Book Review
How to Evaluate Alleged Monopolies

Nicolas Petit

Big Tech and the Digital Economy: The Moligopoly Scenario

Oxford University Press 2020

Reviewed by Steven J. Cernak

The stereotypical monopolist is Rich Uncle Pennybags, doing nothing but putting his feet up on the desk and collecting $200 every time someone lands on one of his four railroads.[1] Or if you think like an economist, he is exploiting his position and creating deadweight losses with his exorbitant prices.

Big Tech companies—think Facebook, Amazon, Apple, Netflix, Google, and Microsoft—look like monopolists, with their large market shares, revenues, and profits. But many of their actions, like long-run low or even $0 prices, do not fit the stereotype. Instead of being satisfied with collecting $200 every time they pass Go, some of them have the world's largest research and development budgets.

What can we learn from this seeming conundrum? Nicolas Petit delves behind the basic facts and headline-grabbing reports to teach us all something in his *Big Tech and the Digital Economy: The Moligopoly Scenario.* Spending more time with 10-K forms and business school strategy and less time with market share numbers and industrial organization economics, Petit discovers the common factors in the behavior of those six companies, offers an explanation for why they act as they do, and suggests when antitrust or other laws should intervene.

The book is far from an apology for Big Tech, but it should give regulators and legislators around the globe pause before rushing for an antitrust solution to an alleged problem. More generally, it gives antitrust enforcers new ways to evaluate the actions of Big Tech that might more closely reflect how such companies really think about competition.

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Not the First To Cover Big Tech

Much ink, real and virtual, has been spilled covering the alleged sins, antitrust and otherwise, of the six companies that Petit calls Big Tech. Petit groups these commentators into two buckets, Neostructuralists and Consumer Welfarism supporters. He summarizes the beliefs of the former as "economic concentration is a political issue; a concern for small business protection, not efficiency . . . [and] economics constrain the development of a normative critique of tech companies' dominance."[2]

Consumer Welfarism supporters, on the other hand, are concerned about conduct that is likely to reduce economic welfare as judged by courts applying rules developed case by case. This group is split between those favoring a lax approach to Big Tech's actions and those favoring a

[1] For more on the rules and strategies of the game of Monopoly, see this site: https://monopoly.fandom.com/wiki/Railroads.

[2] Nicolas Petit, Big Tech and the Digital Economy: The Moligopoly Scenario 18–19 (2020).

stricter antitrust approach. Petit places in this latter subgroup the recent reports on Big Tech from the UK government[3] and the Stigler Center.[4]

Petit asserts that none of these groups properly evaluates Big Tech. The Neostructuralists are "prone to faith-based 'big is bad' claims and a disinterest for empirically observable market facts."[5] Consumer Welfarism supporters satisfied with current antitrust enforcement are too quick to point to low prices as conclusive evidence of lack of consumer harm. Consumer Welfarism supporters looking for vigorous antitrust enforcement fall prey to the Nirvana Fallacy, whereby Big Tech's low prices, increasing output, and high R&D investments could always be improved with just a few tweaks courtesy of antitrust enforcement.

The Moligopoly Hypothesis

In response, Petit develops his own hypothesis:

> [B]ig tech firms, or perhaps just some of them, may simultaneously be monopolists and competitive firms. The competition that bears on tech firms is a form of pressure. It originates from firms outside of the product and service markets that they serve alone. It also stems from indeterminate firms, markets, or industries.[6]

For support, Petit does not turn to the usual antitrust toolbox of "structural assumptions, models, and tools to draw inferences on firm behavior . . . [and alleged] absence of competitors."[7] Instead, he looks to other reports of competition from outside the antitrust world, namely the companies' annual 10-K filings with the U.S. Securities and Exchange Commission and market research from financial analysts.

As a former long-time in-house counsel, my initial reaction to using 10-Ks was "Brilliant! Finally, we will base our conclusions about competition on the perceptions of actual participants, not the guesstimates of so-called experts." As a lawyer who played a small role in composing such disclosures, my second reaction was "But wait a minute. Those disclosures are always over-inclusive to ward off any threat of later securities litigation." Petit anticipates my second response and points out that top executives must sign off on their disclosures' accuracy under severe penalties and that studies have found countervailing incentives to downplay competition or other negative factors.[8]

My fears were further relieved by the strength of Petit's findings. Through numerous analyses of both the 10-Ks and the analyst reports, Petit finds robust evidence that the companies—and the analysts who follow them—know they face "intense, rapid, fierce, or formidable competition" or pressure, either from each other or many others.[9] The resulting picture of Big Tech is one of "[an] undisputable trend toward industry concentration . . . [but] also a competitive force . . . [that] does not seem to originate from substitute products or services."[10]

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[3] Jason Furman et al., *Unlocking Digital Competition: Report of the Digital Competition Expert Panel* (2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

[4] Fiona Scott Morton et al., *Report of the Committee for the Study of Digital Platforms, Market Structure and Antitrust Subcommittee* (George J. Stigler Center for the Study of the Economy and the State, 2019). Note that Petit's book was published just prior to the Majority Staff Report and Recommendations from the Investigation of Competition in Digital Markets by the Antitrust Subcommittee of the U.S. House of Representatives Judiciary Committee (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

[5] Petit, *supra* note 2, at 26.

