United States Senate Judiciary
Subcommittee on Antitrust, Competition Policy, and Consumer Rights

"Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms."

Questions for the Record for Bruce Hoffman
Submitted by Senator Richard Blumenthal
October 8, 2019

1. **The *Wall Street Journal* has reported that the FTC is examining Facebook's many acquisitions as part of its antitrust investigation into the social media giant, seeking to determine if they were part of a campaign to snap up potential rivals to head off competitive threats.**

    a. **Has the FTC brought a Section 2 case against a company in the past for engaging in a pattern of serial acquisitions designed to thwart potential competition?**
    b. **If so, what were those cases and was the FTC successful?**

Response: The Commission has historically relied on Section 7 of the Clayton Act to mitigate the effects of a series of acquisitions that resulted in a firm having a virtual monopoly. For example, the Commission charged Graco, Inc. with buying its two closest competitors in the North American market for fast set equipment ("FSE") in unreportable transactions that did not receive premerger review.[1] After the acquisitions, Graco raised prices for its FSE products, reduced product options, reduced innovation, and raised barriers to entry for firms seeking to compete with Graco, by taking steps to ensure that its distributors would distribute only its products. The Commission's order required Graco to stop implementing any arrangement with distributors that would preclude them from dealing with Graco's FSE competitors. The order also prohibits Graco from discriminating, coercing, threatening, or in any other way pressuring its distributors not to carry its competitors' products.

As our testimony details, the Commission has relied on Section 2 theories of harm to undo acquisitions of nascent competitors that allowed a firm with market power to maintain its monopoly. In Questcor,[2] for example, not only did the Commission require that the acquired assets be sold to another firm that could develop a competing drug, but Questcor also paid $100 million in monetary equitable relief.

We have been analyzing the possible use of Section 2 to address patterns of serial acquisitions designed to thwart potential competition. We believe the legal framework supplied by Section 2 could apply to such conduct and provide a useful vehicle for challenging it in appropriate circumstances. Overall, I am confident in the Commission's ability to use its full range of antitrust authority to combat acquisitions that create durable market power.

[1] *In re Graco, Inc.*, Dkt. C-4399 (Apr. 18, 2013).
[2] This case is often cited as "Mallinckrodt," because Questcor—the firm that engaged in the anticompetitive acquisition—was subsequently acquired by Mallinckrodt.

2. **In a number of mergers over the past decade, antitrust authorities have approved tech mergers based on mistaken industry forecasts. I asked you about some of these during the hearing – specifically, the Google-AdMob merger in 2010 and Google-Double Click in 2007, for which the FTC issued a public closing statement, and the Facebook-Instagram transaction, for which the FTC did not but the UK Office of Fair Trading did.**

    a. **Where the FTC's assumptions and predictions in the context of a merger approval are incorrect, what steps does the agency take to correct its mistakes?**

        i. **Does the FTC continue reviewing consummated mergers where it declined to take any enforcement action to determine the accuracy of its assumptions and predictions?**

            1. **If not, why not? Please be specific.**

            2. **If so, does the FTC consider unwinding a merger after the fact where it finds that its assumptions about competition did not pan out? Please provide an example of when the agency did that.**

Response: The Commission can and does unwind consummated acquisitions that harm competition, even if we had an opportunity to prevent the transaction as part of our premerger review. For instance, that precise scenario occurred when the Commission succeeded in requiring Chicago Bridge & Iron to reestablish a stand-alone competitor after the Commission proved that the company's acquisition of its closest competitor violated Section 7 of the Clayton Act.[3] Where appropriate to restore the competitive status quo, the Commission may require the divestitures of assets outside the market to ensure that the new operator can compete on par with other market participants.[4]

While it is not possible or practical for the FTC to constantly monitor every consummated merger, we rely on various sources of information to ensure we learn about the most pernicious ones. When we hear from customers or other sources about post-merger price increases, quality or output reductions, or other anticompetitive effects, we have the ability to conduct a targeted inquiry that may lead to a law enforcement action. Often, this happens for a non-reportable merger, which may lead us to initiate an enforcement action to unwind the merger. With respect to consummated deals, the Commission can then issue an administrative complaint and proceed to an administrative trial, such as the pending action involving the merger of Otto Bock and Freedom Innovations.[5]

[3] *Chicago Bridge & Iron v. FTC*, 534 F.3d 410 (2008).
[4] See FTC *Competition Matters* blog, "Taking a hard look at the asset package," (Nov. 9, 2016), https://www.ftc.gov/news-events/blogs/competition-matters/2016/11/taking-hard-look-asset-package.
[5] In re Otto Bock HealthCare North America, Inc., Dkt. 9378, https://www.ftc.gov/enforcement/cases-proceedings/171-0231/otto-bock-healthcarefreedom-innovations.

ii. **Does the FTC impose behavioral requirements on companies whose mergers you approve where your assumptions are incorrect?**

