Chairman Lee, Ranking Member Klobuchar, and members of the Subcommittee:

Thank you for inviting me to speak with you today.

I deliver my remarks today through the lens of an antitrust lawyer with almost 20 years of experience. I am currently in private practice where I represent clients in matters before both U.S. and E.U. competition authorities. Previously, I served in government as an antitrust enforcement attorney at the Federal Trade Commission ("FTC"). My remarks today are solely my own and do not necessarily reflect the views of my law firm or its clients.

I am honored to participate in today's discussion comparing U.S. and E.U. approaches to antitrust policy and enforcement.

In particular, I would like to take this opportunity to share a few observations and suggestions.

In examining E.U. competition policy, it is first helpful to understand the origins of our own antirust policies and laws. Antirust is an inherently U.S. concept, and its animating principles are deeply rooted in the founding of our country. Following the American Revolution, the framers of our Constitution were primarily concerned about the concentration and abuse of political power, but also viewed the concentration of economic power as a threat to political liberty.[1]

By the close of the 19th century, it became clear that concentrated economic power could pose as great a threat to liberty as political power. In response to the age of robber barons and industry trusts, Congress passed the Sherman Act to protect America's free market economy from undue concentration. Almost 100 years after its passage, the Supreme Court referred to the Sherman Act as "the Magna Carta of free enterprise."[2] In 1914 Congress passed the Clayton Act, primarily to address mergers and acquisitions. That same year, Congress also created the FTC to investigate and stop unfair methods of competition and deceptive practices.

After World War II, some observers cited a connection between industrial concentration and the rise of fascism in Germany.[3] These sentiments led to the passage of the Celler-Kefauver Act of 1950, which strengthened merger enforcement under the Clayton Act by closing loopholes relating to certain asset acquisitions.[4] Following World War II, the United States required, as a condition of its withdrawal, that Germany adopt an antitrust law framework. Germany's antitrust laws were later a key influence in the drafting of the E.U.'s competition laws.

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[1] Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL'Y 983, 1009–16 (2013)

[2] *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

[3] Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1062 (1979).

[4] Daniel A. Crane, *Antitrust's Unconventional Politics*, 104 VA. L. REV. ONLINE 118, 127 (2018), http://www.virginialawreview.org/volumes/content/antitrusts-unconventional-politics.

U.S. antitrust statutes contain broad language, designed to capture anticompetitive conduct that might harm the competitive process. Although several factions (including judges, academics, and government officials) have sought to narrow or modify the antitrust laws over the intervening years, the laws' original text and intent remains largely unchanged. A plain reading reveals that the goal of U.S. antitrust law is to protect competition and the competitive process.

Taken as a whole, the United States' adoption of antitrust laws has been beneficial for our economy and for our country. It is only natural that other countries have sought to follow our lead. And rather than being quick to judge how other countries enforce *their* competition laws, we should remain focused on how best to apply our own.

In comparing the U.S. and E.U. antitrust regimes, there is a tendency to portray a wide gulf between how the two jurisdictions interpret and enforce their respective laws. I believe that view is misplaced, and that the overwhelming similarities between the two regimes largely outweigh any differences.

While differences do exist, our laws and the set of conduct they are intended to address are essentially the same. Both jurisdictions adopted antitrust laws to address restraints of trade, anticompetitive mergers, exclusionary conduct by dominant companies, monopolization, and monopoly maintenance.

Further, the primary goals underlying the U.S. and E.U. antitrust regimes are substantially similar. While Europe is sometimes accused of protecting competitors instead of competition, this has not been my experience. Rather, Europe has largely demonstrated its commitment to protecting the competitive process, which I believe is also the fundamental mission of the U.S. antitrust laws. Although reasonable minds may disagree with respect to any individual enforcement action, as a matter of general policy and enforcement direction, the U.S. and E.U. are closely aligned.[5]

This leads to an obvious question: "If our antitrust regimes are so similar, why do U.S. and E.U. regulators sometimes diverge so sharply in their treatment of specific cases involving the same conduct by the same players?"

It is fair to say that in recent years Europe has displayed vigorous enforcement in several cases involving allegedly anticompetitive conduct by major global companies, while the United States, in contrast, has been far less willing to pursue, or even seriously investigate, the same conduct.

This divergence cannot be traced to a difference in laws or antitrust policy goals. Rather, the variance is explained by different policy priorities and enforcement discretion.

The focal point of the divergence centers on increasingly important technology markets. The global economy is experiencing a transformation of historic proportions as data has transformed into a critical business resource. Business models that were unimaginable one or two decades ago are now commonplace. European competition authorities are

[5] To the extent significant differences exist, they largely relate to issues of process and procedure.

actively exploring what this means for antitrust enforcement, and how, and whether, antitrust doctrine should evolve to match these new economic realities. That process includes bringing new enforcement cases, so that the law can develop to reflect changing market conditions.

Our antitrust enforcers may not always reach the same conclusions as European antitrust enforcers, but the United States should not adopt a policy of reactionary contrarianism. Instead, the United States policymakers should vigorously explore new questions in antitrust to ensure that U.S. antitrust law remains relevant to the realities of today's economy and society.

Antitrust enforcement, as opposed to regulation, is also a far more precise and effective tool to protect the free market. That is not at all to say that regulation is never appropriate; but in some instances it is wiser to first give competition a chance to resolve any market imbalance. Moreover, antitrust enforcement allows prosecutors to exercise discretion and consider the specific facts and circumstances at issue before bringing a case. Likewise, the requirement to prove a case before an Article III judge or administrative court ensures greater consistency, fairness, and a narrowly tailored application of the law. As former FTC Chairman Robert Pitofsky observed, "Antitrust is a deregulatory philosophy. [But], [i]f you're going to let the free market work, you'd better protect the free market."[6]

In order to protect today's free market, we need to understand how our modern economy operates. It is imperative that the U.S. antitrust law and policy match these new market realities and technologies. Otherwise, we risk overlooking substantial harms (and potential benefits) of a digital economy. A prime example is the journalism industry, where growing concentration among digital distributors and platforms is impairing the ability to produce quality reporting. Perhaps nowhere is it more important to preserve competition than in the marketplace of ideas, where the free flow of news and information is essential to American democracy. Competition policy must take these societal and economic effects into account.

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Thank you for your time. I look forward to engaging with the other panelists, and I would be happy to answer any questions you may have.

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[6] Sharon Walsh, *Going To Bat For The Trustbusters*, WASH. POST, Apr. 13, 1995, https://www.washingtonpost.com/archive/business/1995/04/13/going-to-bat-for-the-trustbusters/86b6466d-aa67-413f-8781-b198c45d52e7/