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Facebook VS FTC, a highly political case under the guise of a legal case

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Resume: *Politics is a tool of law, but should law be a political tool? Yet another antitrust case is aiming one of the GAFA's. Judge Boasberg has finally agreed to hear the FTC's complaint against Facebook after a first temporary dismissal of the case. Accusing the social network giant of abuse of dominance, the American authority wants to force the META Group to separate from its subsidiaries Instagram and Whatsapp. They were previously acquired in mergers subject to control and investigation before being granted authorization. Between the desire for exacerbated regulation and potential infringements of entrepreneurial freedom, we look back at the premises and beginnings of a new battle between the competition authorities and GAFAs.*

I. Introduction

1. The United States, founding father of antitrust. It was in 1890 that the foundations of our modern antitrust system were laid, notably with the Sherman Act. This was one of the first legal texts to prohibit abuses of dominant positions and cartels. Sherman, as he began his audits before Congress, clearly explained his vision: "the association of labour and capital in the form of a corporation (...) must be encouraged and protected, because it tends to reduce certain production costs[1]", emphasising the advantages for trade and the consumer. He saw the competitive process as a good thing, especially when it emanated from a desire for corporate dominance. However, Sherman also highlights the failures of the competitive process which sometimes harms consumers: "This bill does not seek to paralyse combinations of capital and labour, the formation of partnerships or companies, but only to prevent and control combinations made for the purpose of preventing competition or restraining trade, or increasing the profits of the producer to the detriment of the consumer[2]". Sherman's ambition then was to fight what he and others perceived as

[1] Senate, *Congressional Record*, 1890, p. 2457.

[2] *Ibid.*

the excessive use of economic power concentrated in the hands of a few companies to protect consumers, not for the sake of doing so, not to protect democracy[3], not for political reasons[4] and not to protect small business[5]. The idea was to preserve the ability of market players to decide without having to follow the instructions of powerful economic entities since consumers are better off when they can do so[6]. To summarize, antitrust law prohibits centralisation when it does not result from competition on the merits[7]. Antitrust law is therefore not anti-monopoly, it is not the prerogative of a structuralist vision which would prohibit all manifestations of market power[8]. This construction of antitrust law constitutes the foundations for our modern antitrust.

At that time, this was referred to as antitrust 1.0, which was to evolve into antitrust 2.0 in the 1960s, with a more economic approach of the Chicago school[9]. This period was rather prosperous for the American economy, which was reflected in what could be described as uncontrolled liberalism, which at a certain point had the effect of calling into question the antitrust policy pursued by Reagan[10]. If we look at the constituent elements of US antitrust and the handling of its case – which has been largely through private enforcement – antitrust enforcement is mainly economic in nature, as it is mostly conducted outside the courts and is generally based on economic will[11]. Most of the time, antitrust agencies conclude almost all their civil enforcement cases through so-called consent decrees[12]. These consent decrees contain behavioural or structural remedies based on economic analysis, which imposes an economic regulatory regime[13]. This approach demonstrates the desire for fair and balanced market oversight in the face of a US "bigger than yesterday" drive that has been known since the 19th century.

This historical point is crucial in understanding the criticisms that could be

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[3] A. O. Stanley, *United States Steel Corporation: Hearings Before the Committee on Investigation of United States Steel Corporation*, prepared by the House of Representatives, Washington DC, 1912, p. 2862 (statement of Justice L. D. Brandeis); see Justice Brandeis, "Competition and Smallness: A Dilemma Re-Examined", *The Yale L. J.*, Vol. 66, No. 69, 1956.

[4] See L. M. Khan, "Amazon's Antitrust Paradox", *The Yale L. J.*, Vol. 126, No. 3, 2017, p. 742 ("By orienting antitrust toward material rather than political ends, both the neoclassical school and its critics have effectively embraced concentration at the expense of competition").

[5] See "Lina Khan: 'This isn't about antitrust. It's about values'", *The Financial Times*, Mar. 29, 2019, available at <https://perma.cc/7FVT-CHF9>.

[6] C. Schragger, "Decentralization and Development", *Virginia L. Rev.*, Vol. 96, No. 8, 2010, pp. 1851-1852.

[7] T. Schrepel, *Blockchain + Antitrust: The Decentralization Formula*, Edward Elgar Publishing, 2021.

[8] *Ibid.*

[9] T. Schrepel, "Computational Antitrust: An Introduction and Research Agenda", *Stanford Computational Antitrust,* Vol. 1, Jan. 15, 2021.

[10] C. Prieto, "L'Europe et le droit de la concurrence : des malentendus aux mérites reconnus", *JCP G*, No. 12, Doctr. 132, Mar. 21, 2007.

[11] B. Hawk, "System Failure: Vertical Restraints and EC Competition Law", *Common Market L. Rev.*, Vol. 32, Iss. 4, 1995.

[12] J. D. Wright & Douglas H. Ginsburg, "The Economic Analysis of Antitrust Consents", *Eur. J. L. & Econ.*, Vol. 46, 2018, p. 245.

[13] G. Massarotto, "The Deterrent and Enunciating Effects of Consent Decrees", *Competition L. & Econ.*, Vol. 11, 2015, p. 493, 497; G. Massarotto & A. Ittoo, "Gleaning Insight from Antitrust Cases Using Machine Learning", *Stanford Computational Antitrust*, Vol. 1, 2021.

expressed at modern antitrust; it is always good to go back to the foundations in order to understand where the breaking point begins.

2. A liberal approach applied to MAGMAs (formerly GAFAMs). The MAGMAs have emerged from the so-called digital revolution, a revolution that some consider to be the 4e industrial revolution. They are the main players in the so-called digitalisation of the economy, a fundamentally new structure of the economy. Initially, an extremely liberal view of antitrust was applied to MAGMA as they were regarded as endless sources of innovation, new economic ambassadors for the United States and technological powers[14]. These different characteristics led the American competition authorities to be somewhat reluctant to act, specially under the impetus of the Chicago School doctrine which advocates for an economic approach to antitrust. As a matter of fact, a general idea was beginning to take hold in the mind of the regulator, which is that excessive application of antitrust law seems futile, but also threatening to innovation[15].

An emerging fear, along that path, that seems to be the best shield for MAGMAs in their development is the so-called type 1 "false positive" error. This error corresponds to condemning a practice that would have positive, and therefore pro-competitive effects, which would lead to the wrongful condemnation of an innovative company. A form of abstentionism on the part of the American competition authorities was thus born, despite the numerous recommendations from the Democrats. Some authors even speak of *a "tetanized antitrust law*[16]", in the face of the American inaction observed for years. However, for some time now, American antitrust law has been undergoing "the biggest shakeup in generations"[17]. We are faced with a very important form of reactionism with numerous lawsuits underway against Big Tech players[18], of which the *FTC v. Facebook* case is symptomatic.

3. The beginning of a massive reaction. Indeed, initially, on August 22, 2012, the FTC addressed a closing letter to Facebook and Instagram regarding the 1-billion-dollar acquisition stating that "upon further review

[14] M. Pelloli, "20 ans qui ont changé le monde : Les Gafa, champions de l'innovation", *Le Parisien*, Jan. 2, 2021.

[15] C. Prieto, "Numérique et abus de position dominante", *CDE*, No 3, Doss. 18, May 2019.

[16] *Ibid.*

[17] D. Francis, "Making Sense of Monopolization: Antitrust and the Digital Economy", *Antitrust L. J.*, 2022 (forthcoming), p. 6.

[18] See, e.g., *U.S. v. Google*, Case No 1:20-cv-3010 (D.D.C. filed Oct. 20, 2020); *Colorado v. Google*, Case No 1:20-cv-3715 (D.D.C. filed Dec. 17, 2020); *District of Columbia v. Amazon.com, Inc.* (D.D.C. filed May 25, 2021); although the latter suit was dismissed on Mar. 18, 2022: J. D. Mckinnon, "Amazon Wins Dismissal of D.C. Antitrust Lawsuit Over Pricing", *The Wall Street J.*, Mar. 18, 2022, available at <https://www.wsj.com/articles/amazon-wins-dismissal-of-d-c-antitrust-lawsuitover-pricing-.11647645389>.

of this matter, it now appears that no further action is warranted by the Commission at this time. Accordingly, the investigation has been closed"[19]. In 2014, when WhatsApp's purchase was being considered, the only concerns raised then by the FTC were privacy matters. The Chief Privacy Officer then warned both companies in a letter that the promises made regarding consumer's privacy had to be honored or they "could be in violation of Section 5 of the Federal Trade Commission Act"[20]. Yet, these two operations are now being reconsidered by the complaint, *FTC v. Facebook*, first introduced in December 2020, on monopolization ground[21]. In fact, it is alleged that "Facebook has, for many years, continued to engage in a course of anticompetitive conduct [...]. This course of conduct has had three main elements: acquiring Instagram, acquiring WhatsApp, and the anticompetitive conditioning of access to its platform to suppress competition"[22]. What seems like an odd switch of narrative at first fits into a bigger picture, one of a – seeming – general ongoing shift in antitrust.

As mentioned, American antitrust law is currently standing "at its most fluid and negotiable moment in a generation"[23]. Facebook is not the only company undergoing litigations. Google is under the DoJ's probe for, allegedly, "unlawfully maintaining monopolies through anticompetitive and exclusionary practices in the search and search advertising markets"[24]. Amazon, up until a dismissal of the lawsuit on March 18th, 2022[25], was accused of antitrust violations for binding third-party sellers to offer a better price on Amazon.com, preventing them "from offering better deals for their products elsewhere"[26]. However, despite the dismissal, this case is not yet over, the DoJ having issued a statement a month later, on April 27th, urging for reconsideration of the decision[27]. Beyond these judicial proceedings, legislative actions are being also considered.

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[19] FTC, "Closing letter to Counsel for Facebook, Inc.", Matter Number 121 0121, Aug. 22, 2012; "Closing letter to Counsel for Instagram, Inc.", Matter Number 121 0121, Aug. 22, 2012.

[20] FTC, "Letter From Jessica L. Rich, Director of the Federal Trade Commission Bureau of Consumer Protection, to Erin Egan, Chief Privacy Officer, Facebook, and to Anne Hoge, General Counsel, WhatsApp Inc", Apr. 10, 2014.

