

BEFORE THE
UNITED STATES CONGRESS

HOUSE JUDICIARY COMMITTEE

SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW

“PROPOSALS TO STRENGTHEN THE ANTITRUST LAWS AND RESTORE COMPETITION ONLINE”

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STATEMENT OF

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Chairman Cicilline and Ranking Member Sensenbrenner:

Thank you for the invitation to testify before the Subcommittee on the important questions raised by the subject of this hearing. The views presented in this Statement are my own personal views and are not intended to represent those of any other entity or individual, including the Global Antitrust Institute of the Antonin Scalia Law School, where I serve as Director of Competition Advocacy, and the Antonin Scalia Law School itself, where I am an Adjunct Professor.

The increasing success and importance of digital platforms throughout the economy have led to the expression of a variety of concerns. Some of these concerns involve the competitive conduct of the leading platforms. At present a variety of ongoing antitrust investigations and cases are attempting to address such concerns. On April 17, 2020, I submitted a letter responding to your March 13 request for my views on several questions involving the adequacy of our federal antitrust statutes and enforcement institutions to address antitrust issues arising in the digital economy. I hereby reaffirm the views expressed in that April 17 letter. This Statement essentially provides a brief summary of certain key points made in that letter.

In general, I believe that our current federal antitrust statutes and enforcement institutions are adequate to address competition issues arising in the digital economy. The principal antitrust statutes – the Sherman Act, the Clayton Act and Federal Trade Commission Act – are comprehensive in scope, prohibiting agreements “in restraint of trade”, “monopolization” and conspiracies and attempts to monopolize, as well as structural transactions (mergers, acquisitions and joint ventures) whose effect “may be substantially to lessen competition” or “to tend to create

a monopoly” in any line of commerce.¹ The enforcement methods available to challenge antitrust violations include criminal and/or civil prosecution by the Antitrust Division of the Department of Justice, civil and administrative proceedings by the Federal Trade Commission, as well as civil suits by any person injured (or threatened with injury) by an antitrust violation. States also have standing to enforce provisions of federal antitrust law (as well as their own antitrust statutes), and there is frequent coordination between state and federal antitrust enforcers.

The criminal investigation techniques available to the Antitrust Division are comprehensive and very powerful – *e.g.*, use of grand jury proceedings, surreptitious surveillance and leniency programs. Both the government and civil plaintiffs – including the States and the so-called “private attorneys general” – also have formidable civil investigation and discovery tools that can be used to pursue antitrust matters. The antitrust remedies are notoriously severe – up to 10 years incarceration for individuals guilty of an antitrust crime, and criminal fines that often range into the hundreds of millions of dollars for corporations under the Alternative Fines Statute. Treble damages in private civil litigation sometimes reach hundreds of millions or even billions of dollars in class actions. Equitable remedies up to and including divestiture (as applied to Standard Oil in 1911, United Shoe Machinery Corporation in 1968 and the Bell System in 1982) as well as detailed and strict limitations on business conduct are also available as remedies to government and private plaintiffs if an appropriate showing is made.

¹ Although the Federal Trade Commission is authorized to challenge “unfair methods of competition” as well as Clayton Act violations, the law is now well established that any violation of the Sherman Act is also an unfair method of competition under the FTC Act.

Regarding structural transactions, the Hart-Scott-Rodino Act requires parties to prenotify and await clearance from the federal agencies. Thousands of transactions are routinely reviewed, and a small but important fraction of those are investigated intensely and then either restructured or abandoned prior to consummation in light of agency concerns about possible negative competitive effects. The agencies are highly capable of litigating contested cases before the federal courts in order to stop anticompetitive transactions. Even transactions that fall below notification thresholds, and those that actually receive clearance after full HSR review, can be and are challenged successfully by the federal antitrust agencies.

In summary, federal antitrust law provides a wide variety of powerful and inescapable tools for the detection, prevention, deterrence and remedy of any anticompetitive conduct affecting the U.S. economy. Given these longstanding and highly effective provisions of U.S. law, individuals and business firms that are subject to the jurisdiction of U.S. courts are compelled to pay close attention to their antitrust compliance obligations. These observations are fully applicable to digital platforms and other firms participating in the digital economy.

