CPI's North America Column Presents:

CPI TALKS...
... *with Senator Mike Lee*

Senior U.S. Senator for Utah

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CPI COMPETITION POLICY INTERNATIONAL

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In this edition of CPI Talks, we have the pleasure of speaking with Senator Mike Lee, senior U.S. Senator for Utah, and Chair of the U.S. Senate Judiciary Committee's Subcommittee for Antitrust.

Thank you, Senator Lee, for sharing your time for this interview with CPI.

1. **You recently published an op-ed entitled "*Just one agency should enforce antitrust law"* and have made other public statements criticizing the lack of coordination between the Federal agencies entrusted with antitrust enforcement in the U.S. How would you reform the U.S. antitrust enforcement system? For example, should the FTC's powers be transferred to the DOJ, or *vice versa*? Or would you envisage another body entirely?**

I doubt there is anyone who looks at our convoluted system of federal antitrust enforcement and says, yes, this makes a lot of sense. Both Chairman Simons and AAG Delrahim acknowledged as much at the Antitrust Subcommittee's oversight hearing last September. They both admitted that having two federal agencies responsible for civil antitrust enforcement was less than ideal. It's inefficient, results in confusion as to what the federal government's actual position is on these important issues, and, I'm sad to say, leads to bureaucratic pettiness as the agencies waste time and resources jockeying for position rather than focusing on their mission.

Unfortunately, this is the mess we find ourselves in today. But, Washington being Washington, no matter how nonsensical something may be to all observers, it is often still difficult to fix. I suspect that the inherent difficulty in tackling dual enforcement is why the Antitrust Modernization Commission declined to make any recommendations on this issue when they examined it years ago.

Ideally, we would have a single agency responsible for civil antitrust enforcement. But which one? Both agencies have a long history enforcing these laws. Both are filled with hard-working and talented lawyers and economists. Both have their pluses and minuses. As a practical matter, moving all civil antitrust enforcement to the DOJ would probably be the cleanest fix. But picking the Antitrust Division would likely face the most political opposition.

The Federal Trade Commission also has attributes that recommend it, including having bi-partisan commissioners and broader experience as a competition policy agency rather than just as a law enforcer. It also has been more active than the Antitrust Division in bringing both merger challenges and monopolization cases. But, the FTC has its own issues. For one, the FTC, like other administrative agencies, operates outside of the framework provided for in the Constitution. I also disfavor the use of administrative litigation, at least where the Commission votes out a complaint and later sits as judge and jury on that same matter. Then there is the issue of rulemaking authority. Liberal activists would like to dictate antitrust policy by bureaucratic rulemaking rather than through the common law, and they're simply waiting for a politically opportune time to pursue that agenda within the FTC. For all of these

reasons, you couldn't simply move all civil antitrust enforcement to the FTC without also making some fundamental changes to how that agency operates. So, no, I don't have a proposal just yet.

In the meantime, however, I think the DOJ and FTC should do their utmost to reduce the problems that arise from having a bifurcated system of civil antitrust enforcement. At a minimum, the agencies should refrain from investigating the same matters as each other. As I've said before, there is no practical way to split a monopolization investigation of the same company across the two federal antitrust agencies. This will inevitably result in duplicative efforts and possibly opposite outcomes. The DOJ and FTC have no business coming to Congress asking for more funding when they're wasting resources by replicating the work each other is doing.

To that end, the clearance process should run much more smoothly than it does currently. Legislation to fix the clearance process might be a lighter lift than moving all civil enforcement to one agency. It wouldn't be as efficient, but it could at least address some of the issues that spring from having dueling federal agencies policing the same beat. The idea would be to constrain the time the agencies take on clearance, which often unnecessarily delays review of mergers, and eliminate some of the bureaucratic turf battles I mentioned earlier.

