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Subcommittee on Antitrust, Commercial, and
Administrative Law
Committee on the Judiciary
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Response to House Judiciary Committee Request

I want to thank the Committee and its Members for the opportunity to answer these important questions about the adequacy of existing antitrust laws, competition policies, and current enforcement levels in relation to the digital marketplace.¹

My answers to these important questions are informed by my 30 years of experience practicing antitrust law in a variety of roles, including my staff and leadership roles at the Federal Trade Commission (FTC), leadership roles in the Department of Justice's (DOJ's) Antitrust Division (where in addition to being Chief of Staff and Principle Deputy Assistant Attorney General, I also served as Acting Assistant Attorney General for almost a year), my in-house experience at GE as a Vice President and Global Head of Competition Law and Policy, and my seventeen years counseling clients on antitrust issues in private practice.

I have represented technology companies in a variety of antitrust matters throughout my career and do so today as Co-Chair of the Global Antitrust practice at Clifford Chance. Of particular relevance is my experience representing Netscape beginning in 1997, when it was a third party and the lead witness in the DOJ's Sherman Act Section 2 case against Microsoft. I have also considered numerous technology related antitrust issues in my enforcement roles at both the FTC and DOJ's Antitrust Division.

At the outset, I should note that antitrust enforcement is only one method of ensuring competition in this important sector, the digital marketplace. When other sectors have posed unique competition challenges, Congress has enacted tailored legislation to ensure these markets function properly. For example, in 1921, Congress enacted the Packers and Stockyard Act, which addressed

¹ These are solely my views, and not the views of Clifford Chance, or any Clifford Chance client. And I want to give special thanks to Abigail Cessna and Lauren Sillman, my colleagues at Clifford Chance, for their assistance in preparing this response.

competition and unfair and deceptive practices in the meatpacking industry.² Additionally, in the Telecommunications Act of 1996, Congress sought to promote competition by addressing the unique features of the telecommunications sector that made it necessary to take extra measures to protect competition and consumers.³

In addition, antitrust laws and enforcement—or even competition-related industry-specific legislation—are not necessarily solutions to all of the issues that exist in digital markets. Concerns unrelated to competition about privacy and unauthorized use of personal data, fraud, or other perceived harms, such as exploitation in labor markets, should be addressed with the tools of the relevant legal regime. Antitrust's regulatory tools are not designed to correct all of the challenges posed by digital platforms.

I should also note that I continue to believe the consumer welfare standard is the proper measure and basis of our antitrust laws, as long as it is properly viewed as encompassing more than price competition. Under the consumer welfare principle, "antitrust policy encourages markets to produce output as high as is consistent with sustainable competition, and prices that are accordingly as low."⁴ As the 2010 Horizontal Merger Guidelines and case law has made clear, the consumer welfare standard should include product quality and variety, service, and innovation.⁵

Finally, when I was an antitrust enforcer at DOJ and we had to make decisions related to emerging markets and technology marketplaces, we were conscious that antitrust enforcement can have unintended consequences, such as inhibiting innovation or destroying nascent market sectors. So we were careful in our approach, acting surgically rather than with a bludgeon. I think of the *eBooks*⁶ and *Google/ITA*⁷ enforcement actions as examples.

While the *eBooks* case has been criticized by some as advancing Amazon's market power, in my view, this case stands for the proposition that collusion and coordination among competitors—in

² Packers and Stockyard Act, Pub. L. No. 67–51, 42 Stat. 159 (1921) (codified as amended at 7 U.S.C. §§ 181–229).

³ Telecommunications Act, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended at 47 U.S.C. §§ 609, § 251 et seq., § 151 et seq., § 271 et seq.)

⁴ Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. of Corp. L. 101, 102 (2019).

⁵ U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines 2, 23 (2010) [hereinafter 2010 Guidelines], available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>; Verisk Analytics Inc., 9363 F.T.C. 141 0085 (2014).

