

Written Statement of Proposed Testimony

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Introduction

I would like to thank Chairman Nadler, ranking member Collins, Subcommittee Chairman Cicilline, Ranking Member Sensenbrenner, and the members of Subcommittee on Antitrust, Commercial, and Administrative for inviting me to testify at this hearing on online platforms and market power. I commend you for examining these issues that affect American consumers and the interests of U.S. businesses, both here and abroad. It is my hope that I can offer some helpful perspective, as former Acting Chairman and Commissioner of the Federal Trade Commission and a longtime antitrust practitioner, that will assist the Committee with this important effort.

In reaction to today's increasingly connected and technology-driven economy, there is a perception in some quarters that antitrust needs to change. Some have asserted that increasing business concentration has reduced competition across the economy;¹ that antitrust officials lack the tools to address competitive issues involving technology-enabled business models; and that antitrust should address the size and conduct of large firms, especially successful online platforms, regardless of whether it affects the competitive process.² In their view, current events have overtaken the hard-won political consensus that antitrust should principally focus on protecting consumers, and they urge changing the rules of antitrust to intervene more aggressively in markets to pursue a wide variety of goals other than consumer welfare.

Given the clear consumer benefits of technology-driven innovation, I am concerned about adopting an approach that will diminish the focus on consumer interests in the pursuit of other, perhaps even conflicting, goals. But believing that consumer welfare is the appropriate goal of antitrust does not mean being passive or embracing the view that antitrust in the pursuit of consumer welfare cannot be improved. Antitrust law has evolved as our understanding of market dynamics has gotten more sophisticated, and it should continue to adapt as we refine our predictive tools. If those tools suggest that competition will be harmed and consumers made worse off from the behavior of any firm, antitrust enforcers should act.

I have devoted much of my professional career to efforts to safeguard and foster competition, and I believe in its key role in fostering economic growth and innovation.³ As the Supreme

¹ Starting in 2016, some journalists and others observed industry census data; noted that concentration across certain broad industry classifications like retail, transportation, finance, and utilities had risen; and saw that firms' returns on invested capital had increased. From this information, they inferred that monopoly power was rising and called for stricter antitrust enforcement. However, industry classifications identified by the Census Bureau are not antitrust markets and shifting trends in concentration do not necessarily reflect lost competition. Some markets have diminishing long-run average-cost curves, while others produce dominant firms or oligopolies due to superior efficiency or innovation. The arguments about increased concentration overlooked those critical nuances, as well as other key factors. See Maureen K. Ohlhausen, *Does the U.S. Economy Lack Competition?*, 1 *Criterion J. on Innovation* 47 (2016). Other scholars also observed these shortcomings. See Carl Shapiro, *Antitrust in a Time of Populism*, 61 *Int'l J. Indus. Org.* 714-48 (2018); Gregory Werden & Luke Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration* (Apr. 5, 2018), available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3156912##.

² Recent calls to use antitrust to deconcentrate U.S. industry are not unprecedented. For an insightful, historical account, see William Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 *IOWA L. REV.* 1105 (1989).

³ If we wish to increase the amount of competition in U.S. markets, we should also not overlook the need to prune government regulations that inhibit entry, stifle business in red tape, and distort economic activity without offsetting gains. See Maureen K. Ohlhausen and Greg Luib, *Brother, May I?: The Challenge of Competitor Control Over*

Court recently observed, “Federal antitrust law is a central safeguard for the Nation’s free market structures.”⁴ And, in our system of limited government, it is appropriate that antitrust agencies look to the law as interpreted by the courts for guidance in pursuing their enforcement work. In fact, my experience as an antitrust enforcer suggests that a successful antitrust case rests on three pillars: a secure foundation in the law, a solid factual basis, and strong economic evidence of an anticompetitive outcome.

Thus, I firmly support regular evaluation of antitrust enforcement with the aim of improving its ability to predict, prevent, and address anticompetitive mergers and conduct in all sectors of the economy. Any assessment of the state of antitrust enforcement should necessarily entail an understanding of 1) antitrust law as interpreted by the courts, 2) the application of that law to particular types of anticompetitive behavior in defined markets, and 3) the boundaries between antitrust law and regulation.

