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**SUBMITTED TO
THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW
IN CONNECTION WITH BIPARTISAN INVESTIGATION INTO COMPETITION IN
DIGITAL MARKETS**

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**Investigation into
Competition in Digital Markets**

I am pleased to submit these comments in response to an invitation by Chairman David N. Cicilline and Ranking Member J. James Sensenbrenner, Jr. in connection with an investigation of competition in digital markets by the Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary of the U.S. House of Representatives. The Subcommittee has a commendable tradition of engaging in thoughtful, bipartisan analysis of complex issues related to the regulation of business activities under the U.S. Antitrust Laws for the benefit of consumers. From 2004 through 2007, I had the honor of serving by appointment of then-President George W. Bush as Chair of the Antitrust Modernization Commission (or “AMC”), of which the Ranking Member was a key proponent. As you know, the AMC was created by Congress to undertake a comprehensive review of U.S. antitrust law and report whether they needed to be modernized to adequately address issues in “the global, high-tech economy.”¹ I appreciate the Subcommittee’s decision to revisit that question again and am grateful to be invited to contribute to the discussion.

The Subcommittee has invited comment on three issues:

1. The adequacy of existing laws that prohibit monopolization and monopolistic conduct, including whether current statutes and case law are suitable to address any potentially anticompetitive conduct;
2. The adequacy of existing laws that prohibit anticompetitive transactions, including whether current statutes and case law are sufficient to address potentially anticompetitive vertical and conglomerate mergers, serial acquisitions, data acquisitions, or acquisitions of potential competitors; and

¹ See ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 1 (2007) (hereinafter, “AMC REPORT”), available at http://govinfo.library.unt.edu/amc/report_recommendations/amc_final_report.pdf.

3. Whether the institutional structure of antitrust enforcement—including the current levels of appropriation to the antitrust agencies, existing agency authorities, congressional oversight of enforcement, and current statutes and case law—is adequate to promote robust enforcement of the antitrust laws.

My comments first generally address the importance of antitrust enforcement in what are referred to as digital markets and how to think about whether the law needs to change. I summarize relevant parts of the Report and Recommendations of the AMC, because the AMC studied and debated these very issues over the course of several years and much of what it found remains relevant today. I then briefly address each issue identified by the Subcommittee.

A. The Importance of Antitrust Enforcement in Digital Markets

As a preliminary matter, my comments do not reflect a view that we don't need antitrust law enforcement. To the contrary, I am an advocate of strong and effective antitrust enforcement to protect the competitive process from unreasonable restraints, whether imposed by private or governmental actors.² Competition in free markets unfettered by such restraints leads to more optimal pricing of both outputs and inputs (including labor), higher levels of quality and reliability, more choice, and greater rates of innovation. Businesses are pushed to develop and sell the kinds and quality of products and services consumers demand and to do so as efficiently as possible, so they can offer competitive prices.³

The more difficult question is how to vigorously enforce the antitrust laws without unintended effects that actually reduce competition by protecting competitors over competition

² In addition to Chairing the AMC, I have served in the U.S. Justice Department's Antitrust Division leadership during three different Administrations between 1984 and 2007, Chaired the American Bar Association's Antitrust Law Section, and served in the leadership of the Corporations, Securities and Anti-trust Practice Group of the Federalist Society. In 2016-2017, I co-chaired the bi-partisan International Competition Policy Expert Group, which issued a report intended to advise Congress and the in-coming Administration on antitrust and trade policy (the report is available at https://www.uschamber.com/sites/default/files/icpeg_recommendations_and_report.pdf).

³ AMC Report at 1.

or harm the growth of our economy and economic welfare by strangling the flow of capital or punishing successful innovation and efficiency. Too often, I fear we miss the opportunity to find the best solutions by caricaturing each other's positions and motives. It would certainly be a mistake to frame the debate as strong antitrust enforcement versus no or lax antitrust enforcement, big business versus small business, or business versus consumers and labor. To do so would deflect from an important and complex debate about how to best ensure that the U.S. benefits from a vibrant economy that promotes innovation, and the efficient allocation of resources for maximizing consumer welfare. It would be a missed opportunity that could result in policy choices now that we will regret in the future.

