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Subcommittee on Antitrust, Commercial, and Administrative Law
Committee on the Judiciary
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In response to your invitation of March 13, I am happy to submit views on antitrust issues relating to the digital marketplace. My views are informed by nearly 42 years as an enforcer in the Antitrust Division of the U.S. Department of Justice, during which I actively contributed to antitrust scholarship. Since retiring last July, I wrote a book touching on the issues under consideration by the Subcommittee.

Existing antitrust statutes governing monopolistic conduct and mergers are adequate in my view. The statutes are framed in general terms that allow jurisprudence to evolve as the economy changes and as our understanding of the competitive process grows. Cases on monopolistic conduct and mergers in the digital marketplace present challenges, but I do not think that changing substantive antitrust law would help to overcome them.

Altering substantive antitrust law inevitably creates long-lasting uncertainty and is likely to have unforeseeable consequences. The Foreign Trade Antitrust Improvements Act of 1982 is an abject lesson. Its meaning still is not fully resolved, but it has been interpreted to render federal antitrust law incapable of providing a damages remedy when a foreign cartel fixes prices on a component of a consumer product that is assembled outside the United States then imported (see *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2015)).

The bill recently proposed by Senator Klobuchar (S. 3426) exemplifies what should not be done. If it became law, a judge would be empowered to condemn as unlawful exclusionary conduct the introduction of a new product, the improvement of an existing product, or an above-cost price cut. And while Senator Klobuchar seems to be targeting the economy's whales, the law would be used against smaller fish alleged to swim in small ponds. The bill essentially starts from scratch on the law of exclusionary conduct, and if history is a guide, the law will be less clear at the turn of the 22nd Century than it is today.

Economists understand competitive processes much better than when I began my career, but we still have much to learn. Moreover, the economy keeps changing,

so there are always new things we must try to understand. The empirical and analytic tools applied in antitrust cases also are much better than when I began my career, but they will never tell us everything we might want to know in cases involving monopolistic conduct and mergers in the digital marketplace. Many uncertainties simply are unresolvable.

The courts allocate and calibrate burdens to determine which uncertainties are held against which litigants, and in my view, burdens now placed on antitrust plaintiffs can be excessive. I believe the burden was excessive in a case I worked on at the Department of Justice, *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018). The government prevailed at trial by proving that American Express's merchant contracts eliminated price competition among the card networks on the merchant side of the market. American Express then had the burden to justify its contracting practices, and the trial court held that American Express did not carry its burden.

The trial court's findings were not disturbed on appeal, yet the judgment was reversed. The higher courts simply raised the bar and held that the government had not carried its initial burden. The Supreme Court's decision in *American Express* has encouraged a continued rise in the card fees paid by merchants, which pass them on to consumers, and I find absurd the notion that consumers collectively benefit from rewards programs.

The Supreme Court's holding in *American Express* was narrow, but it quickly resulted in the reversal of a jury verdict for the plaintiff in a digital marketplace case involving monopolistic conduct (*US Airways, Inc. v. Sabre Holdings Corp.*, 938 F.3d 43 (2d Cir. 2019)), and it recently contributed to a merger decision adverse to the government in another digital marketplace case (*United States v. Sabre Corp.*, D. Del. No. 19-1548, Apr. 8, 2020). I believe that the Court's decision portends excessive burdens on plaintiffs in many antitrust cases involving the digital marketplace.

Courts allocate and calibrate burdens in civil cases through a process in which they seek to effectuate the purposes of remedial statutes while accounting for the risks and costs of errors. Since the mid-1970s, this process has consistently ratcheted up the burdens placed on antitrust plaintiffs. The courts generally have acted wisely in shaping substantive and procedural antitrust rules, but they have gone too far. Too often, courts now reject sound theories supported by substantial evidence. A plaintiff's proof always has weaknesses because uncertainties are unresolvable, and courts sometimes demand what plaintiffs cannot possibly provide. A solution to this problem is elusive. Reversing the burden of proof goes much too far.

Antitrust law in the United States, appropriately, is rather permissive with respect to potentially anticompetitive single-firm conduct; monopoly itself is

lawful, and even monopolists are entitled to compete vigorously. Since 1890 courts have tried to distinguish lawful competition on the merits from unlawful exclusionary conduct. The Supreme Court has been reluctant to articulate general principles for making this distinction or even to hold that the Sherman Act requires courts to make this precise distinction. The law remains somewhat undeveloped, but the most important thing is clear: U.S. antitrust law protects the competitive process rather than competitors, and even rather than consumers. I note that Senator Klobuchar's bill preempts limiting principles and undermines the notion that antitrust law protects competition rather than competitors.

Many calling for stepped up enforcement see antitrust law as a means through which federal law secures a fair share of the nation's wealth for consumers. That was the hope of two Senators responsible for the Sherman Act (Republicans John Sherman and George Edmunds), but Congress did not make the Sherman Act a tool for redistributing wealth. Congress instead chose to protect the competitive process from the sabotage of private anticompetitive conduct. In my view, Congress should stick to that plan.

