July 15, 2019

Congressman David Cicilline
Chairman
Subcommittee on Antitrust, Commercial, and Administrative Law
2233 Rayburn House Office Building
Washington, DC 20515

Congressman Jim Sensenbrenner
Ranking Member
Subcommittee on Antitrust, Commercial, and Administrative Law
2449 Rayburn House Office Building
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Chairman Cicilline and Ranking Member Sensenbrenner,

We commend you on committing to this investigation into Online Platforms and Market Power. Online platforms play an incredibly important role in our economy, our access to information, and economic opportunity. Yet, they have no dedicated regulatory authority as so many other important industries do. We urge you to identify through this investigation what types of antitrust enhancements and regulatory tools are needed to jump-start competition in these important industries.

Incumbent online platforms benefit from natural economic characteristics that protect their market dominance, causing a slew of competition policy concerns. Companies like Amazon and Facebook benefit from "network effects," meaning that as the number of users goes up, so do the benefits to users of being on the platform. In other words, all else equal, you benefit more by joining the social media platform your friends are on than you do by joining a newer or smaller social network without your friends. Many digital platforms benefit from economies of scale because their software has almost no marginal cost for adding users. Many digital platforms also benefit from economies of scope because data is much more valuable when aggregated and analyzed as a group instead of viewed as single pieces of information. If Google provides my email and my maps, including traffic data, then Google can tell me when to leave for my flight so I arrive on time. By contrast, a competitor's maps app that doesn't have access to my email doesn't even know that I have a flight to catch. Incumbent online platforms also benefit from behavioral ticks like "bounded rationality," where consumers use shortcuts rather than carefully choosing the best option each time. Most of us don't check multiple online stores every time we buy oven mitts—we just go to the same store we usually go to. Similarly, we don't use Bing every few months to see if it's finally caught up to Google's search engine—we just assume that it hasn't and keep returning to Google Search.

The combination of these characteristics makes it incredibly difficult for small companies to grow and new companies to compete against incumbent dominant platforms. Without dynamic competition, where new competitors actually pose a threat to the market position of incumbents, economists expect less innovation, higher prices, and lower product quality. Some harms are more obvious: less consumer choice and limited opportunity for entrepreneurship.

To address a problem this large, we believe Congress must evaluate all the tools that could prevent our digital marketplace from tipping toward monopoly. Congress should stay engaged in oversight of the Federal Trade Commission (FTC) and Department of Justice (DOJ) to ensure these agencies are enforcing the law to the best of their ability and that they have the resources they need to take on and win difficult cases. Antitrust law also needs improvement to address the narrowing it has suffered from decades of judicial pushback and inconsistent enforcement. Third and most important, we need a new regulator to address the competition problems that antitrust cannot solve.

The New Digital Authority

A new expert regulator equipped by Congress with the tools to promote entry and expansion in these markets could actually expand competition to benefit consumers, entrepreneurship, and innovation. The regulatory authority could be housed within an existing agency, such as the FTC, or it could be a new expert body, focused on digital markets.

Interoperability: First, the agency should be authorized to require dominant platforms to be interoperable with other services, so competitors can offer their customers access to the dominant network. Allowing interconnection to the dominant network was a crucial component of the breakup of AT&T, and it can create competition against Facebook, with or without a break up. Online platforms that benefit from network effects and control an important market bottleneck[1] may be appropriate targets for an interoperability rule. A regulator is especially useful for a tool like this because it will require technical detail, frequent updates, and complaint resolution to make sure the interoperability requirement is working as intended.

Non-Discrimination & Un-Bundling: Online platforms know that companies that use their platform can "disintermediate" them by connecting directly with the consumer, effectively cutting out the platform middleman. This means their customers, the companies that use the platform, are also potential competitors. In some cases those companies are actual direct

[1] Here we adopt the definition from the Stigler Competition Report on Digital Platforms and Market Power, "'Bottleneck power' describes a situation where consumers primarily single-home and rely upon a single service provider, which makes obtaining access to those consumers for the relevant activity by other service providers prohibitively costly." Stigler Competition Report on Digital Platforms and Market Power, 2019, 9, available at https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf?la=en&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C.

competitors, like when the same company owns a platform and one of the competitors on the platform. (This is the example of the Amazon Marketplace where many retailers, including Amazon, compete for customers.) As a result of this competitive dynamic, platforms might discriminate against companies that pose a competitive threat, or use data to disadvantage them. Congress should authorize the new regulator to monitor and ban discrimination by digital platforms with bottleneck power in favor of their own services and against their competitors who rely on their platform to reach customers. Similarly, the agency should be authorized to ban certain "take it or leave it" contract terms that require any company doing business with a dominant digital platform to turn over its customer data for the dominant platform to use however it pleases. This effectively bundles the service the companies need with data sharing they may not want to participate in. By prohibiting these practices, we can give potential competitors a fighting chance.

