Comment on Australian Competition and Consumer Commission Merger Proposal

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Avoiding a “Guilty Until Proven Innocent Approach” For Merger Reviews

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NetChoice[1] is a trade association of leading e-commerce and online companies promoting the value, convenience, and choice of internet business models. Our mission is to make the internet safe for free enterprise and for free expression. We work to promote the integrity and availability of the global internet and are engaged on issues in the states, in Washington, and in international internet governance organizations.

Summary

We worry that if the Australia Competition Commission (ACC) follows the failed and flawed regulatory and restrictive approach of Europe with respect to technology and innovation, that Australia will suffer the same fate as Europe, an economy without a technology or innovation sector. As such, the ACC should not adopt a "guilty until proven innocent approach" approach for merger reviews as outlined in the "Second" and "Third" options of the proposed comments.

Today the United States of America relies on an "innocent until proven guilty" approach to merger and acquisition reviews.

Under this and the consumer welfare standard, antitrust law looks at harms to consumers, not harms to other corporations. This makes sense. If a business lowers its prices, that is bad news for its competitor, who may have to lower its prices or improve services to retain customers. But that is good for consumers. And it shows a healthy and competitive marketplace. This provides empiric evidence as to whether antitrust action is needed and justified. Unfortunately, Europe remains in the dark ages of antitrust – an era before the enlightenment of the consumer welfare standard where enforcement was not based on objective facts and evidence but instead on political and personal preferences.

Digital platforms and marketplaces have benefited consumers massively. Based on the consumer welfare standard, this is an open-and-shut case. Businesses like Amazon and Google connect third parties, including their competitors, with billions of potential customers. They also connect them to tens of thousands of products, including those that they themselves make. So not only do consumers have more choices to choose from, they also have access to higher-quality products at lower costs.

Australia threatens a return to the dark ages of antitrust – an era before the consumer welfare standard where enforcement was not based on objective facts and evidence but instead on political and personal preferences.

These benefits are not unique to the digital sphere, however. For decades, brick-and-mortar stores like Costco and Walmart have used vertical integration to cut costs, reduce prices, and attract customers. At the same time, these stores—like their digital competitors—have had to compete on quality. Self-preferencing is of little use if consumers reject the product.

To be sure, vertical integration can be abused. But that has not occurred with digital platforms or marketplaces. To the contrary, these businesses have increased competition, improved quality, and cut prices. That truth should not be submerged simply because populist antitrust wants to turn the clock back to 1960.

[1] NetChoice is a trade association of e-Commerce and online businesses, at www.netchoice.org The views expressed here do not necessarily represent the views of every NetChoice member company.

The ACC's approach on Prior Approval sets a dangerous path for Australian businesses and innovation - guilty until proven innocent

The ACC's proposed "Second" and "Third" options (hereinafter "proposals") essentially bans pro-consumer, innovation, and business mergers by default and represents a guilty until proven innocent approach for Australian businesses.

The proposal is nothing more than an attempt to create a system where the Commission becomes the arbiter of what is best for Australian consumers rather than allowing consumers to decide for themselves. At the same time, these two approaches are likely to create more harm than benefits.

Nothing in the existing first option would prevent the ACC from analyzing and enforcing laws, it only requires that such application occur when the ACC expects an unlawful outcome rather than treating all mergers as criminal by default. This is important because, as discussed below, the costs of prior approval requirements for mergers and acquisitions can be significant and can ultimately end up harming those that the ACC is trying to protect.

Moreover, reimposing these requirements in a significant number of additional cases would waste taxpayer money when it could be better spent in many of the other core functions of the ACC. By forcing the ACC to engage in unnecessary prior approval procedures in a significant number of additional cases, the Commission will have to bear costs that limit its ability to expend resources in more important areas that pose a greater threat of anticompetitive harm to consumers, such as cases of intentional fraud and COVID scams.