B. The Antitrust Modernization Commission's Consideration of Antitrust in High-Tech, "New Economy" Markets

The AMC expressly considered antitrust enforcement in what the Subcommittee refers to as digital markets. Specifically, the AMC sought evidence and testimony about antitrust enforcement in industries in which innovation, intellectual property rights, and technological change are central features.⁴ Among other things, we asked whether antitrust statutes and case law encouraged a static analysis of dynamic industries and whether particular aspects of competition in high-tech, new economy industries posed distinctive problems for antitrust analysis. We also asked whether antitrust enforcers and courts should use different benchmarks for market definition or for market power assessments in digital industries.⁵

⁴ *Id.* at 31. Explained in the AMC Report, new economy industries exhibit many of the same features we see in "digital" industries that have developed since 2007, including a rapid pace of innovation, first-mover advantages, switching costs, demand-side economies of scale and falling average product costs over a wide range of output and zero-price products.

⁵ *Id.*

Commenters and witnesses largely agreed that antitrust enforcement was sufficiently grounded in sound economic analysis, open to new economic learning, and flexible to enable the courts and antitrust enforcement agencies to properly assess competition issues in digital technology industries.⁶ Most importantly, there was broad consensus that “the economic principles on which antitrust is based do not require revision for application to those industries.” As one respected economist noted, basic economic principles do not become “outdated” simply because industries have become more dynamic.⁷

The AMC’s Report and Recommendation to Congress included several observations and guiding principles that remain as relevant today as they were in 2007, particularly as regards certain legislative proposals that would change current law to replace economics-based and evidence-based decision-making with per se prohibitions and irrebuttable presumptions. Although I recommend a full review of Chapter 1 of the Report, here are ten points I believe to be most salient for the Subcommittee’s present inquiry.⁸

1. The digital revolution has produced new, general-purpose technologies that have enabled firms to create scores of new goods and services for consumers, revolutionized the way that they are manufactured and distributed and opened access to markets across the globe. Antitrust analysis must reflect a proper understanding of how these forces affect competition.⁹

⁶ *Id.*

⁷ Prof. Carl Shapiro, Statement at AMC New Economy Hearing, at 2 (Nov. 8, 2005), available at https://govinfo.library.unt.edu/amc/report_recommendation/cr_instructfordownload.html. Of course, a conclusion that current antitrust law encompasses the appropriate tools for an economically sound analysis of competitive effects doesn’t mean that everyone agrees on how to use those tools in a particular case or how to interpret the results of their use. That fact no doubt will be clear from comments provided to the Subcommittee, and Prof. Shapiro himself has been a critic of specific enforcement decisions and judicial decisions. Nonetheless, it is important to distinguish between how facts and analysis were applied in a specific case from whether the law needs to be changed.

⁸ For ease of reading, I have omitted quote marks except for internal quote marks. The full original text of the relevant findings of the AMC can be found at the cited pages of the AMC Report.

⁹ AMC REPORT at 1.

2. To be competitive, markets need not conform to the economic ideal in which many firms compete and no firm has control over price. In fact, the real world contains very few such markets. Experience has shown that intense competition can take place in a wide variety of market circumstances.¹⁰
3. Some factors—such as many sellers and buyers, small market shares, homogeneous products, and easy entry into a market—may suggest competitive behavior is likely. The absence of those factors, however, “does not necessarily prevent a market from behaving competitively.” Herbert Hovenkamp, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 72-73 (2005) (hereinafter, “Hovenkamp, *THE ANTITRUST ENTERPRISE*”). Economic learning in recent decades has afforded a greater appreciation of the variety of factors that can affect competitive forces at work in particular markets.¹¹
4. Antitrust agencies and the courts have long looked to economic learning for assistance in understanding market circumstances and the likely competitive effects of particular business. Economics now provides the core foundation for much of antitrust law, and as economic learning about competition has advanced over the decades, so have the contours of antitrust doctrine. To protect competition and consumer welfare, antitrust analysis must offer sufficient flexibility to take account of these changes, while maintaining clear and administrable rules of antitrust enforcement.¹²
5. The reassessment of antitrust doctrine based on economic learning has resulted in significant improvements to antitrust law over the past thirty years. As new economic learning suggested possible procompetitive explanations for conduct previously assumed to be anticompetitive, courts moved away from per se rules of automatic illegality toward a more flexible rule of reason analysis that would allow consideration of procompetitive explanations of challenged business conduct.¹³
6. During the 1960s and early 1970s, Supreme Court antitrust decisions sometimes seemed more directed to protecting small businesses than to protecting competition that would benefit consumers through lower prices, improved quality, or innovation. In some instances the Court “condemned conduct precisely because it reduced costs or generated more desirable products.” Hovenkamp, *ANTITRUST ENTERPRISE*, at 1. Such decisions were criticized as likely to deprive consumers of lower prices or other benefits from the increased competition that a more efficient merged firm could provide and for the absence of a coherent rule of law that could explain them. The

