

Chairman Fitzgerald,

Thank you for your questions and the opportunity to respond.

The recent U.S. District Court opinion in FTC v. Meta does a pretty good job of giving us some insight into how the Courts are likely to examine a relevant product market in the case of Netflix's merger with Warner Bros. In his opinion, Judge Boasberg concluded, "the best single measure of market share is total time spent," because time spent avoids the problem of "double-counting," which is relevant to a streaming merger where, as we've heard, many households may have multiple users per subscription. What similarities do you see between the Meta opinion and streaming mergers?

The Federal Trade Commission lost its case against Meta because its narrow definition of the relevant market failed to account for competition from TikTok and YouTube, which the court found to be reasonably interchangeable for users' time.¹ In potential antitrust litigation challenging mergers of streaming services, the relevant market will be just as critical. Judge Boasberg's decision should be a warning for regulators to define the relevant market broadly enough to reflect real competitive pressures.

Because of widespread multi-homing (consumers using more than one streaming service), subscriber numbers as a proxy for market share (itself a proxy for market power) may not be as illuminating as they are for other business models.

According to a 2024 study, nearly all U.S. streaming service subscribers (91 percent) utilize more than one service, with an average of 4.88 subscriptions per person.² This same situation exists with social media platforms. As Judge Boasberg writes, "the companies themselves think about competition. Their executives' testimony and ordinary-course documents reveal that they understand themselves to be competing for users' time, not competing to get people to use their app at all."³ While time spent is not a perfect proxy for market share, Judge Boasberg notes,

¹ *Federal Trade Commission v. Meta Platforms, Inc.*, No. 1:20-cv-03590 (D.D.C. November 18, 2025), https://storage.courtlistener.com/recap/gov.uscourts.dcd.224921/gov.uscourts.dcd.224921.693.0_5.pdf.

² Sylvia Chan-Olmsted and Anran Luo, "Streaming Video Service Repertoire: Patterns, Drivers, and Decisions," *International Journal on Media Management*, Vol. 26, Nos. 1-2, pp. 1–27, <https://doi.org/10.1080/14241277.2024.2386670>. Some more recent reports vary. A 2026 report by Parks Associates found that in Q3 2025 the average household subscribed to 6.1 video services. Parks Associates, *S.O.S.: State of Streaming 2026 Report*, 2026, <https://www.parksassociates.com/storage/medias/5c0c8d1ee917c961c21db40eaa8db4113c4356214f608f90e17b405eb0af20df.pdf>. A 2025 study from Simon Kucher finds 3.8 subscriptions per household. Simon Kucher, *US Streaming Study 2025*, 2025, p. 4, <https://www.simon-kucher.com/en/insights/global-streaming-study>.

³ *Federal Trade Commission v. Meta Platforms, Inc.*, p. 83.

“The Court follows [the company’s] lead, using time spent as the most informative measure of market share but also checking it against daily and monthly average users to take a holistic view of these apps’ size.”⁴

Measuring total time spent watching streaming services will be even more informative given the growth of ad-supported plans, because it will better reflect the extent to which ad inventories are being consumed. Additionally, because a single subscription often serves a multi-person household, time spent captures the total volume of ad consumption far more accurately than a simple count of subscribers. According to Parks Associates, 69 percent of households have at least one ad-supported streaming service subscription.⁵ The percentage of total subscribers using an ad-supported plan has increased across all major streaming platforms.⁶

Adopting the total time spent framework would also encompass multichannel video programming distributors (MVPDs) and virtual multichannel video programming distributors (vMVPDs). Traditional MVPDs like cable companies and satellite providers still compete with streaming services, and vMVPDs like YouTube TV, Hulu + Live TV, and Sling TV provide even more flexibility for consumers by utilizing the more modern month-to-month subscription model.

Future antitrust assessments of mergers involving streaming services should take a similar attention-based approach to evaluating competitive pressures. That approach is most reflective of real-world dynamics, as competition for viewers’ attention (time) has surpassed scarcity of distribution, or even scarcity of content, if social media is included in the analysis.

Follow-up: As in the case of the Meta lawsuit, the DOJ would have to prove that Netflix has monopoly power both now, and in the future. The FTC was unable to prove that in the Meta lawsuit, and one of the reasons was because the market for digital products can evolve rather quickly. TikTok was not a legitimate competitor when the Trump Administration brought the lawsuit in 2020, but five years later they were its single-greatest threat. Streaming mergers strike me as similar. Would you agree that the market for streaming is rather fluid, and therefore it would be difficult to predict current and future market share?

