

September 29, 2020

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
Washington, DC 20515

**RE: Proposals to Strengthen the Antitrust Laws and Restore Competition Online
Hearing Submission**

Dear Chairman Cicilline and Ranking Member Sensenbrenner:

Public Knowledge appreciates the Subcommittee holding this hearing on possible reforms to the antitrust laws to protect and reinvigorate online competition. The four companies at the center of the investigation—Google, Facebook, Amazon, and Apple—all wield enormous power in incredibly complex markets. Although reforms to the antitrust laws are needed, antitrust reform alone will be insufficient to fully tackle the market power of dominant digital platforms.

As the Subcommittee looks to make changes to the antitrust laws, we urge you to focus on eliminating recent judicially created impediments to effective law enforcement.¹ For example, flawed legal decisions have created inappropriate barriers to both predatory pricing and refusal-to-deal claims. Congress should pass a law overturning these precedents and restore these claims as valid ways to seek redress against a dominant firm.

Similarly, much of the competitive harm in digital platform markets involves nascent and potential competitors and limits innovation, which the courts have failed to recognize. Antitrust law should be clarified to properly weigh these harms against any consumer benefits.

Antitrust presumptions that go against economic evidence, such as the presumption that vertical mergers do not harm competition, should be re-examined. We need legislation to address the “more likely than not” standard in exclusionary conduct and merger cases, and to instead prohibit conduct that creates a substantial risk of competitive harm. Burdens of proof should be rebalanced to make it easier for plaintiffs to bring successful antitrust cases, including removing output reduction requirements and overly onerous

¹ For more detail on potential antitrust reforms Public Knowledge supports, see *Joint Response to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets* (Apr. 30, 2020), <https://equitablegrowth.org/wp-content/uploads/2020/04/Joint-Response-to-the-House-Judiciary-Committee-on-the-State-of-Antitrust-Law-and-Implications-for-Protecting-Competition-in-Digital-Markets.pdf>.

market definition requirements. Finally, additional funding for the two major enforcement agencies, the Federal Trade Commission and the Department of Justice, would ensure the dedicated professionals at these agencies have the ability to take on cases to protect consumers.

Public Knowledge urges the Subcommittee to also look beyond antitrust reforms. Even strengthened laws with aggressive enforcement cannot bring the swift market-opening tools that are essential to prevent dominant platforms from thwarting the short-term entry and innovation the market needs and consumers deserve. The many years it takes to litigate individual antitrust cases will simply delay necessary reforms.

Whether or not cases launched against dominant technology platforms can ultimately yield structural reforms, legislation empowering regulators to expand competitive options for suppliers and consumers of the dominant platforms could immediately start addressing the imbalance of power that reinforces platform dominance.² For example, Congress should call for:

Interoperability

Major digital platform markets are currently dominated by one company with enormous opportunities to take advantage of network effects and scale economies. To combat these inherent advantages, Congress should empower regulators to mandate interoperability. If new services can easily plug in to the incumbent players, then they have a much better chance of getting off the ground and finding success. A novel email client unable to email existing services would be unlikely to gain traction with consumers. Telephone consumers greatly value being able to call others no matter what network they're on—a feature possible only through the networks' interoperability with one another. Digital platform markets should be viewed as similar to email or phone networks and thus interoperability, especially with the dominant company in a market, should be a priority for regulators. By enabling competitors to benefit from the network effects currently exploited exclusively by incumbent platforms, competition should flourish. This would

² See e.g., *Competition in Digital Technology Markets: Examining Self-Preferencing by Digital Platforms Before the S. Subcomm. on Antitrust, Comp. Policy & Cons. Rights*, 116th Cong. (2020) (statement of Gene Kimmelman, Senior Advisor, Public Knowledge); Gene Kimmelman, *Key Elements and Functions of a New Digital Regulatory Agency*, HARVARD SHORENSTEIN CENTER (Feb. 12, 2020), <https://shorensteincenter.org/key-elements-and-functions-of-a-new-digital-regulatory-agency/>; 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 (Jul. 1, 2019) <https://research.chicagobooth.edu//media/research/stigler/pdfs/marketstructurereport.pdf?la=en&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C>.

result in lower prices in some markets and higher quality (more features, great privacy protections, variety in community and moderation standards) in others.³

Data Portability (with Privacy Protections)

The lifeblood and currency of online platforms is user data. Large platforms benefit from massive data collection and aggregation they then monetize through targeted advertising. Most users are unaware of the amount and depth of data their favorite platforms collect. Each service a platform offers can become a potential vector for data collection and the services have become so ingrained in our day-to-day lives it can be hard to avoid any one major platform. Google can collect data not just from searches, but also its Chrome browser and YouTube. Furthermore, Google's ability to track user location, perhaps the most important datapoint for ads, is unparalleled due to its Android operating system and Maps application. As platforms like Google expand, they make it difficult for users to leave the ecosystems they create. Data portability coupled with privacy protections would allow users to have more control over their data and easily port that data into competitor platforms. This would break the "walled gardens" many platforms constructed, preventing the use of personal data to thwart consumers from moving to alternative service providers.

