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Chairman Cicilline and Ranking Member Sensenbrenner:

Thank you for soliciting my views on these important questions.

For more than 100 years, Congress and the Courts have been in a conversation about the content and direction of antitrust. The pattern has generally consisted of Congress passing broadly-worded statutes that, over time, come to be read in an increasingly narrow fashion by the courts, only for Congress to re-enforce the laws again. In our times, the pattern has repeated itself, and it is time for Congress to substantively re-enforce the antitrust laws for the first time since 1950. That conclusion is only buttressed by the fact that the law faces some of the greatest challenges it has ever encountered, in the rise of platform monopolies and digital markets that the law struggles to understand.

The best precedents for this moment are the years 1914 and 1950. In those years, Congress faced a judiciary that had departed from what Congress intended when it passed the Sherman Act and the Clayton Act, respectively. The courts had allowed loopholes, extra-statutory defenses and balancing to replace what Congress had intended to be stronger prohibitions. On both occasions, Congress acted to clarify to the courts what it meant, through the Clayton Act of 1914, and the Anti-Merger Act of 1950.

As this suggests, my answer to questions one and two is that the laws are inadequate as interpreted. If they were read as Congress originally intended, the laws are, in fact, adequate to nearly any challenge. The antitrust statutes contain broadly written provisions that were, as Congress suggested, meant to combat the menace of monopoly and cartels, and to protect the interests of consumers, smaller producers, and other stakeholders. As Learned Hand wrote in the *Alcoa* case, the laws were written prevent a variety of economic harms, static and dynamic, but also to "prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few."[1]

[1] United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945).

If read broadly, the prohibitions on "monopolization," "unfair means of competition," and "restraints on trade" could be used to handle the challenges of our time. But "broadly" is manifestly not how the laws are read by the judiciary at this point. For the courts have grafted onto these laws burdens of proof, special requirements and defenses that are found nowhere in the statutes, and that have rendered the laws applicable only to the narrowest of scenarios, usually those involving blatant price effects. And it is this that makes the laws inadequate for the challenges presented by digital markets.

There will, to be sure, be some who insist that all is well, that the laws function fine, and that the judiciary has simply thrown out cases that "don't make economic sense." It is true that that the skilled lawyers and economists at the FTC and the Justice Department will do their best to craft cases that try to thread the needles created by the judiciary. But as they take up the fight against any of the more obvious and blatant abuses in the digital markets, they will be like a boxer with weights tied to his legs, weighed down by precedent designed for the problems of a different century. It is not hard to predict that, despite the best efforts of the enforcement agencies and other plaintiffs, conduct that is anticompetitive will escape punishment; monopolization will proceed apace, mergers that should not be approved will be. Sometimes, the agencies will not bring cases, fearing defeat; or they will bring them, and lose cases that, based on Congressional intent, they should win. From the perspective of this committee, the relevant end result is that the broader object of these laws, as specified by Congress, will be defeated. It is in that sense that the laws have become inadequate.

Congress need recognize that its intent is being thwarted by a judiciary who has been willing to elevate abstract economic theory, often outdated, over both the will of Congress and the facts on the ground. It is not hard to find examples, but to seize on just one, consider the *American Express* case, decided by a narrow Supreme Court majority, a case which by itself, presents a strong case for Congressional intervention.[2] That case featured a scheme blatantly designed to disadvantage a lower-priced competitor, and in throwing out the case, the Supreme Court managed to use abstract theory to create a new, near-nonsensical barrier to cases that is certain to influence enforcement in digital markets.

Cases like *American Express* are hamstringing the law's ability to face the challenge of competition in digital markets. Already, companies accused of anticompetitive conduct have begun to seize upon *American Express* like a talisman, or some kind of get-out-of-jail-free card issued by the Court. That the case is often willfully misinterpreted is not the point — it does its damage by its very existence. This year, the case has already, in fact, influenced at least one district court dealing with a major issue of competition in digital markets, and the result was not attractive. Facing the merger of two tech firms that provide travel-related booking services, the trial court relied on *American Express* to reach the implausible holding that firms were not competitors at all, based on the theory — contrary to fact — that two-sided and one-sided business models are not competitors.[3]

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[2] 138 S. Ct. 227 (2018).
[3] United States v. Sabre Corp., No. 1:19-cv-01548, Order (D. Del. Apr. 7. 2020).

