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## QUESTIONS FROM SENATOR CORY A. BOOKER

1. At what point do Big Tech companies cross the line from success that should be applauded, to illegal monopolization?

   Antitrust law is careful not to punish success. A company crosses the line when it uses its power to lessen competition—such as to obtain or retain a monopoly. This is a fact-specific determination. For instance, a court found that Microsoft anticompetitively used its monopoly position in operating systems to block competing web browsers. Yet merely having a dominant position in operating systems or social networks is not enough to be guilty of anticompetitive practices, assuming it was the result of skill and that position is not abused. The line is crossed when a firm uses monopoly power for anticompetitive purposes, such as to raise prices; to reduce output, quality, safety, or innovation; or to foreclose actual or nascent rivals. Because these aims and conduct can be subtle in digital markets, the U.S. needs better study and monitoring of Big Tech to identify anticompetitive outcomes and especially to better understand conduct such as exclusive-dealing contracts, denial of access to critical application programming interfaces (APIs), and acquisitions of nascent competitors

2. Why are forced divestitures an appropriate remedy for Big Tech monopolies?

   Divestitures make the most sense when the divested asset can stand alone and divestiture is the best among available remedies for restoring competition, including alternatives such as interoperability mandates. Although that may seem relatively straightforward, getting to that analytic point means a more rigorous analysis of appropriate remedies than has occurred in the past, when too often the possibility of divestiture was dismissed for the wrong reasons. Upon proof of anticompetitive conduct by Big Tech, a divestiture may be the appropriate remedy for several reasons. First, once the divestiture has occurred, less government oversight is needed. In contrast, with an interoperability remedy, the government may need to resolve disputes indefinitely as the monopolist develops subtle ways to undermine the interoperability mandate. Second, we want to provide the right incentives. If a company creates a monopoly by purchasing other companies, and then gets to keep those other companies, the implicit message is that as long as you succeed in anticompetitively building the monopoly our laws will let you keep it. Divestitures make particular sense when a monopoly is the result of a prior anticompetitive purchase, both because the remedy then more directly responds to the conduct and because it is more likely divestiture will create two viable companies—assuming they were independently viable before.[1] Divestiture may make less sense in contexts where the splitting up a

[1] Rory Van Loo, *In Defense of Breakups: Administering a "Radical" Remedy*, 105 CORNELL L. REV. 1955 (2020).

company might destroy the value to consumers.[2] For instance, if Facebook's acquisitions of WhatsApp are found to be anticompetitive, then divestiture of those prior acquisitions would be more straightforward than asking Facebook to split up its core Facebook users. This does not preclude using divestitures when a monopoly is obtained organically (without acquisitions), just that divestiture will make more sense in some contexts than others.

3. In the browser engine industry, Mozilla's Gecko is one of the only alternatives competing with Apple and Google. However, much of Mozilla's revenue for its privacy-focused web browser Firefox comes from its contractual agreement with Google requiring Google Search be the default search engine. How can we develop behavioral remedies, such as barring exclusionary agreements, for the search industry without endangering competition in the browser engine industry?

   This is a particularly challenging dynamic to navigate. I have two main thoughts if a behavioral remedy such as barring exclusionary agreements is adopted for the search industry. First, it is worth considering how to foster competition and ease the transition in the connected industry (browsers) alongside the intervention in the primary industry (search engines). For an example of one idea to explore, some of the antitrust penalties paid by the monopolist could be used to provide funding to independent browsers, thereby allowing Mozilla to offset contractual losses for some transitional period as they adapt to the new competitive environment. The metric for granting funding would be improving competition. As another example, rival browsers might be set as the default web browser for some period of time on new devices, if doing so would offset some of the previously anticompetitive browser dynamics. Second, ideally the package of interventions would allow for dynamism so that an entity—whether private industry organization or an administrative agency—would be able to adjust the rules in response to any Big Tech efforts to undermine the behavioral remedy. For instance, after being found to have engaged in monopoly practices, Google was required to offer users a choice screen for which search engine to use rather than defaulting to Google. Google responded by charging rival search engines to appear on that choice screen, and in the face of follow-up regulatory pressure Google stopped charging—which reportedly led to market share gains by rivals. Whatever entity is tasked with enforcing the behavioral remedy should have both strong authority to ensure it can meaningfully intervene and sufficient accountability mechanisms to ensure it's doing an effective job.

