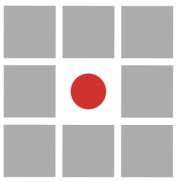

Public Knowledge

Statement of
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On Behalf of Public Knowledge

Before the
U.S. Senate
Committee on the Judiciary

Subcommittee on
Antitrust, Competition, and Consumer Rights

Hearing on:
The Consumer Welfare Standard in Antitrust:
Outdated or a Harbor in a Sea of Doubt?

Washington, D.C.
December 13, 2017

Growing public concerns that ever-fewer companies are dominating important sectors of our economy has appropriately reinvigorated attention to whether our nation's competition policies, including antitrust, are doing enough to protect consumers, promote innovation, and ensure fair market practices. Under U.S. law, antitrust is one critical element necessary to protect consumers and the competitive process. Yet antitrust, by itself, is not enough to harness the marketplace benefits the public is rightfully demanding.

Whether the rising costs of pharmaceuticals, complex financial products, the confusing maze of airline charges, or ever-increasing (and often misleading) cable and broadband fees, consumers want and expect antitrust, consumer protection and competition policy in general to deliver lower prices, better services and more choice in the marketplace. We applaud Members of Congress for beginning a conversation through a heightened focus on the behavior of major tech platforms, and broad policy programs like "A Better Deal"[1] to determine what refinements may be necessary to law and enforcement to deliver better results for consumers. Additionally, we welcome proposed legislation, such as the Merger Enforcement Improvement Act[2] and the Consolidation Prevention and Competition Promotion Act[3] put forth by Senator Klobuchar and co-sponsored by many of her Senate colleagues. Legislation like this that is designed to provide regulators with better information, improve antitrust processes, evaluate the effectiveness of merger conditions, verify that promises of merger-related efficiencies come to fruition, and in appropriate cases shift burdens of proof, has the potential to be very effective in promoting and protecting a marketplace that serves the needs of consumers and a democratic society.

Antitrust and the Consumer Welfare Standard

There has been much debate concerning how well antitrust works—in particular, whether antitrust's "consumer welfare" standard, by itself, is enough to protect competition and consumers. It is not—but to be clear, antitrust law, even in a strengthened form, should not be, and never has been, the sum and substance of competition policy. As this statement will illustrate, policymakers have many other tools at their disposal to ensure a fair economy. These, as well as antitrust, need to be strengthened.

Apart from merger review, antitrust analysis is generally backward-looking: It observes market outcomes that are harmful to consumers, and proposes remedies. But this necessarily requires waiting for abuses to occur, or at least to be in planning stages (e.g., a

[1] A Better Deal, https://www.democrats.senate.gov/abetterdeal.
[2] S.1811 (115th Congress).
[3] S.1812 (115th Congress).

conspiracy to fix prices that is not yet realized). Policing anticompetitive behavior and punishing law-breaking is vital—but particularly in industries where the same patterns of abuse occur again and again, it is more efficient to adopt rules that prevent abuses from happening in the first place, whether through behavioral or structural rules.

Additionally, some characteristics of an industry make it unlikely that private investment and market forces, even in a market free from antitrust abuses, will produce socially optimal outcomes. In some cases, investors cannot project or capture the benefits of the production of a good—public goods such as 911 service, coordination systems such as telephone and internet names and numbers, or infrastructure such as roads or communications networks that produce positive externalities. In other areas, natural monopolistic tendencies, efficiencies of scale and scope, network effects, or similar issues may favor concentration to such a degree that regulation, or some other intervention may be the best course of action.

But that does not mean that antitrust itself does not need to be reinvigorated. In some cases, the enforcement process, evidentiary presumptions, and burdens of proof need to be altered to better reflect empirical evidence of increased concentration in the economy, and the effects of past enforcement actions. Economic models need to take into account the large scale and "winner-take-all" nature of many online platforms and how this may influence mergers and company behaviors. And, while the consumer welfare standard, on paper, takes account of quality and innovation effects, in practice prices are the predominant factor—largely because they are easier to measure. A reinvigorated antitrust framework would take account of these and other issues. However, competition policy must promote competition, not merely protect it. It is not merely a law enforcement activity. Competition policy must lay the groundwork for new markets, in addition to protecting competition in existing markets. Going beyond an industry-specific focus, it must create value throughout the economy, by creating baseline rules that promote commerce more broadly.

Finally, a balanced competition policy would promote non-economic values. Americans hate monopolies not just because of high prices, poor customer service, and slow innovation, but because they oppose excessive concentrations of private political and economic power, because they value free expression and equality, and because they want to access viewpoints (and products) from diverse sources. Communications policy, though far from perfect, illustrates a number of ways policymakers can achieve these goals, and members of Congress should consider analogous approaches in other areas, as well.

