REMARKS OF THOMAS F. ZYCH
TO THE OHIO SENATE JUDICIARY COMMITTEE’S HEARINGS ON ANTITRUST LAWS AND BIG DATA

OCTOBER 28, 2019

Let me begin by thanking the Committee for the invitation to testify and, more to the point, for the Committee’s fresh look at the state’s antitrust laws in light of the dramatic impacts of technology-based competition and the emergence of data as a competitively-powerful asset. Ohio was a pioneer in the earliest days of this nation’s antitrust laws, and it is fitting that Ohio continues to be on the forefront of competition law, policy and enforcement as market realities suggest fresh approaches. History, both distant and recent, demonstrates the critical role that the states play within our federal system in protecting and preserving competition.

I note initially that it long has been the case that the lodestar of our antitrust laws has been the preservation of open, free and robust competition. Measures that seek to prevent and sanction unjustifiable restraints on competition form the core of sound antitrust policy, and policies that remove unreasonable barriers to competition are commendable. On the other hand, measures that seek to create competitive benefits for players within a market, or that otherwise impede market participants’ ability to compete, on bases other than overall consumer welfare are suspect and merit close scrutiny. Nothing about these propositions is novel or the product of technological developments. More to the point, nothing in them is obsolete. Rather, they are perspectives tested and refined over repeated cycles of innovation.

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1 These written remarks and my oral testimony are submitted solely in my individual capacity and should not be construed to represent the views of Thompson Hine LLP or its partners or clients; or those of the Antitrust Law Section of the American Bar Association.
It is tempting to view the advent of “Big Data,” artificial intelligence and machine learning as presenting *sui generis* challenges to conventional antitrust law and policy. Such an assumption would be mistaken. The original antitrust laws, in a sense, were a reaction to the market concentration made possible by the Industrial Revolution and the emergence of new industry structures and capital markets that could support harmful concentrations of power and enable effective and illicit restraints of trade.

Waves of development in both technology and market mechanisms have followed the late 19th century that birthed modern American antitrust laws, including sophisticated distribution and retailing channels and entirely new product and service markets. On more than one occasion, commentators have declared classic antitrust analysis to be arcane, archaic and obsolete. Suffice it to say that those commentators were proven wrong.

Antitrust policy not only has weathered economic and technological advances, it has incorporated and benefitted from them. Advances in economic and econometric methods have provided solid empirical bases for measuring and modeling economic effects of market changes. Policy assumptions and predictions not only can be debated as matters of principal – they can be tested against good economic evidence. “Power” can be measured and assessed. Economic consequences of aggregations of revenue, assets and market share can be modelled to a satisfactory level of certainty. The bases for applying antitrust principles may have remained relatively sound and consistent, but the tools for applying them are more numerous and sharper.

All that said, it appears to me that the advent of Big Data as a distinct asset lends itself both to existing antitrust scrutiny as well as economic evaluation based upon the latest empirical learning. Perceptions of market power based on anecdotal evidence can be replaced by rigorous testing of the extent and duration of current market strength. One need only remember AOL and Netscape to highlight how illusory perceptions of long-term market dominance can drive calls for ill-considered policy changes. Measured market realities, not perceptions or preferences, provide reliable and testable factual answers.
The federal antitrust agencies both are engaged not only in investigations of and enforcement actions against major players in technology-enabled markets, they also are engaged in deep and wide analyses of the markets themselves. Almost all of our state attorneys general are engaged in both enterprises. The unmistakable meaning of this degree of agency focus is that the laws we currently have on the books provide at least the statutory and administrative bases for a thorough policy-and principle-based review of how network effects and large data sets can create meaningful, non-transitory concentrations of market power or facilitate coordinated restraints of trade. The agencies also have a proven, empirically-based yardstick to measure whether emerging market structures and data accumulation merit antitrust security: consumer welfare. This proven analytical method for measuring real economic effects in calibrating antitrust remedies has proven itself to be a robust and evidence-based tool that applies equally well to old and to new economies. We may not like the outcome of every agency determination or court decision, but to date no method other than the consumer welfare standard has emerged as a reasonable alternative as the tool for evaluating antitrust concerns.

Now, new markets yield new particular analyses. The emergence of two- (and multi-) sided markets and the growing predominance of digital marketplace platforms have upended how we as consumers acquire goods and services. My own shopping habits have changed: I rarely set foot in a shopping center anymore. Yet the shift in where and how consumers shop, and the resulting relative rise and fall of distribution channels, does not necessarily signal a market failure. From a consumer welfare point of view, a corner drug store is not necessarily any more or less preferable to a big-box superstore or an on-line marketplace. Consumers will tell us that by their shopping behavior. Where that shift leads to restraints on supply and price competition, or non-transitory and excessive market concentration likely to lead to these results, then our current competition law framework provides the bases for meaningful and appropriate intervention.