2. **Do you think that the current antitrust laws and standards are adequate to deal with concerns in the modern economy? Recent years have seen breakneck technological development, which has brought about unprecedented economic and social change. These concerns have been voiced in detail in recent Congressional and FTC Hearings, and many other public fora. In light of the available evidence, do you think the current antitrust toolkit is fit for purpose (perhaps with some adjustments), or do you think new legislation is required?**

While much concern has been voiced about the state of antitrust law, I don't think anyone has made the case that these laws and our long history of jurisprudence in this area are incapable of tackling today's pressing competition issues. Technological developments can certainly require enforcers to revisit how they think about competition in certain markets, but this has been a common theme across the history of antitrust. Just about every significant technological change has ushered in disruptive economic and social change. Fortunately, the antitrust laws are general enough that they have the flexibility to adapt to these changed circumstances.

This is not to say, though, that we can simply assume that our theoretical and economic toolkit doesn't require some tweaking. The beauty of grounding antitrust enforcement in evidence-based economics is that we can expect to see shifts in how we apply these laws when our understanding of various economic phenomena advances. So, while I have yet to see evidence that we need legislation to fill some gap in our approach to these antitrust issues, or that we need to take a drastically different approach to applying these laws to new technologies, we do need to recognize how the fundamental nature of these new technologies may require adjustments to the analysis of certain antitrust issues.

My primary concern is with those who seek to jettison the objective, economics-based approach that antitrust has developed over the past 40 years or so and return us to a less rigorous, and inherently political, way of addressing these issues. These proposed solutions would seriously undermine the administrability of antitrust. We would end up with antitrust enforcement by bureaucratic fiat. This would not serve the interests of consumers, but would instead benefit those who make such decisions and the special interests that have their ear.

3. **In recent years, large tech "platform" companies have routinely been accused of so-called "self-preferencing," both in the U.S. and internationally. Concretely, this can take many forms, such as a search engine prominently displaying its own ads, an online shopping business prominently displaying its own offers, or a streaming video provider prominently displaying its own productions to users. How, in your view, should potentially harmful self-preferencing be distinguished from the legitimate expression of a business' choice to vertically integrate? If self-preferencing is, in fact, potentially harmful, what kind of remedies do you think should be used to counter it?**

This is an important issue, which is why the Antitrust Subcommittee has scheduled a hearing in March to learn more about this topic. As a general matter, neither vertical integration nor self-preferencing is a problem in and of itself. Indeed, both can provide consumers with real benefits. I also think some of the criticisms of platform self-preferencing often play fast and loose with market definition, such that critics mistakenly treat a platform as the market itself.

What concerns me is where it appears that a platform is combining self-preferencing with tactics that further disadvantage competing products or services. It's one thing to promote one's own product and to highlight it for the consumer. It's another thing to simultaneously take steps that essentially diminish a competitor's product or service, especially where the consumer would be unaware of what was happening behind the scenes.

Given that self-preferencing can be pro-competitive in some circumstances and anti-competitive in others, I would not favor the drastic structural remedies being proposed by some critics. Platforms should not be banned from providing products or services on their own platform. But antitrust enforcers should be on alert to investigate and respond to problematic conduct.

Let me just add one other point, though. Often lost in the discussion about the alleged harms from vertical integration is that the platforms, by virtue of their own vertical integration, create an economic ecosystem that enables other businesses to avoid having to vertically integrate themselves. These companies, many of them quite small or perhaps even just individuals, can utilize the various services these platforms provide so that they can focus on their core business. This has created opportunities for thousands upon thousands of small businesses to flourish by marketing to consumers that they otherwise would have been unable to reach. Platform critics, however, often miss this point. They simply assume you can heavily regulate or even break up these platforms and it won't have detrimental effects on the businesses they claim to be championing.

