Comment of NetChoice on *The Impact of Consolidation and Monopoly Power on American Innovation* before the Senate Judiciary Committee

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Competition spurs innovation. Competition and innovation spur economic growth. And all three benefit American consumers. It is no coincidence, then, that the lodestar of antitrust enforcement—the consumer welfare standard—treats competition, innovation, and consumer welfare as intertwined. It is also no coincidence that, since the United States's adoption of the consumer welfare standard, markets have grown more competitive—even toppling the once-all-powerful Sears—and more innovative, and consumers have benefitted from lower prices and higher-quality goods.[1]

To be sure, the consumer welfare standard has its critics. To some, including members of this Committee and FTC Chair Khan, the consumer welfare standard is outdated and too focused on prices. But that's simply not true. The consumer welfare standard examines a business's effects on prices and intangible factors like quality and *innovation*. In other words, it is entirely plausible under the consumer welfare standard that a business practice be found unlawful because of its effects on innovation.

That courts haven't given innovation its full due speaks not to the consumer welfare standard, but to the antitrust community. Until recently, there wasn't much scholarship examining innovation. But as this Committee's hearings have revealed, economists, scholars, lawyers, practitioners, and enforcers have all begun weighing in. The courts will have the benefit of this new learning moving forward.

Even so, there remains a push to change the country's antitrust laws to target (paradoxically enough) the country's most innovative industry: tech. Instead of studying the onward pace of tech innovation—which helped the country and economy weather the coronavirus-related lockdowns—tech's critics have instead focused on its size. That some of America's most innovative businesses happen to be among the country's largest is to be expected. After all, with more and more regulations on the books, innovation is rarely cheap. But rather than foster further innovation by removing those regulatory roadblocks,

[1] Note that despite some opinions, the breakup of AT&T is not analogous: AT&T was a government-granted monopoly. And its breakup is viewed by some as unsuccessful, having divided the company into regional monopolies, each with fewer resources to innovate to their full extent until the company's reunification decades later.

bills like those passed by the House Judiciary Committee would stifle it by punishing America's most innovative businesses.

Far from being symptoms of an outdated antitrust regime, tech businesses are proof that the country is getting antitrust right.

Digital Markets Are Competitive

Market realities show that Amazon, Apple, Facebook, and Google are not monopolies. In fact, competition in digital markets is strong and growing stronger. Even so, the success these companies have earned has so gripped the public's imagination that we now use them as shorthand for specific products. Take Google Search. It's become so synonymous with internet searches that "Google" is now defined in the dictionary as a verb to that effect. It is thus unremarkable that some see individual companies as representing most or even all of a market. And so, as Alec Stapp of the Progressive Policy Institution points out, it's unremarkable that many Americans use the word "monopoly" interchangeably with "large." Most times, precision doesn't matter. But when it comes to antitrust law, it matters a lot.

In the case of America's leading tech businesses, none has monopoly power. Consider that:

- Amazon's share of the retail market is a mere 4%. Amazon's share of the arbitrarily narrow e-commerce market in the United States—as defined by its critics—is about 38%. Since coronavirus, Amazon has actually lost ground to Walmart, Target, and BestBuy. If it had durable monopoly power that would not be the case;

- Apple's share of the smartphone market is 49%. In 2017, its share was only 29%; in 2018, it hit 47% only to decrease to 39% in in early 2019. If Apple were a monopoly, it would not see these drastic changes in market share so close in time;

- Facebook's share of the digital advertising market is 23%. Since June 2020, major advertisers like Nike have been boycotting advertising on Facebook. If Facebook were a monopoly, companies would have no choice but to advertise with Facebook; and

- Google's share of the digital advertising market is only 29%. Even under an arbitrarily narrow market definition—digital search ads—Google has only 58.5%. Google has also seen both market shares decline since Amazon's

entrance into the digital ads market. Again, that's not something that would happen if Google were a monopoly.[2]

COMPANY	BROAD MARKET DEFINITION	MAIN COMPETITORS
amazon	Retail Shopping	Same + Big Box Stores
Apple	App Stores	Google Play, Microsoft Store, Amazon App Store, Samsung Galaxy Apps
Facebook	Advertising	Same + Traditional Advertising (TV, Print, Etc.)
Google	Advertising	Same + Traditional Advertising (TV, Print, Etc.)

