington, DC 20530



May 30, 2018

Public Comments of the Open Markets Institute Submitted to the Antitrust Division
Roundtable Examining the “Consumer Costs of Anticompetitive Regulations”

The Open Markets Institute welcomes the opportunity to participate in the Justice Department’s roundtable discussion on “the consumer costs of anticompetitive regulations.” We look forward to continuing to engage with the Antitrust Division on antitrust and competition issues.

Markets are shaped through law and regulation. Although public regulations are often depicted as encumbering or interfering with competition, it is a mistake to classify them this way. On the contrary, public regulations are often fundamental to creating constructive competition within open markets. Other public regulations—following legitimate mandates from federal, state, or local authorities—promote non-competition values, such as public health and safety, worker protections, diversity, and local control.

In select instances, it may be appropriate for the Antitrust Division to identify those public regulations that serve private interests at the expense of both competition and the public interest. But our view is that the Antitrust Division should focus its efforts and resources on antitrust enforcement, and that devoting resources to critiquing the work of public regulators should generally *not* be a component of the Division’s work.

We believe this for three reasons. First, the US political economy is currently seeing historically high levels of merger activity alongside signs of persistent and prevalent market power.¹ This means that the Antitrust Division’s tools and resources are critically needed to block anticompetitive mergers and to investigate, remedy, and deter anticompetitive conduct.² The

¹ Companies have spent over two trillion dollars on mergers in 2018 so far, a “record pace for merger activity, topping the deal volume from the first few months of 2007” and set to “easily pass the all-time annual record of \$4.7 trillion in deals set in 2015.” Paul R. La Monica, *Companies have spent a stunning \$2 trillion on mergers so far this year*, CNN (May 24, 2018), <http://money.cnn.com/2018/05/24/investing/merger-boom/index.html>; *Too Much of a Good Thing*, ECONOMIST (Mar. 26, 2016), <http://www.economist.com/news/briefing/21695385-profits-are-too-high-america-needs-giant-dose-competition-too-much-good-thing>; COUNCIL OF ECON. ADVISERS, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER 4 (2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf.

² At his confirmation hearing, Federal Trade Commission Chairman Joe Simons said, “The place most likely to have antitrust problems are places that have market power. Those are the places you want to look the most.” We agree with this approach and believe the prevalence of market power across our political economy should prompt serious investigations by the Justice Department as well as by the Federal Trade Commission. See *Hearing for the President’s Nominees to Serve as Federal Trade Commissioners, Senate Comm. on Commerce, Science, and Transportation*, 115th Cong. (2018); see also Hamza Shaban, *Nominee for FTC chairman signals scrutiny for tech*

Division’s focus should be on identifying exercises of private power that violate the law rather than exercises of public power whose policy judgments the Antitrust Division may question.

Second, the Antitrust Division’s institutional mandate is to enforce the antitrust laws. As far as we can tell, none of the antitrust statutes require or even invite the Division to examine the effects of “anticompetitive” public regulations, an exercise that assesses regulation through the lens of a single goal (competition) while ignoring the other values that lawmakers may have sought to promote. Indeed, playing competition advocate risks putting the Antitrust Division in the position of making policy judgments more suited for a legislature than a law enforcer—a hazard that Assistant Attorney General Delrahim has cautioned against in other contexts.³ The Division’s commitment to regulatory humility should make it equally humble in matters that fall outside its purview and expertise.

Third, concern about the costs of public regulation may also serve to distract both the Antitrust Division and the public from the costs of private regulation. Dominant actors with market power are often able to set the terms within a specific marketplace, thereby dictating outcomes for other businesses. Such unilateral exercise of private power is also very much a form of regulation. As Robert Hale wrote, “There is government whenever one person or group can tell others what they must do and when those others have to obey or suffer a penalty.”⁴ Especially in digital technology markets, certain dominant firms now exert regulatory control over the terms on which others can sell goods and services. The private regulations established by these “functional sovereigns” and the costs they impose on different sets of customers invite close attention from the Antitrust Division, as they suggest both maintenance and potential abuse of market power.⁵

Below we offer our views on (i) the relationship between markets and regulations, (ii) examples of public regulations that promote competition, (iii) examples of private regulations that undermine competition, and (iv) how this should inform the Antitrust Division’s priorities.