[21] FTC, "FTC Sues Facebook for Illegal Monopolization", Dec. 9, 2020.

[22] *FTC v. Facebook, Inc.*, Case No 1:20-cv-03590-JEB, Doc. 1, Dec. 9, 2020; Doc. 51, Jan. 13, 2021, p. 3, 21.

[23] D. Crane, "Antitrust's Unconventional Politics", *Va. L. Rev. Online,* Vol. 104, 2018, p. 118.

[24] DoJ, "Justice Department Sues Monopolist Google For Violating Antitrust Laws," Oct. 20, 2020; *U.S. v. Google*, Case No 1:20-cv-3010 (D.D.C. filed 20 Oct. 2020); *Colorado v. Google*, Case No 1:20-cv-3715 (D.D.C. filed 17 Dec. 2020).

[25] *District of Columbia v. Amazon.Com, Inc*, Complaint (D.D.C. filed 25 May 2021); J. D. McKinnon, "Amazon Wins Dismissal of D.C. Antitrust Lawsuit Over Pricing", *The Wall Street J.*, Mar. 18, 2022, <https://www.wsj.com/articles/amazon-wins-dismissal-of-d-c-antitrust-lawsuit-over-pricing-11647645389>.

[26] Reuters, "U.S. court dismisses D.C. antitrust lawsuit against Amazon", Mar. 21, 2022, <https://www.reuters.com/business/retail-consumer/us-court-dismisses-dc-antitrust-lawsuit-against-amazon-2022-03-19/>.

[27] DoJ, "Statement of interest of the United States of America in support of plaintiff's motion for reconsideration", No. 2021 CA 001775 B, Apr. 27, 2022.

A "broad Executive Order presaging sweeping change"[28] has been signed by President Biden. In this vein, there might be a future adoption of Bipartisan Tech Antitrust Legislation[29] directly aimed at the Digital Sector as the bill "Ending Platform Monopolies Act" can testify. Its goal is, in fact, to "prevent dominant online platforms from leveraging their monopoly power to distort or destroy competition in markets that rely on that platform"[30]. Furthermore, the choice of a quantitative criteria to be deemed a "covered platform", of either at least 50,000,000 United States-based monthly active users or 100,000 monthly active business users, or either the ownership by "a person with net annual sales, or a market capitalization greater than $600,000,000,000"[31] narrows down the possibilities to mostly (or only) Big Tech companies. Facebook, for its part, could also seem particularly concerned by the ACCESS ACT. In fact, the *FTC v. Facebook* complaint, other than the past acquisitions, points out the alleged difficulties for some third-party apps to access Facebook. Application programming interfaces (APIs) were supposedly, for example, only available if the apps "neither competed with Facebook [...] nor promoted competitors"[32]. In this matter, Section 4 of the ACCESS ACT, "Interoperability", if implemented, would oblige covered platform operators to "maintain a set of transparent, third-party-accessible interfaces (including application programming interfaces) to facilitate and maintain interoperability with a competing business or a potential competing business"[33].

This contemporary scrutiny is not without reason. The past years have seen the rise of a Neo-Brandeisian movement, reviving Justice Brandeis' idea that "size can become a menace-both industrial and social"[34] as, in his words, "wherever a dominant position has been attained, restraint necessarily arises"[35]. The concentration of economic power is thus being considered as a threat not only to markets, but to democracy as the "Utah Statement" (called the "Neo-Brandeisian Pamphlet") points out[36]. In consequence, the

[28] D. Francis, "Making Sence of Monopolization: Antitrust and the Digital Economy", Draft, Jul. 2021, p. 6; Exec. Order, *Promoting Competition in the American Economy*, No 14036, Jul. 9, 2021; See, e.g., H. Hovenkamp, "President Biden's Executive Order on Promoting Competition: an Antitrust Analysis", Draft, Jul. 2021.

[29] House Committee on the Judiciary, *Chairman Nadler Applauds Committee Passage of Bipartisan Tech Antitrust Legislation*, Press Release, Jun. 24, 2021.

[30] *Ibid.*

[31] See, e.g., ACCESS Act of 2021, H.R.3849, Introduced on Jun. 11, 2022, p. 11; the definition is the same in the five different antitrust bills.

[32] *FTC v. Facebook*, *op. cit.*, Doc. 1, Dec. 9, 2020; Doc. 51, Jan. 13, 2021, p. 41.

[33] ACCESS Act of 2021, *op. cit.*, Sect. 4, p. 3.

[34] *U.S. v. Columbia Steel Co.*, No 334 U.S. 495, 1948, pp. 535-536, J. Douglas, dissenting.

[35] *American Column & Lumber Co. v. U.S.*, Case No 257 U.S. 377, 1921, p. 414, L. Brandeis, dissenting.

[36] T. Wu, "The Utah Statement: Reviving Antimonopoly Traditions for the Era of Big Tech", *OneZero*, Nov. 18, 2019, <https://onezero.medium.com/the-utah-statement-reviving-antimonopoly-traditions-for-the-era-of-big-tech-e6be198012d7>.

consumer welfare standard, that has been applied by courts for the past decades as the goal of antitrust, is now being called out[37], DoJ's recently appointed Assistant Attorney General, Jonathan Kanter, going as far as to say that it "is a catch phrase, not a standard"[38]. He then proceeded to encourage the reimplementation of a competitive process goal, as some authors who previously advocated for the "consumer welfare standard" to be replaced by an "effective competition standard"[39], for example. Additionally, strong structural remedies are also being asked for by academics[40] and politics[41] as being the only one capable of restoring fair and loyal competition in digital markets. Overall, a revival "of robust oversight over the antitrust laws" is solicited[42] and appears to be going underway along with the rise of the New Brandeis School and the growing interest in Lina Khan, "one of the primary figureheads of the Neo-Brandeisian movement"[43] and nominated by President Biden as Chairwoman in the FTC in June 2021. The *FTC v. Facebook* case is a prime example of this situation as Instagram and WhatsApp acquisitions are now being reconsidered, questioning merger laws, and as structural remedies, such as divestiture of assets, are being called for by the FTC[44]. However, its opening in this context also questions about political influence in a judicial proceeding as Facebook had been previously called out by actors from different fields - academia, politics, or law.

4. Background of the Case. This case is not a surprise, or at least not necessarily unprecedented, as the FTC is not the forerunner of the desire to charge Facebook. Indeed, New-York's State has tried to bring some action against the social networking giant. However, it faced difficulties as the facts took place six years earlier, which mostly motivated the refusal of the judges[45].

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37 L. M. Khan, "Amazon's Antitrust Paradox", *op. cit.*, p. 716: "This analysis reveals that the current framework in antitrust-specifically its equating competition with "consumer welfare," typically measured through short-term effects on price and output-fails to capture the architecture of market power in the twenty-first century marketplace"; F. Marty, "Is Consumer Welfare Obsolete? A European Union Competition Perspective", *Prolegómenos*, Vol. 24(47), pp. 55-78, <https://doi.org/10.18359/prole.4722>.

38 DoJ, "Assistant Attorney General Jonathan Kanter Delivers Remarks at New York City Bar Association's Milton Handler Lecture", May 18, 2022, <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association>.

39 M. Steinbaum & M. E. Stucke, "The Effective Competition Standard: A New Standard for Antitrust", *U. Chi. L. Rev.*, Vol. 87, No. 2, Mar. 2020, pp. 595-623.

40 *See e.g.* L. M. Khan, "The Separation of Platforms and Commerce", *Colum. L. Rev.* Vol. 119, No. 4, 2019, pp. 973-1093.

41 Former Presidential Candidate E. Warren, "Break Up Big Tech", <https://2020.elizabethwarren.com/toolkit/break-up-big-tech>.

42 Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary; Majority Staff Report and Recommendations, *Investigation of Competition in Digital Markets*, Oct. 2020, p. 7.

43 L. Mason & Dr. Herbener, *The Big Tech Debate, Neo-Brandeisians, and Competition*, Economics Colloquium, Dec. 4, 2020, p. 3.

44 *FTC v. Facebook*, *op. cit.*, Doc. 1, Dec. 9, 2020; Doc. 51, Jan. 13, 2021, p. 51: "divestiture of assets, divestiture or reconstruction of businesses".

45 *State of New York et al. v. Facebook Inc.*, Case No 2021 WL 2643724, Jun. 28, 2021.

The FTC, in parallel with this action brought by the State of New York, is taking legal action after three commissioners voted to authorise it[46]. Together with 46 states, the FTC is launching a lawsuit accusing Facebook of abuse of dominance and illegal monopoly. The acquisitions of Instagram and WhatsApp are targeted, accusing Facebook of having stifled competitive threats by buying these companies[47]. However, the fact that it is a federal authority does not provide certain advantages, as it was first dismissed by the Court. In fact, it was considered that the complaint was ill-founded and poorly reasoned, and the FTC was criticised for not having clearly set out its method for calculating market shares[48]. Nevertheless, this litigation is an opportunity to look at certain aspects of this digital market and to study aspects that have not yet been explored[49]. For this reason, and since the FTC "stumbled" at the outset of its first action against Facebook, the Court gave it a second chance[50].

The FTC did not let this second one go, as it backed up its complaint with many elements and legal innovations. In the end, it appears to finally deconstruct a relevant market for personal social networks (PSN) with a new approach for the quantification of market shares[51].

Although the amended complaint was accepted, the FTC still has a lot on its plate, as the complaint does not contain any small remedy requests[52]. At a time when competition law is more than ever in doubt as to the right way to regulate the digital world, are the questioning of previously accepted concentrations (I), the use of drastic structural remedies (II) and the clear politicization of an eminently legal case (III), desirable elements for modern antitrust?

L. D. / N. N.

II. An on-going debate on "killer acquisitions" in merger laws

5. The "killer acquisitions" operated by Big Tech and Big Pharma. Killer acquisitions are once again in the spotlight in this unprecedented case opposing Facebook to the FTC. It could have major consequences never observed in digital economy: FTC asks the Court of District of Colombia to dismantle one of the world's largest company ever — Facebook now called "Metaverse" — because of its killer acquisitions of WhatsApp and Instagram.