Mergers: The regulator could also have the power to review and block mergers, concurrently with the existing antitrust agencies. The new regulator would have a different standard that is more appropriate to the economics of online platforms. It should block mergers involving platforms with bottleneck power that do nothing to actually expand competition in markets. It should place a higher burden on dominant platforms than is used for antitrust. This would prevent increased concentration of power when the company being purchased is too small or the competitive consequences are too uncertain.

Effective Enforcement of Current Antitrust Law

Under current law, our antitrust agencies can and must do more. Antitrust enforcement agencies should develop a better understanding of zero-price markets. Many online platforms offer their services to consumers "for free," in other words without a monetary price. But these services are not really free: consumers barter for these services with their attention and their data. The platforms use that attention and data to generate revenue from advertisers. A market with barter transactions is subject to the antitrust laws just like any other market. However, since money prices are more common and easier to quantify, antitrust economists have developed sophisticated tools to analyze money prices. We lack equally sophisticated tools for analyzing changes in barter markets. Enforcers can and should develop and employ better measures of barter transactions such as quality-based pricing for use under current law. They simply need the resources and a leadership interested in doing so.

Antitrust enforcement agencies should prioritize merger enforcement against acquisitions of potential and nascent competitors, as well as vertical mergers and acquisitions. They must think broadly about market trends to identify anticompetitive acquisitions. Online platforms pose unusual challenges for antitrust merger enforcement. To the extent that platforms are in winner-take-all or winner-take-most markets, mergers will take place largely between dominant incumbents and very small, nascent, or potential competitors, and between dominant incumbents

and firms with complementary rather than competing products. It makes sense that the types of mergers easiest to challenge under antitrust law, horizontal mergers among large direct competitors, are rare here.

The agencies should closely scrutinize the conduct of dominant online platforms, and bring Sherman Act Section 2 cases where appropriate. They must recognize the special economics of platforms and the ways that competition happens and does not happen in those types of markets in order to identify the importance of and anticompetitive impact of their conduct. Of course, in order to be successful an online platform needs to create an ecosystem that is valuable by attracting not only individual users but also businesses, for example to buy ads or sell products on the platform. This may apply some pressure to the platform to offer businesses a system that works well for them. Once a platform achieves some dominance though, it may no longer be subject to those same dynamics. The businesses that used to rely on the platform may become competitors to the platform as they seek to disintermediate them with direct connections to customers. Shifts in business practices to limit opportunities for these businesses may harm competitors, and thereby be subject to antitrust law.

Changes to Antitrust Law

Antitrust law must recalibrate the balance it strikes between the risks of overenforcement and underenforcement. Underenforcement has been the far more pernicious failing in recent decades. Certain types of business conduct that were previously thought to be benign are now understood to be anticompetitive.[2] Knowing this, Congress should revise aspects of antitrust doctrine that were adopted explicitly in order to minimize the risk of overenforcement, and change presumptions to offer less demanding proof requirements on antitrust plaintiffs, especially where facts are difficult to observe or prove directly and indirect proof is available.

Current antitrust precedent in a number of areas needs to be updated to reflect market realities of today. These include unilateral refusals to deal, predatory pricing, two-sided markets, and anticompetitive product design.[3] Perhaps most importantly, antitrust law should be revised to relax, in appropriate cases, the proof requirements imposed upon plaintiffs or to reverse burdens of proof. Burdens of proof might be switched by adopting rules that will presume anticompetitive harm when the plaintiff makes a preliminary showing, then shifting the burden to the defendant. The law could also state when plaintiffs should have a lower burden of proof in matters to which the defendants have greater knowledge and better access to relevant information. In particular, mergers between dominant firms and substantial competitors or likely future competitors should be presumed to be unlawful, with an opportunity for rebuttal by defendants. Also, courts should not be permitted to presume efficiencies when a company purchases a business with a vertical, complementary role, but rather require strong supporting

[2] See Stigler Report for more information on these types of conduct.
[3] *Id*. at 74-78.

evidence showing that the claimed efficiencies are merger-specific and verifiable. These proof requirements are likely to be important in the application of antitrust standards to online platforms.

Even with these changes, online platforms will continue to present some particular challenges for antitrust enforcement. These markets are prone to tipping and the resulting market power is durable, so even effective antitrust enforcement is unlikely to acheive truly competitive markets. These markets move quickly. Antitrust litigation does not. Innovation is particularly important in online platforms, as this industry and its complements were sources of significant disruptive innovation in the past. But innovation effects of anticompetitive conduct or mergers are particularly difficult for economists to model, making it difficult to base a merger challenge or conduct case largely on innovation effects.

This is why Public Knowledge advocates for a new expert regulator with additional regulatory tools beyond antitrust to create real competition on and against online platforms. We urge you to consider these ideas as you proceed with your consideration of policies to address problems in the digital marketplace. Thank you again for your attention to this important issue.

Sincerely,

/s/ Charlotte Slaiman
Charlotte Slaiman
Competition Policy Counsel
Public Knowledge

CC: Chairman Nadler and Ranking Member Collins