January 17, 2025

The Honorable Chris Van Hollen
Ranking Member
Subcommittee on Financial Services and General Government
United States Senate
Washington, DC 20510

Dear Senator Van Hollen:

We write to you as the heads of the nation's top antitrust enforcement agencies, charged with enforcing America's antitrust laws.[1] Our teams perform this work with vigor and fidelity to the law, promoting fair competition that benefits all Americans. We write to bring to your attention an obstacle that has emerged as one of the biggest barriers to sound antitrust enforcement in the United States: the exorbitant cost of antitrust litigation.

Our enforcement teams are winning our cases, delivering landmark victories and materially improving lives for Americans in areas ranging from groceries to housing. But we do so under procedural and administrative hurdles that, as a practical matter, raise the standards for proving antitrust violations beyond what Congress legislated.

Litigating an antitrust case today routinely costs millions of dollars. Indeed, a *single* monopolization case can cost well over 25 million dollars in fees for outside experts. These mounting expert costs consume a growing share of the federal agencies' limited budgets and significantly constrain the enforcement actions we can pursue.[2] The impact is even greater on state enforcers with even more limited budgets,[3] as well as on swaths of market participants—

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[1] *See, e.g.*, Clayton Act, 15 U.S.C. §§ 12–27; Sherman Antitrust Act, 15 U.S.C. §§ 1-7; Federal Trade Commission Act, 15 U.S.C. §§ 41-58.

[2] *See, e.g.*, Budget Hearing—Fiscal Year 2025 Request for the Federal Trade Commission: Hearing Before the Subcomm. on Financial Services and General Government, Comm. on Appropriations, 118 Cong. (2024), https://appropriations.house.gov/schedule/hearings/budget-hearing-fiscal-year-2025-request-federal-trade-commission (Chair Khan noting that "there has been a trend in antitrust litigation for there to be this ratcheting up arms race of each side just having to get more and more experts."); Assistant Attorney General Jonathan Kanter Delivers Farewell Address (Dec. 17, 2024), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-farewell-address (noting that the DOJ can "accrue expert fees of up to 30 million dollars—just for a single case"); *see also* Khushita Vasant & Chris May, *US FTC's Khan Cites 'Arms Race' for Costly Economic Experts in Antitrust Cases, Staff Salaries in Seeking More Funding*, MLEX (May 16, 2024), https://content.mlex.com/#/content/1563296.

[3] *See* Public Comments of Attorneys General of 19 States and Territories in Response to the July 29, 2023 Request for Comments on the Draft Merger Guidelines (Sept. 18, 2023) at 32 ("While the use of empirical economic analysis can provide rigor, overreliance on this analysis comes at a real cost. Antitrust cases are inherently complicated, but their complexity can be unnecessarily inflated if too many fact questions (or even the whole case) come down to a question of proof through empirical economics (and the costly services required to produce these results).").

including consumers, workers, and businesses—who cannot vindicate their rights under the antitrust laws due to these steep costs.

Several factors have contributed to the mounting costs of antitrust enforcement. Over time, defendants have undertaken litigation strategies that have increased the complexity of antitrust analysis. Courts have engaged this analysis, effectively raising the threshold for what agencies must establish to halt illegal activity and effectively requiring litigating parties to retain economic and other experts. Indeed, well-resourced corporate defendants regularly hire multiple experts for a single case, forcing enforcers to choose between making additional costly outlays or risk being at a competitive disadvantage in the litigation.[4]

While economic analysis can play a critical role by shedding light on market realities and competitive dynamics, there is reason to doubt that the current arms race is truly advancing the goal of sound antitrust enforcement or fully serving the public. Several judicial opinions in antitrust cases have highlighted the problem. One court noted that parties' "huge expenditures," including on experts, often "shed[] little light on a clear path to resolving the dispute," and instead amount to little more than "competing crystal balls."[5] Another court noted that the matter before it was "not the first major antitrust trial in which the parties have presented 'costly and conflicting ... economic ... models' and 'incompatible visions of the competitive future.'"[6]

Even when defendants purchase shoddy expert testimony that cannot withstand scrutiny, government enforcers must spend millions of dollars rebutting it. In one recent case, the court extensively detailed the ways in which the defendants' expert's testimony was at odds not only with defendants' ordinary course documents but also with the expert's own academic work.[7] In

[4] In practice, a relatively small number of economic consulting firms provide the support needed for a testifying economist. Given that these firms primarily serve defendants, government enforcers must often retain—using taxpayer dollars—some of the very same entities that routinely work to weaken antitrust enforcement.

[5] *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 187 (S.D.N.Y. 2020) ("Perhaps most remarkable about antitrust litigation is the blurry product that not infrequently emerges from the parties' huge expenditures and correspondingly exhaustive efforts.").

