Comment of NetChoice on Reviving Competition, Part 3: Strengthening the Laws to Address Monopoly Power before the House Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law

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Promoting Competition and Fostering Opportunity for American Consumers

NetChoice

Introduction

Antitrust reform has become an increasingly important part of our national conversation. Many are calling for a massive overhaul of the United States' current approach to antitrust law and enforcement. Just last year, for example, this Committee released a staff report calling for substantial reforms to America's antitrust laws and enforcement practices.[1] And, of course, the very purpose of this hearing is to identify potential areas where antitrust law can be strengthened to address the potential issues raised by monopoly power.[2]

But any proposals for reform should take careful consideration of the potential unintended consequences they might create. Unfortunately, many of the proposals currently being discussed have not been approached with this consideration in mind. Instead, these reforms would serve to undermine the rule of law, greatly hinder innovation, harm small businesses and consumers, and threaten economic growth for decades to come.

When it comes to many advocates of drastic reform, the focus is often not on outcomes, but punishment. Critics are upset with the status quo, angry at the large players, and feel as though something must be done, regardless of the ultimate impact their proposed reforms would have on the broader economy or the average American. But while some of this frustration may be understandable, anger rarely serves as a driver of good policy and the actual consequences of specific reforms should be at the forefront of the discussion, not a secondary afterthought. Even more concerning, many of the more populist-oriented advocates are attempting to use the current wave of antagonism toward the tech sector to enact sweeping and radical reforms that would have devastating consequences throughout the entire United States' economy.

That said, there are several proposals worth serious consideration. Changes to

1 U.S. House Committee on the Judiciary, Investigation of Competition in Digital Markets: Majority staff Report and Recommendation (2020)

2 Committee on the Judiciary, Competition Policy for the Twenty-First Century: The Case for Antitrust Reform, https://www.judiciary.senate.gov/meetings/competition-policy-for-the-twenty-first-century-the-case-for-antitrust-reform.

antitrust law that can enhance competition without jeopardizing the incredible consumer benefits and economic prosperity that has emerged over the past several decades as a result of our evidence-focused approach to enforcement.

These include:

1. Providing greater resources to the federal antitrust enforcers so they can meaningfully enforce our existing laws;
2. Formally codifying the consumer welfare standard through statute and clarifying that courts and enforcement agencies should incorporate considerations of quality and innovation in addition to price;
3. Expanding the power of antitrust enforcers to bring suits against a wider variety of potential defendants including nonprofits, educational institutions, and state licensing boards; and
4. Reducing redundancy between the federal antitrust agencies and providing greater clarity as to their relative roles and responsibilities.

We ask that Congress consider focusing on these targeted yet meaningful reforms and refrain from enacting radical, sweeping proposals that would harm American consumers, businesses, and the broader economy. We appreciate your consideration of our views, and please let us know if we can provide any additional information.

American Antitrust Under Attack

One of the main forces driving the recent attack on America's carefully considered and longstanding approach to antitrust is the rise of large technology businesses, often referred to as "Big Tech," and the antagonism that has formed around them in recent years. Apple, Amazon, Google, and Facebook are now four of the five largest publicly traded companies in the United States.[3] These companies have spurred incredible innovation, created innumerable benefits for consumers, and employed millions of American citizens, all while giving the United States a distinct advantage in the global tech arena.

Even so, many critics argue that the growth of these businesses has given them monopoly power over their relevant markets and that they now act as gatekeepers, controlling access to much of the fundamental infrastructure that is considered essential in our increasingly digital age.[4] As such, antitrust is being looked to as a core tool that tech critics can wield to combat the size and conduct of these large digital platforms. Federal enforcers and state attorneys general have recently initiated antitrust suits against several of the major tech businesses including Google and Facebook.[5]

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3 The fifth is also a large technology company, Microsoft. Kyle Daly, Big Tech's Power, in 4 Numbers, Axios, July 27, 2020.
4 U.S. House Committee on the Judiciary, Investigation of Competition in Digital Markets: Majority staff Report and Recommendation (2020).
5 John D. McKinnon, These Are the U.S. Antitrust Cases Facing Google, Facebook and Others, WallStreetJournal (Dec. 17, 2020) https://www.wsj.com/articles/these-are-the-u-s-antitrust-cases-facing-google-facebook-and-others-11608150564;

