November 18, 2020

The Honorable Jerrold L. Nadler
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable F. James Sensenbrenner
Ranking Member
Subcommittee on Antitrust, Commercial and Administrative Law
U.S. House of Representatives
Washington, D.C. 20515

Converting The Draft *Competition In Digital Markets Report* Into An Accurate And Fair Final Report

Dear Chairman Nadler and Ranking Member Sensenbrenner:

The 51st Congress passed our nation's first antitrust law—the Sherman Act—in 1890. That law enshrined "national values of free enterprise and economic competition," and has long been "a central safeguard for the Nation's free market structures."[1] Since then, Congress has from time to time tweaked and supplemented that law.[2] Today, under the Judiciary Committee's leadership, the House is calling on Congress to once again take up the mantle of antitrust reform.

As common sense suggests and history confirms, antitrust law is well within Congress's wheelhouse. After all, antitrust enforcement is an extraordinary remedy for an extraordinary problem. Given the stakes, it is only right that the people's democratically elected representatives put their stamp of approval on any wholesale changes to the free market's safeguard.

To be sure, we do not share in the belief that the country's antitrust laws are broken. In fact, we remain steadfast supporters of the current consumer welfare standard. For although it is imperfect, the consumer welfare standard reflects decades of accumulated wisdom and works remarkably well.

But we pen this letter not to air our differences on that score; we write only to urge caution and further study before drafting antitrust reform bills. We fear that the Committee's new report on competition in digital markets—especially its factual findings—gives an incomplete and inaccurate picture of competition and consumer benefits. Because Committee

[1] N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n, 135 S. Ct. 1101, 1110 (2015) (internal citation omitted).
[2] For example, Congress passed the Clayton Antitrust Act and the Federal Trade Commission Act in 1914, the Robinson–Patman Act in 1936, and the Celler–Kefauver Act in 1950.

Members have made clear that this report will inform legislative changes to the law, the factual record must be the gold standard.

That is because "[w]ithout information," as the Supreme Court recently explained, "Congress would be shooting in the dark, unable to legislate 'wisely or effectively.'"[3] And although we recognize the Committee's attempt to provide Congress with the information it needs to legislate wisely and effectively, we agree with Stanford Law professor Douglas Melamed's conclusion that, as currently written, "the staff report is a political document, not an economic, legal or policy analysis."[4]

To be sure, Congress is a political institution by design and in practice. But just as Congress would be shooting in the dark without information, so too would it be missing its target if its sights were distorted by incomplete or inaccurate information. The report is likely to do just that:

- First, "[i]t does not evaluate possible innocent explanations of the events described or contrary policy arguments";
- Second, "it largely ignores issues of efficiency, economic welfare and the deterrent effects of legal rules";[5] and
- Third, there are numerous factual errors and very little contrary evidence.

As a result, it paints a picture of competition that is but a mere silhouette of market realities. At worst, it paints a picture that may lead Congress to pass reforms that respond purely to theoretical problems that have no basis in fact.

It may also lead Congress to pass reforms that put the United States at a competitive disadvantage and leave American consumers worse off. If the report's recommended reforms are any indicator, that harm would extend far beyond digital markets to consumers of every business in every industry in every state.

To that end, we offer here several examples of factual inaccuracies and shortcomings—we have identified more than 200 thus far—that the Committee should address. Please note that these examples are only a sample of the report's flaws and thus should not be viewed as an all-inclusive list.

We aim to make you aware of these problems so that Congress has the best information available, and hope these examples will convince the Committee to re-open and correct the record.

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[3] Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2031 (2020) (quoting McGrain v. Daugherty, 273 U. S. 135, 161, 175 (1927)).
[4] Global Competition Review, *Slaughter and Others React to House Report* (Oct. 16, 2020), https://globalcompetitionreview.com/gcr-usa/department-of-justice/slaughter-and-other-experts-react-house-report.
[5] *Id.*

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Procedural Shortcomings

Even setting aside concern that the report is not a bipartisan-endorsed document—indeed, it spawned not one but *two* dissenting Minority reports—the investigatory process was flawed in itself. There are complaints from the Minority about being shut out of the process and not being allowed to see the final report before its introduction. Moreover, many of the countervailing facts and issues raised during the multiple hearings were left out of the final report.

Substantive Shortcomings

1. Competitors' Echo

Next we turn to the report's factual substance. First, the report relies heavily on—and indeed echoes—anecdotes collected from competitors of Amazon, Apple, Facebook, and Google. Although this information may be relevant to the Committee's investigation, it is neither dispositive nor necessarily reliable. And yet the report uses these anecdotes to make substantive points, and even treats them as definitive evidence of anticompetitive behavior.

Take the report's "findings" section. It claims, for example, that Google and Facebook are "undermining the quality and availability of high-quality sources of journalism."[6] To support this conclusion, the report cites only the testimony of David Chavern, the president and CEO of News Media Alliance. With all due respect to Mr. Chavern, we take issue with the report's use of his *opinion* as objective fact. We also take issue with the report's extrapolation from his actual statement, which, as the report notes in its citation, is: "In effect, a couple of dominant tech platforms are acting as regulators of the digital news industry."[7]

At best, this competitor's-anecdote-as-proof method gives a misleading picture of digital competition. For starters, the anecdotal evidence is inherently biased. That does not mean such information should be disregarded completely, but it does mean it should be taken with a grain of salt and balanced with anecdotes from businesses that benefit from partnerships with Amazon, Apple, Facebook, and Google, or from use of their products and services.