⁶ See Docket for *U.S. v. Apple, Inc., et al*, Department of Justice, <https://www.justice.gov/atr/case/us-v-apple-inc-et-al>.

⁷ See Docket for *U.S. v. Google Inc. and ITA Software, Inc.*, Department of Justice, <https://www.justice.gov/atr/case/us-v-google-inc-and-ita-software-inc>.

this case eBook publishers, facilitated by Apple, a competing platform—is not a legitimate means to combat perceived dominance. That said, the consent agreements with the settling publishers were specifically limited in scope and duration because the eBooks industry was emerging at the time, and we did not want to constrain its development.

The consent agreement in *Google/ITA* is another example of a surgical approach to promoting competition in light of careful consideration of the marketplace. There, Google was acquiring ITA, which developed and licensed software called QPX—software used by many airlines, travel agents, and travel search websites. Google had plans to offer a search engine for travel, so, in essence, Google was acquiring a necessary input for companies that would be competing with Google. Thus, the transaction created the risk that Google could use the product to foreclose competition or raise prices. As a remedy, the DOJ required Google to continue licensing the product on commercially reasonable terms and to continue to develop ITA's next-generation search product. However, as discussed below, with hindsight, given the division of cases between the DOJ and FTC in place at that time, the DOJ may not have had access to all relevant information about Google's broader activities and lacked appropriate analytical tools to understand possible competitive concerns. Given better tools and information, an all-out prohibition of that merger might have been warranted, given what we know today about Google's enhanced market power in numerous sectors of the digital marketplace.

As my answers below reflect, I believe this Committee's work is important, and I am hopeful it will lead to meaningful bipartisan reflection and actions. As I set out below, I do not believe the existing US antitrust laws need revision. They are broad mandates into which many industries readily fit and can be adjudged. However, I do believe we need to clarify certain existing court decisions, particularly as they apply to digital marketplaces. I also believe the agencies must sharpen their analytic tools and focus their enforcement resources with respect to both mergers and potential anticompetitive conduct in the digital marketplaces. Finally, I believe the time has come to consider institutional changes to the DOJ and FTC. Some of the very best antitrust attorneys work daily within these agencies to protect consumers, but their work is often hampered by bureaucratic hurdles and resource limitations. These ideas are set out in more detail below.

1. The adequacy of existing laws that prohibit monopolization and monopolistic conduct, including whether current statutes and case law are suitable to address any potentially anti-competitive conduct;

The existing antitrust laws that address monopolization and monopolistic conduct are sufficiently broad. Section 2 of the Sherman Act states "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty" This statutory text is flexible enough to address new markets and novel types of monopolistic and anticompetitive conduct.

Digital Platforms are Unique – To assess whether current case law and available analytical tools are suitable for addressing anticompetitive conduct in the digital markets, it is necessary to evaluate

what makes these digital markets different from other markets that antitrust law has sufficiently addressed so far. Digital platforms now not only dominate our economy, they underpin society itself. Americans rely on these platforms, most of which did not exist twenty years ago to an astonishing degree. As a result, these companies possess a staggering amount of power.

Digital platforms have a number of characteristics that make them unique. Digital markets are distinguished by strong economies of scope and scale, single-homing, and the ability for platforms to use collected data to nudge consumer behavior. This combination of factors means that digital markets are prone to tipping, with the result that platforms gain durable market power protected by high barriers to entry. Dominant platforms can also protect their market power by using their accumulated data and their status as gateways to consumers to foreclose rivals.

Limiting Precedent – While the antitrust statutes are broad, courts have interpreted these statutes narrowly in the last few decades. These cases create obstacles to enforcement when they are applied to digital markets, which is a troubling precedent. We see the limitation of Section 2 in cases such as *Trinko*,⁸ *Amex*,⁹ and *Novell*.¹⁰

The Supreme Court's *Trinko* decision has had a chilling effect on lower courts' interpretation of the refusal to deal doctrine. In *Trinko*, a local exchange carrier incumbent breached its duty under the Telecommunications Act of 1996 to share its network with competitors. The opinion stated that the breach of this legal obligation did not give rise to a Section 2 claim, particularly where there was no prior voluntary course of dealing. *Trinko* did not actually overturn *Aspen Skiing*¹¹ or *Otter Tail*,¹² but defendants now commonly cite *Trinko* to support the proposition that a monopolist's right to refuse to deal is virtually unlimited.