However, much of the animosity animating the recent attacks on large technology companies is built around baseless accusations, loaded rhetoric, and in many cases outright misinformation.[6] To begin with, while the major tech businesses are unquestionably popular among American consumers and have grown substantially over the past two decades, they are far from monopolies. Amazon competes against giants like Walmart, Target, and BestBuy, and has only 6 percent of the overall retail market in America.[7] Some critics argue that Amazon competes in the narrower market of e-commerce, but even in this market Amazon still has only a 24 percent market share.[8]

Google competes in the advertising market against a broad swath of traditional options such as TV advertising, billboards, radio, and newspaper along with a variety of others. And even if you define Google's relevant market narrowly as only including online advertising, it competes against Facebook, Twitter, Microsoft-owned LinkedIn, Amazon, and a wide variety of other online advertising platforms. In the digital advertising market, Google's market share is still less than 32 percent and that number is expected to drop even lower in coming years as more competitors enter the market and existing competitors continue to expand their capabilities.[9]

As mentioned above, Facebook competes against Google and a variety of others in the digital advertising market. It accounts for less than 24 percent of this market.[10] And Apple competes against Samsung, LG Electronics, and others in the U.S. smartphone market and was actually surpassed by Samsung in the third-quarter of 2020. [11] There is no doubt that these companies are popular, but popularity does not in-and-of-itself give a business monopoly power.

But while the lawsuits against the large digital platforms are still in their infancy, many critics are already seizing upon the growing hostility toward the tech sector to argue that they will not be enough. That the current approach to antitrust enforcement in America is fundamentally ill-equipped to deal with the problems of our modern digital economy. Instead, they argue that antitrust law and enforcement is in need of a major overhaul that would fundamentally restructure the way we assess antitrust violations and the behavior of large firms. Among other things, critics argue that we should overturn the consumer welfare standard and integrate a variety of other vague normative values into antitrust analysis, enact standard changes that make it more difficult for businesses - particularly large businesses - to merge or acquire other businesses, and enact bright-line rules

6 Trace Mitchell, Debunking The Campaign Against American Tech, NetChoice (Feb. 18, 2021) https://netchoice.org/debunking-the-campaign-against-american-tech/.

7 Benedict Evans, What's Amazon's Market Share?, Benedict Evans (Dec. 19, 2019), https://www.ben-evans.com/benedictevans/2019/12/amazons-market-share19.

8 Don Davis, Amazon's Share of U.S. Online Retail Revenue Dips Slightly in Q3, Digital Commerce 365 (Nov. 3, 2020), https://www.digitalcommerce360.com/2020/11/03/amazons-share-of-us-online-retail-revenue-dips-slightly-in-q3/.

9 Brad Adgate, In A First, Google Ad Revenue Expected To Drop In 2020 Despite Growing Digital Ad Market, (Jun. 22, 2020) https://www.forbes.com/sites/bradadgate/2020/06/22/in-a-first-google-ad-revenue-expected-to-drop-in-2020-despite-growing-digital-ad-market/?sh=45f3f435607d.

10 Emily Barry, Google's U.S. ad revenue projected to fall this year, eMarketer says, as Facebook, Amazon gain share, MarketWatch (Jun. 22, 2020) https://www.marketwatch.com/story/googles-us-ad-revenue-projected-to-fall-this-year-emarketer-says-as-facebook-amazon-gain-share-2020-06-22.

11 Duncan Riley, Samsung surpasses Apple to top third-quarter US smartphone sales, SiliconAngle (Nov. 9, 2020) https://siliconangle.com/2020/11/09/samsung-surpasses-apple-top-us-smartphone-sales-third-quarter/.

completely prohibiting specific types of conduct.[12] Not only will these reforms greatly hinder America's global position as a leader in technological growth and innovation, they will create devastating, widespread negative effects throughout the rest of the United States' economy.