[6] *Id.* at 33.

[7] *Id.* at 34.

[8] *Id.* at 37–38.

[9] *Id.* at 51.

[10] *Id.* at 62.

Because these facts do not align with the textbook model of monopoly, Petit develops his own hypothesis based on insights from theories of competition in markets with network effects and tipping. The key insight is that each of these companies faces great uncertainty and the risk of severe disruption or, perhaps worse, irrelevance. Before reaching the tipping point, wherever that might be, no firm wants to risk the one wrong move that can destroy the company. After reaching that point, every firm is concerned about the market re-tipping, especially when technology, and consumer preferences, can change so rapidly.

Fear of being the next Blockbuster or Myspace because of mistakes or just some "black swan" event drives much Big Tech behavior. So while the firms hold "structural positions akin to a monopoly in their origin market,"[11] they behave in those and other markets like competitive oligopolists. As Petit summarizes the Big Tech competition, it is a "'moligopoly' in which tech giants compete against each other or against non- big tech firms, either known or unknown to them."[12]

Antitrust Implications

Even if the companies are merely oligopolists, not monopolists, traditional antitrust law should be concerned about "mutual forbearance" or other tacit agreements among the tech giants to respect each other's positions and minimize competition. Petit finds little data to support that result; instead, he finds companies fixated on growth by creating new products or entering existing product markets "directly" with perfect substitutes or "indirectly" with complements or imperfect substitutes.[13]

Because competition can take the form of competitive pressure, not just rivalry, and still create the well-known benefits to consumers, antitrust analysis of Big Tech companies should focus on retaining that pressure even if there is no direct rivalry. According to Petit, antitrust tools should be used to preserve competitive pressure on monopolists in tipped markets because the incentives for indirect entry have disappeared. On the other hand, antitrust should encourage entry, whether direct or indirect, into untipped markets because such entry can help reduce the monopoly rents in the tipped market. In particular, antitrust should be "more forgiving" of leveraging of market power in a tipped market to enter an untipped market.[14] The example Petit uses to show this form of indirect competition is the 1990s innovators' focus on search engines, social networks, and other internet applications to indirectly challenge Microsoft's dominance in computer operating systems and productivity software.[15]

The moligopoly model's focus on tipped and untipped markets suggests that antitrust analysis of these companies and the markets in which they compete should be more dynamic than the static analysis sometimes used. For example, the focus on closest substitutes in the typical market definition exercise can yield a myopic view of competition:

> In practice, market definition starts from the largest set of substitution possibilities to users, and progressively zeroes in on substitution possibilities that are as perfect as possible . . . . With eyes toward the best substitution possibilities, antitrust agencies and courts tend to discount indirect, external, and potential sources of competition informative of an untipped market.[16]

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[11] *Id.* at 153

[12] *Id.*

[13] *Id.* at 159.

[14] *Id.* at 172.

[15] *Id.* at 178.

[16] *Id.* at 228.

For instance in the *Google Shopping*[17] decision, Google was found guilty of exclusionary conduct against comparison shopping sites whose market shares dropped after Google began promoting its own shopping services, and demoting the competing shopping sites, in response to product searches. Authorities "rejected evidence that the [comparison shopping sites'] lost market share might have been caused by participation in an untipped market comprising merchant platforms like Amazon and eBay."[18] In other words, the myopic focus of traditional market definition analysis on closest competitors caused the authorities to miss the competitive effects of other entities' pressuring Google's search services because those other entities were not offering directly competing methods of discovering product information.

Similarly, the European Commission allowed Facebook's 2014 acquisition of WhatsApp to proceed after using a "market definition limited to consumer communication apps for smartphones and excluding traditional communications services."[19] Evidence of the competitive pressure Facebook felt from WhatsApp, even if its services were not in the same antitrust market, came to light later and now supports one of the key allegations in the U.S. Federal Trade Commission's monopolization complaint against Facebook.[20]

Application Outside Big Tech?

My one mild criticism of the book concerns the section discussing antitrust implications of the analysis. Nearly all of the book is carefully, even painstakingly, argued. Arguments are cogently argued and built, potential objections are noted and discussed, and caveats and limitations are clarified. Do not misinterpret that comment—the book is not a long or complicated read, and an appropriate use of footnotes allows the narrative to build while flagging other important points that might require a deeper discussion.

