Comments of the American Consumer Institute Regarding Twenty-First Century Anti-Trust Act Senate Bill S8700A Submitted September 11, 2020

The American Consumer Institute Center for Citizen Research (ACI) is a nonprofit (501c3) educational and research institute with the mission to identify, analyze and project the interests of consumers in selected legislative and rulemaking proceedings in information technology, health care, insurance, energy and other matters. The goal of ACI is to bring to bear the tools of economic and consumer welfare analyses as rigorous as available data will allow, while taking care to assure that the analyses reflect relevant and significant costs and benefits of alternative courses of government action.

I am the president and CEO of ACI, and I also chair the Federal Communications Commission's Consumer Advisory Council (CAC). The comments submitted here are solely the views of ACI and do not necessarily reflect the views of the CAC or its members. These comments specifically address the Twenty-First Century Anti-Trust Act (Senate Bill S8700A), which seeks to expand antitrust laws in the State of New York and target large corporations, particularly those in the information technology sector. To summarize, we believe the expansion of antitrust laws in the State of New York to target large corporations, and specifically big tech, is unnecessary and could lead to consumer welfare losses. Therefore, in our view, this is not pro-consumer legislation.

Consumers Benefit from Economies of Scale

The extensive literature focused on industrial organization provides an array of economic theories of competitive, oligopoly, and monopoly models, including the consequences of concentration, market power, collusion, price fixing, and predatory pricing. The main rationale for action is the belief that too few competitors will lead to a lack of market rivalry, which will raise consumer prices and restrict supply – thus reducing consumer welfare. While some policymakers may speak as if market concentration is automatically bad and that the government needs to act, this conclusion has no basis of support in the economic literature.

As the structure-conduct-performance paradigm shows, in general, market concentration is not as relevant as industry performance. Regardless of market structure, if market prices are decreasing or stable, then consumers are not at risk from market power. Stable prices, increasing innovation, and the substantial rate of network investment are the confounding factors providing evidence that companies are entering and competing for customers, and as a result, consumer welfare is improved. Without empirical evidence of the exploitation of market power, there is no economic justification for antitrust intervention.

The reality is that perfect competition is not perfect, and concentrated markets, in many cases, can yield more benefits for consumers. For example, under the textbook model of perfect competition, there is no investment, no innovation, no price competition, no product differentiation, and no economies of scale and scope. On the other hand, many large companies, including manufacturers, network businesses, and information technology companies, can achieve significant economies of scale and scope, which enables them to reduce per unit costs, increase productivity, and lower consumer prices. In this instance, big is good for consumers and increases consumer welfare.

Alternatively, in an industry with decreasing average costs, without the benefit of scale economies, consumers will pay more. In the absence of network economies, there would be little investment and little innovation for online technology services and applications. In other words, if perfect competition were a requirement, we would have no internet services, no social media, no railroads, no airlines, no battery companies, no college testing services, no utilities, no wireless phone services, and so on.

Antitrust laws that target and punish successful new businesses because of their size and concentration are not appropriate public policies, and later these laws could be misused or weaponized to target out-of-favor companies at a regulator's whim. Online information technology companies appear to be vibrant, innovative, and competitive, and consumer benefits are being achieved without the help of additional antitrust measures. The current consumer welfare standard is sufficient.

The reality is that big tech invests enormous sums in R&D to discover the next great idea, improve features, and retain a highly-mobile consumer base.[1] Among the world's top 1,000 publicly owned corporations, Amazon and Alphabet (Google's parent company) are the top two spenders in R&D; Apple was seventh and Facebook was fourteenth.[2]

Market Structure Does Not Determine Conduct or Performance

A reasonable assessment of the structure, conduct, and performance of the online information and network technology sector provides no substantial evidence of market failure and certainly not enough to warrant imposition of new antitrust laws. The imposition of such laws could create costs and risks for new entrants, and that would raise the specter of serious unanticipated consequences and produce consumer welfare losses as a result of overregulating and stagnating this dynamic sector.