Justice Thomas' majority opinion in *Amex* is similarly obfuscatory. The case involved a claim that the anti-steering policies included by some credit card banks in their agreements with merchants were anticompetitive. The majority opinion affirmed the Appeals Court's complex new balancing test for certain two-sided markets. This balancing test combined both sides of the platform into a single market to conduct a rule of reason analysis regarding whether the benefits outweighed the anticompetitive effects on the other side of the platform. Although Justice Thomas limited this test to certain types of two-sided markets—two-sided transaction platforms where the platform facilitates a simultaneous transaction with parties on both sides of the platform—it is a vague test. This vagueness is likely to result in further confusion as lower courts attempt to apply the test and digital platforms strive to use it as a shield. The application of the *Amex* precedent in the

⁸ Verizon Comm. Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

⁹ Ohio v. American Express Co., 138 S.Ct. 2274 (2018).

¹⁰ Novell, Inc. v. Microsoft Corp., 731 F.3d 1064 (10th Cir. 2013).

¹¹ Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

¹² Otter Tail Power Co. v. U.S., 410 U.S. 366 (1973).

Sabre/Farelogix case evidences how this standard can hamper the ability of courts to block anticompetitive mergers using the market definition standards set out in the non-merger opinion, and how confusing the standard actually is.¹³

Recent case law also creates uncertainty around the proper role for evidence of predatory intent in evaluating whether conduct is anticompetitive. For agencies evaluating conduct in dynamic markets, documents revealing the subjective views of key decisionmakers can be highly informative.¹⁴ However, at least with respect to some Section 2 claims, judges are increasingly willing to excuse defendants' conduct so long as they can provide some legitimate business purpose.¹⁵ The DOJ has recently endorsed this approach, at least for certain types of cases, in an amicus brief filed in the Seventh Circuit.¹⁶

While these cases generally do not explicitly rule out evidence of predatory intent, the reasoning in many gives little weight to this type of evidence.¹⁷ For example, in *Novell*, then-Judge Gorsuch reviewed a Section 2 claim against Microsoft. Microsoft had originally announced that it would offer software developers access to Windows 95 APIs prior to release, to allow developers to ensure that their applications were ready to run on Windows 95 when the operating system was released to consumers. However, Microsoft then reversed course and decided not to prerelease to developers in order to advantage its own applications. Judge Gorsuch concluded that this conduct did not amount to a violation of Section 2 and held that for refusal to deal and some other types of conduct by a monopolist, the burden is on the plaintiff to exclude a plausible legitimate business purpose. Or in Judge Gorsuch's words, "[p]ut simply, the monopolist's conduct must be irrational but for its anticompetitive effect."¹⁸

¹³ United States v. Sabre Corp., 1:19-CV-01548 (D. Del. April 8, 2020).

¹⁴ See Janith Aranze, *FTC seeks hot docs to assess nascent competition*, Global Competition Review (Jan. 24, 2020), available at <https://globalcompetitionreview.com/article/usa/1213387/ftc-seeks-hot-docs-to-assess-nascent-competition>.

¹⁵ See, e.g., *Novell, Inc.*, 731 F.3d at 1080; *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1134 (9th Cir. 2004); *Covad Communications Co. v. Bell Atlantic Corp.*, 398 F.3d 666 (D.C. Cir. 2005) (to be unlawful, refusal to deal must be "irrational" in the sense that the defendant sacrificed the opportunity to make a profitable sale only because of the adverse impact the refusal would have on a rival").