Yes, I would agree. An inherent difficulty in antitrust regulation is that market forces often outpace regulators.

The EU has responded erroneously to this reality.⁷ Its *ex-ante* approach to competition law in the tech sector ignores the other inherent problem with antitrust law: regulators are not clairvoyant.

⁴ *Federal Trade Commission v. Meta Platforms, Inc.*, p. 84.

⁵ Parks Associates, *State of Streaming*, p. 13

⁶ See Parks Associates, *State of Streaming*, p. 28; Simon Kucher, *US Streaming Study*, p. 8.

⁷ Jessica Melugin, “Don’t Let Harmful EU Tech Regulations Spread Across the Globe,” *National Review*, January 14, 2026, <https://www.nationalreview.com/2026/01/dont-let-harmful-eu-tech-regulations-spread-across-the-globe/>; Henrique Schneider, “The European Union’s Digital Markets Act Seeks to Regulate Competition with Little Regard to Impact on Consumers,” *Competitive Enterprise Institute, OnPoint*, No. 277 (May 25, 2022), https://cei.org/wp-content/uploads/2022/05/Henrique_Schneider_-_Digital_Markets_Act.pdf.

They are not magically imbued with knowledge about future technologies, changes in consumer preferences, or innovative business arrangements. The EU’s approach is delivering predictable results: a lagging tech sector that is particularly challenging for smaller firms, lost innovation that harms consumers, and an absence of created wealth. This approach may have closed the time gap for enforcement but at a cost to prosperity that undermines too many benefits of the market system. The U.S. should learn from the EU’s mistakes and reject calls to emulate their approach.⁸

Changes in the marketplace also played a pivotal role in the Meta case.⁹ As Judge Boasberg noted in his opinion, “The landscape that existed only five years ago when the Federal Trade Commission brought this antitrust suit has changed markedly.”¹⁰ By the time the case went to trial, TikTok and YouTube had become major competitors to Meta’s platforms, with billions of users.

The same fast pace is surely present in the battle for television screen time. Social media companies are increasingly competing for attention on the TV screen, and TV ad spending is catching up with ad spending on social media.¹¹ Both YouTube and Instagram offer dedicated TV apps.¹² While TikTok briefly did the same, the app was discontinued following the passage of the Protecting Americans from Foreign Adversary Controlled Applications Act.¹³ However, the platform remains accessible on TVs via the mobile app’s casting feature.¹⁴

As today’s streaming services increasingly compete with similar offerings from social media companies, treating the market as static enough for sustained abuse of market power is likely unwise. These changes will make a tidy relevant market and clear market share more difficult for antitrust authorities to define. The changes themselves suggest a healthy, competitive market that is serving consumers and not in need of government antitrust intervention.

With thanks for your consideration,

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⁸ Raymond J. Keating, “Return of the ‘Big Tech’ Bill that Hits Small Business? Why It Should Stay Buried,” Small Business & Entrepreneurship Council, January 21, 2026, <https://sbecouncil.org/2026/01/21/return-of-the-big-tech-bill-that-hits-small-business-why-it-should-stay-buried/>.

⁹ Jessica Melugin, “In the Long Run, the Meta Case Is Dead,” Civitas Outlook, December 2, 2025, <https://www.civitasoutlook.com/research/in-the-long-run-the-meta-case-is-dead-90f9ddf1-a6ea-43c0-85fe-e17cb830c172>.

¹⁰ *Federal Trade Commission v. Meta Platforms, Inc.*, p. 1.

¹¹ Kerry Flynn and Sara Fischer, “Social Media Moves into the Living Room,” Axios, December 16, 2025, <https://www.axios.com/2025/12/16/instagram-reels-tv-app-youtube-tiktok>.

¹² “Introducing Instagram for TV,” Instagram, December 16, 2025, <https://about.instagram.com/blog/announcements/instagram-tv-app>; “Download the YouTube App on Your Smart TV or Game Console,” Google, accessed January 30, 2026, <https://support.google.com/youtube/answer/16432961>.

¹³ Flynn and Fischer, “Social Media Moves into the Living Room.”

¹⁴ “Cast TikTok to a TV,” TikTok, accessed January 30, 2026, <https://support.tiktok.com/en/using-tiktok/exploring-videos/cast-tiktok-to-a-tv>.