I. What is an antitrust violation?

Turning to the legal standard, I will address the foundational issue of what is an antitrust violation. A defining quality of an antitrust violation is the elimination or weakening of a market constraint on a firm’s power to set the terms of its market interactions. This can be achieved through a collusive agreement among competitors, a merger between current or likely future competitors, or by the exclusionary conduct of a company with market power. We sometimes think of an antitrust offense in terms of anticompetitive effects, but, properly understood, it is how the scrutinized conduct affects the universe of market constraints facing the relevant firm. In other words, we examine the impact on the “competitive process” through which a firm makes its decisions on price, quality, and the need to innovate, among other terms. A good formulation of this concept as applied to a particular type of antitrust violation appears in the FTC & DOJ Horizontal Merger Guidelines.⁵

I do not mean to say, of course, that negative market outcomes are irrelevant in antitrust law. To the contrary, antitrust enforcers should direct their limited resources to areas where consumers are suffering from or are likely to experience harms such as higher prices, reduced quality, or fewer innovative offerings. In commentators’ zeal to scrutinize business conduct and protect consumers, however, sometimes simply the size or conduct of large players become synonymous with a problem that antitrust enforcement can solve.

Having identified a “problem” in the economy, some want to correct it by condemning certain observed behavior by large online platforms, even if that behavior did not lift a competitive constraint on the firm’s market power. But simply condemning a particular structure or term of dealing in markets with large online platforms divorced from its impact on consumers is not the

Market Entry, Oxford Journal of Antitrust Enforcement (2015). Available at SSRN: <https://ssrn.com/abstract=2670697> .

⁴ N. Carolina State Bd. of Dental Examiners v. Fed. Trade Comm’n, 135 S. Ct. 1101, 1109 (2015).

⁵ “Horizontal Merger Guidelines” (2010) at 2 (“A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives”), available at https://www.ftc.gov/system/files/documents/public_statements/804291/100819hmg.pdf .

purpose of antitrust.⁶ It is a regulatory action meant to reengineer market outcomes to reflect values other than market competition, such as fairness, consumer privacy,⁷ or the protection of small business. By contrast, antitrust violations involve a restraint, practice, or acquisition that removes a market constraint on a firm's behavior.⁸

This definition of antitrust hews to the core premise of the Sherman Act, which is our belief that a market economy, free of private restraints and unnecessarily burdensome regulations, produces superior outcomes over time.⁹ This is a time-honored idea; for example, in its 1978 opinion, *National Society of Professional Engineers*, the Supreme Court embraced the “assumption that competition is the best method of allocating resources in a free market[.]”¹⁰

The Supreme Court also clearly expressed this position in its *Trinko* opinion, which dealt with a lawsuit that accused Verizon of monopolizing a telecommunications market by not sufficiently interconnecting with competitive local exchange carriers.¹¹ Reversing the Second Circuit, the Supreme Court dismissed the antitrust claim, even though the compulsory-access requirements of the 1996 Telecommunications Act may have produced lower prices, greater output, and more varied choice for consumers. But liability did not turn on whether exclusion caused higher prices. Something more fundamental was at stake.

In the Court's view, markets encourage competition only if prevailing firms can reap what they sow. Taking away that prize would undermine the competitive process, replacing market forces with a more “competitive” market structure featuring low prices, but lacking incentives that drive investment in infrastructure, technology, and advancement.¹² Hence, the Court's famous

⁶ See, e.g., Carl Shapiro, *Antitrust in a Time of Populism*, 61 *Int'l J. Indus. Org.* 714 (2018) (“We learned long ago that proper antitrust enforcement is about protecting consumers, and protecting the competitive process, not about protecting competitors. We must not forget that guiding principle. Indeed, that principle is especially important in markets subject to large economies of scale, whether those scale economies are based on traditional production economies or based on network effects, which are often important in the tech sector.”)

