DEPARTMENT OF JUSTICE

Concentrating on Competition:
An Antitrust Perspective on Platforms and Industry Consolidation

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I. Introduction

Good afternoon. Thank you for the kind introduction and thank you to the Capitol Forum for inviting me to speak today.[1]

It would be an understatement to say that antitrust is a hot topic these days, and much of the attention has been focused on prominent tech, media, and telecom companies. Tech platforms, in particular, have taken a central role in the current debates over industry concentration, as well as the implications of "big data."

Platforms undoubtedly bring tremendous innovations and benefits to the marketplace. They lower transaction costs, enabling sellers and customers to find each other more easily. Mobile platforms, like iOS and Android, enable app developers to launch new products and services and reach thousands of customers instantly. Travel and ecommerce platforms like Expedia and eBay help consumers compare prices and products more easily across different sellers.

Platforms also bring vibrant new competition to traditional industries. For example, Uber and Lyft disrupted the taxi business and provided new opportunities for the people on both sides of those platforms. Airbnb disrupted the hotel industry, giving consumers more options and giving home-owners additional revenue opportunities.

No one can deny the benefits that digital platforms provide. But some people are concerned that a few of today's leading platforms have become too big, that markets are becoming increasingly concentrated, and they are looking to the antitrust laws to help.

[1] Thanks also to Lauren Willard, who assisted me with these remarks.

II. The Debate over Concentration and Market Power

First, let's focus on the evidence of increased concentration. Over the past few years, a number of articles have suggested that industries are becoming more concentrated, with a handful of firms accounting for an increasing share of the marketplace.

Some people blame increased consolidation on lax antitrust enforcement. But before we rush to judgment, we need a better understanding of *why* there is increased concentration. Is the rise of big firms actually due to anticompetitive behavior? Are there regulatory barriers to entry? Or are firms big because they are better at what they do? The answer isn't simple, and likely differs across markets.

a. Evidence on Concentration

I'll start with the evidence on concentration itself. In 2015, the Council of Economic Advisers issued a study on competition and market power, finding that concentration in the United States has increased in recent years.[2] Another study relied on Census data to conclude that "[m]ore than 75% of US industries have experienced an increase in concentration levels over the last two decades."[3] A number of these studies claim that this increased industry-level concentration is the result of lessened antitrust enforcement.

Some criticisms, including those published last month by Carl Shapiro,[4] as well as Greg Werden and Luke Froeb,[5] challenge these studies because they rely on industry-level Census data rather than measuring concentration in relevant antitrust markets.

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[2] Council of Economic Advisors, Benefits of Competition and Indicators of Market Power (Council of Economic Advisors Issue Brief updated May 2016), *available at* https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160502_competition_issue_brief_updated_cea.pdf.

[3] Gustavo Grullon, Yelena Larkin & Roni Michaely, *Are U.S. Industries Becoming More Concentrated* (Oct. 2018), Review of Finance (forthcoming), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2612047.

[4] Carl Shapiro, *Antitrust in the Time of Populism*, 61 INT'L J. INDUS. ORG. 714 (2018).

[5] Gregory J. Werden & Luke M. Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration*, ANTITRUST, (Fall 2018), at 74.

The studies relying on US Census data look at broad categories like "retail trade," "utilities," "finance and insurance," and "healthcare."[6] A relevant antitrust market, however, is invariably much narrower because it includes only products that are close substitutes from the consumer perspective.

If the studies do not capture concentration in relevant antitrust markets, they can't really meaningfully tell us anything about the changes in competition that we're interested in.

b. Alternative Explanations for Concentration Trends

But even if one assumes, for the sake of argument, that there is increased concentration in relevant antitrust markets, it's important to consider the possible reasons behind such a trend.

i. More Efficient Firms

One possible reason is dynamic competition based on efficiency. If one firm is much more efficient than its rivals, it can displace inefficient competitors and leave fewer firms in the market. Some have called these exceptionally efficient firms "superstars."