Competition Policy Improvements for the Twenty-First Century

But there are other paths forward. Enhancements that policymakers could enact to help improve competition in the United States without undermining our belief in the rule of law or jeopardizing the incredible consumer benefits we have gained over the past several decades. These include providing greater resources to the enforcement agencies, codifying the consumer welfare standard through legislation, expanding the pool of potential antitrust defendants, and reducing reducency between the federal enforcement agencies.

1. Providing Greater Resources to Antitrust Enforcers

While the economy has grown substantially since the late 1970s, the resources and manpower provided to the United States' federal antitrust enforcement agencies have not kept pace. In 1979, the Federal Trade Commission (FTC) employed 1,746 full-time staff.[13] In 2019, the FTC employed only 1,101.[14] While the United States' Gross Domestic Product grew over 800 percent during this period,[15] the FTC's funding increased by less than 500 percent and funding for the DOJ's Antitrust Division increased by less than 450 percent.[16] All the while, the number of full-time employees at the FTC actually decreased by over 36 percent.[17] Between 2010 and 2018, merger filings increased by over 80 percent while the number of enforcement actions remained largely constant.[18]

It is not that our current laws are insufficient to deal with the problems of the twenty-first century, it is that our antitrust enforcers are not equipped with the resources or staff necessary to engage in proper, widespread enforcement of those laws. If our goal is to strengthen competition through antitrust enforcement in our dynamic modern economy, the best place to start is by ensuring our antitrust regulators have the funding and workforce necessary to meaningfully enforce the laws we already have on the books.

12 U.S. House Committee on the Judiciary, Investigation of Competition in Digital Markets: Majority staff Report and Recommendation 376-405 (2020); Lauren Feiner, Klobuchar unveils sweeping revamp of antitrust enforcement, laying out vision as new subcommittee chair, CNBC (Feb. 4, 2021) https://www.cnbc.com/2021/02/04/klobuchar-unveils-sweeping-antitrust-bill-laying-out-her-vision-as-new-subcommittee-chair-.html;

13 Federal Trade Commission, FTC Appropriation and Full-Time Equivalent (FTE) History, https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation.

14 Id.

15 World Bank, GDP (current US$) - United States, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=US.

16 Federal Trade Commission, FTC Appropriation and Full-Time Equivalent (FTE) History, https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation; Department of Justice, Appropriation Figures for the Antitrust Division, https://www.justice.gov/atr/appropriation-figures-antitrust-division.

17 Federal Trade Commission, FTC Appropriation and Full-Time Equivalent (FTE) History, https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation.

18 Michael Kades, The state of U.S. federal antitrust enforcement, Washington Center for Equitable Growth (Sept. 17, 2019) https://equitablegrowth.org/research-paper/the-state-of-u-s-federal-antitrust-enforcement/.

2. Enshrining the Consumer Welfare Standard into Law

Another important step that Congress could take to help enhance America's approach to antitrust without massively disrupting the United States economy would be to codify the Consumer Welfare Standard (CWS) into law through direct legislation and clarify that courts should consider the impact a decision might have on quality and innovation in addition to price. Many critics have pointed out that the CWS was adopted largely through judicial decision making and agency action over time rather than an overt act by Congress.[19] While these critics are incorrect in arguing that this somehow undermines the CWS as the proper loadstar for antitrust analysis,[20] Congress can and should address this concern by formally adopting the CWS through explicit legislation.

In addition, one reason critics argue that the CWS is ill-equipped to deal with the problems of the twenty-first century economy is because they think it is too narrowly focused on "price and output."[21] However, price and output are just two factors that contribute toward a consumer's overall welfare. Quality and innovation are also incredibly important determinants when it comes to consumer outcomes and should play a core role in antitrust analysis under a holistic CWS. While courts and enforcement agencies do already take these considerations into account, Congress can and should provide greater clarity by explicitly instructing them to incorporate these factors when engaging in analysis under the CWS.

