



**Testimony of
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**Before the
United States House of Representatives
Committee on the Judiciary**

**Subcommittee on
Antitrust, Commercial, and Administrative Law**

**Hearing On:
Reviving Competition, Part 1: Proposals to Address Gatekeeper Power and Lower Barriers
to Entry Online**

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¹ I want to thank Alex Petros, Policy Counsel for his support in preparing this statement.

Chairman Cicilline, Ranking Member Buck, Chairman Nadler, and Ranking Member Jordan:

It is an honor to have this opportunity to testify before you today on behalf of Public Knowledge. I'm Charlotte Slaiman, Competition Policy Director at Public Knowledge, a nonprofit that has represented the public interest for 20 years. We value an open internet, free expression, and access to affordable communications tools and creative works for everyone. We believe this requires a competitive digital environment. The team at Public Knowledge has written extensively and engaged with policymakers to help address the challenges presented by the ever-increasing dominance of a few digital platforms. I'm an antitrust lawyer and former antitrust enforcement attorney at the Federal Trade Commission in the Anticompetitive Practices Division, the division then responsible for monopolization cases dealing with technology companies. My job was investigating and litigating antitrust conduct violations, including the 2017 case against 1-800 Contacts for manipulating Google search ad auctions.

Competition is often the best way to make companies pay attention to what the people want. When companies face few competitors and are protected by high barriers to entry, they find they can ignore the interests of their customers and business partners. That's when public interest advocates, antitrust enforcers, regulators, and Members of Congress must start paying close attention.

Towards the end of last year, we saw major cases filed against Google by the Department of Justice and two separate coalitions of state attorneys general. Facebook is the target of dual suits from the FTC and another bipartisan coalition of state attorneys general. I applaud enforcers for bringing these cases. The cases reflect a lot of work that has been done and a lot of work left to do. The cases target particular conduct by two powerful firms and provide an opportunity for courts to apply their tools to remedy that conduct. But much more is needed.

Congress has also begun to act. The work this Subcommittee has undertaken is significant, including a year-long investigation; an in-depth staff report; a series of hearings on the problems with competition and dominant digital platforms; and now this series of hearings to discuss proposals to address those problems. I appreciate that this Subcommittee is digging in and doing the work, building a record for new laws and rules that can actually promote competition *on* and *against* the most powerful digital platforms.

Gatekeeper Power and Barriers to Entry

This hearing rightly zeroes in on the concept of gatekeeper power. The committee's legislative proposals should be targeted at addressing gatekeeper power head on. Gatekeeper power, sometimes called "bottleneck" power or "strategic market status," is the special power that the platforms have over businesses and consumers that rely on them to reach each other. The University of Chicago's 2019 Stigler Center Report on Digital Platforms explains that firms have

bottleneck power when “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.”² The Furman Report in the U.K. prioritizes regulating firms with strategic market status when a firm is in “a position of control over other parties’ market access.”³ *This power is the root of the problem.*

A gatekeeper uses this power to benefit itself to the detriment of competition as a whole. Of course a gatekeeper can impose contract terms -- like high prices or unfair data access requirements -- on businesses that can only access consumers through their gate. Even more concerning, though, is that gatekeepers can also use their gatekeeper power to protect themselves from potential competitive threats. They can outright block would-be rivals, like startups, from getting off the ground or ensure that existing competitors can’t come close.

If we want true competition against digital platforms like Facebook, Google, Amazon, and Apple, then we need to break open the gates. We need to change the structure of these markets so that one or a few firms can’t maintain this gatekeeper power at the public’s expense.

These gatekeepers exploit incumbency advantages, or “barriers to entry.” These are features of the market that make it especially difficult for anyone to challenge the gatekeeper. Network effects, especially prevalent among these digital platforms, are a powerful barrier to entry. Network effects occur when a platform becomes exponentially better and more useful as more and more users join the service. When your sister joins Facebook, the value of Facebook goes up for you because it’s now a place where you can see photos of your nephew. The value of Facebook also goes up for all of your sister’s friends that can now connect with her. These increases in value are happening across the network all the time as each new user joins Facebook. A digital platform’s network double the size of a competitor is not just doubly as attractive, but exponentially so.⁴ And Facebook is not just populated with your family and friends. It’s also used by businesses and community organizations, schools, and municipalities.