In fact, economists have observed increased variation in productivity levels across firms, and that the industries with the highest concentration levels are also those with the greatest productivity and innovation growth.[7]

That's not surprising. When firms are able to operate at lower costs or produce better products than rivals, they can increase their market share and drive out less efficient competitors.

Although the process may result in higher concentration, it is the result of the competitive process at work. As Assistant Attorney General Delrahim has said: "Rather than a failure of antitrust, concentration may be the byproduct of healthy competition as the most innovative and

[6] CEA Issue Brief, supra note 1, at 4.
[7] David Autor, et al., *The Fall of the Labor Share and the Rise of Superstar Firms* (May 2017), *available at* https://economics.mit.edu/files/12979.

efficient firms grow and attract customers."[8] Indeed, if firms are gaining market share because they are winning consumers through competition on the merits, that should be applauded not condemned.

ii. Winner-Take-Most Markets

A second and closely related explanation for increased concentration is the growth of platforms and the rise of "winner-take-all" or "winner-take-most" markets.[9]

Economists have long recognized that economies of scale, including demand-side network effects, can result in concentration.[10] Consumers often benefit from concentration in such markets.

Waze is a good example. The more people on the road that use Waze, the more accurate its traffic and navigation services are for other consumers. Drivers may benefit from having all drivers on a single platform, rather than having them fragmented across multiple different navigation services.

This doesn't mean "winner-take-most" markets are without competition. Rather, there is stronger competition "for the market," even if less competition "in the market."

Another example of competition "for the market" is the battle between Blu Ray and HD-DVD that occurred between 2006 and 2008. Blu Ray ultimately prevailed in the competitive battle with HD-DVD, but its victory was fleeting. Consumer preferences and technology shifted again and streaming video seems to be rapidly replacing Blu Ray discs and HD-DVDs.

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[8] Makan Delrahim, Assistant Attorney General, U.S. Department of Justice Antitrust Division, Don't Stop Believin': Antitrust Enforcement in the Digital Era (April 19, 2018), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-university-chicagos.

[9] John Van Reenen, *Increasing Differences between firms: Market Power and the Macro-Economy* (August 2018), at 22, *available at* https://www.kansascityfed.org/~/media/files/publicat/sympos/2018/papersandhandouts/jh%20john%20van%20reenen%20version%2020.pdf?la=en.

[10] Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J.L. & ECON. 1 (1973); Sam Peltzman, *The Gains and Losses from Industrial Concentration*, 20 J.L. & ECON. 229 (1977).

iii. Regulatory Barriers to Entry

A third explanation offered for increased concentration is increased regulatory barriers to entry. Regulation can entrench incumbent firms and keep out new entrants, leading to concentration in a market. Where regulation creates a barrier to entry, it can limit competition, raise the costs of goods and services, and stifle innovation.

Of course, incumbents naturally prefer regulation because it preserves the status quo. Regulatory barriers to entry are particularly pernicious because they cannot be surmounted through fierce or disruptive competition.

Occupational licensing is one example. A 2015 White House report observed that the share of US workers holding occupational licenses has increased five-fold since the 1950s and that licensing requirements had raised the price of goods and services.[11] Another example is the Certificate of Need regulations that hampers competition in health care markets.

III. Principles for Antitrust Enforcement

In light of these possible explanations, it's not clear that alleged market concentration is a *competition* law problem. Indeed, economists have found little correlation between increases in prices and changes in concentration, as would be expected if concentration were being driven by weaker competition.[12]

For these reasons, I am skeptical of the drastic calls for breaking up firms or turning tech platforms into regulated utilities. Those kind of blunt approaches may ultimately harm the consumers and sellers that we seek to protect. As we at the Antitrust Division think about our responses to this debate about concentration, we keep four basic principles in mind.

