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United States Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW, Suite CC-5510
Washington, DC 20580

Re: *Competition and Consumer Protection in the 21st Century Hearings, Project Number P181201*

Issue 1: The state of antitrust and consumer protection law and enforcement, and their development

I. Introduction

These comments are submitted in response to the U.S. Federal Trade Commission (FTC)'s announcement regarding hearings on competition and consumer protection in the 21st Century.¹ The Computer & Communications Industry Association (CCIA)² commends the FTC for seeking a better understanding of the legal and policy challenges that arise with the digitalization of the global economy and CCIA welcomes the opportunity to provide its views on the variety of competition issues raised.

Internet-enabled commerce represents a highly competitive, growing sector of the economy in the U.S. and around the world. Research from earlier this year from the U.S. Bureau of Economic Analysis shows that “the digital economy has been a bright spot in the U.S. economy”,³ growing at an average annual rate of 5.6 percent per year from 2006 to 2016, compared to 1.5 percent growth in the overall economy. The study also found that the digital economy accounted for 6.5 percent of current-dollar GDP in 2016. Last year, the U.S.

¹ Press Release, FTC Announces Hearing on Competition and Consumer Protections in the 21st Century (June 20, 2018), <https://www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st>.

² CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. Our members employ more than 750,000 workers and generate annual revenues in excess of \$540 billion. A list of CCIA members is available at <https://www.ccianet.org/members>.

³ U.S. Bureau of Economic Analysis, *Defining and Measuring the Digital Economy: Working Paper* (Mar. 2018) at 3, https://www.bea.gov/digital-economy/_pdf/defining-and-measuring-the-digital-economy.pdf.



International Trade Commission reported that from 2012 to 2016, global e-commerce grew 44 percent from \$19.3 trillion to \$27.7 trillion.⁴

Researchers have found that the Internet accounted for 21 percent of GDP growth in mature economies in recent years, and, on average, 3.4 percent of GDP across the large economies that make up 70 percent of global GDP.⁵ In numerous advanced economies, the Internet accounted for 10 percent of GDP growth over a 15-year period.⁶ In developed markets, the Internet economy has been projected to be one of the fastest growing sectors, with estimates anticipating that the growth rate will be “far outpacing just about every traditional economic sector, producing both wealth and jobs.”⁷

In addition to contributing to the growth of the economy and GDP, there has also been measurable job growth in the tech sector, with today’s leading technology companies creating more jobs than leading companies of the past. As economist Michael Mandel noted last year, “When we compare today’s tech leaders with the employment leaders of the past at a similar stage of development, it turns out that the job creation performance of the tech sector looks quite good.”⁸ Employees in these jobs are obtaining a greater share of gains from productivity.⁹ At the same time, technology companies are expected to invest increasing amounts in research and development, with spending expected to rise 24 percent this year, and capital expenditures expected to rise by 48 percent.¹⁰

In order for innovation in the technology market to continue driving the U.S. economy, both competition policy and sound antitrust enforcement must play a crucial role in ensuring that competition exists across markets. A sound understanding of the evolution of the U.S.

⁴ U.S. Int’l Trade Comm’n, *Global Digital Trade 1: Market Opportunities and Key Foreign Trade Restrictions* (Aug. 2017) at 13, available at https://www.usitc.gov/publications/332/pub4716_0.pdf.

⁵ McKinsey Global Institute, *The Great Transformer: The Impact Of The Internet On Economic Growth And Prosperity* (Oct. 2011) at 1, available at http://www.mckinsey.com/insights/high_tech_telecoms_internet/the_great_transformer.

⁶ Matthieu Pélissier du Rausas et al., *Internet Matters: The Net’s Sweeping Impact On Growth, Jobs, and Prosperity* (May 2011) at 1, available at http://www.mckinsey.com/insights/high_tech_telecoms_internet/internet_matters.

⁷ David Dean et al., *The Internet Economy in the G-20: The \$4.2 Trillion Growth Opportunity*, Boston Consulting Group (Mar. 2012) at 6, available at http://img-stg.bcg.com/The_Internet_Economy_G-20_tcm9-106842.pdf.

⁸ Michael Mandel, *An Analysis Of Job And Wage Growth In The Tech/Telecom Sector*, Progressive Policy Institute, (Sept. 2017), available at http://www.progressivepolicy.org/wp-content/uploads/2017/09/PPI_TechTelecomJobs_V4.pdf.

⁹ Michael Mandel, *Manufacturing, Tech/Telecom and the Falling Labor Share*, Progressive Policy Institute (Feb. 20, 2018), available at <http://www.progressivepolicy.org/blog/manufacturing-tech-telecom-falling-labor-share/>.

¹⁰ Dan Gallagher, *Big Tech’s Growth Comes With A Big Bill*, WALL. ST. J. (July 17, 2018), <https://www.wsj.com/articles/big-techs-growth-comes-with-a-big-bill-1531819800>.



competition system reveals that it is difficult, if not impossible, to reconcile economic analysis with public interest considerations other than harm to competition and consumer welfare within the antitrust framework. Factoring other public interest concerns into the antitrust analysis could result in inconsistent application of competition norms and political intervention in the antitrust decision-making process.

