

Prepared Testimony for the Hearing “Online Platforms and Market Power, Part 3: The Role of Data and Privacy in Competition”

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U.S. House of Representatives
Committee on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law

October 18, 2019

Chairman Cicilline, Ranking Member Sensenbrenner, and Members of the Committee:

Thank you for the opportunity to testify on the important topic of online platforms and market power. I am a Professor of the Practice of Economic Policy at the Harvard Kennedy School where I focus on a wide range of economic policy issues. I recently chaired the Digital Competition Expert Panel for the UK government that produced a report titled *Unlocking Digital Competition*.¹ I am currently advising the UK as they move forward with a key set of recommendations from this report, including the establishment of a Digital Markets Unit to act as a pro-competition regulator. Many of the recommendations in our report are applicable to the United States and I appreciate the opportunity to share some of those ideas with you today.

In my testimony today I will make four points:

1. The major digital platforms are highly concentrated and, absent policy changes, this concentration will likely persist with detrimental consequences for consumers.
2. More robust competition policy can benefit consumers by helping to lower prices, improve quality, expand choices, and accelerate innovation. These improvements would likely include greater privacy protections given that these are valued by consumers. However, it is not clear that competition will be sufficient to adequately address privacy and several other digital issues.
3. More robust merger enforcement should be part of the solution to expanding competition, including better technical capacity on the part of regulators, more forward-looking merger enforcement that is focused on potential competition and innovation, and legal changes to clarify these processes for the courts.
4. A regulatory approach that is oriented towards increasing competition by establishing and enforcing a code of conduct, promoting systems with open standards and data mobility, and supporting data openness is essential. This is because more robust merger enforcement is too late to prevent the harms from previous mergers and antitrust enforcement can take too long in a fast moving market.

¹ Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

I also want to recommend to the Committee the recommendations in the recent report by the University of Chicago's Stigler Center Committee on Digital Platforms on the economy and market structure, many of which dovetail with the suggestions in the report I chaired and with the recommendations in my testimony today.²

I will now elaborate on each of my four points.

Point #1: The major digital platforms are highly concentrated and, absent policy changes, there is a high likelihood that this concentration will persist with detrimental consequences for consumers.

The major online platforms including online search, mobile operating systems, digital advertising and social media are each dominated by two players. Moreover the two players in each of these markets are generally drawn from the same five major companies. A number of economic features of digital markets have helped to greatly reduce what economists call "competition in the market" by leading to tipping that results in a winner-take-most situation. These economic features include the combination of economies of scale and scope, the network externalities associated with having many users on the same platform, behavioral biases on the part of consumers, the data advantages of incumbents, the importance of raising capital, and brands. While many of these individual features are found in a wide range of markets, their combination in digital markets is unique.

It is more difficult to provide a definitive answer to the question of whether there is "competition for the market" in the digital sector. This is the idea that even if at any given moment only one or two major platforms are viable, over time these incumbents can be toppled and replaced by newer and more innovative competitors. Many of the dominant technology companies of the past seemed unassailable but then faced unexpected competition due to technological changes that created new markets and new companies. For example, IBM's dominance of hardware in the 1960s and early 1970s was rendered less important by the emergence of the PC and software. Microsoft's dominance of operating systems and browsers gave way to a shift to the internet and an expansion of choice. But these changes were facilitated, in part, by government policy in particular antitrust cases against these companies, without which the changes may never have happened.

Similar changes have been seen in the platform space, including, Google replacing Yahoo and Facebook replacing MySpace. However, these and other similar examples all took place in the early days of the World Wide Web. Moreover, to the degree that the next technological revolution centers around artificial intelligence and machine learning, then the companies most able to take advantage of it may well be the existing large companies because of the importance of data for the successful use of these tools. New entry may still be possible in some markets, but to the degree that entrants are acquired by the largest companies with little or no scrutiny,

² Available at <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf?la=en&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C>.

anticompetitive behavior is tolerated, and open standards are limited, the channel of competition for the market is not fully operative.

Point #2: More robust competition policy can benefit consumers by helping to lower prices, improve quality, expand choices, and accelerate innovation.