⁷ See Maureen K. Ohlhausen & Alexander P. Okuliar, *Competition, Consumer Protection, and the Right [Approach] to Privacy*, 80 *Antitrust L.J.* 121,152-53 (2015) ([T]he application of competition law is appropriate only where the potential harm is grounded in the actual or potential diminution of economic efficiency. If there is likely no efficiency loss because of the conduct or transaction, another legal avenue for enforcement is more appropriate and efficient. Second, the scope of the potential harm also should aid in the choice of law. Antitrust laws are focused on broader, macroeconomic harms, mainly the maintenance of efficient price discovery in the markets, whereas the consumer protection laws are preoccupied with ensuring the integrity of each specific contractual bargain. These are complementary, but discrete, enforcement goals. Third, and finally, the available remedies must be able to address effectively the potential harm. Enjoining a merger may do little to prevent a privacy violation if the parties can simply share the same consumer information under a contractual arrangement.”)

⁸ That is not to say that non-pecuniary values are irrelevant to antitrust; antitrust protects the market process by which consumers express their preferences. See Maureen K. Ohlhausen, *Antitrust Over New Neutrality: Why We Should Take Competition in Broadband Seriously*, 15 *Colo. L.J.* 119, 133 (2017) (“Market forces and antitrust policy can . . . safeguard nonmonetary goals like free speech and openness, at least to the extent that consumers share those values.”)

⁹ See, e.g., *Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-08 (2004); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 694-95 (1978); *Rambus Inc. v. Fed. Trade Comm'n*, 522 F.3d 456, 464 (D.C. Cir. 2008).

¹⁰ *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695.

¹¹ *Trinko*, 540 U.S. at 403-05.

¹² *Id.* at 407-08.

observation that “charging . . . monopoly prices . . . is an important element of the free-market system.”¹³

In sum, antitrust enforcers should intervene only when firms are or are likely to corrupt the competitive process and gain or maintain market power through means other than competition on the merits, such as by colluding with rivals, merging with competitors to reduce competition, or, for a firm with market power, engaging in exclusionary conduct that does not benefit competition on balance. This allows antitrust to foster the incentives in our free market system that reward the players that best meet consumer demands, which over time leads to greater innovation in the economy.

II. How have enforcers applied antitrust law to particular anticompetitive behavior in defined markets?

Antitrust law’s focus on protecting the competitive process does not mean that it cannot reach many of the competitive concerns raised by today’s commentators, as long as there is sufficient factual and economic evidence of cognizable competitive harm under the antitrust laws. These concerns may include price effects, reductions in quality,¹⁴ and impacts on innovation, as well as the ability of a dominant player to acquire and neutralize a nascent competitor. I’d like to offer some facts and examples to show what U.S. enforcers have been able to accomplish in recent years.

Antitrust enforcers generally agree that mergers creating durable market power do not serve consumers well. Thus, the pace of merger enforcement at the antitrust agencies in recent decades has generally varied on the basis of overall economic activity rather than on the political affiliation of the administration. For example, during my time as the Acting Chairman, when the FTC had only one Republican member and one Democratic member, the FTC identified a total of 32 proposed mergers with significant competition concerns. Of these, the agency accepted a consent agreement to protect consumers in 19 cases, with the balance of these deals either abandoned in the face of our challenge or contested in litigation.¹⁵ At one point, the FTC had ten competition matters in active litigation at the same time, with three more on appeal, which approached historic levels of activity. And the action didn’t stop at merger review; the FTC also brought forward nine different conduct cases, including several challenging anticompetitive behavior by drug manufacturers.

I would like to highlight our challenge to the merger between CDK and Auto/Mate.¹⁶ The fact pattern was essentially a large, established firm with a substantial share of the market buying a

¹³ Id. at 407.

¹⁴ In the tech sector, reductions in quality could, in some circumstances, include factors such as reduced features, restricted consumer choice, or lessened control over privacy. See, e.g., Ohlhausen & Okuliar, 80 Antitrust L.J. at 133-34 (noting competition among online platforms and technology companies on their privacy protections).

¹⁵ See Federal Trade Commission & U.S. Department of Justice, Hart-Scott-Rodino Annual Report, Fiscal Year 2017 at 15-22, available at https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014_fy_2017_hsr_report_c.pdf; FTC Annual Highlights 2018, available at <https://www.ftc.gov/reports/annual-highlights-2018>.