A key feature of federal antitrust enforcement is its reliance on the process of common-law interpretation and application of the antitrust statutes by the federal judiciary. We are fortunate to have a federal judicial system that employs a wide variety of principles and practices that help to ensure that federal court decisions are made by impartial judges independent of the political branches. Article III protections for judges (Presidential nomination, advice and consent of the Senate, tenure during good behavior, no reduction in compensation) as well as extensive rules involving procedure, evidence, appeal and review, and rules of judicial conduct all

help to ensure that our judicial decisions are based on a thorough and balanced assessment of the facts and the law, free of personal bias or *ex parte*, political or other inappropriate influences.

While our basic antitrust statutes protect competition, they do not prescribe rules of decision that are sufficiently specific to resolve all individual cases. Over the 130 years since passage of the Sherman Act, the Supreme Court has refined its approach to antitrust interpretation through the common-law process. Early cases such as *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897), and *United States v. Joint Traffic Association*, 171 U.S. 505 (1898), established that cartel behavior – naked restrictions of competition – would be condemned automatically (*per se*), without regard to whether the resulting prices, output, quality or other competitive terms were reasonable. *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899), clarified that contractual restrictions ancillary to the main purpose of a lawful transaction are themselves lawful to the extent they are reasonable in scope. Then in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), and *United States v. American Tobacco Co.*, 221 U.S. 106 (1911), the Court established that the rule of reason – allowing competitive practices to be defended based on facts and circumstances of the particular case – would be the usual method of analysis for conduct falling outside the *per se* category established for cartel activity. In that same term the Court also included vertical price agreements among the list of *per se* illegal practices. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), *overruled*, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

Antitrust enforcement became a major issue in the Presidential election of 1912, immediately following the *Standard Oil* and *American Tobacco* decisions. The election of President

Woodrow Wilson led to enactment of the Clayton Act and the Federal Trade Commission Act in 1914, which added new enforcement modalities, clarified the application of antitrust law to structural transactions, and created a new antitrust enforcement agency, the FTC. Eventually, in FDR's second term as President, under the leadership of Assistant Attorney General Robert Jackson (later an Associate Justice of the Supreme Court) and his successor, Thurman Arnold, a more aggressive enforcement attitude began to permeate antitrust. With the strong encouragement of the government agencies, the use of *per se* rules and other presumptions of illegality began to proliferate.

Eventually such rules and presumptions spread to nearly every aspect of federal antitrust interpretation – all non-price vertical restraints, *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), both price and non-price restrictions contained in joint venture agreements, *United States v. Sealy, Inc.*, 388 U.S. 350 (1967); *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972), and a wide variety of intellectual property licensing restrictions. See, Remarks by Deputy Assistant Attorney General for Antitrust Bruce B. Wilson before the American Patent Law Association, “Department of Justice Luncheon Speech Law on Licensing Practices: Myth or Reality?” (Jan. 21, 1975). Although not denominated as *per se* illegal, the Supreme Court adopted strong presumptions of illegality for structural transactions, even for mergers involving competitively insignificant entities, *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966). Similarly, firms with monopoly power were presumed liable for monopolization, and had the burden to establish that their market positions had been “thrust upon” them, even for conduct considered “honestly industrial.” *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd mem.*, 347 U.S. 521 (1954).

The effect of these changes in substantive antitrust interpretation was to deprive antitrust defendants of most opportunities (all opportunities, when the *per se* rule applied) to defend their conduct based on the facts and circumstances of particular cases – for example, by showing lack of market power, absence of any anticompetitive effect, legitimate procompetitive business justifications for conduct – or to use economic analysis to explain why the impugned conduct might enhance competition. Indeed, in *Topco, supra*, the Court openly mocked the idea of using economic analysis. The effect of these increasingly strict antitrust rules was to limit the competitive vigor of firms engaged in U.S. commerce. During the late 1960's and 1970's the U.S. economy ran into noticeable headwinds. The economy experienced a period of “stagflation” – slow growth and persistent inflation – leading to the three “Nixon Shocks” of 1971 (a federally mandated wage and price freeze followed by a period of wage and price controls, imposition of a 10% surcharge on all imports, and permanent termination of dollar-gold convertibility). Major U.S. firms in important sectors – automobiles, machine tools and consumer electronic products – suffered significant declines due to emerging competition from firms in Asia and Europe.