When innovation, hard work, and good fortune combine to produce spectacular success, antitrust law should cheer because that success provides the incentive that makes competition an engine for technical progress and consumers always share the benefits from marketplace success. Antitrust law in the United States has never been seen as an invitation to micro-manage the economy and thereby secure a greater share of the benefits for consumers, and I oppose any antitrust legislation extending the invitation to either judges or bureaucrats.

Antitrust law steps in when tactics used in the digital marketplace are not competition on the merits and serve to maintain monopoly, create monopoly, or threaten to create monopoly. The D.C. Circuit's *en banc* opinion in *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001), shows that the existing antitrust statutes can be applied successfully to monopolistic conduct in the digital marketplace.

Recent reports contend that special rules are needed for dominant digital platforms, but the reports are vague on what the rules should be and even on what constitutes a dominant digital platform. The reports tend to treat the five U.S. tech giants as a single phenomenon, although each is very different from the others in ways that matter. Whether any practice of a tech giant should be condemned under U.S. antitrust law can be determined only through a deeply fact-intensive analysis. Investigations are underway, and if anticompetitive conduct is found, no defect in substantive antitrust law will prevent a remedy from being secured.

The anti-merger statute, Section 7 of the Clayton Act, is adequate for the digital marketplace, and the two federal antitrust enforcement agencies have experience with merger enforcement in the digital marketplace. Merger litigation, however, is plagued by the unresolvable uncertainty because the courts are asked to compare two visions of the future. The uncertainty is at a minimum with mergers eliminating ongoing, head-to-head competition, but mergers in the digital marketplace often present the less clear-cut scenarios, and the Supreme Court has plainly indicated that Section 7 encompasses all merger scenarios.

A Section 7 challenge under any scenario is viable if a fact-based analysis demonstrates a reasonable probability that competition will be materially less over the foreseeable future with the merger than without it. That demonstration sometimes can be made on the basis that, but for the merger, the merging firms likely would compete head-to-head in the relevant market, even though they had never done so in the past. This is the scenario in which a potential competition theory is viable. The mere potential for future competition does not satisfy the reasonable probability standard articulated by the Supreme Court. In my view, that demonstration also could be made on the basis of a pattern of small mergers with a substantial cumulative effect.

Multiple theories of anticompetitive effects are viable in challenges to mergers that combine complements, generally called vertical mergers. Horizontal (including potential competition) theories and vertical theories exhaust the viable theories: No viable theory of conglomerate mergers has been articulated. At a time when the Supreme Court was finding every merger that came before it unlawful, the Nixon Administration launched a campaign against conglomerate mergers. The spectacular failure of that campaign should not be forgotten.

Section 7 explicitly applies to the acquisition of assets. The most sought-after prizes in many acquisitions are intangible assets such as intellectual property, customer lists, and data. Whenever data is of competitive significance, a data acquisition could be challenged under what amounts to a horizontal or a vertical theory.

The greatest problem in merger litigation is that judges do not fully understand vital economic evidence. One reason for this is that judges lack training in economics, but a greater problem, which is far easier to solve, is that live expert testimony is too abbreviated. In my view, Congress should mandate written expert testimony in all government cases under Section 7. The sort of detailed expert reports now in use could easily be converted to written testimony. To keep written expert testimony from overwhelming the courts, I suggest a word limit, perhaps

25,000 words per side, divided among each side's experts and between direct and rebuttal testimony. Footnotes should be used only for citations and should not count against the word limits.

The Subcommittee might consider the radical reform of entrusting adjudication to antitrust experts. A step in that direction was taken in *United States v. Novelis, Inc.* Before the Antitrust Division filed its Section 7 suit in federal district court, it was agreed that a single factual issue should be dispositive, and that the issue would be submitted for binding arbitration under the Administrative Dispute Resolution Act of 1996. An antitrust lawyer served as the arbitrator. His March 9, 2020 decision (<https://www.justice.gov/atr/case-document/file/1257031/download>) hints that he could not follow some of the economic evidence. In my view, a better approach is adjudication by an expert panel with an economist majority (e.g., two economists and one lawyer). The panel's decision could be binding as in *Novelis*, or appellate review could work as in agency cases today.

The foregoing are the only changes to the institutional structure of antitrust enforcement that I suggest that the Subcommittee consider. But I also suggest that the Congress substantially increase in budget and staffing for the Antitrust Division of the U.S. Department of Justice. Antitrust enforcement by the Department has been funded out of a separate appropriation since February 25, 1903 (the Antitrust Division itself was not created until 1919). For much of my time in government, the Antitrust Division was starved of resources, while the Federal Trade Commission often was not, or was not to the same extent. I suggest a 15% increase in spending and staffing authorization for the Antitrust Division each year for five years.

Sincerely,

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