46 FTC, "FTC Sues Facebook for Illegal Monopolization", Dec. 9, 2020, <https://bit.ly/30Q3I8Y>.
47 B. Deffains, "Antitrust - Le virage de l'antitrust", *JCP G*, No 3, Jan. 18, 2021, Doctr. 67.
48 W. Chaiehloudj, "United States: The District Court for the District of Columbia rejects a social network's request to extinguish the FTC's lawsuit (Facebook)", *Concurrences*, No 1-2022, Art. 105568, Jan. 11, 2022, pp. 214-216.
49 J.-C. Roda, "Un an de droit de la concurrence dans l'univers numérique", *Comm. Comm. Élec.*, No 10, Oct. 2021, Chron 11, pt.10.
50 *FTC v. Facebook*, *op. cit.*, Memorandum Opinion, Jan. 11, 2022, p. 1.
51 See *infra* paragr. 10, 12.
52 *Ibid.*

Such operations are suspected of endangering innovation and of impeding the competitive process. Killer acquisitions were theoretically and empirically studied in a paper of the academics Cunningham, Ederer and Ma[53]. They examined more than 60,000 mergers in the pharmaceutical sector and proposed to define the notion of "killer acquisitions": "an incumbent firm may acquire an innovative target and terminate development of the target's innovations to preempt future competition. We call such acquisitions "killer acquisitions" as they eliminate potentially promising, yet likely competing, innovation"[54]. Three legal components are identified: they are acquisitions and more broadly mergers (1) which have anticompetitive effects of restricting of innovation (2) and preempting future competition (3). They also added a parameter to the first legal element: killer acquisitions are usually horizontal mergers in pharmaceutical markets[55]. Horizontal mergers imply that both parties are at the same level of the value chain. And they observed in that sense that an acquiring company is four times more likely to merge with a target company which develops substitutable or very similar drugs[56].

This paper focused on pharmaceutical sectors but companies operate killer acquisitions in many markets and especially in digital markets. However, the first legal component differs for digital killer acquisitions which are, here, conglomerate mergers[57]. Indeed, digital companies develop a particular economic model of multi-sided platform which have activities within diverse markets as conglomerate mergers do. If merger law learns that there is an economic consensus in favour of an indulgent analysis of conglomerate mergers[58], this statement has to be challenged for digital conglomerate mergers. Indeed, conglomerate mergers are operations where both parties do not have activities at the same level of chain value but have complementary or independent products and services. That's why they are normally inoffensive because each company has less market power and influence in other markets than in its own.

However, multi-sided platforms have specificities which allow them to grow faster than traditional companies and to expand

53 C. Cunningham, F. E & S. MA, "Killer Acquisitions"*, J. of Political Econ.*, Vol. 129, No 3, 2021, pp. 649-702.
54 *Ibid.*, p. 1.
55 *Ibid.*, pp. 15-16.
56 *Ibid.*, p. 4.
57 A. Gautier & J. Lamesch, "Mergers in the Digital Economy", *Center for Econ. Studies and the ifo Institute*, No 8056, 2020, p.5.
58 See: DoJ & FTC, Non-Horizontal Merger Guidelines, 1984 (last revised in 1997), pt. 4; EU Comm., Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, paragr. 11; J. Langenfeld, "The need to revise the U.S. non-horizontal merger guidelines", *Concurrences*, No 4/2016, pp. 51-52.

easily on other markets[59]. These particularities are network effects, massive data and their "platform envelopment" effect[60] — meaning that a platform can easily enter new markets thanks to interoperability between its products and services and products and services of the target market[61]. In other words, digital conglomerate acquisitions have also to be scrutinized to the extent that digital platforms have incentives to diversify their products and services and to the extent that they can easily overwhelm other markets[62]. Above all, they are suspected to acquire their market position by anticompetitive conducts as killer acquisitions.

That's why the United States and Europe have to answer a common question: what is the most appropriate way to address the "killer acquisitions" concern? There are many answers which differ on both sides of the Atlantic Ocean. Let's first remark that these responses definitely have to be concealed with an imperative of legal certainty in the course of trade[63]. One can intuitively think about merger laws. Yet, this case shows that another competition rule seems to be relevant as well. In sum, a comparative law perspective offers diverse answers to this question.

6. What legal basis should be applied to "killer acquisitions"? Some answers from a comparative law analysis. The case-law related to Facebook, WhatsApp and Instagram illustrates a current debate — in the United States and in Europe — on the relevant ground to overcome the "killer acquisitions" concern. Beyond this sole case, GAFAM are actually involved in many killer acquisitions: between 2015 and 2017, they acquired 175 companies and around 60% products they acquired are no longer marketed, improved or maintained[64]. Besides, one interesting fact for this study is that Facebook — and Apple — realized more killer acquisitions than Google, Amazon and Microsoft between 2015 and 2017. This new phenomenon also raised a question: how competition authorities and courts can react? This case gives an original answer: the complaint against Facebook is based on Section 2 of Sherman Act which prohibits the infringement of "illegal monopolization". As a remedy to this anticompetitive conduct, FTC also asks the Court for the District of

[59] See. J. Crémer, Y.-A. de Montjoye et H. Schweitzer, *Competition policy for the digital era*, DG Competition, 2019, p. 108: "The expansion of the power of established platforms with a strong user base and a conglomerate profile into new markets pioneered by other platforms or firms is currently debated under the heading of 'platform envelopment'".

[60] T. Lécuyer, "Digital conglomerates and killer acquisitions – A discussion of the competitive effects of start-up acquisitions by digital platforms", *Concurrences*, No 1, 2020, p. 46.

[61] T. Eisenman, G. Parker & M. Van Alstyne, "Platform envelopment", *Strategic Management J.*, Vol. 32, No 12, 2011, pp. 1270-1285.

[62] M. Bourreau & A. Perrot, "Digital platforms: Regulate before it's too late", *CAE*, Vol. 60, Iss. 6, 2020, pp. 3-4.

[63] See *infra* paragr. 6.

[64] A. Gautier & J. Lamesch, "Mergers in the Digital Economy", *op. cit.*, p. 4 et p. 24.

Columbia for breaking up Facebook from Instagram and WhatsApp. In Europe, an equivalent solution would be the article 102 of TFEU: indeed, a past case-law "Continental Can"[65] allowed EU Commission to control a merger after its implementation. In addition, another question was to know if article 102 of TFEU could apply to mergers under thresholds and consequently to killer acquisitions. The FCA — French Competition Authority — recently gave a negative response[66]. However, both parties appealed FCA's decision before the Paris Court of Appeal, which decided to refer a prejudicial question to the CJEU[67]. Therefore, the debate on the application of article 102 of TFEU to killer acquisitions remains open.

Beyond that, this case also highlights the need for a future reform of merger laws. Firstly, in the United States, one can doubt on the reliability of substantial analysis in merger control: why did the FTC accept Facebook's acquisitions a few years ago? One can probably answer that FTC made some mistakes in its analysis of anticompetitive effects due to some gaps in substantial merger law. Indeed, US merger law needs to be updated to the digital economy and to some notions: innovation and potential competition[68]. One can not ignore their growing importance. However, no more informations related to FTC's reasoning can be provided because the FTC simply agreed with these acquisitions without more details[69], except for the acquisition of WhatsApp where the FTC raised a concern related to the interoperability between Facebook data and WhatsApp data[70].

Secondly, in Europe, these substantial gaps also exist in merger law. Some procedural gaps are also identified. Indeed, EU merger law did not institute some tools as an *ex-post* merger control, a "value of transaction" criteria or a "share of supply criteria". That's why the EU Commission recently decided — without waiting for a mature reform — to fill the gaps of merger

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65 CJEC, *Europemballage Corporation & Continental Can Company Inc. v/ EC Comm.*, Case No 6-72, Febr. 21, 1973.

66 FCA, Decision No 20-D-01 of Jan. 16, 2020 regarding a practice implemented in the digital terrestrial television broadcasting sector.

67 A. Ronzano, "Thresholds: The Paris Court of Appeal asks the Court of Justice of the European Union whether the Continental can case law is still applicable to a merger, lacking a Community dimension, located below the thresholds for compulsory ex ante control provided for by national law and not having given rise to a referral to the European Commission (Itas / TDF)", *Concurrences*, No 4-2021, Art. 101479.

68 J. M. Yun, "Potential Competition, Nascent Competitors, and Killer Acquisitions", *The Global Antitrust Institute Report on the Digital Economy*, No 18, 2020, p. 655; C. Caffara, G. S. Crawford & T. Vallettu, "'How Tech Rolls": Potential Competition and "Reverse" Killer Acquisitions", *CPI Antitrust Chronicle*, Vol. 2, No 2, 2020, pp. 2-6; N. Petit, "Innovation Competition, Unilateral Effects and Merger Policy », *Antitrust L. J.*, Vol. 82, Iss. 3, 2019, p. 873; G. J. Werden & K. C. Limarzi, "Forward-Looking Merger Analysis and the Superfluous Potential Competition Doctrine", *Antitrust L. J.*, Vol. 77, No 1, 2010, p. 136.

69 FTC, "FTC Closes Its Investigation Into Facebook's Proposed Acquisition of Instagram Photo Sharing Program", Press Release, Aug. 22, 2012.

70 FTC, "FTC Notifies Facebook, WhatsApp of Privacy Obligations in Light of Proposed Acquisition", Press Release, Apr. 10, 2014; EU Comm., "Mergers: Commission fines Facebook €110 million for providing misleading information about WhatsApp takeover", Press Release, May 18, 2017, IP/17/1369.

law by a simple, quick but insecure solution: the European Commission put the turnover's criteria aside thanks to a new interpretation of article 22 of Merger Regulation. The major consequence is the suppression of European merger law's thresholds: all mergers or acquisitions — regardless of their size — are now falling within the scope of merger control. The first application of the "new" article 22 occurred in Illumina/Grail case. However, in this case, Grail recently challenged this changing interpretation before the CJEU[71]. The pharmaceutical company argued that such a solution introduces a narrow and uncertain legal framework for companies which do not know if they have to notify all their mergers to competition authorities. If they don't, they take the risk of paying a fine. In addition, this new interpretation gives a new power to the EU Commission: it can now control a merger in a delay of 6 months after its implementation.

