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Antitrust Provides a More Reasonable Framework for Net Neutrality Regulation

by

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Introduction and Summary

In 2015, the FCC departed from almost 20 years of precedent and reclassified the framework for regulating the Internet under Title II of the Telecommunications Act. This departure, done at the behest of President Obama, meant that Internet access is regulated as a "telecommunications service" under Title II rather than as an "information service" regulated under Title I. The effect of the 2015 Order is to classify Internet service providers (ISPs) as common carriers, regulating them like a public utility.

After classifying Internet service providers as common carriers, the FCC found it necessary to forbear from enforcing "30 statutory provisions" and rendered "over 700 codified rules inapplicable."[1] Further, the FCC adopted no-blocking, no-throttling, and no-paid prioritization rules, as well as a general Internet conduct standard and "enhancements" to the transparency rule.

[1] In the Matter of Protecting and Promoting the Open Internet, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5616 (2015).

In 2016, the D.C. Circuit affirmed the validity of the Title II classification in a divided decision.[2]

In April 2017, the FCC issued a Notice of Proposed Rulemaking (NPRM) to end the Title II regulatory approach, and return to the lighter-touch Title I approach, which would again regulate Internet access as an "information service." The explicit rationale was to "reverse the decline in infrastructure investment, innovation, and options for consumers put into motion by the FCC in 2015."[3] The NPRM proposes to eliminate the Internet conduct standard, and seeks comment on blocking, throttling, and paid prioritization. Finally, the NPRM proposes to return jurisdiction to the FTC to police ISPs, thereby shifting the regulatory approach from an aggressive *ex ante* regime to a more reasonable *ex post* framework.

One primary point of contention has been whether the 2017 NPRM will increase capital expenditures in the Internet ecosystem. Prior to the 2017 NPRM, the FCC claimed ISPs continued to invest at the same or even higher rates despite the imposition of a heavy-handed regulatory scheme. However, data indicate that between 2014 (the year before the 2015 Order) and 2016 (the year after) capital expenditures by broadband ISPs decreased by $3.6 billion, or 5.6%.[4]

Another point of contention in the net neutrality debate concerns the reversion to the FTC of jurisdiction to police claims that ISPs unfairly or unreasonably discriminate against content providers and thereby harm competition. While there is no apparent dispute that the FTC's authority to prohibit deceptive practices can be deployed to reach broadband providers,[5] there appears to be greater confusion about the appropriate role of antitrust and its domain in broadband markets. Some even go so far as to claim relying upon antitrust law amounts to no regulation at all.[6] A useful comparison of antitrust law to alternative regulatory schemes, such as Title II,

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[2] United States Telecom Ass'n v. FCC, 825 F.3d 674 (D.C.C. 2016), *reh'g en banc denied*, No. 15-1063, 2017 WL 1541517, at *1 (D.C.C. May 1, 2017) (stating that "[e]n banc review would be particularly unwarranted at this point in light of the uncertainty surrounding the fate of the FCC's Order").

[3] In the Matter of Restoring Internet Freedom. Federal Communications Commission, WC Docket No. 17-108, April 27, 2017.

[4] *See* Hal Singer, *2016 Broadband Capex Survey: Tracking Investment in the Title II Era* (Mar. 1, 2017), *available at* https://haljsinger.wordpress.com/2017/03/01/2016-broadband-capex-survey-tracking-investment-in-the-title-ii-era. Investment decreased for eight of the twelve major ISPs in Singer's study. The largest decrease was $3.4 billion or 16.2% by AT&T and $2.4 billion or 62.7% by Sprint. *See generally* Thomas W. Hazlett & Joshua D. Wright, *The Effect of Regulation on Broadband Markets: Evaluating the Empirical Evidence in the FCC's 2015 ''Open Internet'' Order*, 50 REV. OF INDUS. ORG. 487, 489 (2017).