¹⁰ *Id.* at 2, citing Dennis W. Carlton & Jeffrey M. Perloff, *MODERN INDUSTRIAL ORGANIZATION* 57 (4th ed. 2005) and David McGowan, *Innovation, Uncertainty, and Stability in Antitrust Law*, 16 *BERKELEY TECH. L.J.* 729, 734–35 (Spring 2001). See also William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Legal and Economic Thinking*, 14 *J.L. & ECON. PERSP.* 43, 52 (2000), cited at *AMC REPORT* 26, n.19.

¹¹ *AMC REPORT* at 2-3.

¹² *Id.* at 3.

¹³ *Id.*

Court's premise seemed to be that all markets should be made up of many small firms, staying as close as possible to the economic ideal of "perfect competition."¹⁴

7. Developments in economic learning seriously undermined these premises and sent antitrust law in a new direction. In response to advances in economic understanding, the Supreme Court in 1977 stated without caveat that the "antitrust laws . . . were enacted for 'the protection of competition, not competitors.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). In 1979, it described the Sherman Act as a "consumer welfare prescription." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).¹⁵
8. Over the ensuing decades, consumer welfare was recognized as the unifying goal of antitrust law, with few disputing that the core mission of antitrust law is to protect consumers' right to the low prices, innovation, and diverse production that competition promises.¹⁶
9. Over time, new economic learning has brought to the fore procompetitive explanations for certain business practices previously condemned outright. Given the potential for either procompetitive or anticompetitive explanations for business conduct, antitrust analysis needed to move away from per se rules of automatic illegality. The use of per se rules of automatic illegality is now substantially reduced, replaced by a more discriminating analysis under the rule of reason.¹⁷
10. Among other things, this move has opened antitrust analysis to a more economically sophisticated approach to intellectual property issues, increasing the likelihood that antitrust will properly value the contribution of intellectual property rights to innovation and competition.¹⁸

¹⁴ *Id.* at 34.

¹⁵ *Id.* at 34-35. The AMC Report acknowledged debate at the time about whether the consumer welfare should mean allocative efficiency or wealth transfers from consumers to producers. *See Id.* at 44 n.19 and 26.22. The AMC did not believe it was necessary to resolve this particular debate given general agreement that it was not materially impacting enforcement decisions. *Id.* at 35. *See, e.g.,* AMC Hearings, Merger Enforcement Trans. at 122 (Baker) (stating that "possibilities for conflict are largely hypothetical" and that, in his experience, "agency investigations rarely turn on the welfare standard"); *id.* at 172-73 (Rule) (questioning practical relevance given the difficulty of calculating different types of efficiencies). *But see* separate statement of Commissioner Jacobson, joined by Commissioner Valentine, *id.* at 422-424.

¹⁶ *Id.* at 35. More recently, some observers have argued that application of the consumer welfare standard is focused too much on price effects and insufficiently on the effects on innovation. I agree that it is important to consider the effects of transactions and conduct on innovation and believe that innovation effects in general are more important than transitory price effects. However, innovation effects have been a priority for the U.S. Justice Department and Federal Trade Commission for decades, and it is unclear how continuing to recognize consumer welfare as a goal of antitrust would degrade that focus.

¹⁷ *Id.* at 36.

¹⁸ *Id.* at 37.