Prior Approval Requirements Will Harm Innovation, Small Businesses, and Consumers

The economy constantly finds new and better ways to serve the needs of consumers. A core component of this dynamism is the ability of businesses to merge with one another or acquire entities to provide innovative products and services that take advantage of each companies' comparative advantage in a way that could not be achieved in a premerger world. This innovation is possible only because of gained efficiencies and the development of capabilities that did not exist previously. Acquisitions and mergers are about far more than just acquiring another business, they're about gaining infrastructure, talent, intellectual property, and a variety of other capabilities that can help both businesses provide better products and services to consumers going forward.

By imposing cumbersome prior approval requirements, the ACC risks deterring these kinds of consumer-welfare enhancing mergers and undermining the enormous potential for innovation that comes with them. Decisions regarding mergers and acquisitions are made on the margin and an increase in the cost of these transactions or the risk that they will not be approved even after the expense of significant administrative costs can have the effect of killing them before they ever even have the chance to be reviewed by the ACC.

As such, many of these transactions that would spur innovation and promote economic growth will never see the light of day, regardless of whether the ACC would have ultimately approved them. By artificially deterring what would be procompetitive transactions, the ACC risks not only undermining innovation but also weakening Australia's economic position in the global community.

Excessive and overly burdensome prior approval requirements also threaten to harm small businesses and forward-thinking entrepreneurial endeavors. The potential of being purchased by a larger, more well-established business provides a major financial incentive for up-and-coming entrepreneurs to engage in innovative activities.[2] It allows for greater specialization and creates incentives for entrepreneurs to invest in narrowly focused, but ultimately value-enhancing, ventures without having to stand up an entire corporate infrastructure to bring their innovative product or service to fruition.

In fact, many entrepreneurs now begin innovative undertakings with the explicit goal of being acquired by one of the larger players, and venture capitalists often invest with an eye toward this possibility.[3] It is important to remember that businesses only agree to merge or sell if they and their stakeholders feel it will ultimately be beneficial. By raising the costs and increasing the difficulty of these mergers and acquisitions, the ACC risks harming small businesses and cutting off a core incentive to invest in these enterprises, which can also serve to hinder innovation in and of itself.

Mergers and acquisitions do not just allow businesses to develop new and innovative products and services, they provide businesses with the tools necessary to both improve and lower the prices of their currently existing products and services.

Finally, and most importantly, imposing excessive prior approval requirements on a substantial number of additional mergers will ultimately harm consumers, which should be the primary focus of any action taken by the ACC. Not only will these requirements hinder innovation, as discussed above, they will also likely lead to higher prices and lower quality goods and services.

Risks To The Australia and The ACC From an Anti-Merger Default

Mergers and acquisitions do not just allow businesses to develop new and innovative products and services, they provide businesses with the tools necessary to both improve and lower the prices of their currently existing products and services. The purchase of a company with superior data security capabilities allows an existing firm to improve their offerings by providing their customers greater privacy protections in the services they already supply. The purchase of a company with superior manufacturing capabilities allows an existing firm to make their production capabilities far more efficient, leading to lower prices for their customers. By raising the cost of these types of procompetitive transactions, the ACC risks harming consumers when it comes to innovation, price, and quality.

Moreover, the requirements jeopardize other core values of the ACC and undermine the agency's reputation for apolitical expertise. For example, without the consistency provided by the consumer welfare standard, and without objective criteria to replace it, the ACC's discretion over merger and acquisition approval will be even more concerning as this subjective approach allows the Commission to hinder what would otherwise be procompetitive transactions. In essence, the more deals the ACC gets to review and approve before they commence, the more likely it is to abuse its new ad-hoc, politicized approach to enforcement.

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[2] Michael Mandel & Diana G. Carew, *Innovation by Acquisition: New Dynamics of High-Tech Competition*, Progressive Policy Institute (Nov. 2011), https://www.progressivepolicy.org/wp-content/uploads/2011/11/11.2011-Mandel_Carew-Innovation_by_Acquisition-New_Dynamics_of_Hightech_Competition.pdf.

