Antitrust and Harm to Innovation:
Answers in Response to Questions for the Record

Before the Senate Judiciary Committee Subcommittee on Competition Policy, Antitrust, and Consumer Rights

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October 14, 2022

In response to a letter dated August 24, 2022 from Senator Richard Durbin (D-IL) following my Senate Testimony[1] at a hearing held on December 15, 2021 entitled "The Impact of Consolidation and Monopoly Power on American Innovation,"[2] I am writing to provide answers in response to questions for the record from Committee members of the Senate Judiciary Committee.

Question from Senator Thom Tillis

1. As [Deputy] Assistant Attorney General for the DOJ's Antitrust Division in the Trump Administration, you stated that China should "enforce competition laws consistent with intellectual property rights. That means competition law and policy should not constrain the legitimate exercise of intellectual property rights, or stifle innovation by undermining incentives for investment. It is critical to create a culture of innovation and economic freedom, where the default position is that anything that is not prohibited is permitted. This leads entrepreneurs, investors, and innovators to migrate toward your economy and identify it as a cradle of creation."[3]
    a. Do you agree with this statement?
    b. What role should intellectual property rights have in any assessment of innovation and antitrust policy and enforcement?

Answer from Professor Roger Alford

From August 1, 2017 to July 24, 2019, I served as the Deputy Assistant Attorney General in the Antitrust Division with responsibility for international antitrust enforcement. The

[1] Roger Alford, *Antitrust and Harm to Innovation*, (Dec. 15, 2021), https://www.judiciary.senate.gov/imo/media/doc/Alford%20Testimony1.pdf.
[2] The Impact of Consolidation and Monopoly Power on American Innovation, (Dec. 15, 2021), https://www.judiciary.senate.gov/meetings/the-impact-of-consolidation-and-monopoly-power-on-american-innovation.
[3] Roger P. Alford, "Crossing the River by Feeling the Stones": Reflections on a Decade of Chinese Competition Enforcement, (July 31, 2018), https://www.justice.gov/opa/speech/file/1083971/download.

quoted language in your question comes from a speech I gave in Beijing on July 31, 2018, on the ten-year anniversary of China's anti-monopoly law. The purpose of the speech was to reflect on the evolution of antitrust laws in the United States and suggest that that experience might provide useful guidance to assist China as it seeks to progress toward a mature antitrust enforcement regime. The speech was approved by the Assistant Attorney General as consistent with the aims of the United States in dealing with our Chinese counterparts. I still agree with the points made in the speech.

As stated in that speech, intellectual property and antitrust laws should work together to promote a market environment in which entrepreneurs, investors, innovators, and consumers have confidence that intellectual property rights are respected and exploited and markets function competitively and efficiently. The precise relationship between intellectual property rights and antitrust depends on the context.

Question from Senator Thom Tillis

2. While at the DOJ, you gave a speech to the Chinese advocating for enforcement actions based on protecting competition, and that "injecting notions of fairness into competition law enforcement inevitably turns it into regulation that protects competitors rather than competition itself." Do you still hold that view?

Answer from Professor Roger Alford

Yes, I continue to hold this view. Yes, I continue to hold this view. The full paragraph of the speech was an admonition to Chinese authorities to adopt and maintain the United States' antitrust consumer welfare standard. It reads as follows:

> "[B]ase your enforcement actions on protecting competition. This standard focuses on allocative efficiency, price competition, quality, and innovation. It lets market-based economics, which are growing by leaps and bounds in China, drive the outcome. This standard also is, in our view, the most objective. It allows competition authorities to focus less on extraneous values and more on economic realities and business incentives. Notions of fairness can be difficult to determine and too subjective to provide consistent, reliable guidance for businesses and consumers alike. Moreover, injecting notions of fairness into competition law enforcement inevitably turns it into regulation that protects competitors rather than competition itself."[4]

This paragraph is consistent with the position I articulated in my Senate Testimony:

[4] Roger P. Alford, "Crossing the River by Feeling the Stones": Reflections on a Decade of Chinese Competition Enforcement, (July 31, 2018), https://www.justice.gov/opa/speech/file/1083971/download.

