April 17, 2020

The Honorable David N. Cicilline
Chairman
Subcommittee on Antitrust,
Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable F. James Sensenbrenner
Ranking Member
Subcommittee on Antitrust,
Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Cicilline and Ranking Member Sensenbrenner:

Consumer Reports[1] has been following with great interest the Subcommittee's investigation into the state of competition in the digital marketplace. We appreciate your invitation to share our perspective on whether our current antitrust laws are up to the challenges of protecting competition and consumer choice in this marketplace, what improvements to those laws might be needed, and what might be needed to supplement them.

As we write this letter, Congress is rightly focusing its attention on the urgent challenges presented by the COVID-19 virus, on which Consumer Reports is also focused. We look forward to further assisting the Subcommittee when it can return its attention to this important investigation.

Throughout our 80+ year history, Consumer Reports has emphasized the fundamental importance of competition for ensuring a marketplace that works for consumers, by empowering them with the leverage of choice, the ability to go elsewhere for a better deal. Antitrust law is critical to protecting that competition, and we have steadfastly supported strong antitrust laws, and advocated for sound and determined antitrust enforcement, consistent with the core values of an open marketplace and the benefits it brings to consumers, to the economy, and to society.

[1] Consumer Reports (CR) is a nonprofit membership organization that works side by side with consumers to create a fairer, safer, and healthier world. For 80 years, CR has provided evidence-based product testing and ratings, rigorous research, hard-hitting investigative journalism, public education, and steadfast policy action on behalf of consumers' interests, including promoting strong antitrust laws an sound and effective antitrust enforcement. Unconstrained by advertising or other commercial influences, CR has exposed landmark public health and safety issues and strives to be a catalyst for pro-consumer changes in the marketplace. From championing responsible auto safety standards, to winning food and water protections, to enhancing healthcare quality, to fighting back against predatory lenders in the financial markets, Consumer Reports has always been on the front lines, raising the voices of consumers.

A New Marketplace Landscape

We are now facing an entirely new breed of concentrated market power.

The internet has ushered in breathtaking technological change that has revolutionized commerce and communication, in extraordinarily beneficial ways. But a principal promise of the internet is being only partially realized. Many hoped the internet would dramatically open the marketplace, empowering consumers to more conveniently and widely comparison shop among sellers from across the country and around the world. A further hope was that when faced with more competition, companies would be incentivized to offer better products and services at more affordable prices. And ultimately, that a vibrant online marketplace would benefit consumers with a rich variety of good choices.

Unfortunately, the promise of new consumer power has been undercut by the rise of a handful of giant tech platforms that have come to increasingly dominate online commerce and communications. The market power of these large platforms is enabling them to exercise inordinate influence over market access, restricting and diminishing the quantity and quality of our choices, and the pathways for all who seek to reach us – including manufacturers, service providers, content creators, and other voices.

That market power is being further amplified and reinforced by the platforms' ability to amass, analyze, and exploit vast and constantly growing troves of information on us and our online activities. A dominant platform can use this information to target discriminatory favoritism among sellers, advertisers, or information providers who use the platform to reach consumers. Or to tailor new product and service offerings of its own to preempt promising business opportunities it identifies, even to target another seller's customers. Additionally, the possession of these vast troves of information creates a formidable barrier to market entry by would-be competitors who do not have access to similar information.

More broadly, this business practice gives these dominant online platforms unprecedented and pervasive insight into our everyday lives, enabling them to monitor, manipulate, and monetize our personal interactions as consumers, and as citizens – and to further tailor ads and information through opaque and unaccountable artificial intelligence systems, in ways that are still not fully understood and appreciated.

Restoring and Reinvigorating Antitrust

In the face of these new challenges, it is a fitting time to re-examine our antitrust laws and their effectiveness.

To begin with, the existing antitrust statutes – which prohibit companies from suppressing competition through agreements with each other, through exerting market power, or through acquiring other companies – remain essential protectors of our marketplace. A key step in ensuring that our antitrust laws are up to the task is increasing enforcement resources to levels commensurate with that task.

But that is not enough. Unfortunately, over the past few decades, the effectiveness of the antitrust statutes has been gradually eroded in significant respects, through a number of court decisions that have hampered their reach. Collectively, these court decisions have allowed theory-based skepticism to displace longstanding, experience-based antitrust principles, and to unduly intrude into assessments of problematic marketplace conduct, resulting in presumptions that block fact-based enforcement decisions. The gaps that have been created in the reach of the antitrust laws are starkly evident in the context of the online marketplace.