Hence, as in 1950, when the Supreme Court permitted a merger between two of the nation's largest steel producers in *United States v. Columbia Steel Co*., 334 U.S. 495 (1948), it is time for Congress to rejoin the conversation.

American Express, however, is just the tip of the iceberg. Here is not the place to summarize all that has been done to weaken the laws, and render them inadequate for the challenge of digital markets. It would take a volume, and indeed there are several such volumes, broadly suggesting a problem of underenforcement and too much reliance on questionable economic theories.[4] The problem can be summarized this way:

> [Those who sought to weaken antitrust argued that] what Congress had condemned as abusive conduct—predatory pricing, price discrimination, coercive tying of unwanted products—was really no such thing, but being practiced for the best and happiest of reasons… [The] assertion was that that which did not exist in theory probably did not exist in practice. Robbing banks is economically irrational, given security guards and meager returns; ergo bank robbing does not happen; ergo there is no need for the criminal law. Exaggerated only slightly, this premise has been at the core of [contemporary] antitrust for more than thirty years.

There is much that could and should be done: I believe that Congress should take on the task of antitrust reform more broadly. However, specific to the challenges of digital, I would suggest the following reforms.

1. Recognition of Non-Cash Markets — the question of "free"

A great stumbling block, when it comes to digital markets, is the fact that antitrust doctrine has been centered on cash markets and the proof of price harms. Under current caselaw, with rare exceptions, courts have demanded that competitive harms be demonstrated by showing a price effect. Yet, in digital markets, experience has shown that both data and attention are key assets for which firms compete, and which motivate both acquisitions and potentially exclusionary strategies.

Hence, Congress should confirm the use of non-cash markets in antitrust analysis. Other scholars have addressed the need to understand the role of data. I write here to suggest that Congress legitimize the use of "attention markets" in order to address a new generation of antitrust enforcement challenges, created by the prominence of businesses that resell the resource of human attention.

Attention Markets. Contemporary antitrust doctrine assumes cash markets, but many firms today, especially in the media and technology industries, depend on attention markets. Companies such as Facebook and Google, who at first glance appear to be giving away their products for free, are in fact competing in attention markets. Attention is a scarce resource. We

[4] *See, e.g.*, Robert Pitofsky, How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust (Robert Pitofsky, ed., 2008); Tim Wu, The Curse of Bigness (2018); Jonathan B. Baker, The Antitrust Paradigm: Restoring a Competitive Economy (2019).

are always paying attention to something, but our attention is limited by the brain's processing power and by the hours in the day. Thus, we make "attentional decisions" — deciding to pay attention to some things, while ignoring others. Much attentional spending, like the spending of currency, is dictated by preferences (Fox News vs. MSNBC) and habits (checking email or Twitter). The value of human attention is illustrated by the large amounts of money that firms pay for it; over $200 billion was spent on advertising in the United States in 2017. Firms use this access to attention to influence demand curve for their products, such as making the brand more desirable or giving the customer information about the product.

Attention Resellers. Businesses like television networks or websites like Facebook and Google resell attention to make money. They do this by bringing together two groups: the public and attention-seekers (commercial advertisers, or other entities like politicians). However, unlike typical intermediaries (e.g. shopping malls, credit card companies) for which both "sides" of the market are cash markets, these businesses have a cash market on one side and an attention market on the other side. They are obtaining attention and reselling the attention for cash. In doing so, businesses set an "attentional price" — usually how much advertising to combine with the desirable content that attracts audiences. A webpage with nothing but ads will attract few viewers. A webpage with no ads will maximize viewership but result in no revenue. The optimal price lies somewhere in between. For instance, modern cable television adheres to 14 to 16 minutes of advertising per hour. However, firms may adopt different pricing strategies. Facebook, for example, started out with a low attentional price (no ads), then once it gained market power, increased its volume of advertising, similar to a predatory pricing strategy.

