

Before the Federal Trade Commission

In re:
Competition and Consumer Protection in the
21st Century

Docket no. FTC-2018-0048
Project No. P181201

Comments of the Washington Center for Equitable Growth

Topic 1: The State of Antitrust and Consumer Protection Law and Enforcement, and Their Development, since the Pitofsky Hearings

The Washington Center for Equitable Growth commends the Federal Trade Commission’s decision to broadly evaluate the state of competition and consumer protection law. This process fulfills the agency’s responsibility to address “emerging problems and prepare public reports on the facts, issues, governing law, and the need, as appropriate, for change.”¹ The topics identified in the notice are ambitious and wide ranging. Equitable Growth suggests that the hearings include the following three topics:

1. Is monopoly power prevalent in the U.S. economy?

The goal of antitrust enforcement is to promote competition and protect markets from the improper accumulation or abuse of monopoly power. Assessing the state of antitrust enforcement begins with an assessment of the prevalence of monopoly power in the U.S. economy. The more prevalent monopoly power is, the more likely dramatic changes in antitrust doctrine, enforcement priorities, and enforcement resources are needed. Conversely, if monopoly power is not a significant issue, then any changes are likely to be modest. Typically, industrial organization economists study the issue of competition in individual markets or an individual industry. Recently, however, economists in other disciplines (labor economists, macroeconomists, finance economists) are finding evidence that monopoly power is an increasing phenomenon in the broader U.S. economy. These hearings provide an opportunity for the Federal Trade Commission to bring together experts from various economic disciplines to discuss these findings and, ideally, reach a conclusion on their meaning.

Concerns about concentration, monopoly power, and the loss of competition are now featured in the popular press. This focus reflects recent academic studies on these issues. Those studies fall into three broad categories. First, economists have studied concentration in particular markets and the impact of specific mergers and acquisitions.² These studies do not assess the economy as whole, but nonetheless provide some evidence on the state of competition in the United States.

¹ Timothy J. Muris, *More Than Law Enforcement: The FTC’s Many Tools—A Conversation with Tim Muris and Bob Pitofsky*, 72 *Antitrust L.J.* 772, 773 (2005).

² See e.g. Leemore Dafny, Mark Dugan, and Subramaniam Ramnarayanan, “Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry,” 102 *American Economics Review* 1161 (2012); John E. Kwoka “Does Merger Control Work? A Retrospective on US Enforcement Actions and Merger Outcomes,” 78 *Antitrust L.J.* 619 (2013).

Recently, labor economists have documented that employment markets are highly concentrated and result in lower wages, an example of monopsony power that was long thought to be a theoretical issue but not a practical one.³

Second, other economists have tried to measure concentration across multiple industries or across the economy as whole. Under President Barack Obama, for example, the Council of Economic Advisers found that between 1997 and 2012, concentration (measured by the top 50 firms) had increased in a majority of industries.⁴ The Federal Trade Commission and the Antitrust Division recently raised methodological concerns with this approach, finding the claims to be “unsupported by data for meaningful markets.”⁵ According to the agencies’ joint comment, studies like the CEA’s do not define markets in ways that match true competitive dynamics.

Third, a growing body of research finds other evidence of monopoly power—defined as the ability to set prices above marginal costs.⁶ Mark-ups are increasing, which suggests that monopoly power is becoming more prevalent,⁷ and high corporate profits appear to be persistent.⁸ Firms are not only earning higher profits but also are more likely to maintain that profitability. In competitive markets, some firms can earn very high profits in the short term, but a firm’s advantages should dissipate over time. Meanwhile, a falling share of national income is going to wages.⁹ Macroeconomists are even beginning to include measurements of monopoly power in their macroeconomic models.¹⁰

Certainly, no consensus has developed about whether the U.S. economy suffers from a monopoly problem. Even if monopoly power is more common in the economy, there may be

³ See e.g. Jose Azar, Ioana Marinescu, and Marshall Steinbaum, “Labor Market Concentration,” IZA Discussion Paper No. 11254. Available at SSRN: <https://ssrn.com/abstract=3097372>.

