September 24, 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

Dear Chairman Lee and Ranking Member Klobuchar:

Consumer Reports appreciates the Subcommittee holding today's hearing, to examine whether merger enforcement policy is appropriately taking into account the effects of mergers on potential competition. A look at the colossal market power that Facebook, Google/Alphabet, Amazon, Microsoft, and Apple have accumulated make clear that it is not.

One of Congress's principal purposes in enacting Section 7 of the Clayton Act more than a century ago, and then strengthening it almost 70 year 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."[1] 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."[2]

In recent decades, unfortunately, the courts and, as a result, the enforcement agencies, have become too reluctant to apply the incipiency standard as vigorously as it was intended. They have effectively read the "may" out of Section 7. The standard has instead devolved to essentially require the government to prove demonstrable, concrete, imminent, quantifiable harm. This has resulted in consideration of each merger, including a series of acquisitions by one growing corporation, in piecemeal isolation, disregarding unmistakable trends until it is often too late.

[1] Brown Shoe Co. v. United States, 370 U.S. 294, 317-18 (1962).
[2] 15 U.S.C. § 18 (emphasis added.)

This short-sighted approach invites a corporation to execute a strategy of growth to dominance by quietly acquiring potential rivals as soon as they appear on the horizon, before they reach the quantitative thresholds that trigger interest of the courts and enforcers under this approach.

A look at the five Internet giants Facebook, Google/Alphabet, Amazon, Microsoft, and Apple is illustrative. Policymakers are now confronting the dominance of these giants, and its threat to a free, open, competitive online marketplace, one that works for consumers and for all who seek to conduct commerce or communicate. And this is prompting an examination into whether the antitrust laws can effectively address these serious challenges, and what more may be needed.

But these five giant corporations did not suddenly spring on the scene in their current dominance. Google was founded in 1998, and began selling ads to finance its search engine in 2000. Amazon was founded in 1994, and began managing the inventory of third-parties selling on its website in 2006. Microsoft was founded in 1975, to adapt the BASIC software language for use with the just-invented microcomputer, then contracted in 1981 to supply the operating system for IBM's personal computers, and released Word and the Mouse in 1983, and Windows in 1985. Apple was incorporated in 1977, and for many years was an upstart innovator who fought against IBM, Microsoft, and others to keep the marketplace open. Facebook first became available for use by the public in 2006, after initially being available only to students at Harvard and then at a few other universities.

In the course of their growth to their current dominance, each of these corporations has made dozens or even hundreds of acquisitions, from companies who could instead potentially have become part of building a competing business and giving consumers a more vibrant online marketplace. Each of these acquisitions was subject to review under Section 7 of the Clayton Act. But as far as we know, very few were actually *subjected* to serious review.

And only one of these acquisitions was subjected to enforcement action: Google's acquisition of ITA Software, a leading producer of airfare pricing and shopping systems. And even in that case, the Justice Department allowed that acquisition, when Google agreed to license travel software for use by other air travel shopping websites – for a few years.[3]

Google/Alphabet has made about 225 of these acquisitions, that we know of, about 150 of them during this decade alone (since December 31, 2010). Amazon has made about 100, with about 60 during this decade. Microsoft has made about 225, with about 85 during this decade. Apple has made about 100, with about 70 during this decade. And Facebook has made about 75,

[3] https://www.justice.gov/opa/pr/justice-department-requires-google-inc-develop-and-license-travel-software-order-proceed-its.

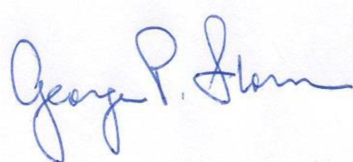
with about 60 during this decade.[4] In short, there have been plenty of opportunities to catch the attention of a vigilant antitrust enforcer.

No doubt each of these acquisitions can be rationalized as a good business decision in the eyes of the acquiring corporation. But the antitrust laws say that private benefit to the acquiring corporation cannot be the determining consideration. A concentrated marketplace always brings benefits to the corporations who are concentrating it. The antitrust laws are there to ensure that these private benefits do not come at the expense of public harm, in the loss of meaningful choice.

Merger enforcement needs to restore the "incipiency standard" to the full vigor Congress intended in enacting Section 7. Courts and enforcers should be looking further down the road, and even around corners, beyond quantifiable, imminent, obvious effects. They should be using the full powers of their foresight to focus on what is needed to protect and promote, over the long haul, an open and innovative marketplace, where consumers are in charge, empowered with the leverage of meaningful choice that competition creates, and where sellers are free to offer that meaningful choice. And they need the resources and the encouragement from Congress to do so.

We look forward to continuing to work with the Subcommittee as it addresses these serious challenges.

Sincerely,



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

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[4] https://www.crunchbase.com/organization/google/acquisitions/acquisitions_list;
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