[3] Gordon Phillips & Alexei Zhdanov, *Venture Capital Investments and Merger and Acquisition Activity around the World*, Harvard Law School Forum on Corporate Governance (Dec. 29, 2017), https://corpgov.law.harvard.edu/2017/12/29/venture-capital-investments-and-merger-and-acquisition-activity-around-the-world/#:~:text=Most%20venture%20capital%20investments%20are,strategy%2C%20but%20increasingly%20less%20so.

What is Past is Prologue: Big-is-Bad Gut Instincts

Australia should look to the antitrust approach in the United States, not Europe. Antitrust laws in the United States are meant to protect the benefits consumers receive from competitive markets, as opposed to the European approach.[4] Businesses that have to compete will usually cut prices while increasing the quality of their products or services.[5] And ever since the Sherman Act became law in 1890, "'protecting consumers from monopoly prices' has been 'the central concern of antitrust.'"[6] Antitrust laws also "stimulate businesses to find new, innovative, and more efficient methods of production," which also benefits consumers.[7]

But for much of our history, antitrust relied on "confused doctrines that pursued populist notions" that mistook big for bad.[8] By following these populist appeals, the government's enforcement decisions "led to contradictory results that purported to advance a variety of social and political goals at the expense of American consumers."[9] In the Sherman Act's first decade, for example, the Supreme Court held that the law was meant to protect "small dealers and worthy men."[10] Decades later, the Court reaffirmed that interpretation, holding that antitrust laws are meant to protect "viable, small, locally owned business" even when that protection means "higher costs and prices."[11]

But in the 1970s, economists were successful in anchoring antitrust analysis in consumer welfare.[12] They were so successful, in fact, that the United States became the first country to root antitrust analysis in economics.[13] Under the consumer welfare standard, antitrust uses economic learning and evidence to assess whether a business's actions benefit or harm consumers.[14] Business decisions that benefit consumer welfare are allowed; those that harm consumer welfare are blocked. Economists, antitrust scholars,[15] and U.S. courts[16] agree that the consumer welfare standard has succeeded in protecting consumers. That success came only once the government abandoned its big-is-inherently-bad gut instinct and aligned its legal theories of harm with economic theories of anticompetitive harms.[17]

By disregarding the successful US approach, Australia would be following Europe's lead. European courts have held that the E.U.'s main antitrust law, the Treaty on the Functioning of the European Union (TFEU), "is designed to prevent competition from being distorted to the detriment of the ***public interest***, individual undertakings and consumers" so that "the well-being of the European Union" is protected.[18] The broad concept of "the public interest" refers to yet another broad concept, "fairness." Answering whether something is fair relies on subjective instincts, which is in part why the European Union focuses far less on economic analysis than the United States does.[19]

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[4] Dep't. of Justice, *Antitrust Enforcement and the Consumer* (last accessed Mar. 6, 2020), https://www.justice.gov/atr/file/800691/download.
[5] *Id.*
[6] *Apple v. Pepper*, 139 S. Ct. 1514, 1525 (2019) (internal citation omitted).
[7] *Id.*
[8] Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise & Inevitable Fall of Hipster Antitrust*, 51 Ariz. St. L.J. 293, 294, 299 (May 2019), http://arizonastatelawjournal.org/wp-content/uploads/2019/05/Wright-et-al.-Final.pdf.
[9] *Id.* at 294.
[10] United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 323 (1897).
[11] Brown Shoe Co. v. United States, 370 U.S. 294, 333, 344 (1962).
[12] *Id.*
[13] Roger D. Blair & D. Daniel Sokol, Welfare Standards in U.S. and E.U. Antitrust Enforcement, 81 Fordham L. Rev. 2497, 2508-09 (2013).
[14] *Id.*
[15] Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 Fordham L. Rev. 2405, 2406 (2013).
[16] *See, e.g.*, *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438 (2009).
[17] Wright, *supra* note 6, at 305.
[18] Case C-52/09, 2011 E.C.R. I-00527, ¶¶ 22–23 (emphasis added).
[19] Roger D. Blair & D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 Fordham L. Rev. 2497, 2514 (2013), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4889&context=flr.