Response: The Commission prefers structural remedies for illegal mergers, even consummated mergers. Divestitures to a buyer capable of maintaining or restoring competition prevent mergers from causing competitive harm, provide the right incentives for firms in the market to continue to compete, and do not require the same level of monitoring by the Commission. Nevertheless, in appropriate circumstances, we would consider non-structural remedies for harmful consummated mergers.

b. **When the FTC reviewed and eventually approved the Facebook-Instagram merger, how did the agency define the market for each company? Please be specific.**

Response: I was not working at the Commission when this merger was reviewed, and therefore do not have first-hand knowledge of how that decision was reached. I can assure you that the Bureau's newly formed Technology Enforcement Division is taking a fresh look at the markets in which these firms compete. We have not yet reached any conclusions regarding the definition or assessment of any relevant markets.

c. When the FTC reviewed and eventually approved the Amazon-Whole Foods merger, how did the agency define the market for each company? Please be specific.

Response: The Commission and its staff looked at a very broad range of markets that might have been affected by the proposed merger. For instance, we looked at markets for online groceries, as well as possible effects in delivered groceries. We also considered the effect of Amazon's plans to open brick-and-mortar outlets. In each of these potential relevant markets, we found that consumers would have many options other than Amazon/Whole Foods. Our investigation did not yield evidence that the proposed merger—which combined two firms with, at most, a miniscule overlap, numerous larger competitors, virtually no competitive interaction between them pre-merger, and almost none in the then-foreseeable future—would have any harmful effect on competition. We also considered other theories, such as whether the merger would provide Amazon with access to data that could strengthen its position; however, such a result would be procompetitive in most circumstances, and no evidence indicated any likelihood of countervailing anticompetitive effects. Additionally, we considered other possible effects, such as implications of the transaction for various trading partners of Amazon and Whole Foods; while there was some possibility of commercial disruptions of the kind that occur with any merger, there was no evidence that competition would be harmed. In the end, we determined that there was no evidence to support any valid theory of harm, in any market, that could be the basis of an enforcement action.

While we have not conducted a formal retrospective study of this merger, anecdotal evidence suggests that our assessment was correct. There appears to be some evidence that the merger has generated procompetitive effects, such as lower prices on certain grocery items at Whole Foods, plus strong competitive responses by rival grocery stores (e.g., accelerated efforts to provide online ordering, delivery services, and so forth). There is no indication that market prices have risen, quality or output have fallen, or innovation declined. Even Instacart, which was identified by some commentators as likely to be harmed by the merger due to its prior relationship with Whole Foods, appears to have successfully entered into arrangements with other grocery stores to compete and to have grown rapidly since the merger. We are not aware of any evidence that data Amazon may have obtained from Whole Foods' relatively small number of customers (compared to other grocery stores) has created any harmful effects.

d. **It has been publicized that the FTC is reviewing consummated mergers in the technology industry. As part of this review, are you considering whether the agency was making incorrect predictions that systematically led to less aggressive enforcement?**

   i. **If not, will you commit to analyzing this issue?**

Response: I cannot comment on any specific investigation, but I can assure you that we have not prejudged any issues and are committed to taking a fresh look at these markets.

9. **For the following transactions, provide a written explanation for (a) why the FTC did not bring an enforcement action, (b) any judgements or predictions the agency made about how the market would develop post-merger, and (c) whether those predictions have been accurate. I am not asking for information that is privileged, but merely the type of information the agency has made publicly available in its closing statements in other transactions, such as Google-Doubleclick and Google-Admob.**

   a. **Google acquisition of YouTube – October 9, 2006**
   b. **Amazon acquisition of Zappos – July 22, 2009**
   c. **Amazon acquisition of Quidsi – November 8, 2010**
   d. **Google acquisition of Waze – June 11, 2013**
   e. **Facebook acquisition of WhatsApp - February 19, 2014**
   f. **Facebook acquisition of Instagram – August 22, 2012**

Response: I was not at the Commission during the review of any of these mergers. The Commission, in its discretion, chose not to explain what (if anything) it had concluded about the likely effects of these mergers. I am unable to provide further details regarding these non-public matters.

10. **As you know, the FTC can pursue a range of remedies if it finds antitrust issues in a particular industry. In the context of the large technology companies, one popular remedy that has been floating is seeking a spinoff (breakup) of certain acquisitions; another is to restrict the company's future conduct. Pursuing breakup in particular is likely to lead to litigation. The FTC's and DOJ's track record in litigating against tech companies is abysmal. The *only* technology merger challenged in federal court between the years 2001-2017 was Google-ITA, a case brought by DOJ. The FTC challenged none in that same time period. Antitrust regulators have failed to challenge several key mergers that consolidated the tech industry and killed off competition, including Google-Admob, Google-Doubleclick, Facebook-Instagram, and Facebook-WhatsApp.**

    Response: I do not agree that the Commission has not challenged acquisitions involving "technology" companies. In the first place, as both Professor Moss and I pointed out in our testimony, there is no such thing as a category of "tech companies" that includes only Google, Amazon, Apple, and Facebook and none of the other tens of thousands of technology companies—including software companies, digital platforms, chip, switch, computer, mobile phone, and other hardware manufacturers, and many others. Even the companies identified in the question are not "tech companies" in the same sense; for example, Google is primarily active in search, and is at most a weak competitor or potential competitor in social networking, while the opposite is true for Facebook. Our testimony catalogues a number of mergers that the Commission blocked involving important technology markets, such as CDK/AutoMate. In fact, many of our cases involve firms that compete with patented technology, where innovation is often a main driver of competition. Similarly, the question ignores our substantial history of bringing cases against high technology companies for alleged anticompetitive conduct, such as the Commission's cases against Intel, Rambus, Unocal, Qualcomm, and others.

