Responses to question from member of the Senate Judiciary Committee

on the hearing entitled:

"Understanding the Digital Advertising Ecosystem and the Impact of Data Privacy and Competition Policy"

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QUESTIONS FROM SENATOR WHITEHOUSE:

1. …What are the most exploitative practices used to coerce consumers into granting consent that federal law should prohibit?
2. …Are there best practices with respect to consumer consent?

While there are no doubt some practices that are baldly coercive, those that take advantage of the fact that consumers are uninformed and impatient may be the most damaging because they are simple and omnipresent. Pretty well every consumer is imperfectly informed about what the site will do with her information, and almost every consumer is impatient and wishes to quickly achieve what she came to the site for. Darkpatterns.org demonstrates how sites can steer consumers to click where they do not want to – as demonstrated by their behavior in more neutral environments. Federal law could require all questions to be framed in a neutral way (which can be enforced through experimental testing) or in a symmetric way as explained by Dr. Johnny Ryan.

A second metric of coercion is the level of switching cost the consumer experiences. If she has invested in a device, a network of friends, useful data, past transactions, or the like then she can be coerced by the provider into agreeing to a policy in order to retain access to that asset. Federal law could protect consumers from being offered such conditions.

Consumers can be made confused very easily by anything complex. Behavioral economics teaches that a few clear and standardized choices will improve consumer decision-making. For example, a regulator could establish four tiers of privacy options: the first could offer complete privacy (sharing no data) for which the site could charge a subscription; then three others could involve giving up sequentially more data with tiered cost levels. Perhaps the first is free, the second earns the consumer a small payment in exchange for revealing more data, and the third earn the consumer a larger payment in return for even more data. Such standardized tiers across sites (with different prices) could help consumers understand and rely on the privacy level they are choosing.

The Federal government could task a regulator or agency with establishing open standards for micropayments which would enable these different tiers to have different prices.

QUESTTIONS FROM SENATOR BOOKER

1. …The Bundeskartellamt has forbidden Facebook from combining its data with WhatsApp and Instagram data. A) is this the most effective remedy? B) does this decision open opportunities for new entrants?

A) Not in my view. B) Likely not. Because of network externalities, users are likely to still prefer the biggest platform. Encouraging entry may require the imposition of different remedies that overcome network externalities such as mandatory open APIs. Open APIs would allow a small entering social media site to continuously provide its customers their Facebook friends' feed.

2. …The potential explanatory power of behavioral economics seems apparent, and yet our traditional enforcement agencies do not account for it in their analyses. Why is that? What, specifically, can be done to change it?

The weight of old Chicago school rhetoric and persuasion by the parties that gain from under-enforcement has slowed the adoption of rigorous current economics into enforcement practices. Agencies have not made the case in court that behavioral tools provide different, correct, and useful answers. Change requires more translational scholarship by economists, more purposeful adoption by agencies, and endorsement from Congress.

3. …Does the FTC have the authority to obtain the data necessary to determine whether Facebook and Google are behaving as monopolies? Does Congress?

Yes (Facebook), and the DOJ does also (Google). Note that any investigation would be focused on whether either firm engaged in anticompetitive conduct. I am sorry but I do not know enough to answer the second part of your question.

4. Your testimony details the creation of a new regulatory agency called the Digital Authority (DA) which would improve the impact of digital platforms on society. Why take the approach of creating a new entity? Do you believe the FTC's current jurisdiction and power are insufficient? Is the FTC capable of providing the type of sector-specific regulatory role as the DA?

In the report we use the name Digital Authority as a placeholder for whatever regulatory structure Congress thinks would be most effective. Certainly, creating a new function at the FTC, so that it had three units: Consumer Protection, Antitrust and Digital, might work well. This would be a particularly good idea if some career staff rotated across these areas on a regular basis as that would likely reduce capture and increase expertise in all three areas.