It is also why the European Union has far more government intervention in the market.[20] Most recently, that intervention has been in policing "self-preferencing" among U.S.-based technology firms like Google, Amazon, and Facebook.[21] According to the European Commission, "dominant tech companies have a special responsibility to avoid favoring their own in-house products and services over competitors."[22] So even though consumers may benefit, and even though E.U. competition law does not address self-preferencing directly, self-preferencing, the argument goes, is "unfair" and therefore illegal.[23]

Digital Platforms & Marketplaces Benefit All Consumers

Consider the robust and beneficial competition in digital platforms and marketplaces. Digital platforms and marketplaces have to compete on quality.[24] Take Google Search, for example. Launched in the internet's early years, Google Search originally returned a list of just 10 links—all to external websites.[25] These days, Google Search returns lists of countless external links and often answers consumers' questions itself.[26]

Critics have not explained why Google's success in answering consumers' questions is a problem, let alone an antitrust problem. Google Search competes against Microsoft's search engine, Bing, against Yahoo!'s search engine, and against newcomer DuckDuckGo's search engine. Google also competes with many vertical search providers, such as Yelp, Expedia, Amazon, and many others. And consumers can now find answers from a growing number of innovations, such as competing digital assistants. So if Google Search's preference for answering questions directly was not useful, consumers would turn elsewhere. And given the continued user growth for companies like Amazon and Yelp, many users do turn to rivals for their search needs.

That Google Search is most consumers' go-to choice for many online searches reflects the platform's quality and most consumers' preferences. But that success does not mean Google Search is without competition—far from it. Yelp's user numbers have steadily increased despite its complaints to regulators, most recently boasting that it serves almost 100 million local search users.[27] In a July 2019 interview, when asked about his company's complaints about Google, Yelp's Senior Vice President of National Sales stated that:

> On the sales side, I feel we can fight the fair fight and compete on our merits. I'm not an expert in public policy.
>
> **We grew 22% from Q1 2018 to Q1 2019.** As an example, we've identified 250 strategic accounts we're really focused on and have entered in 60 of them. We're seeing growth, and we have years of runway ahead of us in terms of enterprise opportunity. We hold our own performance-wise.[28]

Although vertical integration analysis focuses on benefits or harms to consumers, not competitors, the lack of harm by Google Search's results to even Yelp is a telling sign of robust digital competition.

Apple, too, has been accused of self-preferencing at competitors' and consumers' expense.[29] But like Amazon's and Google's practices, Apple's vertical integration benefits both groups. First, consider the allegation:

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[20] *See generally* Francesco Russo et al., EUROPEAN COMMISSION DECISIONS ON COMPETITION 113–97 (2010).
[21] Valentina Pop & Sam Schechner, *Google Appeals Against EU Antitrust*, WALL ST. J. (last updated Feb. 12, 2020), https://www.wsj.com/articles/google-starts-appeal-against-eu-antitrust-decisions-11581516872.
[22] *Id.*
[23] *Id.*
[24] Dolmans, *supra* note 23.
[25] Nicas, *supra* note 35.
[26] *Id.*
[27] Yelp, *Investor Presentation* (Feb. 2020), https://s24.q4cdn.com/521204325/files/doc_financials/2019/q4/Yelp-Investor-Presentation_February-2020.pdf.
[28] Sarah Sluis, *After Conquering Local Ads, Yelp Eyes National Sales* (July 10, 2019), https://www.adexchanger.com/the-sell-sider/after-conquering-local-ads-yelp-eyes-national-sales/#more-124407.
[29] Nicas, *supra* note 35.

Because Apple makes the iPhone, and because the iPhone's App Store is tightly controlled by Apple, and because Apple offers its own apps and services on the App Store, this must mean that Apple kneecaps its competitors.[30] Spotify, a digital music platform, for example, advanced this argument in the European Union, claiming that Apple's 30% commission fee to use the App Store harms competition because Apple Music, a competing music platform, is available on the App Store and Apple does not have to pay a fee to use its own App Store.[31]

Common sense undercuts this argument. First, Apple's development of Apple Music gives consumers another choice for streaming music. Second, Apple owns the App Store, which means Apple pays for the platform's employees and funds its research and development. Third, Apple charges a 30% commission ***only if*** a developer uses the App Store to gain user subscriptions. So if a consumer subscribes to Spotify on Spotify's own website, Spotify pays nothing when that consumer then downloads its app from Apple. With this in mind, Spotify's argument is that it should benefit from Apple's development of the App Store, which reaches millions, for free, even when it gains subscribers through the App Store and even though Apple Music is a competitor.