> "I support the consumer welfare standard because it is the best way to properly focus antitrust laws without importing broader citizen or public interest concerns. But we should recognize that the consumer welfare standard applied in antitrust law includes more than price and output effects; it also includes quality, consumer choice, and innovation."[5]

The language you quote incorporates two important ideas. First, as the Supreme Court has opined, "[t]he antitrust laws . . . were enacted for 'the protection of competition, not competitors.'"[6] Second, as then-AAG Robert H. Jackson advocated, robust antitrust enforcement, as opposed to regulation, typically is the better solution to the monopoly-related problems in the national economy.[7] Jackson explained, "The antitrust laws represent an effort to avoid detailed government regulation by keeping competition in control of prices."[8]

Question from Senator Thom Tillis

3. In your written testimony, you note that greater weight should be given to quality harms like harm to innovation, and you advocate for government enforcers to take an evidence-based approach to mergers while also raising the commensurability problem.
   a. How can enforcers best assess harms and benefits to future innovation, both in and outside of the merger context?
   b. Do current statutory authorities permit enforcement agencies to appropriately assess harms to innovation?
   c. Does Congress need to act to ensure that enforcement agencies are basing any assessment of innovation harms or innovation competition on solid evidence, and not subjective speculation?

Answer from Professor Roger Alford

In my experience, antitrust enforcers assess harms and benefits to future innovation on a case-by-case basis relying on available evidence. This is true for both in and outside the merger context. There is no one-size-fits-all approach to how a merger will affect innovation. Current statutory authorities often are sufficient to permit agencies to appropriately assess harms to innovation. But as discussed below, there are instances in which existing antitrust laws are not up to the task of addressing harm to innovation, and therefore new legislation is needed to address those concerns. It is my understanding

[5] Roger Alford, *Antitrust and Harm to Innovation*, (Dec. 15, 2021), https://www.judiciary.senate.gov/imo/media/doc/Alford%20Testimony1.pdf.
[6] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)
[7] R. Hewitt Pate, *Robert H. Jackson at the Antitrust Division*, 68 Alb. L. Rev. 787, 790 (2005).
[8] Robert H. Jackson, *Should the Antitrust Laws Be Revised?*, 71 U.S. L. Rev. 575, 576 (1937).

that enforcement agencies typically base their assessment of innovation harms on solid evidence, and judicial review of these enforcement actions serves the function of guaranteeing that they do. In addition, Congress has a limited role through oversight hearings and other mechanisms to ensure that the enforcement agencies rely on proper evidence to support their claims of anticompetitive harm.

Question from Senator Thom Tillis

4. Does concentration always harm consumers? Is it always a symptom of an underlying anticompetitive behavior?

Answer from Professor Roger Alford

No, concentration does not always harm consumers, and is not always a symptom of underlying anticompetitive behavior. Concentration may be the result of intense competition that has introduced innovation, higher quality, and lower prices to the market, increasing the market share of a small number of competitors and leading less efficient competitors to exit the market. As the Supreme Court has stated, the abuse of monopoly power is the "willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a super product, business acumen, or historic accident."[9] But concentration often positively correlates with harm to competition, most notably because increased concentration is often associated with greater market power. For example, highly concentrated horizontal mergers are understood to be presumptively illegal based on the high likelihood that they threaten harm to competition and consumers. Collusion between competitors is more likely in concentrated markets with fewer competitors. And firms with monopoly power are of particular concern for their potential to abuse their monopoly power and harm consumers. The increased market power associated with highly concentrated markets suggests that antitrust laws should be strengthened, antitrust institutions should be fortified, and antitrust enforcement should be intensified.

Question from Senator Thom Tillis

5. Would shifting the focus to concentration rather than consumers deter future innovation or at the very least discourage or chill business practices that benefit consumers?

[9] United States v. Grinnell Corp., 384 U.S. 563, 571 (1966).