    Second, without commenting on any pending investigations, while many in the media have claimed that the mergers specifically identified in this question "killed off competition," neither a court decision nor rigorous analysis have yet determined that to be true for any of these mergers. In fact, some recent analyses that we are aware of were unable to conclude whether Facebook's acquisition of Instagram actually reduced competition because of a lack of sufficient evidence to determine whether, absent the transaction, Instagram would have developed into a substantial competitor to Facebook, or instead would have continued as a small and relatively inconsequential player in the industry. Determining whether consummated mergers harmed competition is a fact-intensive, complex exercise that requires a rigorous review of evidence and economics and identifies the differences between merger effects and intervening changes in the industry that did not result from the merger. The Commission has a demonstrated history of successfully undertaking that challenging exercise, and—as we did in the case of hospital mergers—taking action where the evidence supports doing so.

a. **If you find anticompetitive conduct in your investigation of the big tech companies, are you prepared to engage in litigation and take these companies to court?**

Response: Yes, and we have several cases pending in federal court against a number of significant technology companies such as Qualcomm, Inc. and Surescripts, Inc., as well as others referenced in the prepared testimony. The Commission has a long track record of consistent, effective, and determined litigation. We have not hesitated to litigate all the way to the U.S. Supreme Court, and to bring multiple cases despite initial setbacks, where the evidence and law indicated to us that we were on the right path.

For example, we litigated multiple cases over many years, eventually to the Supreme Court, to ensure that anticompetitive reverse payment patent settlements would receive rigorous antitrust scrutiny.[6] The Commission recently obtained the first litigated ruling involving sham litigation as a method of monopolization.[7] We have challenged opportunistic behavior in the context of industry standard setting organizations.[8] Despite many difficult outcomes, we patiently and repeatedly challenged improper attempts to shield anticompetitive conduct under the state action doctrine, ultimately triumphing in three separate Supreme Court decisions.[9]

The FTC is committed to developing the law through fact-based, economically sound litigation for the benefit of consumers. In the roughly twenty years since the *Microsoft* decision, the FTC has brought well over 100 conduct challenges, including 26 monopolization (or unilateral conduct) cases—with the latter number comprising the overwhelming majority of federal monopolization cases. As I noted in my testimony, in the two years I've been back at the Commission, we completed nine trials, which of course does not account for all the cases where respondents settled with us or abandoned transactions rather than litigate against us. We have been working at or near the limits of our resources in terms of both litigation and other enforcement activity. This is an extraordinary record of litigation activity, which I think more than speaks for itself.

b. **Have you ever decided, or been told by Commissioners, to avoid remedies that would require litigation?**

Response: While I cannot discuss any particular non-public deliberation, the Commission considers many factors in determining when and how to bring an enforcement action in the public interest. In general, the Commission will weigh alternative outcomes that would be achievable with and without resorting to litigation. As my answer to the previous question demonstrates, the Commission certainly does not shy away from litigation.

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[6] *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005), *cert. denied*, 548 U.S. 919 (2006); *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013).
[7] *FTC v. Abbvie, Inc.*, 329 F.Supp.3d 98 (E.D. Pa. 2018).
[8] *Rambus, Inc. v. FTC,* 522 F.3d 456 (D.C. Cir. 2008); *Union Oil Co. of California,* Dkt. 9305 (Jul. 27, 2005).
[9] *FTC v. Ticor Title Ins. Co.,* 504 U.S. 621 (1992); *FTC v. Phoebe Putney Health Sys., Inc.,* 568 U.S. 216 (2013); *North Carolina State Bd. of Dental Examiners v. FTC*, 135 S.Ct. 1101 (2015).

11. **In July, the FTC settled with Facebook for $5 billion over its violations of a data privacy consent decree negotiated in 2011. Although this is the largest fine the FTC has ever issued for a privacy case, it was a slap on the wrist, and resulted in the company's stock to soar the next day. This fine – without any substantial structural reforms – suggests that antitrust authorities may not have the will or the tools necessary to robustly enforce the federal antitrust laws against the big tech giants.**

    a. **What additional tools does the FTC need to deter and address such conduct in the future?**

        i. **Does the FTC need the ability to issue fines for first instance violations?**

Response: The Commission's settlement with Facebook, which related to its violations of a prior Commission consumer protection order, contained significant conduct relief in addition to the record-setting civil penalty. Our Chairman has discussed the Facebook consumer protection settlement in more detail in his testimony, and I defer to that testimony. Notably, the recent Facebook settlement was not an antitrust matter and has no bearing on the Commission's antitrust enforcement.