3. Empowering Antitrust Enforcers to Effectively Scrutinize Nonprofits, Educational Institutions, and State Licensing Boards

Congress could also strengthen the ability of antitrust plaintiffs to bring suits against a broader category of defendants including nonprofits, educational institutions, and state licensing boards. While each of these has the power and incentive to engage in anticompetitive conduct that harms consumers, under current law they are largely exempt from certain types of antitrust scrutiny.[22]

First, Congress should clarify that all federal antitrust laws apply to all nonprofits and institutions of higher education. Although most antitrust laws apply to nonprofits and colleges, they tend to escape antitrust scrutiny and enforcement. In the nonprofit sector, for example, the government and courts are less likely to challenge a nonprofit hospital merger because, presumably, the hospital isn't driven by a desire to raise prices and thus profits. Likewise, in the college context, many practices–from admissions to financial aid to college sports–escape scrutiny because the defendant is a public institution. As discussed below, public institutions chartered by the state are immune from antitrust scrutiny.

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19 U.S. House Committee on the Judiciary, Investigation of Competition in Digital Markets: Majority staff Report and Recommendation 391 (2020)

20 Id.

21 Id.

22 15 U.S.C. § 13c; 15 U.S.C. § 44-45; Federal Trade Commission, What the FTC Does, https://www.ftc.gov/news-events/media-resources/what-ftc-does ("The Federal Trade Commission enforces a variety of antitrust and consumer protection laws affecting virtually every area of commerce, with some exceptions concerning banks, insurance companies, non-profits, transportation and communications common carriers, air carriers, and some other entities.") Parker v. Brown, 317 U.S. 341 (1943).

To be sure, the enforcement agencies have tried to block nonprofit hospital mergers and the DOJ has investigated colleges and universities for antitrust violations. But these efforts are rare and rarely successful. Making matters worse, since the 1990s, states have passed laws to further protect public institutions from antitrust scrutiny, meaning that their state AGs are stripped from enforcement power and the federal government is the only enforcer in business.

To remedy this, Congress should enshrine the consumer welfare standard in law, making clear that it considers nonprice factors like quality and innovation, and should enshrine in law that nonprofits are treated the same as private businesses.

And second, empowering enforcers to go after state licensing boards would be one of the most effective ways for antitrust law and enforcement to adopt an "antiracist" agenda focused on promoting the welfare of marginalized groups and historically disadvantaged communities.[23] The profound negative impact that state licensing boards have on the poor and disenfranchised is pervasive and well documented.[24] For nearly 80 years, antitrust enforcers have been severely limited in their ability to address this problem because of something known as the "state action" or "Parker" doctrine.

Owing its name to the 1943 Supreme Court case Parker v. Brown, this doctrine holds that state-sanctioned licensing boards are immune from antitrust scrutiny, subject to a few narrow exceptions. These boards are composed mainly of well-established industry incumbents that often use the board's power to engage in blatant and egregious anticompetitive behavior while cloaking themselves behind a facade of state action. However, because of the state action doctrine, antitrust plaintiffs are greatly curbed in their ability to challenge these boards under America's antitrust laws. Congress should overturn this doctrine and empower antitrust enforcement agencies to bring suits against state licensing boards when they are engaging in blatantly anticompetitive conduct.

If Congress wants to better address this issue without fully overturning the Parker decision, it could also limit the state action doctrine to cases where the state fulfills certain requirements. For example, it could qualify the ability of a state to invoke the doctrine on a requirement that the state engage in a "least restrictive means" approach to professional regulations or adopt a judicial appeals process for aggrieved parties hoping to challenge a board decision. This would allow states to retain their immunity when acting in good faith while requiring them to take precautionary steps that would prevent their boards from being captured by incumbents and used to promote anticompetitive ends. This was the approach taken by Sen. Lee in the Restoring Board Immunity Act of 2017 and Rep. Issa in his House companion bill.[25]

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23 Lauren Feiner, How FTC Commissioner Slaughter wants to make antitrust enforcement antiracist, CNBC (Sept. 26, 2020) https://www.cnbc.com/2020/09/26/ftc-commissioner-slaughter-on-making-antitrust-enforcement-antiracist.html.

