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Federal Trade Commission

Promoting Sound Policies for the Next Decade

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* The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner. Many thanks to my Attorney Advisor, Keith Klovers, for assisting in the preparation of these remarks.

I. Introduction

I'm delighted to be here today at the hearing on the FTC's role in a changing world. Our next panel will discuss how to ensure that we have sound policies in place for international cooperation in the next decade.

I should also give some perspective on my interest in this area. As a young associate, I was privileged to practice law with James F. Rill, former Assistant Attorney General for Antitrust at the U.S. Department of Justice, who will speak at this hearing later today. It was Jim who instilled in me an understanding of the importance of focusing upon international competition issues and participating in events like this. While working with Jim, I helped prepare submissions to the Organization for Economic Cooperation and Development (OECD), the World Trade Organization (WTO), and the International Chamber of Commerce (ICC). We also collaborated on activities involving the U.S. Council for International Business (USCIB) and the Business and Industry Advisory Committee (BIAC), the voice of the business community at the OECD. And perhaps most memorably, I worked with Jim on the International Competition Policy Advisory Committee (ICPAC) hearings and final report, including the recommendation to create what later became the International Competition Network (ICN).[1]

Then, as Chief of Staff to FTC Chairman Tim Muris, I was privileged to help launch the ICN.[2] I have watched with pride in the ensuing years as the ICN has grown and succeeded. Indeed, it has exceeded my loftiest expectations, and I know I am not alone in marveling at the good work done under its auspices.

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[1] INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE TO THE ATTORNEY GENERAL AND THE ASSISTANT ATTORNEY GENERAL FOR ANTITRUST, FINAL REPORT (2000), *available at* https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/cover.pdf.

[2] Timothy J. Muris, Creating a Culture of Competition: The Essential Role of Competition Advocacy, Remarks before the International Competition Network, Naples, Italy, Sept. 28, 2002, *available at* https://www.ftc.gov/public-statements/2002/09/creating-culture-competition-essential-role-competition-advocacy.

Given these experiences, I have great faith in the ability of jurisdictions to nurture constructive dialogues through bilateral and multilateral forums. But things have changed significantly since I began practicing antitrust law in the 1990s.

Indeed, we have seen a sea-change in the international aspects of competition law. For example, as we were preparing the final ICPAC report, I eagerly described that work to a relatively senior antitrust partner at our firm. Perhaps frustrated because I did not have time to work on his matter, he responded indignantly that "there is no such thing as international antitrust!"

Today, there is no disputing that antitrust law has a clear international dimension. Its internationalization reflects a number of factors, including an increase in the number of jurisdictions with antitrust laws and the increasingly global scope of many industries.

This growth has been coupled with a second significant development, the growing digitization of our economy. Apart from Microsoft, many of today's business titans did not even exist when I graduated from law school. (Neither did email or the Internet, but that's another matter.)

These technology firms are now at the center of the next great debate: Whether we should abandon, or at least radically alter, traditional antitrust principles to address what many believe to be a "technology" problem.

II. Today's Great Debate

This question is being debated not only in the U.S., but also worldwide. I was recently in Berlin for the excellent biannual conference sponsored by the Bundeskartellamt (BKA). In speech after speech, panel after panel, I heard the same watchword, "choices," as shorthand for the need to make choices about how to adapt antitrust law for the 21st century economy. Indeed,

several speakers argued that we have reached an inflection point, particularly with respect to Big Tech, and that decisive action must be taken.[3] Both at that BKA event and at an earlier International Competition Network (ICN) event in Tokyo,[4] I've heard agency heads discuss various proposals to significantly change the way we enforce the antitrust laws.

This theme is also apparent in the news. For example, in the last month, organizations in several other jurisdictions, including the U.K. and Australia, have issued reports recommending significant changes to their respective competition regimes.[5] These reports have, among other things, recommended expanding regulations governing the conduct of large technology companies.

Here at home we hear similar calls for big changes, from wide-ranging structural and behavioral remedies to changes in the underlying goals of antitrust law. For example, Senator Elizabeth Warren recently proposed rules that would break up technology platforms with annual global revenues over $25 billion and impose various behavioral regulations upon the remaining platform.[6] For smaller companies, she would impose the same behavioral rules, but not structural separation.[7]

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[3] To name just one example, South African Commissioner Bonakele was quoted as saying "I do accept that the digital economy is at an inflection point that perhaps calls for new measures." Tom Madge-Wyld, *Top Enforcers Call for Global Response to Dominance in Digital Markets*, GLOBAL COMPETITION REVIEW, Mar. 15, 2019, https://globalcompetitionreview.com/article/1188843.

[4] International Competition Network, 2018 ICN Merger Workshop, Tokyo, Japan, Nov. 7-8, 2018.

[5] *See* Jason Furman et al., Unlocking Digital Competition: Report of the Digital Competition Expert Panel at 2, Mar. 2019, *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf; U.K. HOUSE OF LORDS, SELECT COMMITTEE ON COMMUNICATIONS, REGULATING IN A DIGITAL WORLD, 2d Report of Session 2017-19 (published Mar. 9, 2019), *available at* https://publications.parliament.uk/pa/ld201719/ldselect/ldcomuni/299/299.pdf; AUSTRALIAN COMPETITION & CONSUMER COMMISSION, DIGITAL PLATFORMS INQUIRY: PRELIMINARY REPORT (Dec. 2018), *available at* https://www.accc.gov.au/system/files/ACCC%20Digital%20Platforms%20Inquiry%20-%20Preliminary%20Report.pdf.