The section on antitrust implications, however, feels rushed with too many points and examples noted too quickly. After 190 pages developing the moligopoly hypothesis of competition and explaining how it describes Big Tech behavior, Petit then spends only 15 pages on a retrospective application of the theory to past antitrust matters, some of which, like *BMI*,[21] seem relevant but not very different from the many current Big Tech antitrust debates. Another 20 pages to flesh out how the moligopoly hypothesis could better illuminate past or potential antitrust issues involving Big Tech would have been a good investment.

Petit cautiously notes that this analysis applies to these six companies, plus any others that share most or all of the attributes of these companies, which he carefully describes. I think Petit might be too humble here. I think there are at least two takeaways from the book that can be applied outside of Big Tech.

First, Petit's extensive and detailed use of Company 10-K filings and financial analyst reports should be replicated, especially in investigations of entire industries when the volume of material can be large. Instead of economists and, worse, lawyers guessing at the rationales for a company's actions, use the documents prepared by the company's top executives and others who have large incentives, legal and otherwise, to accurately depict the complete competitive picture.

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[17] Case AT.39470—Google Search (Shopping), § 216, C(2017) 4444 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=151619835804&uri=CELEX:52018XC0112(01) (summary of Commission decision).

[18] Petit, *supra* note 2, at 228.

[19] *Id.* (quoting Case No. COMP/ M.7217, Facebook/WhatsApp, C(2014) 7239 final, https://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf).

[20] Complaint, FTC v. Facebook, Inc., 1:20-cv-03590 (D.D.C. Dec. 9, 2020).

[21] Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979).

Of course, that was part of the original intent of Item 4(c) of the Hart-Scott-Rodino[22] form; however, too often those submissions and second request searches seem more focused on obtaining "hot documents," which can be context-free excerpts of documents from others lower down in the organization, who might not see the complete picture. A careful analysis of a large trove of documents, like the one performed by Petit here, can give a better sense of the overall competitive situation from those in the arena.

Second, the moligopoly hypothesis's focus on competitive pressure from sources other than the rival making the closest substitute might be helpful in antitrust analyses outside of Big Tech. In fact, once one understands Petit's thesis, one begins to see its application in many antitrust contexts, especially merger review.

For instance, consider the original *Staples/Office Depot merger challenge.*[23] There, the court correctly followed usual market definition analysis and found a narrow market for "consumable office supplies sold through office superstores." The parties unsuccessfully argued, to use Petit's terms, that they felt and reacted to competitive pressure from other retailers of the same products, like Wal-Mart, Target, Best Buy, and Costco.[24] Of course, the evidence showing the parties' pricing responding chiefly to the presence of other superstores undercut such arguments of significant competitive pressure from outside the defined market.[25]

An earlier, lesser-known, challenge with which I was involved is *United States v. General Motors.*[26] There, the Justice Department Antitrust Division challenged the proposed merger of the two largest manufacturers of automatic transmissions for medium- and heavy-duty trucks in the United States, GM's Allison Transmission Division and ZF. The parties then abandoned the transaction.

Again, the Division (and my co-counsel) correctly followed the usual market definition analysis and found narrow markets like "automatic transmissions for heavy refuse route trucks." Such a finding perplexed the Allison executives who had spent decades—and tens of millions of marketing and development dollars—warding off competitive pressure from the larger producers of the more popular and less expensive manual transmissions. Those executive saw "increasing automaticity" as the only way for Allison to grow. That competitive pressure from outside the narrowly defined market was completely discounted in favor of a focus on the markets where Allison had very successfully convinced truck buyers to buy only automatics.[27] While the concepts so eloquently described and ably supported by Petit in his book probably would not have changed the Allison result, their use would have painted a fuller picture of the transaction's likely competitive effects.

While too late to help me and my Allison clients, these concepts certainly should prove useful today to enforcers, legislators, counselors, commentators, and judges involved in the numerous antitrust disputes surrounding Big Tech. I highly recommend Petit's analysis to anyone considering antitrust issues surrounding Big Tech companies—and that seems like almost every antitrust practitioner and commentator today. ●

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[22] 15 U.S.C. § 18a.

[23] FTC v. Staples, 970 F. Supp. 1066 (D.D.C. 1997).

[24] *Id.* at 1077.

[25] *Id.* at 1075–76.

[26] 6 Trade Reg. Rep. (CCH) ¶¶ 45,093, 44,661 (D. Del. 1993).

[27] To be (slightly) fairer to the Division, there were some "hot documents" from lower-level Allison employees that identified ZF as the main competitor and several truck builders and buyers of large refuse trucks and transit buses complained about the proposed transaction.