[6] *United States v. Am. Airlines Grp. Inc.*, 675 F. Supp. 3d 65, 100 n.61 (D. Mass. 2023), *aff'd*, 121 F.4th 209 (1st Cir. 2024) (quoting *Deutsche Telekom AG*, 439 F. Supp. 3d at 187); *cf. United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 36 (D.D.C. 2017) (referring to what is often called a "battle of the experts.").[7] *See, e.g.*, *FTC v. Tapestry, Inc.*, No. 1:24-CV-03109, 2024 WL 4647809, at *54-55 & n.41 (S.D.N.Y. Nov. 1, 2024) (citing defendants' expert's earlier work to contradict defendants' argument); *id.* at *17-18 (rejecting defendants' expert's calculations "as unreliable and contrary to other evidence in the record."); *id.* at *17 (rejecting defendants' argument "because the statistics they cite [were] deficient and ultimately misleading."). At one point, one of the defendants' experts "presented a demonstrative with a chart that seemed to indicate that sales of preowned handbags nearly doubled from 2020 to 2023," but the court found her opinion unreliable after learning that the expert's analysis "was missing data from a major reseller" and the expert could not adequately explain the discrepancy. *Id.* at *40. In another example, the same expert testified that when considering pricing, a joint owner of two brands would not "actually want to get too involved in trying to coordinate them." *Id.* at *55 n.41. This was not made as an empirical observation and moreover undermines basic economic principles underpinning horizontal merger enforcement.

[7] *See, e.g.*, *FTC v. Tapestry, Inc.*, No. 1:24-CV-03109, 2024 WL 4647809, at *54-55 & n.41 (S.D.N.Y. Nov. 1, 2024) (citing defendants' expert's earlier work to contradict defendants' argument); *id.* at *17-18 (rejecting defendants' expert's calculations "as unreliable and contrary to other evidence in the record."); *id.* at *17 (rejecting defendants' argument "because the statistics they cite [were] deficient and ultimately misleading."). At one point, one of the defendants' experts "presented a demonstrative with a chart that seemed to indicate that sales of preowned handbags nearly doubled from 2020 to 2023," but the court found her opinion unreliable after learning that the expert's analysis "was missing data from a major reseller" and the expert could not adequately explain the

another case, the court ultimately afforded "no weight" to three separate experts that defendants had retained in light of their "apparent bias."[8] While the agencies won these cases, the fact that significant taxpayer dollars had to be spent on disproving analysis so wholly lacking in rigor or credibility underscores the problem.

Our agencies have taken steps to responsibly limit the use and costs associated with outside expert witnesses, including through increasing reliance on in-house economists and investing in growing our team of statisticians, financial analysts, and others who can aid the economic analysis. But even these efforts have not been scalable or sustainable to meet the demands of our agencies' missions. And only a small handful of states have in-house economists dedicated to antitrust work. Absent intervention, the steep costs of antitrust litigation may very well worsen. As antitrust investigations increasingly involve enormous volumes of data, the expense of storing and processing this data will similarly increase.

The exorbitant costs of antitrust enforcement need not be a fait accompli. We urge Congress to take up this issue and help curb the astronomical costs of antitrust litigation, while preserving the rigor and accuracy of factual presentation and legal analysis.[9] For example, legislation mandating that a defendant pay a prevailing plaintiff's expert costs (along with attorneys' fees), in conjunction with legislation amending the rules of analysis, substantive standards, and burdens of proof in antitrust cases could promote more efficient litigation and enable enforcers to fully vindicate their statutory obligations.

We welcome the opportunity to discuss these and other potential reforms at your convenience.

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discrepancy. *Id.* at *40. In another example, the same expert testified that when considering pricing, a joint owner of two brands would not "actually want to get too involved in trying to coordinate them." *Id.* at *55 n.41. This was not made as an empirical observation and moreover undermines basic economic principles underpinning horizontal merger enforcement.

[8] *United States v. Am. Airlines Grp. Inc.*, 675 F. Supp. 3d at 101, 103-04; *id.* at 101 ("The apparent bias of the defendants' retained experts is reason enough to reject the opinions and conclusions they rendered in this case."); *see also id.* (rejecting defendants' "expert on competitive dynamics in the airline industry" because he "expressed opinions that were not soundly reasoned, tailored to this case, or supported by the evidence."); *id*. at 102 (rejecting defense lead expert's testimony because it "demonstrated a misunderstanding and misapplication of antitrust concepts, rendered opinions based on false assumptions, and failed to account for the circumstances presented by the NEA."); *id.* at 103 (giving no weight to the opinions rendered by defendants' third expert because they were based on assumptions that were "fundamentally flawed" and conflicted with "the overwhelming weight of evidence.").

[9] We also urge Congress to continue its efforts to fund the Federal Trade Commission and the Antitrust Division at proper levels. Analysis shows, for example, that for every dollar Congress appropriates to the Federal Trade Commission, the agency provides a significant return on investment to the General Fund. This return-on-investment alone provides important benefits to the American people—even as it *understates* the full benefits that vigorous antitrust enforcement delivers, such as more resilient supply chains and high-quality access to the necessities of life.

Sincerely,

Lina Khan
Chair
Federal Trade Commission

Rob Bonta
Attorney General
State of California

William Tong
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State of Connecticut

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