What common sense suggests, empirical evidence confirms: Apple's vertical integration benefits competitors and consumers. Over 84% of those who use the App Store pay nothing and share *none* of the revenue generated by the App Store with Apple.[32] And like Amazon and Google, the App Store allows developers to reach millions of consumers that they otherwise would not be able to reach without creating their own device, platform, service—or all three. So for a 30% fee, Spotify is able to access the 45% of smartphone users—over 100 million people—in the United States who use an iPhone.[33] Even for those who pay the 30% fee, Apple's App Store still benefits competitors. Apple reinvests the fee into improving its App Store and developing free tools for developers to use.[34]

To date, Apple's App Store has generated over $120 billion for other businesses.[35] Another benefit: Consumers who use Apple's App Store also spend more on average than do consumers who use other app platforms.[36] And for Spotify in particular, Apple received a commission on just 680,000 of Spotify's 100 million subscriptions.[37]

Embracing New-And-Innovative Business Practices:

Procompetitive and exclusionary conduct are often brewed in the same barrel: conduct that benefits consumers also tends to exclude competitors. So even with an eye toward consumer welfare, spotting the difference can be difficult. This is especially true in multi-sided markets—like those Apple competes in—where a platform's conduct may benefit one group of consumers, while seemingly harming another.

So without such practices, product innovation will slow. Even worse, tech's business strategies, models, and practices benefit both consumers and the economy. And in fact, they are practices that other industries will likely adopt to remain competitive as their markets grow integrated and ever-more digital. Think about the banking industry. Not only is it moving online, it's becoming an entirely digital market for some consumers.

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30 *Id.*
31 Thomas Ricker, *Apple to be Formally Investigated Over Spotify's Antitrust Complaint, says Report*, The Verge (May 6, 2019), https://www.theverge.com/2019/5/6/18530894/apple-music-monopoly-spotify-app-store-europe.
32 Apple, *App Store: Dedicated to the Best Store Experience for Everyone* (last accessed Mar. 6, 2020), https://www.apple.com/ios/app-store/principles-practices/.
33 Statista, *Share of Smartphone Users that Use an Apple iPhone in the U.S. from 2014 to 2021* (last accessed Mar. 6, 2020), https://www.statista.com/statistics/236550/percentage-of-us-population-that-own-a-iphone-smartphone/.
34 Apple, *supra* note 50.
35 *Id.*
36 Sarah Perez, *App Store Generated 93% More Revenue than Google Play in Q3*, TechCrunch (Oct. 11, 2018), https://techcrunch.com/2018/10/11/app-store-generated-93-more-revenue-than-google-play-in-q3/.
37 Chris Crooke, *Apple Says Spotify has Exaggerated the Impact of its App Store Fees*, Complete Music Update (June 25, 2019), https://completemusicupdate.com/article/apple-says-spotify-has-exaggerated-the-impact-of-its-app-store-fees/.

Rather than condemn the new-and-better, or even the new-and-potentially-better, the government should celebrate the market's innovations.

