September 4, 2020

The Honorable David N. Cicilline
Chairman
Subcommittee on Antitrust, Commercial and Administrative Law Committee on the Judiciary
U.S. House of Representatives Washington, D.C. 20515

The Honorable F. James Sensenbrenner
Ranking Member
Subcommittee on Antitrust, Commercial and Administrative Law Committee on the Judiciary
U.S. House of Representatives Washington, D.C. 20515

Re: Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook, and Google

Dear Chairman Cicilline and Ranking Member Sensenbrenner:

We write today to provide you with additional material for inclusion in the record of the Subcommittee's above referenced hearing of July 29th. Attached you will find a series of "ICLE - TL;DR" short-form explanatory pieces distilling the analysis we provided in Geoffrey Manne's invited statement of April 17, entitled *Correcting Common Misperceptions about the State of Antitrust Law and Enforcement*.

The TL;DRs cover six areas, each of which was a topic of discussion at the hearing:

1. Competition and Concentration: An Unclear Connection
2. Competition in Digital Platform Markets: A Question of Definitions
3. Vertical Integration: Economies of Scope
4. Self-Preferencing: Building an Ecosystem
5. Killer Acquisitions: An Exit Strategy for Founders
6. Access to Data: Not the Barrier It's Thought to Be

Collectively, these pieces highlight why antitrust law and policy should, above all, continue to adhere to the error-cost framework that has successfully guided antitrust case law for five decades. The effort to effect a wholesale, legislative transformation of antitrust law (especially in digital markets) founders on the lack of knowledge that precludes accurate, generalizable presumptions about the state of the digital economy and the competitive consequences of the business conduct that characterizes it. Rather, the overall stance should be one of restraint, reflecting the state of our knowledge. We may well be able to identify anticompetitive harm in certain cases, and when we do, we should enforce the current laws. But dramatic new statutes that undo decades of antitrust jurisprudence with the stroke of a pen are unjustified and unwarranted.

We respectfully request that this letter and the accompanying TL;DRs be entered into the hearing's record.

Thank you for your attention.

Best,

Geoffrey A. Manne
President & Founder
International Center for Law & Economics

COMPETITION AND CONCENTRATION: an unclear connection

July 2020

tl;dr

Concentration is a poor measure of competition, because large businesses can be better for consumers than small ones. And concentration isn't even rising in the ways that would matter.

The Debate:

Concentration measures the size and number of businesses competing in a market, and is sometimes used as a barometer of competition. Measures of concentration nationally show that in many markets it has been rising, which some point to this as evidence of falling competition.

But… concentration has generally been falling in local markets, and inferring anticompetitive effects from market structure can be misleading. Large businesses with economies of scale can offer cheaper products and spread new technology more rapidly, for the benefit of consumers.

KEY TAKEAWAYS

AS CONCENTRATION HAS BEEN RISING NATIONALLY, IT HAS BEEN *FALLING* LOCALLY.

Competition usually takes place in local markets: it hardly matters to a shopper in Portland, OR, that there may be fewer grocery store chains nationally if she has more stores to choose from within a short walk or drive from her home.

THIS IS BEING DRIVEN BY FIRMS GROWING AT THE NATIONAL LEVEL TO COMPETE WITH EACH OTHER MORE INTENSELY AT THE LOCAL LEVEL.

More large chains are competing in towns that previously only had a handful of smaller retailers, for example. New technology is the driving factor here and has enabled large firms to expand production over a larger number of establishments in more places.

IN MARKETS WHERE CONCENTRATION HAS BEEN RISING, IT HAS USUALLY BEEN DRIVEN BY TECHNOLOGICAL FACTORS.

Digitization makes it more efficient for a smaller number of larger firms to operate than a large number of small firms, for example by allowing a productive firm to expand out of its home area thanks to better communication and advertising tools. These industries have seen more output and productivity growth and lower prices, the opposite of what would be expected if the problem was less competition.