[5] *See* Joint Statement of Acting FTC Chairman Maureen K. Ohlhausen and FCC Chairman Ajit Pai on Protecting Americans' Online Privacy, (Mar. 1, 2017) ("We still believe that jurisdiction over broadband providers' privacy and data security practices should be returned to the FTC, the nation's expert agency with respect to these important subjects.") *available at* https://www.ftc.gov/news-events/press-releases/2017/03/joint-statement-acting-ftc-chairman-maureen-k-ohlhausen-fcc; Alden Abbott, *You Don't Need the FCC: How the FTC Can Successfully Police Broadband-Related Internet Abuses*, (May 20, 2015) ("The…FTC has ample authority under Section 5 of the …FTC Act…to challenge any harmful conduct by entities involved in Internet broadband services markets when such conduct undermines competition or harms consumers.") *available at* http://www.heritage.org/government-regulation/report/you-dont-need-the-fcc-how-the-ftc-can-successfully-police-broadband.

[6] Brandon Sasso, *Forget the FCC – Should the FTC Enforce Net Neutrality?*, (June 20, 2014) ("I have the highest admiration for the antitrust laws," [Tim] Wu testified. "But I simply don't think they're equipped to handle the broad range of values and policies that are implicated by net neutrality and the open Internet.") *available at* https://www.theatlantic.com/politics/archive/2014/06/forget-the-fcc-should-the-ftc-enforce-net-neutrality/456918/; Hal Singer, *A New Path Forward For Net Neutrality*, (Jan. 10, 2017) ("Unfortunately, antitrust laws are not up to the

requires first an accurate description of what the former entails. A careful comparison makes clear that claims that antitrust amounts to "doing nothing" are a combination of overzealous advocacy and deception. But the more interesting issue is which regulatory framework – each with its own strengths and weaknesses – best protects competition and consumers.

Antitrust law has developed a sophisticated "rule of reason" framework to determine whether vertical agreements are procompetitive or anticompetitive. The rule of reason approach examines vertical agreements on a case-by-case basis by weighing costs and benefits and recognizing possible losses from enforcement errors that go in either direction. Despite the 2015 Order ban on vertical agreements by Internet service providers, rule of reason analysis would not similarly result in a total ban on vertical agreements because economics literature clearly indicates that while vertical agreements are capable of harming competition in the manner contemplated by net neutrality proponents, more often than not they are beneficial to consumers. Furthermore, with few exceptions, the literature does not support the view that these practices are used for anticompetitive reasons. In short, the vertical agreements at the heart of the net neutrality debate are generally procompetitive.

Economic analysis predicted the 2015 Open Internet Order ban on vertical agreements would likely harm consumers and depress investment. Now, empirical evidence is consistent with those predictions. Reclassifying Internet service providers under Title I would restore incentives to invest in broadband markets. A less obvious benefit is that it replaces the 2015 Order's categorical ban on contract arrangements that benefit consumers – including paid prioritization and other vertical arrangements – with antitrust jurisprudence's rule of reason. A close look at the antitrust approach shows not only that it can reach the harms envisioned by net neutrality proponents, but also that it is superior to alternatives that would condemn vertical arrangements in broadband markets without proof of harm to competition.

The Antitrust Framework

The crux of the net neutrality debate is the fear that via paid prioritization, ISPs will enter vertical business agreements that will prove to be anticompetitive, and ultimately harm consumers. Vertical agreements are agreements between firms at different levels of a supply chain; in this context, they are between an ISP and a content provider. Even though there was no evidence of a single harmful agreement during the fourteen years of Title I coverage, the Title II Order chose to prohibit all vertical agreements. The net neutrality debate is marked by a dearth of economic perspective -- framing consumer harm without consideration of the promotion of consumer welfare. These ephemeral hypothetical harms do not provide regulatory clarity and do not allow the FCC to create precedent in the appropriate cases. Instead, net neutrality categorically banned vertical agreements.