This creates a difficult bootstrap problem for a new entrant. A startup trying to make a social network that can compete with Facebook starts out with very few users. This means the value to potential new users is low because there’s not much content for a new user to enjoy, and not many viewers for the content they post. This leads users to feel locked in to the existing dominant network; it leads new entrants to fail when users won’t switch; and it leads investors to

² George J. Stigler Center for the Study of the Economy and the State, *Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report* 32 (Jul. 1, 2019), <https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf>.

³ Digital Competition Expert Panel, *Unlocking digital competition* 59 (Mar. 13, 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

⁴ See HAROLD FELDT, *THE CASE FOR THE DIGITAL PLATFORM ACT: BREAKUPS, STARFISH PROBLEMS, & TECH REGULATION* 21 (2019).

refuse to fund competitors to the large incumbents. Investors instead choose to primarily fund companies that provide a *feature* to an incumbent firm and are hoping for *acquisition* rather than competition.⁵

Network effects also apply in other digital platforms such as an ecommerce marketplace that connects retailers and end consumers. Retailers benefit from having more consumers on the marketplace shopping for their products, while consumers benefit from having more retailers to choose from. An app store needs a lot of users to entice app developers to make their apps available in the store, but it also needs a lot of apps to entice users to choose their platform. An ad auction is far more competitive if there are more advertisers on one side and more publishers on the other. Sheer size can keep consumers locked in, even when there are superior options available.

Platforms also take advantage of economies of scope and scale as their costs decline with each increase in users and as they expand their set of services. Data is the lifeblood of many platform business models, and the major platforms have more of it than any upstart competitor can hope to match. As the platforms have expanded into new lines of business, those businesses become new streams of data generation. Each additional datapoint is able to fill in holes and reinforce accurate assumptions. A company like Google can get data from your phone's operating system, your online searches, your internet browser, and now even your Fitbit. A company competing in just *one* of those lines of business finds itself outgunned right out the gate.

Platform business models also have very low distribution costs. The cost of each additional Facebook user, Google search query, or Amazon transaction are basically nonexistent outside of the negligible increase in computing power required. Once the hurdle of establishing a platform is overcome, growth (and profits) can be quick and unbounded. Regulation thus needs to focus on lowering the initial hurdle of entry to facilitate competition.

Lastly, dominant digital platforms take advantage of some aspects of consumer behavior that preserve incumbents, like the power of defaults, that can be easily manipulated in the digital environment. A website interface gives a platform unique control over user behavior and the platforms have the ability and incentive to take advantage of user inertia. For example, if your cousin values his data privacy but can't determine what level of protection he's receiving from a platform, then how can he determine if he should switch platforms *when this information is hidden from him*? How can an alternative platform convince users their privacy protections are better? If something works well enough, and the need for and availability of alternative options are well-hidden, users stay put -- depriving promising yet less-established competitors of the oxygen they need to grow.

⁵ Olivia Solon, *As tech companies get richer, is it 'game over' for startups?*, THE GUARDIAN (Oct. 20, 2017), <https://www.theguardian.com/technology/2017/oct/20/tech-startups-facebook-amazon-google-apple>.

As a result of these special characteristics, the platforms' own efforts to magnify and exploit these advantages, and a lack of regulation, competition against a platform that has achieved dominance is especially hard, requiring more than antitrust enforcement to sustain.

I am not saying that these markets are natural monopolies that require prescriptive regulation every step of the way, spanning every operations detail. I don't think that's been proven necessary. The world we live in today, where a single company can dominate search, shopping, or social networking, is not inevitable. It is, instead, the result of our policy choices. We have a market structure that tends toward monopoly because Congress, regulators, and antitrust enforcers chose not to intervene. We chose through our inaction to let this happen, but it's not too late to make a different choice. Congress, led by this Subcommittee's sterling work, can and, indeed, *must* pass new laws like interoperability and non-discrimination requirements. Congress *must* empower agencies like the FTC with new powers and funding to rein in dominant digital platforms.