Answer from Professor Roger Alford

No. The focus on concentration is based on an understanding that it positively correlates with increased market power, which is likely to harm consumers. The question presumes that in focusing on concentration one is not focusing on consumers, which is an antilogy. Concentration often increases market power, which is generally understood to mean the power to control prices, deter innovation, or exclude competition. As discussed in my Senate Testimony, such concentration resulting in harm to consumers is evident, for example, with Big Tech market power. As Senator Mike Lee (R-UT) stated in a recent keynote speech to NetChoice, a technology lobbying group funded by Big Tech companies, "the only people who still argue that there's no reason to be concerned about competition in Big Tech are the ones paid by Big Tech to say so."[10] He noted that "when well-compensated lobbyists and their non-profit proxies attempt to pervert conservative economic and legal philosophy into a defense of Big Tech monopolists, antitrust policy and consumers suffer…. This is what happens when conservatives are told that concentrated economic power shouldn't worry us as much as concentrated political power…. But as we've seen, the idea that Big Tech operates in a functioning free market can no longer be taken as a serious position."[11]

Question from Senator Thom Tillis

6. When evaluating potential anticompetitive conduct or developing antitrust policy, should antitrust agencies be required to consult with other agencies or stakeholders with relevant equities – such as cybersecurity, intellectual property, or industry expertise?

Answer from Professor Roger Alford

My experience as Deputy Assistant Attorney General suggests that antitrust agency leaders routinely consult with other agencies and ask for input from relevant stakeholders when enforcing antitrust laws and developing antitrust policy. That is evident from the manner in which mergers were reviewed, cases were litigated, consent decrees were proposed and reviewed, policy roundtables and antitrust conferences were convened, guidelines were drafted and adopted, and joint interagency policy statements were promulgated. Other agencies and relevant stakeholders routinely reached out to antitrust agency personnel to express their views related to antitrust policy and the investigation

[10] NetChoice, American Antitrust: Reforms to Create Further Innovation and Opportunity, YOUTUBE (June 22, 2021) https://www.youtube.com/watch?v=pToFy8BY5C4.
[11] Id.

or prosecution of actual or potential antitrust cases, and in my experience agency officials took those views into appropriate account. In addition, legislative proposals, Senate and House reports, and congressional hearings provide useful mechanisms for antitrust agency leaders to receive input regarding stakeholder concerns regarding the development of antitrust policy and the evaluation of potential anticompetitive conduct. It is my impression that in the context of congressional oversight hearings and congressional letters to agency leaders, questions were often asked upon the recommendation of relevant stakeholder interests, providing yet another opportunity for antitrust agency leaders to consider and consider relevant equities. Given the existing practice of antitrust enforcement agencies receiving input from relevant stakeholders, formally requiring that they do so is inappropriate.

Question from Senator Thom Tillis

7. Do you have any concerns about the unintended consequences of over-regulation on innovation or competition? If so, how can Congress address such concerns?

Answer from Professor Roger Alford

The choice between regulation and litigation is often difficult, and that is particularly true in dealing with anticompetitive conduct. As noted above, antitrust enforcement, as opposed to regulation, typically is the better solution to the monopoly-related problems in the national economy. But that is not always the case. In my experience, antitrust enforcers have had difficulty keeping up with the growing market power of Big Tech companies and litigation efforts have not deterred their abuse of monopoly power. For example, federal and state antitrust litigation against Google, as well as similar efforts abroad, has been slow and expensive and done little to deter Google's abuse of its monopoly power. In the face of such difficulties, it is not surprising that conservative lawmakers like Senator Mike Lee (R-Utah) have introduced common sense legislation such as the Competition and Transparency in Digital Advertising Act to address the same or similar issues that antitrust litigation is attempting to address. I agree that in some markets there are examples of over-regulation that have hindered innovation. As I have discussed in speeches while at the Department of Justice, some regulations are anticompetitive and "lawmakers should do a better job of ensuring that government action supports, rather than impairs, the operation of free markets."[12] And as I testified before the Senate Judiciary Committee, there are obvious examples of such anticompetitive regulations. The real estate market is an example of state anti-rebate and minimum service requirement laws have undermined efforts by discount real estate

[12] Roger Alford, The Role of Antitrust in Promoting Innovation, (Feb. 23, 2018), https://www.justice.gov/opa/speech/file/1038596/download.

brokers such as Redfin from using technological innovations to effectively reduce brokerage fees and pass those savings on to consumers.[13] The repeal of such laws at the state level or the preemption of those laws at the federal level would promote innovation in the real estate market.

