

May 19, 2020

Dear Chairman Cicilline and Ranking Member Sensenbrenner:

Thanks to you both and to the other members of the Subcommittee on Antitrust, Commercial and Administrative Law for the opportunity to submit comments concerning whether our existing antitrust laws, enforcement policies, judicial interpretation and funding are up to the challenges posed by competition in the digital marketplace and elsewhere in our economy.

By way of brief background, antitrust has been the principal focus of my career. On three different occasions I served in the U.S. antitrust enforcement agencies: from 1975 to 1980 in various positions at the Federal Trade Commission; from 1995 to 1999 as Director of the Bureau of Competition at the FTC; and from 2013 to 2017 at the Justice Department where I was Assistant Attorney General for Antitrust for 3-plus years and then Acting Associate Attorney General from April 2016 until January 2017. When not in public service I was a partner at Arnold & Porter in Washington, D.C. Since January of this year I have been a Visiting Fellow at the Brookings Institution.

I write from the perspective of someone privileged to have served on the front lines of antitrust enforcement. I have seen where enforcement has been successful and a force for good. I have also seen where antitrust, for reasons I will discuss, has fallen short and failed to protect consumers and competition as much as it can and should.

My submission makes four basic points: (1) to be effective and embraced by the courts, antitrust enforcement needs to be based on an analytically sound, fact-based framework; (2) but we cannot let the perfect be the enemy of the good, and many courts hold enforcement to an effective standard of proof that is unrealistic and inconsistent with the plain language of our antitrust statutes; (3) the antitrust agencies should be advocates for a more robust approach to enforcement, but if the courts are unwilling to step back from bias against the risk of over-enforcement, legislation may be the only way of resetting the balance; and (4) more resources are needed if antitrust enforcement is to fulfill its role as the economic cop on beat.

I begin with my views on certain positive aspects of modern antitrust enforcement. The criticism voiced by many in the late 1960s, 70s and 80s was that antitrust lacked a consistent analytical framework and failed to apply advances in industrial organization economics to determine what behaviors threatened injury to competition and consumers. Justice Stewart's famous 1966 dissent in *Von's Grocery* ("The sole consistency that I can find is that in litigation under § 7 [of the Clayton Act], the Government always wins.") succinctly captured that critique.<sup>1</sup> Bork's "Antitrust Paradox" and other Chicago School devotees elaborated on it in the 1970s and 80s.<sup>2</sup>

What resulted was more rigor in antitrust analysis, enforcement and judicial decision-making. Enforcers and the courts disciplined themselves to make sure that each enforcement action told a credible story of economic harm from the behavior being challenged. The antitrust agencies developed enforcement guidelines for mergers, intellectual property licensing, defense industry consolation, competitor collaborations, innovation, among others, that explained when certain

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<sup>1</sup> *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966). <https://tile.loc.gov/storage-services/service/ll/usrep/usrep384/usrep384270/usrep384270.pdf>.

<sup>2</sup> Bork, Robert H. *The Antitrust Paradox: A Policy at War with Itself*. Free Press, 1978.

behaviors and mergers caused or risked injury to competition and consumers.<sup>3</sup> And over time the courts welcomed at least the merger guidelines as providing helpful explanations of how our antitrust laws should be applied in a late 20<sup>th</sup> and early 21<sup>st</sup> century economy.

The executive and legislative branches, whether led by Republicans or Democrats, were mostly on the same page. As a result, for the last 30 years or so, antitrust enforcement has been largely nonpartisan, driven by the widely shared view that harm to consumers and competition should be the predicate for challenging conduct. And that is a good thing. Analytically sound and fact-based antitrust enforcement, as I testified at my nomination hearing before the Senate Judiciary Committee in 2012, provides the public, the business community, the courts and the legislative branch with some assurance that it is the merits that count – not political ideology, whim or the desire to pick winners and losers in the economy.<sup>4</sup> And it helps explain why there have been only modest pendulum swings in competition enforcement over the last few decades. Consistency and predictability enhance the credibility of antitrust enforcement.