Proposals to Address Gatekeeper Power and Barriers to Entry

Public Knowledge believes that the best path forward lies in sector-specific laws and competition-promoting rules targeting the most dominant digital platforms to jump-start competition against them. We have all seen firsthand the limitations of antitrust enforcement. Antitrust is all about maintaining competition. But digital platform markets are characterized by a distinct shortage of competition, due in large part to the exploitation of gatekeeper power and barriers to entry. We need to *promote* competition in these markets, not just maintain it. This is where Congress needs to step in. In markets as fast-moving and prone to tipping as these, case-by-case antitrust litigation is too slow and limited to fully address the breadth of the problem. In dealing with quickly changing technology, you need speed and flexibility. In dealing with markets prone to tipping, you need ongoing monitoring and enforcement. Public Knowledge believes that competition-inducing regulation is the best, most agile and efficient tool in our arsenal.

Interoperability

When the problem is network effects, the solution must be interoperability. Gatekeeper platforms must be interoperable with competitors and potential competitors. This means they must offer competitors and potential competitors access to key features of their networks to facilitate competition. Today, dominant digital platforms are largely free to offer or withhold interoperability with their platforms, granting and denying access as an anticompetitive tool. With interoperability, users would be empowered to choose the "best" service for them, without worrying about how popular it is.

Absent any sort of intervention, it has been demonstrated that users are unable to resist the gravitational pull of the largest networks.⁶ True interoperability should make network size close to irrelevant from a competition standpoint. Users won't flock to the platform that is the biggest, but instead to the one that offers the highest quality of service or has other metrics the user finds preferable. This means a user could switch to the platform with the most privacy protections, the platform with her preferred content moderation policy, or even the platform boasting the most innovative features -- at any time. With interoperability, we can realign incentives so the platforms actually have to compete by having the best product instead of just maximizing growth and engagement. We've seen the world those growth and engagement incentives have created -- platforms rife with misinformation and users feeling a loss of control. Interoperability can help us build a better one.

Both the Subcommittee's majority report and the Ranking Member's "Third Way" report highlighted interoperability as a potential remedy. Public Knowledge believes there can be bipartisan consensus on interoperability, and we are excited to work with you to make that happen.

Interoperability has a lot of advantages. Startups would be more willing to take risks and enter once-stagnant markets knowing that the threat of the dominant competitor cutting them off at the knees is gone. This increased competition would force dominant platforms like Facebook and Google, which claim people choose their products because they're the "best," to innovate and respond to their users to remain on top. We know interoperability can work because it has worked in the past with then-novel technologies dominated by only a few players. Our phone networks are interoperable -- one need not worry whether the person you're calling is on Verizon's or AT&T's network. Customers choose a provider based on price or network quality, not just how many others are also on the network. Interoperability in this area was no historical accident. It took strong regulatory intervention to create -- beginning as early as the 1913 Kingsbury Commitments, and increasing to the 1996 Telecommunications Act.⁷ Congress can and should pass similar laws tailored for platform markets.

Today, Facebook provides interoperability with a social network it owns: Instagram. This provides no competitive benefit, but it does illustrate an example of interoperability that's clearly feasible. A user can easily post something on Facebook and, with a simple click, post that same content to Instagram at the same time, or vice versa. This is called "cross-posting." It increases the content available to both Instagram and Facebook users and keeps users engaged with one or both networks. Cross-posting is one type of interoperability that Facebook should be required to offer to competitors and potential competitors. Then users would be able to easily cross-post on

⁶ Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1079 (2019).

⁷ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C. (2012)). Important interoperability progress was also made in 1993. *See Omnibus Budget Reconciliation Act of 1993*, Pub. L. No. 103-66, 107 Stat. 312.

the platforms they want, not just the ones that contribute to Facebook's bottom line. For a new social network, this would help address the bootstrap problem -- new platforms could more easily increase their content available for users to engage with.

A user's Facebook friends list -- the people on Facebook with whom a user has chosen to connect -- makes up the social graph, and is perhaps the most important data for a social network, both from the perspective of a user and a platform. Perhaps that's why Facebook will allow a user to download her statuses and photos, but closely guards a user's friends list. Today, Facebook only extends friend list interoperability to platforms Facebook owns (WhatsApp or Instagram) or other companies that increase engagement with Facebook without posing a competitive threat (*e.g.*, Candy Crush). Facebook should be required to offer interoperability with its friends list. Then users could choose to have instant access to their Facebook friends list on a new network, enabling them to more easily try new apps and contribute to jumpstarting new platforms.