Question from Senator Marsha Blackburn

1. There are areas where the FTC and the Department of Justice have overlapping jurisdiction when it comes to antitrust enforcement. We saw it, for example, when both were looking at the role of Big Tech companies in the U.S. economy, and they ended up splitting up the work and each focusing on a few companies. Is there a better way to think about what each agency's jurisdiction should be in antitrust enforcement?

Answer from Professor Roger Alford

In my experience, disputes regarding clearance are rare and the Department of Justice and the Federal Trade Commission typically resolve clearance questions with little difficulty. There have been occasional instances when resolution of clearance disputes has been difficult. As the question suggests, one of those instances arose in the context of investigations of Big Tech companies. As the agencies gain experience and expertise in emerging technologies, clearance disputes in those industries likely will decline. Even still, the traditional criteria for resolving clearance disputes occasionally do not offer sufficiently clear guidance as to which agency should have jurisdiction. More detailed clearance guidelines and more specific industry descriptions and enumerations for allocation may avoid such problems in the future.

Question from Senator Marsha Blackburn

2. Should we be concerned that either agency will inject political leanings into antitrust enforcement?

Answer from Professor Roger Alford

Consistent with international standards, competition agencies are required to "conduct enforcement matters in a consistent, impartial manner, free of political interference."[14] Occasionally, lobbyists representing powerful interests and their non-profit proxies will suggest to congressional leaders or executive agencies that they are national champions

[13] Roger P. Alford and Benjamin H. Harris, *Anticompetition in Buying and Selling Homes*, Regulation (Summer 2021), https://www.cato.org/sites/cato.org/files/2021-06/regulation-v44n2-2.pdf

[14] INT'L COMPETITION NETWORK, ICN GUIDING PRINCIPLES FOR PROCEDURAL FAIRNESS IN COMPETITION AGENCY ENFORCEMENT (Mar. 2018), http://icn2018delhi.in/images/AEWG-Guiding-Principles-4PF.pdf.

or otherwise deserve special status under existing antitrust laws or in drafting new antitrust laws based on their nationality, their political clout, or their market position. As I stated in a speech in Beijing on July 31, 2018, "All enforcement agencies face challenges in dealing with entrenched interests, and the risks of promoting national champions is ever present."[15] One of my principal tasks at the Department of Justice was to avoid such a discriminatory mentality. As a result, together with Assistant Attorney General Makan Delrahim, I personally led negotiations on behalf of the Department of Justice that resulted in the adoption by over 70 competition agencies of the ICN Framework on Competition Agency Procedures, which obligates each antitrust enforcement agency to "ensure that its investigation and enforcement policies and procedural rules afford persons of another jurisdiction treatment no less favorable than persons of its jurisdiction in like circumstances."[16] In my experience, antitrust enforcement agencies in the United States are aware of the risks of political influence and are vigilant to ensure that their investigations and enforcement actions are based on competition concerns rather than politics.

Question from Senator Marsha Blackburn

3. You have said that "there is no one-size-fits-all approach to how a merger will affect innovation." When the FTC and the Department of Justice look at mergers, it seems like the agencies —the FTC especially— are undercounting the impact of e-commerce platforms and online retailers as competitors. How should the FTC and DOJ think about online competition as part of their merger analyses?