Some members of the Commission support legislation to give the Commission the authority to impose civil penalties for initial violations of the FTC Act, for both consumer protection and competition matters, as an additional deterrent. Personally, I think that additional remedial authority, such as the ability to impose fines or civil penalties for antitrust violations, merits serious consideration.

        ii. **Are there barriers to litigation that the FTC currently experiences that can be removed through statute?**

Response: The FTC's track record in antitrust litigation is stellar. However, as noted above, the lack of civil penalty authority for first-instance violations may somewhat limit our enforcement. This is because—with the exception of cases where equitable monetary relief is appropriate—violators sometimes may conclude that litigating, including prolonging the litigation for as long as possible, is the best strategy since the likely outcome of a loss is not very different than what we would accept in a consent decree. As a result, we may have to expend resources on litigating matters that should settle, diverting resources from other matters where litigation might be more necessary. Civil penalty authority might alter that calculus, enabling us to settle more cases and then have more resources available to litigate even more challenging cases.

The greatest threat to the Commission's ability to effectively enforce the FTC Act is a set of recent circuit court decisions that mistakenly reinterpret Section 13(b). Section 13(b) of the FTC Act authorizes the FTC to sue in federal court for any provision of law enforced by the FTC. But in a recent ruling in a monopolization case involving a pharmaceutical defendant, the Third Circuit overturned 40 years of precedent and dismissed our complaint, holding that the FTC may not rely on Section 13(b) unless the

violation is ongoing or impending at the time the suit is filed.[10] If widely adopted, this purported new limitation on our authority may give prospective defendants the means to avoid enforcement simply by stopping their conduct before the Commission completes its investigation. In a separate ruling in a consumer protection case, the Seventh Circuit reversed its own precedent and found that the statute allows only behavioral remedies (such as an injunction) and not monetary relief.[11] Again, if widely adopted, this new limitation would render the agency unable to obtain monetary redress for consumers who are the victims of fraud or anticompetitive behavior, or to deter harmful behavior through other equitable remedies such as disgorgement. These incorrect rulings could undermine the FTC's ability to bring cases in certain circuits, and impair the efficacy of the agency's core statute. All of our current Commissioners have testified in support of corrective legislation to reaffirm the FTC's authority to pursue federal remedies and protect consumers in all circuits. Without a legislative fix to clarify any ambiguities introduced by recent court decisions, the FTC likely will face repeated attempts to dismiss our federal court actions brought under Section 13(b).

b. Has the Bureau of Competition been provided all of the documentation from the Bureau of Consumer Protection and/or other parts of the FTC used in the Facebook privacy case?

Response: While I cannot comment on any ongoing non-public investigation, the Bureau of Competition works closely with our colleagues in the Bureau of Consumer Protection and when appropriate, seeks insight and relevant materials.

c. Does Bureau of Competition engage with the Bureau of Consumer Protection during settlement negotiations and investigations? If so, did you provide any advice, feedback or help to the Bureau of Consumer Protection with the recent Facebook or YouTube settlements?

Response: I am not able to comment on the details on any individual investigation, but I would note that the Commissioners and their advisors see all case-related materials generated by the investigative staff of the Commission during their deliberations. At the Commission level, experience with both consumer protection and competition law can be directly synthesized.

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[10] *FTC v. Shire ViroPharma, Inc.,* 917 F.3d 147 (3d Cir. 2019).

[11] *FTC v. Credit Bureau Center, LLC,* No. 18-3310 (7th Cir. 2019).

12. **The European Union certainly believed that Facebook did not keep its commitment on WhatsApp. In May 2017, its Antitrust Chief fined Facebook $122 million for providing misleading statements during the acquisition. This was a rare case where even Facebook acknowledged it was wrong. It told European regulators that the social network would not combine the company's data with that of WhatsApp. Yet, by 2016, it reversed course started disclosing the phone numbers and analytics data of its users to Facebook.**

    a. **Did Facebook provide similar commitments to the FTC? Has the FTC conducted a review to determine whether Facebook held to its commitments with the WhatsApp acquisition?**

    Response: While I cannot comment on the non-public aspects of any investigation, I note that this was a consumer protection matter. The then-Director of the Bureau of Consumer Protection publicly warned Facebook that it would be held to its obligations to the FTC regardless of its acquisition of WhatsApp.[12]

13. **As you know, the HSR Act mandates that companies attempting mergers above a certain threshold must file a pre-merger notification with the FTC or DOJ. These notifications allow the agencies to review the merger for anticompetitive harms and, where necessary, block the merger before it is consummated. There are concerns, however, that the thresholds for these notifications are too high. How does the FTC learn of mergers or acquisitions that are below current HSR thresholds and therefore not formally reported to the FTC?**