¹⁶ Brief for the United States as Amicus Curiae In Support of Neither Party, *Viamedia, Inc. v. Comcast Corporation*, 951 F.3d 429 (7th Cir. 2020) (advocating for a "no economic sense" test in refusal to deal cases).

¹⁷ See Gregory Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 Antitrust L. J. 413 (2006) ("In applying the no economic sense test, what matters are the objective economic considerations for a reasonable person, and not the state of mind of any particular decision maker.").

¹⁸ *Novell, Inc.*, 731 F.3d at 1075.

Trinko, *Amex*, and other Section 2 cases dealt with established markets (telecommunications, credit cards, etc.), which do not exhibit many of the same attributes as digital markets. Thus, courts should be cautious in applying their holdings to digital markets. I am confident in the breadth of the antitrust laws to properly investigate and enforce the law as applied to digital markets. However, the agencies need better analytical tools to address new issues and must be free of the limitations of narrow precedent that hampers rigorous court challenges and enforcement by the antitrust agencies. Agencies can support the development of new precedent by bringing cases strategically and providing novel forms of evidence of competitive harms gleaned through new analytical tools. Yet, such efforts alone might be insufficient if courts continue to apply troubling precedent and restrict liability under antitrust laws. It could fall upon Congress to override certain precedents if they persist as an obstacle to needed enforcement in the digital marketplace.

Specialized Legislation – As noted above, antitrust tools alone may be insufficient to address some of the issues particular to digital platforms. This industry may require specialized legislation to address some of its features that cannot be properly addressed using the antitrust laws. I support careful review of this option. As a start, policymakers should consider whether legislation should be adopted to address harms including privacy, fraud, and exploitation of the labor markets. Some of the measures instituted to promote competition in the telecommunications sector may be applicable to digital markets. Such measures include data portability, interoperability, and the implementation of new standards. However, some have noted that certain measures, such as data portability and interoperability, may only be suitable remedies for commoditized products and could actually cement dominance of other products in digital markets.

2. The adequacy of existing laws that prohibit anti-competitive transactions, including whether current statutes and case law are sufficient to address potentially anti-competitive vertical and conglomerate mergers, serial acquisitions, data acquisitions, or acquisitions of potential competitors;

The existing antitrust laws that prohibit anticompetitive transactions are also very broad. Section 7 of the Clayton Act prohibits mergers or transaction where the effect "may be substantially to lessen competition, or to tend to create a monopoly." However, the way those laws have been interpreted by the agencies and the efficiencies arguments utilized by parties and accepted by courts raises the question of whether the existing analytical tools used to evaluate mergers are sufficient.

Non-Horizontal Transactions – I applaud the repeal of the DOJ 1984 Non-Horizontal Merger Guidelines and the effort by the agencies to provide updated joint guidance. The DOJ and FTC should not miss the opportunity to provide greater clarity on the likely procompetitive benefits of vertical transactions, to develop the analytical framework used to evaluate such combinations, and to achieve consistency with other merger regimes outside the United States, particularly on the 20% safe harbor. As the agencies continue this review, I would also note that I generally do not embrace a conglomerate effects merger analysis, and I do not think the agencies should return to such an analysis.

Reviewing Transactions in Context – With respect to the review of either horizontal or vertical mergers, the agencies must have the resources and the mandate to consider acquisitions within the context of the broader acquisition patterns of dominant platforms. Consider the consent decree obtained by the DOJ in the *Google/ITA* case mentioned above. Based on the facts, the DOJ was concerned that by acquiring ITA, which was a necessary input for Google's competitors in the travel search market, Google would be able to foreclose competitors from the market or raise the price for rivals. Although I was recused from that matter, I think the DOJ would have greatly benefitted from access to documents from previous Google transactions, particularly the DoubleClick acquisition, which was reviewed by the FTC. With additional documents from the company, as well as access to the analysis conducted by the FTC in that transaction, the DOJ would have been able to conduct a more fulsome analysis of Google's plans. Potentially, access to more information may have led the DOJ to block the transaction rather than seek a consent decree. An agency cannot adequately assess the potential anticompetitive impact of a transaction when it does not have access to all relevant information.

