Senator Thom Tillis

Questions for the Record

Senate Judiciary Competition Policy Subcommittee Hearing

"The Impact of Consolidation and Monopoly Power on American Innovation."

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1. In your written testimony, you advocate for government enforcers to bring standalone claims of innovation competition harm.
    a. How can enforcers best assess harms and benefits to future innovation, both in and outside of the merger context?

MOSS RESONSE: There are three major ways in which the antitrust agencies can better address innovation competition issues. One, the antitrust agencies should bring more "standalone" cases that allege harm to innovation competition. This means cases where harm to innovation is the major alleged harm, separate and apart from adverse price or quality effects. Two, the success of innovation competition cases would be enhanced by agency policy to discount unsubstantiated claims that mergers or conduct will generate longer-term benefits around innovation. Three, the agencies should bring more cases against acquisitions of smaller rivals that are designed to extinguish innovative threats to a dominant firm.

    b. Do current statutory authorities permit enforcement agencies to appropriately assess harms to innovation?

MOSS RESPONSE: Yes, for the most part. However, additional measures will be necessary to promote the ability of the agencies to fully address potential harm to innovation from anticompetitive mergers and conduct. This includes, for example, the need for new presumptions of illegality under Clayton S.7. These include a presumption against anticompetitive vertical mergers and a presumption against acquisitions of smaller rivals, especially nascent rivals with more innovative business models or technologies. The existing "structural presumption," against concentrative horizontal mergers, should also be strengthened, in that the antitrust

agencies (and courts) often do not enforce it.

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?

MOSS RESPONSE: Aside from the need for new presumptions, discussed in 1.B, members of Congress might consider legislative proposals to emphasize that the agencies should consider evidence of anticompetitive "intent." This includes evidence that a dominant firm was motivated to acquire a smaller rival to neutralize a competitive threat.

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

MOSS RESPONSE: Concentration does not always harm consumers or gives rise to anticompetitive behavior. There are reasons why concentration may increase, separate and apart from consolidation or anticompetitive behavior. These include factors such as technological change and the achievement of some scale and scope economies. However, major arguments for why high concentration is needed to invest in R&D and spur innovation have been increasingly discredited. This has shifted the focus to consolidation and anticompetitive conduct as a major factor in increasing concentration, which can increase incentives to engage in anticompetitive behavior.

3. 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?

MOSS RESPONSE: The focus of the antitrust laws is to promote and protect competition, for the benefit of consumers (e.g., fair prices, high quality, and innovation). To the extent that a merger increases concentration, or anticompetitive conduct reinforces high concentration and thus creates incentives to exercise market power, there is a heightened risk of harm to consumers. This linkage between concentration, anticompetitive effects, and impact on consumers is a vital part of ensuring that the antitrust laws have their intended effect – to promote competition and protect consumers.

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

MOSS RESPONSE: Proposals to reform the antitrust laws to implement broad and sweeping "bright line" tests (e.g., market capitalization thresholds, market share thresholds, minimum numbers of competitors in a market, break-up thresholds, etc.) could well have unintended consequences on competition and consumers. It is also the case that reform to the intellectual property (IP) system in the U.S. is needed to ensure that innovators (e.g., patent-holders) do not use their IP to stymie competition. For example, so-called "product hopping" involves a pharmaceutical patent-holder making minor modifications to a patented technology, re-patenting it, and switching consumers to the new technology. This extends the patent-holder's monopoly and harms consumers. Congress would be well-suited to opining on this issue through reform to the patent and trademark system.

5. Your written testimony states that the corporate-academic innovation partnership has weakened since the 1980s, with universities focusing on research and companies focusing on development. Yet during the 1980s, the bipartisan Bayh-Dole Act allowed universities and grant recipients to hold title to intellectual property to ensure that companies would focus on commercializing technologies that otherwise would not be developed. What role should intellectual property rights and policy have in any assessment of innovation and antitrust policy and enforcement?

MOSS RESPONSE: Per my answer to #4, there are sometimes conflicts between competition enforcement and intellectual property law. The pharmaceutical "product-hopping" example is important, and we will likely see it emerge in agricultural biotechnology as transgenic seeds come off patent. It is also true that the U.S. approach to pay-for-delay in pharmaceuticals, whereby the patent holder pays off the generic competitor to stay out of the market, should have been considered a "per se" illegal antitrust violation, from the start. Instead, the practice was allowed to continue, to the detriment of competition in generic drugs, and resulting high drug prices to consumers.

6. When evaluating potential anticompetitive conduct or developing antitrust

policy, can it be useful for antitrust agencies to consult with other agencies or stakeholders with relevant equities – such as cybersecurity, intellectual property, or industry expertise?

MOSS RESPONSE: Absolutely. The era of antitrust enforcement dominated by two disciplines – law and economics – should be long gone. Technological change, changes in consumer behavior and advent of dynamic pricing, the evolution of digital platforms and algorithmic preference shaping, etc. – all emphasize the need for a multidisciplinary approach to competition analysis and enforcement. Congress could play an important role in ensuring that the agencies tap into multiple disciplines as part of agency appropriations.

7. I have heard diverging opinions as to whether "growth by acquisition" is stimulating or stifling for innovation. On the one hand, acquisitions are seen as an "exit strategy" for entrepreneurs, and an incentive for venture capitalists to invest in start-ups. On the other, acquisitions may be seen as internalizing technology that otherwise would be available in the marketplace. How should antitrust enforcers and policy makers assess these perspectives?

MOSS REPONSE: Antitrust has never "deferred" to any particular business or growth model, such as the VC-backed start up model that we see in the digital sector. Indeed, antitrust's generalist approach ensures that the laws are enforced consistently across sectors. Moreover, antitrust deference to any particular innovation model would involve government enforcers in picking "winners" and "losers." To the extent that a "growth by acquisition" model characterizes a sector, then antitrust enforcers should keep a close eye on rapid consolidation and expansion. Similarly, to the extent that acquisitions are motivated by dominant firms neutralizing a competitive threat, innovation stands to suffer because acquirees could have grown into standalone rivals and acquirers would have been forced to "build" it themselves, to the benefit of consumers.The antitrust agencies appear to be focused more on these factors, but we have not yet seen enough cases that address them, at this time.