United States Senate Judiciary
Subcommittee on Antitrust, Competition Policy, and Consumer Rights

"Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms."

Questions for the Record for Diana Moss
Submitted by Senator Richard Blumenthal
October 8, 2019

1. According to a recent study by the Washington Center for Equitable Growth, the 16 criminal antitrust cases brought in 2018 were the lowest number filed since 1990. While merger filings were 80 percent higher in 2017 than in 2010, enforcement actions did not increase. In your own analysis, you point out that of the 200 reportable Big Tech merger transactions, only nine received a second request for more information from the DOJ or FTC. And of those, only one deal was challenged in federal court – the Google-ITA Software, Inc. matter.

    a. How do you explain this trend? What has gone wrong? Have the enforcement agencies become afraid to enforce the nation's laws?

Response: AAI's forthcoming midterm report on antitrust enforcement under the Trump administration will contain statistics and analysis on enforcement rates by the DOJ and FTC. Our data shows a significant fall-off in Section 1 enforcement over the past two years. We also see a weakening in the rates of second requests and challenges in Section 7 enforcement across both agencies. Moreover, another important metric of federal antitrust enforcement, agency advocacy, has fallen off in key areas since 2017.

AAI believes the decline in enforcement under the Trump administration -- relative to the more vigorous enforcement under the Obama administration -- reflects a return to ideology that gives excessive deference to the claimed benefits of anticompetitive conduct and mergers and spurs lax enforcement of the antitrust laws. As has been demonstrated by empirical evidence of declining competition and rising concentration, the adverse effects of lax enforcement are felt by consumers, workers, entrepreneurs, and imperils our market system.

    b. Do the FTC and DOJ need additional resources?

Response: Federal antitrust agencies and sector regulators with competition mandates (e.g., FERC, FCC) should be given additional resources to enforce the antitrust laws and fulfill their statutory responsibilities, respectively. Resource constraints for the antitrust agencies are revealed in any number of ways, most markedly through their ability to litigate only a small number of cases per year. This constraint likely raises the agencies' perceived risk of litigation and could cause them to stop short of moving to block harmful mergers and to bring cases *involving abusive conduct. In the area of mergers, the practical effect of such restraints is to settle more challenged merger cases with potentially ineffective remedies. This is problematic because in some cases, the most effective remedy is to block a merger. Moreover, despite DOJ's messaging in AT&T-Time Warner confirming the well-known disadvantages of conduct remedies, we continue to see the DOJ and FTC continue to accept such remedies (e.g., firewalls and other behavioral restrictions).*

c. Do the FTC and DOJ need additional legal tools?

2. In a number of mergers over the past decade, the FTC has declined to take certain enforcement steps due to mistaken industry forecasts. For instance, In the Google/Ad Mob merger in 2010, the FTC issued a closing statement basing its approval on two stunningly incorrect predictions. First, that Apple would quickly become "a strong mobile advertising competitor," and second, that another firm would develop a smartphone to compete with the Apple iPhone and Google Android. These were both wrong.

a. Would retrospective merger reviews in big tech would be useful in the FTC's antitrust enforcement efforts?

Response: Yes. Retrospective merger reviews have already proven vitally important in developing an empirical record that demonstrates the adverse effects of previous mergers. These studies should play a significant role in informing merger policy moving forward, particularly as more studies emerge on the effects of successive mergers in concentrated markets. Codification of a policy on merger retrospectives is, in AAI's view, a central piece of sensible, constructive merger reform. But the mechanism for accomplishing this (e.g., new legislation and/or agency guidance) and the details of how retrospectives are performed have yet to be worked out. Namely, what template should be used to perform consistent retrospective analysis? Who will perform retrospectives (e.g., the agencies themselves, scholars, etc.)? How will questions of access to confidential data be resolved? And how will the agencies provide guidance on the use of retrospectives in merger enforcement?

b. Do you think these mistakes occurred because of the presumption in current antitrust enforcement that mistakenly blocking a competitive merger is worse than mistakenly allowing an anticompetitive merger to go forward?

Response: Yes. "Error cost" analysis has played a central role in enforcers' forbearance from enforcing the antitrust laws. Weak enforcement in certain sectors (e.g., digital technology, agricultural biotechnology, wireless telecommunications, healthcare), particularly against the backdrop of rising concentration and vertical integration, provide the empirical "evidence" of policies that give excessive deference to efficiencies claims.