I. Reframing Regulations

Given the topic and the framing of this workshop, it is worth first discussing the relationship between markets and regulation. Markets are created and structured through law. There is no such thing as a market “free” from government intervention; in fact, government is a precondition for a functioning market. Markets cannot function without property rights, which government defines and enforces, and markets rely on state authority to settle disputes through contract law and other tools.

giants, WASH. POST (Feb. 14, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/02/14/nominee-for-ftc-chairman-signals-scrutiny-for-tech-giants/?utm_term=.a0e513d2e0b1.

³ Makan Delrahim, Assistant Att’y Gen., Antitrust Div., Dep’t of Justice, Assistant Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association’s Antitrust Fall Forum (Nov. 16, 2017) <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar>.

⁴ ROBERT HALE, FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER (1952).

⁵ Frank Pasquale, *From Territorial to Functional Sovereignty: The Case of Amazon*, CNBC (Dec. 8, 2017), <https://www.cnbc.com/2017/12/08/amazon-shows-corporations-replacing-government-functions-commentary.html>.

For this reason, the Antitrust Division’s framing of this topic—looking at regulations that “supplant free market processes”—is misguided. It misses the fact that markets are not freestanding organic entities. Government does not stand outside of and separate from markets—it is intrinsic to and constitutive of them. “Laissez-faire was planned.”⁶ In structuring markets, legislators and other policymakers seek to promote a range of economic, political, and social objectives, including short-term price competition, but also consumer protection, public health, fair wages, safe working conditions, and the dispersal of private power. Consumer protection and public health laws and regulations—just like contract and property law—are forms of state action that shape markets.

Similarly, it’s important to recognize that regulations can play a critical role in promoting competition. The Antitrust Division invites us to examine “the costs of supplanting competition with regulation,” implying that competition and regulation are inexorably at odds, or that regulations necessarily undermine competition. But, as we describe below, regulations can play a critical role in promoting competition. History shows that regulations can help structure open marketplaces, enabling firms to compete on a level playing field. For this reason, it is especially important that the Antitrust Division employ both regulatory humility and deference to legislators and regulators. Not only do many regulations legitimately reflect democratic decision-making and non-competition values that fall outside of the Division’s role and expertise, but they can also successfully fulfill competition mandates.

II. How Public Regulations Can Promote Competitive Market Structures

There are at least four types of regulations that can promote competition. These include: (i) separation rules, (ii) common carriage rules, (iii) rules reducing switching costs, and (iv) price transparency regimes. Described as “competition catalysts,” these regulations have traditionally been applied in network industries, or sectors where a small number of private actors have captured control over an essential input or critical infrastructure.⁷ Below we briefly review how each can structure competition.

- (i) Separation rules place structural limits on business activity in order to ensure that firms don’t exploit their control over critical networks. By serving as limits on certain forms of integration, these rules ease barriers to entry in related or adjacent markets. Examples of separation regimes that successfully promoted competition include the “fin-syn” rules, the “Maximum Separation” rules, and the *Carterfone* rule. All were issued by the Federal Communications Commission and are viewed as having successfully kept existing incumbents from dominating adjacent markets.⁸

⁶ KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (1944).

⁷ Tim Wu, *Antitrust via Rulemaking: Competition Catalysts*, COLO. TECH. L. J. (forthcoming).

⁸ Marc L. Herskovitz, *The Repeal of the Financial Interest and Syndication Rules: The Demise of Program Diversity and Television Network Competition?*, 5 CARDOZO ARTS & ENT’MENT 177, 183 (1997); Jonathan Weinberg, *The Internet and “Telecommunications Services,” Universal Service Mechanisms, Access Charges, and Other Flotsam of the Regulatory System*, 16 YALE J. ON REG. 211, 222 (1999); Robert Cannon, *The Legacy of the Federal Communication Commission’s Computer Inquiries*, FED. COMM. L. J., Vol. 55, Iss. 2, Art. 2 (2003); Tim Wu, *Wireless Carterfone*, 1 INT’L J. OF COMM. 389, 395–97 (2007). For an overview of how structural separations can enhance competition, see Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV.