There seems to be a consensus that some regulation of vertical agreements is necessary to protect consumers. One option is *ex ante* regulation that is effectively a categorical prohibition on vertical agreements. In the 2015 Order, the FCC adopted this *ex ante* approach, which is now known generally as "net neutrality." The second option is *ex post* regulation that seeks to permit

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task of policing discrimination on the Internet."), *available at* https://www.forbes.com/sites/washingtonbytes/2017/01/10/a-new-path-forward-for-net-neutrality/#2bb207ce79c2.

procompetitive vertical agreements, while preventing anticompetitive ones. The *ex post* approach aims to maximize consumer welfare wherever possible by applying the tenets of antitrust law.

Antitrust law has developed a sophisticated "rule of reason" approach to determine whether vertical agreements are procompetitive or anticompetitive. The rule of reason approach examines vertical agreements on a case-by-case basis by "weighing costs and benefits, and recogniz[ing] possible losses from enforcement errors that go in either direction."[7] According to FTC staff, rule of reason "weigh[s] potential anticompetitive effects against the procompetitive effects and efficiencies that drive business practices in fast-growing industries."[8] The rule of reason analysis would not result in a categorical ban on vertical agreements. Instead, by applying rule of reason, vertical agreements would be analyzed on a case-by-case basis, and be rejected only if careful economic analysis concluded there are anticompetitive effects greater than any procompetitive effects or efficiencies.

The regulatory framework must also minimize the social costs of regulatory errors and the costs of administering the regulatory system. The inputs required to apply the "error cost framework" are: (1) the probability that the agreements at issue (in this case vertical restraints) are anticompetitive; (2) the magnitude of errors associated with erroneous enforcement; and (3) the administrative costs of implementing the system. The errors can either be false positives, in which agreements that benefit consumers are prohibited, or false negatives, in which agreements that harm consumers are allowed.[9] Overall, consumers are best protected by an *ex ante* categorical ban if all vertical agreements are anticompetitive, or if there are an abundance of false negatives. And consumers are best protected by an *ex post* approach if there are even a few procompetitive vertical agreements, or an abundance of false positives.

The economics literature on vertical agreements is consistent and very clear: while vertical agreements are capable of harming competition in the manner contemplated by net neutrality proponents, vertical agreements are more often beneficial to consumers.[10] Furthermore, "with few exceptions, the literature does not support the view that these practices are used for anticompetitive reasons," which supports "a fairly strong prior belief that these practices are

[7] *See* Hazlett & Wright, *supra* note 4, at 489.
[8] Letter from the Staff of the Fed. Trade Comm'n, to Marlene H. Dortch, Secretary, Fed. Comm. Comm'n (July 17, 2017) *available at* https://www.ftc.gov/system/files/documents/advocacy_documents/comment-staff-bureau-consumer-protection-bureau-competition-bureau-economics-federal-trade/ftc_staff_comment_to_fcc_wc_docket_no17-108_7-17-17.pdf [hereinafter Letter from FTC Staff].
[9] *See* Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Net Neutrality Meets Regulatory Economics 101, Remarks at the Federalist Society Media and Telecommunications Practice Group Event: *The Future of Media – Is Government Regulation in Today's Media Landscape "Over-The-Top"?* (Feb. 25, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/626591/150225wrightfedsoc.pdf.
[10] *See* Francine LaFontaine and Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. Vol. 629, 680 (2007) ("Under most circumstances, profit maximizing vertical-integration decisions are efficient, not just from the firms' but also from the consumers' points of view…we have found clear evidence that restrictions on vertical integration…are usually detrimental to consumers. Given the weight of the evidence, it behooves government agencies to reconsider the validity of such restrictions."); *see also* Letter from FTC Staff, *supra* note 8, at 28 ("Most forms of vertical integration can generate procompetitive efficiencies, thus antitrust analysis generally regards them as harmless or even beneficial to consumer welfare.").

unlikely to be anticompetitive in most cases."[11] Thus, the vertical agreements at the heart of the net neutrality debate are generally procompetitive. Indeed, vertical agreements are often observed between firms without any plausible market power. Vertical agreements can reduce double marginalization, prevent free riding on manufacturer-supplied investments, and align incentives of manufacturers and distributors. Consumers benefit from these efficiencies "in the form of lower prices, increased output, higher quality, and greater innovation."[12] In short, vertical contracts can improve consumer outcomes by creating demand or lowering costs.