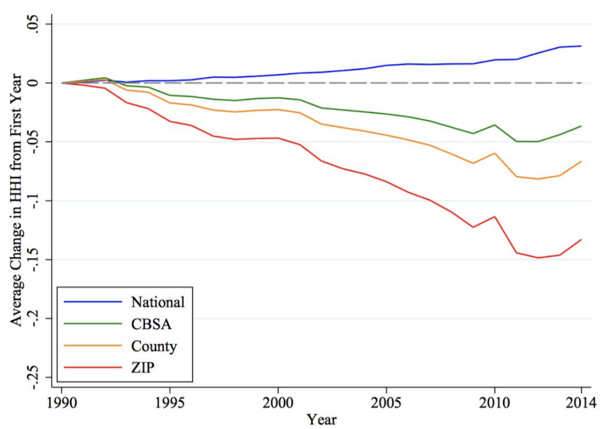
EMPLOYMENT MARKETS ARE ALSO BECOMING LESS CONCENTRATED FOR MOST AMERICANS.

78 percent of American workers live in areas where local employment markets are becoming less concentrated.

RISING CONCENTRATION IS UNLIKELY TO BE THE CAUSE OF LABOR INCOME FALLING AS A SHARE OF TOTAL NATIONAL INCOME.

There is no relationship between the share of workers employed by a few concentrated employers and the profits made by those companies.

Figure 1: Diverging economy-wide national and local concentration trends



Source: Rossi-Hansberg, et al. (2020)[51]

For a fuller explanation of these and related issues, see Geoffrey Manne's recent submission to the U.S. House of Representatives Committee on the Judiciary, Subcommittee on Antitrust, Commercial, and Administrative Law, "[Correcting Common Misperceptions About the State of Antitrust Law and Enforcement.]"

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COMPETITION IN DIGITAL PLATFORM MARKETS: a question of definitions

July 2020

tl;dr

Competition is strong in digital markets, but traditional antitrust tools may miss competitive nuances in these markets.

The Debate:

Critics argue that competition is weak in digital platform markets because each market tends to be dominated by a single player: Google in Search, Amazon in online retail, and so on.

But… digital platforms overlap significantly and are constantly expanding into each other's markets, and new entrants are a constant threat. Retrospective market definition, the tool that antitrust agencies use to determine the boundaries of competition, will frequently miss changes in the nature of the products and markets under review, and as a result miss much of the competition taking place. Features of that competition are discussed below.

KEY TAKEAWAYS

MANY DIGITAL MARKETS WILL HAVE ONE OR A FEW DOMINANT FIRMS AT A SINGLE POINT IN TIME.

Unlike many traditional markets, competition in most digital markets typically turns on product quality rather than price, and online competitors will often develop an entirely new product to supplant the alternatives altogether instead of trying to slowly expand market share.

BIG PLATFORMS ACT LIKE FIRMS THAT ARE COMPETING INTENSELY.

High levels of R&D spending, product entry and exit, and product development point to a high degree of competition even in markets dominated by one platform. Google recently scrapped fees for companies listing on Google Shopping in the face of strong competition from Amazon, despite the view of some competition authorities that Google Shopping does not compete with Amazon.

BECAUSE PLATFORMS ARE ABOUT MATCHING USERS WITH EACH OTHER, BIGGER PLATFORMS ARE TYPICALLY BETTER FOR USERS.

Although "network effects" are often seen as a barrier to user switching, one reason for this is that a larger network is better for users: more people on each side of a platform increases the platform's ability to match people with each other. The benefits of larger platforms are obvious to users but sometimes ignored in debates about competition.

PLATFORMS OFFERING DIFFERENT THINGS STILL COMPETE WITH EACH OTHER FOR USER ATTENTION.

Although sites like Instagram and Youtube offer different kinds of content, and may be dominant in their respective content areas, both compete for the time and attention of the same users who may treat them as substitutes.

BIG TECH PLATFORMS CANNOT EASILY DOMINATE OTHER MARKETS, AND WHEN THEY DO EXPAND INTO THEM THE RESULT IS MORE COMPETITION.

The success of Zoom in the face of similar offerings from Google, Facebook, Amazon, and Microsoft – whose video calling product Skype was a long-established incumbent – shows that size is often of no use in the face of a small rival with a better product, and how quickly users will adopt a new product if it suits their needs. Similarly, Google's acquisition of ITA, which makes travel booking software, has added a new option to the market for travel booking services but has failed to give Google anything like dominance in that market. And, of course, Google+ was a total flop, despite Google's large installed base of users.