Answer from Professor Roger Alford

The referenced sentence from my February 23, 2018 speech at King's College London is part of the following paragraph:

> Enforcers must ensure that their theories of innovation are tested against the factual evidence on a case-by-case basis. As our Guidelines suggest, the relationship between competition and the pace of innovation is complex. There is no one-size-fits-all approach to how a merger will affect innovation. In analyzing the likely impact on innovation in a particular case, the Antitrust Division looks at the factual and economic evidence. For example, is there evidence that premerger, the parties can produce better, faster or different solutions in response to a rival's innovation? Is there evidence that innovative efforts are largely duplicative? Do innovations quickly swing market share to the innovator? Or, are the innovations

[15] Roger P. Alford, "Crossing the River by Feeling the Stones": Reflections on a Decade of Chinese Competition Enforcement, (July 31, 2018), https://www.justice.gov/opa/speech/file/1083971/download.
[16] ICN Framework on Competition Agency Procedures, https://www.internationalcompetitionnetwork.org/frameworks/competition-agency-procedures/.

rapidly duplicated by others in the industry? These are just a few examples of the many questions we have explored in conducting merger reviews.[17]

As is suggested from the question, there is evidence to suggest that antitrust enforcement agencies are not fully accounting for the impact of e-commerce platforms and online retailers as competitors. In particular, these retailers often provide goods and services to consumers and simultaneously provide a platform for competitors to provide goods and services to consumers. The information asymmetries and other competitive advantages that result from such combined functions are undercounted in merger analysis. They also are undercounted in enforcement actions. In some instances, Big Tech e-commerce platforms have monopoly power and abuse that power in the fees they charge, the information they control, the innovation they deter, and the competitors they exclude. While more vigorous antitrust enforcement should be encouraged to address such practices, there also is a need to consider legislative proposals such as the Open App Markets Act that Senators Blackburn (R-Tenn.), Blumenthal (D-Conn.), and Klobuchar (D-Minn.) have introduced. This bill seeks to address the problem of gatekeeper companies like Google and Apple controlling the dominant mobile operating systems and their app stores, empowering them to dictate the terms of the app market, inhibiting competition and restricting consumer choice. As Senator Marsha Blackburn has stated in introducing this legislation, "Big Tech giants are forcing their own app stores on users at the expense of innovative start-ups. Apple and Google want to prevent developers and consumers from using third-party app stores that would threaten their bottom line."[18] Such initiatives are welcome developments to properly address the impact of e-commerce platforms.

Question from Senator Marsha Blackburn

4. Are these agencies leaving out significant parts of markets that make a real difference to consumers and businesses?

Answer from Professor Roger Alford

As I stated in a speech on May 7, 2019 in Hainan, China, the role of state-owned enterprises engaging in anticompetitive behavior deserves greater scrutiny.[19] Over the past few decades, state-owned enterprises have increasingly played a more prominent role in international commerce. In fact, some of the largest companies in the world are state-owned enterprises, including OPEC oil companies and numerous Chinese

[17] Roger Alford, The Role of Antitrust in Promoting Innovation, (Feb. 23, 2018), https://www.justice.gov/opa/speech/file/1038596/download.
[18] Blackburn, Blumenthal, Klobuchar Introduce Bipartisan Antitrust Legislation To Promote App Store Competition, (Aug. 11, 2021), https://www.blackburn.senate.gov/2021/8/blackburn-blumenthal-klobuchar-introduce-bipartisan-antitrust-legislation-to-promote-app-store-competition.
[19] Roger Alford, The Pearl of Great Worth: The Common Pursuit of Protecting the Markets, (May 7, 2019), https://www.justice.gov/opa/speech/file/1160506/download.

companies. To the extent those companies engage in anticompetitive commercial behavior that harms the United States market, United States antitrust enforcement authorities should investigate and challenge such behavior and subject foreign state-owned enterprises "to the U.S. antitrust laws to the same extent as the activities of privately owned firms."[20] In the United States, state-owned enterprises that engage in commercial activity with a United States nexus[21] are not immune from the antitrust laws. Where competitors, whether private or state-owned, engage in collusive or anticompetitive behavior that harms the United States market, the United States should bring all its enforcement tools to bear.[22] I encourage Congress to bring greater attention to the anticompetitive harm that state-owned enterprises cause to American consumers.

[20] United States, Competition Law and State-Owned Enterprises, OECD, at 6 (2018), available at https://one.oecd.org/document/DAF/COMP/GF/WD(2018)55/en/pdf.
[21] 28 U.S.C. § 1605(a)(2).
[22] Makan Delrahim, Competition, Intellectual Property, and Economic Prosperity (February 1, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-us-embassybeijing.