[6] Elizabeth Warren, *Here's How We Can Break Up Big Tech*, MEDIUM, Mar. 8, 2019, https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c ("Companies with an annual global revenue of $25 billion or more and that offer to the public an online marketplace, an exchange, or a

Others have called for revisions to the U.S. antitrust laws that would require enforcers and courts to consider whether the challenged conduct increases fairness, reduces income inequality, preserves jobs, benefits small businesses, and protects "competitors, workers, customers, and suppliers."[8] Oftentimes these calls are accompanied by conclusory statements asserting that the American economy is less competitive than in some ill-defined golden age of yore.[9] Sometimes these claims are even supported by rudimentary statistics measuring the total number of mergers, the valuation of these mergers, the size of the largest businesses, or the share of the "eCommerce" industry controlled by the largest online retailers.[10]

So it strikes me that we ***are*** at an inflection point, and we ***do*** have important choices to make. To name three:

- Should we abandon our present focus upon a single goal of antitrust, presently the consumer welfare standard, in favor of a standard that requires us to weigh several different factors?
- Should we abandon our present reliance upon economic principles to inform our understanding of whether a given merger or trade practice is anticompetitive?

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platform for connecting third parties would be designated as 'platform utilities.' These companies would be prohibited from owning both the platform utility and any participants on that platform. Platform utilities would be required to meet a standard of fair, reasonable, and nondiscriminatory dealing with users. Platform utilities would not be allowed to transfer or share data with third parties.").

[7] *Id.* ("For smaller companies (those with annual global revenue of between $90 million and $25 billion), their platform utilities would be required to meet the same standard of fair, reasonable, and nondiscriminatory dealing with users, but would not be required to structurally separate from any participant on the platform.").

[8] Senate Democrats, A Better Deal: Cracking Down on Corporate Monopolies, at 1 (2017), https://www.democrats.senate.gov/imo/media/doc/2017/07/A-Better-Deal-on-Competition-and-Costs-1.pdf; *see also id.* at 1-2 (listing the goals mentioned in the text).

[9] *See, e.g.*, Statement of Commissioner Christine S. Wilson at 1-3, Staples, Inc. / Essendant, Inc., File No. 181-0180 (Jan. 28, 2019), https://www.ftc.gov/system/files/documents/public_statements/1448307/181_0180_staples_essendant_wilson_statement.pdf (collecting claims made by others).

[10] *See id.* at 2-3 (finding these claims "highly flawed").

- Should we return to the days of *Pabst Brewing* and *Von's Grocery*,[11] when antitrust analysis began and ended with a simple rule tied to a simple number, such as prohibiting any increase above a given concentration threshold?

As I have said in recent speeches and statements, I myself would answer each of these three questions with an emphatic "no."[12] But regardless of my views on the substance, I have confidence that we are well-equipped to study these questions and reach sound conclusions. And perhaps more importantly for today's purposes, I also have confidence in the ability of the international antitrust community – including its many bilateral relationships and multilateral institutions – to examine these important questions.

III. This Debate Highlights the Value of International Engagement

Discussing these questions with our international partners is especially important in today's interconnected antitrust environment. The antitrust rules we adopt in the United States may have repercussions abroad, and antitrust rules adopted by other jurisdictions may affect us here in the United States.

Comparing notes with our international partners generates at least two benefits. First, it helps each agency, including the FTC, sharpen its own analysis. Second, it helps us identify areas for collaboration and, if appropriate, convergence.

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[11] United States v. Pabst Brewing Co., 384 U.S. 546 (1966); United States v. Von's Grocery Co., 384 U.S. 270 (1966).

[12] *See, e.g., id.*; Christine S. Wilson, Vertical Merger Policy: What Do We Know and Where Do We Go?, Keynote Address at the GCR Live 8th Annual Antitrust Law Leaders Forum, Feb. 1, 2019, https://www.ftc.gov/system/files/documents/public_statements/1455670/wilson_-_vertical_merger_speech_at_gcr_2-1-19.pdf; Christine S. Wilson, Welfare Standards Underlying Antitrust Enforcement: What You Measure Is What You Get, Keynote Address at the George Mason Law Review 22nd Annual Antitrust Symposium, Feb. 15, 2019, https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf.

Given the importance of these discussions, we are fortunate to have strong teams in charge of international cooperation. Here at the FTC, Randy Tritell and his team do yeoman's work managing our extensive network of bilateral relationships with sister agencies around the globe. Our Office of International Affairs (OIA) leads our daily cooperation on competition, consumer protection, and data privacy cases in order to reach compatible analyses and outcomes.

OIA is also instrumental to the success of our other international initiatives, including our international assistance missions and our international fellows program. Even more impressively, the Office maintains high quality over a very large volume of initiatives; in 2018 the FTC conducted 24 international assistance missions abroad and hosted 10 International Fellows from foreign agencies here at home. Roger Alford and his team have done similarly excellent work at the DOJ.

We also benefit from exchanging ideas in order to promote convergence with our international partners through both bilateral relationships and multilateral organizations such as the ICN, the International Consumer Protection Enforcement Network (ICPEN), and the OECD.

IV. Conclusion

In conclusion, there is a growing international debate about whether and how to revise the antitrust laws, particularly as they apply to the digital economy. Given the potential impact that changes in antitrust law would have upon large global businesses, it is critically important that we think through these issues together with our international partners.

Thankfully, we can lean upon Randy, his team, and his counterparts to facilitate this discussion and help us identify areas for further collaboration. This meaningful international collaboration is no small victory, and certainly something that I would not have predicted more than twenty years ago.

And now I will turn it over to our panelists to advise us on how to make the next decade of international collaboration even more successful.