This lack of competition is costly. Consumers may think they are receiving “free” products but they are paying a price for these products in a number of ways. First, the competitive price for some of these products might have been negative, so the fact that consumers are not being paid for the use of their data may reflect a failure of competition. Second, to the degree that the highly concentrated advertising market results in higher ad prices than would otherwise be the case, these higher costs are passed along by sellers in the form of higher prices for consumers. Third, consumers pay in the form of quality reductions. Finally, consumers pay in the form of reduced innovation in a world in which the major platforms have reduced incentives to innovate and incumbents have distorted incentives to make more incremental improvements that can be incorporated into the dominant platforms rather than more paradigmatic changes that could challenge these platforms.

Competition policy is very good at helping consumers get more of what they want. To the degree that public policy interests are aligned with those of consumers that means that competition policy can be an effective tool in increasing social welfare. That is generally the case in the economy and the digital sector is no exception. Many consumers want more privacy. Right now with so few platform choices they have limited options in this regard—a consumer can delete Facebook, for example, but will not have another place to go to connect with her friends. More choice would create more incentives for privacy protections.

There is an alternative perspective on privacy that is the basis for the European Union’s General Data Protection Regulation (GDPR), which is that privacy is grounded in human rights and is generally applicable—it is not just something that should be provided to the degree that consumers want it in a competitive marketplace. This perspective would say that in addition to ensuring robust choices for consumers, regulators should also explicitly set minimal standards and rules for privacy, based on these human rights concerns or the worry that consumers will not be sufficiently attentive for competition to serve their needs. The United States already has such rules in areas like healthcare and banking and understanding whether a generalized set of privacy rules is necessary—as a complement to competition policy and taking into account their impact on competition—is an important issue to resolve.

Beyond privacy there are some issues that cannot be solved by competition. Some consumers value harmful content, like child pornography or instructions on assembling weapons of mass destruction. Competition, by itself, would deliver more of this content. While competition is an essential component of policy towards digital platforms, these other issues make clear that competition cannot be the only element of such a strategy.

Point #3: More robust merger enforcement should be part of the solution to expanding competition, including better technical capacity on the part of regulators, more forward-looking merger enforcement that is focused on potential competition and innovation, and legal changes to clarify these processes for the courts.

Competition policy generally recognizes a distinction between companies that grow organically, presumably reflecting efficiencies, and companies that grow through mergers, where regulators need to weigh the efficiencies against the harms from lessened competition.

In the last decade, Amazon, Apple, Facebook, Google, and Microsoft combined have made over 400 acquisitions globally. Many, if not most, of the major features of these companies have not been developed internally but acquired. Many of these acquisitions are small and almost certainly efficiency enhancing, but several have been quite big—the largest being Microsoft paying \$26.2 billion for LinkedIn.

Merger control is subject to two types of errors: false positives, when a merger that should have been allowed to go through is blocked, and false negatives, when a merger that should have been blocked is allowed to go through. No enforcement can be perfect given all of the uncertainties inherent with forward-looking merger assessments, so some balancing of these types of errors is necessary.

To date, there have been no false positives in mergers involving the major digital platforms, for the simple reason that all of them have been permitted. Meanwhile, it is likely that some false negatives will have occurred during this time. This suggests that there has been underenforcement of digital mergers, both in the United States and globally. Remediating this underenforcement is not just a matter of greater focus by the enforcer, as it will also need to be assisted by legislative change. Had such a change been in effect it is likely that the vast majority of these mergers would still have gone through based on their minimal impact on competition and their potentially large benefits for consumers. But some would likely have been blocked, resulting in more competition today.

A better approach involves three elements. First, the Federal Trade Commission (FTC) and Department of Justice's Antitrust Division need expanded resources to develop greater technical expertise in the digital space. Economics and law are essential, but so is computer science. Doing this will require more staff and an increased focus on digital expertise.