In addition, the combination of triple damages, recovery of lawyer's fees, and class action lawsuits is a recipe for increased rent-seeking, thereby encouraging litigation, cronyism, and the manipulation of antitrust laws to extract additional profits for the benefit of trial attorney profits.[3] Moreover, rival companies could use these

[1] Timothy W. Martin, "American Tech Firms Are Winning the R&D Spending Race With China: Led by Amazon and Google, U.S. Firms Spend $5 for every $1 by Chinese Companies, PwC says," *Wall Street Journal*, October 30, 2018, https://www.wsj.com/articles/american-tech-firms-are-winning-the-r-d-spending-race-with-china-1540873318.
[2] Barry Jaruzelski, Robert Chwalik and Brad Goehle, "The Global Innovation 1000 Study," PwC, available online at https://www.strategyand.pwc.com/gx/en/insights/innovation1000.html#GlobalKeyFindingsTabs4, referencing 2018 rankings.
[3] Robert D. Tollison, "The Economic Theory of Rent Seeking," *Public Choice*, Vol. 152:1/2, July 2012, pp. 73-82.

expanded antitrust laws to bring actions against their competitors, instead of engaging in head-to-head competition for the benefit of consumers. As a result, investment, differentiation, innovation, and competition would slow down, thereby harming consumer surplus. These antitrust provisions have little to do with helping consumers.

Even for giant tech companies, the costs of complacency are high. Over and over, once-dominant companies have cratered when they failed to innovate fast enough. Concerns of concentration among these relatively young but dominant companies are often short lived. Netscape, Blockbuster, Altavista, CompuServe, Prodigy, Ask Jeeves, and Myspace provide just a few examples of how dominant firms had fallen to the wayside. They were replaced by a host of improved services, some totally free to consumers.

While the online technology sector is, indeed, quite concentrated, they nonetheless perform quite well without onerous regulations. A review of the literature on duopoly from different perspectives yields no evidence that duopoly or concentration *per se* is a sufficient indicator of market failure and that structure does not determine conduct and performance. In fact, the causality is reversed.[4]

Consumer Welfare Standard is Key

For eight decades after the passage of the Sherman Act of 1890, the first federal law to prohibit monopolistic business practices, regulators and judges struggled to develop a coherent interpretation of vaguely-written federal antitrust laws.[5] Amid this uncertainty, a simple doctrine emerged: "big is bad." Companies were sanctioned, not because their activities harmed the public, but merely because they were deemed to have grown too large. With no rigorous grounding, antitrust decisions could easily be abused to target political enemies or handicap disfavored industries.

[4] See Professor Larry F. Darby, "To Regulate or Not to Regulate: Where Is the Broadband Market Failure?" The American Consumer Institute, November 19, 2009.
[5] Ryan Young, "Antitrust Basics: Rule of Reason Standard vs. Consumer Welfare Standard, Competitive Enterprise Institute, July 8, 2019, https://cei.org/blog/antitrust-basics-rule-reason-standard-vs-consumer-welfare-standard.

The pre-1970s, the "big is bad" philosophy was eventually replaced with an empirically-driven consumer welfare standard, which focuses on whether consumers are harmed — through higher prices or decreased output, for example — by exploitation of a firm's market power. The consumer welfare standard has the flexibility to adapt to new market realities, like the growing dominance of digital communications and commerce, while maintaining objective principles that promote the public's interest.[6]

Viewed through a consumer welfare lens, the case for adding additional restrictions on big tech companies crumbles.[7] For one, these platforms face intense competition, both with each other and with smaller firms.[8] Facebook's hegemony in social media, for example, has sharply eroded since 2015 as competitors like TikTok have attracted many of its younger users.[9] To stay on top, today's big tech firms — unlike the paradigmatic robber barons of the 19th century — massively invest in research and development to create new products and fine-tune existing features to retain a highly-mobile customer base.[10]

As previously stated, the current literature generally suggests that large firms, due to economies of scale, are better positioned to produce at lower costs and maximize consumer welfare benefits.[11] This is especially true in network economies with billions of users and devices. Indeed, many of the services we most rely on —