[11] THE WHITE HOUSE, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS (2015).
[12] Van Reenen, supra note 9, at 24.

a. Competition as Core Concern for Antitrust Laws

First, we have to remember that antitrust laws are concerned with *competition*, not concentration. Concentration may indeed be scary, but the relevant question is really whether *competition* is still working to benefit consumers. Our focus is on the competitive *process* and applying the consumer welfare standard to protect consumers' interests in low prices, product quality, choice, and innovation.

If concentration is the result of more efficient and better firms attracting customers through competition on the merits, we should conclude that antitrust is working exactly as it should. The whole point of competition is that the market, rather than regulators, pick the winners and losers. Indeed, much of the debate over concentration seems to overlook that many large tech companies attract consumers with lower prices and more innovative products and services.

b. Antitrust as Law Enforcement

Second, our job at the Antitrust Division is law enforcement, not regulation. We don't have free-wheeling authority to regulate or break-up an industry. We bring enforcement actions where there are violations of the antitrust law, as supported by the facts and economics.

We also recognize that we at the Antitrust Division aren't business people. We're not experts at determining how businesses should be run in the long term, or what prices to charge. Even if we had the authority to break up firms just because they are too big, it's not clear that we would know how to do that without harming consumers or the economy. Nor is it clear that breaking up big platforms would necessarily resolve the concerns people are voicing, which often tend not to be related to competition itself.

c. Big is Not Bad

Third, in looking for antitrust violations, we need to remember, as Assistant Attorney General Delrahim likes to say, "Big is not bad. Big behaving badly is bad."

As antitrust enforcers, we do not object when a firm gains market share by competing on the merits, including through superior quality or lower prices.

What we do look for is big firms behaving badly by engaging in anticompetitive conduct, such as collusive, exclusionary, and predatory behavior. The Supreme Court has been very clear on this point, declaring that, in order "[t]o safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*."[13]

Unfortunately, too much of the concentration debate seems to focus on the size or market power of today's tech platforms rather than looking at whether they are engaging in anticompetitive conduct. Our focus should be on what big platforms are *doing* and not merely how big they are.

d. Incentives to Innovate

Fourth, we need to keep in mind the need to preserve those incentives to innovate. Breaking up or regulating successful firms as if they were public utilities threatens to reduce incentives to innovate.

The prospect of making it big motivates innovators and entrepreneurs to invest in new technologies and products.

Consider an analogy to the lottery. When the jackpot is big, more people buy lottery tickets. Even people who hardly ever play, will buy a ticket just for the chance of an enormous pay-out. Some of you may remember the MegaMillions jackpot reached $1.6 billion this October, causing a frenzy of ticket purchases. I can confess that I couldn't resist buying some tickets, and I know I'm not alone.

[13] Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

Something similar happens in the business world. The prospect of a big payout will, as Schumpeter wrote, "lure capital" into new markets and may thereby produce a "perennial gale of creative destruction" resulting in innovative products and services that benefit consumers.

The Supreme Court echoed this idea in *Trinko*, where Justice Scalia wrote: "[t]he opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth."[14]

IV. Current Division Efforts That May Help Address Concentration Concerns

Keeping these four core principles in mind, we at the Antitrust Division are doing a number of things that may help alleviate concerns about increasing concentration and market power.

a. Merger Review

First, vigilant merger review is a key tool to prevent anticompetitive concentration in markets. Under Section 7 of the Clayton Act, the Division can seek to block mergers if the effect of the merger "may be substantially to lessen competition, or tend to create a monopoly." Preventing an anticompetitive merger is far easier than breaking up a monopoly after the fact.