The AMC made several recommendations relevant to the Subcommittee’s current investigation.¹⁹ Unless otherwise specifically noted, these recommendations reflect a full consensus of all twelve AMC commissioners.²⁰

Recommendation 1: *There is no need to revise the antitrust laws to apply different rules to industries in which innovation, intellectual property, and technological change are central features.*

“The evolution of antitrust law—both through case law and [antitrust enforcement] agency guidelines—has shown that new or improved economic learning can be incorporated into antitrust analysis as appropriate. Allowing the ongoing incorporation of economic learning into antitrust case law and agency guidelines is preferable to attempts at legislative change to specify different antitrust analyses for industries characterized by innovation, intellectual property, and technological change. Industries that fall into those categories will keep changing over time; attempts to define them would likely be difficult and impermanent at best. Furthermore, economic learning continues to evolve, and antitrust law needs to be able to incorporate this new learning as appropriate. It is important that antitrust develops through mechanisms, such as case law development in the courts and agency guidelines, that allow ongoing reassessments of existing law and economic principles relevant to antitrust analysis.”²¹

Recommendation 2: *In industries in which innovation, intellectual property, and technological change are central features, just as in other industries, antitrust enforcers should carefully consider market dynamics in assessing competitive effects and should ensure proper attention to economic and other characteristics of particular industries that may, depending on the facts at issue, have an important bearing on a valid antitrust analysis.*

¹⁹ Some recommendations did not focus specifically on digital markets or are tangential to the Subcommittee’s inquiry, and others are no longer relevant because they have been acted upon. I did not fail to include any finding or recommendation on the basis that I disagreed with it. In addition, I have not included recommendations related to the substance of the SMARTER Act proposal, as to which I have previously testified.

²⁰ The AMC was a bi-partisan body. Commissioners were appointed four by the President, four by the House of Representatives and four by the Senate. The President was not allowed to appoint more than two commissioners associated with the same political party. To quote from the AMC’s letter the President and Congress transmitting the Report and Recommendations:

As one Commissioner has said, the Commission’s recommendations were “fashioned on the anvil of rigorous discussion and debate.” The Commission also endeavored at every turn to obtain a diversity of views from the public. In the end, the Commission was able to reach a remarkable degree of consensus on a number of important principles and recommendations.

²¹ *Id.* at 39.

“Antitrust analysis in all industries requires careful assessments of each industry’s market dynamics and economic characteristics. To take proper account of market dynamics, antitrust analysis should carefully consider the incentives and obstacles that firms seeking to develop and commercialize new technologies face.”²²

Recommendation 3: *No statutory change is recommended with respect to Section 7 of the Clayton Act.*

- a. There is a general consensus that, while there may be disagreement over specific merger decisions, and U.S. merger policy would benefit from continued empirical research and examination, the basic framework for analyzing mergers followed by the U.S. enforcement agencies and courts is sound.*²³
- b. The Commission was not presented with substantial evidence that current U.S. merger policy is materially hampering the ability of companies to operate efficiently or to compete in global markets.*²⁴

Recommendation 4: *No substantial changes to merger enforcement policy are necessary to account for industries in which innovation, intellectual property, and technological change are central features.*

- a. Current law, including the Merger Guidelines, as well as merger policy developed by the agencies and courts, is sufficiently flexible to address features in such industries.*²⁵

Recommendation 5: *The Federal Trade Commission and the Antitrust Division of the Department of Justice should ensure that merger enforcement policy is appropriately sensitive to the needs of companies to innovate and obtain the scope and scale needed to compete effectively in domestic and global markets, while continuing to protect the interests of U.S. consumers.*

Recommendation 6: *The Federal Trade Commission and the Antitrust Division of the Department of Justice should give substantial weight to evidence demonstrating that a merger will enhance efficiency.*

Recommendation 7: *The Federal Trade Commission and the Antitrust Division of the Department of Justice should increase the weight they give to certain types of efficiencies.*

²² *Id.*

²³ Commissioner Kemp did not join this recommendation based in part on his concern that the merger guidelines published by the agencies did not reflect actual agency practice, that there is an insufficient empirical basis for resting merger enforcement policy on measures of concentration, and that the agencies gave insufficient weight to efficiencies resulting from a merger. See AMC Report at 428 et al.

²⁴ Commissioner Kemp did not join this recommendation.

²⁵ Commissioner Kemp did not join this recommendation.

For example, the agencies and courts should give greater credit for certain fixed-cost efficiencies, such as research and development expenses, in dynamic, innovation-driven industries where marginal costs are low relative to typical prices.