That said, looking back at the application of that rough consensus gives cause for concern. The legitimate goal of analytically sound and fact-based enforcement has morphed into an overly cautious approach by the courts and to some extent by the enforcers themselves. In the 1980s and through the mid-1990s, the courts seemed hostile to most government challenges. Few mergers were blocked. Challenges to unilateral conduct by dominant firms were infrequently brought and rarely successful. Consolidation increased to worrisome levels across many sectors of the economy, including hospitals, retail, manufacturing, telecommunications, insurance and the travel industry. Vertical relationships between upstream suppliers and downstream distributors began to be treated as invariably efficient and procompetitive. We went from an antitrust culture where “the government always wins” to one where enforcers almost always lost, or where fear of losing caused the government not to act at all.

That turned around to some modest extent in the late 1990s as the government succeeded in convincing the courts to block consolidation among office supply superstores and drug wholesalers and to sustain challenges to efforts by firms like Microsoft and Toys R Us to dominate markets by limiting opportunities for rivals to compete.<sup>5</sup> Those modest successes continued over the last two decades as the courts came to appreciate the anticompetitive impact of hospital consolidation and “pay for delay” agreements between brand name and generic pharma manufacturers.

But looking back at the cases where the government prevailed in the last 20-plus years helps explain why concentration in markets has increased and why that long-standing consensus on enforcement is under attack. Invariably in those cases where the government won an antitrust challenge, the government’s evidence was overwhelming. It was clear-cut. Mergers blocked by the courts involved horizontal mergers to monopoly or near monopoly. Anticompetitive conduct challenges were less frequent and less often successful. In close cases the government typically lost, or the

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<sup>3</sup> “Antitrust Enforcement Guidelines for International Operations.” U.S. Department of Justice and Federal Trade Commission, April 1995. <https://www.justice.gov/atr/antitrust-enforcement-guidelines-international-operations>.

<sup>4</sup> Nomination of William Joseph Baer, of Maryland, Nominee to be Assistant Attorney General, Antitrust Division, U.S. Department of Justice: Hearing before the Judiciary Subcommittee on Antitrust, Senate, 112<sup>th</sup> Cong. (2012).

<sup>5</sup> *United States v. Microsoft Corporation*, 253 F.3d 34 (D.C. Cir. 2001); *Toys “R” Us, Inc. v. Federal Trade Commission*, 221 F.3d 928 (7<sup>th</sup> Cir. 2000).

enforcers never brought the case in the first place, out of fear that the courts would rule against and as a result make it harder to win the next case.

Why? In my view the fear of getting it wrong warped antitrust enforcement. That is my fundamental concern with the state of antitrust enforcement today. It is too cautious, too worried about adverse effects of “over enforcement” (so called Type I errors). The attitude that any uncertainty should result in inaction has caused many courts to demand a level of proof that is often unattainable. Judge Easterbrook in 1984 articulated the view that underenforcement was much preferred to the risk associated with antitrust enforcement that challenged conduct that risked harm to competition and consumers but where we lacked a near certainty that the harm was there.<sup>6</sup>

That overly cautious approach has largely defined antitrust enforcement for the last 3 decades. And, as Bob Pitofsky and his co-contributors explained in his 2008 book “How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on Antitrust,” the result is that too much current or potential future conduct that poses antitrust risk has gone unchallenged by enforcers or unremedied by the courts.<sup>7</sup>

We need to promote innovation, reward success, protect intellectual property and allow mergers and acquisitions that will make markets more efficient. Those are givens. But we should not succumb to the frequently made argument that the threat of a government antitrust challenge will cause firms not to invest in new ideas or strive to be successful if in individual cases the government challenges and the courts find certain behavior or a proposed acquisition to be injurious to consumers and competition. There no evidence to support the view that enforcers should act and courts should find a violation only when shown clear and compelling evidence of antitrust harm.

Indeed the effort to avoid Type I errors has had the practical and perverse effect of effectively raising the burden of proof in an antitrust challenge. Black letter law says that in a civil antitrust case, the government or a private plaintiff must prove a violation by a *preponderance of the evidence*. That simply means showing that something is more likely than not. But many courts seem to be requiring a much higher level of certainty.

Take for example a government merger challenge under the Clayton Act.<sup>8</sup> Section 7 requires the government to show that the proposed transaction “*may* be substantially to lessen competition, or *tend* to create a monopoly.” Read literally the burden on the plaintiff is merely to show by a preponderance of the evidence that there is a risk competition will be lessened. Indeed, in a Federal Trade Commission preliminary injunction proceeding, the required showing is even less. Yet, that is not how most courts analyze the facts and law when refusing to enjoin mergers challenged by antitrust enforcers.