For a fuller explanation of these and related issues, see Geoffrey Manne's recent submission to the U.S. House of Representatives Committee on the Judiciary, Subcommittee on Antitrust, Commercial, and Administrative Law, "Correcting Common Misperceptions About the State of Antitrust Law and Enforcement."

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VERTICAL INTEGRATION: economies of scope

July 2020

tl;dr

Vertical integration allows businesses to innovate more. It may be bad for certain competitors, but it is rarely bad for competition.

The Debate:

Vertical integration refers to businesses performing a number of different and important roles in the supply chain for a particular product — for example, a manufacturer that sells its products directly to the public in its own stores. While all businesses are vertically integrated to some extent, some worry that vertical integration in digital markets prevents smaller businesses from competing.

But… empirical research has consistently found vertical integration to be good for consumers through a number of mechanisms that allow for reduced costs and better product quality.

KEY TAKEAWAYS

COMPREHENSIVE REVIEWS OF RECENT EMPIRICAL RESEARCH SUPPORT EARLIER CONCLUSIONS IN FAVOR OF VERTICAL INTEGRATION.

Vertical integration by businesses has been consistently found in a series of reviews to produce benefits for consumers, and predictions about vertical mergers raising prices have been extremely unreliable, at best.

VERTICAL INTEGRATION WORKS BY ALLOWING TECHNOLOGY TRANSFER BETWEEN FIRMS AND REDUCING THE INEFFICIENCIES AND DISCOORDINATION THAT CAN OCCUR IN SUPPLY CHAINS.

These include transaction costs, where the difficulties of different parties dealing with each other raise costs of production; holdup problems, where attempts by each party to extract greater profits raise costs overall; moral hazard, where certain parties (e.g., retailers) run down the value of a brand that represents the whole supply chain; and other risks and costs that can arise when the external costs of businesses' actions are not borne by the businesses themselves.

THE VALUE OF NEW INNOVATIONS CAN "LEAK" LESS FROM VERTICALLY INTEGRATED BUSINESSES, CREATING STRONGER INCENTIVES FOR BUSINESSES TO INVEST IN NEW TECHNOLOGY.

Vertical integration can be a mechanism that allows innovative businesses to prevent their inventions from being copied by rivals, giving them greater returns on their R&D investment and giving society more innovation overall.

VERTICAL INTEGRATION CAN HARM COMPETITORS WHO HAD PREVIOUSLY BEEN PART OF THE SUPPLY CHAIN MIX, BUT THIS IS NOT THE SAME AS HARMING CONSUMERS.

When Apple vertically integrated digital sales from the iTunes Store and the iPod, it may have harmed the manufacturers of CDs, but it benefited consumers by providing an easier to use product with a greater selection to choose from.

WHERE ANTITRUST AGENCIES CAN IDENTIFY A POTENTIAL HARM TO COMPETITION FROM A VERTICAL MERGER, THEY CAN PROHIBIT THE SPECIFIC BEHAVIOR CONCERNED.

Behavioral remedies are a less interventionist way of avoiding potentially anticompetitive behaviour than blocking mergers outright, which prevents the realization of any and all merger efficiencies, not just potentially harmful conduct.

For a fuller explanation of these and related issues, see Geoffrey Manne's recent submission to the U.S. House of Representatives Committee on the Judiciary, Subcommittee on Antitrust, Commercial, and Administrative Law, "[Correcting Common Misperceptions About the State of Antitrust Law and Enforcement.](#)"

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SELF-PREFERENCING: building an ecosystem

July 2020

tl;dr

"Self-preferencing" is a normal part of how platforms operate, both to improve the value of their core product and to make money from it so that they have a reason to keep investing in it.

The Debate:

Digital platforms have been accused of unfairly favoring their own products over those of their competitors, most notably in the EU's case against Google for displaying Google Shopping results in relevant Search result pages.

But… platforms' incentives are to maximise the value of their whole ecosystem, which includes both the core platform and the services they attach to it. Platforms that preference their own products frequently end up increasing the value of the market overall by growing the total share of users of a particular product, and those that preference inferior products end up hurting the attractiveness to users of their 'core' product, weakening themselves to competition from rivals.

KEY TAKEAWAYS

THERE IS NO EMPIRICAL BASIS FOR A PRESUMPTION OF HARM WHEN PLATFORMS SELF-PREFERENCE.