    Response: We have many sources to learn about non-reportable transactions. Our staff are experts in their industries, and they routinely monitor trade press to learn of non-reportable transactions, for instance by setting up news alerts. In other instances, we are contacted directly by customers, competitors, suppliers, or other market participants to alert us of pending deals. During our pending investigations, we hear about other deals during our contacts with industry members. We receive emails and phone calls from the public with tips. And I and others in the Bureau routinely encourage industry participants to contact us with concerns about mergers or conduct when we speak to groups or to the media. Our efforts to welcome tips and complaints have resulted in many Commission challenges to consummated mergers, including the recent Otto Bock matter.[13]

[12] FTC News Release, FTC Notifies Facebook, WhatsApp of Privacy Obligations in Light of Proposed Acquisition," (Apr. 10, 2014), https://www.ftc.gov/news-events/press-releases/2014/04/ftc-notifies-facebook-whatsapp-privacy-obligations-light-proposed.

[13] *In re Otto Bock HealthCare N.A.*, Dkt. 9378 (Dec. 20, 2017).

a. **Would you support mandatory filing for all mergers of any size if pursued by one of the Big Tech firms (Facebook, Apple, Amazon, Google). If not, why not?**

Response: No, for several reasons—though I specifically reserve the possibility of a different answer in the event that we were to find, after investigation, that a remedy of that nature was necessary to address an established anticompetitive practice by a specific firm.

First, having special antitrust rules for specific companies is not fair, may not be legal, and would be bad policy. There is as yet no evidence that these four firms have engaged in more or fewer anticompetitive mergers than any other comparable group of four firms. Nor is there evidence that any such mergers would not have been reportable—in fact, the mergers mentioned earlier in these questions were reportable under HSR. Further, such a filing requirement would impose a burden on the agencies to devote staff and resources to processing and reviewing additional filings, and would raise the cost of such transactions to the firms, which—given the current lack of evidence that small acquisitions by these firms have been anticompetitive—could be economically inefficient and wasteful. Finally, one of the reasons antitrust law has been so successful for so long—notwithstanding the current popular but factually unsupported claims to the contrary—is that rather than long lists of specifically proscribed conduct or targeted companies which tend to become outdated as soon as written,[14] and which also can often be circumvented,[15] antitrust law is written as broad policy guidance capable of evolving with legal and economic learning and adapting to changing facts and conduct.

Second, as I observed earlier, there is as yet no actual evidence establishing either that acquisitions—particularly non-reportable acquisitions—by these firms are so uniquely problematic as to justify a specific filing requirement. As of now, I know of no systematic evidence that acquisitions of these or other "tech" firms are more common or more likely harmful than acquisitions by other types of companies. I am not aware of any valid empirical work quantifying, for example, the frequency of acquisitions by these firms, or by all firms in the industries in which they compete, relative to the frequency of acquisitions by other firms in other industries.[16] Moreover, any such

[14] Not very long ago, the list of firms viewed as likely to be subject to such a requirement would probably have been quite different, and a few years from now, it could be quite different again.

[15] For example, it would be difficult to draft such a requirement that could not be circumvented by a change of corporate form or other similar behavior or restructuring by the targeted companies. For similar reasons, using industry codes or some other basis for the added filing requirements rather than identifying specific companies would also be unlikely to be effective (and, in this context, I note again that even these four firms do not file all or even most of their transactions in the same industry codes).

[16] As I noted in my live testimony, the study by AAI, while a laudable effort to generate the type of empirical evidence that is currently lacking, was flawed for the precise reason that the firms in question are not part of a single "tech" industry. Thus, transactions in which they are involved use multiple industry codes, and the activity in the code analyzed in the AAI study was not representative of the actual activity of these firms or the industries in which they participate. As I said, I do not mean to be critical of AAI—the flaw in the data they used could not be corrected by AAI because the relevant information is non-public and would not have been observable to AAI's researchers.

broad measure would fail to address the most important question—the significance of anticompetitive acquisitions. An industry in which acquisitions are quite rare could nevertheless suffer greatly from a single, profoundly anticompetitive acquisition, while an industry in which acquisitions are frequent could be vigorously competitive. The crucial point to assess is whether there is evidence of anticompetitive acquisitions (or a pattern of acquisitions that, as a whole, is anticompetitive). An ex ante filing requirement for small transactions by four specific companies would not likely supply that evidence. The best way to address this issue is by specific investigations.

Generally lowering the HSR thresholds—as opposed to selectively targeting a few companies for unique thresholds—would avoid some of the problems I described above. But as of now, the evidence indicates that any such cure would likely be worse than the disease. There is no valid evidence that the antitrust agencies are systematically missing competitively troubling below-HSR threshold acquisitions, or that if we were, that lowering the HSR notification thresholds would solve the problem. I note that HSR merger notifications have topped 2000 per year, doubling our workload in reviewing these filings over the past ten years, while over the same period we have experienced a decrease in staffing. This is not sustainable at current levels, and the problem would be exacerbated by lowering the filing thresholds. Moreover, enforcement is closely correlated with merger size. While there are always exceptions, small mergers generally are less likely to raise competitive issues. This is why Congress raised the HSR threshold in the first place—the agencies were being inundated with filings involving small transactions that required resources to process but raised no competition issues. Finally, we actively hunt for anticompetitive nonreportable mergers, and take action when we find them.

b. **Is the FTC looking into so-called “killer acquisitions” in the tech industry?**

Response: Yes, but I cannot comment on any particular non-public investigation.

