

September 15, 2020

The Honorable Michael S. Lee
Chairman, Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights

The Honorable Amy Klobuchar
Ranking Member, Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights

Dear Chairman Lee and Ranking Member Klobuchar,

We, the undersigned, write today to provide you with a statement for inclusion in the record of the Subcommittee's September 15th hearing, "Stacking the Tech: Has Google Harmed Competition in Online Advertising?"¹ We are a group of legal experts, economists, and consumer and taxpayer advocates who believe in the importance of promoting competitive markets and defending the rule of law.

We believe that weaponizing antitrust for broader socio-economic purposes would fundamentally alter the primary goal of antitrust and seek to address the increasing calls to move away from the consumer welfare standard² and to use antitrust as a tool for unrelated concerns.³

While signatories herein may prefer various approaches for addressing non-competition concerns about issues such as privacy, online content, liability, and myriad other popular topics associated with technology firms, we uniformly agree that any congressional assessment of issues related to digital markets must be characterized by rigorous economic analysis, productive in promoting competition and consumer welfare, and based on predictable and enforceable standards.

¹ See *Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook, and Google. Hearing Before the House Committee on the Judiciary, Subcommittee on Antitrust, Commercial, and Administrative Law*, 116th Cong, (July 29, 2020), available at: <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=3113>

² See Robert H. Bork, "The Antitrust Paradox: A Policy at War with Itself" (1978).

³ See, e.g. Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 *Harvard Journal of Law and Public Policy*. (217-18) (2010) (discusses political goals read into the Sherman Act by the Supreme Court).

As discussions about antitrust law enter mainstream discourse, we thank the Subcommittee for the opportunity to provide a statement for inclusion in the record, and for providing an appropriate forum specifically dedicated to the discussion of antitrust concerns.

PUTTING RECENT PROPOSALS INTO PERSPECTIVE

Before addressing the specific topic of today’s hearing, we find it critical to make note of the economic consequences of many of the recent proposals to revise antitrust law, which seriously risk making the American economy and consumers substantially worse off across a wide array of industries. Many discussions around antitrust have centered on large, successful American technology companies, and the House Judiciary Committee has launched an investigation and we expect to see certain proposals come out of that investigation. However, the implications of today’s antitrust debate extend far beyond just “Big Tech.”

These proposals — which are likely to materialize within the days or weeks following today’s hearing — include aggressive merger prohibitions, inverting the burden of proof, allowing collusion and antitrust exemptions for politically favored firms, and politicizing antitrust enforcement decision-making more generally. Additionally, arbitrary or overly broad antitrust enforcement would hamper economic recovery and risks job losses as the nation recovers from the economic slow-down, evolving market dynamics, and changing consumer needs resulting from the global pandemic.

THE CURRENT STATE OF THE ANTITRUST DEBATE

We fear that both sides of the aisle are pushing for the weaponization of antitrust, either as a tool to punish corporate actors with whom they disagree or out of a presupposition that big is bad. Unfortunately, the antitrust debate has begun to devolve into a litany of unrelated and often contradictory concerns, unsubstantiated and dismissive attacks, and seemingly a presumption that any market-related complaint that can be made on the internet can also be cured by the panacea of antitrust. This highly charged atmosphere has led to radical proposals that run contrary to economic evidence and endanger significant advances made in antitrust scholarship.

The Senate Committee on the Judiciary — and specifically this Subcommittee — has an important role to play. While there are many issues plaguing our society today, we believe that this Committee is equipped to examine antitrust soberly and without misdirection from legitimate anger over other issues which antitrust is not designed to address.

CONSIDERATIONS FOR FURTHER INQUIRY

I. THE LAW: NEW TECHNOLOGY, SAME PRINCIPLES

- a. **The consumer welfare standard has greatly benefited antitrust and is underrecognized as a significant narrowing of federal government power in the last half century and a major victory for the movement to preserve the rule of law.**

It is important to consider what is at stake. Using antitrust to achieve policy or political goals would upend more than a century of legal and economic learning and progress. The need to bring coherency to antitrust law through a neutral underlying principle that cannot be weaponized is what led to the adoption of the modern consumer welfare standard. It is broad enough to incorporate a wide variety of evidence and shifting economic circumstances but also clear and objective enough to prevent being subjected to the beliefs of courts and enforcers.⁴

Therefore, we would like to stress the need to distinguish between the proper and improper uses of antitrust in approaching discussions of market power, and are concerned that today's hearing could lead to the use of antitrust to address concerns surrounding online content moderation, data privacy, equality, or other socio-political issues that are unrelated to the competitive process. Weaponizing antitrust for broader socioeconomic purposes would fundamentally alter the primary goal of antitrust, undermine the rule of law, and negatively impact consumers.