Common Carrier Rules

Common carrier obligations are an important way of ensuring that certain vital activities are undertaken in a nondiscriminatory way. They promote commerce and competition, among other things, by ensuring that certain basic inputs such as transportation and communication are available on just and reasonable terms, and that these essential services cannot be leveraged to harm competition.[4] In economic terms, when certain activities are undertaken in a nondiscriminatory way, they promote broad social utility far in excess of the private gains that might be realized by allowing unfettered discrimination.

Yet, despite how widespread common carriage is, and how intuitive its principles are (see, for example, recent calls to treat social networks such as Twitter as common carriers), it is widely misunderstood. So, to be clear, common carriage is not a synonym for public utility regulation. Many public utilities are common carriers, and vice versa, but the two categories do not entirely overlap. Nor are common carrier rules applied only to monopolies, or to uncompetitive markets. While the presence of competitive alternatives may inform what behaviors are just and reasonable in specific cases, common carriage promotes broader, and at times non-economic ends that even a highly competitive market cannot be relied on to provide.

Common carriage works alongside antitrust because it promotes competition across the economy and in many different markets, and prevents common carriers with market power from unfairly leveraging their control into adjacent markets.

Public Utility Law

Public utilities are another way of promoting competition throughout the economy, by ensuring that basic services are available to all on fair terms. However, the concept of the public utility is distinct from common carriage. Common carriage focuses on nondiscrimination and is most common in areas where the common carrier transports goods or people or transmits messages. Public utilities, by contrast, are those goods or services that are so important to the functioning of the economy and society that they must be universally available and affordable. Public utilities are also often infrastructure-based natural monopolies. For this reason, utilities such as electricity and water companies not only cannot discriminate as to users, but have many other service and quality

[4] Notable applications of common carriage in the United States have been to communications networks such as telegraphy, telephony, and broadband; to freight transport; and to accommodations such as hotels.

requirements, and may be price-regulated as well. In the area of communications, telephone service has traditionally been both a common carrier and a public utility.

Public utilities are another way of ensuring that business of all kinds have access to essential inputs, and public utility law is another bedrock of a competitive economy.

Jump-Starting Competition

In many respects the government creates the conditions of markets, by setting out rules, creating property rights, and otherwise fashioning the legal and economic structures that are necessary for businesses to operate. How well it does this job can affect the nature of competition in a market just as much as how well it enforces antitrust law.

For instance, the Federal Communications Commission (FCC) issues wireless spectrum licenses, wireless towers and access points are deployed under government rules. Issues such as roaming are also governed by a legal framework. The way that these ground rules are set has a direct effect on competition. The government can choose to issue licenses to a variety of competitive carriers, or let a handful of companies acquire the bulk of them. It can ensure that customers of smaller carriers can easily roam onto other networks when they are traveling, or it can let larger carriers block them. These policies as much or more than whether to allow or disallow particular mergers determine the number of competitive choices consumers have.

An example of how broader policies such as common carriage lead to the creation of markets is the competitive Internet Service Provider (ISP) market of the 1990s.Because telephone companies were regulated as common carriers, they were required to provide service to competitive ISPs just like any other business, and they were required to allow customers to use whatever non-harmful equipment they wanted to use with their telephone connections, such as modems. These two components of nondiscrimination together ensured that a robust and competitive market for ISPs could develop, which did much to promote early commercial, consumer internet adoption and usage. But this competitive market could not have existed without Title II of the Communications Act and a series of related regulations.. The failure to preserve a broad set of ISP regulations led to today's marketplace, where ISP service is directly integrated with transmission lines and consumers have little choice, and the primary policy debate is whether, and how, to prevent ISPs in a now-uncompetitive market from leveraging their position to unfairly discriminate against various "edge services." While this is not the forum to discuss the

complexities of these matters, the history of ISPs provide a clear, recent example of how public policy can shape markets in ways that go beyond what antitrust can do.

Cable Ownership Cap

The cable ownership cap is an example of a policy designed to promote competition in cable TV programming, and prevent any one video distributor from gaining or abusing its dominance. These rules created a nationwide cap where cable companies could not exceed 30 percent of the TV subscription market. While incumbents have repeatedly challenged the FCC's rules, the Congressional directive to the Commission to enact cable ownership rules remains the law.[5]

Because the Commission has not carried out the law, the cable TV industry is dominated by a few big players. The cap served as a valuable consumer protection mechanism—it encouraged lower prices, more choice, and diversity of programming in direct response to the growth of cable cartels. Not only did it prevent any one cable operator from getting too big, it prevented an operator from using its scale to have market power as a dominant buyer of programming. Policymakers should again explore whether, in some markets, simple market share caps are an effective way to maintain competition and prevent abuse of dominance.