- (ii) Common carriage rules require the carrier to treat all customers equally and transparently—both at the consumer and at the producer level. Absent common carriage, a dominant transportation or network facility can discriminate among customers, picking winners and losers. This means that the success or failure of a particular good depends on the whims of the carrier, rather on the merits of the product. This also opens the door to de facto extortion by the carriers, who can demand ever higher payments for carriage. Common carriage prevents such distortion and such extortion. Net neutrality rules are the most recent example of common carriage. The rules prohibited Internet carriers from discriminating between senders of content and from accepting payment for faster transmission. After being implemented, the policy protected TV and music providers, bloggers, nonprofit organizations like Wikipedia, and other entrepreneurs from being throttled or blocked by providers like AT&T and Verizon—thereby promoting an open market for content and information.⁹
- (iii) Rules reducing switching costs promote competition by eliminating a barrier to entry. Switching costs typically arise when customers have long-term, dependent relationships with a firm and when firms make it difficult to abandon their services. Pro-competitive regulations isolate the source of the switching costs and use regulation to reduce them. The “number portability” rules adopted by the FCC for the mobile phone market, for example, required that a consumer be permitted to keep their number when changing service providers. Regulations requiring that a dominant firm make its product interoperable with services offered by competitors play a similar role, promoting competition through reducing switching costs and entry barriers.
- (iv) Price transparency rules seek to prevent companies from distorting the competitive process through engaging in deceptive pricing. As the National Economic Council has described, deceptive pricing may “inhibit the competitive process” by hurting “the ability of a price-cutting competitor to take business away from a more expensive rival.” Price transparency regulations—such as “all-in” pricing that require firms to display all and any fees that constitute the final price—help promote competition on the merits.

A final example of pro-competitive regulation that reflects these principles but does not fall neatly into any single one of these categories are the USDA’s Grain Inspection, Packers and Stockyards Administration (GIPSA) rules. First proposed in 2010 following joint national workshops held by the Antitrust Division and USDA, the rules sought to redress the monopsony power that packers and processors enjoy over farmers and ranchers. As the Antitrust Division’s record of the workshops documents, certain agricultural markets—particularly in poultry—are characterized by extreme disparity of bargaining power between processors and farmers.¹⁰ This is because packers

(forthcoming).

⁹ Tim Wu, *The ‘Fix’ for Net Neutrality That Consumers Don’t Need*, N.Y. TIMES (Apr. 28, 2017), <https://www.nytimes.com/2017/04/28/opinion/the-fix-for-net-neutrality-that-consumers-dont-need.html>.

¹⁰ Antitrust Div., Dep’t of Justice, Competition and Agriculture: Voices from the Workshops on Agriculture and Antitrust Enforcement in our 21st Century Economy and Thoughts on the Way Forward (May 2012), <https://www.justice.gov/sites/default/files/atr/legacy/2012/05/16/283291.pdf>. See also, CHRISTOPHER LEONARD, THE MEAT RACKET (2014); Lina Khan, *Obama’s Game of Chicken*, WASH. MONTHLY (Nov/Dec 2012).

and processors were permitted to roll up agriculture markets through mergers and acquisitions. The lack of competition today enables processors to use their leverage over farmers to extract better terms, saddle them with risk, and engage in deceptive, unfair, and potentially anti-competitive practices.¹¹

By clarifying the scope of the Packers and Stockyards Act, the GIPSA rules would have given teeth to a statute that prohibits processors and packers from abusing their monopsony power against farmers. Although a modified version of the rules were due to go into effect last year, a few days before its scheduled implementation, GIPSA announced it was withdrawing them.¹² The USDA's decision to withdraw the rule has allowed the existing conduct to continue. Given the Antitrust Division's extensive efforts documenting the effects of concentration in agriculture markets, its competition advocacy work should have impelled it to publicly support the GIPSA rules.

III. How Dominant Firms Impose Private Regulations

In highly concentrated markets, dominant players with market power can impose private regulations. Private regulations are decisions by private actors that unilaterally set the terms of commerce and steer outcomes within a marketplace. When a single company or a small group of dominant companies make decisions that effectively set standards for the rest of the industry, those outcomes take on the character of governance.¹⁵ The power to establish private regulations is troubling because, unlike a government, private actors are not accountable to the public.

Indeed, many modern markets are not competitive but are governed by private regulatory power. Instead of targeting public regulations, the Antitrust Division should focus on private regulations, which can (i) signify market power and (ii) distort market outcomes.