II. THE ROLE OF PRESUMPTIONS

- b. **Approaches to antitrust enforcement based on presumptions of anticompetitive harm drastically upend core tenets of our legal system by inverting the burden of proof and diminishing the role of the federal judiciary.**

Returning to the highly interventionist pre-1970s antitrust jurisprudence through burden shifting provisions that would require a company to prove it is not a monopoly would create greater incentives for the government and private plaintiffs to file suit. More importantly, however, these reforms are not needed because current antitrust law has

⁴ Shifting away from the consumer welfare standard would catapult antitrust law back to the era of the 1960s when, in Justice Potter Stewart's words, "[t]he sole consistency that I can find is that, in litigation under [the antitrust laws], the Government always wins." *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

adequate power to intervene and claims of lax antitrust enforcement are demonstrably false. The FTC and the DOJ have only lost a handful of cases in the last decade, and private litigants continue to bring monopolization claims. Outside of the courtroom, multitudes of mergers and anticompetitive actions are prevented out of fear of government action.

III. THE MARKET: QUESTIONS OF CONCENTRATION AND DEFINITIONS

- c. Digital platform markets are not traditional linear markets. They are two-sided markets and competition typically turns on non-price factors.**

One of the most important questions to address in this discussion is that of market definition. Importantly, digital advertising is not a traditional, linear market. It is a two-sided market in which advertisers try to influence the online behavior of consumers through an intermediary.⁵ Traditionally, market definition is framed around a static product with a distinct type of customer. With advances in technology, this build-and-freeze model breaks down as advertising platforms evolve.

However, as Ronald Coase pointed out: [I]f an economist finds something - a business practice of one sort or other - that he does not understand, he looks for a monopoly explanation. And as in this field we are rather ignorant, the number of ununderstandable practices tends to be rather large, and the reliance on monopoly explanations frequent.⁶ Indeed, when it comes to the innovative business model that has engulfed digital advertising, regulators are struggling to apply the correct regulatory framework.

- d. The relationship between concentration and competition in the market is tenuous, and structural changes in the economy have resulted from increased competition.**

A positive correlation between high market concentration and profitability does not indicate monopolistic practices, and the underlying drive for commercial success can simultaneously enhance pro-consumer efficiencies.⁷ In other words, concentration alone does not indicate lack of competition, as firms capture a larger slice of the market through

⁵ See, e.g. Ashley Baker, *Comments Submitted to the DOJ Antitrust Division Regarding Competition in Television and Digital Advertising*. (June 2019), available at: <http://bit.ly/2PwehnJ>.

⁶ R.H. Coase. "Industrial Organization: A Proposal for Research. Policy Issues and Research Opportunities in Industrial Organization." (p. 67). (Victor R. Fuchs ed.) (1972).

⁷ Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 *Journal of Law & Economics* (April 1973), 1-8.

higher productivity and innovation.⁸ Some critics argue that systematic anticompetitive conduct is inherent in the digital advertising model, or that the rapid growth or dominance of these platforms allow them to exist entirely insulated from competitive market forces.

As then-Judge Clarence Thomas wrote in *U.S. v. Baker Hughes*, “[e]vidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness.”⁹ It is a step in the right direction for today’s hearing to analyze the exercise of market power, but it is critical to determine whether the power of the market is being used to benefit or harm not the competitor, but instead the consumer. That is the relevant inquiry.

CONCLUSION

As Robert Bork pointed out, “[a]dvertising and promotion are particular obsessions of antitrust zealots.”¹⁰

We encourage the Committee to continue in this effort and to reclaim this debate from the politicized approach that seeks to transform our antitrust laws and refocus the conversation on enforcement, market analysis, and the core purpose of antitrust.

We thank you for your oversight of this important issue and ask that this letter be included on the Committee or Subcommittee’s website and repository. Please feel free to contact us should you have any questions or requests for additional input from signatories. We welcome the opportunity to further discuss these views and relevant proposals or congressional assessment with the Committee.

⁸ See David Autor, David Dorn, Lawrence F. Katz, Christina Patterson, and John Van Reenen. “Concentrating on the Fall of the Labor Share.” *American Economic Review*, 107 (5): 180-85 (2017).

⁹ See *U.S. v. Baker Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990)

¹⁰ See Robert H. Bork, “The Antitrust Paradox: A Policy at War with Itself” (p. 314) (1978).

Sincerely,

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