With merger enforcement, Congress intended to prevent market concentration from ever reaching levels of concern, by "provid[ing] authority for arresting mergers at a time when the trend to lessening of competition in a line of commerce is still in its incipiency ... to brake this force at its outset and before it gathered momentum."[2] This purpose is embodied in the very text of Section 7 of the Clayton Act, which prohibits acquisitions where "the effect of such acquisition *may be* substantially to lessen competition or to tend to create a monopoly."[3]

In recent decades, unfortunately, courts have effectively abandoned this "incipiency standard" and have read the "may" out of Section 7. The standard has instead devolved to essentially require the government to prove demonstrable, concrete, imminent, quantifiable harm. This has resulted in consideration of each merger, including a series of acquisitions by one growing giant corporation, in piecemeal isolation, disregarding unmistakable trends until it is often too late.

This short-sighted approach invites a corporation to execute a strategy of growth to dominance by quietly acquiring potential rivals as soon as they appear on the horizon, before they've had a chance to reach a size where antitrust scrutiny would be called for.

The five internet giants – Facebook, Google/Alphabet, Amazon, Microsoft, and Apple – did not suddenly spring onto the scene in their current dominant positions. Google was founded in 1998, and began selling ads to finance its search engine in 2000. Amazon was founded in 1994, and began managing the inventory of third parties selling on its website in 2006. Microsoft was founded in 1975, to adapt the BASIC software language for use with the just-invented microcomputer, then contracted in 1981 to supply the operating system for IBM's personal computers, and released Word and the Mouse in 1983, and Windows in 1985. Apple was incorporated in 1977, and for many years was an upstart innovator who fought against IBM, Microsoft, and others to keep the marketplace open. Facebook first became available for use by the public in 2006, after initially being available only to students at Harvard and then at a few other universities.[4]

In the course of their growth, each of these corporations has made dozens or even hundreds of acquisitions, from companies who could instead potentially have become part of building a competing business and giving consumers a more vibrant online marketplace. In just

[2] Brown Shoe Co. v. United States, 370 U.S. 294, 317-18 (1962).
[3] 15 U.S.C. § 18 (emphasis added.)
[4] *See, e.g.*, www.britannica.com/topic/Google-Inc; www.britannica.com/topic/Amazoncom; www.britannica.com/topic/Microsoft-Corporation; https://www.britannica.com/topic/Apple-Inc; https://www.britannica.com/topic/Facebook.

the past decade, Google/Alphabet has executed about 150 of these acquisitions; Amazon has made about 60; Microsoft, about 85; Apple, about 70; and Facebook, about 60.[5] Each of these acquisitions was subject to review under Section 7 of the Clayton Act. But as far as we know, very few were actually *subjected* to serious review.

Under a properly applied "incipiency standard," enforcers would be encouraged to use the full powers of their insight and foresight to focus on discernible market trends, and what is needed to protect and promote, over the long haul, an open and innovative marketplace, where competition prevails, and consumers are in charge.

Court decisions have similarly hampered antitrust enforcement against exclusionary conduct – a dominant corporation sabotaging the competitive efforts of its rivals, such as by blocking or interfering with their access to supply or distribution channels. Section 2 of the Sherman Act prohibits monopolization or attempt to monopolize. Among the additional proof hurdles that courts have imposed is that the dominant corporation either must already have an actual monopoly, or must have a "dangerous probability" of achieving one through the exclusionary conduct in question.[6] Under this over-exacting legal standard, many strategic moves by a dominant corporation to block or undermine efforts by potential rivals to offer choices to consumers are beyond the reach of antitrust enforcement, even when they are clearly harmful to competition and consumers.

Although these ill-conceived court decisions could be self-corrected over the course of time by new, better-informed court decisions, we cannot afford to wait to see if that might eventually transpire. Instead, we recommend that Congress step in with carefully measured clarifications to help reinvigorate antitrust enforcement. These improvements should be informed by the new challenges presented by online platforms, but should be written so as to apply to antitrust across all parts of the economy, as the current antitrust laws do.

For example, we support a number of proposals now pending in the Senate that warrant the Subcommittee's consideration, including:

- S. 3426, the Anticompetitive Exclusionary Conduct Prevention Act, to strengthen the ability of the antitrust laws to reach anticompetitive exclusionary conduct before the violator achieves a full monopoly;

- S. 2237, the Monopolization Deterrence Act, to authorize the Justice Department and the FTC to impose civil penalties for unlawful monopolizing;

[5] https://www.crunchbase.com/organization/google/acquisitions/acquisitions_list;
https://www.crunchbase.com/organization/amazon/acquisitions/acquisitions_list;
https://www.crunchbase.com/organization/microsoft/acquisitions/acquisitions_list;
https://www.crunchbase.com/organization/apple/acquisitions/acquisitions_list;
https://www.crunchbase.com/search/acquisitions/field/organizations/num_acquisitions/facebook.
[6] *E.g.*, Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459 (1993).