Second, merger analysis cannot simply be focused on short-run, static price effects, but must also consider how the effects on innovation in the future. This can involve consideration of the role of data as a potential barrier to entry and the role of potential competition in the market. This is further complicated by the fluid definitions of digital markets, which continue to evolve over time. Economists have tools to assess some of these issues, but in many cases this can be very difficult and can lead to some ambiguity and uncertainty in any given case.

Third, in recent decades courts have established an increasingly high bar for blocking mergers. This is likely inappropriate in the economy as a whole, but it is especially problematic in the digital sector where a strong presumption in favor of mergers runs up against the necessity of

considering what are inherently more speculative—but still very real and important issues—like potential competition and innovation. As a result, the legal standards for merger review need to be clarified, either more generally or specifically for the digital space, including shifting some of the burdens of proof.

Point #4: A regulatory approach that is oriented towards increasing competition by establishing and enforcing a code of conduct, promoting systems with open standards and data mobility, and supporting data openness is essential.

Expanded merger enforcement would be helpful but it is not sufficient since many of the horses have already left the barn. Antitrust scrutiny of the major platforms, like the valuable work being undertaken by this Committee and the efforts by the FTC and Department of Justice, are important as well. But in a fast moving technological landscape none of these efforts are sufficient to ensure adequate competition—by the time enforcement happens the competition may have been wiped out and the major platforms have moved on. Moreover, the fines associated with enforcement may not be a sufficient deterrent, especially when they are levied for very specific conduct and do not set a clear precedent for other companies operating in the future.

That is why my panel recommended the establishment of a “Digital Markets Unit,” a step the UK government announced it is taking and that I am currently helping them to implement. I believe this recommendation is fully applicable in the United States. I will describe the three main functions that regulation should undertake, recognizing that this could be housed in an existing regulator like the FTC or in a new body like the “Digital Authority” floated by the Stigler Center commission.

The first function is a code of conduct that would apply to companies that were deemed to have “strategic market status,” a designation that would be applied based on transparent criteria that would be re-evaluated every three to five years and would be focused not just on traditional criteria like market shares but also on the degree to which a platform acted as a “gateway” or a “bottleneck.” Companies with strategic market status should be subject to a code of conduct that would be developed through a multi-stakeholder process and should be enforceable. The elements of the code of conduct would be similar to existing antitrust law, including ensuring that business users are provided with access to designated platforms on a fair, consistent and transparent basis; provided with prominence, rankings and reviews on designated platforms on a fair, consistent, and transparent basis; and not unfairly restricted from, or penalized for, utilizing alternative platforms or routes to market. Importantly, smaller businesses and new entrants would not be subject to these rules—the goal of these rules is the establishment of a level playing field but not inhibiting innovation and choice by emerging competitors.

The second function is promoting systems with open standards and data mobility. These steps would benefit consumers by allowing them to access and engage with a wider range of people in a simpler manner, fostering more competition and entry—including enabling consumers to multi-home by using multiple systems simultaneously or to switch more easily to alternative platforms. This step is not self-executing, you cannot just order it and expect it to happen. It will

require hard work to identify relevant areas, like messaging or social networks, collaboration with companies on necessary technical standards, and careful consideration to ensure that it is done in a manner that is compatible with other objectives like protecting privacy. Much of this is happening already, including through initiatives like the Digital Transfer Project organized by many of the major tech companies. Companies do not, however, have a fully aligned incentive to facilitate competition through open standards so further pressure can help by providing further incentive for private efforts to continue to become even more robust and/or by creating a more formal regulatory requirement.

The third function is data. Companies active in the digital economy generate and hold significant volumes of customers' personal data. This data represents an asset which enables companies to engage in data-driven innovation, helping them improve their understanding of customers' demands, habits and needs. Enabling personal data mobility may provide a consumer-led tool that will increase use of new digital services, providing companies with an easier way to compete and grow in data-driven markets. However, in some markets, the key to effective competition may be to grant potential competitors access to privately-held data. Such efforts, however, need to be very carefully balanced against both commercial rights and concerns about privacy. Digital platforms are already making an increasing amount of data open. Continuing to encourage this is important but so is understanding additional steps that could foster more open data.

Thank you very much for your work on these important issues and I look forward to your questions.