Despite this literature, the FCC's 2015 Order proposed a categorical ban on vertical agreements without any plausible economic justification or evidence to support it. Indeed, the 2010 Order offered up only a frail attempt to justify its proposal on economics grounds – citing to a single paper, later omitted from the 2015 Order after substantial criticism.[13]

Any regulatory regime somewhat reflecting the state of economic knowledge on vertical restraints would accept the premise that these contracts can generate both pro- and anticompetitive results. The 2015 Order did not implement a regime that attempted to differentiate between the two – sacrificing for broadband consumers the benefits from the many "good" vertical restraints, in the name of prohibiting the few "bad" ones. Such a regulatory regime is easily outperformed by one that is capable of distinguishing between the two with even a mundane level of accuracy. This is where antitrust comes into play.

The 2017 Restoring Internet Freedom NPRM proposes to shift the regulatory scheme back to Title I. With that shift, the 2017 rulemaking proposal contemplates that antitrust and its "rule of reason" framework will provide the competitive rules of the road for vertical agreements between broadband providers and content providers.

Over the last 125 years, antitrust jurisprudence has developed a method to analyze vertical arrangements: rule of reason.[14] Under a rule of reason approach, every vertical arrangement is analyzed individually to determine if the agreement is anticompetitive.[15] The main function of rule of reason analysis is to condemn vertical restraints that harm consumers and allow those that are either not anticompetitive or beneficial.[16] It seems clear that antitrust's rule of reason framework is

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[11] Daniel O'Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems*, REPORT: THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 72-73 (2008). There is a consensus among empirical economists that vertical agreements are procompetitive.
[12] Wright Remarks, *supra* note 9.
[13] *See* Austan Goolsbee, *Vertical Integration and the Market for Broadcast and Cable Television Programming*. (Apr. 2007), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DA-07-3470A10.pdf. The 2010 Order claims "the Goolsbee Study provides empirical evidence that cable providers have acted in the past on anticompetitive incentives to foreclose rivals, supporting our concern that these and other broadband providers would act on analogous incentives in the future."; *but see* Thomas W. Hazlett & Joshua D. Wright, *The Law and Economics of Network Neutrality*, 45 IND. L. REV. 767, 813-34 (2012). Hazlett & Wright point out that in Goolsbee's actual findings "operators have discriminated against the programming services that they owned—the opposite of [harms stemming from] vertical foreclosure," certainly do not support the economic logic underlying the 2010 or 2015 Orders.
[14] *See* Wright Remarks, *supra* note 9.
[15] *Id*. ("The rule of reason requires that each vertical arrangement be assessed on a case-by-case basis by marshaling the available economic literature and empirical evidence to evaluate the evidence of actual competitive harm under the specific circumstances of the case.").
[16] *See generally* Hazlett & Wright, *supra* note 4.

a superior regulatory framework than the categorical ban on vertical agreements that was proffered in the 2015 Order.[17]

What Harms Can the Antitrust Framework Reach?

Some critics acknowledge the role a rule of reason framework can play in regulating ISPs' vertical agreements, but claim that it might not work in all instances, or reach all possible types of harms.[18] These critics contend that antitrust's consumer welfare framework allows it to reach anticompetitive conduct that manifests in the form of a reduction in output or an increase in price, but not reductions in quality or incentives to innovate.[19] Some critics have argued that the possibility of harms existing "outside" the antitrust framework justify a blanket prohibition on vertical contracts and paid prioritization, as laid out by the 2015 Order. Others argue this alleged "gap" in the antitrust laws calls for a "new" framework that substitutes a focus on consumer welfare with an analysis of whether discrimination is "unreasonable," regardless of its effects on consumers.