⁴ Council of Economic Advisors, “Benefits of Competition and Indicators of Market Power,” (2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf

⁵ Submission by the United States to Directorate for Financial and Enterprise Affairs Competition Committee, OECD, “Market Concentration,” (May 2018), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/market_concentration_united_states.pdf

⁶ Kip Viscusi, John Vernon, and Joseph Harrington, “Economics of Regulation and Antitrust,” 266 (2nd ed 1995).

⁷ Jan De Loecker and Jan Eeckhout, “The Rise of Market Power and the Macroeconomic Implications,” NBER Working Paper No. 23687 (Aug. 2017). <http://www.nber.org/papers/w23687.pdf>

⁸ *The Economist*, “Too Much of a Good Thing,” (March 26, 2016), www.economist.com/briefing/2016/03/26/too-much-of-a-good-thing

⁹ See De Loecker and Eeckhout, *supra* n.7; Simon Barkai, “Declining Labor and Capital Shares,” (2017), <http://home.uchicago.edu/~barkai/doc/BarkaiDecliningLaborCapital.pdf>

¹⁰ German Gutierrez and Thomas Philippon, “Investment-less Growth: An Empirical Investigation,” NBER Working Paper No. 22897 (2017). <https://www.nber.org/papers/w22897>; Gauti Eggertsson, Jacob Robbins, and Ella Wold: Kaldor and Piketty’s Facts: The Rise of Monopoly in the United States,” NBER Working Paper No. 24287 (2018), <https://www.nber.org/papers/w24287>.

many causes.¹¹ It could reflect, for example, a failure in antitrust enforcement, an increase in the value of information technology or research and development, or superior efficiency.¹²

The Federal Trade Commission would miss an important opportunity if the hearings fail to assess all of the recent evidence on the scale and scope of monopoly power in the U.S. economy. Similarly, it would be a lost opportunity if the FTC hearings only focused narrowly on evidence related to concentration. The Washington Center for Equitable Growth recommends that at least one panel discuss this range of issues. This topic fits within Topic (1)(b), “economic analysis and evidence on market competitiveness, enforcement policy and the effects of past FTC enforcement decisions.”

2. Do the antitrust laws as applied by the courts correctly balance the benefits and costs of deterring anticompetitive conduct and permitting procompetitive conduct?

The proposed hearing topics cover a number of timely issues for antitrust enforcement. The Washington Center for Equitable Growth commends the breadth of the proposed issues. This is a critical moment in the growth of new technologies and industries that make it important to study issues involving media technology networks, platform business, big data, the effects of corporate mergers, monopsony power, the intersection of intellectual property and competition in promoting innovation, and the consumer-welfare implications of algorithmic decision tools, artificial intelligence, and predictive analytics. In addition to those specific topics, the hearings also are an opportunity to assess a set of overarching questions: Is current antitrust doctrine effectively protecting competition? And can antitrust doctrine address new challenges posed by rapidly changing industrial, economic, and technological markets?

Over the past 50 years, antitrust law has generally become more tolerant of business practices. Relying on substantive theories from the Chicago School and concerns about the administrability of the antitrust laws from the Harvard school, a series of U.S. Supreme Court decisions significantly restricted the scope of monopolization claims.¹³ The last major monopoly case was 20 years ago, and at least one scholar openly questions whether the government’s case against AT&T would have been successful under today’s standards.¹⁴ Merger law has become more sophisticated and complicated, but is it doing a better job at stopping anticompetitive deals?¹⁵ Courts also have raised procedural burdens on plaintiffs generally and private plaintiffs in

¹¹ Herbert J. Hovenkamp, “Is Antitrust’s Consumer Welfare Principle Imperiled,” University of Pennsylvania Institute for Law & Econ Research Paper No. 18-15, at 9 (June 2018),

https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2987&context=faculty_scholarship

¹² See generally, Herbert Hovenkamp and Carl Shapiro, “Horizontal Mergers, Market Structure, and Burdens of Proof,” 107 Yale L. J. 1996, 2004-06 (2018); Carl Shapiro, “Antitrust in a Time of Populism,” <https://ssrn.com/abstract=3058345> at 16-21.