In sum, a prohibition decision which may result from an *ex-post* merger control creates legal uncertainty in the course of trade, and worse, involves additional costs — by breaking up companies many years after they merged — for authorities, companies, consumers and more broadly society. Besides, such an *ex-post* decision reveals some failures in the first control: competition authorities should have detected anticompetitive concerns sooner and should have forbidden such operations in reasonable time. However, merger law is by definition uncertain because it provides a prospective analysis. That's why legal uncertainty in merger law could simply be avoided through the use of economic theories and tests: they would have merits to improve prospective and legal analyses of merger law[72]. The present case is another illustration of this lack.

7. Background on the acquisition of Instagram by Facebook in 2012. In Europe, this merger had a national dimension — because the turnover of Facebook and Instagram did not reach the turnover's thresholds of European merger law — and the consequence was that this operation was only captured by UK merger law. Indeed, Instagram hired only 13 employees when it started its activity in 2012. In addition, Instagram "had not generate any turnover since it was established"[73]: the power market of digital platforms does not reflect on their turnover, due to their business model based on free products and services. They actually make money from advertising revenues. This particularity shows that the turnover's criteria is now obsolete in digital economy. In the

[71] CJEU, *Grail/Commission*, Case No T-23/22, Jan. 11, 2022.

[72] F. Marty, "Le contrôle des concentrations en Europe et aux États-Unis — Critères économiques et sécurité juridique", *OFCE*, Vol. 2007/1, No 100, pp. 85-120.

[73] OFT, *Facebook inc./Instagram inc.*, Case No ME/5525/12, Aug. 4, 2002, p. 2.

United Kingdom, the British authority — the Official Fair Trading (OFT) now the Competition and Markets Authority (CMA) — instituted another criteria to answer this problem: the "share of supply" criteria, which "allows the CMA to exert jurisdiction over transactions in digital markets, where a target has no turnover, but clearly has a market presence, if one looks at other metrics such as downloads or share of attention"[74]. In Facebook/Instagram case, the "share of supply" criteria was met[75]. That's why the British authority was the only competent authority and the only country who controlled the acquisition of Instagram by Facebook in Europe. The OFT identified two relevant markets: the market of provision of three relevant services of social networking to users, camera app to users and advertising space to advertisers (1) and the market of provision an app allowing users to take and modify photos and share those photos with other users (2). The definition of two separate markets raised the question to know "whether the merger parties would forclose rival social networks by (a) a preventing Instagram users from uploading their photographs to those networks and the effect of such an action on competition; or (b) deteriorating the quality of the connection of the API between Instagram and rival social networks"[76]. However, the OFT finally concluded that Facebook and Instagram were still indirect competitors and that the degree of competition within Instagram's market would still be high after the merger[77].

In the United States, parallel proceedings were conducted and were faster than transatlantic: after a nonpublic investigation on the acquisition of Instagram by Facebook[78], the FTC sent a closing letter to the parties explaining that the investigation would not be subject to a complaint[79]. Facebook bought WhatsApp for $1,000,000,000 dollars — around $300,000,000 in cash and 22,999,412 shares of common stock — and that allows US merger law to apply thanks to the "value of the transaction" criteria. Such a criteria takes into account the amount payed by Facebook for the acquisition of Instagram. Such a criteria is proper to our US neighbors and is not instituted in Europe, except in Austria and Germany.

8. Background on the acquisition of WhatsApp by Facebook in 2014. As explained above, digital killer acquisitions are mostly conglomerate mergers: an illustration is Facebook/WhatsApp merger-case[80]. The

[74] J. Bamford & A. Slezeviciute, "Brexit: Balancing UK and EU merger control", *Concurrences*, No 4, 2019, Art. n°92059.
[75] *Facebook inc./Instagram inc., op. cit.*
[76] *Ibid.*, pp. 2-3.
[77] *Ibid.*, pp. 9-10.
[78] FTC, "FTC Closes Its Investigation Into Facebook's Proposed Acquisition of Instagram Photo Sharing Program", *op. cit.*
[79] See *supra* paragr. 3.
[80] EU Comm., *Facebook/WhatsApp*, Case No M.7217, Oct. 3, 2014.

parties referred their operation to the EU Commission on the basis of article 4(5) of the Regulation 139/2004. This provision gives to parties the possibility to request for a referral of their merger from Member States to European Commission. The condition is that at least three Members States are competent[81]. In this case it was fulfilled: the EU Commission also controlled the merger. Firstly, it pointed out a difference between the intrinsic markets of each company: Facebook can be used through diverse electronic devices but WhatsApp was only available — at least in the past — on smartphones. As Instagram, WhatsApp was a startup which realized a low turnover and hired approximately 30 employees. Yet, all these indicators were not reflecting its actual market power: the company offered an innovative messaging service enabling users to exchange multimedia instant messages[82].

Some concerns were also identified by the EU Commission. First, the merger could produce network effects — and then a "platform envelopment" effect — in the consumer communications apps market, which could yet be balanced by short innovation cycles proper to digital sectors[83]. One can pointed out that this market definition — "consumer communication apps" market — is very broad: the EU Commission sometimes admits that the geographic market is undefined. Firstly, globalization implies that the geographic market is international most of the time. Secondly, it admits that its decision-making practice is unclear in digital sectors[84]. Back to the case, the "platform envelopment" concern was solved by the assessment of Facebook that there was no agregability between its own users data and WhatsApp's users data: network effects were limited. This assessment was based on informations provided by Facebook to the authority during the procedure. Finally, the EU Commission authorized the merger because parties were not direct competitors [85]: they have activities in different markets — ignoring the instant messages services offered by Facebook called "Messenger" — and consumers have — in the past — to use different supports. However, in May 18, 2017, the European Commission published a decision imposing a fine of €110,000,000 to Facebook: the giant gave false informations to the EU authority by claiming there was no interoperability between Facebook's data and WhatsApp's data[86].

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81 *Reg. No 139/2004 of 20 Jan. 2004 on the control of concentrations between undertakings*, OJ L 24, Jan. 29, 2004, Art. 4, paragr. 5.

82 EU Comm, "Mergers: Commission approves acquisition of WhatsApp by Facebook", Press Release, Oct. 3, 2004, IP/14/1088.

83 J. T. Kang, "European Community Antitrust Law: Innovation Markets and High Technology Industries", *Fordham International L. J.*, Vol. 20, Iss. 3., 1997, p. 718.

84 *Facebook/WhatsApp*, *op. cit.*, paragr. 57.

85 EU Comm, "Mergers: Commission approves acquisition of WhatsApp by Facebook", Press Release, Oct. 3, 2004, IP/14/1088.

86 EU Comm., "Mergers: Commission fines Facebook €110 million for providing misleading information about WhatsApp takeover", *op. cit.*

In the United States, at the same time, the FTC examined an anticompetitive concern related to users data too. However, the ground was different: the FTC reasoned in the light of privacy and on the basis of Section 5 of the FTC Act. The authority decided that Facebook could acquire Shazam, in exchange for Facebook promises to submit to privacy obligations regarding consumers[87]. However, the FTC finally published a complaint against Facebook for violating its privacy obligations[88]: in sum, FTC said that Facebook had to "get consumers' affirmative consent before making changes that override their privacy settings, among other requirements"[89]. One can notice that the fine was ordered by the EU Commission for similar reasons. Then in April 10, 2014, Bureau Director Jessica Rich warned by letter both companies — Facebook and WhatsApp — to honor their privacy obligations in light of the acquisition[90]. However, this particular procedure had no follow up because the FTC recently charged Facebook for the WhatsApp's acquisition in a new procedure: thanks to these illegal acquisitions, Facebook obtained a monopoly position on the market. This case shows that the FTC definitely moved up a gear against the MAGMA by expressing its determination to break up a Big Tech for the first time.

9. The complaint of the FTC against Facebook and its acquisitions of Instagram and WhatsApp. In December 9, 2020, the FTC published a press release involving Facebook for illegal monopolization[91]. The appointment of Lina Khan as Chair of the FTC in June 2021 has something do with it[92]. The complaint before the District Court of Columbia accused the world's dominant social network of having illegally monopolized the personal social networking services (PSN services) market in the United States, thanks to the acquisitions of WhatsApp and Instagram. Facebook would have acquire these nascent firms in the purpose of protecting its monopoly power[93]: Instagram and WhatsApp are consolidating/defensive acquisitions more than killer/offensive acquisitions[94]. From the first complaint until now, both parties —

87 FTC, "FTC Notifies Facebook, WhatsApp of Privacy Obligations in Light of Proposed Acquisition", *op. cit.*

88 See *supra* paragr. 8 and *infra* paragr. 23, 24.

89 FTC, "FTC Notifies Facebook, WhatsApp of Privacy Obligations in Light of Proposed Acquisition", *op. cit.*

90 FTC, "Letter From Jessica L. Rich, Director of the Federal Trade Commission Bureau of Consumer Protection, to Erin Egan, Chief Privacy Officer, Facebook, and to Anne Hoge, General Counsel, WhatsApp Inc.", Press Release, Apr. 10, 2014.

91 FTC, "FTC Sues Facebook for Illegal Monopolization — Agency challenges Facebook's multi-year course of unlawful conduct", Press Release, Dec. 9, 2020.

92 See *infra* paragr. 3.

93 FTC, "FTC Sues Facebook for Illegal Monopolization — Agency challenges Facebook's multi-year course of unlawful conduct", *op. cit.*

94 According to F. Marty and T. Warin, "a killer acquisition can be a defensive acquisition (avoiding an entry into the dominated ecosystem) or an offensive acquisition (removing a competitor - even a potential one - from an ecosystem into which the predator wants to enter). Therefore, the strategy can be thought of as a consolidation of the dominant position via the suppression of potential innovation and an

Facebook and the FTC — faced strong proceedings. Indeed, the Court for the District of Columbia firstly rejected FTC's complaint in June 28, 2021: the district Judge James E. Boasberg dismissed FTC's complaint but ordered the FTC to file any amended complaint[95].