Both groups of critics reveal a profound and fundamental lack of understanding of the rule of reason framework. The rule of reason, and antitrust jurisprudence generally, has evolved to reach all forms of competitive harms – including innovation and quality. One need not go beyond the *Horizontal Merger Guidelines* to see evidence of this evolution. Neither the original 1968 Merger Guidelines, nor the 1982 Merger Guidelines, mentioned potential harm to innovation. The 1992 Guidelines and their 1997 revision only loosely allude to the subject as a potential merger efficiency.[20] However, two decades later, the 2010 *Guidelines* prominently include an entire section on potential harm to innovation, suggesting that the FTC believes such harms are clearly actionable and within their purview.[21] Importantly, the 2010 HMGs, like all Merger Guidelines, do not initiate new policies, but describe what is already happening inside the agencies.

Furthermore, the FTC has acted on numerous mergers that in either strong or weak terms reference "innovation" or "research and development" harms. Between 2004 and 2014 the FTC challenged 164 mergers, and 54 of them alleged harm to innovation. Clearly, there were other mergers that alleged conduct amounting to harm to innovation without specifically using those phrases.[22] These

[17] *See* Letter from FTC Staff, *supra* note 8, at 29 ("The FTC's activities in Internet-related markets demonstrate its ability to protect the competitive process, promote the innovation that such competition fosters, and preserve the resulting benefits to consumers.").

[18] See e.g., Hal Singer, *Why Antitrust Cannot Reach the Part of Net Neutrality That Everyone Is Concerned About* (Apr. 29, 2017), https://haljsinger.wordpress.com/2017/04/29/why-antitrust-cannot-reach-the-part-of-net-neutrality-that-everyone-is-concerned-about/; Washington Bytes, *The Future Of Antitrust Enforcement: Innovation, Wage Inequality And Democracy,* (June 15, 2017), https://www.forbes.com/sites/washingtonbytes/2017/06/15/the-future-of-antitrust-enforcement-innovation-wage-inequality-and-democracy/#70114556145d; Washington Bytes, *Is Antitrust The Right Framework For Net Neutrality?* (Mar. 15, 2017), https://www.forbes.com/sites/washingtonbytes/2017/03/15/is-antitrust-the-right-framework-for-net-neutrality/#17c9d5e28b53.

[19] *Id*.

[20] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4 (rev. 1997), *available at* https://www.justice.gov/atr/horizontal-merger-guidelines-0. The 1992 *Horizontal Merger Guidelines* do not explicitly refer to harm to innovation, but only that "[e]fficiencies also may result in benefits in the form of new or improved products, and efficiencies may result in benefits even when price is not immediately and directly affected."

[21] Richard J. Gilbert & Hillary Greene, *Merging Innovation into Antitrust Agency Enforcement of the Clayton Act*, 83 GEO. WASH. L. REV. 1919, 1931-32 (2015).

[22] *Id.* at 1933.

developments clearly show that harms to innovation are cognizable within antitrust; but net neutrality proponents skeptical of the antitrust approach will be quick to point out that these are mergers and not potentially exclusionary or discriminatory conduct such as vertical restraints.

Antitrust can reach innovation concerns in those cases too. The FTC has pursued several conduct cases where the theory of harm was decreased innovation. For example, consider the FTC's allegations against Intel.[23] The FTC alleged Intel's conduct would likely result in the monopolization of the GPU market in violation of Section 2 of the Sherman Act. Intel manipulated CPU industry standards to advance their own products and prevented competitors from introducing a competing product – in short harming CPU innovation. The FTC alleged that "the loss of price and innovation competition in the relevant markets will continue to have an adverse effect on competition and hence consumers."[24] Further, the FTC alleged that there were no offsetting procompetitive efficiencies and sought to enjoin Intel.[25] This case is a clear example that under existing antitrust laws the FTC alleged harm to innovation based upon vertical agreements.[26]