¹³ See William Kovacic, “The Intellectual DNA of Modern U.S. Competition for Dominant Firm Conduct: The Chicago/Harvard Double Helix,” 2007 Colum. Bus. L. Rev. 1, 13-14 (2007)

¹⁴ Howard A. Shelanski, “The Case for Rebalancing Antitrust and Regulation,” 109 Mich. L. Rev. 683, 684 (2011)

¹⁵ See generally, John Kwoka, “The Structural Presumption and the Safe Harbor in Merger Review: False Positives or Unwarranted Concerns?” 81 Antitrust L. J. 837 (2018).

particular that make it harder for the private sector to make up for any underenforcement by the government.¹⁶

The FTC hearings provide an opportunity to assess whether antitrust law effectively deters anticompetitive conduct, both in preventing it and in allowing procompetitive conduct. In part, the Federal Trade Commission should be analyzing antitrust doctrines to determine whether they reflect sound economics. In particular, economic research has progressed a great deal since the Chicago School revolution and all of that learning may not yet have made its way into judicial decisions.

The Federal Trade Commission also should consider whether concerns with the dangers of overly aggressive enforcement have undermined antitrust doctrine. All judicial rules are subject to two types of error: false positives and false negative. A false positive occurs when a rule incorrectly prohibits a procompetitive practice; for example, if a judicial rule condemns an exclusive distribution agreement that is benign. The rule is over-inclusive. A rule that generates many false positives will prevent conduct that is harmless or procompetitive. The cost is not simply the case being litigated—the rule will deter other firms from innovations and practices that would rely on the beneficial conduct.

A False negative occurs when a rule incorrectly allows an anticompetitive practice; for example, if a judicial rule allows mergers that substantially reduce competition, generating higher prices and deadweight loss. The rule is under-inclusive. An antitrust rule that generates too many false negatives—that fails to catch illegal behavior—will encourage anticompetitive activity. The cost is not simply the defendant in a specific case avoiding liability—firms will engage in more anticompetitive conduct because it is profitable.

Since the 1980s, antitrust academics have argued that courts should consider the cost of errors when adopting or crafting antitrust rules.¹⁷ The best antitrust rule is one that balances the probabilities and costs of false negatives and false positives while taking into account the cost of enforcement.¹⁸ As Professor Baker has noted, decision theory is not ideological.¹⁹ Depending on the relative cost of false positives and false negatives, and the chance of each, a system designed to maximize social welfare with antitrust enforcement could result in very stringent or very lenient legal rules. Conservative antitrust scholars, however, have argued that false positives are far more likely and costlier (e.g. efficient mergers would be blocked and thereby not benefit consumers) in antitrust law than false negatives.²⁰ According to this view, false negatives caused by an under-inclusive rule (such as a high standard of proof in monopolization cases allowing violations to escape condemnation) are not costly to society. This would be the case if monopolies were inherently temporary or, perhaps, if large monopoly profits were to stimulate

¹⁶ See e.g. *Bell Atlantic Corp v. Twombly*, 550 US. 554 (2007) and *American Express Co., v. Italian Colors Restaurants*, 570 US 528 (2013).

¹⁷ See Frank Easterbrook, “The Limits of Antitrust,” 63 Tex. L. Rev. 1 (1984).

¹⁸ *Id.* at 16.

¹⁹ Jonathon Baker, “Taking the Error out of ‘Error Cost Analysis: What’s Wrong with Antitrust’s Right,” 80 Antitrust L. J. 1, 7 (2015).

²⁰ Easterbrook, *supra*, n.17 at 14-16.

sufficient innovation to offset their costs deadweight loss. If true, incorrectly condemning conduct under the laws would be more harmful than allowing anticompetitive conduct to escape condemnation.

But not all antitrust scholars agree that false positives are more costly than false negatives in antitrust law. In particular, recent economic theory and empirical work provide numerous objections that should be explored. For instance, the premise that markets correct more quickly than judicial error are empirical claims that have not been tested.²¹ The market may take longer to correct anticompetitive activity than is presumed. Entry may be difficult,²² and cartels can last a long time.²³ Similarly, false negatives can be costly and long-lived. False negatives may occur more frequently than false positives.²⁴ If the empirical evidence is showing these costs to be much higher than previously anticipated, then the relevant question should be how to balance enforcement to achieve the most competition and greatest benefit.