Even after the fact, however, we can take steps to protect competition, as our case against Parker Hannifin last year demonstrated. In that case, we filed a civil antitrust lawsuit after the consummated merger on the grounds that the merger eliminated competition in the aviation fuel filtration market. Shortly after we filed our complaint, we reached a settlement that required Parker-Hannifin to divest its aviation fuel filtration assets.[15]

The acquisition of start-ups presents a particular challenge for antitrust enforcers. But it's important to distinguish between (i) acquisitions in which an incumbent firm recognizes a pesky

[14] *Id*.
[15] Press Release, Department of Justice Office of Public Affairs, Justice Department, Justice Department Reaches Settlement with Parker-Hannifin (Dec. 18, 2017), https://www.justice.gov/opa/pr/justice-department-reaches-settlement-parker-hannifin

threat and seeks to eliminate it, and (ii) acquisitions in which an incumbent firm helps fund, and greatly expand, the range of a target's products to the benefit of consumers. The hardest cases are those where both incentives appear to be at play.

We also need to be careful about making it too difficult for start-ups to be acquired. If we remove one of the important "exit strategies" for entrepreneurs, we may unintentionally reduce incentives to invest in the first place.

And it's important to remember in this regard that a start-up's success as an independent firm may not be inevitable. Entrepreneurs often can't take their creations to market successfully on their own, and may not even be interested in running a company long-term. Acquisitions enable firms with the necessary capital and skill set to bring innovative products and services to consumers that might not have reached them otherwise.

b. Structural Remedies

A second development at the Division that may help address concentration concerns is our emphasis on structural remedies, such as divestitures, rather than behavioral decrees. Our evolution in thinking about remedies is informed by shortcomings observed in prior behavioral merger remedies.

Back in 1961, the Supreme Court itself observed that "[c]omplete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws," and such relief "is simple, relatively easy to administer, and sure."[16] Behavioral decrees, in contrast, are inherently difficult to get right, and they rely on ongoing government oversight of what should preferably be a free market.

[16] *United States v. du Pont & Co.*, 366 U.S. 316, 331 (1961).

A recent example of a structural merger remedy is the Disney-Fox merger, in which the Division secured a divestiture of the twenty-two Regional Sports Networks ("RSNs") as a condition of the merger.[17] This remedy resolved the Division's concern over harm to cable sports programming without needing to impose complicated behavioral conditions on how sports programming should be licensed to competitors.

c. Regulatory Barriers

A third development that addresses concentration concerns is the Division's work on reducing regulatory barriers, which can increase concentration and market power. Assistant Attorney General Delrahim recently discussed the Division's concern over regulatory barriers to entry. He explained that it's "important to distinguish between regulatory barriers that are the unfortunate product of an incumbents' attempt to block innovative entrants and those that are justified by legitimate concerns. In some cases, competition enforcers may need to intervene to advocate for the removal of regulatory barriers and open up the marketplace for new entrants."[18]

As part of that effort, we have implemented an initiative to terminate "legacy" antitrust judgments, of which there are many. Among them, we are currently reviewing a set of decrees that apply to certain movie studios, commonly referred to as the Paramount Decrees.

These Decrees have no termination date and have regulated the motion picture industry for over seventy years. By banning certain film licensing practices, and even requiring certain movie studios to obtain court approval before acquiring movie theatres, the decrees impose a distribution

[17] Press Release, Department of Justice Office of Public Affairs, Comcast Corporation Abandons Proposed Acquisition of Time Warner Cable After Justice Department and the Federal Communications Commission Informed Parties of Concerns (Apr. 24, 2015), https://www.justice.gov/opa/pr/walt-disney-company-required-divest-twenty-two-regional-sports-networks-order-complete

[18] Makan Delrahim, Assistant Attorney General, U.S. Department of Justice Antitrust Division, Life in the Fast Lane: Antitrust in a Changing Telecommunications Landscape (Nov. 7, 2018), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-federal-institute.

model on the industry that, given the vast changes in the motion picture industry since the 1940s, may be outdated.

Although our review has not reached any conclusions yet, we are analyzing whether the Decrees stifle new and innovative distribution and licensing arrangements that are efficient and beneficial to the industry and moviegoers.

d. Information-Sharing

Fourth, the Division is on the watch for anticompetitive conduct in concentrated markets. Hard core price-fixing, bid-rigging, and market allocation remain, of course, a key aspect of our enforcement mission, but the Division also is looking at other forms of coordination and collusion that can harm competition.