I believe the powers of the FTC today are insufficient. The lawyers tell me that the FTC can make rules under Section 3 and enforce Section 5. These are all elements of the existing FTC Act so a lay reader might well assume the FTC has these powers. However, as an economist observer, I see an inconsistency that is confusing; at the same time as insisting the FTC has these rights, enforcers at the agency decline to use them – perhaps as cover because they do not want to enforce, or perhaps because they are afraid that a court will rule against the agency and determine it does not, in fact, have those powers. Therefore, if Congress would like an expanded FTC to definitely have the ability to make rules and enforce beyond the Sherman Act using Section 5 of the FTC Act, it would be wise of Congress to write that down in the form of a statute.

5. Do you believe that society and industry can benefit from enforcement agencies simply commencing antitrust litigation?

Yes, I think this can be beneficial when the agency is correct about the economic harm from the conduct. Explaining that harm and putting sunshine on it allows the public, regulators, state officials, and partners in the industry itself to learn about the firm's strategy and develop a plan to counter it. While the government is bringing a case – an unfortunately long time for antitrust litigation - it is particularly difficult for a dominant firm to engage in exclusion because it is under daily scrutiny. Managers may believe that engaging in anticompetitive conduct *during* the investigation or trial would almost guarantee liability. Secondly, the existence of an investigation allows complainants to come forward knowing they are part of a group. This is less dangerous for any individual complainant than if it is alone.

6. a) I do not know.

   b) I do not know

7. Given the lack of transparency about this process, how confident are you that this is a functioning market? How do we know that it is competitive? How do we know whether it is efficiency enhancing?

We are not confident that digital advertising is a well-functioning market. There is ample evidence suggesting it is not competitive. We do not know it's efficient. For all these reasons an investigation would be informative.

8. Targeted advertising increases revenue by 4%. A) If ultimately proven true, what should advertisers do with this information?

Perhaps they need to investigate for themselves as to its truth in their setting and business model. They could request state or federal agencies investigate to further understand what features of the market (lack of transparency, lack of competition, bundling, tying, fraud, etc) that may be causing targeted ads costing multiples of nontargeted prices while not delivering multiples in value. They could further consider selling only contextual ads on their platform.

B) Professor Scott Morton, your testimony explains in clear detail why data have increasing marginal returns (namely, a company will always benefit from having specific information about an individual, allowing it to become more confident about what that individual wants, and to better tailor its ad services). What do you make of Professor Acquisti's preliminary findings?

The report explains that adding dimensions of data may lead to increasing returns and gives a specific, common example. It does not argue that this will be true about all data all the time. A disconnect between a market price and market value can be a sign of a dysfunctional market or the exercise of market power.

9. The New York Times completely eliminated behavioral targeting on its European sites…and saw no ad revenue drop as a result…Does this episode tell us anything at all about the efficacy of behavioral targeting? Or can this outcome simply be attributed to the strength of certain brands?

This anecdote is consistent with behavioral targeting returning no incremental revenue to the publisher. That does not mean the ad was not more valuable, but rather that any increase in value must have flowed to other parties. It is also possible, of course, that the ad was not more valuable.

If brands have strength due to years of investment in quality or positioning, being able to sell ads and monetize the audience is part of the value and returns to that brand. If behavioral targeting instead allows advertisers to follow individual consumers around the web until they land on a less expensive site – and serve them the same ad on that less expensive real estate – the value proposition of the brand is lessened. This strategy is possible because the intermediary tags the consumer when she visits the branded site (proving that she is a desirable target) and the brand is unable to prevent that identification from leaving with the customer. Then the intermediary is able to sell that identification to the advertiser for a significant cut of the price difference.

SENATOR KLOBUCHAR

The Supreme Court's decision in the *Trinko* case reflects concerns that aggressive enforcement of antitrust laws could chill the very competitive conduct that these laws were designed to protect. Others have argued that we should be more concerned with weak enforcement of these laws in the context of digital platforms, which are susceptible to the formation of monopolies.

- What are your views on the current state of enforcement under Section 2 of the Sherman Act?
- In your opinion, is there a role for Congress to play in improving enforcement relating to single firm conduct?

There is ample evidence (which can be seen in my collected literature review on the site of the Washington Center for Equitable Growth) that we have been underenforcing Section 2 of the

Sherman Act for many years. Courts rely on assumptions about what conduct is likely and/or efficient that are inconsistent with economic theory or evidence and thereby lead to incorrect conclusions about harm to competition. A re-balancing is badly needed.