Last month, a district court judge in Delaware decided a DOJ merger challenge to the acquisition of Farelogix by Sabre.<sup>9</sup> Both firms are involved in the sale of seats on airplanes, albeit their roles and

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<sup>6</sup> Easterbrook, Frank H. “Limits of Antitrust.” 63 Texas Law Review 1 (1984).

[https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2152&context=journal\\_articles](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2152&context=journal_articles).

<sup>7</sup> Pitofsky, Robert. *How the Chicago School Overshot the Mark: the Effect of Conservative Economic Analysis on U.S. Antitrust*. Oxford University Press, 2008.

<sup>8</sup> Clayton Act, 15 U.S.C. § 12. <https://www.law.cornell.edu/uscode/text/15/12>.

<sup>9</sup> *U.S. v. Sabre Corp.*, 2020 WL 1855433 (D. Del. 2020).

business models differ. The court refused to enjoin the transaction. It did so despite the court finding that:

- The two firms see each other as competitors, key competitors in many respects;
- Indeed, Farelogic was uniquely positioned to offer airlines and passengers a competitive alternative to booking through Sabre;
- Sworn testimony by Sabre’s executives that Farelogix was not a competitor and that the acquisition was not intended to eliminate a competitor were not credible; its documents showed otherwise;
- If the merger is allowed, “Sabre will have the incentive to raise prices, reduce the availability of [Farelogix’s products], and stifle innovation.”<sup>10</sup>

How did the court square its refusal to enjoin the transaction with these findings? It simply raised the government’s burden of proof, concluding that DOJ had not proven that the merger “*will*” harm competition. That approach does not square with the plain language of the Clayton Act. The statute, as noted above, speaks in terms of transaction which “*may*” lessen competition in a significant way or “*tend*” a market toward monopolization. Yet court decisions like *Sabre* mean the government effectively has to show it “*will*” injure competition. A look at other court merger decisions in recent years finds a similar tendency to ignore the Clayton Act mandate to prevent against risks to future competition and to hold the government to a near impossible standard.

Reversing that trend and avoiding risks that acquisitions may reduce competition will go a long way towards addressing criticism of the effectiveness of merger enforcement in the U.S. It will avoid creeping increases in competition in antitrust markets. And it will empower the enforcement agencies to be more assertive in challenging acquisitions of nascent competitors, potential entrants and those in vertical relationships where the combination risks reduction in competition.

That same bias against the risk of over-enforcement has resulted in court hostility to monopolization challenges under Section 2 of the Sherman Act. As well put in the Joint Response to this Subcommittee by twelve experienced antitrust scholars and former public servants, “[the antitrust laws, *as interpreted and enforced today*, are inadequate to confront and deter growing market power in the U.S. economy... [emphasis added].”<sup>11</sup> We need, as they argue, to take a fresh look at behavior by dominant firms that has the purpose and effect of limiting the ability of actual or would-be competitors to offer meaningful alternatives to those with monopoly or near-monopoly power. That concern manifests itself increasingly in high tech markets, where network effects make it more likely that the market will “tip” in the direction of one provider. Antitrust enforcement needs to be able to examine and challenge conduct that on balance allows dominant firms to unfairly maintain or enhance their market power.

So where do we go from here? One strategy has the antitrust enforcers developing new policy guidance in areas such as vertical mergers, standard essential patents and high tech platforms to nudge the courts towards a less skeptical view of the need for assertive enforcement. The joint DOJ/FTC

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<sup>10</sup> *Ibid*, p. 3 (Stark, L.P.).

<sup>11</sup> Baker, Jonathan B., et al. Joint Response to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets, 116<sup>th</sup> Cong. (2020). <https://equitablegrowth.org/wp-content/uploads/2020/04/Joint-Response-to-the-House-Judiciary-Committee-on-the-State-of-Antitrust-Law-and-Implications-for-Protecting-Competition-in-Digital-Markets.pdf>.

Horizontal Merger Guidelines have, as I noted earlier, have over time increasingly been relied on by the courts as providing a framework for determining whether the combination of two rivals risks harm to consumers and to competition.