And if the concern is that American tech platforms are "hurting innovation," as some claim, consider that tech spends more on research and development and has higher capital expenditures than almost every other industry in the country:

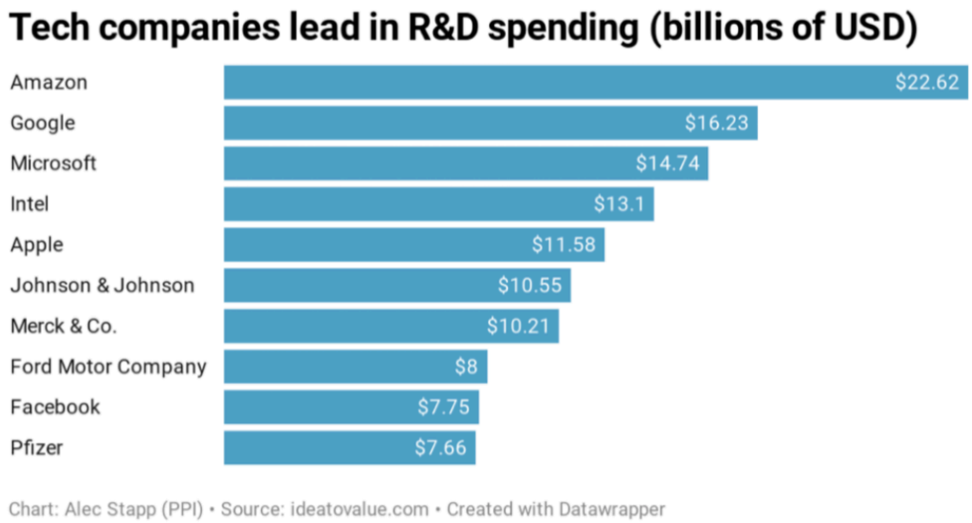

TABLE 5: NON-ENERGY U.S. INVESTMENT HEROES: TOP 25 NONFINANCIAL COMPANIES BY ESTIMATED U.S. CAPITAL EXPENDITURE*

	COMPANY	ESTIMATED 2018 U.S. CAPITAL EXPENDITURES (MILLIONS USD)
1	ALPHABET	20,188
2	AT&T	19,209
3	AMAZON.COM	15,577
4	VERIZON COMMUNICATIONS	14,912
5	MICROSOFT	11469
6	COMCAST	10,890
7	FACEBOOK	10,763
8	CHARTER COMMUNICATIONS	9,125
9	WALMART	7,683
10	INTEL	7,426
11	APPLE	7,129
12	FORD MOTOR	6,513
13	GENERAL MOTORS	5,756
14	FEDEX	5,255
15	DELTA AIR LINES	5,168

New developments in markets and in business-to-business and business-to-consumer relationships show robust competition and innovation

The online environment is robust and healthy, and market players are numerous. For consumers, prices are low; for small businesses, opportunity and entrepreneurship are growing. And these results are because competition is robust.

Today, American consumers have more choices and more information than ever. Historically, consumers had to rely upon only a handful of nearby businesses from which to buy products or services. These businesses could set prices higher than competitors located farther away, and customers had a difficult time researching the comparative value and quality of options.

Today, thanks to the internet, consumers have access to an ever-expanding list of products, businesses, and information about pricing. With a couple of clicks customers can find the lowest prices for the goods they want. No longer limited to just nearby stores, customers can buy from hundreds of thousands of stores across the country and around the world.

Online services have evolved to help consumers find the lowest prices. Websites such as Slickdeals[38] help consumers find active discounts. Services such as Honey[39] enable real-time price comparison and coupon testing at checkout. Customers can easily find the products they want at the lowest prices.

For businesses, the internet has reduced barriers to entry and increased their potential marketplace. Now an art student can easily sell paintings from her studio to anyone around the world, without first obtaining access to dealers and conceding markups to galleries. A parent can sell her children's old toys in a large market rather than relying on a one-day neighborhood yard sale. Put simply: Anyone can compete with any business, big or small, because of the internet.

Large platforms help small businesses

Anti-business advocates claim that "big is bad." But for Australia's small and mid-size businesses, the bigger the platform the better for reaching larger audiences.

Consider a local custom furniture store. Just fifteen years ago businesses like this could barely afford to place an ad in a local newspaper, let alone on TV or radio. ***But thanks to large online platforms, for less than ten dollars a small business can reach thousands of potential customers and target them more accurately than ever before.***

Large online platforms have given new growth opportunities to small businesses. Consider the app stores on the Apple and Android platforms. Developers can reach markets of millions of customers. And the costs for a developer to distribute an app are intentionally low; this empowers small developers to compete against larger ones. Fifteen years ago, this was possible only through significant outlays for advertising, distribution, and logistics to move software to customers. And even if developers decide to not publish their apps in the Android or Apple marketplaces, they can make their services available through device websites.