Antitrust authorities should continue to enforce antitrust laws based on sound economic analysis that focuses on potential harm to competition and consumer welfare. Given the growing politicization of antitrust abroad, it is imperative that U.S. authorities advocate for this evidence-based approach domestically and abroad.

II. The consumer welfare standard and economic analysis and evidence

The promotion of consumer welfare through competitive markets is the economic model for decision-making employed by antitrust enforcers to determine whether a given business practice warrants antitrust enforcement or not. A competition system guided by the consumer welfare standard has as a goal the maximization of consumers' benefits, with 'consumer' being defined broadly to include both business and consumer purchasers.

The debate over the appropriateness of the consumer welfare standard is a healthy exercise, but significant changes should be considered with great caution. Antitrust norms should not be expanded to include other public policy factors unrelated to economics-based competition concerns.

First, the consumer welfare test best serves consumers' interests. Antitrust enforcement based on the consumer welfare standard targets harmful anticompetitive practices without penalizing practices that are pro-consumer, such as innovative strategies, or mergers that increase efficiencies. To achieve this, when enforcing the antitrust laws under the consumer welfare standard, the tradeoffs between various forms of competition and their effects are considered. As such, the evolution of economic thinking has allowed the courts to decide antitrust cases with a very high degree of accuracy in order to avoid harming consumers. Ultimately, the consumer welfare standard has enabled antitrust enforcement to put consumers first.

Second, the consumer welfare standard enhances predictability and legal certainty by providing businesses with clear guidance with respect to the test to which business practices are subjected. In contrast, a chaotic interpretation of antitrust as inclusive of all manner of undefined public policy consideration risks comparing apples to oranges (i.e. employment opportunities vs. impact on prices), and would not provide clarity to companies with respect to what practices are acceptable to antitrust enforcers before introducing them to the market, undermining due process norms.



Third, since the consumer welfare standard is an economic analysis-based test — non-economic considerations are not factored in — enforcement coherence is preserved. Weighing non-economic factors against economic considerations risks inviting discretionary and unjust results.

The U.S. Supreme Court consistently enforces the consumer welfare standard as the guiding principle for antitrust analysis. However, some observers do not see the consumer welfare standard as the solution for antitrust enforcement, and claim that other public policy considerations should factor into the antitrust analysis. These calls for changes to the consumer welfare standard are misguided, and could create business uncertainty and hinder economic growth if followed.

Non-competition policy objectives once were conflated into U.S. antitrust enforcement decisions, but modern enforcement decision-making relies upon economic analysis, a change which is generally regarded as having brought greater intellectual coherence and predictability to the antitrust framework.

In 2003 the OECD recognized that the inclusion of conflicting objectives, including public policy interest considerations other than consumer welfare, would undermine the public good. It stated that rooting antitrust in multiple competing policy rationales

increases the risks of conflicts and inconsistent application of competition policy. The interests of different stakeholders may severely constrain the independence of competition policy authorities, lead to political intervention and in a relatively minor way, compromise and, adversely affect one of the major benefits of the competitive process namely, economic efficiency.¹¹

III. New developments in markets and in business-to-business or business-to-consumer relationships

The Internet has allowed for many enterprises and new business models to emerge. This, in turn, has changed the economic landscape, fundamentally altering how we engage in commerce. An increasing number of consumers now use online services to acquire products and services also available in traditional brick and mortar spaces. As discussed at greater length in CCIA's response to Issue 2, these new forms of commerce have increased the importance of ensuring that broadband Internet access providers do not engage in anticompetitive practices.

¹¹ Organisation for Economic Cooperation and Development, *The Objectives of Competition Law and Policy* (2003), [https://one.oecd.org/document/CCNM/GF/COMP\(2003\)3/en/pdf](https://one.oecd.org/document/CCNM/GF/COMP(2003)3/en/pdf).



The importance of policing broadband Internet access providers becomes even more relevant given that many of these carriers compete at the downstream level with companies that also offer competing products and services on the Internet, and therefore are dependent upon non-discriminatory access to Internet users. As vertically integrated firms that own essential physical infrastructure, these broadband providers have a greater incentive to distort access to the downstream market. The “gatekeeper” role, when exercised by an owner of essential physical network infrastructure, can be used to exert undue influence on new forms of Internet commerce.

IV. The growth of international competition systems and the advisory and advocacy role of the FTC

A. The FTC’s role in advocating for enforcing antitrust norms under the consumer welfare standard

Currently, there are approximately 127 competition systems worldwide.¹² These competition systems sometimes pursue different goals, and some invoke general public interest concerns, just as U.S. policy once did. For example, in South Africa, competition law includes as one of its goals “to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.”¹³ As competition systems mature, however, these other legitimate public policy interests are usually addressed separately, in independent policy frameworks. This effectively removes dissonant considerations from competition policy, ensuring the primacy of consumers’ welfare.

