The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?
Questions for the Record
Submitted December 15, 2017

QUESTIONS FROM SENATOR BLUMENTHAL

1. From the testimonies of the witnesses at the hearing, it appears that there is agreement that innovation is an important component of antitrust law.
   a. Would you agree that if a merger will undermine innovation it can be challenged under the consumer welfare standard?

      Yes. The "consumer welfare standard" embodies the overarching principle – observed and supported by the Supreme Court and the federal antitrust enforcement community (federal antitrust enforcement agencies, antitrust practitioners, antitrust economists and other antitrust scholars) – that the antitrust laws should be construed and applied to maximize the long-run economic value of what we produce from the resources available. It is beyond serious argument that innovation has been critical to economic progress and will remain so for the foreseeable future. Therefore competitive conduct that places material limits on innovation should be subject to antitrust prohibition, subject of course to the overarching constraint that all aspects of antitrust enforcement should be held to rigorous standards of sound procedure and administration.

   b. More broadly, would you agree that harm to innovation constitutes a harm to consumers under current law?

      Yes; competitive conduct that places material limits on innovation undermines the fundamental objective of antitrust law, as described in my previous answer.

2. New research has shown that more concentrated labor markets are generally correlated with lower wages.
   a. Would you agree that a more effective antitrust enforcement regime could help combat labor market monopsony, and in turn help fight stagnant wages and inequality? Why or why not?

   In general, competitive conduct involving buyers (unilateral marketplace conduct by a monopsonist, or coordinated action among competing buyers) should be analyzed under U.S. antitrust law using the same fundamental economic and legal approaches as for competitive conduct involving sellers. This basic principle is supported by sound and empirically based economic analysis as well as by controlling U.S. judicial precedent. A good overview of the subject, including discussion of leading cases, may be found in the federal antitrust agencies' 2008 submission on this subject to the Competition Committee of the OECD, available at https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/monopsony.pdf (I may not necessarily agree with every nuance of the submission, but overall it provides a sound assessment of and insights regarding the main issue – symmetrical antitrust treatment of buy-side and sell-side competitive conduct.)

Except where an exemption or immunity is available under governing law, this principle is generally applied to conduct by employers – buyers in the market for the labor of individuals. In October 2016 the federal antitrust enforcement agencies issued "Antitrust Guidance for Human Resource Professionals", available at https://www.justice.gov/atr/file/903511/download, generally describing the nature of and rationale for the antitrust constraints on employer conduct in the market for labor. This document also identifies recent civil actions successfully challenging unlawful employer collusion, and warns that certain future instances of "naked" employer collusion may warrant criminal prosecution:

> Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements. These types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct. Accordingly, the DOJ will criminally investigate allegations that employers have agreed among themselves on employee compensation or not to solicit or hire each others' employees. And if that investigation uncovers a naked wage-fixing or no-poaching agreement, the DOJ may, in the exercise of its prosecutorial discretion, bring criminal, felony charges against the culpable participants in the agreement, including both individuals and companies.

These enforcement policies have a sound legal and economic basis. Anticompetitive conduct by employers may reduce wages and impose other costs on the U.S. economy.

While I support antitrust enforcement consistent with current law and the stated policies of the federal enforcement agencies referred to above, I am not aware of any persuasive economic assessment of the nature, extent or significance of any specific labor monopsony in the U.S. Moreover, I am skeptical of assertions that concentration measures have a meaningful inverse correlation with wage rates in specific markets that can be used as the basis for specific enforcement actions. In any event, even if studies found some negative correlation between buy-side concentration in labor markets and wage rates, and I do not believe that such a correlation would furnish a persuasive basis for antitrust enforcement aimed at conduct in specific labor markets. As I explain below, broad correlations between seller concentration and prices and/or profits generally are not currently regarded as either valid or useful in enforcement activities directed at competitive conduct by sellers. In other words I would question both the existence and strength of any causal relationship between buy-side labor-market concentration and wages, and I would expect to find much better evidence than concentration/wage correlations to assist agencies and courts in determining whether specific instances of labor-market conduct should be regarded as anticompetitive.

