

Kluwer Competition Law Blog

Antitrust in Political Battlefield – Google Trapped in Partisan Battle

Aurelien Portuese (Vrije Universiteit Brussel) · Thursday, October 29th, 2020

Few days ahead of a historic presidential election, the political pressure accrues and has already made one collateral casualty: Google. David Cicilline (D-RI) has issued a [House Report](#) where big tech companies, including Google, are threatened to be broken up. In the same week, Trump’s Attorney General William Barr launched a [lawsuit against Google](#) with the explicit threat of breaking the company into pieces. [Our research shows](#) that antitrust laws and policies can be weaponized for electoral purposes by both resorting to populist rhetoric (referred to as “[political antitrust populism](#)”) and to a populist use of antitrust concepts and tools (referred to as “[conceptual antitrust populism](#)”). The [Google story](#) which boisterously unfolded last week represents a fine and lasting illustration of the populist use of antitrust policies.

Indeed, [self-proclaimed populists](#) are winning over the instrumentalization of antitrust enforcement. They claim populism in antitrust policies – but with a “[brain](#)”. Barry Lynn epitomizes the populist motto of scrapping big companies irrespectively of their conduct and [irrespectively of the social benefits some big companies can deliver to society](#). Barry Lynn catapulted [Open Markets Institute’ fellow Lina Khan](#) who discovered that the early case law on antitrust at the beginning of the 20th century, despite being commonly referred to as [populist and economically unsound](#), ought to be a renewed source of inspirations for the way we approach big tech companies of the 21st century. Lina Khan advocated powerfully for a [return to the legal complexities](#), subsequently debunked by [improvements in economic understanding](#), and she ended up being the main person behind the House Report since she has been appointed as one of the Counsel of Representative David Cicilline.

The Department of Justice (DoJ) and the House appear to be both engaged in last-hour popular moves against big tech companies to gain electoral votes. It is indeed [popular to go against the “establishment”](#) – and big tech companies somehow represent the new establishment along with media corporations. Thus, both the DoJ and the House primarily aim at imposing the most dramatic remedy to Google: a breakup of the corporation. However, research and experience nevertheless demonstrate that breakups are the most inappropriate remedies available.

First, popular beliefs about what is deemed to be anticompetitive may not necessarily prove to be right – or, rather, is often wrong. Indeed, economic analysis and strategic management may explain the pro-competitive nature of complex firm conducts. This may be at odds with popular beliefs but consistent with the efficiency and prosperity of the economy. Second, should anti-competitive

conducts may be evidenced, the new business conducts deemed a posteriori anticompetitive should not be sanctioned, they should be prohibited in the future. For the sake of protecting legal certainty and for adherence to the rule of law, one must not be sanctioned for conduct that was not illegal at the time when carrying them out. A decision with no fine but regulatory requirements is not weak enforcement, it is fine and elaborate enforcement. Finally, should there be anticompetitive conducts evidenced, and should the case for sanction be convincingly made, fines and behavioural remedies are sufficient if one wants not to deter innovation and optimal incentives to business leaders. Structural remedies (or breakups) imposed on companies can therefore be envisaged once these stages of analysis have proven to be insufficient and inappropriate.

Both the DoJ and the House Report are not concerned with these logical stages of analysis. They straightforwardly jump the last possible solution because it also happens to be the most dramatic and sensational solution possibly yielding popular support ahead of presidential elections. For sure, politicians may ignore [antitrust consensus on research and experience](#) which call for caution before envisaging breakups of companies. For sure, politicians may win by turning antitrust logic upside down only at the expense of Google being trapped in highly inflammatory antitrust populism.

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe [here](#).

Kluwer Competition Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers are coping with increased volume & complexity of information. Kluwer Competition Law enables you to make more informed decisions, more quickly from every preferred location. Are you, as a competition lawyer, ready for the future?

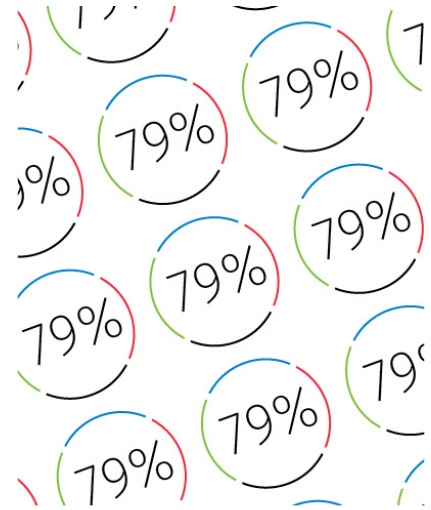
Learn how **Kluwer Competition Law** can support you.

79% of the lawyers experience significant impact on their work as they are coping with increased volume & complexity of information.

Discover how Kluwer Competition Law can help you.
Speed, Accuracy & Superior advice all in one.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change



This entry was posted on Thursday, October 29th, 2020 at 1:46 pm and is filed under [Source: OECD](#), [Antitrust](#), [Google](#), [Remedies](#), [United States of America](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.