24 Matthew D. Mitchell, Occupational Licensing and the Poor and Disadvantaged, Mercatus Center (Sept. 28, 2017) https://www.mercatus.org/publications/corporate-welfare/policy-spotlight-occupational-licensing-and-poor-and-disadvantaged.

25 Restoring Board Immunity Act of 2017, S. 1649, 115th Cong. (2017); Restoring Board Immunity Act of 2017, H.R. 3446, 115th Cong. (2017).

4. Reducing Redundancy between the Federal Antitrust Enforcement Agencies

A final proposal that Congress could adopt to help modernize antitrust enforcement would be to help reduce redundancy and discrepancies between the federal antitrust enforcement agencies by clarifying their relative roles and responsibilities. Senator Mike Lee's "One Agency" bill, for example, would consolidate the federal government's antitrust enforcement in the DOJ Antitrust Division. If enacted, this proposal would streamline government review, increase efficiency, and reduce friction between government enforcers.

Even if agency consolidation is not in the cards, Congress should pursue changes that clarify roles and harmonize guidelines. With few exceptions, the DOJ and FTC largely decide for themselves which agency oversees which industry and even players within the same industry. For example, the DOJ currently oversees Google and is responsible for the government's antitrust lawsuit against it; the FTC, meanwhile, oversees Facebook and is the lead on the government's case against it. This division of labor makes little sense. Indeed, even though the agencies use similar guidelines in making their enforcement, differences in substance and procedure exist. So by arbitrarily dividing up the same industry, and subjecting competitors to slightly different guidelines, the agencies undermine their own authority. At the very least, then, the agencies should have to use the same guidelines from start to finish so that the federal government's evaluative tools are uniform.

Second, Congress should abolish the FTC's in-house adjudication system. From a constitutional perspective, the FTC's adjudicatory body is suspect. Whereas the DOJ must pursue its cases in an Article III court, the FTC may instead choose to bring a case in house. That raises serious concerns about objectivity, fairness, and due process. Indeed, as the FTC recently acknowledged, it has not lost an in-house adjudication in decades.

Although that may be a testament to the FTC's case selection–and it undoubtedly is to an extent–it calls into question the adjudicatory body's independence and objectiveness. Whether that's true as a factual matter is important, but not dispositive. As the Supreme Court has noted, due process can be undermined by the appearance of partiality. Given the ramifications of antitrust enforcement, all parties should have confidence in the tribunal's ultimate decision. To aid in that, Congress should require the FTC to sue only in federal court, like it does for the DOJ.

Eliminating the FTC's in-house adjudication system will also promote stability in legal doctrine. By requiring all antitrust lawsuits to go before the judiciary, Congress can help create better clarity by establishing binding precedent that will put businesses on notice going forward. Currently, many cases are resolved through consent decrees that apply to the parties in the current action but do not establish binding precedent. This creates a lack of certainty for businesses trying to comply with the law and risks empowering enforcers to extract short-term

concessions without actually litigating the issue in a court of law to create binding precedent.

Conclusion

The United States was the first country to pass antitrust legislation. It was also the first country to reorient its antitrust doctrines away from political considerations toward objective enforcement based on empirical evidence. This reorientation, which occurred primarily because of the country's adoption of the consumer welfare standard, has largely insulated antitrust enforcement from politics. So successful was this reorientation that it is now the norm in the United States for antitrust enforcement to be above the political fray.

We have the opportunity to engage in this kind of innovative, forward-thinking, evidence-based modernization again and should seize upon this opportunity without jeopardizing the incredible consumer benefits and economic prosperity that has emerged over the past several decades. We can do this by rejecting radical proposals that would completely overhaul the American approach to antitrust while embracing thoughtful, targeted reforms that keep what's working and meaningfully addressing what's not.

As always, we stand ready to work with Congress to achieve good policy outcomes for the country. We appreciate your consideration of our views and are happy to provide further information upon request.

Sincerely,

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