Facebook's integration of Instagram and Google's release of Google Photos increased consumer demand for photo sharing apps as a whole, not just those products. Video games released by Sony, Nintendo and Microsoft for their consoles expanded the install base of those consoles, increasing demand for third party products, as well.

PLATFORM OPENNESS COMES AT THE COST OF REDUCED REVENUE FOR THE PLATFORM OWNER AND LESS CHANCE TOO CURATE THE PLATFORM TO USERS' BENEFIT.

Platforms that are more tightly controlled can be regulated by the platform owner to avoid some of the risks present in more open platforms. Apple's App Store, for example, is a relatively closed and curated platform, which gives users assurance that apps will meet a certain standard of security and trustworthiness.

PLATFORMS OFTEN REQUIRE SOME SELF-PREFERENCING IN ORDER TO MAKE INVESTMENT PROFITABLE.

Google's Android operating system, for example, makes very little money for Google directly, and its predominantly open design even facilitates its use by competitors. But Google makes money from people’s use of products like Google Search that are pre-installed in Android, and that ‘self-preferencing’ is what makes it profitable for Google to invest in Android in the first place.

PLATFORMS MUST STRIKE A BALANCE WITH THIRD PARTY PROVIDERS TO SUCCEED.

Like most other large retailers, Amazon produces its own private label products. But it also has to be careful not to smother the profits that third-party sellers can make on its platform, or they will leave the platform altogether. This is also true on app stores, where Apple and Google have to strike a balance between promoting their own products and ensuring that there is a healthy amount of demand for third party apps, or risk losing the third party developers altogether.

For a fuller explanation of these and related issues, see Geoffrey Manne's recent submission to the U.S. House of Representatives Committee on the Judiciary, Subcommittee on Antitrust, Commercial, and Administrative Law, “Correcting Common Misperceptions About the State of Antitrust Law and Enforcement.”

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KILLER ACQUISITIONS:
an exit strategy for founders

July 2020

tl;dr

Being acquired is how many startup founders and investors expect to make money. If you make that harder you'll get fewer startups.

The Debate:

Some allege that large tech companies acquire nascent competitors to prevent certain startups from competing with them later on, effectively "killing" potential competitors before they can be a serious threat to them.

But... founders still have an incentive to hold out and compete against incumbents, yet many startups are also founded and invested in only because of the possibility of being acquired by a bigger firm. Acquisitions additionally allow features to be added to benefit large existing user bases.

KEY TAKEAWAYS

BEING ACQUIRED IS AN 'EXIT STRATEGY' FOR INVESTORS AND ENTREPRENEURS.

Investors and entrepreneurs hope to make money from the products they are putting time and money into. That may come from the product becoming wildly successful, and potentially displacing an incumbent, but that may be very difficult to achieve. The prospect of being acquired increases the possibility that these people can make a return on the product, and so increases their incentives to build and innovate.

ACQUISITIONS IMPROVE PRODUCTS THAT PEOPLE ARE USING.

When platforms acquire other products they typically intend to incorporate those products into their offering, giving their existing large user bases a better product. This may raise their welfare compared to a counterfactual without the acquisition where those users would have to switch away to the other product to enjoy the benefits of its innovation, especially if there are complementarities between the platform and the third-party product.

THE PROSPECT OF BEING ACQUIRED ALLOWS NON-MONETIZABLE PRODUCTS TO BE PROFITABLE.

Some innovations are not easily monetizable except by being incorporated into an existing product - they may require too deep an integration into the product to make contractual dealings feasible. In this case, the only way products like this can be viable for non-incumbents to be developed is for the product to be acquired by an incumbent.

ARGUMENTS THAT ACQUIRED BUSINESSES ARE POTENTIAL COMPETITORS OFTEN IMPLY THAT THERE IS A HUGE AMOUNT OF COMPETITION IN THE MARKET.

If Instagram was a potential competitor to Facebook when it was acquired in 2012, that implies that all the other differentiated social networks on the market today, like TikTok, Snapchat, and Twitter are also actual or potential competitors of Facebook — implying that Facebook faces a lot of competitive constraints on its actions.

MANY SUPPOSEDLY ANTI-COMPETITIVE ACQUISITIONS APPEAR THAT WAY ONLY BECAUSE OF IMPROVEMENTS MADE TO THE ACQUIRED BUSINESS BY THE ACQUIRING PLATFORM.