In response to the suggestion of a negative employer concentration/wage level correlation contained in this question, I have reviewed a recent paper purporting to find such a relationship, "Labor Market Concentration" by José Azar, Ioana Marinescu and Marshall I. Steinbaum, Working Paper 24147, http://www.nber.org/papers/w24147. To be credible, any broad claim that market concentration levels are meaningfully correlated with and likely to have a material influence on wage rates would require far more detailed and persuasive support than is offered in this single paper. For example, the authors are forthright in pointing out that the data they rely upon are derived from a very limited portion of the broader labor sector (the main data source, CareerBuilder, reportedly accounting for about a third of U.S. job openings, with only 20% of the data points in the domain of the study providing any wage figure). Without going into details of econometric methodology, I would hope that the authors would concede that there are numerous points for further exploration and analysis, and that economists should hesitate to accept assertions regarding a broad concentration-wage correlation without substantial additional study and testing based on other types of data and different approaches to the question.

Previously, similar studies have been offered to support assertions that there is a meaningful positive correlation between product-market concentration and prices and/or profits, but none has withstood the scrutiny of scholarship and experience. In the 1960's and 1970's such correlations were widely put forward as a basis for antitrust policy, but the supporting scholarship has been undermined or discredited in various ways. *See* Industrial Concentration: The New Learning (Goldschmid, Mann & Weston, eds.; 1974). The Supreme Court notably rejected federal antitrust enforcement efforts based on predictions of competitive harm derived from heavy reliance upon concentration data. *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974). This debate, initially settled in the 1970's, was revived about thirty years later in a notable study by a Task Force appointed by the American Bar Association Section of Antitrust Law. (I served as a member of this Task Force.) Again, careful scholarship largely discredited efforts to identify an empirical basis to treat concentration and changes in concentration as a meaningful guide to assessment of anticompetitive effect in specific antitrust cases. ABA Section of Antitrust Law Task Force Report, Perspectives on Fundamental Antitrust Theory (2001). Broadly speaking, this Task Force Report, which considered the views of present and former senior antitrust enforcement officials, experienced practitioners and economists, found the empirical and theoretical support for the existence of a consistent, statistically significant and material negative correlation between concentration and the intensity of competition in a market to be insufficient for use in specific antitrust cases.

In keeping with this persistent skepticism regarding the explanatory value of concentration measures in antitrust enforcement, the most recent (2010) version of the federal agencies' Horizontal Merger Guidelines significantly deemphasizes market concentration as a factor in the analysis of likely competitive effects of structural transactions subject to Section 7 of the Clayton Act. A spirited and credible defense of this trend to deemphasize concentration as a factor in competitive analysis was provided by one of the 2010 *Guidelines'* principal architects, Prof. Carl Shapiro, who served as Deputy Assistant Attorney General for Economics at the Antitrust Division during the development and release of the *Guidelines*. Carl Shapiro, "The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years", 77 Antitrust L.J. 701 (2010).

While the *absence* of significant concentration is useful as a "safe harbor" for conduct that might otherwise attract concern in a market with very few competitors, significant concentration (or an expected increase in concentration) is not sufficient to conclude that conduct is or will be anticompetitive. Concentration data may have some role to play in sifting through competing economic explanations for observed market behavior and in predicting future competitive effects of particular conduct, but simplistic reliance on concentration measures to assess or predict competitive effect is not regarded currently as a supportable approach. Other information (difficulty and speed of entry and/or exit, size, frequency and transparency of individual transactions, product complexity and customer capacity to obtain and understand the product, the rate of change in output or the presence or expectation of rapid changes in technology) are likely to provide clues to competitive dynamics that are far more significant than those provided by concentration measures. Therefore the meticulous measurement of market concentration and the attribution of key analytical significance to concentration are no longer characteristic of sound competitive analysis by federal courts and antitrust enforcement agencies. Concentration is one item of data that is often interesting to know, but is rarely dispositive or even especially helpful in resolving close questions of competitive effect that are key to assessing the legality of specific conduct.

Although I did not have time to assess the specific data and methodologies employed in the paper cited above, I note several questionable assertions in the introductory section of the paper. For example:

> Antitrust enforcement is mainly concerned with consumer welfare, and hence the impacts of a lack of competition on product prices, not wages. Antitrust regulators pay little attention to labor market power . . ..