Recommendation 8: *The Federal Trade Commission and the Antitrust Division of the Department of Justice should give substantial weight to evidence demonstrating that a merger will enhance consumer welfare by enabling the companies to increase innovation.*

Recommendation 9: *The agencies should be flexible in adjusting the two-year time horizon for entry, where appropriate, to account for innovation that may change competitive conditions.*

Recommendation 10: *The Federal Trade Commission and the Antitrust Division of the Department of Justice should seek to heighten understanding of the basis for U.S. merger enforcement policy. U.S. merger enforcement policy would benefit from further study of the economic foundations of merger policy and agency enforcement activity.*

- a. The Federal Trade Commission and the Antitrust Division of the Department of Justice should conduct or commission further study of the relationship between concentration, as well as other market characteristics, and market performance to provide a better basis for assessing the efficacy of current merger policy.*
- b. The Federal Trade Commission and the Antitrust Division of the Department of Justice should increase their use of retrospective studies of merger enforcement decisions to assist in determining the efficacy of merger policy.*

Recommendation 11: *The Federal Trade Commission and the Antitrust Division of the Department of Justice should work toward increasing transparency through a variety of means.*

- a. The agencies should issue “closing statements,” when appropriate, to explain the reasons for taking no enforcement action, in order to enhance public understanding of the agencies’ merger enforcement policy.*
- b. The agencies should increase transparency by periodically reporting statistics on merger enforcement efforts . . . as well as determinative factors in deciding not to challenge close transactions. These reports should emanate from more frequent, periodic internal reviews of data relating to the merger enforcement activity of the Federal Trade Commission and the Antitrust Division of the Department of Justice. To facilitate and ensure the high quality of such reviews and reports, the Federal Trade Commission and the Antitrust Division of the Department of Justice should undertake*

*efforts to coordinate and harmonize their internal collection and maintenance of data.*²⁶

Recommendation 12: *In general, standards for applying Section 2 of the Sherman Act’s broad proscription against anticompetitive conduct should be clear and predictable in application, administrable, and designed to minimize overdeterrence and underdeterrence, both of which impair consumer welfare.*

Recommendation 13: *Congress should not amend Section 2 of the Sherman Act. Standards currently employed by U.S. courts for determining whether single-firm conduct is unlawfully exclusionary are generally appropriate. Although it is possible to disagree with the decisions in particular cases, in general the courts have appropriately recognized that vigorous competition, the aggressive pursuit of business objectives, and the realization of efficiencies not available to competitors are generally not improper, even for a “dominant” firm and even where competitors might be disadvantaged.*

Recommendation 14: *Additional clarity and improvement are best achieved through the continued evolution of the law in the courts. Public discourse and continued research will also aid in the development of consensus in the courts regarding the proper legal standards to evaluate the likely competitive effects of bundling and unilateral refusals to deal with a rival in the same market.*

Recommendation 15: *Additional clarity and improvement in Sherman Act Section 2 legal standards are desirable, particularly with respect to areas where there is currently a lack of clear and consistent standards, such as bundling and whether and in what circumstances (if any) a monopolist has a duty to deal with rivals.*

Recommendation 18: *In general, firms have no duty to deal with a rival in the same market.*²⁷

Recommendation 22: *The Federal Trade Commission and the Antitrust Division of the Department of Justice should develop and implement a new merger clearance agreement based on the principles in the 2002 Clearance Agreement between the agencies, with the goal of clearing all proposed transactions to one agency or the other within a short period of time. To this end, the appropriate congressional committees should encourage both antitrust agencies to reach a new agreement, and the agencies should consult with these committees in developing the new agreement.*

Recommendation 48: *There is no need to give the antitrust agencies expanded authority to seek civil fines.*

²⁶ Commissioner Kemp dissented from this recommendation out of concern that requiring such reporting would “create an irresistible temptation for agencies to bring ill-considered enforcement actions in order to ‘improve’ their statistical score-card.” AMC Report at 432.

²⁷ Commissioners Jacobson and Shenefield join this recommendation “with qualifications.”