Interoperability has potential applications far beyond Facebook and social networking. As this Subcommittee noted in its recent report, Google dominates online advertising auctions. In many transactions, Google can represent both the publisher *and* the advertiser -- and even conduct the auction to facilitate the transaction between them. Google, as the only company at every stage of the auction process, withholds some levels of interoperability from competitors. This makes it difficult for competing advertising technology tools (ad tech) to attract customers. Customers know that unless they use Google's products across the board, they will face interoperability hurdles when they inevitably need to interface with Google's products. With interoperability, smaller ad tech competitors would be able to exert more competitive pressure on Google despite being only present on one level of the ad-tech stack.

Data portability is another useful tool to promote competition. along the same lines as interoperability. Data portability allows a user to move her data from one platform to another, potentially severing her relationship with the prior platform. Think of how you can keep your phone number when you switch carriers or download all of your pictures stored on Facebook before deleting your Facebook account. Although the platforms offer some level of data portability today, much of the most useful data (*i.e.*, your friends list) remains inaccessible. Data portability lowers the costs to leave a platform and thus makes competition more likely. But to truly promote competition we also need interoperability so that users can *continuously* connect across competing services.

In the Senate, the ACCESS Act gives another great example of how interoperability could be required for large communications platform providers. It also includes data portability requirements, and provisions to enable users to deputize a third party to guard their data. The law would specifically call on the FTC to conduct interoperability rulemaking and the National Institute for Standards and Technology (NIST) to define interoperability's technical details.

I've discussed a few examples of the types of interoperability that would promote competition on and against dominant digital platforms by reducing switching costs for users, lowering barriers to entry for new competitors, and reducing gatekeeper power. This would help innovative ideas come to market, enabling innovative competitors to compete on a level playing field with dominant platforms. Instead of the gatekeepers choosing winners and losers, the users would choose.

Tailoring Interoperability Through Regulation

It's important to make sure the interoperability requirements are tailored to maximize competition and innovation. Interoperability itself can take many forms, from a completely interoperable network to a series of application programming interfaces (APIs) third parties can use to connect with a pre-existing network. What works best in a particular platform market depends on the unique features of the market itself: What works for social networking might not work for advertising technology, for example. Finding and choosing the most efficient options requires a level of technical detail -- prescribing the technical standards and/or evaluating the technical capabilities available to competitors -- best suited for an agency regulator to set the rules of the road.

It's equally important that the interoperability requirement can change as needed to accommodate new technology. These decisions can be made on an ad-hoc basis by courts, or updated after a number of years by Congress. But the most efficient mechanism would be for a nimble regulator with technical expertise to promulgate rules through an efficient process and update them frequently. Congress should give clear rulemaking authority to an agency, either a new agency or an existing agency such as the FTC, to require interoperability from gatekeeper platforms for competitors or potential competitors that meet certain privacy and safety minimum thresholds.

Moreover, a regulatory agency can help ensure that Congress' intent in promoting market competition does not fall victim to time. Congress was last able to address broad antitrust reform in 1950.⁸ Given this is a rapidly evolving market, unfortunately the cop on the beat in this instance cannot be Congress. A well-directed agency, with rigorous Congressional oversight, is what Congress and consumers need to really revive competition in this important sector.

The FTC is already being asked to do much more than it has been. Promulgating new rules targeted at digital platforms, like the rules for interoperability and non-discrimination, will be a new and different responsibility for the agency. Yet APA rulemaking is a key component of these proposals. To make sure that the FTC is able to promulgate and enforce these new and

⁸ Celler-Kefauver Act, Pub. L. No. 81-889, 64 Stat. 1125.

different rules effectively, we need far more than a task force of antitrust enforcement attorneys. This is a task that will require the FTC's dual expertise, both competition experts and experts in rulemaking. It will also require increased technical expertise for these highly technical rules. The FTC should have a new bureau focused on digital gatekeepers and barriers to entry to implement these important pro-competition rules.