¹⁶ In the Matter of CDK Global, Inc., a corporation; CDK Global, LLP, a limited liability company; Auto/Mate, Inc., a corporation; Robert Eustace, an individual; Elsa Eustace, an individual; G. Larry Colson, Jr., an individual; Michael Esposito, an individual; and Glen Eustace, a representative, Docket No. 9382, Public Administrative Complaint (Mar. 20, 2018), available at

relatively small upstart that had enjoyed some recent success and appeared poised to challenge the market leaders more aggressively. The market was concentrated and barriers to meaningful entry were substantial. To be sure, there was some current competition between the firms, but the greatest concern we identified during the investigation was the likely future competition that would be lost, should Auto/Mate be absorbed by CDK.

Some have questioned whether the existing antitrust paradigm can ever reach this kind of behavior, where a big player squashes or absorbs a promising upstart before it can ultimately grow into a more substantial competitor. The CDK-Auto/Mate action shows that the antitrust law can address this competitive issue if the facts and economic evidence support it. As a counterexample, the FTC was unsuccessful in challenging the Steris merger based on a loss of potential competition, which the court ultimately failed to sustain on factual grounds.¹⁷ Again, the three pillars are essential to successful enforcement, as they should be.

I'd like to say a few words about so-called "vertical mergers," which have been a hot topic in the antitrust world of late. A "vertical" merger is one in which the parties do not directly compete, instead operating on different levels of the supply chain. A classic example would be a manufacturer merging with its distributor or retailers selling its products, and there are many recent examples in the tech sector as well, including Apple's purchase of music-recognition app Shazam, and Google's acquisition of ITA Software and its flight-search engine.

The vast majority of vertical arrangements are pro-competitive.¹⁸ FTC Commissioner Christine Wilson, has convincingly laid out the reasons why: vertical deals eliminate no head-to-head competition in any market, create cost-saving benefits such as the elimination of double-marginalization, incentivize investment by aligning upstream and downstream incentives, and are confirmed to be typically procompetitive by retrospective analyses, such as those collected by the Global Antitrust Institute.¹⁹ Vertical mergers can, however, raise antitrust concerns when the parties gain an ability and incentive to foreclose their rivals from a significant portion of the market. Thus, as with horizontal mergers, vertical deals should be evaluated case-by-case based

https://www.ftc.gov/system/files/documents/cases/docket_no_9382_cdk_automate_part_3_complaint_redacted_public_version_0.pdf.

¹⁷ *FTC v. Steris Corp.*, 133 F. Supp. 3d 962 (N.D. Ohio 2015).

¹⁸ See, e.g., Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, *Handbook of Antitrust Econ.* 391–414, 409 (Paolo Buccirossi ed., 2008) (concluding from an empirical analysis that, "when manufacturers choose to impose [vertical] restraints, not only do they make themselves better off, but they also typically allow consumers to benefit from higher quality products and better service provision. . . . The evidence thus supports the conclusion that in these markets, manufacturer and consumer interests are apt to be aligned, while [government] interference in the market is accomplished at the expense of consumers (and of course manufacturers)") (alteration in original); James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 *Int'l J. Indus. Org.* 639, 662 (2005) ("Our review of the empirical evidence—which informs our priors—suggests that vertical restraints are likely to be benign or welfare enhancing."). The Supreme Court has adopted the prevailing economic learning. *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 889–92 (2007) (discussing and embracing key insights from the economic literature).

¹⁹ Statement of FTC Commissioner Christine Wilson, *Vertical Merger Policy: What Do We Know and Where Do We Go?*, at 3-5 (Feb. 1, 2019), available at

https://www.ftc.gov/system/files/documents/public_statements/1455670/wilson_-_vertical_merger_speech_at_gcr_2-1-19.pdf; see also Statement of D. Bruce Hoffman, *Vertical Merger*

Enforcement at the FTC, at 2-3 (Jan. 10, 2018), available at

https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf

on all the available evidence and not pre-judged based on the size of the parties or concerns outside of preserving market competition.