Instagram was a small photo-sharing app in 2012 and Facebook was widely mocked for overpaying when it bought it for $1 billion; the enormous growth and success Instagram has enjoyed since then is at least partially (and maybe significantly) due to Facebook's managerial skill and the integration of Instagram with other Facebook products. Youtube's growth since its acquisition by Google for $1.65 billion in 2006 has been driven by Google's investment in improving search, video retrieval, and marketing on Youtube, which may not have taken place without the acquisition.

THE EVIDENCE AROUND KILLER ACQUISITIONS IS THIN AND FOCUSED ON PHARMACEUTICALS, WHICH HAS KEY DIFFERENCES WITH TECH.

The single paper cited to support the theory of harmful killer acquisitions is based on a study of the pharmaceutical market, and centers on problems that may arise when patent protections incentivize existing patent holders to buy drugs that are similar to their own and shut down production. But patent protections are rare in the digital market acquisitions that critics allege are "killers", and without them the "killer acquisition" strategy is likely to be unviable, because incumbents generally cannot prevent another business from copying the product of the acquired firm.

For a fuller explanation of these and related issues, see Geoffrey Manne's recent submission to the U.S. House of Representatives Committee on the Judiciary, Subcommittee on Antitrust, Commercial, and Administrative Law, "[Correcting Common Misperceptions About the State of Antitrust Law and Enforcement.]"

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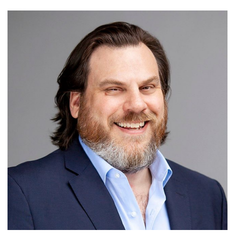

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ACCESS TO DATA: not the barrier it's thought to be

July 2020

tl;dr

Data doesn't create a barrier to entry, but privacy regulations might.

The Debate:

Some fear that incumbents' access to user data gives them the ability to improve and target their products in ways that new entrants cannot replicate, creating a barrier to entry that holds back competition in ways that are harmful to consumers.

But... while access to data may confer some advantages on incumbents, they are not insurmountable by others, and they are akin to other benefits like reputation that are not considered to be barriers to entry.

KEY TAKEAWAYS

MOST SUCCESSFUL DIGITAL BUSINESSES STARTED OFF WITHOUT ACCESS TO DATA.

This includes the core services of now-giants like Google, Uber, and Facebook as well as businesses that thrive in their product niches like Tinder, Whatsapp, and King Entertainment's games. Data is typically generated after companies have entered the market, not before – if lack of access to data was a barrier to entry none of these firms could exist.

OTHER INTANGIBLE FACTORS LIKE REPUTATION ALSO CONFER ADVANTAGES ON INCUMBENTS WITHOUT PREVENTING COMPETITION FROM TAKING PLACE

It is well established that an incumbent firm having a good reputation does not constitute an anticompetitive barrier to entry for less well-known entrants, although it is clearly a benefit to the incumbent. The fact that incumbents may have certain advantages like this, and access to data to improve their products, is not on its own a problem for competition.

DATA IS NOT SCARCE AND NEW ENTRANTS CAN ACCESS IT FROM THIRD PARTIES TO BETTER COMPETE WITH INCUMBENTS.

Data is not 'the new oil', because unlike oil it is not a scarce, consumable, and rivalrous resource: new entrants can and frequently do pay for data from third parties to improve their products, making it easier for them to compete with incumbent platforms. In digital advertising, for example, much of the data held by Google and Facebook about consumers' preferences can also be acquired from card networks, retailers, data brokers, and similar sources.

THERE IS AN INHERENT TENSION BETWEEN PRIVACY REGULATIONS AND COMPETITION.

Laws like the GDPR, which make it harder for businesses to buy and sell user data, make it harder for new entrants to acquire data as described above. While this may be deemed a price worth paying for the goals that these regulations are intended to achieve, the anticompetitive effects of these measures should be recognized, and if possible tackled with changes to those regulations.

For a fuller explanation of these and related issues, see Geoffrey Manne's recent submission to the U.S. House of Representatives Committee on the Judiciary, Subcommittee on Antitrust, Commercial, and Administrative Law, "Correcting Common Misperceptions About the State of Antitrust Law and Enforcement."

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