COMPANY	NARROW MARKET DEFINITION	MAIN COMPETITORS
amazon	E-Commerce	Walmart Online, eBay, Target Online
Apple	Smartphone Operating Systems	Google's Android
Facebook	Digital Advertising	Google, Amazon, Adobe, AT&T, Comcast, Rubicon Project, The Trade Desk, Twitter, Snapchat, & Verizon
Google	Digital Advertising	Facebook, Amazon, Adobe, AT&T, Comcast, Rubicon Project, The Trade Desk, Twitter, Snapchat, & Verizon

And even as digital markets mature, innovation shows no signs of slowing. But "Big Tech" companies aren't invincible. Like the market leaders before them—Kodak, MySpace, Yahoo, Blockbuster—they aren't immune to creative destruction. No matter how great their products and services are today, things change. This is especially true in digital markets, where tech companies must keep pace with markets that keep integrating and creating new markets. So much so that no one really knows what tomorrow's markets will look like.

And they remain competitive because our antitrust regime gives them breathing room to try out new business models and practices. Although the law sometimes requires them to get a permission slip before merging, it generally trusts that markets will make better decisions than the government in allocating resources and delivering consumer benefits. And thus far, the market has delivered.

[2] NetChoice Report, pp. 14-15 (2020), https://www.congress.gov/116/meeting/house/110883/documents/HHRG-116-JU05-20200729-SD021.pdf.

Digital Markets Are Highly Innovative

While it can be difficult to measure a market's innovation, one proxy that correlates to innovation is spending on research and development. Another is capital expenditures. And as Alex Stapp at the Progressive Policy Institute points out, both show that tech spends a lot of money—in some cases, more than any other industry in the United States—on innovation. His charts are reproduced below:

Tech companies lead in R&D spending (billions of USD)

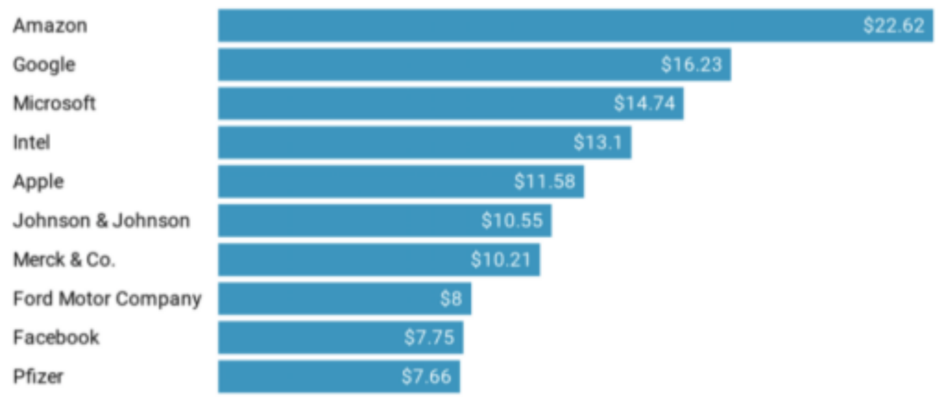

Chart: Alec Stapp (PPI) • Source: ideatovalue.com • Created with Datawrapper

TABLE 5: NON-ENERGY U.S. INVESTMENT HEROES: TOP 25 NONFINANCIAL COMPANIES BY ESTIMATED U.S. CAPITAL EXPENDITURE*

	COMPANY	ESTIMATED 2018 U.S. CAPITAL EXPENDITURES (MILLIONS USD)
1	ALPHABET	20,188
2	AT&T	19,209
3	AMAZON.COM	15,577
4	VERIZON COMMUNICATIONS	14,912
5	MICROSOFT	11469
6	COMCAST	10,890
7	FACEBOOK	10,763
8	CHARTER COMMUNICATIONS	9,125
9	WALMART	7,683
10	INTEL	7,426
11	APPLE	7,129
12	FORD MOTOR	6,513
13	GENERAL MOTORS	5,756
14	FEDEX	5,255
15	DELTA AIR LINES	5,168

Conclusion

Antitrust laws in the United States work well. In fact, tech's successes show that our antitrust regime works remarkably well. Far from being monopolies, Amazon, Apple, Facebook, and Google all face stiff competition. This is so even as they deliver more and more benefits to consumers. And despite rhetoric to the contrary, none engages in unlawful conduct. Instead, each competes aggressively—precisely what our antitrust laws are designed to promote.

"Tweaking" or overhauling our antitrust laws will harm American consumers. It will hinder our nation's competitiveness.

Consider Europe. Its antitrust regime is far more aggressive than ours. And yet, Europe can claim only one company on a list of top 30 tech companies in the world (Spotify). Europe's antitrust approach doesn't promote innovation, and thus shouldn't be adopted here. Doing so would benefit only foreign competitors.

American tech companies benefit consumers and competition in digital markets is strong and growing stronger. As the country's economy continues integrating traditional markets with digital ones, tying the hands of the country's most innovative companies is the wrong move.

Sincerely,

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