It is true that some technology-fueled markets, including but not limited to markets with online platforms, may present interesting analytical challenges to antitrust enforcers if they have significant network effects, high switching costs, and resulting barriers to entry. But these issues are not unique to these markets, and their implications have been well studied by economists and antitrust lawyers alike. They have also made their way into the body of antitrust case law over the past few decades, providing legal roadmaps for future enforcement cases. The necessary tools exist today to account for these market characteristics. However, reverting to my three pillars for successful enforcement, the mere presence of network effects does not necessarily support a conclusion of an anticompetitive market outcome.²⁰

Even with the best analytical tools and intentions, though, no enforcer can get it right 100% of the time, which is why I agree that occasional retrospective reviews of mergers and enforcement remedies are very important. And the agencies regularly undertake such reviews, probing the effectiveness of their past decisions and using that information to inform future enforcement. For example, in 2017 the FTC updated its divestiture study to examine seven years' worth of remedies, taking a hard look at whether each remedy succeeded in preserving competition.²¹ While the overall prognosis was positive, the results showed that FTC-approved divestitures of limited asset packages had a higher failure rate than divestitures of whole business lines. The FTC staff took that information to heart and used it immediately to apply more scrutiny to proposed asset packages in deals under review. A limited number of retrospectives of prior deals, using the best available economic analysis, could provide similarly helpful insights, though I would caution against doing this routinely as it would divert resources away from the important job of enforcement.

I should also note that the agencies can and do review already-consummated mergers and order divestitures when justified by the facts and law. This occurs most commonly in mergers that fall below the Hart-Scott-Rodino Act reporting thresholds, such as the 2008 Polypore-Microporous²² acquisition that was finally unwound in 2013 following a challenge by the FTC, and the Commission's current challenge to the Otto Bock/Freedom Innovations merger.²³

²⁰ See, e.g., Catherine Tucker, Network Effects and Market Power: What Have We Learned in the Last Decade?, *Antitrust Magazine*, Spring 2018, at 73 (“First, network effects do not imply entrenchment and can actually lead to quicker destabilization of a market leader position. Second, network effects tend to be quite localized, meaning that they tend to be less a function of an entire user base than a function of the scope of a user’s interactions in a digital ecosystem. Third, in some instances the addition of certain users to an ecosystem can have negative effects for the relative attractiveness of that platform. These shifts mean that it can no longer be assumed that the mere existence of network effects will lead to entrenchment.”) available at <http://sites.bu.edu/tpri/files/2018/07/tucker-network-effects-antitrust2018.pdf>.

²¹ Federal Trade Commission, *The FTC’s Merger Remedies 2006-2012* (Jan. 2017), available at https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

²² In the Matter of Polypore Int’l, Inc., FTC No. 081 0131, available at <https://www.ftc.gov/enforcement/cases-proceedings/081-0131/polypore-international-inc-matter>.

²³ In the Matter of Otto Bock HealthCare N. Am., Inc., FTC No. 171 0231, available at <https://www.ftc.gov/enforcement/cases-proceedings/171-0231/otto-bock-healthcarefreedom-innovations>.

But trying to “unscramble the eggs” through a divestiture remedy long after a merger has been consummated, or using a breakup as a remedy in a conduct matter, is a drastic step that carries serious risk of doing more harm than good for competition and consumers. As pointed out by the D.C. Circuit in the Microsoft case, the dissolution of an already-unified company is rife with “logistical difficulty,” and should be “imposed only with great caution, in part because its long-term efficacy is rarely certain.”²⁴ Such a remedy could actually reduce consumer welfare if the breakup leaves the company unable to innovate or with higher costs. As Frank Easterbrook noted many years ago, breaking up particularly innovative firms risks chilling innovation, because as “innovations and other forms of information become a larger and larger fraction of the cost of production, breaking up firms with substantial market positions imposes greater and greater costs” as the reward for all their R&D is dispersed.²⁵ Aside from practical concerns, divestitures in monopoly cases require a particularly “significant causal connection between the [challenged] conduct and creation or maintenance of the market power.”²⁶ I agree with my former FTC colleague, Commissioner Noah Phillips, that breaking up established companies, even those credibly accused of monopolistic conduct, is a “treatment [that] may be worse than the disease,” and should be a last resort for the most inveterate antitrust offenders.²⁷

The current state of antitrust law may in very limited circumstances allow for divestiture when a prior merger is demonstrably anticompetitive, but prophylactic enforcement is a much-preferred solution wherever possible. Whatever enforcement direction the agencies take, they should be careful not to create a kind of “antitrust double jeopardy” where previously cleared deals are subject to a “do-over” investigation solely due to a change in political winds. The primary focus should be on getting it right the first time, based on provable facts and sound economics, which will respect procedural fairness and better preserve benefits for consumers.