The law should recognize that these entities operate in attention markets: they have consumer-facing products that are competing for attention, which is then resold to advertisers on the other side of the market.

Market Definition. The law can define the relevant consumer markets based on "time spent" as the currency, and then make use of the familiar economic concept of substitution to find an appropriate market by asking whether other products compete for the same attention (e.g. does streaming video compete for the same attention as online maps?).

Confirming the use of attention markets in antitrust analysis will enable antitrust enforcers to properly scrutinize the actions of firms that operate in the attention economy.

2. Nascent Competitors — The buy-out of threatening upstarts

One of the major ways in which the tech monopolies have held power and prevented their own usurpation is through programs of defensive acquisitions: the buying of threatening competitors. This is conduct that one would think to be obviously anticompetitive and relatively easy to prevent. But the experience of the last twenty years in digital markets have also shown that current antitrust doctrine struggles with the problem of nascent competitors — the

acquisition or exclusion of small, unproven competitors to incumbents. This has been a problem in healthcare markets as well as digital markets, thus warranting particular attention.[5]

A nascent competitor is a firm whose prospective innovation represents a serious future threat to an incumbent. The firm's potency as a competitor is as yet not fully developed and hence unproven. For example, a new, fast-growing, and evolving online platform is a nascent competitor to the currently dominant platform. A promising but unproven cure for a disease represents nascent competition for an incumbent selling a therapy that is the current standard of care.

The problem of nascent competition is an important matter for antitrust law. As the D.C. Circuit has explained, "it would be inimical to the purpose of the Sherman Act to allow monopolists free rei[n] to squash nascent, albeit unproven, competitors at will . . . . . "[6] But there is some danger that enforcers and courts might ignore such conduct. In the absence of current, direct competition, one might miss the harm arising from the elimination of a nascent competitor. Even if the threat is recognized, an enforcer might hesitate to act without strong proof that the competitor, if left alone, probably would have grown into a full-fledged rival.

Nascent competitors are important in a dynamic analysis as they tend to compete for the market, not merely within the market. Put another way, innovation may be the only way to dislodge an entrenched incumbent. Nascent competition tends to be important in industries marked by rapid technological change. In such businesses, the capabilities of the new firm, the incumbent, or both, are evolving over time.

To be sure, acquisitions of nascent competitors raise several challenging questions. Acquisition can serve as an important exit for investors in a small company, and thereby attract capital necessary for innovation; thus, blocking or deterring too many acquisitions would be undesirable. However, the significance of this concern should not be exaggerated, for the approach detailed here is very far from a general ban on the acquisition of unproven companies. The approach would discourage, at most, acquisition by the firm most threatened by a nascent rival. Profitable acquisitions by others would be left alone, as would the acquisition of complementary or other non-threatening firms. While wary of the potential for over-enforcement, I believe that scrutiny of the most troubling acquisitions of unproven firms must be a key ingredient of an innovation policy.

Doctrinally, as it stands, the anticompetitive acquisition of a nascent competitor can be challenged under Section 2 of the Sherman Act, or Section 7 of the Clayton Act. However, neither is a perfect vehicle, and Congress should act in this area, as part of a broader project of reform in how mergers are reviewed in this country.

The court-created doctrine of potential competition, as it stands, is less part of the solution that part of the problem. Potential competition case law has focused mainly on anticipated competition in existing products from established firms. The nascent competition

[5] For more on this topic, see *Scott Hemphill & Tim Wu, Nascent Competitors*, U. Penn. L. Rev. (forthcoming 2020).
[6] United States v. Microsoft Corp., 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc) (per curiam).

approach, by contrast, properly focuses attention on future competition from unproven, innovative firms.

The poorly named doctrine of "actual potential competition" is meant to focus on the future benefits of competitive entry. However, litigated actual potential competition cases have a different subject than nascent competition. Case law has focused on anticipated entry using existing products, by firms with established capabilities already selling in related markets (often other geographic markets). For example, the court asks whether the existing bank is likely to expand its scope, as to a product that it already sells, to a new geographical market.

