March 5, 2019

The Honorable Mike Lee, Chairman
The Honorable Amy Klobuchar, Ranking Member
Subcommittee on Antitrust, Competition Policy, and Consumer Rights
Committee on the Judiciary
United States Senate
Washington, DC 20510

RE: Does America Have a "Monopoly Problem"?

Dear Chairman Lee and Ranking Member Klobuchar:

Consumer Reports[1] appreciates the Subcommittee's holding this hearing today. We appreciate your continued leadership in bringing attention to the increasing concentration in the U.S. marketplace, and its implications for consumer choice and value, business and employment opportunities, and innovation and economic growth. And we appreciate your dedication to keeping antitrust enforcement policy resilient and effective in the marketplace of the 21st Century.

There is a re-awakening underway in our country, which Consumer Reports is proud to have played a role in helping to foster, regarding the essential importance of genuine competition, and the antitrust laws that protect and promote it, for ensuring that our market economy works for all Americans.

There has been a great deal of discussion in antitrust circles recently regarding whether "consumer welfare" is the appropriate guiding objective for antitrust. As a leading consumer organization for 83 years, the welfare of consumers has always been at the core of our focus. But the "consumer welfare" standard has at times been applied too constrictively. Properly understood, consumer welfare encompasses far more than just immediate price impacts. Those may be the easiest impacts for economists to measure. But the Supreme Court has emphasized that "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."[2]

[1] Consumer Reports is an expert, independent, non-profit organization in the United States, whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. Consumer Reports works for pro-consumer policies in the areas of antitrust and competition policy, food and product safety, financial services and marketplace practices, privacy and data security, telecommunications and technology, travel, and other consumer issues, in Washington, DC, in the states, and in the marketplace. Consumer Reports is the world's largest independent product-testing organization, using its dozens of labs, auto test center, and survey research department to rate thousands of products and services annually. Founded in 1936, Consumer Reports has over 6 million members and publishes its magazine, website, and other publications.

[2] National Society of Professional Engineers v. United States, 435 U.S. 679, 695 (1978).

Thus, a more useful starting point for assessing consumer welfare effects is that competition benefits consumers by giving them meaningful choice, which empowers them to give businesses incentive to pay attention to them and give them what they want – a greater variety of better and safer and more useful products and services at more affordable prices, and, over the longer term, incentive to continually strive to improve in all those respects. A more affordable price is just one of the array of resulting benefits.

Bringing economic rigor into antitrust analysis can help put enforcement decisions on solid ground. But economic analysis has at times been misused. It has been used not to illuminate and inform antitrust consistent with its core underlying values, but instead to undermine its effectiveness, by calling into question the legitimacy of those values, and by second-guessing concrete evidence that consumer choice is being constrained.

Detaching consumer welfare analysis from consumer choice runs the risk of abstracting it, in ways that fail to account for the actual interests of consumers. It risks creating a marketplace in which corporations dictate to consumers what is in their interests, rather than listening to them. Consumers should be the ones to ultimately determine what is in their best interest, not those who profit by selling to them. For example, accepting the goal of efficiency, detached from considerations of consumer choice, can lead to justifying mergers that *reduce* choices, in order to "make it easier" for "busy" consumers; or that simply cut costs by cutting now-"duplicative" jobs that are integral to enabling the two separate corporations to compete effectively in offering choices.

Moreover, consumer choice requires that competition be functioning effectively at all levels and in all quarters. Consumers have meaningful choice when suppliers, distributors, inventors, and workers also have opportunities to offer choices, including opportunities for new entry by smaller and start-up businesses.

The values of antitrust are enduring values that remain every bit as important in the face of the dramatic changes taking place in technology and in the marketplace. Meaningful competition is still the best hope for consumers to get anything resembling a level playing field.

The antitrust laws remain fundamentally sound, and should not be jettisoned in favor of some new experiment. But they need to be reaffirmed, and their vitality restored, so that they can effectively fulfill their critical role in helping ensure that America's market economy works for all Americans.

One of the principal purposes of enacting Section 7 of the Clayton Act more than a century ago, and strengthening it almost 70 years ago, was to prevent market concentration from ever reaching levels of concern, by "provid[ing] authority for arresting mergers at a time when the trend to lessening of competition in a line of commerce is still in its incipiency...to brake this force at its outset and before it gathered momentum."[3] This purpose is embodied in the text of Section 7, which prohibits acquisitions where "the effect of such acquisition *may be* substantially to lessen competition or to tend to create a monopoly" (emphasis added).[4]

In recent decades, unfortunately, the courts and, therefore, the enforcement agencies, have become too reluctant to apply this standard as vigorously as it was intended. They have effectively

[3] Brown Shoe Co. v. United States, 370 U.S. 294, 317-18 (1962).
[4] 15 U.S.C. § 18.

read the "may" out of Section 7. The standard has devolved instead into something closer to a burden on the government to prove demonstrable, concrete, imminent, quantifiable harm. This has resulted in consideration of each merger in too piecemeal a fashion, in isolation, discounting the unmistakable trends until they have already reached the point where one more merger is demonstrably too many. This allows no safeguard against miscalculation, let alone against unanticipated later changes in the marketplace that can exacerbate the effects of concentration even without another merger taking place. And it also neglects the cumulative effects of growing concentration in multiple sectors.

As a result, consumers today face a marketplace that has grown ever more concentrated, in sector after sector, over the past few decades, offering them less and less choice.

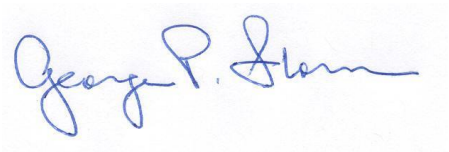
We need to restore the "incipiency standard" in the full vigor Congress intended in enacting it. Furthermore, mega-mergers should be exactingly held to the long-standing legal presumption that they are anticompetitive, and they should have to meet a higher burden to overcome that presumption and demonstrate that they will not be harmful. Large mega-mergers should also be subject to a retrospective look-back, in which they are held up to see to what extent the corporation's assurances that the marketplace would continue to benefit from competition are borne out. This information should be used not only to evaluate similar assurances made in future proposed mergers, but also potentially to be the basis for bringing a post-merger challenge to that merger itself.

And antitrust enforcement agencies should have the resources they need to litigate effectively against the imposing legal firepower that merging corporations bring to battle – and with large mega-mergers shouldering more of the costs.

Legislation introduced by Senator Klobuchar and others would help advance many of these objectives.[5] We hope this Subcommittee will consider these and other constructive ideas for restoring the vitality and original purposes of our antitrust laws, while preserving their strengths.

We look forward to continuing to work with you and Members of the Subcommittee on these important challenges.

Respectfully,



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Cc: Members, Subcommittee on Antitrust, Competition Policy, and Consumer Rights

[5] S. 306, Merger Enforcement Improvement Act, https://www.congress.gov/116/bills/s306/BILLS-116s306is.pdf; S. 307, Consolidation Prevention and Competition Promotion Act of 2019, https://www.congress.gov/116/bills/s307/BILLS-116s307is.pdf.