Bruce Hoffman
Director of the Bureau of Competition
Federal Trade Commission
Questions for the Record
Submitted October 8, 2019

QUESTIONS FROM SENATOR BOOKER

1. **The metaphor of data as "the new oil" is somewhat inaccurate,[1] but there is no denying that venture capital investors oftentimes evaluate startups based on their ability to access or build data sufficient to extract rents, and gain insights into which competitors to copy, buy, or block.**

   a. **What is the best metaphor for the role data play in the platform economy?**

   b. **How important is it for a startup to have the data in the first place, compared with being able to invent with the research and infrastructure necessary to develop and cultivate those data? Which is the bigger barrier to entry?**

   Response: There is no single answer to this question because it depends on the type of data and how it is used. Data can have many different implications for competition analysis. In some circumstances, data is a product that is bought and sold. Such data might be necessary, or helpful, for a new firm to compete, and in such situations, access to data, especially historical data, can theoretically operate as a barrier to entry. However, this is not necessarily the case; old data may not be very useful (or useful at all), or might be easily replicable, or the competitive implications may not result from the data, but from firms' skill in making use of the data.

   In other situations, data may be an important input into another product or service. In such a case, lack of access to data can prevent a new firm from competing if there are no alternative sources for the data. Or an entrant may have different (possibly better) data sources that would allow it to compete, or (as noted above), old data may not be as useful as new data, which would allow entrants to rapidly reach a competitive state.

   Further, use of data by incumbents might generate important consumer benefits, such as increased quality, better services, or lower prices (think of a supermarket that realizes that its customers just don't buy particular products; consumers benefit when the supermarket uses that data to change its product mix to match evolving customer preferences). It is important to keep in mind the possibility of deterring firms from investing in developing and using data.

2. **I have focused extensively on how millions of American workers are limited in their ability to switch jobs because of "noncompete" and "no poaching" agreements—contractual provisions that forbid employees from leaving their job, and working for a competitor or starting their own business.[2] These provisions have been shown to reduce employee motivation, entrepreneurship, and knowledge sharing, all of which are integral to fostering innovation and growth.**

   There are similarly restrictive contractual provisions throughout the tech platform industry— namely, exclusive contracts and loyalty contracts—that can be used to exclude nascent competitors. For example, long-term contracts that prohibit advertisers from using new entrants can stifle demand from that new provider, causing them to exit the industry prematurely. Similarly, contracts between platforms and advertisers that provide for individual negotiation can keep incumbents from losing unique targeted sales to new competitors without requiring the incumbent to lower prices across the board.

   a. **There is a very strong case to be made that no-poaching agreements are unfair trade practices in violation of Section 5 of the Federal Trade Commission (FTC) Act. Has the FTC considered issuing a rule banning these agreements? If not, should it do so?**

   Response: In 2016, the FTC and Department of Justice issued Antitrust Guidance for HR Professionals, which made clear that certain no-poach and wage fixing agreements could be viewed as *per se* violations of the Sherman Act, possibly leading to criminal liability for those involved. Since that time, the FTC challenged an illegal wage-fixing agreement involving home therapy providers, and DOJ has also pursued numerous no-poach cases, and has announced that it intends to bring criminal charges where appropriate. In light of these clear statements and vigorous enforcement, I do not see the need for an FTC rule banning no-poach or wage-fixing agreements among competitors.

[1] *See, e.g.*, Antonio García Martínez, *No, Data Is Not the New Oil*, WIRED (Feb. 26, 2019), https://www.wired.com/story/no-data-is-not-the-new-oil.

[2] *See, e.g.*, Cory Booker, *The American Dream Deferred*, BROOKINGS INST. (June 2018), https://www.brookings.edu/essay/senator-booker-american-dream-deferred; Office of Sen. Cory Booker, Press Release, Booker, Warren Introduce Bill To Crack Down on Collusive "No Poach" Agreements (Feb. 28, 2018), https://www.booker.senate.gov/?p=press_release&id=760.

b. Are there potential efficiency benefits that make it particularly difficult to challenge this behavior under existing antitrust law?

Response: For the types of *per se* violations discussed above, defendants may not offer efficiency arguments to justify naked agreements not to compete for workers. There are certain circumstances in which a restraint on hiring or soliciting current or former employees is part of a larger legitimate collaboration between employers such that is would not be subject to *per se* condemnation but would instead be evaluated under a rule of reason framework. In this situation, a court would consider efficiency justifications for the restraint. For example, a buyer will often require the seller of a business to agree not to solicit employees for a short period of time after the sale. In fact, the FTC may require merging parties to agree not to solicit workers for a certain period of time from the divested business (their former employees) to ensure the new competitor has the skilled labor necessary to maintain competition. Current antitrust standards permit reasonable restraints on soliciting workers in these circumstances. Here, too, caselaw provides sufficient guidance to assess these agreements under a rule of reason analysis.

c. Do the current safe harbors for "short-term" exclusive dealing arrangements capture the market power of dominant platforms, which, arguably, do not need long-term contracts to create the desired outcome from their partners?