3. Under the Hart-Scott-Rodino Act (HSR Act), merging companies are only required to

report their merger to the FTC and DOJ if they reach certain thresholds. Currently, if the size of the transaction is below $90 million, they do not need to report the merger to the agencies.

a. Is the FTC missing any anticompetitive mergers due to the current HSR thresholds?

Response: The average value of merger transactions has escalated steadily over time. Corresponding increases in the HSR thresholds seems a logical response to such increases, given constraints on agency resources. However, this relationship ignores other important developments that bear directly on merger activity and enforcement. For example, market entry in many industries is driven by entrepreneurial activity, including the now institutionalized "start-up" model. The value of many start-ups falls below the HSR reporting thresholds. Indeed, of the over 700 acquisitions made by the five largest digital technology companies over the past three decades, only a small fraction were reportable. But as discussion at the subcommittee's September 24th hearing revealed, acquisitions of startups by large digital platforms can have outsized effects on competition, consumers, and markets. Start-ups play a central role in other industries as well, including agricultural biotechnology (e.g., digital farming, healthcare, and content and distribution). Thus, there is a strong argument for a fresh look at the HSR thresholds for adjustments that reflect these changes.

b. Should the FTC require Facebook, Apple, Amazon, or Google to report any proposed merger or acquisition to the agency, regardless of size?

Response: Yes. While they may not all be reportable, the pattern of acquisitions by the largest digital technology players should provide important information for enforcers, policymakers, and legislators as to how markets are changing and corresponding changes in incentives and abilities to exercise market power. Recently, the AAI submitted comments to the Federal Energy Regulatory Commission encouraging the agency to continue to collect information on mergers and acquisitions, even if they fall below the size thresholds. The antitrust agencies have the ability and resources to track this important information.

4. The United States and European cases against Microsoft demonstrate that antitrust enforcement against technology firms can invigorate innovation. It is widely believed that the Microsoft antitrust case fostered new competition in the browser and operating system markets that gave rise to Google and Facebook. A crucial fact pattern of this case was Microsoft's attempts to use its control over Windows to stifle other internet browsers and promote Internet Explorer. In response, European regulators required Microsoft to publish information that would allow competitors to be interoperable with its products, not just with internet browsers, but across a wide range of prominent Microsoft services. Interoperability between platforms and products is now key to Microsoft's consumer business strategy.

a. Should the FTC and DOJ be pursuing interoperability mandates when it finds anticompetitive practices in the tech sector?

Response: Interoperability requirements to address competitive issues involving some digital technology markets are within the realm of remedies that could be considered *by the antitrust agencies. Whether the agencies pursue them or not will be determined by a number of factors. However, developing interoperability protocols or setting other standards that facilitate rivals' nondiscriminatory access to a digital platform requires significant economic-engineering perspective and collaboration between enforcers, industry, and other stakeholders. For example, interoperability remedies have been used in regulated industries such as electricity and telecommunications, but they have been developed by regulatory agencies with deep technical and institutional knowledge of technologies and markets. Interoperability is also a conduct remedy that does not change incentives to exercise market power and is subject to interpretation, violation, and compliance monitoring. Economic theory on the limitations of conduct remedies, and growing evidence on their limitations should strongly inform the use of interoperability remedies in antitrust cases.*

i. How would that shape or promote competition?

Response: Interoperability requirements are designed to ensure that rival technologies or applications can interact with a platform in the same way that the platform owner's technologies or applications interact. Interoperability can be one key feature of a nondiscriminatory access regime that promotes competition on the platform. However, as explained above, there are significant considerations associated with developing interoperability requirements. Mostly important, they are only a part of a more comprehensive regulatory nondiscriminatory access regime.

ii. What types of markets or products should the antitrust regulators be focusing on for interoperability mandates?

Response: Enforcers are likely to pursue interoperability requirements in markets where there are strong incentives to exclude rivals. This includes the markets in which large digital platform owners compete in the sale of products or services on their own platform. Examples include advertising, retailing, and search.

iii. What types of conduct would be appropriate for an interoperability remedy?