A re-balancing could be undertaken by the agencies and courts, but it would proceed incrementally and, even if successful, would likely take decades. If congress does not want to wait that long for competition and consumers to be protected in all markets, including digital ones, it may want to pass a new version of the Sherman Act explaining that exclusionary conduct requires more accurate and careful enforcement and gives courts instructions about how congress would like the law to be enforced. In particular, any new antitrust law should address the important benefit of potential and nascent competition in both merger and unilateral conduct analysis. In digital markets with strong network externalities, such nascent and potential competition may be the only, or an important, source of competition benefitting consumers, and should therefore be protected in merger review and in analysis of exclusionary conduct.

SENATOR LEAHY

1. There are many reasons a company may need specific information to provide a contracted service. For example, global positions services cannot function as intended without knowing where you are and where you are going. There are many other examples, however, where companies collect information that is not at all related to their direct business with the consumer.

    a. In general, are consumers aware of the many ways their personal information is used by companies unrelated to the purpose of a contracted service?

In general, I would say they are not.

    b. In your view, are protections for consumers beyond mere opt-in consent appropriate when companies, websites, and apps require consumers to turn over more data than is actually needed for delivery of a service?

Yes, definitely.

2. Even when companies have an actual business purpose for collecting information, they sometimes sell or share that data to third parties. There is discussion about the benefits of requiring consumer consent, but as many of these technologies have become ubiquitous in our daily lives, opting-out of data collection and sharing seems increasingly difficult.

    a. What restrictions currently exist, if any, regarding how data brokers use consumers' data? What is your view on how transparent that process is for an average consumer? Are consumers even aware of what data brokers are doing?

I am sorry that my area of expertise does not allow me to answer this question fully. I can say that I think the process is not at all transparent and consumers are largely unaware of what data brokers are doing.

b. What sort of transparency and disclosure rules should be included in a federal data privacy law? Is opt-in consent enough?

Again, I apologize for not being able to answer this question. It is Dr. Ryan's area of expertise and he may be able to answer.

c. What should consent look like and how can we ensure that consent is truly meaningful? Can we expect people to opt-out when the technology we use has become central to our daily lives?

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Digital platforms have leverage to require data sharing because of the level of switching cost the consumer experiences. If she has invested in a device, a network of friends, useful data, past transactions, or the like then she can be coerced by the provider into agreeing to a policy in order to retain access to that asset. Federal law could protect consumers from being offered such conditions.

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It is important for the federal government to set standards on what information digital services may demand given that many consumers are unwilling to walk away from these services.

3. Up to this point, a number of states have lived up to their "laboratories of democracy" moniker and led the way in regulating data privacy. One of the biggest issues surrounding a potential federal consumer data privacy law is preemption.

a. Do you believe that Congress should write "one national standard" that wipes out state legislation like California's Consumer Privacy Act (CCPA),

Illinois' Biometric Privacy Act, and Vermont's Data Broker Act, or should the federal bill create a minimum standard that allows states to include additional protections on top of it?

If congress writes a privacy law that does a good job and really does provide protection and choice to citizens, I think it could be better to have federal law take precedence over state law. I am concerned, however, that the federal standard will be weak and ineffective, and in that case states will want to add their own protections.

b. Do you believe that any federal privacy standard should, at a minimum, meet the existing consumer protections set by the states, noted above, that have thus far led the way?

Yes, in level and spirit, while making improvements where possible.

SENATOR GRAHAM

1. How is the current digital advertising marketplace impacting publishers like the WSJ and NYT? How will privacy legislation change that?

The current environment is poor for publishers for two reasons. First, the digital revolution has removed their monopoly on classified ads and similar products with network effects. This has lowered revenue. Secondly, the current digital advertising market does not seem to function in a competitive manner and one outcome of the dysfunction (and perhaps fraud) may be lower payments to publishers. A competitive, transparent market could result in higher payments to publishers which would lead to more investment in news and content.

2. As a result of GDPR, we understand that Google limited third-party ad serving on YouTube and also restricted the data received by publishers through AdSense. Do you agree with Google's interpretation of GDPR? Could the law be clearer?

I am sorry but I do not have an answer to this question.