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2 American agencies are not alone in this endeavor. The EU is aggressively engaged in scrutinizing high-tech markets, and the Australian Competition and Consumer Commission on July 26 issued a comprehensive report on the concentration of market power, and the state of competition generally, in digital markets.
So, I offer three suggestions for the Committee’s consideration. First, I believe the Committee should evaluate our state’s antitrust laws to determine if idiosyncrasies left over from the vintage of our antitrust statutes hinder proper antitrust enforcement. Modern competition policy focuses on both multi-firm conduct (e.g., price fixing, market allocation, mergers and acquisitions) as well as simple-firm conduct (e.g. monopolization). Both prongs of antitrust scrutiny are relevant to digital markets and data-driven competition. A single digital platform conceivably could aggregate sufficient market power so as to impair market entry and restrain product supply and price competition, and unreasonably restrain entry into the market by new competitors, effects that can be every bit as damaging to consumers as naked antitrust conspiracies. I believe it would be a useful exercise for this Committee to use its hearings as a basis for re-evaluating the absence of single-firm violations in the Valentine Act. Monopolization is not any more or less harmful to consumer welfare in digital markets than in traditional ones, but perhaps the analytical green field under the Committee’s eyes will provide a fresh opportunity to revisit the perceived hole in our state’s antitrust law.

Second, I suggest several specific areas of inquiry that I commend for the Committee’s consideration as areas of focus as its contemplates potential fine-tuning of our competition laws with regard to Big Data, artificial intelligence and our market platforms. These are:

- The advent of Big Data together with algorithm-based machine learning provide businesses with tools to hyper-individualize the marketing and sale of their goods and services. The benefits are obvious: I am presented with offers best suited to me. On the other hand, if the algorithms are value-neutral, the result of their application in consumer-facing channels may be the inadvertent distribution of discriminating offers. A machine may not know that zip codes, college attendance, income and other facially-neutral profile traits may reflect historical discrimination, and relying on them may result in a new species of algorithmic implicit bias and effective digital redlining.
At the risk of invoking robot-character science fiction plots, algorithmic pricing based on competitive data presents the potential for lightning-quick pricing decisions, a good thing for consumers, but also a scenario in which algorithms operated by competitors can combine to produce price coordination. Our antitrust laws addressing agreements in restraint of trade assume that humans have set the suspect prices. Where prices are algorithm- and machine learning-driven, our current constructs have not yet caught up with the new world. Evaluation of when and how to apply antitrust-principles to non-human decision making is more than timely.

While not the purview of this hearing, digital markets create privacy concerns. Privacy is not addressed within current antitrust rubrics, but it should be said that there are potential harms that flow from the aggregations of personal information in the Big Data world, beyond those from those resulting from the acquisition and use of an individual’s sensitive information.

Big data has the potential to entrench market dominance and restrict competition. Data-driven markets can tip to one or two products or platforms: In some digital markets, the scale of a dominant platform can make entry an overwhelmingly difficult prospect.

Each of these concerns, however, is capable of examination and remedy under existing antitrust law and policy. In my view, each is susceptible to scrutiny under current state, statutory and judicial and administrative, competition law and policy. Unless and until concrete harm to consumer welfare unaddressed by current antitrust law, we should be wary of creating special antitrust remedies for digital markets.

This leads me to my third suggestion. It certainly is possible, if not likely, that the Committee may discover potential harms to consumers, employees, medical patients, students and others that are especially germane to digital markets. It is equally likely that the Committee may perceive that traditional antitrust remedies may not be suitable for solving those. As I’ve stated, I do not believe this

3 Other than, as noted above, the absence of single-firm prohibitions under the Valentine Act.
justifies jettisoning proven antitrust principles. But the Committee certainly can identify other legal avenues for relief.

As an example, let us use the current state of antitrust enforcement with regard to so-called “no poach” cases. I will not take a position on either side; I am constrained from doing so. But, if antitrust treatment does not (or cannot) fully remediate any perceived harm to employees that do not rise to the level of prohibited restraints of trade, the game is not over. The lack of an antitrust remedy for proven dislocations in the labor market caused by non-competition covenants does not mean the law is at the dead end of the alley. There may be a second-best approach, say, re-evaluating the common law analysis of restrictive covenants. I do not advocate any specific outcome or standard; rather, I simply suggest that there are available alternatives when good antitrust policy reaches its borders.

Antitrust should be humble enough to know it is not the answer to all market failures. It should be, however, sufficiently thoughtful that when interested policy-makers, like this Committee, examine the antitrust laws in a Big Data world, that they (and we) be willing to take what is learned and, where an antitrust solution is neither available nor wise, also be willing to take the next step and identify more appropriate existing legal frameworks.

Again, I am grateful to the Committee for this opportunity to present my views.

Thomas F. Zych
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