Killer acquisitions in the digital markets have received a significant amount of recent attention from scholars and enforcers. Recent challenges to the acquisition of nascent competitors demonstrate that the agencies are actively pursuing these cases. In *PacBio/Illumina*, the parties abandoned the transaction after the FTC's challenge. The DOJ litigated *Sabre/Farelogix* under a nascent acquisition theory; however, the recent District Court Decision, which questioned the DOJ's market definition that established the parties as competitors, suggests challenges the agencies will likely face in litigating these cases involving the tech industry where the importance of innovation might make relevant markets more difficult to define.

Data acquisitions, which can take various forms, are also facing increased scrutiny from antitrust agencies. There is an increasing realization that at least part of the power of these platforms is derived from consumer data they have access to and monetize. In evaluating transactions that involve data and the acquisition of data, the DOJ and FTC need enhanced analytical tools to determine the competitive advantage that such data can provide. This analysis must acknowledge not all data is of equal value. Data's value results from the type of data, potential other sources of the data, and potential uses for the data.

The FTC 6(b) study should shed additional light on past serial acquisitions and acquisitions of nascent competitors in the digital markets and guide enforcement efforts regarding digital platforms going forward. Additionally, the FTC 6(b) study should also provide insights into how digital platforms have acquired data from small companies and how they viewed the importance and uses of such data. Any action by Congress should take into account the lessons learned from this important study.

3. Whether the institutional structure of antitrust enforcement—including the current levels of appropriations to the antitrust agencies, existing agency authorities, congressional oversight of enforcement, and current statutes and case law—is adequate to promote the robust enforcement of antitrust laws.

If asked to design a system of antitrust authorities from scratch, one would not likely design the system we have today in the United States, where merger review and civil enforcement of the antitrust laws is split between two agencies. The split responsibility creates serious issues around clearance, and which agency will review a given matter. Traditionally, the agencies have allocated cases based on their respective expertise in different markets. However, as new markets emerge in which neither agency has expertise, disputes over clearance become more common. According to recent testimony from AAG Delrahim, at least one clearance dispute in the past few years was settled by a coin toss. It should be noted that difficulties surrounding clearance have not only emerged under this administration. Lore is that at one point the agencies actually employed an arbiter to handle clearance.

As this Committee is carefully evaluating the role of the agencies in antitrust enforcement in the United States, it is an excellent opportunity to learn from other countries around the world by considering how different jurisdictions have designed their competition enforcement agencies. For example, in 2018, China combined three agencies—1) the Price Supervision and Antimonopoly Bureau of the National Development and Reform Commission, 2) the Antimonopoly Bureau of the Ministry of Commerce, and 3) the Antimonopoly and the Anti-Unfair Competition Bureau of the State Administration of Industry and Commerce—into one agency: the State Administration for Market Regulation.

We should be looking at options for rationalizing the institutional structure for antitrust enforcement and considering lessons learned from other jurisdictions, as well as the experience of other US agencies. Short of comprehensive institutional change, it is worth considering whether all matters involving digital markets should be reviewed by just one of the agencies. Digital markets are extremely complicated, and understanding these markets and appropriately applying the antitrust laws requires a significant investment in background knowledge. If one agency is selected to handle all competition concerns regarding digital markets, that agency would need to take responsibility to develop expertise in digital markets. That means the agency would need to devote the resources required to collate substantial background knowledge and develop innovative analytical tools.

Even if all antitrust activities are consolidated within one agency, this decision should not affect the resources available. The overall apportionment of resources and staff should remain the same or increase if the Committee determines a combined agency is the most efficient option for antitrust enforcement in the United States.

Again, thank you for the opportunity to answer these important questions. And please let me know if you have further questions or concerns.

Sincerely,

Sharis Pozen

Sharis Pozen