Media and Broadcast Ownership Rules

Unfortunately, the FCC plans to roll back its media ownership rules. These rules promote competition, in addition to localism and diversity, by limiting cross-ownership in newspaper, radio, and television. Limiting cross-ownership allows for more stakeholders by preventing the consolidation of all media voices within the same market. As the U.S. Supreme Court has stated, "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public," and "assuring the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."[6]

The media ownership rules are necessary because when the FCC evaluates competition, it takes into account whether stations have incentives to invest in diverse news and local

[5] 47 USC § 533.
[6] Dana A. Scherer, The FCC's Rules and Policies Regarding Media Ownership, Attribution, and Ownership Diversity at 1-2 (2016), https://fas.org/sgp/crs/misc/R43936.pdf, *citing Associated Press v. United States*, 326 U.S. 20 (1945) and *Turner Broadcasting System, Inc. v. FCC* 512 U.S. 663 (1994).

programming tailored to serve audiences in their communities. Because consumers traditionally were not charged to receive broadcast programming, antitrust historically focused on the prices stations charge advertisers to air commercials during programming. With television, antitrust considers the prices broadcasters charge cable and satellite operators for retransmission of their programming. These differences are important, because the FCC promotes competition beyond what basic antitrust law provides; the FCC creates competition policy, whereas antitrust polices against specific harms to competition.

Video Programming Rules

The Communications Act's program access and program carriage rules illustrate another way that sector-specific public policies can promote competition. These rules, though unfortunately weakened in recent years by the FCC, are designed to ensure that dominant video platforms do not abuse their dominance by unfairly discriminating against smaller programmers, and rival distributors. Under the program carriage rules, video distributors may not decline to carry programming based on who creates it. Under the program access rules, video distributors are required to make their programming available to other platforms. To the extent there are shortcomings in these rules, these can be traced to the FCC failing to fully implement Congressional directives—the Commission needs only political and policy determination, not new legal authority, to ensure they more effectively promote competition and diversity of programming.

Other Areas

This statement has focused primarily on communications law because that is one of Public Knowledge's areas of expertise. But similar examples can be found in many areas of the economy. The Department of Transportation reviews airline mergers, for instance, not only to protect competition but to ensure continued service to smaller markets.[7]Like the FCC, the DOT enforces pure competition principles, being directed by Congress to "avoid[] unreasonable industry concentration, excessive market domination, monopoly powers, and other conditions that would tend to allow at least one air carrier or foreign air carrier unreasonably to increase prices, reduce services, or exclude competition in air transportation."[8]Going further than that, it "has a mandate to foster and encourage legitimate competition,"[9] and is statutorily charged with "encouraging entry into air

[7] Jad Mouawad & Christopher Drew, Justice Dept. Clears Merger of 2 Airlines , NY Times (Nov. 12, 2013), https://dealbook.nytimes.com/2013/11/12/u-s-said-to-be-near-settling-american-us-airways-merger-lawsuit.
[8] 49 U.S.C. § 40101.
[9] Dep't of Transportation, Enforcement Policy Regarding Unfair Exclusionary Conduct in the Air Transportation Industry, 63 Fed. Reg. 17919-17922 (April 10, 1998).

transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry."[10] Another example is the Drug Price Competition and Patent Term Restoration Act (commonly known as the Hatch-Waxman Act), which encourages the manufacture of generic drugs, and saves American consumers billions of dollars per year.

Conclusion

In considering ways to protect consumers, promote competition, and further other social goals, policymakers and other thinkers are rightly considering ways that antitrust can be improved. Some have proposed technical fixes that affect process and could bring about positive results without fundamentally changing the current nature of antitrust enforcement. Some have proposed radically rethinking antitrust and bringing it closer to its Progressive Era-roots. But competition policy is broader than antitrust, and members of Congress should not overlook other tools at their disposal to ensure that markets are functioning effectively. For example, major online and technology platforms have recently come under scrutiny. It may be that industry-wide data portability, transparency, or interoperability requirements would be the best way to ensure competitive markets. Other consumer issues, such as privacy, may not be "competition" problems at all. No matter how it is formulated, antitrust is likely not the best tool to provide solutions such as these. Instead, antitrust should be applied alongside regulatory, structural, and other approaches to ensure that markets serve the public interest.

[10] Id.