Below are two examples of private regulations:

- (i) Four airlines govern which cities in America receive affordable and regular air service and which are cut off from the grid. Due to a series of mergers approved by the Justice Department, what were nine major carriers in 2005 have whittled down to four. Following these mergers, major airlines have dramatically slashed flights at major hubs, "de-hubbing" airports in Cincinnati, Memphis, Pittsburgh, and St. Louis. Each of these cities saw flights cut by over fifty percent.¹⁶ The sharp reductions have led businesses to relocate; Chiquita Banana, for example, moved its headquarters from Cincinnati to Charlotte, citing the poor air service in Cincinnati. Given the lack of

¹¹ *Id.*

¹² Deena Shanker, *Trump Chooses Big Meat Over Little Farmers*, BLOOMBERG (Oct. 25, 2017).

¹⁵ For examples of instances whereby firms with market power have issued private regulations, see Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. CONST. L. & PUB. POL'Y 37, 53-55 (2014). See also Sandeep Vaheesan, *What Iron Pipefittings Can Teach Us About Public and Private Power in the Market*, 91 INDIANA L. J. SUPP. 15 (2015).

¹⁶ Phil Longman & Lina Khan, *Terminal Sickness*, WASH. MONTHLY (Mar/Apr 2012); Alan Blinder, *The Trouble With the Memphis Airport: No Crowds*, N.Y. TIMES (May 23, 2018) <https://www.nytimes.com/2018/05/23/us/memphis-airport.html>.

competition, policies set by airline executives can now shape the economic geography of the entire country, helping determine the economic fate of a given city or region. Perversely, airlines enjoy this private regulatory power largely because the Antitrust Division failed to vigorously enforce the antitrust laws. Alfred Kahn, a primary architect of airline deregulation, acknowledged that deregulation had failed to meet its promise, in part due to government's failure to fully enforce antitrust.¹⁷

- (ii) Two companies—Google and Facebook—serve as private regulators over the news and publishing industries. Close to 50 percent of Americans rely on Facebook to access news, and the two companies together capture 83% of all digital revenue growth. News publishers depend on Google and Facebook for traffic; tweaks to their algorithms can lead traffic to plummet. For this reason, editorial decisions are now informed by what Facebook and Google's algorithms privilege. When Facebook decided to prioritize video content, for example, editors “pivoted to video,” laying off dozens of journalists.¹⁸ According to news reports, Mark Zuckerberg is directly involved in determining business outcomes for publishers, determining, for example, the number of articles that readers can read for free.¹⁹ “Facebook and Google are our primary regulators,” said David Chavern, president of the News Media Alliance, a trade group representing over 2,000 newspapers.²⁰

IV. Antitrust Division's Priorities

America's political economy is witnessing both historic levels of market power and record-breaking merger waves. This means that the Antitrust Division's resources are critically needed to police anticompetitive mergers and to investigate and challenge companies engaging in exclusionary, predatory, and other abusive conduct. Insofar as the DOJ engages in competition advocacy, its efforts should be focused on *promoting* pro-competitive regulations—especially given that the Trump administration as a whole is pursuing a deregulatory agenda that in many instances may reduce competition. Targeting market power will also help the Division identify anticompetitive forms of *private* regulation—which is at the core of the DOJ's statutory mandate to enforce the antitrust laws.

¹⁷ Alfred E. Kahn, *Deregulation: Looking Backward and Looking Forward*, 8 YALE J. REG. 325, 348 (1990) (“[T]he government clearly has neglected responsibilities of which it was never the intention of deregulation to relieve it. These include...vigorous enforcement of the antitrust laws.”).

¹⁸ Daniel Walters, *Facebook's new algorithm threatens to destroy media companies that long chased Facebook clicks*, MONTEREY CENTERPIECE NOW (Feb. 15, 2018), http://www.montereycountyweekly.com/news/cover/facebook-s-new-algorithm-threatens-to-destroy-media-companies-that/article_2010756a-11e5-11e8-99b7-5bf7e5612006.html.

¹⁹ Nellie Bowles, *Is Facebook's Campbell Brown a Force to Be Reckoned With? Or Is She Fake News?*, N.Y. TIMES (Apr. 21, 2018), <https://www.nytimes.com/2018/04/21/technology/facebook-campbell-brown-news.html>.

²⁰ Nitasha Tiku, *Publishers Could Get a New Weapon Against Facebook and Google*, WIRED (Mar. 7, 2018), <https://www.wired.com/story/bill-would-let-publishers-gang-up-versus-facebook-and-google>.