The report fails to do that. Instead, as antitrust expert Geoffrey Manne notes, "conduct with manifest benefit to consumers is offered up as evidence of anticompetitive conduct by platforms, mostly on the back of complaints from competitors."[8]

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[6] MAJORITY STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGIT. MKTS. 17 (2020).
[7] *Id.* at fn. 26.
[8] GCR, *supra* note 4.

Beyond being laced with bias, these anecdotes also focus on *competitor* wellbeing, not consumer wellbeing. In other words, even assuming all the complaints from rivals are true, that alone does not show anticompetitive behavior. And because the report fails to cite concrete evidence of consumer harm, let alone consumer harm linked to these complaints, the report misleads readers into believing American tech is guilty of antitrust violations.

The report also fails to grapple with the potential of *rivals* to use antitrust law for anticompetitive reasons all their own. It goes without saying that competitors, especially those that stand in the shadow of wildly successful businesses like Amazon, Apple, Facebook, and Google, ordinarily welcome government interference that could disrupt their competitors' businesses. And because the report treats their testimony as fact, it incentivizes rivals to compete in the halls of Congress rather than in the market.

Acknowledging this reality is not the same as saying that rivals can never be telling the truth. Instead, it is to admit that witness testimony has its limits, and that the best way to control for bias is by collecting *all* evidence, from *all* sides, and considering the totality of the circumstances.

2. Unsupported Claims

Throughout the report, Committee staffers wrote conclusory statements that are uncited, unexplained, or both. For example, the report claims that "[a]lthough Amazon is frequently described as controlling about 40% of U.S. online retail sales, this market share is likely understated, and estimates of about 50% or higher are more credible."[9] The report cites nothing for this conclusion; it does not even cite the "estimates" it finds "more credible." Although the Committee is within its right to weigh the credibility of evidence, unsupported and unexplained conclusions like this one do not serve readers—or Congress—well.

Other examples of unsupported claims material to antitrust reform include:

- "Facebook's monopoly power is firmly entrenched and unlikely to be eroded by competitive pressure from new entrants or existing firms."[10] *How does the Committee reach this conclusion? Doesn't TikTok's rapid rise and Facebook's declining market share suggest otherwise? If not, why not?*

- "In the absence of genuine competitive threats, a firm offers fewer privacy protections than it otherwise would."[11] *Even if this were true, it supports the conclusion that digital markets are competitive because each business has increased its privacy controls in recent years. Why is that ignored?*

[9] Report, *supra* note 6, at 15.
[10] *Id.* at 13 (no citation provided).
[11] *Id.*

Examples of unexplained claims include:

- "Consistent with a winner-takes-all dynamics, the digital economy is highly concentrated."[12] *How is it "consistent" and "highly concentrated" as compared to what?*

- "A number of key markets online—such as social media, general online search, and online advertising—are dominated by just one or two firms."[13] *What about all the other competitors the report leaves out like Snap, Twitter, and Parler (social media), and AT&T, Adobe, Verizon, The Rubicon Project, etc. (digital advertising)?*

3. Wrong, Dubious, or Contradictory Claims

In addition to raising questions about how it reached its conclusions, the report also trafficks in misinformation.

At the outset, for example, the report claims that in "[j]ust a decade into the future, 30% of the world's gross economic output may lie with these firms, and just a handful of others."[14] But the McKinsey report cited for that proposition says no such thing; it estimates that *all* business-to-business and business-to-consumer platforms may account for 30%.[15] Given that even brick-and-mortar industries like banking are moving online, this estimate could very well be true. Even so, it certainly does not support the report's fearmongering about Big Tech gobbling up the world's economy percentage point by percentage point.

Examples of incorrect statements also include:

- "Apple pre-installed the service on iPhones and made it the only music service accessible through Siri, Apple's virtual assistant."[16] *Apple's Siri allows access to competing music services like Spotify*.

- "A number of key markets online—such as social media, general online search, and online advertising—are dominated by just one or two firms."[17] *Today, social media, for example, is led by multiple competitors including Twitter, TikTok, and Pinterest*.

The report also faults the businesses for not adequately protecting users' privacy. In particular, the report chastises Google for using data to deliver targeted advertising to its users.

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[12] *Id.* at 38.
[13] *Id.*
[14] *Id.* at 12.
[15] Venkat Atluri, Miklos Dietz, & Nicolaus Henke, *Competing in a World Without Borders*, McKinsey (July 12, 2017), https://www.mckinsey.com/business-functions/mckinsey-analytics/our-insights/competing-in-a-world-of-sectors-without-borders.
[16] *Id.* at 338.
[17] *Id.* at 38.

But elsewhere the report criticizes Google for following an emerging industry trend of banning third-party cookies from tracking users online, calling such a move anticompetitive. In other words, the report suggests that the businesses are damned if they do and damned if they don't.

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The report correctly conveys that antitrust law is a creature first and foremost of Congress's creation. But since the beginning, when Congress first sought to protect consumers from abusive monopolies, the federal judiciary has played a helping hand. The report claims that the courts have contravened Congress's will. That's not true. But in the event that Congress wishes to change the country's laws regardless, it ought to do so only with the best information at hand.

Congress will be ill-served without that information. To prevent that, we hope the Committee will consider not just the points raised here, but also reconsider its own report from top to bottom. No one likes editing, let alone rewriting, but the country deserves a well-informed factual record. As always, we stand ready to offer any assistance we can.

Sincerely,

NetChoice

Steve DelBianco
President & CEO

Carl Szabo
Vice President & General Counsel

Christopher Marchese
Counsel

cc:

The Honorable Jim Jordan, Ranking Member, Committee on the Judiciary
The Honorable David Cicilline, Chairman, Subcommittee on Antitrust, Commercial and Administrative Law
The Honorable Joseph Neguse, Vice Chairman, Subcommittee on Antitrust, Commercial and Administrative Law