Of course, we are cognizant of the risk of regulatory capture. Regulatory capture is something Public Knowledge has had to fight for many years. For example, we were frustrated many times by the power that the voice of industry seemed to carry at the Federal Communications Commission during the last administration. However, we have always found that it is better to have a forum for those debates rather than no forum at all.

Interoperability requirements are absolutely necessary to reinvigorate competition on and against digital gatekeepers. Interoperability creates lasting change to the structure of platform markets. For markets where a gatekeeper controls access to key components, it will be incredibly difficult to sustain multiple competitors without interoperability, leaving us again with the gatekeeper problem.

Other Proposals

Public Knowledge also supports a strong non-discrimination rule. Today's dominant digital platforms have expanded into myriad markets where their vertical integration means they wear multiple hats in a single transaction. Amazon is not just a marketplace on which to sell goods, but is also a retailer selling goods on that same marketplace. In an online advertising auction, Google can represent both the publisher and advertiser, as well as run the actual auction itself. Apple's own apps compete with third-party offerings on an app store Apple also runs. The potential conflicts of interest naturally develop.

Perhaps most importantly, one of the very few ways of attempting to compete against a dominant digital platform is to start out in an adjacent market, as a company that competes on the platform. Often, the market for competition *on* the platform could serve as a "feeder" market for competition *against* the platform. From the feeder market of competing *on* the platform, an entrant can expand out to provide more and more "verticals" to eventually replace the platform for some users. Or, an entrant can "disintermediate," building a direct relationship with the consumer and bypassing the platform altogether.⁹ The gatekeeper platforms recognize this, and thus can use the many tools for discrimination at their disposal to demote companies that may pose a competitive threat to the platform itself -- not just the platform's other businesses that compete on the platform.

⁹ See Fiona Scott Morton & David Dinielli, *Roadmap for a Monopolization Case Against Google Regarding the Search Market* 33 OMIDYAR NETWORK (June 2020), <https://omidyar.com/wp-content/uploads/2020/09/Roadmap-for-a-Monopolization-Case-Against-Google-Regarding-the-Search-Market.pdf>.

Absent intervention, we can simply expect the platforms to do what is best for their bottom lines, not what is best for the consumer. Platforms can use their gatekeeper power to pick themselves as winners in a market while ensuring rivals and potential rivals remain losers. We need to remove the ability for platforms to self-preference or anticompetitively discriminate. We need a non-discrimination rule.

Other important tools to promote competition would be a system of data firewalls based on the Customer Proprietary Network Information (CPNI) standard from telecommunications law.¹⁰ This would prohibit platforms from using certain data gathered from their business customers to unfairly compete against them. Additionally, a specialized merger review process for platforms would ensure the unique features of technology markets are properly accounted for.¹¹

Of course, full structural separation in the form of divestiture and “break up” remains a critical tool in some circumstances. Interoperability is not a substitute for structural separation, and structural separation is not a substitute for interoperability. We need to have *all* of these tools available to use in the right circumstances.

It’s also important that Congress continue its important work to address other problems we see from these digital platforms. Achieving competition in these markets will not solve all their ills. Other policy changes, such as a comprehensive privacy law and patent reform, are also needed.

Conclusion

Digital gatekeepers control increasingly important parts of our economy and of our very lives. These gatekeepers grow unabated as they remain protected from competition by high barriers to entry. Policy choices have allowed this to continue for far too long. Now, Congress has the opportunity to act. Pro-competition tools examined by this subcommittee such as interoperability can wrest control from these gatekeepers and put it back where it belongs -- in the hands of the people. It’s time for Congress to break open these gates.

¹⁰ For more, see Harold Feld, *Mind Your Business: Protecting Proprietary Third-Party Information From Digital Platforms*, PUBLIC KNOWLEDGE (June 2020), <https://www.publicknowledge.org/wp-content/uploads/2020/07/Mind-Your-Own-Business.pdf>.

¹¹ For more, see Gene Kimmelman, *Key Elements and Functions of a New Digital Regulatory Agency*, PUBLIC KNOWLEDGE (Feb. 13, 2020), <https://www.publicknowledge.org/blog/key-elements-and-functions-of-a-new-digital-regulatory-agency/>.