According to the Court, the agency's complaint was legally insufficient because "the FTC has failed to plead enough facts to plausibly establish a necessary element of all of its Section 2 claims — namely, that Facebook has monopoly power in the market for Personal Social Networking (PSN) Services"[96]. The identified concern was related to the definition of a PSN services market which had no precedent in the United States. Indeed, the market share is usually measured thanks to revenue, units sold, or other typical metric. However, "this case involves no ordinary or intuitive market. Rather, PSN services are free to use, and the exact metes and bounds of what even constitutes a PSN service […] are hardly crystal clear"[97]. That's why the District Judge James E. Boasberg asked the FTC to identify metrics or methods which could justify Facebook market share. Moreover, the judges were not convinced by the market's definition in itself and by the analysis of substituability[98]. However, in January 11, 2022, the court definitely agreed with the FTC's new complaint[99].

10. The definition of a new relevant market in digital economy. The novelty of this case is that judges agrees with the existence of a new relevant market relative to the PSN services for the first time[100]. It relaunches the debate of a new market of attention[101]. The undesirable consequences for Facebook are that it is actually the main competitor in its market. The social networking services are defined as "application systems that offer users functionalities for identity management (1) (i.e. the representation of the own person e.g. in form of a profile) and enable furthermore to keep in touch (2) with other users (and thus the administration of own contacts)"[102]. According to the Memorandum of Law of the FTC published in 2021, indirect and

anticompetitive leverage strategy ». See: T F. Marty & T. Warin, "Visa Acquiring Plaid: A Tartan Over a Killer Acquisition? Reflections on the Risks of Harming Competition Through the Acquisition of Startups Within Digital Ecosystems", *Center for Interuniversity Research and Analysis on Organizations*, Cahier scientifique, No 2020S-62, 2020, p. 1.

95 *FTC v. Facebook Inc.*, *op. cit.*

96 *Ibid.*, p. 2.

97 *Ibid.*

98 W. Chaiehloudj, "United States: The District Court for the District of Columbia rejects a social network's request to extinguish the FTC's lawsuit (Facebook)", *op. cit.*

99 See *FTC v. Facebook, Inc.*, Memorandum opinion, *op. cit.*, p. 20: "Rather, it suffices to conclude that the FTC has plausibly alleged that Facebook maintained a dominant share of the U.S. personal social networking market since 2011".

100 J.-C. Roda, "Un an de droit de la concurrence dans l'univers numérique", *op. cit.*, p. 7.

101 See *infra* paragr. 14-15.

102 A. Richter & M. Koch, "Functions of Social Networking Services", in *Proceedings of the 8th International Conference on the Design of Cooperative Systems,* 2008, pp. 87-98.

direct evidences show that Facebook has a monopoly situation in the PSN services market. Firstly, indirect proofs are related to the fact that Facebook created significant barriers to entry through the acquisitions of Instagram and WhatsApp and to the fact that Facebook has dominant share of the market[103]. The share is based on three key measures of output: time spent by the users on Facebook's services, daily active users (DAUs) and monthly active users (MAUs). According to the FTC, "Facebook's share of time spent for U.S. PSN services has exceeded 80%; that its share of DAUs has exceeded 70%; and that its share of MAUs has exceeded 65%"[104]. Secondly, direct proofs are the fact that acquisitions of Instagram and WhatsApp would have reduce quality and exclude competition within the market and that Facebook maintained its position by the exclusionary conduct of such acquisitions[105]. After a first complaint in December 9, 2020, Facebook gave a very strong response to the Court for the District of Columbia by asking the recusal of Chair Lina Khan from Commission votes. This event is an interesting way to study the particularity of US antitrust proceedings, where competition law can be implemented before courts and judges. Indeed, contrary to the EU competition law, the courts have the strong power and responsability to validate or not the complaint of competition authorities. Moreover, the District Court had to decide the fate of Chair Lina Khan who was suspected of having conflict of interests in the present procedure.

11. The relative efficiency of private enforcement in the United States. The role of the Court for the District of Columbia shows the particularity of the US antitrust law and its differences with others countries: this case illustrates the sophisticated system of private enforcement involving companies, competition authorities and courts. It guarantees the so-called "check and balances" principle. However, this case also shows its limits. Indeed, two arguments exist. Firstly, the Court for the District of Columbia finally rejected Facebook's request of recusal about the potential conflict of interests of Lina Khan. Facebook explained that Chair Khan was a law professor and antitrust scholar who wrote a lot about competition issues and precisely about the activities of the major technology companies[106]. Then, Facebook concluded that she could not participate to the Commission vote given that she has some preconceptions against the huge company. However, the Court clearly answered that this argument fails "because in this case the Commission is acting as a plaintiff or prosecutor rather than performing a judicial

[103] *FTC v. Facebook, Inc.*, *op. cit.*, p. 18.
[104] *FTC v. Facebook, Inc.*, *op. cit.*, Plaintiff Federal Trade Commission's Memorandum of Law, Nov. 17, 2021, p. 4.
[105] *Ibid.*, pp. 12-15.
[106] *Ibid.*, pp. 42-43.

or quasi-judicial function"[107]. In other words, preconceptions of Chair Lina Khan against Facebook do not matter to the extent that — as a prosecutor — she necessarily has to write against the social network to the extent that it had some anticompetitive conducts. By doing that, the Court means that FTC is a party and a plaintiff in these proceedings who has to argue against Facebook. Secondly, one can pointed out that the Court for the District of Columbia did a great favour to the FTC by giving it the opportunity to make a second complaint and to justify its legal arguments. Indeed, the court only rejected the complaint and not the entire case.

In other words, one can doubt about the impartiality of the court. The particularity of private enforcement in the United States is normally that it is a great way to give a guarantee of due process to companies: the previous arguments allow to doubt on the true impartiality of the Court of Columbia. Private enforcement has great virtues and such a procedure does not have this significance, as in Europe where public enforcement prevailed. That's why one can regret that the court simply aligned with the competition authority in this case. However, such a major and symbolic process against one of the largest company in the world's history — Metaverse — should probably not be closed by a simple reject of the FTC's complaint due to some gaps in its legal reasoning.

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III. The efficiency of the remedies and solutions proposed by the FTC

12. A case with a particular relevant market. What needs to be understood before analysing the efficiency of the remedies contemplated by the FTC is to which type of market Facebook belongs. While this may seem like a simple question, the analysis of it is much less so. This is what cost the FTC a dismissal of its first complaint[108]. Social media is a new type of market that has been proven and recognised by the acceptance of the second complaint, but it is also a new form of economy that leaves observers and antitrust agencies doubtful.

The FTC will assert in its complaint that personal social networks ("PSN") in the US are in themselves a relevant market[109]. The latter states that "*personal social networking services are a unique and distinct type of online service*[110]". The uniqueness of this market was highlighted by the FTC in its complaint, which states that "*personal social networking services include features that many users regularly use to interact with personal connections and share*

[107] *Ibid.*, p. 2.
[108] See *supra* para. 4.
[109] See *infra* para. 10.
[110] *Public redacted version of document filed under seal, Federal Trade Commission v. Facebook, Case 1:20-cv-03590, September 8, 2021, Para.165, P.54.* pt.166, p. 54.

personal experiences in a shared social space, including in a one-to-many 'broadcast' format"[111].

This particularity in the typology of the market notably impacts the way Facebook's dominant position is characterised within the complaint.

13. A particular characterisation of dominance. Indeed, the FTC directly asserts in its complaint that "*Facebook holds monopoly power in the provision of personal social networks in the United States and has held that power continuously since at least 2011*"[112]. Of course, the law requires that this dominance must be characterised by the antitrust agency that is bringing the complaint. Doing so, a certain singularity in the method employed by the FTC can be observed.

Indeed, the CA will use a very interesting and rather innovative characterisation of Facebook's dominance, considering three main criteria: time spent by consumers using the service, number of daily active users and monthly active users. For the agency, these factors provide significant evidence of Facebook's enduring monopoly power over personal social networking services since at least 2011[113]. The FTC continues this rationale by stating that these metrics, based on active users and the time they spent on the service, are entirely appropriate to quantify the market share and power of personal social networking services[114].

Using these criteria and after a lengthy investigation, the FTC asserts that "*Facebook's share of time spent by users of applications providing personal social networking services in the United States has exceeded 80 percent since 2012 and was at least as high in 2011*"[115]. The FTC's quantification of Facebook's dominance is extremely interesting because it is not a traditional quantification. This new approach responds to a new economic reality often avoided or even misunderstood, which is the attention economy.

14. The new understanding of markets in the attention economy. These specific typologies of market approach and characterisation of dominance are necessary. For although one cannot take away the status of business from social networks, they interact with the economy in a completely different way from classical businesses and with two main characteristics. Firstly, they "give everything away for free to everyone[116]". Secondly, their main and only source of revenue is usually from fees paid by advertisers[117]. If we do a quick calculation of

[111] *Ibid.,* pt.168, p. 55.
[112] *Ibid.*, pt.164, p. 53.
[113] *Ibid.*, pt. 191, p. 63
[114] *Ibid.*, pt.191, p. 63.
[115] *Ibid.*, pt. 199, p. 65.
[116] A. Prat, T.M. Valletti & M. Tommaso, "Attention Oligopoly", *American Econ. J.: Microeconomics*, May 25, 2021 (forthcoming), Available at <https://ssrn.com/abstract=3197930>.
[117] E.C. Parisi & F. Parisi, "Rethinking Remedies for the Attention Economy", Draft, May 10, 2021, available at <https://ssrn.com/abstract=3843334>.

these two characteristics, we quickly understand that the use of social networks is not free after all. It is our attention that is captured and provided to advertisers in exchange for a fee. As Justin Rosestein points out in *The Social Dilemma,* "If you don't pay for the product, you are the product[118]". The attention economy can be summarised with the definition provided by Evans: "The attention market involves a competition in which platforms acquire time from consumers, with bundles of content and ads, and sell ads to marketers to deliver messages during that time[119]".

This brief definition of the attention economy is not intended to be its scientific analysis, as brilliant authors have already done so and in a much more thorough manner. However, it is necessary to understand that the analysis to come of the remedies is not done under the prism of a classic economy and market. These are markets that antitrust authorities have rarely faced, and this is what makes the task so difficult for them. This is at least what the FTC's high-profile litigation against Facebook suggests, as well as the fact that competition for attention is becoming a central focus of contemporary antitrust[120].