The FTC has also been active in alleging harm to innovation in the pharmaceutical industry.[27] For example, in the case *Grifols, S.A./Talecris Biotherapeutics Holdings Corp.*, the FTC alleged that the proposed merger between two manufacturers of plasma-derived drugs would "increase the likelihood that consumers experience lower levels of innovation and service" in the relevant product markets.[28] The FTC's concerns could not be remedied by further investigation, but rather through a consent decree. The FTC required the merging firms to divest a significant number of production facilities as well as manufacture three plasma-derived products for another firm in the industry for several years.[29]

In *Mylan Pharmaceuticals, Inc. v. Warner Chilcott plc, et al.*, the FTC filed an *amicus* brief urging

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[23] *See* Complaint, Intel Corp., Docket No. 9341 (F.T.C. Dec. 16, 2009) *available at* https://www.ftc.gov/sites/default/files/documents/cases/091216intelcmpt.pdf.
[24] *Id*. at ¶ 27.
[25] *Id*. at ¶ 91 ("Intel's conduct has no legitimate or sufficient business justification and has and will continue to harm competition, innovation, and consumers, unless it is enjoined.").
[26] *See generally* Joshua D. Wright, *An Antitrust Analysis of the Federal Trade Commission's Complaint Against Intel*, 38 REV. IND. ORG. 387 (June 2011).
[27] *See, e.g.*, Novartis AG/GlaxoSmithKline, PLC, FTC File No. 141-0141 (Filed Feb. 23, 2015) (alleging harmful effects on the future development of cancer treatment products), *available at https://www.ftc.gov/system/files/documents/cases/complaint_0.pdf*; Pfizer Inc./Wyeth, FTC File No. 0910053 (Filed Jan. 29, 2010) (alleging a reduction in incentives to innovate in the markets for animal pharmaceuticals and vaccines), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2010/01/091014pwyethcmpt.pdf; Genzyme Corp./Novazyme Pharms., Inc., FTC File No. 021-0026 (investigating potential harm to innovation in the development of treatments for Pompe disease); Pfizer Inc./Warner-Lambert Co., FTC File No. 001-0059 (Filed July 28, 2000) (alleging reduction of innovation in the markets for OTC pediculicides and drugs for the treatment of Alzheimer's disease), *available at https://www.ftc.gov/sites/default/files/documents/cases/2000/07/pfizercmp.htm*; Ciba-Geigy, Ltd./Sandoz, FTC File No. 961-0055 (Filed Apr. 8, 1997) (alleging a harmful impact on innovation in the market for gene therapies and flea control products), *available at https://www.ftc.gov/sites/default/files/documents/cases/1997/04/c3725cmp.pdf*.
[28] Grifols, S.A./Talecris Biotherapeutics Holdings Corp., FTC File No. 1010153 (Filed Jul. 22, 2011), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2011/07/110601grifolsacmpt.pdf.
[29] *Id*.

the Third Circuit to reverse the district court's ruling.[30] Mylan alleged that the Defendants intentionally circumvented generic competition for their acne drug by engaging in anticompetitive product hopping.[31] Invoking the rule of reason analysis in support of Mylan, the FTC asserted that "policies favoring innovation do not categorically preclude antitrust liability for product-hopping."[32]

The Antitrust Division at the Department of Justice has brought similar cases. Such was the case in the landmark antitrust case, *United States v. Microsoft*, where Microsoft's long-term market dominance, "browser wars," and pattern of penalizing companies that were offering consumer efficiencies led Judge Jackson to clearly note that Microsoft's conduct was harmful to innovation.[33]