Response: Although in the past, courts would consider the duration of exclusive dealing arrangements as a factor in their legality, courts today focus on the practical effect of these dealings, not the nominal term of the agreement.[1] In fact, even exclusive arrangements that are terminable at will can be anticompetitive when used to attain or maintain a monopoly. For instance, the Commission found (and the 11th Circuit affirmed) that McWane Inc.'s Full Support Program operated as a *de facto* exclusive dealing policy that penalized distributors who bought domestic fittings from other companies by withholding earned rebates or cutting them off from purchasing McWane's domestic fittings. The Commission found that this "voluntary" program allowed McWane to maintain its monopoly power by impairing the ability of rivals to grow into effective competitors that might erode the firm's dominant position.[2] This focus on the practical effect of the conduct follows the Supreme Court's approach to monopolization claims as set out in *Tampa Electric Co. v, Nashville Coal Co.*, 365 U.S. 320-326-28 (1961).

[1] *McWane, Inc. v. FTC*, 783 F.3d 814, 833-34 (11th Cir. 2015) (discussing and dismissing older decisions that presumed short term exclusion arrangements to be presumptively legal).
[2] Id at 833.

3. **As we navigate the contours of crafting federal privacy legislation, one of the most intense recurring debates centers around interoperability provisions, i.e., the ability of consumers to control the use of the information they provide on one service on another service.**

   a. **What kinds of data should be portable?**

   Response: In general, the antitrust laws may not provide the proper framework to assess how and when to make data portable because the antitrust laws do not impose a general obligation to share data or make it portable. From an antitrust perspective, we would ask if a lack of data portability violates one of the antitrust laws. There doesn't seem to be a clear answer here. As a result, there is little to be gleaned from competition analysis to inform a judgment about how to craft a privacy law.

   b. **Generally speaking, how would a law giving consumers control of their data affect the viability and valuation of nascent tech companies?**

   Response: From a business perspective, there may be several reasons to offer data portability to consumers. That decision would probably entail a complicated cost/benefit analysis that is beyond the reach of antitrust analysis. On the other hand, requiring data portability may reduce incentives to invest in businesses that rely on data collection, including start-ups. Data portability could reduce the costs of entry by making it easier for consumers to provide data to the nascent competitor. But if the data is widely available and is also available to incumbents, this might make it more difficult for nascent competitors to differentiate their product or service. Again, from a competition standpoint, there is no certain benefit from requiring data portability.

   c. **Does the FTC, as currently constructed, have the resources to effectively manage a behavioral remedy that mandated data sharing from bad actors?**

   Response: Yes, and the Commission has experience with requiring data sharing to remedy anticompetitive mergers. For instance, we have had some remedies that mandate data sharing. In 2014, the Commission required CoreLogic, Inc. to divest bulk data in order to maintain competition in conjunction with its acquisition of DataQuick.[3] When the Commission determined that CoreLogic had failed to provide all the data and information that the divestiture buyer needed to compete, the Commission extended the term of the data-sharing requirements and clarified the company's obligations. We are well aware of the challenges of requiring data sharing, and the ongoing monitoring required to make it an effective means of preventing anticompetitive harm.

[3] *In re CoreLogic, Inc.*, C-4458 (Mar. 24, 2014), https://www.ftc.gov/enforcement/cases-proceedings/131-0199/corelogic-inc-matter.

4. **The United States stands out for its reluctance to address privacy as a competition issue. The FTC has frequently failed to consider consumer privacy and data security in its merger review process. Specifically, I am concerned that when companies combine large amounts of data, it increases the risk of a breach, but it also enables companies to use those data in even more opaque ways. I've introduced a bill with Senator Wyden that would hold companies accountable for auditing the automated decision-making tools that increasingly affect sensitive aspects of American lives.**

    a. **Should companies be allowed to merge large sets of consumer data without oversight, accountability, and transparency?**

    Response: I do not agree that the Commission fails to consider privacy as a competition concern. Privacy can be viewed as a form of price or non-price competition and whenever firms compete by offering better privacy protection, we will consider it as a form of competition that could be restrained or eliminated via a merger.[4]

    The question presented in this subpart is whether companies should be allowed to merge large sets of consumer data. Competition law does not provide a single answer to that question. Where merging data sets harms competition, the answer is that the merger—of the firms, not of the data sets—should not be permitted, or should be subject to adequate remedies. If merging data sets does not harm competition, no antitrust remedy is appropriate. Merging data sets could also be procompetitive, such as by increasing the firm's efficiency or improving its products or services. If a remedy is appropriate, its terms will be dictated by the harm to competition that we are trying to remedy.