15. Antitrust and the attention economy. Despite their scale, attention markets have largely escaped the attention of antitrust authorities and researchers for decades[121]. Some authors have, however, begun to call for antitrust to focus on attention-based markets as a way of moving beyond price theory. Newman, referring largely to the work of Wu[122], adds to this argument that the purpose of antitrust law is to protect trade and commerce, and that there is nothing in the *Sherman Antitrust Act* or the *Clayton Act* that indicates that price should be a necessary consideration in the application of antitrust law[123]. This view will clash with certain positions, notably those of Wagner and Evans, who consider that free goods and services are favorable to competition and consumer welfare[124].

This ideological confrontation is interesting, because there is a major consensus in the academic field that antitrust and competition law must evolve in the face of the digitisation of the economy. Yet, when

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118 J. Orlowski, "The Social Dilemma", 2020.

119 D. S. Evans, "The Economics of Attention Markets", Draft, Global Econ. Group; University College London, Apr. 15, 2020, pp. 1-41, available at <https://doi.org/10.2139/ssrn.3044858>.

120 J. M. Newman, "Antitrust in Attention Markets: Definition, Power, Harm", Paper No 3745839, University of Miami Legal Studies Research, available at <https://ssrn.com/abstract=3745839> or < http://dx.doi.org/10.2139/ssrn.3745839>.

121 T. Wu, "Blind Spot: The Attention Economy and the Law", *Antitrust L. J.,* Vol. 82, 2019, pp. 771-806.

122 *Ibid.*

123 J. M. Newman, "Antitrust in Attention Markets: Objections and Responses", *Santa Clara L. Rev.*, Vol. 59, 2020, pp. 743-769.

124 D. Wagner, "Is Free an Antitrust Issue?", Google Public Policy, Jul. 10, 2009, available at <https://publicpolicy.googleblog.com/2009/07/is-free-antitrust-issue.html>; D. S. Evans, "The Antitrust Economics of Free", *CPI J.*, Vol. 7, Apr. 7, 2011, pp. 1-26; D. S. Evans, "The Economics of Attention Markets", Global Econ. Group; University College London, Apr. 15, 2020, pp. 1-41, available at <https://doi.org/10.2139/ssrn.3044858>.

it comes to the treatment of this evolution, we are still in a certain vagueness as to the benefits or not of certain aspects of this digitisation.

However, the evidence in the FTC's complaint does show that the agency tends to adopt the positions of those who advocate for better antitrust treatment of the attention economy. This can be seen particularly when analysing what Wu proposed already in 2019, to "*define relevant consumer markets using 'time spent' as a currency, and then use the familiar economic concept of substitution to find an appropriate market*"[125]. This idea was partly or entirely taken up by the FTC in its characterization of Facebook's dominance as seen above.

Even the solutions and remedies contemplated by the FTC in the complaint were considered as early as 2019 by Wu. He has already heavily criticised the antitrust agencies, saying it "*would not be too late for them to challenge some of the relevant acquisitions made in the 2010s, such as Facebook-Instagram*"[126].

It is noticeable that, willingly or not, the FTC tends to adopt the positions of those who advocate for a more serious and constructed approach to the attention economy through antitrust. This now leaves open the question of whether this new antitrust approach to the attention economy leads to viable remedies and solutions or not.

16. The structural remedies considered by the FTC. The federal agency will take an unconventional approach in its analysis, not from the point of view of consumers and the prices they pay, but from the advertisers. This is quite logical since consumers are not affected, the service being provided for free[127]. This approach is built on the particularity of these social networking services, which are ultimately an echo of the digital industry and its relationship with antitrust.

In recent years, as Cabral says and summarises, proposals to solve the problems caused by the digital giants are abundant[128]. European and US agencies have been prescribed structural remedies as a preventive measure against potential mergers in most of the commissioned reports[129]. Some of the proposed US remedies were specifically related to Facebook, including one in 2020 from the Antitrust Subcommittee in the House of Representatives, which issued a report recommending several ways to

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125 T. Wu, "Blind Spot: The Attention Economy and the Law", *op. cit.*, p. 772.

126 *Ibid.*

127 E.C. Parisi & F. Parisi, "Rethinking Remedies for the Attention Economy", *op. cit.*, p. 8.

128 L. Cabral, "Merger policy in digital industries", *Information Econ. and Policy*, Vol. 54 (C), 2021.

129 J. Crémer, Y.-A. de Montjoye et H. Schweitzer, *Competition policy for the digital era*, *op. cit.*; J. Furman, D. Coyle, A. Fletcher, P. Marsden & D. McAuley, *Unlocking digital competition*, Report of the Digital Competition Expert Panel, Mar. 13, 2019; F. Scott Morton, P. Bouvier, A. Ezrachi, B. Jullien, R. Katz, G. Kimmelman, D. Melamed & J. Morgenstern, *The Stigler Committee on Digital Platforms Final Report*, Stigler Center for the Study of the Econ. and the State, Chicago Booth, 2019, available at available at Sept. 2019, <https://research.chicagobooth.edu/stigler/media/news/committee-on-digital-platforms-final-report>.

mitigate Facebook's market power, including structural "carve-outs" of the company[130]. Recommendations that the FTC seems to intend to follow in its applications to the courts, as the complaint requested "*Asset divestiture, business divestiture or reconstruction (including, but not limited to, Instagram and/or WhatsApp), and any other measures sufficient to restore competition that would exist absent the conduct alleged in the complaint, including, to the extent reasonably necessary, the provision of continued support or service by Facebook to one or more viable, independent businesses*"[131].

This structural remedy proposed by the FTC is intended to prevent the consolidation of market dominance and the adoption of anti-competitive practices that may prevent the entry of competition by new firms into the market[132]. The idea is to create a form of gateway to facilitate competitive entry into such markets dominated by a quasi-natural monopoly. While the idea is commendable and surely applicable to other cases, is it really efficient for the attention economy?

17. The typology of Facebook's monopoly and its impact on remedies. It is interesting to open a discussion on the FTC's views of Facebook's monopoly. The antitrust agency rejected the characterisation of social media platforms as natural monopolies, a rejection that comes from the existence of economies of scale and direct rivalry that have existed in the past. This decision is surprising given that some authors have noted that "*Facebook exhibits the characteristics of a natural monopoly, including high barriers to entry, low marginal costs and strong network effects*"[133]. Although these authors lean towards a natural monopoly, they do not deny the anti-competitive risks of Facebook's behaviour[134].

The difference in this characterisation of monopoly between the FTC and the authors stems from the fact that rejecting the natural monopoly status allows for much more effective regulation and enforcement. If the opposite had been chosen, any competition revived by structural remedies would not be sustainable in the long run[135]. Distorting the classification will not necessarily serve the purpose of restoring competition in the long term and may even create consequences that directly affect consumers and advertisers.

18. The effects of the structural remedy considered by the FTC. The FTC's intended dismantling may have effects on producer's economies of scope and

130 Subcommittee, *Investigation of Competition in Digital Markets*, *op. cit.*, pp. 81-378.
131 *FTC v. Facebook, Inc.*, *op. cit.*, Public redacted version of document filed under seal, p. 79.
132 E.C. Parisi & F. Parisi, "Rethinking Remedies for the Attention Economy", *op. cit.*, p. 11.
133 F. Chang & S. Benzell, "Facebook, Welfare, and Natural Monopoly: A Quantitative Analysis of Antitrust Remedies", Mar. 7, 2022, p. 22, available at <https://ssrn.com/abstract=4052023>.
134 *Ibid.*
135 *FTC v. Facebook, Inc.*, *op. cit.*, Public redacted version of document filed under seal, p. 79.

consumer's network effects, with consequences parallel to the effects of foregone economies of scale in the horizontal dismantling of a natural monopoly[136].

This dismantling would not have a direct effect on the Facebook Blue application itself[137]. Some authors have considered what would happen in the event of a vertical break-up. Their study considers a 5% loss of interest in Facebook Blue among the US population, leading to a reduction in the rate of advertising by Facebook, which would have to become more inventive to attract users. This creates a risk of reduced consumer welfare, although the Neobrandesians are against this philosophical aspiration within the antitrust[138]. This remains a reality that could be counterbalanced by the hypothetical development of an independent WhatsApp and Instagram, but this remains pure speculation for the moment.

If the effects of dismantling are to be analysed further, they must be examined through the prism of economies of scale[139]. In the case of natural monopolies (although the FTC wrongly rejects this characterisation), economies of scale are maximised by allowing production to be carried out by a single firm. The same is true in our case where economies of scope and network effects can be maximised by allowing users to interact on an integrated platform[140], e.g. sending a message from Instagram to Facebook. Looking at the overall effects of a structural remedy on social welfare there would be two main elements that would be determined: (1) the benefits of increased competition between independent networks and economies of scope foregone by the platform and, (2) lost network effects for users. When the latter factor takes over the former, the possible disruption becomes socially undesirable.

The fact is that if this route is taken with the loss of economies of scope and competitive pricing of user attention for advertisers, social media networks may not be able to be economically sustainable. Indeed, they would not be able to charge high enough attention costs to cover the zero-price production costs that we know today[141]. Economic viability would be called into question and *de facto* the very structuring of the so-called attention economy could be as well. The remedies called for therefore open the door to a destructuring of the market, by undermining the social element of "consumer

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136 E.C. Parisi & F. Parisi, "Rethinking Remedies for the Attention Economy", *op. cit.*, p. 12.

137 F. Chang & S. Benzell, "Facebook, Welfare, and Natural Monopoly: A Quantitative Analysis of Antitrust Remedies", *op. cit.*, p. 22.

138 J. Kanter, "Assistant Attorney General Jonathan Kanter Delivers Remarks at New York City Bar Association's Milton Handler Lecture", The 2022 Milton Handler Lecture, New York, May 18, 2022, available at <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city- bar-association>.

139 O. Williamson, "Economies as anti-trust defence: The Welfare Tradeoffs", *The American Econ. Rev.*, Vol. 58(1), 1968, pp. 18-36.

140 E.C. Parisi & F. Parisi, "Rethinking Remedies for the Attention Economy", *op. cit.*, p. 12.

141 *Ibid.*

welfare", which would ultimately have repercussions on the economic model of social networks.

19. The programmed inefficiency of structural remedies. Some authors have spoken directly about the difficulties of regulating and creating a new normative stucture on concentrations within the digital sector. Cabral was the first to raise the difficulty within these industries of predicting the evolution of business models and *de facto* the risk of discouraging innovation through legal restructurings that create instability within these economies[142].