4. **Finally, the technology sector in general has recently come under enhanced scrutiny due to a variety of political, social, and economic concerns. At a political level, disparate actors are calling for enhanced antitrust enforcement against large technology companies as a result, even though, arguably, many of the perceived harms fall outside the domain of antitrust enforcement as it has been conducted in recent years. Even if there is no need for reform of the underlying laws, do you think that calls for reorientation of existing enforcement priorities are legitimate? Alternatively, do you think that appropriate sector-specific legislation or regulation would be warranted at a Federal level?**

First, let me say that I share many of the concerns that critics of Big Tech have raised. If you're inclined to balk at Big Government possessing all kinds of deeply personal information about you, then you also should be wary of private companies having that same information. Currently, these tech firms seem intent on using this information just to help other companies pitch you to buy stuff. But, that could change in the future. Look at what is happening in China with their social credit system, which uses personal data, with the aid of private tech platforms, to control citizens' behavior. It's like something out of *A Clockwork Orange*. So, yes, I think this is an area that needs to be looked at seriously. I just don't think antitrust is the right tool for addressing many of these issues.

But your question also goes to the point I raised earlier about my concerns with those who want to use antitrust as a Swiss army knife policy tool to tinker with the economy to refashion it as they see fit. This is the mentality behind calls to abandon the consumer welfare standard. Critics are using bi-partisan concerns about Big Tech as a vehicle to advance this agenda. I fear that some centrists and conservatives fail to see the end game here. As a result, they're letting their legitimate concerns with Big Tech color their views on what is the appropriate province of antitrust enforcement. But, as I noted earlier, abandoning our economics-based approach would turn antitrust enforcement into an inherently political activity. This would have repercussions not only for the tech sector, but for the entire economy, since antitrust is a blunt policy instrument.

While the antitrust center may currently be on solid ground, it still needs to be defended. This isn't a defense of the *status quo*, however. As I noted earlier, antitrust enforcement may need some tweaking to account for the specific challenges posed by these new technologies. Any change, however, needs to be well-founded and based on the facts and economics. Unfortunately, much of the public discussion of antitrust is often led by those who either scream that the sky is falling or claim that all is well. We need to hear more from those in the antitrust center who want to keep antitrust from being refashioned completely but recognize that proper enforcement needs to address potential abuses that can arise given the economic realities characteristic of platform markets.

5. **Antitrust enforcement is a global phenomenon. Just as the U.S. Sherman Act inspired foreign antitrust laws, developments (in terms of enforcement, legislation, and published studies and inquiries) abroad can have a profound impact on U.S. companies, even in their domestic activities. By analogy, in terms of privacy laws, the European General Data Protection Regulation has had a profound impact on U.S. tech companies, and has also inspired similar legislation in the U.S., such as the California Consumer Privacy Act ("CCPA"). Should U.S. Federal legislators and regulators attempt to reassert "thought leadership" over developments in antitrust law to better ensure coordination and that appropriate standards are used worldwide?**

It is critical that the United States be at the forefront of legal and economic thinking on antitrust issues. As your question notes, if the U.S. isn't vocal in this space, the world won't simply sit still. So, yes, we should work to ensure better international coordination on antitrust enforcement. That said, much of what has been done elsewhere in terms of antitrust enforcement is not necessarily consistent with how we approach these issues in the United States. This means that while the US should reassert itself as a thought leader, we can't just simply adopt the policies of our more interventionist partners.

It also shouldn't be lost on anyone that the interventionist competition policies of other nations often are incorporated within a broader industrial policy aimed at creating national champions. Some enforcement actions in these jurisdictions may have less to do with concern for consumers than they do in giving domestic businesses a leg up versus their international competitors.

This shouldn't be misunderstood, however, as me saying the U.S. should be preaching that we need less enforcement. A competitive marketplace requires effective antitrust enforcement. We shouldn't be pro-enforcement, *per se*. Rather, we should be pro-consumer. That means we need smart enforcement, grounded in objective economic analysis. Interventionist antitrust enforcement that is poorly conceived could have serious long-term effects on the economy and consumers. In particular, we should be wary of pursuing antitrust policies that could undermine the innovation that has long served as the growth engine of the American economy. And, as I noted earlier, we can't afford to return to an antitrust policy based on the subjective political and social goals of unelected bureaucrats, influenced by utopian ideas or special interest groups.