Prohibit Unfair Self-preferencing

Numerous platforms have become essential to businesses seeking to reach their customers, while also directly competing with these businesses for those customers. Google can represent both the publishers and advertisers in an online advertising transaction while also running the exchange on which said transaction occurs. Amazon offers a platform to third-party sellers to reach customers while selling its own products on the same platform. There is an obvious incentive to favor one's own products or services in these marketplaces, especially when a platform has market power in one aspect of the market while other aspects remain somewhat competitive. In these circumstances, dominant platforms must be prevented from any form of anti-competitive discrimination against those who depend upon them to reach their customers. This will lessen the outsized advantage that dominant platforms currently enjoy.

A Customer Proprietary Network Information (CPNI) Regime

³ For more on interoperability as an antitrust remedy, see Michael Kades & Fiona Scott Morton, *Interoperability as a competition remedy for digital networks*, WASH. CENTER FOR EQUITABLE GROWTH (Sept, 23, 2020), <https://equitablegrowth.org/working-papers/interoperability-as-a-competition-remedy-for-digital-networks/>.

Platforms wearing multiple hats in a competitive transaction can behave in many more competitively problematic ways over just simply favoring their own products. As a condition of competing on the platform, third parties must give up all sorts of proprietary business data to the platform operators. This could include things like locations of customers or the identity of customers with a particular interest in a product. Platforms can then engineer this data to launch their own competing products. By adapting the CPNI approach from telecommunications law, platforms would be allowed to collect data on competitors, but only use it for competitively neutral purposes (*i.e.*, running the recommendation function on a platform).⁴ This will mitigate the competitive advantage a platform enjoys from being both the *marketplace* on which commerce occurs and a *competitor* within that marketplace.

Reforms to App Stores

While app stores present unique benefits to consumers, they can also create unique competitive challenges in the market.⁵ To expand competition, dominant app stores should be required to allow app “side-loading.” This would allow users a separate avenue to download applications onto their devices if they so choose and would give developers an alternative to the app store bottleneck. A mandatory code-signing requirement could ensure security concerns are met. Competition would also expand if app stores limit in-app purchases to features directly related to app functionality. This would strike a balance between allowing apps to have tiered services or free trials while prohibiting the store from taking a hefty cut from all digital services offered by an app, such as e-books or cloud services. Third, only core device functions should be deemed appropriate for preloading to promote increased competition for apps on devices across the marketplace. Consumers very rarely change defaults, and platforms can take advantage of this to bundle their devices with additional services. Consumers should also be able to easily change default programs on their devices.

We believe that these reforms, taken together, would rein in the power of dominant digital platforms. The best way to enforce and implement these reforms will require both careful remedial oversight through antitrust litigation and the creation of a new digital regulatory body. Such oversight should be dedicated to promoting digital market competition focused on online platforms and would be able to bring the expertise

⁴ For more on how to implement a CPNI regime, see Harold Feld, *Mind Your Own Business: Protecting Third-Party Information From Digital Platforms*, PUBLIC KNOWLEDGE (June 2020), <https://www.publicknowledge.org/wp-content/uploads/2020/07/Mind-Your-Own-Business.pdf>.

⁵ For more proposed reforms to app stores, see John Bergmayer, *Tending the Garden: How to Ensure That App Stores Put Users First*, PUBLIC KNOWLEDGE (June 2020), https://www.publicknowledge.org/wp-content/uploads/2020/06/Tending_the_Garden.pdf.

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necessary to fully monitor digital market dynamics and implement technical remedies. Just as Congress has created public interest requirements alongside antitrust law for every other sector of the economy, it should do the same for the digital marketplace.

We applaud the Subcommittee's thorough and fruitful investigation. We welcome the opportunity to discuss these issues further with you

Sincerely,

/s/ Gene Kimmelman

Senior Advisor
Public Knowledge

/s/ Alex Petros

Policy Counsel
Public Knowledge

Cc:

Congressman Jerrold Nadler
Chairman
Committee on the Judiciary
2109 Rayburn House Office Building
Washington, DC 20515

Congressman Jim Jordan
Ranking Member
Committee on the Judiciary
2056 Rayburn House Office Building
Washington, DC 20515

Congressman Joe Neguse
Vice Chair
Subcommittee on Antitrust, Commercial
and Administrative Law
1419 Longworth House Office Building
Washington, DC 20515