Since *Microsoft*, the Antitrust Division has brought similar cases such as a lawsuit to prevent H&R Block Inc. from purchasing TaxACT.[34] The Antitrust Division alleged that the proposed merger would have an effect on competition "resulting in less innovation and higher prices for consumers."[35] The Antitrust Division alleged that H&R Block's acquisition of TaxACT would eliminate a firm that substantially "disrupted" the market for do-it-yourself tax preparation products and lessened the incentives to innovate.[36]

The Antitrust Division has alleged harm to innovation in several mergers, including those in high-technology markets.[37] Like the FTC, harm to innovation is a consideration that the Antitrust Division consistently considers in merger enforcement.[38] Thus, claims that the antitrust laws cannot reach harm to innovation either because such harms are not cognizable under antitrust law or because the agencies are unwilling to bring cases are each incorrect.

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[30] 838 F.3d 421 (3rd Cir. 2016). The district court held that Warner Chilcott lacked monopoly power and that product hopping almost never constitutes exclusionary conduct. *Mylan Pharms. Inc. v. Warner Chilcott Pub. Co.*, No. 12-3824, 2015 WL 1736957 (E.D. Pa. 2015).
[31] *Mylan*, 838 F.3d at 426.
[32] Brief for Amicus Curiae Fed. Trade Comm'n Supporting Plaintiff-Appellant at 14, *Mylan Pharms. Inc. v. Warner Chilcott Pub. Co.*, 883 F.3d 421 (3rd Cir. 2016) (filed Oct. 19, 2016).
[33] United States v. Microsoft Corp., 253 F.3d 34, 60 (D.C.C. 2001).
[34] United States v. H&R Block, Inc., 833 F. Supp. 2d 36, (D.C.C. 2011).
[35] Complaint ¶ 2, H&R Block, Inc., 833 F. Supp. 2d 36 (D.D.C. 2011) (filed May 23, 2011) *available at* https://www.justice.gov/atr/case-document/complaint-119. Speaking about the potential harm to innovation resulting from the merger, Christine Varney, then Assistant Attorney General, asserted that "TaxACT has aggressively competed in the digital do-it-yourself tax preparation market with innovation such as free federal filing. If this merger is allowed to proceed, that type of innovation will be lost." *Justice Department Files Antitrust Lawsuit to Stop H&R Block Inc. From Buying TaxACT*, Department of Justice (May 23, 2011) *available at* https://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-stop-hr-block-inc-buying-taxact.
[36] Complaint, *supra* note 35, at ¶ 28.
[37] *See* Complaint ¶ 50, *United States v. Bazaarvoice*, No. 3:13-cv-00133 (N.D. Cal. 2014) (filed Jan. 10, 2013) ("Quality and innovation for PRR platforms will likely be less than the levels that would have prevailed absent the transaction."), *available at* http://www.justice.gov/atr/cases/f291100/291187.pdf; Second Amended Complaint, ¶ 48, *United States v. AT&T et al.*, No. 11-01560 (D.D.C.) (filed Sept. 30, 2011) ("[I[nnovation and product variety likely will be reduced"), *available at* https://www.justice.gov/atr/case-document/second-amended-complaint.
[38] *See* Renata B. Hesse, Deputy Assistant Att'y Gen., Antitrust Div., Dep't of Justice, Remarks at the Conference on Competition and IP Policy in High-Technology Industries (Jan. 22, 2014) ("While competitive prices are…a key objective, the division fully appreciate the importance of innovation.").

Conclusion

Economic analysis predicted the 2015 Open Internet Order ban on vertical agreements would likely harm consumers and depress investment. Empirical evidence is consistent with those predictions. Reclassifying Internet service providers under Title I restores incentives to invest in broadband markets. A less obvious benefit is that it replaces the 2015 Order's categorical ban on contract arrangements that benefit consumers – including paid prioritization and other vertical arrangements – with antitrust's rule of reason. A close look at the antitrust approach shows not only that it can reach the harms envisioned by net neutrality proponents, but also that it is superior to alternatives that would condemn vertical arrangements in broadband markets without proof of harm to competition.

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