Mergers are not the only area of competitive concern and other recent enforcement efforts targeted firms using a dominant position to exclude competition, such as FTC’s action against McWane for exclusionary conduct against rival manufacturers,²⁸ as well as the DOJ’s continual efforts in the criminal sphere to uproot and squelch price-fixing and other antitrust conspiracies that deprive consumers of the benefit of competition.²⁹ In the latter category, the FTC and DOJ’s joint efforts to crack down on no-poach agreements that stifle wages and other employee benefits, including a new criminal enforcement policy, have built on the DOJ’s enforcement actions against numerous tech companies with anticompetitive “no cold call” agreements.

I believe antitrust can and should address such anticompetitive behavior by any company, including innovative technology companies, as set forth in the thoughtful D.C. Circuit opinion in the Microsoft matter.³⁰ Among other things, that case teaches that under current antitrust law a

²⁴ *United States v. Microsoft Corp.*, 253 F.3d 34, 80, 106 (D.C. Cir. 2001).

²⁵ Frank Easterbrook, *Breaking Up Is Hard To Do*, *The American* (Dec. 7, 1981), available at <https://www.aei.org/publication/breaking-up-is-hard-to-do/>.

²⁶ *Microsoft*, 253 F.3d at 106.

²⁷ Noah Phillips, *We Need to Talk: Toward a Serious Conversation About Breakups* (Apr. 30, 2019) at 14, available at https://www.ftc.gov/system/files/documents/public_statements/1517972/phillis_-_we_need_to_talk_0519.pdf.

²⁸ *In the Matter of McWane, Inc., and Star Pipe Products, Ltd.*, FTC No. 101 0080b, available at <https://www.ftc.gov/enforcement/cases-proceedings/101-0080b/mcwane-inc-star-pipe-products-ltd-matter>.

²⁹ See Department of Justice Antitrust Division, *Criminal Enforcement Trends Charts Through Fiscal Year 2018*, available at <https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts>.

³⁰ See *U.S. v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

dominant provider must maintain its position through legitimate competition on the merits, rather than through exclusionary conduct that has little or no purpose beyond disadvantaging rivals.³¹

The Microsoft decision stands for the proposition that monopolists can improve their products to better serve their customers just like any other market participant. But enforcers will not tolerate the use of market position to short-circuit competition on the merits. In essence, monopolists need to fend off their rivals the same way other firms do, by doing things better than the next guy. This standard leaves enforcers plenty of room to attack the kind of exclusionary conduct the antitrust laws are meant to address.

In sum, I believe that today's antitrust paradigm can confront meaningful competitive harm in the modern, digitally mediated economy but that antitrust enforcement should always turn on the specific facts of each individual case and the likelihood of actual consumer harm. Enforcers can and should bring cases in these areas when the interests of consumers are threatened and should continue to refine their tools to better identify when such consumer harm is likely to occur. Through this approach, enforcement can pursue the goal of antitrust as articulated by the Supreme Court, which is to protect free and open markets for the benefit of consumers.

III. What are the boundaries between antitrust and regulation?

Conversely, competition enforcers should not intervene simply because they dislike certain market outcomes. Antitrust is about protecting the process, not guaranteeing a particular result at a particular time. Our free market system rests on the conclusion that markets in which firms must endure competitive pressures will produce favorable outcomes in terms of price, output, quality, and innovation in the long run. But if some competitors seem to be winning the race at a point in time, we should not use antitrust enforcement to hamper them or to require them to compete less aggressively, as long as they are not corrupting the competitive process. As the Supreme Court observed in *National Society of Professional Engineers* even "occasional exceptions to the presumed consequences of competition" are not grounds for antitrust enforcement.³²

We should also carefully examine some of the assumptions made by those who would seek a more interventionist role for competition enforcement involving online platforms, which are present in many sectors. Perhaps the most troubling assumption here is that regulators can divine how new technologies should develop and where and how they should be used. Our enforcement agencies are specialists in analyzing and enforcing antitrust law, not in divining the next big innovation in technology-based offerings.³³

In considering whether to replace antitrust with a detailed regulatory structure, we should think about some of the subsidiary questions that would require the government to decide.³⁴ Can these

³¹ *Id.* at 58.