By contrast, protecting nascent competition focuses on innovation. Its focus is the nature and potential of the unproven competitor's product, rather than anticipated competition in existing products from an established firm. Potential competition doctrine, as it has developed in lower courts, has not addressed or wrestled with the distinctive features of innovation competition, including its unusually important benefits, the prospect of competition for the market, the distinctive nature of the uncertainties associated with innovation competition, and the heightened importance of protecting innovative entrants when the incumbent resisting innovative displacement is a monopoly. This neglect is a significant shortcoming of actual potential competition case law.

Relatedly, future innovation often creates uncertainty that the existing potential competition case law is not well equipped to handle. A potential competition case often relies on the fact that the entrant's capabilities are fully established. The consequences of entry may be easy to assess given previous entry episodes by the same firm or analogous entry by others. For future innovation, these bases for prediction are generally absent, and the nature of the resulting uncertainty generally more resistant to measurement. In the language used above, nascent competition is characterized by the Knightian uncertainty of an unproven technology or an emerging ecosystem that may evolve in unexpected directions.

Congress can amend the Clayton Act to provide scrutiny of acquisitions of nascent competition that are reasonably capable of posing a serious future threat to the incumbent, given evidence of intent to eliminate the threat. This approach would clarify that, consist with the *Microsoft* case, that it does not require proving, as some have suggested, that successful competitive entry in the "but-for" world by the excluded innovator would necessarily or probably have occurred.

The eventual significance of any nascent competitor is uncertain by its nature. This is a ground for caution, but I argue that the overall balance favors a bias to action, given the importance of the innovation at risk from exclusion or acquisition by an incumbent. The protection of innovation, particularly disruptive innovation, is a key objective of antitrust law.

This would not remove the need for enforcers to distinguish the harmful from the harmless. Many acquisitions have important procompetitive justifications or are harmless overall. A small, unproven firm might be acquired by a dominant firm in order to acquire expertise, to add a specific technical capability, or to make a bet on a "moon shot" — a risky, unproven technology in an unrelated market. Distinguishing anticompetitive conduct is a

familiar and pervasive problem in antitrust enforcement, but it is heightened by the uncertainties associated with innovation and technological change.

That is why the approach advocated sees anti-competitive intent as a particularly important guide in this area. Such intent might be subjectively expressed through testimony or internal writings. Alternatively, intent might be revealed through conduct, such as paying too much for a rival (unless the anticompetitive benefits are taken into account) or a broader pattern of buying nascent competitors.

3. The Competitive Process Standard

The competitive process standard asks the following: given a suspect conduct (or merger), is this merely part of the competitive process, or is it meant to "suppress or even destroy competition"? In other words, is the conduct at issue actually part of the competitive process, or is it enough of a deviation as to be unlawful?

This standard actually already forms a part of antitrust doctrine. What changes is eliminating "consumer welfare" as a final or necessary consideration in every case.

Disadvantages of Consumer Welfare Standard

The "consumer welfare" standard has several disadvantages. First, the maximization of the *value* of "consumer welfare" is abstract and challenging for enforcers and judges to measure. By protecting *process*, enforcers and judges can better achieve adherence to the law. The legal system often does better trying to protect a process than the far more ambitious goal of maximizing an abstract value like welfare or wealth. For instance, to protect "equality," we protect employees from racial discrimination in the employment process.

Second, the consumer welfare standard's emphasis on measurable harms to consumers tends to bias the law toward a focus on static harms and, especially, on prices. It thus ignores dynamic harms, like the blocking of potential competition, slowing of innovation, loss of quality competition, and overall industry stagnation. Although it can be useful for measuring the harms of price collusion, it is not effective for measuring harms such as dynamic costs, quality effects, and projected prices.

Advantages of Competitive Process Standard

The protection of competition includes both competition on quality and price. Competition can be disrupted by market entry and the development of new technologies, and it can be suppressed or impaired by collusion, by barriers to competition or to entry, by the raising of rivals' costs, and myriad other means.