Recommendation 49: *There is no need to clarify, expand, or limit the agencies' authority to seek monetary equitable relief. The Commission endorses the Federal Trade Commission's policy governing its use of monetary equitable remedies in competition cases.*

C. Comments on the Subcommittee's Three Issues

The growth of high-tech and digital industries can be seen as an American success story. It's fair to say that, in addition to human ingenuity, this story results from our free market system, competitive markets, and existing antitrust rules, which ensure that capital is available for good ideas, success is rewarded in the marketplace, and intellectual property is protected. So-called digital "platforms" have facilitated the creation of new products and services, increased market reach, employed more than one million people, provided new and more effective ways for people to express and educate themselves, and enabled connections to further spur the economy.

That is not to say that there is no place for antitrust enforcement. To the contrary, antitrust law is as applicable to these new-tech industries as to any other industry. However, it is a reminder as some critics advocate breaking up companies, imposing absolute prohibitions on potentially efficient conduct and reversing the burden of proof in antitrust cases, that there is potentially significant cost to error in terms of innovation and technology leadership, jobs and consumer welfare.

1. Any change to the law should be based on relevant, reliable economic data and analysis; a sufficient basis hasn't been established

Any change to antitrust law should be solidly grounded in relevant, reliable and properly understood evidence and economic analysis. Various studies that appear to have propelled calls

for radical revision of existing antitrust law—such as those of Furman & Orszag²⁸, *The Economist*²⁹ and De Loecker & Eeckhout³⁰—on examination, do not actually support overhauling antitrust law and policy. These studies and others purport to establish that industrial concentration in the United States has been increasing, that this increase has harmed the economy and consumer welfare, and that increased concentration is the result of lax or ineffective antitrust enforcement over the last four decades (under both Democratic and Republican Administrations). However, several commentators have explained the fallacy of leaping from observations of high level, aggregate industry concentration to conclusions about concentration in antitrust markets comprising firms that competitively interact; the weaknesses of several outcome oriented cross-sectional studies purporting to relate aggregate concentration levels to indicators of economic performance; and the lack of a strong causal connection between concentration and competitive performance even where concentration is measured at the market level. As to the last point, the AMC Report identified the problem of equating concentration to competitive performance. Under the Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, market concentration accordingly are the *starting point* of analyzing the likely competitive effects of a proposed merger or acquisition, not the end point.³¹

²⁸ Jason Furman & Peter Orszag, *A Firm-Level Perspective on the Role of Rents in the Rise of Inequality*, Presentation at “A Just Society” Centennial Event in Honor of Joseph Stiglitz, Columbia University (Oct. 15, 2016).

²⁹ *Business in America: Too Much of a Good Thing*, THE ECONOMIST (May 26, 2016).

³⁰ Jan De Loecker & Jan Eeckhout, *The Rise of Market Power and the Macroeconomic Implications* 5 (2017), available at <http://www.janeeckhout.com/wp-content/uploads/RMP.pdf>.

³¹ See, e.g., Comment of the Global Anti-trust Institute, Antonin Scalia Law School, George Mason University, U.S. Federal Trade Commission Hearings on Competition and Consumer Protection in the 21st Century, Hearing on Concentration and Competitiveness in the U.S. Economy, available at <https://gai.gmu.edu/wp-content/uploads/sites/27/2019/01/The-Federal-Trade-Commissions-Hearings-on-Competition-and-Consumer-Protection-in-the-21st-Century-Privacy-Big-Data-and-Competition.pdf>; Gregory J. & Luke M. Froeb, *Don't Panic: A*

2. Current antitrust law is sufficiently flexible to enable enforcers and courts to address and remedy competitive concerns; new *ex ante* prohibitions and statutory presumptions based on company size and concentration are neither necessary nor wise

The Subcommittee has asked whether existing laws prohibiting monopoly and anticompetitive transactions are sufficient to protect and preserve competition. With respect to mergers and acquisitions, in particular, the Subcommittee has asked whether the law is sufficient to deal with potentially anticompetitive vertical and conglomerate mergers, “serial acquisitions,” acquisitions involving data and acquisitions of potential competitors. As in 2007, I believe the answer to those questions remains “yes,” for the reasons explained by the AMC Report.