Or consider how the platforms like Etsy and eBay enable small sellers to find customers across the country and even around the world. These benefits are the result of allowing online platforms to grow and flourish because America's antitrust law has relied upon the consumer-welfare standard to regulate that growth.

[38] Slickdeals.net.
[39] JoinHoney.com.

Disruptive and generational changes in technology provide new avenues for competition

With rapid innovation and growth of online platforms, we've seen a breakdown of barriers into established markets for new entrants, which forces existing businesses to innovate and compete.

Despite claims that "consumers are locked into large platforms," public opinion and consumer behavior shows just the opposite. Think back to 20 years ago, when Fortune Magazine featured this article:

> **How Yahoo! Won the Search Wars**[40]
>
> *Once upon a time, Yahoo! was an Internet search site with mediocre technology. Now it has a market cap of $2.8 billion. Some people say it's the next America Online.*
>
> Let's leave aside, for now, questions of whether Yahoo! will be around in ten years or whether there's any way its stock might be a good investment. This much is clear: Yahoo! has won the search-engine wars and is poised for much bigger things.
>
> According to a survey by Mediamark Research last year, in a typical month more than 25 million people use Yahoo!. Some months, 40 million people visit. More people go to Yahoo! than to Netscape or AOL. More people search at Yahoo! than watch MTV, Nickelodeon, or Showtime in any given week. More people check out Yahoo! than read the typical issue of Time, Newsweek, or Life. Simply put, that's why some people think Yahoo! may make wads and wads of money in the future by selling ads. Observes Oppenheimer & Co. analyst Henry Blodget: "I have yet to find a flat surface attractive enough to grab the attention of 40 million pairs of eyeballs but not attractive enough to spend big money advertising on."
>
> Gathering eyeballs has been the company plan since its inception. It turns out that this pack of Net-besotted, Yahoo!ing-their-brains-out, twenty- and thirty-something Web surfers have real business savvy, and **their near-flawless execution and brilliant marketing have eviscerated the competition.** (emphasis added)

It's hard to believe now, but online search was once dominated by Yahoo! when Google arrived as the 8th search competitor in the late 1990s.

In 2006, MySpace had more daily visitors than Google — but was later overtaken by Facebook. As stated by Ryan Bourne in Cato Policy Analysis:

> "Will Myspace ever lose its monopoly?" asked Victor Keegan in the *Guardian*'s technology section in early 2007. The journalist was riffing off a TechNewsWorld article by John Barrett that claimed Myspace was not just a monopoly, but a natural one.
>
> The arguments for such claims were similar to those made about Facebook today
>
> Importantly, the Myspace history shows that the very network effects that lead to massive growth can also lead to a rapid demise when a superior product comes along. All social networks face a difficult balancing act between providing an attractive and innovative user experience, on the one hand, and monetizing the platform by competing for the real "customers"—digital advertisers—on the other. The Myspace example shows the degree of interdependence between the two. Getting the balance wrong can have significant consequences.[41]

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[40] Stross, Randall, *How Yahoo! Won the Search Wars*, in FORTUNE MAGAZINE (Mar 2, 1998), https://archive.fortune.com/magazines/fortune/fortune_archive/1998/03/02/238576/index.htm.

[41] Bourne, Ryan, *Is This Time Different? Schumpeter, the Tech Giants, and Monopoly Fatalism*, in CATO POLICY ANALYSIS (Jun 17, 2019), https://www.cato.org/publications/policy-analysis/time-different-schumpeter-tech-giants-monopoly-fatalism.

Truth is, nobody can predict what the tech landscape will look like in five or ten years, and today's leaders must adapt—or risk the same fate as MySpace.