This view becomes tangible in this case. The unpredictability of the social network market leads to social networks undermining the long-term viability of proposed structural remedies and disinterest from dominant social networks. If companies in the social media network market face economies of scope in production and parallel network effects in consumption, one of them will eventually gain market power and *de facto* drive the others out of business[143], thus reverting to a form of natural monopoly despite the remedies imposed by the FTC. It is plausible that, in the short term, there will be a form of market correction. Users will consider opening different accounts on all social networks and may potentially be indifferent to the end of interactions between platforms. However, in the long term, the effect of the remedy will disappear and will end up once again providing a natural monopoly to one of the companies. A structural correction, in the end, does not allow for sustainability and a true competitive reconstruction.

20. The reality of the attention economy versus structural remedies. This drastic remedy requested by the FTC seems to be a response to the many claims made in the various reports and scientific contributions released over the years. However, when we take a look at the detailed analysis of the Parisi in 2021[144], we realise by doing some scientific forecasting on the effects of these remedies that they are in the end only a shot in the dark, or even something that could worsen the situation of all parties, whether consumers, advertisers or companies owning social network media. The example of the Google Shopping case in Europe[145] is an excellent illustration of this[146]. It is not the complaint itself that raises interrogations, having been rejected the first time, but the difficulty that the FTC will face in proving its allegations[147],

142 L. Cabral, "Merger policy in digital industries", *op. cit.*, p. 1.
143 E.C. Parisi & F. Parisi, "Rethinking Remedies for the Attention Economy", *op. cit.*, p. 13.
144 *Ibid.*, p. 12.
145 EU Comm., *Google Inc. and Alphabet Inc.*, Case No AT.39740, Jun. 27, 2017.
146 N. Jornet, "Google shopping: the remedy proposed by the EU is not the right one", *Commerce connecté*, LSA, Jul. 12, 2018.
147 *FTC v. Facebook, Inc.*, *op. cit.*, Memorandum Opinion, p. 2.

above all in motivating the use of structural remedies.

This case is ultimately just another illustration of the reality that law now must face, a reality in which digital markets challenge antitrust law in more ways than one. Hence, the design of a remedy is increasingly difficult, as the market power of monopolists in digital markets appears to be more durable than that of most monopolists in other market typologies[148], attracting more and more public attention, and thus reviving political interest in antitrust.

L. D.

IV. The shadow of political influence in a judicial proceeding?

21. The interrelation between antitrust and politics. It is undeniable and manifest that politics play a role in antitrust[149]. Nominees for FTC Chair positions are chosen by the President and confirmed by the Senate, as well as the Justices of the Supreme Court, the highest court of United States. The Department of Justice is led by an Assistant Attorney General, also nominated by the President. Companies can directly – and heavily – invest in lobbying Congress to push for their agendas. For instance, in 2020, the five Big Tech Companies have spent altogether a combined total of 61,09 million US dollars, with Facebook being the biggest lobbyist at 19.68 million[150] and Google directly addressing the problem of online advertising regulation[151], a sector in which it has a dominant position[152]. It doesn't come as a surprise when one think of the direct influence strict or soft antitrust laws can have on economy, and consequently on popular satisfaction (or dissatisfaction). Hence political influence is "especially strong in the antitrust arena, where decisions and policy measures often significantly affect the profitability of market players"[153].

However, what may diverge is the weight of this political influence over the years and whether it leads to a more vigorous enforcement or not. Antitrust has thus been navigating through periods of aggressive enforcement, such as "from 1935 until the beginning of World War II"[154], with the New Deal administration, or periods of

148 M. Gal & N. Petit, "Radical Restorative Remedies for Digital Markets", *Berkeley Technology L. J.*, Vol. 37, No. 1, Sept. 6, 2020, p.1, available at SSRN <https://ssrn.com/abstract=3687604>.

149 See, e.g., D. Crane, "Antitrust's Unconventional Politics", *Va. L. Rev. Online*, Vol. 104, 2018, pp. 55-118; J. Baker, "Economics and Politics: Perspectives on the Goals and Future of Antitrust", *Fordham L. Rev.*, Vol. 81, Iss. 5, Art. 4, 2013, pp. 2175-2196.

150 L. Feiner, "Facebook spent more on lobbying than any other Big Tech company in 2020", *CNBC*, Jan. 22, 2021.

151 A sector for which the enterprise is undergoing investigation by the European Commission; EC, Press Release, *Antitrust: Commission opens investigation into possible anticompetitive conduct by Google in the online advertising technology sector*, Jun. 22, 2021.

152 *The Stigler Committee on Digital Platforms Final Report*, *op. cit.*, p. 156.

153 M. Gal, "Reality Bites (or Bits): The Political Economy of Antitrust Enforcement", *Fordham Corporate L. Institute, L. & Econ. Research Paper*, Series Working Paper No 06-22, May 2006, p. 12.

154 D. Crane, "Antitrust's Unconventional Politics", *op. cit.*, p. 126.

"simultaneous deregulation and relaxation"[155], such as the one between the 1970's, the Reagan Administration[156], and nowadays. The tendency now seems to possibly fall back into a pattern of robust enforcement with the choice of structural remedies in the complaint[157]. It aligns with the growing apprehension of the economic power of certain corporations, and especially the five Big Tech companies, provoking a new spike of interest in antitrust or as Carl Shapiro and Daniel Crane would say: "antitrust is [not only] sexy again"[158] but is also "back on the menu"[159]. A few questions ensue these statements: what caused this step back from the Chicago School ideas, is it unanimous among different sides of politics and, ultimately, is the *FTC v. Facebook* case the topical example of this evolution?

22. From "under-enforcement" to closer scrutiny. As just mentioned with the Reagan administration, public enforcement has known a decline since the late 1970s, correlated to the rising influence of the Chicago School of Economics[160] and its "laissez-faire ideology" based on the assumptions of self-correcting markets and "rational, self-interested"[161] participants. A few emblematic cases mark this period but not always for the right reasons. The *Microsoft III* case, in which the company was sued by the DoJ and 19 states for attempting to illegally maintain its operating system monopoly and to obtain a monopoly in Web browsers[162], ended in a settlement considered by some as very convenient for the defendant[163]. In an apparent contradiction with this evolution, the past few years has seen the reemergence of momentous cases, such as the one in question, *FTC v. Facebook*.

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155 *Ibid.*, p. 134.

156 Period during which AT&T was paradoxically dismantled; D. Crane, "Antitrust's Unconventional Politics", *op. cit.*, p. 132: "How did the largest antimonopoly corporate break-up in history occur at the hands of the Reagan Administration and its decidedly Chicago School Justice Department?".

157 See *supra* III, paragr. 16-20.

158 C. Shapiro, "Antitrust in a Time of Populism", *Int'l J. Indus. Org.*, Vol. 61, 2018, p. 714.

159 D. Crane, "Antitrust's Unconventional Politics", *op. cit.*, p. 135.

160 See, e.g. H. Hovencamp & F. Scott Morton, "Framing the Chicago School of Antitrust Analysis", Research Paper No 19-44, U. PA. L. School, ILE, Nov. 2019; G. L. Priest, "Bork's Strategy and the Influence of the Chicago School on Modern Antitrust Law", *J. L. & Econ.*, Vol. 57, No S3, The Contributions of Robert Bork to Antitrust Econ., Aug. 2014, S1-S17.

161 M. E. Stucke & A. Ezrachi "The Rise, Fall, and Rebirth of the U.S. Antitrust Movement", *Harvard Business Rev.*, Dec. 15, 2017, available at <https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement>.

162 *U.S. v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. filed 2000); At first, the district court followed DoJ's proposal that Microsoft should be divided in two firms, but the order was reversed and remanded: *U.S. v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. filed 2001).

163 See, e.g., N. Hawker & R. Lande, "As Antitrust Case Ends, Microsoft Is Victorious in Defeat", *Balt. Sun*, May 16, 2011; E. Elhauge, "Soft on Microsoft, The Potemkin Antitrust Settlement", *The Weekly Standard*, Mar. 25, 2002: "But in fact the settlement leaves Microsoft free to exclude rivals through product bundling or design decisions that confer no technological benefit on users and even degrade performance"; Meanwhile European Commission fined Microsoft 500M € for an abuse of dominant position, two years after the settlement; EC, *Microsoft*, COMP/C-3-37.792, May 24, 2004; a 561M€ additional fine was also imposed in 2013 for non-compliance with the commitments; EU Commission, *Antitrust: Commission fines Microsoft for non-compliance with browser choice commitments*, Press Release, Mar. 6, 2013.

What led do this development has been explained partly earlier with the ascension of the New Brandeis school[164]. The full explanation lays in the understanding that digital market's characteristics make them prone to tipping, creating a "winner-takes-all" effect[165] and leading to extreme concentration of markets[166]. Some companies, taking full advantage of these characteristics, have known an exponential growth, with higher annual revenues than some countries' GDP[167], and users that can sometimes be counted in terms of billions.

The economic power yield by these firms, especially the GAFAM, has driven some authors to say that we are currently in a "New Gilded Age" as can be seen in this quote: "We have managed to recreate both the economics and politics of a century ago—the first Gilded Age—and remain in grave danger of repeating more of the signature errors of the twentieth century"[168]. It is thus in reaction to this situation that the New Brandeis school has risen, with the fear of a threat to democracy as "economic power is recognized as inextricably political"[169]. This idea has also been conveyed in an official Report expressing worries that "concentration of political influence alone would be a troubling development for American democracy"[170]. It then comes as no surprise that David Cicilline, Chairman of the Subcommittee in charge of the Report, called for a Glass-Steagall – a law that separated investment from commercial banking – legislation for digital platforms[171], the remedies being considered by the FTC regarding Facebook being an echo of this proposition. Though, interestingly enough, "the ascendant pressures for antitrust reforms are flowing from both wings of the political spectrum"[172]. It is not the first-time democrats and republicans find a common ground[173]. Nevertheless, it is rare enough to highlight the importance of the issues at stake and the politicization of the debate surrounding antitrust and the Big Tech companies right

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[164] See *supra* paragr. 3.