The elegance of our current law is that it broadly prohibits any conduct that monopolizes or attempts to monopolize any part of trade or commerce or any merger or acquisition where the effect may be substantially to lessen competition or tend to create a monopoly in any line of commerce. These broad proscriptions, and the presumptions applied by the courts, leave plenty of room for enforcers (and private plaintiffs) to prove likely or actual competitive effect, relying on the most recent economic learning and understanding. As explained in the AMC Report, the ongoing incorporation of economic learning into antitrust case law is far preferable to trying to

Guide to Claims of Increasing Concentration, ANTITRUST MAGAZINE, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3156912; Chad Syverson, *Macroeconomics and Market Power: Context, Implications, and Open Questions*, *Journal of Economic Perspectives* vol. 33, No. 3, 23-43 (Summer 2019); Sam Peltzman, *Productivity and Prices in Manufacturing During an Era of Rising Concentration* (May 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3168877; Robert E. Hall, *New Evidence on the Markup of Prices over Marginal Costs and the Role of Mega-Firms in the U.S. Economy*, NBR Working Paper No. 24574 (May 2018), available at <https://www.nber.org/papers/w24574>; James Traina, *Is Aggregate Market Power Increasing? Production Trends Using Financial Statements* 9 (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3030966; Sharat Ganapati, *Oligopolies, Prices, Output, and Productivity* (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3030966. See also Timothy J. Muris, *Improving the Economic Foundations of Competition Policy*, 12 *Geo. Mason L. Rev.* 1, 9-10 (2003); Note by the United States, *Market Concentration*, OECD at 3 (2018), available at [https://one.oecd.org/document/DAF/COMP/WD\(2018\)59/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)59/en/pdf) (“with no reliable data for most of the U.S. economy, it is impossible to know whether market concentration increased significantly in any parts of the economy”).

legislate different antitrust analyses for digital markets. Those markets will continue to change over time, as will our understanding of them. “It is important that antitrust develops through mechanisms, such as case law development in the courts and agency guidelines, that allow ongoing reassessments of existing law and economic principles relevant to antitrust analysis” in these and other markets.³²

While antitrust analysis of technology-based markets may involve consideration of issues like network effects, high switching costs and entry barriers, these issues are not unique to digital markets. They are well understood and “have also made their way into the body of antitrust case law over the past two decades, providing legal roadmaps for future enforcement cases.”³³ The Justice Department and Federal Trade Commission have challenged and will likely continue to challenge where they deem appropriate potentially anticompetitive vertical, “serial acquisitions,” acquisitions involving data and acquisitions of potential competitors. The agencies already win more challenges than they lose, including where companies chose to abandon transactions or agree to remedy them through divestitures. Legislative overhaul should not be based on one or two high profile losses in court. Only the hardest, closest to the line, cases tend to go to court, and the losses tend to be very fact-specific.

Certain legislative proposals would change the law by re-instituting *per se* prohibitions on conduct that has been proven over the years to have procompetitive effects in most instances, establishing irrebuttable presumptions based on company size or share, prohibiting courts from considering procompetitive effects, and shifting burden to the parties to show that a proposed

³² AMC Report at 39.

³³ Maureen K. Ohlhausen, Written Statement of Proposed Testimony before U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Antitrust, Commercial, and Administrative Law, Hearing on Online Platforms and Market Power Part 2: Innovation and Entrepreneurship 6 (Jul. 16, 2019).

merger or acquisition is not anticompetitive. Such thumb-on-the-scale legislation to stack the decks for the government are neither necessary nor wise. This approach curiously ignores decades of economic learning designed precisely to enable us to find the right balance to maximize consumer welfare and economic growth with little regard for the damage that such an approach would cause to investment, innovation and efficiency.³⁴

Conclusion

The Subcommittee has asked important questions worthy of careful consideration and debate. Fortunately, you have a wide body of expertise to draw upon. I have tried to focus on what I might uniquely contribute, namely by reminding the Subcommittee of the good work of the AMC that remains relevant today. Thank you for that opportunity.

³⁴ For further discussion of certain legislative proposals, see Koren W. Wong-Ervin, Anne Layne-Farrar & James Moore, *The Risks of Radicalism: Exacerbating Harms from Type I Errors*, available at <https://www.competitionpolicyinternational.com/the-risks-of-radicalism-exacerbating-harms-from-type-i-errors/>.