4. You have testified that the government should not be afraid to break up a monopoly when the facts and law justify it. Please discuss market conditions when a mix of structural and behavioral remedies, as the DOJ has proposed in the Google search case, is appropriate.
   a. How do these remedies both react to anticompetitive conduct in Big Tech and address problems prospectively, if at all?

   Even after breaking up a monopoly, some parts of the industry may need further help to facilitate competition. Sometimes divestitures may still leave part of the industry heavily

[2] On interoperability and related remedies, see Herbert Hovenkamp, *Antitrust Interoperability Remedies*, 123 COLUMBIA LA REVIEW FORUM 1 (2023).

concentrated. For instance, even if it were forced to sell its ad exchange and buy-side software businesses, Google may have monopoly power in its remaining sell-side software business. If that were the case, behavioral remedies could help to deter Google from using its remaining monopoly power anticompetitively. Additionally, competition requires other market conditions besides a sufficient number of competitors. Transparency, ease of entry for new competitors, and low switching costs (a customer's ability to switch to another business) are important as well. Access mandates can remove entry barriers. Smart mandated disclosures can improve transparency. The law can also help customer switching by preventing businesses from erecting barriers—as was done with mandates that customers be able to bring their phone numbers with them if they switch phone carriers. All of these require careful design of the substantive rule as well as the procedure, including dispute resolution, to get the mandate right. A system in which small businesses need to regularly bring legal cases in court to enforce an access mandate, for instance, may give the big tech company with deep legal resources too much ongoing power to undermine the mandate. In such instances, it is worth considering other design features, such as penalty payments awarded to the small business forced to bring lawsuits. Other possibilities include alternatives to expensive lawsuits, such as empowering an expert administrative agency or private industry body to more quickly and affordably adjudicate disputes.

5. How can addressing Big Tech monopolies also address socioeconomic harms?

   We need better data about who pays for Big Tech monopolies and how rents extracted are distributed. From the preliminary data we have for monopolies more broadly, when a company can charge consumers anticompetitive prices it has the potential to exacerbate economic inequality. Consumers are, on average, lower income than shareholders and workers. Thus, assuming those higher prices increase shareholder value or are disproportionately captured by wealthier executives within the monopolist, anticompetitive prices would, in theory, transfer resources from a lower-income group to a significantly higher income group.[3] Additionally, anticompetitive prices overall make it so that for a given income earned, households already on a tight budget can simply purchase fewer (or lower quality) goods and services.

   Note that these socioeconomic gains would come alongside the core competition gains that tend to animate antitrust law, both as a matter of economic theory and legal standard. Those gains—typically framed, under the prevailing standard, as advancing consumer welfare and efficiency—would be expected to expand productivity. Thus, whether one cares about productivity or equality, there are compelling reasons to crack down on anticompetitive practices through stronger antitrust interventions, greater price transparency requirements, and access mandates.

[3] *See, e.g.*, Einer Elhauge, Essay, *Horizontal Shareholding*, 129 HARVARD LAW REVIEW 1267 (2016).

## Senator Amy Klobuchar

**For Rory Van Loo, Professor of Law, Boston University**

One way to determine the effectiveness of remedies—and ensure future remedies are effective—is to study past actions. In my *Competition and Antitrust Law Enforcement Reform Act*, I propose creating a new Office of Market Analysis and Data within the Federal Trade Commission to study markets in the wake of mergers or other significant antitrust actions.

- Why is it so important for enforcers to collect data and evaluate the efficacy of antitrust remedies to better understand how to protect consumers in future cases?

  Collecting good data and rigorously analyzing the efficacy of remedies are essential for strong antitrust law. There is currently insufficient evidence about the effectiveness of antitrust remedies. Without good data and analysis, it is more likely uninformed remedy decisions will be made. Ideally, the office would selectively access nonpublic information when necessary to produce the most rigorous analysis possible of how much more consumers are paying due to anticompetitive practices and how much consumers gain or lose due to any particular intervention. Additionally, the office could estimate the distributional implications to determine which households are most harmed by anticompetitive conduct.[4]

[4] Rory Van Loo, *Broadening Consumer Law: Competition, Protection, and Distribution*, 95 NOTRE DAME LAW REVIEW 211 (2019).