There are at least two reasons to doubt whether reliance on that strategy will be sufficient. First, it took years for the courts to embrace the soundness of the merger guidelines, indeed more than a decade. Can we afford to wait that long? Second, there is no guarantee that the courts will embrace that new guidance. The mindset that antitrust enforcers are more likely to be wrong than right, and that as a result, we should at all costs avoid the risk of over-enforcement, is pretty well-entrenched in antitrust jurisprudence. Absent some further direction from Congress, those biases are unlikely to change.

So I think the Subcommittee is doing the right thing by taking a hard look at changes to current law that will encourage the courts and empower the antitrust enforcers to be more assertive in challenging conduct and consolidation that risks creating or enhancing market power. These changes need not be dramatic. By incorporating presumptions that certain behaviors are likely to reduce competition, by making it more clear that showing a risk of a reduction in competition is sufficient and by emphasizing that anticompetitive effects are not limited to price effects, but include quality and innovation competition, Congress can make a meaningful difference.

The other thing Congress can and should do is provide adequate resources to the antitrust enforcement agencies. Today we are not doing that, not by a longshot. A recent report by Michael Kades of the Washington Center for Equitable Growth found that in real dollar terms we are spending 18% less on antitrust enforcement than in 2000.<sup>12</sup> Officials at the Antitrust Division tell me the organization ended fiscal year 2019 with just 594 employees, compared to 795 employees at the same time 10 years early. This, as Kades notes, is occurring in the context of significant growth in the economy over that same time.

The dollars and resources need to be increased for a number of reasons. First, as I have discussed, the courts today place a high burden on the government to prove an antitrust violation. That means the enforcers need to devote significant resources to investigating and proving their cases, including extensive document reviews, witness interviews and depositions and expert opinion – industrial organization economists and others. It is time-consuming; it is expensive; and it is resource-intensive. As an example in 2016 the Antitrust Division challenged two proposed mergers that would have dramatically consolidated the health insurance industry: Anthem’s proposed acquisition of Cigna and Aetna’s effort to acquire Humana.<sup>13</sup> We successfully persuaded the courts to enjoin both deals, but to get there required the commitment of 25 to 30% of the Division’s professional staff. My colleagues in the FTC’s Bureau of Competition were similarly constrained as they litigated in multiple forums during that same time. That inevitably meant other matters were understaffed. That is no way to ensure adequate enforcement.

But second, more resources would allow for after-action studies of what happened in markets where the agencies decided not to bring enforcement actions or where the courts rejected an antitrust

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<sup>12</sup> Kades, Michael. “The state of U.S. federal antitrust enforcement.” Washington Center for Equitable Growth, September 17, 2019. <https://equitablegrowth.org/research-paper/the-state-of-u-s-federal-antitrust-enforcement/>.

<sup>13</sup> *United States and Plaintiff States v. Anthem, Inc., and Cigna Corp.* No. 1:16-cv-01493, ECF No. 411 (D.D.C. 2016). <https://www.justice.gov/atr/case-document/file/971316/download>.

challenge. Developing that data would allow the antitrust enforcers to demonstrate to the courts what happens when there is under-enforcement. I urge the Subcommittee to consider carefully the submission of former FTC Chairman Tim Muris where he details how a series of retrospective studies by FTC economists during his tenure allowed the agency to persuade the courts that hospital consolidation in local markets across the country had resulted in significant increases in costs. The antitrust enforcers need more resources to develop the evidence needed to persuade the courts that antitrust enforcement can and does make a positive difference.

I applaud the Subcommittee's effort to shine a spotlight on the state of antitrust enforcement today and assess whether and what changes are needed to maintain and enhance competition in our economy. That inquiry is more vital today as we confront and fight our way out of the Covid-19 pandemic.<sup>14</sup> I appreciate the opportunity to support that effort and stand ready to assist the Subcommittee going forward.

Respectfully submitted.

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<sup>14</sup> Baer, Bill. "Why we need antitrust enforcement during the COVID-19 pandemic." The Brookings Institution, *TechTank*, April 22, 2020. <https://www.brookings.edu/blog/techtank/2020/04/22/why-we-need-antitrust-enforcement-during-the-covid-19-pandemic/>.