Response: Interoperability remedies target conduct designed to prevent rivals from access to inputs or distribution (obtained through the platform) that impairs their ability to reach consumers. Examples of such conduct include, but are not limited to, denying rivals access to a digital platform; discriminating between rivals in interoperating on the platform (e.g., price or quality) in ways that raises their costs; or requiring some rivals to agree to conditions of access that impairs their ability to compete on rival platforms.

b. When the FTC and DOJ have used interoperability as a remedy in the past, has it been effective at promoting competition?

Response: The antitrust agencies have attempted to craft nondiscrimination-type conditions as part of consent orders in past merger cases (e.g., Comcast-NBC Universal, Google-ITA

Software, Monsanto-Delta and Pine Land). But these fall short of technical and operational interoperability conditions that would be promulgated by a regulatory body. The agencies have also offered comments to other agencies on interoperability and competition (e.g., the FTC and healthcare data) as part of their advocacy efforts. Antitrust enforcers and the courts are not well-suited to serving as oversight authorities and compliance enforcers for conduct-type remedies in general. In addition to their superior effectiveness in preserving competition, this is a major reason why structural remedies should be favored. And, as discussed above, the agencies lack the expertise that would be required to establish an effective interoperability regime. However, given the challenges posed by digital technology markets, antitrust enforcers should work together with other agencies that have purview over more regulatory access-type regimes in order to craft comprehensive solutions that tap into multiply policy tools (e.g., antitrust, social regulation, etc.)

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American Antitrust Institute Questions for the Record Submitted October 8, 2019

<u>QUESTIONS FROM SENATOR BOOKER</u>

1. The metaphor of data as "the new oil" is somewhat inaccurate,[1] but there is no denying that venture capital investors oftentimes evaluate startups based on their ability to access or build data sufficient to extract rents, and gain insights into which competitors to copy, buy, or block.

    a. What is the best metaphor for the role data play in the platform economy?

Response: Data as the "new oil" focuses on consumer data as a major driver for e-commerce, particularly given the importance of such data in leveraging the value proposition across digital ecosystems. However, this view somewhat ignores the role of data as a primary metric of "exchange" in digital markets. Instead of dollars, consumers pay in the form of their time, attention, and information. Similar to the exercise of market power when price is the metric of exchange, consumers' experiences in digital markets can be driven by the misuse or abuse of their data. This concept of data is far more complete than viewing it simply as a fuel for e-commerce because it captures both raw data and processed data (e.g., using artificial intelligence (AI), data analytics, and business intelligence (BI) tools) as a source of market power.

    b. How important is it for a startup to have the data in the first place, compared with being able to invent with the research and infrastructure necessary to develop and cultivate those data? Which is the bigger barrier to entry?

Response: Data is a critical input for many participants in digital technology markets. But processed data (using AI, BI, and data analytics) is an equally if not more important input because of the significant valued added component. Some digital technology startups actually produce the technologies that facilitate data collection and processing. But other startups that provide services and products often rely on them as critical inputs that are necessary to ultimately reach consumers. In such markets, lack of access to data and data processing capability can be a significant barrier to entry. Whether data or data processing is the larger of the two depends on the markets at issue and competitive dynamics within those markets. Of particular concern, however, should be large digital players that have a market position in both data and data processing.

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[1] *See, e.g.*, Antonio García Martínez, *No, Data Is Not the New Oil*, WIRED (Feb. 26, 2019), https://www.wired.com/story/no-data-is-not-the-new-oil.

2. I have focused extensively on how millions of American workers are limited in their ability to switch jobs because of "noncompete" and "no poaching" agreements—contractual provisions that forbid employees from leaving their job, and working for a competitor or starting their own business.[2] These provisions have been shown to reduce employee motivation, entrepreneurship, and knowledge sharing, all of which are integral to fostering innovation and growth.

   There are similarly restrictive contractual provisions throughout the tech platform industry— namely, exclusive contracts and loyalty contracts—that can be used to exclude nascent competitors. For example, long-term contracts that prohibit advertisers from using new entrants can stifle demand from that new provider, causing them to exit the industry prematurely. Similarly, contracts between platforms and advertisers that provide for individual negotiation can keep incumbents from losing unique targeted sales to new competitors without requiring the incumbent to lower prices across the board.

   a. There is a very strong case to be made that no-poaching agreements are unfair trade practices in violation of Section 5 of the Federal Trade Commission (FTC) Act. Should the FTC consider a rule banning these agreements?