- S. 307, the Consolidation Prevention and Competition Promotion Act, to strengthen merger enforcement by restoring the "incipiency standard" and shifting the burden of proof for acquisitions involving extremely large corporations; and

- S. 1937, the Merger Filing Fee Modernization Act, to strengthen antitrust enforcement resources by increasing pre-merger filing fees for extremely large acquisitions.

These are sound and measured proposals that hold true to the long-established, enduring values of the antitrust laws. They constructively clarify and build on these laws so they are better equipped to fulfill their critical mission in today's marketplace, including the online marketplace.

Other Efforts to Promote Competition in the Online Marketplace

At the same time, there are limits to what the antitrust laws can do to address the dysfunction inherent in a marketplace that is already over-concentrated, such as we are now seeing with online platforms. The antitrust laws, properly reinvigorated, can address ongoing exclusionary or collusive conduct; and they may be able to reverse a previously completed anti-competitive merger when it is practical to unwind it. But beyond these situations, the antitrust laws simply do not prohibit a company that has market power from directly taking advantage of that to increase its profits by raising prices or cutting quality.

This kind of extreme market concentration nonetheless harms consumers, by depriving them of the benefits of choice, and the leverage that choice gives consumers to incentivize companies to make products and services better and more affordable. And for online platforms, this extreme concentration can be particularly entrenched and resistant to the emergence of new competition. The natural advantages of being the biggest are reinforced and augmented by network effects that make it advantageous for consumers to use the same platform that most others are using, so as to be able to easily connect with each other. And they are further reinforced and augmented by a dominant platform's ability to track consumers' online activities, collect vast amounts of their personal information, and combine it with information obtained from other sources to create intimate profiles that can be used to anticipate and influence consumers' decisions.

Opening the online marketplace to functional competition is essential for it to work effectively for consumers and for those who seek to reach them. Reinvigorating the antitrust laws, while a key part of that, is not the full answer. Congress should also consider ways to restructure the online marketplace to promote competition – as it did three decades ago for telecommunications. In particular, we recommend Congress pursue two reforms that were key parts of what became the Telecommunications Act of 1996. Portability would enable consumers to exercise control over the information they have put on a platform, and to switch among platforms without having to "start over" and lose important records, documents, photos, and other materials. And interoperability would enable consumers and others using one platform as their home base to connect with those using other platforms. Both these reforms would promote competition by making it practical for consumers to choose a new platform that offered better features or otherwise better fit their needs.

We recognize that, because these structural reforms are outside the scope of the antitrust laws, they will involve other committees beside yours. But we would encourage this Subcommittee to contribute its experience and expertise to these broader competition-promotion efforts, as it did with the Telecommunications Act.

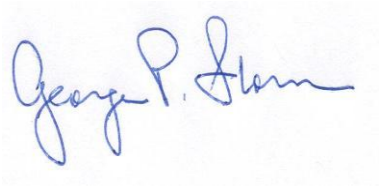
Addressing Other Consumer Concerns in the Online Marketplace

Finally, there are other serious consumer concerns stemming from the increasing use of online platforms in commerce and communications that will not be solved by improved antitrust enforcement or pro-competitive market restructuring. Protecting the privacy of personal consumer information transmitted over a platform is one important example. Another is ensuring accountability for safety and quality of products and services sold over a platform. Congress must address these other concerns as well. Improved competition can potentially help create an environment in which platforms have greater incentives to respond to these other concerns. But online platforms large and small have inherent incentives to cut corners on protecting privacy and on ensuring accountability, not only to reduce costs and increase profits, but also to monitor, monetize, and manipulate our personal interactions as consumers and as citizens. To effectively counter these tendencies, more direct regulatory and liability mechanisms will be required.

This will not be our last word on these important consumer and marketplace concerns. As Consumer Reports continues to examine them and to consider appropriate solutions, we will be looking at whether more far-reaching regulatory approaches are also needed. We look forward to continuing to work with this Subcommittee and with others in Congress to address these concerns effectively, consistent with ensuring that the antitrust laws are an effective tool and are equipped to perform their critical mission in making the online marketplace work for consumers, and for everyone.

Thank you again for the opportunity to present our perspective on this important work in which the Subcommittee is engaged.

Sincerely,



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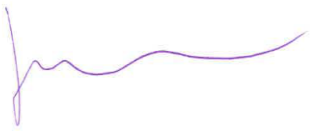

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cc: Members, Subcommittee on Antitrust, Commercial and Administrative Law