Despite the lack of systematic evidence, the judiciary has largely accepted that over-inclusive rules, which generate false positives, are costlier to consumers than under-inclusive rules, which generate false negatives. And, application of error-cost analysis has justified doctrine that is more lenient toward business conduct under the antitrust laws. The U.S. Supreme Court has restricted monopolization claims to avoid false positives.²⁵ Initially, in antitrust challenges to pharmaceutical patent settlements, courts implicitly relied on concerns about false positives in justifying lenient rules allowing reverse payments.²⁶ Even in merger cases, courts have warned about the dangers of false positives.²⁷ They, however, very rarely discuss the dangers of under-inclusive rules. Consequently, it would not be surprising if courts have over-emphasized false positives in designing antitrust rules, making these concerns an important line of inquiry during the hearings.

²¹ See Alan Devlin and Michael Jacobs, “Antitrust Error” 52 Wm. and Mary L. Rev.75, 97 (2010)

²² See Baker, *supra* n. 19, at 8-12.

²³ See *id.* at 12 n.45-46.

²⁴ See Shelanski, *Supra* n. 14, at 711.

²⁵ *Verizon Commc’ns., Inc. v. Law Offices of Curtis v. Trinko*, 540 U.S. 398, 414-415 (2004); *Credit Suisse Sec. v. Billing*, 551 U.S. 264, 283-284.

²⁶ See *Federal Trade Commission v. Actavis*, 570 US 136, 170 (Roberts C.J., dissenting) (“The majority’s rule will discourage settlement of patent litigation.”); *Schering-Plough Corp. v. Federal Trade Commission*, 402 F.3d 1056, 1075 (11th Cir. 2005) (“Finally, the caustic environment of patent litigation may actually decrease product innovation by amplifying the period of uncertainty around the drug manufacturer’s ability to research, develop, and market the patented product or allegedly infringing product. The intensified guesswork involved with lengthy litigation cuts against the benefits proposed by a rule that forecloses a patentee’s ability to settle its infringement claim.”); *Asahi Glass co. v. Pentech Pharms, Inc.*, 289 F. Supp. 2d 986, 994 (ND Ill 2003) (“A ban on reverse-payment settlements would reduce the incentive to challenge patents by reducing the challenger’s settlement options should he be sued for infringement, and so might well be thought anticompetitive.

²⁷ See *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1055 (8th Cir. 1999) (“We are mindful that competition is the driving force behind our free enterprise system and that, unless barriers have been erected to constrain the normal operation of the market, ‘a court ought to exercise extreme caution because judicial intervention in a competitive situation can itself upset the balance of market forces, bringing about the very ills the antitrust laws were meant to prevent.’”) citing *United States v. Syufy Enters.*, 903 F.2d 659, 663 (9th Cir. 1990).

This topic fits within Topic (1)(b), “economic analysis and evidence on market competitiveness, enforcement policy and the effects of past FTC enforcement decisions.”

3. Does the Federal Trade Commission have the resources it needs to fulfill its competition mission?

Based on the notice, the Federal Trade Commission will consider its “investigation, enforcement, and remedial processes.” The hearings, however, should also consider whether the agency has the resources it needs to effectively meet its enforcement mission. The agency’s overall budget has basically been flat since 2010.²⁸ Meanwhile, the economy has grown, new technologies and business models have become a much larger part of GDP, and there has been a merger wave.²⁹ The agency should consider whether the merger wave has diverted resources from the ability of the FTC to conduct investigations and whether it has the resources to bring additional cases.

This topic fits either within Topic (1)(b), “economic analysis and evidence on market competitiveness, enforcement policy and the effects of past FTC enforcement decisions,” or Topic 11, “The agency’s investigation, enforcement, and remedial processes.”

These three issues are all within the overall goal of the hearings to determine whether adjustments to competition law, enforcement priorities and policy are needed. Each question provides a frame for assessing those concerns. The Washington Center for Equitable Growth recommends that the Commission pursue these issues in the upcoming hearings.

Respectfully Submitted

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²⁸ See Presentation: Merger Enforcement Statistics, The Washington Center for Equitable Growth, (January 2018), available at <https://equitablegrowth.org/presentation-merger-enforcement-statistics/>.

²⁹ See *id.*