³² *Nat'l Soc'y of Prof's Eng'rs v. United States*, 435 U.S. 679, 695 (1978)

³³ The ability to predict the future success of any new product is highly uncertain even for the most sophisticated technology companies. See, e.g., Sean Ellis & Morgan Brown, *Hacking Growth, How Today's Fastest Growing Companies Drive Success* (2017), pp. 59-60 (noting the failure of Google Glass, Amazon's Fire Phone, and Microsoft's Zune music player).

³⁴ For an excellent discussion of the troubled history of regulatory capability to structure markets, see Christine Wilson, *Remembering Regulatory Misadventures: Taking A Page from Edmund Burke to Inform Our Approach to*

technology firms branch out into new markets, or must they narrowly focus on their original, core competency? When a technology company lowers prices, should that be permitted by regulators because it helps consumers or prohibited because it makes some other business less likely to succeed? How should a regulator weigh these effects against each other?

Also, even well-intentioned regulatory interventions can have unintended, substantial negative impacts on competition, as the recent adoption of the General Data Privacy Regulation (GDPR) in Europe demonstrates. A recent op ed by several economists described the results of their study on the impact of GDPR on investment in Europe, which found the observed effects on small technology firms “were immediate, pronounced, and negative.”³⁵

Furthermore, the U.S. has consistently been a strong voice globally in advocating for competition law to focus on consumer welfare goals and not to include other policy goals. I fear that abandoning this clear position in the U.S. will encourage regimes around the world to pursue industrial policy goals, such as favoring domestic industry, to the detriment of U.S. consumer and business interests.³⁶

Conclusion

I hope my remarks have provided some helpful context on the role of antitrust law in protecting competition, including in markets with online platforms. This nation’s antitrust enforcers have many tools in their arsenal to combat anticompetitive mergers and practices by any company, including platforms, but these tools are powered by the facts and evidence specific to each case,

Big Tech (June 28, 2019) available at

https://www.ftc.gov/system/files/documents/public_statements/1531816/wilson_remarks_biiel_6-28-19.pdf.

³⁵Jian Jia, Ginger Jin, Liad Wagman, The short-run effects of GDPR on technology venture investment, Jan. 7, 2019, <https://voxeu.org/article/short-run-effects-gdpr-technology-venture-investment>. The study is available at Jian Jia, Ginger Zhe Jin, Liad Wagman, “The Short-Run Effects of GDPR on Technology Venture Investment” (working paper, National Bureau of Economic Research, November 2018), <https://www.nber.org/papers/w25248>. (“EU technology firms, on average, experienced double-digit percentage declines in venture funding relative to their US counterparts after GDPR went into effect. At our aggregate unit of observation, EU venture funding decreased by \$3.38 million at the mean of \$23.18 million raised per week per state per crude technology category. This reduction takes place in both the intensive margin (the average dollar amount raised per round of funding, which decreased 39%) and the extensive margin (the number of deals, which incurred a 17% average drop). GDPR’s effect is particularly pronounced for young (0–3 year old) EU ventures, where an average reduction of 19% in the number of deals is observed. From the US Census data, we know business startups contribute substantially to gross and net job creation (Haltiwanger et al. 2013). If GDPR leads to fewer new ventures and less capital per venture, there could be fewer jobs as a result. Our back-of-the-envelope calculation suggests that the investment reduction for young ventures could translate into a yearly loss between 3,604 to 29,819 jobs in the EU, corresponding to 4.09% to 11.20% of jobs created by 0–3 year old ventures in our sample.)

³⁶ See Prepared Statement of the FTC Before the U.S. House of Representatives Committee on the Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law “International Antitrust Enforcement: China and Beyond” (June 7, 2016) (“We have long advocated that competition law be applied with the goal of protecting competitive markets and promoting consumer welfare, and to all market participants in a non-discriminatory manner. Using competition law for protectionist ends to promote a domestic competitor or industry would rob consumers of the intended benefits of competition law enforcement and undermine the legitimacy of the competition law system globally.”) available at

https://www.ftc.gov/system/files/documents/public_statements/953113/160607internationalantitrust.pdf

as they should be in our system of limited government. We should reflect very carefully before asking our enforcers to go beyond this well-established mission of antitrust.