Given these alarming U.S. economic trends, a broad variety of federal policies came under scrutiny in the 1960's and 1970's, including antitrust enforcement. The widespread use of *per se* rules and other adverse presumptions came under analysis and criticism by legal and economic scholars and antitrust practitioners. Presented with this new learning, beginning with *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), the Supreme Court became more receptive to efforts by those accused of antitrust violations to defend their conduct based on economic analysis and the facts and circumstances of the particular case. Eventually, the *per se* rules were again limited to naked cartels, and heavy presumptions against the legality of structural

transactions and procompetitive conduct by firms with monopoly power were mollified. A consensus emerged within the antitrust enforcement community – the federal agencies, antitrust practitioners, American businesses, antitrust scholars and antitrust economists – supporting the fundamental principles adopted by the Supreme Court: that antitrust law is for the protection of vigorous competition, not individual competitors, and that antitrust rules should be formulated so that businesses are allowed to defend particular practices – based on specific facts and circumstances as well as sound economic analysis – that do not tend to restrict competition.

As a result of these refinements of the substantive interpretation of the basic antitrust statutes, the U.S. economy has experienced a lengthy period of extraordinary innovation and economic growth. Many other shifts in federal policy also contributed to this success: strengthened intellectual property protection, reduction or elimination of sectoral economic regulation by administrative agencies such as the Interstate Commerce Commission, Civil Aeronautics Board and Federal Communications Commission, as well as adjustments in federal macroeconomic policies. However, since antitrust enforcement provides the main standards for competitive conduct throughout the private economy, these refinements in substantive antitrust interpretation must be given a significant share of the credit for the long period of unprecedented economic success that the U.S. has enjoyed.

With its emphasis on the protection of competition and the use of sound economic analysis rather than legal formalism, the Supreme Court has proven capable of adapting antitrust standards for effective application to new business practices in light of developments in technology and industry structure. Specifically, with regard to digital platforms and other aspects of the digital

economy, it has been shown repeatedly that the existing tools and principles of antitrust enforcement are sufficiently flexible to incorporate new economic understandings and to govern new forms of competition. The unique economic and competitive characteristics of multi-sided markets were initially recognized by Professor William F. Baxter, President Reagan's first Assistant Attorney General for Antitrust, as a result of his extensive study of four-party payment systems (electronic funds transfer systems and credit card systems). William F. Baxter, Bank Interchange of Transactional Paper: Legal and Economic Perspectives, 26 J.L. & Econ. 541 (1983). As further refined by other legal and economic scholars, these insights led to the correct application of the current antitrust statutes to the activities of Microsoft Corporation in two government Sherman Act lawsuits, *United States v. Microsoft Corp.*, Civil Action No. 94-1564 (SS) (D.D.C.; Competitive Impact Statement available at <https://www.justice.gov/atr/competitive-impact-statement-us-v-microsoft-corporation>), and *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc), and in a major lawsuit against one of the leading credit-card systems. *Ohio v. American Express*, 585 U.S. ___, 138 S. Ct. 2274 (2018).

Thus, as explained more fully in my April 17 letter, U.S. antitrust statutes and enforcement institutions are well-adapted to handle competition problems emerging in the digital economy. I have also recommended two initiatives to further improve our antitrust enforcement system so that anticompetitive practices are correctly identified and eliminated, while assuring that procompetitive conduct is not excessively burdened by inappropriate forms of public intervention. Specifically, I support the recommendation made in the March, 2017 Report and Recommendations by the International Competition Policy Experts Group (of which I was a member) to establish and fund a dedicated office within the Executive Branch to identify and eliminate foreign-jurisdiction

antitrust enforcement practices that limit competition and innovation by U.S. firms. Of greatest concern are those non-U.S. antitrust regimes that incorporate standards and objectives in tension or conflict with dynamic free-market competition (*e.g.*, protection of local competitors or promotion of “national champions”), or that unduly restrict the procedural defense rights of business firms that are subject to antitrust investigations and cases. Second, I support efforts to ensure more effective separation of prosecutorial and adjudicative functions within the Federal Trade Commission, such as designating the Director of the Bureau of Competition as an officer of the Executive Branch, with appointment and supervision of the Director similar to those applicable to the Assistant Attorney General for Antitrust.

Thank you for the opportunity to testify in this important hearing. I look forward to answering any questions you may have.