The use of the competitive process standard will produce a fact-intensive inquiry and an analysis of the pro-competitive justifications offered by the defendant. This will yield a body of rules and standards which enforcers and judges can use to protect competition. This standard will separate fair and foul—allow competition, but deter and penalize the undue suppression, distortion or subversion of that process. Such suppression includes conduct designed to negate price or quality competition, or designed to block or exclude challengers, which can be collusive or unilateral, and exclusionary or related to price or quality.

Further, the "competitive process" standard is truer to legal precedent and to the legislative intent underlying the antitrust law. For instance, Representative Dick Thompson in 1914 stated: "the one thing we wish to maintain, and retain and sustain, is competition. We want to destroy monopoly and restore and maintain competition."[7] Historically, the rule of reason in antitrust analysis was clearly concerned with the competitive process. Justice Brandeis' primary concern was whether a restraint on trade was something designed to promote the process of competition, or to hinder it. As he wrote, "[t]he true test of legality is whether the restraint imposed is such as merely regulates, and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition."[8]

The competitive process standard also calls for a more realistic assessment of firms at different stages of their life cycle. The Sherman Act was premised on the concern that that monopolies and mergers to monopoly tended to suppress the competitive process. The law should also recognize that there are such things as long-standing incumbents, that is, firms that have held considerable market share for some time, as well as entrants, challengers and mavericks, firms that are either new to the market, or in some way attempting to gain market share. There are long-standing oligopolies who may want to exclude outsiders. Firms can be in ascendance or on the decline and that this may influence their incentives and the goals of their mergers. It is not unreasonable to suspect that a long-standing monopolist with outdated technology facing a challenge from an innovative competitor may, in fact, have the incentive to try and exclude the challenger.

The main advantage of a "competitive process" standard is that, unlike threats to "consumer welfare," potential threats to the competitive process are far more obvious. The allegation is that a powerful or unethical firm is seeking to disable the process of competition on the merits. It is not ultimately tied to arguments about whether, in the final analysis, consumer welfare has been served or not. By using the competitive process standard, antitrust law can better address dynamic harms — such as stagnation and lack of innovation — and protect competition, encouraging firms to develop better products.

4. Other Changes Helpful to Address Competition in Digital Markets

I note here, in less detail, other changes to doctrine, available to Congress, that would make antitrust law better capable of facing the challenges of competition in digital markets:[9]

- The *Brooke Group* test for predatory pricing and *Weyerhaeuser* test for predatory bidding should be overruled;

- The essential facilities doctrine should be reinvigorated for dominant firms that deny access to critical infrastructural services;

[7] Rep. Dick Thompson Morgan, 51 Cong. Rec. 9265 (1914).

[8] Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).

[9] These are drawn from the "Utah Statement" for antitrust reform. https://onezero.medium.com/the-utah-statement-reviving-antimonopoly-traditions-for-the-era-of-big-tech-e6be198012d7

- By rule or statute, non-compete agreements should be made presumptively unlawful;

- Noerr-Pennington should be overruled and replaced by a First Amendment defense and appropriate statutory protections for workers.

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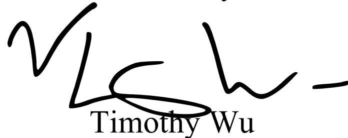
Thank you again for this opportunity. I note in closing that I did not address question three in depth. I would just say this: that of all the enforcement agencies I have had experience with, the antitrust agencies are the most outmatched. Their suits can put into question not millions, but billions in supra-competitive profit, making it reasonable to spend anything to win a case. Hence, Congress should fund the agencies in a manner adequate to ensure that the government's lawyers have a fighting chance.

I would also note that third question is related to the first two. My experience suggests that the attorneys at the enforcement agencies are hardworking and talented, but find themselves handicapped by the judiciary's weakening of the law, and thereby not able to bring cases when they see abuses. With Congress leading a project of antitrust reform and revival, the agencies could more efficiently and effectively follow out the objectives that Congress first specified in 1890.

Yours truly,



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