



March 18, 2021

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 Ken Buck
Ranking Member
Subcommittee on Antitrust,
Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

RE: Subcommittee hearing on strengthening the laws to address monopoly power

Dear Chairman Cicilline and Ranking Member Buck:

Consumer Reports is pleased the Subcommittee is considering changes and clarifications to the antitrust laws, and other policy proposals like interoperability, non-discrimination, and limiting self-preferencing under appropriate conditions. These are required to meet the challenges confronting an increasingly concentrated marketplace which forces consumers to choose among too few options – and too often, bad options.

As your investigation and staff report starkly illuminated, the online marketplace is not working as it should for consumers and those who seek to reach them. Choices at all levels of the supply and distribution chain are essential to enable a functioning marketplace. A handful of dominant platforms are obstructing this healthy competition in the online marketplace, abusing their power as gatekeepers. But there is a similar profound imbalance of power throughout the economy.

In a functioning competitive marketplace, consumers are empowered with the leverage of choice, the ability to go elsewhere for a better deal. That motivates businesses to be responsive to consumers' wants and needs, offering better choices, more affordability, and spurring innovation. (In the online marketplace, that includes better privacy and security protections for consumers' personal information.) But today, sellers of essential products and services are increasingly able to offer consumers one choice – take it or leave it. Consumer spending is the engine that drives the economy, yet consumers are being denied a fair voice.

Areas where the antitrust statutes need a course correction, to restore their effectiveness consistent with Congress's original intent, include mergers, exclusionary conduct, affirming the

broad definition of the consumer welfare standard, and clarifying that market definition is not a strict requirement, but rather is one tool for understanding the presence or absence of competitive constraints. These changes can be best accomplished by grounding these sensible changes in well-established antitrust principles and terminology.

Merger enforcement

As to merger enforcement, restoring its potency means reaffirming the “incipiency standard.” As the Supreme Court explained, Congress intended to give enforcers:

... authority for arresting mergers at a time when the trend to a Lessening of competition in a line of commerce was still in its incipiency. Congress saw the process of concentration in American business as a dynamic force; it sought to assure ... the power to brake this force at its outset and before it gathered momentum.¹

This purpose is embodied in the 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” (emphasis added).

But the courts have effectively read the “may” right out of Section 7. The standard has devolved instead into something tantamount to requiring the government to prove demonstrable, imminent, quantifiable harm to a virtual certainty. This has led to examining mergers in isolation, with blinders as to what’s on the horizon. Unmistakable trends are disregarded until they have already reached the point where one more merger is demonstrably too many – right up to the brink of immediate harm. No margin for error, or for a key player later deciding to close shop and fundamentally altering the assumptions on which the decision to permit that last merger was based.

We’ve seen one risk of this short-sighted brinksmanship in the COVID pandemic, where supply chains suddenly gave out, exposing our overreliance on too few suppliers for critical products and inputs. This critical aspect of competition has been underappreciated in the quest to diminish its values to just economic efficiency in the immediate term.

We need to reaffirm and revive the incipiency standard, so that merger enforcement can look not just at the immediate obvious result, but look down the road, and where possible, around the corners, and give appropriate consideration to foreseeable effects under market conditions that may now be only on the horizon, but are clearly in view.

We also need to reaffirm and clarify the longstanding presumption that acquisitions by the largest corporations that already have significant market power are anticompetitive and unlawful, subject to a clear showing that they are not.

¹ Brown Shoe Co. v. United States, 370 U.S. 294, 317-18 (1962).

Exclusionary conduct

The prohibition against anticompetitive exclusionary conduct – against a dominant corporation harming competition by sabotaging the ability of others to compete, by cutting off access to critical supplies or customers or distribution – has been hampered by court-imposed constraints on two fronts.

First, the prohibition against anticompetitive conduct by one corporation acting alone is found in section 2 of the Sherman Act, the prohibition against monopolization or attempt to monopolize. The courts have interpreted this to require, at a minimum, proof that the exclusionary conduct has a “dangerous probability of success” in creating a monopoly.² As a result, corporations that clearly have enough market power to cause harm to competition, and are clearly harming it, are not subject to the prohibition.

Second, various theories have been put forward, and have gained currency in the commentary and the courts, to explain why such exclusionary conduct does not make business sense for a corporation even when it has the power to engage in it, and so a claim that it is occurring should never be seriously entertained. Instead, whatever appears to be happening is explained away as some kind of routine business decision, and the apparent harm to competition as logically impossible. These explanations erect a bulwark of theory against common-sense consideration of concrete empirical evidence of actual harm.

Both these obstacles to taking enforcement action against harmful exclusionary conduct warrant correction by Congress.

