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Senate Judiciary Committee Democrats: Ask the Hard-Hitting Antitrust Questions

David Goodfriend (The Goodfriend Group) · Tuesday, October 2nd, 2018

Senate Judiciary Committee Democrats should continue their truth-out tradition when the Subcommittee on Antitrust holds an antitrust hearing October 3rd. Here are a few recommended questions:

1. **Sprint/T-Mobile Merger.** Even after the Department of Justice Antitrust Division rejected the proposed merger between AT&T and T-Mobile as harmful to consumers, Sprint and T-Mobile have proposed a similar merger that, they say, is different this time around. Most Americans use a mobile phone and at a time when wages stagnate while the cost of living skyrockets, the high cost of cell phone and data plans hurts consumers. Particularly when low-income and rural Americans rely on prepaid plans (a combined Sprint/T-Mobile would control 54% of that market), and on wireless generally as their primary access to the Internet, how would reducing the number of major wireless carriers from 4 to 3 actually reduce already expensive mobile bills? The proposed merger triggers both local and national horizontal merger standards used by the Department of Justice Antitrust Division and the Federal Trade Commission to flag a high risk of increased market power by the merging companies. In an already highly concentrated market, how can empty promises of enhanced 5G deployment and better rural service (that have yet to be substantiated) make up for higher prices, less innovation, and other predictable consumer harms?

2. **Antitrust and net neutrality.** The Senate voted in favor of a resolution to restore the Federal Communications Commission's net neutrality rules. Opponents of restoring those rules argue that antitrust law provides sufficient protection to consumers from Internet Service Providers deliberately blocking, throttling, discriminating against, or imposing paid prioritization on unaffiliated websites or apps. If that is the case, why have neither the DOJ Antitrust Division or Federal Trade Commission opened investigations into whether ISPs have engaged or plan to engage in anticompetitive, discriminatory activity by abusing their residential broadband market power? Are cable operators favoring or planning to favor their own internet video content over that of competing over-the-top services such as Sling, SonyVue, YouTubeTV, Netflix, or DIRECTV Now? If no such investigations have been launched, doesn't that suggest the need for strong, preventive net neutrality rules at the FCC?

3. **Anti-Conservative Bias Claims.** Lately, conservatives have been complaining about a so-called anti-conservative bias at technology companies, most recently culminating in Breitbart releasing a video of Google employees and executives talking about immigration issues after the 2016 election. Concurrently, Attorney General Sessions announced that DOJ "has convened a meeting with state attorneys general . . . to discuss a growing concern that these companies may be hurting competition and intentionally stifling the free exchange of ideas on their platforms." After failing

at first to invite any Democratic state Attorneys General, Mr. Sessions finally included a few, including California Attorney General Xavier Becerra, and was rebuffed when meeting participants, like Democratic Mississippi AG Jim Hood, said that the main focus is antitrust and privacy, not bias. But all of this begs a critical question: Have the Attorney General or Chairman of the FTC launched an investigation into the reaction of oil and gas, health insurance, pharmaceutical, telecommunications, or coal executives to the election of President Obama? Did they tell their employees that they were not happy with the election result? Will the agencies explore an anti-Progressive bias implemented through market power abuses? If executives at, say, United Health or ExxonMobil expressed a bias against President Obama, or Democrats generally, and if the firm possessed market power in certain insurance or energy markets, would there not be a threat of bias against serving cities, counties, or states with the same level of service as a conservative-leaning jurisdiction? If this is a ridiculous proposition, why is such an assertion about the tech industry plausible? If it is not ridiculous, why has the DOJ not opened such an investigation?

Senate Democrats have an opportunity October 3rd to remind the American public why antitrust matters and what appropriate enforcement of our laws should look like. The nation is watching.

David Goodfriend is a Washington, D.C.-based lawyer and advocate who worked for former Antitrust Subcommittee chairman Sen. Herb Kohl (D-WI) and served as Deputy Staff Secretary to President Bill Clinton. He represents clients opposing the Sprint/T-Mobile merger, including DISH Network and the Communications Workers of America, and clients from the technology sector, such as Google and PayPal.

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