    Although the Commission has not yet stopped a merger solely on the grounds that it would substantially reduce the level of privacy protection offered post-merger, we routinely assess that along with other potential harms and would expect that this analysis will become more frequent to the extent that firms compete more directly on privacy.

[4] Economic literature to date does not clearly indicate whether, and to what extent, consumers value privacy, especially relative to possible improvements in service that reduced privacy may create. As just one example, consumers may value mapping apps that use the consumer's actual location data to provide directions more than they would value mapping apps that are unable to use the consumer's actual location, notwithstanding the lesser privacy protections for the more accurate mapping apps. Once again, this is an issue that likely does not have a single answer from the perspective of competition policy.

b. Will the FTC make algorithmic transparency a priority for merger review in the future?

Response: No, there is no basis in antitrust law or policy for making algorithms public as a general matter. In fact, there is a substantial risk that such transparency could facilitate collusion or lower incentives to invest by forcing companies to give up the "secret sauce" of their pricing decisions. It is always possible that in a particular case, some form of access or transparency might be an appropriate remedy for particular anticompetitive conduct, or a particular anticompetitive transaction, but generally antitrust enforcers have been appropriately skeptical and cautious about such remedies for the reasons I noted above.

5. Mr. Hoffman, this precedes your tenure as Director, but I remain concerned about the FTC's decision not to sue to block Facebook's acquisition of Instagram back in 2012.

a. **Can you tell us in general how the agency thinks about an acquisition by a very large and powerful company of another company in a similar industry that shows a lot of fast growth but is still very small?**

Response: As described in the Commission's testimony, we use standard merger analysis under Section 7 caselaw and the Horizontal Merger Guidelines to determine if the acquisition of a firm with few or no sales may nonetheless violate the law. The Commission has also applied Section 2 monopolization standards to undo acquisitions of emerging competitors that allowed a firm to maintain its monopoly by eliminating a nascent threat.

b. Do you believe that the purchase of a relatively small company can have a significant impact on competition? Did this purchase affect competition?

Response: Yes. I think the best example of this is the Commission's challenge to CDK's acquisition of AutoMate. In March 2018, the FTC challenged the merger of market leader CDK Global, and far-smaller competitor, Auto/Mate, alleging that the transaction would have reduced competition in the already-concentrated U.S. market for specialized software known as dealer management systems. Auto/Mate competed with CDK and other larger franchise dealer management system providers and won business by offering lower prices, flexible contract terms, free software upgrades and training, and high quality customer service. The Commission's complaint alleged harm to current competition but also stressed the potential for harm to future competition given Auto/Mate's substantial efforts to grow its single-digit market share through important price and non-price competition. Shortly after the FTC issued its complaint, the parties abandoned their proposed transaction. Similarly, our recent challenge to the below-threshold consummated acquisition by Otto Bock of Freedom Industries involved what we

alleged was a clearly anticompetitive acquisition of a relatively small company.

6. **The field of behavioral economics seemingly provides answers to everything from why tech platform alternatives are not simply "just a click away" to why giving users more granular privacy controls can actually incentivize more reckless sharing. The 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?

   Response: It is not correct that we do not account for behavioral economics in our analysis. The FTC has over 80 PhD economists and many of them are well-versed in the literature from the field of behavioral economics, especially as it relates to the FTC's enforcement of consumer protection standards. As long ago as 2007, the Bureau of Economics hosted a workshop on behavioral economics to discuss insights from psychological research to identify ways in which consumers may systematically fail to act in their own best interests due to behavioral traits such as self-control problems, failure to process information objectively, and inaccurately predicting the costs and benefits of prospective choices.[5]

   That said, the FTC always looks for insights into consumer behavior, which is complex and not easily categorized or uniformly predictable. Some have raised concerns that solutions offered from the field of behavioral economics are not a panacea.[6] Namely, the challenge is to adopt policies that improve consumer welfare by more closely aligning each individual's actual choices with his "true" or unbiased preferences without reducing his ability to make a choice among those available to him.

7. **The German Bundeskartellamt now prohibits Facebook from combining data gathered from WhatsApp or Instagram and assigning those data to a Facebook user account without a user's voluntary consent.**

   What prohibits the FTC from adopting a similar remedy for other anticompetitive tech platforms?

   Response: My understanding is that the outcome of this decision was suspended by a higher court in Germany as potentially not consistent with German law, and that the case may be reviewed again on appeal. In any event, the FTC will be applying U.S. law using prevailing U.S. legal standards and economic learning, and any consideration of appropriate remedies must wait until there is a proven violation of U.S. law.

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[5] See FTC Conference on Behavioral Economics and Consumer Policy webpage, https://www.ftc.gov/news-events/events-calendar/2007/04/conference-behavioral-economics-consumer-policy.

[6] Joshua D. Wright and Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 Nw. U. L. Rev. 1033 (2015), https://scholarlycommons.law.northwestern.edu/nulr/vol106/iss3/2.