[6] Joe Kennedy, "Why the Consumer Welfare Standard Should Remain the Bedrock of Antitrust Policy," Information Technology & Innovation Foundation," October 2018, http://www2.itif.org/2018-consumer-welfare-standard.pdf?_ga=2.224338459.1068613097.1597177969-1447226085.1597177969.
[7] Loren Thompson, "Inventing Bogus Antitrust Arguments to Bring Down Big Tech is Bad for National Security, *Forbes*, July 16, 2020, https://www.forbes.com/sites/lorenthompson/2020/07/16/inventing-bogus-antitrust-arguments-to-bring-down-big-tech-is-bad-for-national-security/#7366403c784b.
[8] Christopher Marchese, "Debunking the 'Big is Bad' Bogeyman: Facebook Benefits Consumers, *George Mason Law Review*, 28:1, 2020, working copy at http://georgemasonlawreview.org/wp-content/uploads/2020/08/Marchese_Final_Web3.pdf.
[9] Ibid, and Tripti Lahiri, "Facebook Finally Has a Serious – and very fun – Chinese Rival, Quartz, March 4, 2019, https://qz.com/1564270/bytedance-video-app-tiktok-rival-to-facebook-reached-1-billion-downloads/.
[10] Barry Jaruzelski, Robert Chwalik and Brad Goehle, "The Global Innovation 1000 Study," PwC, available online at https://www.strategyand.pwc.com/gx/en/insights/innovation1000.html#GlobalKeyFindingsTabs4.
[11] Geoffrey A. Manne and Justin Hurwitz, "Big Tech's Big-Time, Big Scale Problem," Cato Institute, May/June 2018, https://www.cato.org/policy-report/mayjune-2018/big-techs-big-time-big-scale-problem.

Google Search, social media, millions of smartphone apps — are available for free. This begs the question -- where is the evidence that consumer welfare is being harmed?

How we resolve the current debate over antitrust policy will affect much more than just big tech. Weakening the consumer welfare standard — or abandoning it altogether — could have profound repercussions for industries across the U.S. economy, leaving us with fewer innovative products and higher prices – thus, by definition, harming consumer welfare.[12] Legal scholars A. Douglas Melamed and Nicolas Petit have warned that "the proposed alternatives [to the consumer welfare standard] would make things worse—not better."[13] This, in turn, will also affect U.S. competitiveness abroad.

Summary

The emergence of the information economy, the U.S. global leadership in technology, and the massive consumer welfare benefits that these services bring should give us pause to revisit the scholarly literature that provides empirical evidence on these issues. We do not know which of these technology giants will be gone in a decade, nor which new services, platforms and applications will emerge.

Considering all the above points, we conclude that the current antitrust laws, which rely on a consumer welfare standard, are sufficient and reflect the current market dynamics. Expanding the role of antitrust law will likely create additional costs and risks, which will, ironically, adversely affect market entry and competition, as well as provide regulators with the ability to influence who wins and losses in the marketplace. That outcome does not reflect how competition should work, nor is that outcome consumer welfare maximizing.

[12] Coalition letter to the U.S. House of Representatives Judiciary, see https://0b08fe39-6499-4606-ae41-14b1febdf607.filesusr.com/ugd/3bb067_5797dfb282cf42faa684c55e9a9ef0fd.pdf.

[13] A. Douglas Melamed and Nicolas Petit, "The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets," *Review of Industrial Organization*, Vol. 54, pp. 741-774, 2019, https://link.springer.com/article/10.1007/s11151-019-09688-4A.

While it is reasonable to question whether the consumer welfare standard has been adequately applied to big tech companies, and whether some of their practices may unfairly handicap potential competitors — for now, the evidence for that charge is thin. We currently have adequate antitrust laws to deal with this.

Alternatively, what is NOT productive is to advocate for a return to the refuted "big is bad" standard of a century ago, where consumer interests would be ignored to satisfy political and ideological motives. This legislation is not pro-consumer.

Respectively,

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