This statement demonstrates both a misapprehension of the term "consumer welfare" as used in U.S. antitrust law, and a mistaken characterization of the manner in which antitrust law is construed and applied to labor markets. Concerning the misapprehension, as explained in my written statement submitted for the hearing, "consumer welfare" does not mean that antitrust cases are determined by the outcome of a measurement of whether consumers derive net benefits from the specific conduct under scrutiny. It means that in implementing the key operative instrument of antitrust – the preservation of a dynamic competitive process (competition, not competitors) – in cases where the rule of decision for the specific case is subject to argument, the court should choose the solution that has the best chance (considering all relevant evidence and well-founded economic interpretations of the conduct under scrutiny) of maximizing the value of what our economy produces from its available resources. Thus, under the consumer welfare approach, anticompetitive restraints affecting a labor market should be fully vulnerable to antitrust challenge (unless one of the labor exemptions or immunities applies). The U.S. Department of Justice has specifically stated in its "Antitrust Guidance for Human Resource Professionals" that it will consider future no-poach agreements and similar buyers' cartel conduct in the labor market to be criminal matters. This is fully consistent with the meaning of "consumer welfare" as I have explained it, and is <u>not</u> consistent with the concept of consumer welfare as identified in the introduction to the paper by Azar *et* *al.* as I understand it – in other words, a narrow measurement of the welfare of consumers and, by implication, failure (advertent or otherwise) to focus on economic harm inflicted by anticompetitive conduct in the labor market.

As to the mistaken characterization, the Antitrust Division's public issuance of a warning of criminal consequences for labor-market buyers' cartels is manifestly inconsistent with any suggestion that "[a]ntitrust regulators" (a choice of terminology that is also questionable given the fundamental conflict between market competition versus government-mandated outcomes to advance economic goals) ignore or minimize labor-market considerations. As a technical point one could say that a willingness to prosecute employers' cartels criminally does ignore "labor market power", but only because proof of such power is not an element of a naked cartel offense under Section 1 of the Sherman Act – not because enforcers are uninterested in restraints that reduce the wages of laborers selling services into a labor market victimized by buyer (employer) collusion, as distinct from collusion-inflated prices for products sold to consumers. It would inhibit effective antitrust enforcement to require consideration of labor market power in such circumstances, and therefore it could not stand as a persuasive criticism of current doctrine (from the perspective of protecting the interests of laborers in a fully competitive economy, including a fully competitive labor market) that the applicable legal rules do not impose any such requirement for proof of liability.

Subject to these observations regarding the basis for the question, I nevertheless fully support application of antitrust principles to the non-exempt/non-immune aspects of labor markets, and I would expect well-grounded enforcement efforts to help restore (i.e., raise) wages to competitive levels and eliminate economic costs imposed by any anticompetitive conduct affecting labor markets.

3. The pending merger between Sinclair Broadcast Group, the largest owner of local TV stations in America, and Tribune Media would create a broadcasting colossus, reaching 223 stations in 108 markets, covering 72% of households.
    a. Given the Justice Department's recent action to block the AT&T-Time Warner merger, wouldn't it raise serious concerns if the Department allowed the Sinclair-Tribune merger to proceed?

I do not have sufficient information to answer this question. Each transaction subject to review under U.S. antitrust law involves its own specific markets and must be assessed on the basis of careful factual investigation and a balanced and reasonable evaluation of a range of fact-based economic hypotheses regarding likely competitive effects. The federal antitrust agencies have the necessary authority to investigate and assess transactions, but without benefit of the results of such a fact investigation and the benefit of economic analysis of the likely possible future competitive effects of these transactions, I could not make an assessment. For similar reasons I am not in a position to assess whether any particular conclusion regarding the likely future competitive effects of the AT&T-Time Warner transaction might imply anything about the proper competitive analysis of any other transaction, including the Sinclair-Tribune transaction.

b. Recent media reports indicate that the Justice Department may be proposing a deal in which Sinclair would be required to sell off 12 to 13 Tribune stations. Do you think the remedies proposed by the Justice Department can adequately mitigate the effects of this merger?

See answer to subpart a.