One example is our focus on information-sharing, which can be more effective in more concentrated markets. Last month, the Division filed a complaint against six broadcast television companies alleging that they'd engaged in unlawful agreements to share non-public, competitively sensitive information with their competitors.[19]

While the parties were not engaging in direct price-fixing, they were exchanging a type of information (called "pacing" information) that could enable them to better anticipate whether their competitors were likely to raise, maintain, or lower local spot advertising prices, which in turn could help inform the stations' own pricing strategies and their negotiations with advertisers.

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[19] Press Release, Department of Justice Office of Public Affairs, Justice Department Requires Six Broadcast Television Companies to Terminate and Refrain from Unlawful Sharing of Competitively Sensitive Information (Nov. 13, 2018), https://www.justice.gov/opa/pr/justice-department-requires-six-broadcast-television-companies-terminate-and-refrain-unlawful.

e. Common Ownership and Interlocking Directorates

Finally, the Division is looking at common ownership and interlocking directorate issues more closely. These issues become especially important in concentrated markets, where coordination may be easier.

Section 8 of the Clayton Act prohibits a person from simultaneously serving as a director or officer of competing corporations. The concern behind Section 8 is that a director or officer could coordinate business decisions and exchange competitively sensitive information between competitors. Violations of Section 8 are commonly described as per se offenses, and a lack of competitive injury will not exempt parties from liability unless one of the statutory de minimus exceptions applies.

As today's tech platforms start competing against traditional industries and each other in new ways, this can create Section 8 and common ownership issues. Changes in technology and business strategy can cause two companies to become competitors in markets where they previously did not compete.

Recognizing the dynamic nature of competition, the statute does provide officers and directors with a one-year grace period to resign. Board members should therefore pay attention to changing competitive dynamics and be prepared to step down if necessary to comply with the statute. Recently, we've seen resignations on boards of various media and technology firms, as competition has evolved.

There also are interesting questions about whether Section 8 applies to corporate entities created after the statute was passed in 1914, such as limited liability corporations. This is another issue we are currently thinking about.

In addition to Section 8, Section 1 of the Sherman Act may apply where common ownership results in firms—either directly or indirectly—agreeing to share competitive sensitive information, to allocate markets, or to otherwise pull competitive punches.

Lots of people are discussing whether or not the mere fact of common ownership in and of itself is an antitrust problem because of the incentives it creates. Regardless of how one feels about that issue, real problems certainly can arise when a significant shareholder actively encourages competing firms to coordinate their conduct rather than compete against each other as they otherwise would in the ordinary course of business.

V. Conclusion

In conclusion, I'd like to ask you to reflect on where we were fifteen or twenty years ago. On a day like today, I might send a few emails from my Blackberry, look at catalogues from retail stores for holiday shopping, log on to AOL to browse the internet, and rent a DVD from Blockbuster. Magazines and newspapers ran articles with titles such as "How Yahoo! Won the Search Wars,"[20] and "Will MySpace ever lose its monopoly?"[21]

Today, however, the world looks quite different, with a whole different set of firms leading the pack. Who knows what companies and technologies consumers will be using ten or twenty years from now. What we do know is that antitrust authorities must remain vigilant in their role as law enforcers, and promote the competitive process, while at the same time preserving the incentives to innovate that drive the forces of dynamic competition.

[20] Randall E. Stross, "How Yahoo! Won the Search Wars," FORTUNE, (March 2, 1998), *available at* http://archive.fortune.com/magazines/fortune/fortune_archive/1998/03/02/238576/index.htm.

[21] Victor Keegan, "Will MySpace ever lose its monopoly?" THE GUARDIAN (Feb. 8, 2007), *available at* https://www.theguardian.com/technology/2007/feb/08/business.comment.