[165] See, e.g., H. Hovenkamp, "Antitrust and Platform monopoly", *Faculty Scholarship at Penn Law 2192*, Nov. 16, 2020, pp. 1-121, 15-58; D. Evans & R. Schmalensee, "The Matchmakers: the New Economics of Multisided Platforms", *Harv. Bus. Rev. Press*, 2016.

[166] See, e.g., *The Stigler Committee on Digital Platforms Final Report*, *op. cit.*, pp. 6-9, 35-43.

[167] C. Gartenberg, "Big Tech's 2021 earnings were off the chart", *The Verge*, Feb. 11, 2022: Amazon, for example, had an annual revenue of 350 billion US dollars; it is thus at an equivalent place with Denmark (38th out of 211 countries in terms of highest GDP) who's GDP is 351 billion US dollars; "Classement des pays par produit intérieur brut (PIB) dans le monde", <https://planificateur.a-contresens.net/classement_par_pays/PIB.html>.

[168] T. Wu, "The Curse of Bigness: Antitrust in the New Gilded Age", *Columbia Global Reports*, 2018, p. 14.

[169] T. Wu, "The Utah Statement: Reviving Antimonopoly Traditions for the Era of Big Tech", *op. cit*.

[170] Subcommittee, *Majority Staff Report and Recommendations, Investigation of Competition in Digital Markets*, *op. cit.*, pp 279-280.

[171] D. West, "TechTank Podcast Episode 3: Why Rep. David Cicilline thinks we need a Glass-Steagall Act for the internet", *TechTank*, Sept. 2, 2020.

[172] D. Crane, "Antitrust's Unconventional Politics", *op. cit.*, p. 118.

[173] J. Baker, "Economics and Politics: Perspectives on the Goals and Future of Antitrust", *op. cit.*, p. 2194.

now, a politicization that could've been predictable.

23. Economic inequality and antitrust goals. Predictable, firstly, because economic inequalities – despite the slow recovery from the subprime mortgage crisis – have been increasing, and especially in the United States[174]. And with inequalities, come public disapproval. Nonetheless, on the opposite side, with economic power comes political power[175], notably thanks to lobbying, and the "capacity to influence the public discourse to their advantage"[176]. Those two divergent – yet inextricably related – paths are forced to collide and provoke a reaction that can go either way. Either it can "spark proposals to modify antitrust and competition policy"[177] and "tilt the balance towards specific markets or firms or [it can] shift the investigation away from them"[178]. Both are not without risks. The first can fall into a danger of adopting a "populist" vision and fighting "a growing and intolerable evil"[179] represented by big companies to attract voters. It is the epitomy of the "Big is bad" vision. Whereas the latter can pave the way to under-enforcement of antitrust and false negatives – in which conducts are not deemed as anticompetitive practices when they did injure competition – which is precisely what is being criticized nowadays. How can these two conjectures can co-exist? Simply because antitrust and its goals do not have the same meaning for everybody.

Even though a single economic approach, the "consumer welfare standard" has predominantly been used since the 1970s[180], there is still no consensus on what goals should be pursued by antitrust and the Sherman Act. Legal precedents sets firmly that antitrust laws were created "for the protection of competition, not competitors"[181]. They should thus guarantee a free and unfettered competition "to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up"[182]. Albeit this longstanding position, it is now proposed that antitrust should go back to non-economic goals as it was once the case, such as the protection of workers or guaranteeing a better data protection and

174 OECD, "United States, Tackling high inequalities, Creating opportunities for all", Jun. 2014, available at <https://www.oecd.org/unitedstates/Tackling-high-inequalities.pdf>: "Income inequality in the US is higher and increased more than in most OECD countries"; "the average income of the richest 10% is 16 times as large as for the poorest 10%.".

175 J. Baker & S. Salop, "Antitrust, Competition Policy, and Inequality", *Geo. L. J.*, Vol. 104, 2015, pp. 1-28.

176 Subcommittee, *Majority Staff Report and Recommendations, Investigation of Competition in Digital Markets*, *op. cit.*, p. 278.

177 J. Baker & S. Salop, "Antitrust, Competition Policy, and Inequality", *op. cit.*, p. 4.

178 M. Gal, "Reality Bites (or Bits): The Political Economy of Antitrust Enforcement", *op. cit.*, p. 4.

179 D. Crane, "Antitrust's Unconventional Politics", *op. cit.*, p. 134; quoting William Howard Taft.

180 See *supra* paragr. 3.

181 *Brown Shoe Co. v. U.S.*, Case No 370 U.S. 294, 1962, p. 320.

182 FTC, "Guide to Antitrust Laws", available at <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws>.

privacy for consumers, notwithstanding labor laws or privacy laws. Professor Eric Posner, for instance, argues in his books, *How Antitrust failed workers* (Oxford University Press, 2021) that labor markets should be governed by antitrust laws, as highly concentrated markets allow employers to impose lower wages, that are as hurtful to the economy as price-fixing practices[183]. DoJ's assistant attorney general, Jonathan Kanter, in his remarks, concurs with this position and goes even further stating that antitrust laws should bring "a range of benefits to consumers, resiliency, and our democracy"[184]. Consequently, depending on the choice of a broad – political – or narrow – solely economic – vision of antitrust, enforcement will be more or less necessary, which has practical implications regarding *FTC v. Facebook*.

24. A broad vision of antitrust in the Facebook case. In truth, if it is considered that a degradation of privacy for users is an antitrust matter because there is a deterioration of quality for consumers, then Facebook and its void promises[185] not to track its users and to not use cookies to collect private information could justifiably be sanctioned. On this topic, two Consent Orders between the FTC and Facebook has been signed, in 2012 and 2019, resulting in a 5 billion US dollars penalty the second time but no significant changes from the social media. Hence, the complaint alleges that, due to its monopoly in personal social networking, Facebook "has been able to provide lower levels of service quality on privacy and data protection"[186], resulting in a harm to consumers, as they have no choice but to accept this deterioration of quality. *In fine*, a harm to competition presumably occurs in terms of quality of service and with lesser choices offered to personal social networking users.

A parallel should be made here with the *Facebook* case in Germany as the Bundeskartellamt prohibited Facebook from processing the data collected on third-party websites without additional consent from the users[187], as the initial consent was a mandatory prerequisite to be able to use the social media. This practice was deemed as a qualitative abuse in a decision that has not

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183 B. Beaupre Gillepsie, "The same laws that protect consumers from monopoly power could be used to boost wages and improve working conditions, Professor Eric Posner argues in a new book", *U. Chi. Law*, Nov. 29, 2021, <https://www.law.uchicago.edu/news/how-antitrust-failed-american-worker>.

184 DoJ, "Assistant Attorney General Jonathan Kanter Delivers Remarks at New York City Bar Association's Milton Handler Lecture", *op. cit.*

185 D. Srinivans, "The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy", *Berkeley Bus. L. J.*, Vol. 16, Issue I, Art. 2, 2019, pp. 39-101.

186 *FTC v. Facebook, Inc.*, *op. cit.*, Doc. 82, Sept. 8, 2021, p. 74.

187 Bundeskartellamt, *Facebook*, Case No B6-22/16, Feb. 6, 2019; FOJ, Case No 080/2020, Jun. 23, 2020; "Federal Court of Justice provisionally confirms allegation of Facebook abusing dominant position", available at <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2020/23_06_2020_BGH_Facebook.pdf?__blob=publicationFile&v>.

been short of critics as the lines between data protection and the GDPR and competition law become significantly blurrier. Yet again, depending on the choice of what antitrust should pursue as a goal, there is legitimacy – or not – to this decision and the FTC's complaint. The authors of this paper would probably have long and heated discussions on this topic, and still not agree in the end.

25. The unpredictable future of the Facebook case and antitrust. Truth be told, there is not an entirely right or wrong answer. Ultimately, it will be up to the courts to decide which postulate to use if this case goes any further, as the defendants can appeal decisions in front of the judge. And "for courts to 'make political decisions' would be 'a perversion of their role'"[188]. Nonetheless, in the meantime, mediatic cases can affect public opinion and hence, the future legal changes as citizens can exercise pressure on legislators. It is up to the Commissioners, and other members of the agencies, to be as fair and impartial as possible – even though it is an obligation considering section 7(a) of the Administrative Procedure Act – and not fall into the pitfall of populism. Utilizing "the antitrust system [to help calm public opinion by taking some governmental action in [an] affected market"[189] is not desirable just as much as inaction causing the lessening of innovation or higher prices. A unified and comprehensive representation of antitrust laws would be beneficial to address these risks, but it remains for now a utopia.

N. N.

IV. Conclusion

26. This case in the making, which we have just commented on, is like modern antitrust, open to criticism. The fact that the antitrust agencies are revisiting mergers that have benefited from an *ante* control demonstrates the unpredictable nature and, above all, the lack of understanding of the reality of the digital world by the antitrust agencies. The remedies taken show a certain weakness in the legal arsenal to the agencies. Indeed, the fact that this case was called into question because of the potential political influence within the agency demonstrates the importance of the issue of antitrust law at the present time.

The issues and challenges facing antitrust law should not be taken lightly. The digital revolution is as much a social revolution as it is an industrial one, and every such revolution brings with it the need for a legal revolution[190]. It is no longer time to tinker with competition law, but to give it a new impetus, a new identity that would allow

188 T. Voorhees, "The political hand in American antitrust: invisible, inspirational, or imaginary?", *Antitrust L. J.*, Vol. 79, No. 2, 2014, p. 561.

189 M. Gal, "Reality Bites (or Bits): The Political Economy of Antitrust Enforcement", *op. cit.*, p. 4.

190 G. Ripert, "Aspects juridiques du capitalisme moderne", L.G.D.J., 1946, p. 2.

us to respond to this digital revolution and its digital giants that are causing uncertainty through a legal revolution in competition law. A revolution does not mean a radical break, but a transition over time, keeping the strong points of the relevant elements and adapting or renewing other elements for the new realities of our time[191].

Although this case is still in its infancy, it will see many currents of ideas confront each other, will give rise to great misunderstanding and exciting debates, but will nevertheless remain an illustration of the difficulties of modern competition law.

L. D.

Inès GUITTARD, Nathalie NIELSON,

Lylian DENIS

[191] G. Jorland, "La notion de révolution scientifique aujourd'hui", *European Social Science J.*, XL-124, 2002, pp. 131-146.