The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?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

<u>QUESTIONS FROM SENATOR BLUMENTHAL</u>

<u>RESPONSES OF JOSHUA D. WRIGHT</u>

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. Innovation is an important dimension of competition in many industries. Recognizing this, the U.S. antitrust agencies ("Agencies") and courts have long understood likely effects on innovation in deciding whether to challenge a transaction, and have challenged transactions that would harm consumer welfare by impairing innovation.[1] Similarly, the Agencies recognize that a merger might enhance innovation under some circumstances. The importance of innovation is ingrained in the modern antitrust approach, as exemplified in Section 6.4 of the Agencies' Horizontal Merger Guidelines; these Guidelines generally set forth the Agencies' framework for analyzing transactions, and Section 6.4 specifically discusses ways in which transactions that impede innovation may harm consumers. Section 10 of the Guidelines discusses the Agencies' framework for evaluating the possibility a merger increases innovation. In my role as a Commissioner at the Federal Trade Commission ("Commission"), I observed firsthand Commission staff economists' and lawyers' ability to analyze thoroughly the potential innovation effects under the consumer welfare standard.

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

   Yes. A reduction of competition that results in less innovation is a cognizable harm under existing antitrust law. The consumer welfare standard does not, however, consider harm to innovation in isolation from other factors. This standard—tethered to modern economics—recognizes the importance of taking a holistic approach to understanding a transaction's likely long-run impact, including price, quantity, quality, innovation and other effects.

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?

[1] Between 2004 and 2014 the FTC challenged 164 mergers, and 54 of them alleged harm to innovation. Joshua D. Wright, *Antitrust Provides a More Reasonable Regulatory Framework than Net Neutrality*, George Mason Law & Economics Research Paper No. 17-35 (Aug. 15, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3020068. *See generally* Douglas H. Ginsburg & Joshua D. Wright, *Dynamic Analysis and the Limits of Antitrust Institutions*, 78 ANTITRUST L.J. 1 (2012).

Modern antitrust law is fully capable of identifying and addressing monopsony issues. Under the consumer welfare standard, antitrust scrutiny of unlawful buyer conduct, or monopsony issues, is of course appropriate. This includes employer conduct directed at those offering labor in a relevant antitrust market, absent any unique legal exemption or immunity. Antitrust enforcement applies the same economic and legal approaches used to analyze the conduct of sellers to analyze the conduct of buyers; for instance, as the U.S. agencies explained in a submission to the OECD, "[m]ergers may be found unlawful on the basis that they are likely to create or enhance market power on the buying side of the market."[2] Likewise, the Justice Department and the Commission have recently stated they will aggressively target anticompetitive employer collusion.[3]

As is true in cases of seller-power, however, inferring harm to competition from concentration alone has proven a poor substitute for careful economic analysis. Moreover, as featured prominently during the Hearing in both oral and written testimonies, antitrust law has performed exceptionally poorly when it fails to focus exclusively upon issues of competition and consumer welfare, and is instead distracted by socio-political goals. Attempting to distort the consumer welfare focus of the modern antitrust laws by incorporating socio-political goals led historically to an antitrust regime that fostered corporate welfare over consumer welfare, perversely favoring corporations at the expense of individual consumers. There is every reason to believe a modern revival of a similar plan to "reinvigorate" antitrust by distracting its focus from consumer welfare to a broad portfolio of policy issues and subjective preferences of regulators would generate the same result.

It is important here to note a critical—but often overlooked—distinction between those labor markets antitrust law can, and rightly does, consider, and those non-competition labor and employment concerns that antitrust law rightly ignores. It is undisputed that antitrust law appropriately examines competitive effects of business conduct within appropriately defined markets, including labor markets. For example, if employers conspired to set prices (salaries, bonuses, benefits, etc.) for certain employees, like specific software engineers, antitrust law would condemn this behavior.[4]

What antitrust law does not do and should not do is consider independent and abstract notions of employment, such as the overall effect a particular merger might have on national employment levels, income inequality, or wages for "executive secretaries" in isolation. There are many reasons for antitrust law's historical skepticism of separately considering employment effects, including:

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[2] U.S. submission to OECD, *Roundtable on Monopsony and Buyer Power* (Oct. 13, 2008), https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/monopsony.pdf.

[3] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

[4] U.S. submission to OECD, *Global Forum on Competition: Does Competition Create or Kill Jobs* (Oct. 20, 2015), https://www.justice.gov/atr/file/813036/download, ¶ 7, n.19.

> [T]wo difficulties with expanding the scope of antitrust analysis to include employment concerns warrant discussion. First, a full accounting of employment effects would require consideration of short-term effects, such as likely layoffs by the merged firm, but also long-term effects, which could include employment gains elsewhere in the industry or in the economy arising from efficiencies generated by the merger. Measuring these effects would require additional resources and could extend the amount of time required to conduct a thorough analysis of the transaction or conduct in question. Second, unless a clear policy spelling out how the antitrust agency would assess the appropriate weight to give employment effects in relation to the proposed conduct or transaction's procompetitive and anticompetitive effects could be developed, the uncertainty caused by the pursuit of multiple objectives could create undue uncertainty in the economy. The difficulty of expressing a consistent set of weighting criteria could hamper an agency's ability to provide transparency on the standards used for its analysis.[5]

Most notably, the vagueness inherent in such considerations renders them ripe for abuse and corporate rent-seeking, as decades of early antitrust enforcement proved. Moreover, the consumer welfare standard already focuses primarily upon output—which is consistent with permitting business conduct that increases employment.

I have reviewed the recent working paper, "Labor Market Concentration,"[6] which purports to support the proposition that concentrated labor markets are correlated with lower wages. Careful empirical study of labor markets and monopsony power are critical to calibrating appropriate policy responses. The authors should be commended for their effort to increase our understanding of labor markets. While this is not the appropriate place to detail specific issues with this particular paper, I do believe in general one should avoid relying upon any single paper to reach policy conclusions—for example, its relevance for antitrust law. That caution is especially appropriate here for several reasons. One is the methodological skepticism of causal inference in studies correlating measures of concentration and price. This skepticism has a long history in the industrial organization literature attributable to the endogenous relationship between price, concentration, and competition. Another is the disconnect between the "markets" explored in the authors' paper and "relevant markets," as the term is used in antitrust analysis.

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?

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[5] *Id.* ¶ 8.

[6] Jose Azar, Ioana Marinescu, & Marshall Steinbaum, *Labor Market Concentration*, NBER Working Paper 24147 (Dec. 2017), http://www.nber.org/papers/w24147.

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?

I do not have the information required to answer these questions at this time. Merger analysis is a fact-intensive exercise. The Justice Department's (like the Commission's) evaluation of business conduct for potential antitrust violations is a specific, iterative process by which: the agency shares its competitive concerns with the company under investigation; the company responds with substantial data, economic analysis, and other evidence; and the agency lawyers and economists analyze these data and ultimately make decisions. Without taking part in that analysis or independently evaluating the relevant data, I lack an informed basis to properly evaluate the Justice Department's pending decisions regarding this specific transaction or how a decision here might implicate any other agency decisions.