When looking online for products, ***more online shoppers start their product searches on Amazon than on Google***.[42] For general searches, we've seen rapid growth of new search engines like DuckDuckGo.[43] For travel searches, we have Expedia, Travelocity, Orbitz, and Kayak. And when searching for local restaurants and vendors, Americans choose from TripAdvisor, UrbanSpoon, Angie's List, and Yelp.

Despite Yelp's present leadership in this search category, the company says in its latest earnings report, "***We compete in rapidly evolving and intensely competitive markets, and we expect competition to intensify further in the future with the emergence of new technologies and market entrants***."[44]

Innovative new features easily attract consumer attention, and competition is truly only a click away. Nationwide polling conducted by Zogby Analytics and commissioned by NetChoice[45] showed consumers can and do leave platforms when better options are available.

Question: Do you think that the services offered by online platforms like Apple, Google, Facebook, and Amazon can be replaced if a better competitor comes along?

- 70% of those with an opinion said "Yes."

Big Tech critics have failed to make their case

Proponents of breaking-up tech companies via new theories of antitrust have failed to substantiate their allegations—even though the burden of proof rests with these accusers.

The consumer welfare standard looks to overall consumer welfare and economic efficiency as the main factors when engaging in antitrust analysis.

With fewer than 20 million U.S. users, Facebook's messaging tool WhatsApp is much smaller than Apple's iMessage, which connects over 90 million American consumers. TikTok, a fairly new competitor in the social media market, has over half a billion users worldwide.

And in search, as described above, Google's competition is a click away as we see the rapid ascent of new general search engines like DuckDuckGo[46] and Google competes with tailored search like Yelp for restaurants and Angi for services.

These American businesses are not consumer-harming monopolies as some claim; instead, they are social networking services that have earned global success in a competitive marketplace.

American success stories, such as Google, Apple, Amazon, and Facebook, empower small businesses to reach new customers all over the world like never before. From online marketplaces, to app stores, to photo sharing services, these platforms allow individuals to connect with the world in ways only dreamed of twenty years ago

[42] Krista Garcia, *More Product Searches Start on Amazon*, eMarketer (Sept. 7, 2018) ("Nearly half (46.7%) of US internet users started product searches on Amazon compared with 34.6% who went to Google first, according.").
[43] Matt Southern, *DuckDuckGo Traffic Up 50% from Last Year, Hits New Record of 30M Daily Searches*, Search Engine Journal (Oct. 11, 2018).
[44] Yelp Inc., 10-Q, May 2019.
[45] *See* Zogby Analytics survey of 1222 adults in the United States conducted from August 6, 2018 to August 8, 2018.
[46] Matt Southern, *DuckDuckGo Traffic Up 50% from Last Year, Hits New Record of 30M Daily Searches*, Search Engine Journal (Oct. 11, 2018).

Bottom Line

Whether a business operates brick-and-mortar stores, digital marketplaces, or both, vertical integration benefits consumers. But digital platforms like Google Search and Apple's App Store benefit both consumers *and* their competitors. Today, consumers use digital app platforms and marketplaces with increasingly regularity—and those platforms support entrepreneurship like never before. Thanks to these platforms, small businesses can opt to own brick-and-mortar stores, sell online, or do both. This means local businesses can reach beyond their local communities. It also means consumers are not limited to their geographic region.

> *Moving merger reviews into a "guilty until proven innocent approach" or adopting a doctrine to cast self-preferencing as an anticompetitive practice will send Australia into a dark-ages of innovation and antitrust and it'll ensure these benefits are reduced.*

All these benefits—lower prices, higher-quality products and services, greater competition, more entrepreneurship—are made possible by the consumer-welfare model. Moving merger reviews into a "guilty until proven innocent approach" or adopting a doctrine to cast self-preferencing as an anticompetitive practice will send Australia into a dark-ages of innovation and antitrust and it'll ensure these benefits are reduced.

Conclusion

As always, we stand ready to work with the Commission to achieve beneficial outcomes that promote the interests of the consumers and innovation. We appreciate your consideration of our views.

We thank you for your time and consideration.

Sincerely,

Carl Szabo, Vice President & General Counsel