Response: Yes.

   b. Are there potential efficiency benefits that make it particularly difficult to challenge this behavior under existing antitrust law?

Response: The types of conduct described above are unlikely to generate any legitimate efficiencies that would, under an antitrust rule of reason analysis, justify exclusion of rivals. This is particularly true in situations where an incumbent: (1) owns and competes on its own platform and uses such conduct to defend a market position and (2) where rivals that interoperate on platforms have few alternative outlets for reaching consumers. The second of these questions is subject to fact finding and analysis. However, these situations closely resemble the practices of monopoly network owners in other industries, which have the subject of antitrust enforcement and regulation for decades. There is no practical difference between these cases and restrictive practices involving the digital technology markets.

   c. Do the current safe harbors for "short-term" exclusive dealing arrangements capture the market power of dominant platforms, which, arguably, do not need long-term contracts to create the desired outcome from their partners?

Response: Any safe harbor for unilateral firm conduct -- whether defined by the term over which the conduct is exercised or market share thresholds -- should be scrutinized carefully. This is particularly true of firms with significant market shares and in markets with high

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[2] *See, e.g.*, Cory Booker, *The American Dream Deferred*, BROOKINGS INST. (June 2018), https://www.brookings.edu
/essay/senator-booker-american-dream-deferred; Office of Sen. Cory Booker, Press Release, Booker, Warren Introduce Bill To Crack Down on Collusive "No Poach" Agreements (Feb. 28, 2018), https://www.booker.senate.gov
/?p=press_release&id=760.

concentration. It is also true in the case of digital technology markets, which display economic phenomena such as network effects, strong incentives to leverage market power across an ecosystem, and winner-take all markets. Justifying safe harbors under such circumstances should be extremely difficult, if not impossible.

3. As we navigate the contours of crafting federal privacy legislation, one of the most intense recurring debates centers around interoperability provisions, i.e., the ability of consumers to control the use of the information they provide on one service on another service.

    a. What kinds of data should be portable?

Response: Perhaps the most difficult question posed by portability proposals is the difference between raw consumer data and processed consumer data. While a consumer should retain the rights to his/her own raw data, more difficult is the question – should it ever be legally decided – of whether processed data is proprietary to the firm and therefore not subject to portability regulations. Because processed data and data processing capabilities are significant sources of market power and barriers to entry, high priority should be given to assessing this distinction in crafting legislative proposals.

    b. Generally speaking, how would a law giving consumers control of their data affect the viability and valuation of nascent tech companies?

Response: Should a data proprietary/portability law be passed, financial markets will internalize the effect of such a law in establishing a market value for all companies (incumbents and entrants) for which data and data processing are critical assets or inputs. Since data and data processing are important inputs that can affect the viability of entrants and smaller rivals, portability requirements would likely have an impact on them. However, much depends on what types of data are the subject of regulation and what portability requirements ultimately take shape. The process of establishing these parameters – much like in any other industry that relies on critical inputs (e.g., natural gas as a fuel for electricity, healthcare professionals as key inputs in hospital market, etc.) – will require thought and care so that portability requirements promote a level playing field, as opposed to entrench incumbent interests.

    c. Does the FTC, as currently constructed, have the resources to effectively manage a behavioral remedy that mandated data sharing from bad actors?

Response. No.

4. The field of behavioral economics seemingly provides answers to everything from why tech platform alternatives are not simply "just a click away" to why giving users more granular privacy controls can actually incentivize more reckless sharing. The explanatory power of behavioral economics seems apparent, and yet our traditional enforcement agencies do not account for it in their analyses.

    Why is that? What, specifically, can be done to change it?

Response: We see the role of behavioral economics in antitrust analysis expanding, albeit slowly. There remains a robust debate about the underlying assumptions, empirical evidence, and potential role of behavioral economics in antitrust. The agencies could play an important role in moving this process along by gathering more information on behavioral economics applications to antitrust analytics and outcomes through agency roundtables or conference.