In 1995, UNCTAD observed that:

There has in fact been an increasing convergence in the provisions or the application of competition laws over the laws two decades. Competition systems in many countries are now placing relatively greater emphasis upon the protection of competition, as well as upon efficiency and competitiveness criteria, rather than upon other public interest goals.¹⁴

The trend to elevate consumer welfare as a standard would not have taken place without the FTC’s international advocacy. The FTC, through its Office of International Affairs, has

¹² The George Washington University Competition Law Center, Worldwide Competition Database, *available at* <http://www.gwclc.com/World-competition-database.html>.

¹³ Article 2 of the South African Competition Act, *available at* [http://gwclc.com/Library/Africa/South%20Africa/Competition%20Act\(1\).pdf](http://gwclc.com/Library/Africa/South%20Africa/Competition%20Act(1).pdf).

¹⁴ See United Nations Conference on Trade and Dev., *The Basic Objectives and Main Provisions of Competition Laws and Policies*, 6 (1995), *available at* http://unctad.org/en/Docs/poitd_15.en.pdf.



throughout the years played a key role in providing technical assistance to new competition systems, as well as mature systems seeking to fine-tune their competition laws to ensure that the market economy benefits consumers in the most efficient manner. CCIA commends the work done thus far by the FTC in the international arena and encourages the agency to increase its efforts and resources devoted to advocating for sound competition law and policies around the world. As discussed in CCIA's response to Issue 11 regarding the agency's investigation, enforcement and remedial processes, the FTC's international efforts would benefit further from consideration of strategies discussed therein.

The FTC's advocacy and technical assistance work is particularly important for the digital economy. The increasingly cross-border nature of the market for Internet services means that asymmetries between different jurisdictions' competition frameworks threaten incentives to innovate. This may have a detrimental effect on both the U.S. economy and U.S. consumers, as well as the development of new business models and technologies abroad.

B. The FTC's role in promoting economic analysis in competition policy

The advanced nature of economic analysis in U.S. competition law enforcement has given U.S. authorities and courts a better understanding of business models, markets, and their impact on consumer welfare. Just as the FTC has encouraged antitrust authorities to elevate consumer welfare considerations in antitrust policy, it should also promote the use of objective economic analysis in enforcement decision-making.

The use of economic analysis has allowed the United States to more efficiently protect consumers without negatively impacting incentives for companies to invest in research, development, and innovation. Unfortunately, some foreign jurisdictions lack sufficient economic understanding of the business models that govern the digital economy. By enforcing their competition laws without a sound understanding of consumers' interests, these regulators may penalize online enterprises providing services across borders for pro-consumer business practices. The consequences of such misapplication fall not only on foreign consumers, but U.S. consumers as well.

CCIA encourages the FTC to dedicate resources to encouraging the application of economics to antitrust enforcement in foreign jurisdictions, such that agencies and courts abroad utilize objective economic analysis in competition decision-making processes similar to the United States.

Finally, CCIA praises the work done by the FTC in international fora such as the OECD, UNCTAD, and the ICN. Participating in these fora provides U.S. officials an opportunity to



foster dialogue among worldwide agencies, promote objective principles, and engage in trust-building relationships that ultimately benefit global antitrust enforcement. As the number of foreign jurisdictions increases, the FTC should increase its resources devoted to ensuring an efficient presence and engagement in all these international fora.

V. Conclusion

The U.S. antitrust framework has evolved in a manner that maximizes the goal for which competition norms were conceived: the promotion of consumer welfare through competitive markets. The application of economic analysis has been instrumental to the advancement of the U.S. competition system, and it should continue to play a key role, especially given the digitalization of the economy. Whereas it is fortunate that many foreign jurisdictions have adopted and committed to a market economy and created competition systems for that purpose, the failure to fully embrace the application of economic analysis to law enforcement remains detrimental to consumers. Therefore, the FTC should continue to devote resources and efforts to advocate for sound competition law enforcement, informed by economics, to the benefit of consumers worldwide.



Annex:

Per the FTC's request for empirical research regarding the topics at issue in the hearing announcement, CCIA offers the following additional resources.

- Carl Shapiro, *Antitrust in a Time of Populism* (Oct. 24, 2017), available at <https://ssrn.com/abstract=3058345>.
- Daniel A. Crane, *Antitrust Antifederalism*, 96 CAL. L. REV. 1 (2008).
- Delegation of the United States to the Competition Committee, Note Submitted for OECD Roundtable on Evaluation of the Actions and Resources of Competition Authorities 7-8 (May 25, 2007).
- Herbert J. Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?* (2018).
- James C. Cooper & William E. Kovacic, *U.S. Convergence with International Competition Norms*, 90 BOSTON U. L. REV. 1555 (2010).
- Malcolm B. Coate, Richard S. Higgins & Fred S. McChesney, *Bureaucracy and Politics in FTC Merger Challenges*, 33 J.L. & ECON 463 (1990).
- Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 4861 (1987).
- Robert D. Anderson & William E. Kovacic, *Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets*, 18 PUB. PROCUREMENT L. REV. 67 (2009).
- William E. Kovacic, *Toward a Domestic Competition Network*, in *Competition Laws in Conflict* 316 (Richard A. Epstein & Michael S. Greve eds., 2004).