The course corrections for mergers and for exclusionary conduct need to be accompanied by a substantial increase in enforcement resources. Over the past four decades, the economy has grown astronomically, and the largest corporations have higher stock value than the GNPs of many countries. And yet the budget for antitrust enforcement has not kept pace. Antitrust enforcement actions are expensive, and can take years. Enforcers need sufficient resources to provide effective deterrence.

As the Subcommittee considers appropriate clarifications and measured reforms as outlined above, we encourage you to keep two broader points in mind: supposed efficiencies cannot and should not excuse a harmful merger; and the consumer welfare standard does not mean short-term benefits for consumers at the expense of all the short- and-long terms benefits that competition brings to everyone, including but by no means limited to consumers.

Supposed efficiencies – or “synergies” – are at the core of the case made for virtually every merger proposal, in the submission to the enforcement agencies, and in the public relations campaign. These claims need to be assessed with skepticism, but too often they are not. Instead,

² *E.g.*, *Spectrum Sports v. McQuillan*, 506 U.S. 447, (1993).

it is assumed that anything that might decrease costs for the merged corporation, or increase its capabilities, can offset concerns about harmful effects on competition. This is a fundamental misconception about efficiencies. As the Merger Guidelines make clear, efficiencies are relevant only when they are demonstrated to result in an otherwise unlawful merger instead actually *increasing* competition in the *marketplace*.³

As to the consumer welfare standard, as a leading consumer organization, we naturally view the benefits of antitrust through a consumer-oriented lens. We fully agree that consumers belong at the forefront of the beneficiaries of an open, competitive marketplace. But ours is a wide-angle lens.

Properly understood, consumer welfare is an all-encompassing look at *all* the ways consumers benefit from having meaningful choice in a competitive marketplace, in the short term and the long term. As the Supreme Court has stated:

All elements of a bargain – quality, service, safety, and durability – and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.⁴

Moreover, we appreciate that consumer welfare ultimately benefits from competition at *all levels* of the production and distribution and marketing chain. And that means sufficient numbers of independent companies, and workers, at all those levels, because that’s what generates the choice for consumers. There is absolutely no tension between protecting choice for workers, suppliers, farmers, producers, and creators, and protecting it for consumers. Indeed, they all go necessarily hand in hand.

These reforms to the antitrust statutes are necessary, but will not be sufficient in the online marketplace. Alphabet/Google, Amazon, Apple, and Facebook are among the most powerful companies in the world today, not only because they’ve bested the marketplace, but because they’ve become the marketplace. Addressing their entrenched dominance will require consideration of additional legislative changes to enable a market structure where competition can emerge and grow, and to ensure that firms with market power operate with a duty of care for consumers.

Consumer Reports supports the following complementary reforms to restore competition in the digital economy:

- Imposing non-discrimination requirements to limit self-preferencing by dominant online platforms.
- Requiring interoperability under appropriate conditions to lower barriers to entry and enable effective consumer choice among alternatives.

³ Horizontal Merger Guidelines, at 29-31, <https://www.justice.gov/atr/file/810276/download>.

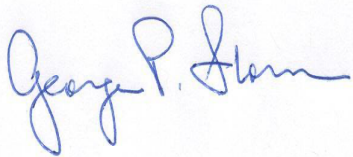
- Limiting a dominant platform’s ability to use a consumer’s personal information to further entrench its dominance, by limiting use to what is reasonably necessary for delivering requested services to that consumer.
- Prohibiting abuses of superior bargaining power to impose unfair commercial conditions on businesses or consumers such as discriminating against consumers who do not consent to or who opt out of secondary data collection and usage.

We also support the FTC playing a more active role to set rules for the online marketplace using its delegated rulemaking authority under Section 5 of the FTC Act. The FTC should use its APA rulemaking authority to designate specific practices as “unfair methods of competition” to enable more effective enforcement against them. This competition rulemaking should address the persistent market dominance, abuse of dominance, and gatekeeper power of online platforms evidenced in the House Antitrust Subcommittee staff report.

For the marketplace to be working for consumers, it has to be working for all who seek to reach them. It has to be working for everyone.

Throughout our 85-year history, Consumer Reports has emphasized the critical importance of sound antitrust laws and effective antitrust enforcement for promoting competition and all the benefits it provides. Our survey last summer confirmed that consumers do not have confidence that the online marketplace is working for them, and they support corrective action by Congress.⁵ We look forward to working with you as you consider how to best ensure that the online marketplace works for consumers, for businesses big and small that seek to serve their needs, and for all who seek to reach them on the internet.

Sincerely,



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Consumer Reports



Sumit Sharma
Senior Researcher, Technology Competition
Consumer Reports

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

⁵ https://advocacy.consumerreports.org/press_release/consumer-reports-survey-finds-that-most-americans-support-government-regulation-of-online-platforms/.