Duty to Deal?

- Adopt limitations on the duty to deal expressed in *Verizon Comms., Inc. v. Trinko, LLP*, 540 U.S. 398 (2004).
    - Note that *Trinko* is being distinguished in major tech cases. *See, e.g.* Amicus Brief of the United States in Support of New York, et al., *New York v. Facebook,* Case No. 21-7078, D.C. Cir., Jan. 28, 2022, ¶¶ 19-27, https://www.justice.gov/atr/case-document/file/1467321/download

- State that *Trinko* is not the law of California
    - *See e.g.* S. 225 (117th Cong.), § 9.

- *Adopt some version of the essential facilities doctrine*
    - *See e.g., MCI Comms. Corp. v. Am. Telephone & Telegraph Co.,* 708 F.2d 1081, 1132-33 (7th Cir. 1982), *see also Otter Tail Power Co. v. U.S., 410 U.S. 366 (1973).*
        - Monopolist controls an essential facility
        - Competitor is unable practically or reasonably to duplicate the essential facility
        - Monopolist is denying use of the essential facility to a competitor
        - Providing the facility is feasible

Non-Discrimination/Equal Treatment?

- Concerns about providing non-discriminatory treatment of rivals and retailers on large platforms test the bounds of current duty to deal case law.
    - Adopt current federal duty to deal case law?
    - Provide that California law:
        - Require separation of elements of large platforms to eliminate conflicts of interest between the platform's offerings and those of other retailers or rivals. *See e.g*. H.R. 3825 (17th Cong.), or
        - Preclude self-preferencing by platforms of a specific size or scope. *See, e.g*. American Innovation and Choice Online Act, S. 2992 (117th Cong.), § 3(a)(1)?
            - See also EU's Digital Markets Act, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en.

Mergers?

- Rely on federal courts or the use of federal law under the Unfair Competition Law (Bus. & Prof. Code § 17200)?
- If considering a state-level merger provision:

    - Prohibit mergers that "create an appreciable risk of materially lessening competition (vs. the current Clayton Act standard that prohibits mergers that "substantially" lessen competition). See, e.g. S. 225, (17th Cong.), § 9;

    - Prohibit mergers of a certain size or effect. *See, e.g*. S. 3847 (117th Cong.), § 3; or

    - Burden shifting, such that large platforms may not acquire other firms, unless they demonstrate that the acquisition is procompetitive, including an affirmative obligation to demonstrate that the to-be-acquired firm does not represent "nascent or potential competition" for the platform. *See, e.g.* H.R. 3826 (117th Cong.) § 2(b)(2)(B).

Resources

- Congressional Research Service (CRS), *Antitrust Reform and Big Tech Firms (R46875)*, Updated Mar. 22, 2023, https://crsreports.congress.gov/product/pdf/R/R46875.

- Fiona Scott Morton, Testimony, "Reining in Dominant Digital Platforms: Restoring Competition to Our Digital Markets," before the Senate Committee on the Judiciary, Subcommittee on Competition Policy, Antitrust, and Consumer Rights, Mar. 23, 2023, https://www.judiciary.senate.gov/imo/media/doc/2023-03-07%20-%20Testimony%20-%20Morton.pdf.

    - Note particularly cross references to the EU Digital Markets Act at 10-11.

- Richard J. Gilbert, *Antitrust Reforms: An Economic Perspective*, 15 Ann. Rev. Econ. 1 (Aug. 2023), https://www.annualreviews.org/doi/abs/10.1146/annurev-economics-082222-070822?journalCode=economics.

Thank you and questions