



Public Knowledge

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Congressman David Cicilline
Chairman
Subcommittee on Antitrust, Commercial,
and Administrative Law
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Washington, DC 20515

Congressman Jim Sensenbrenner
Ranking Member
Subcommittee on Antitrust, Commercial,
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2449 Rayburn House Office Building
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Chairman Cicilline and Ranking Member Sensenbrenner,

Public Knowledge submits the following letter to the Committee's investigation into the major digital platforms. Our antitrust laws should be reformed to better protect both consumers and competition. We offer some proposals below, as well as several relevant attachments by Public Knowledge experts further expounding on these ideas.

While the reforms below would all improve our current antitrust regime, antitrust cannot be the sole panacea to all the thorny issues that the platforms present. The best solution would be a new digital platform-focused agency to regulate the platforms. Because antitrust cannot do enough by itself to expand competition and innovation, creation of such an agency is necessary if Congress is serious about reining in potential abuses by dominant platforms.

Antitrust Reforms

Antitrust laws should be recalibrated to adjust the balance between overenforcement and underenforcement. Currently, antitrust law is too concerned about potential overenforcement, and as a result is doing less enforcement than is needed. This is based on flawed Chicago School reasoning that assumed inefficient monopolies mistakenly allowed to be created or maintained would be quickly dealt with by the entry of new and efficient competitors. This idea is not supported by evidence. Instead, the true villain is underenforcement, especially in fast moving industries that already tend towards monopoly like digital platforms. As the 2019 Stigler Competition in Digital Platforms Report stated, "Underenforcement is likely to be costlier than previously thought because, among other things, market power of large technology platforms is more enduring. False negatives [underenforcement] are almost certainly more common than previously thought because certain types of conduct that were previously thought to be benign

are now understood to be anticompetitive.”¹ Public Knowledge supports the following concrete reforms.

Under current doctrine, **unilateral refusals to deal** are notoriously difficult to litigate. In antitrust case law, this is exhibited by the narrowing of *Aspen Skiing* by *Trinko*.² To prove a unilateral refusal to deal, an enforcer today must prove facts almost exactly analogous to the fact pattern of *Aspen Skiing*. This allows the platforms considerable leeway to deny their rivals interoperability and important data. A dominant platform can raise rivals’ costs and push them out of the market through this behavior. Given the platforms’ function as distribution platforms, this doctrine is particularly limiting to enforcers.

Another area of possible reform is the **predatory pricing** law. Platforms have extremely low marginal costs—it costs very little for the additional search query, social media user or online sale. When the marginal cost is almost zero, it’s very difficult to meet the legal burden of showing that prices are below cost. Another requirement sometimes applied under current law is that only competitors equally efficient to the defendant are protected. An already dominant platform, with an already locked-in user base, benefits enormously from its scale, while rivals still scaling up cannot yet achieve the same efficiency. However, these smaller (and thus less efficient) competitors are often the only source of actual or potential competition, so it’s incredibly important to protect their ability to compete. The major platforms are so varied that they even have the ability to take losses in one sector in order to push out a rival that might only be competing in that single vertical. Improvements to this area of the law could include expanding the notion of recoupment and closely scrutinizing loyalty discounts.

The recent *American Express*³ decision imposed new **market definition requirements** for plaintiffs bringing a case against a vertical restraint. In other cases, and previously in vertical restraint cases, plaintiffs could show market power directly by showing harm to competition. “This holding was based on the notion that vertical restraints almost always enhance efficiency and almost never harm competition. Scholars over the past 30 years have demonstrated that that notion is false and therefore, that vertical restraints must be evaluated individually on the specific facts.”⁴ Therefore, just as in other antitrust cases, it’s important that the law not require

¹ 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), 79, <https://research.chicagobooth.edu//media/research/stigler/pdfs/marketstructurereport.pdf?la=en&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C> (hereafter “Stigler Report.”)

² *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

³ *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

⁴ Stigler Report, at 77, citing Steven C. Salop, Revising the Vertical Merger Guidelines: Presentation at the FTC Hearings on Competition and Consumer Protection in the 21st Century (Nov. 1, 2018), https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_5_georgetown_slides.pdf; Steven C. Salop, Invigorating Vertical Merger Enforcement, 127 YALE L.J. 1742 (2018).

circumstantial evidence like defining the relevant market when direct evidence is available. It would also be useful to clarify in light of *American Express* that harms to one market cannot be justified by benefits to another market, even in the case of two sided markets.

In certain situations, **burdens of proof** should be rebalanced to favor antitrust plaintiffs after their initial preliminary showing. For example, courts should not be allowed to presume efficiencies from vertical transactions. Vertical mergers are a hallmark of the platform industry and have been a key factor in entrenching the dominance of several platforms. There are several presumptions Congress could put in place to better protect consumers from anticompetitive vertical mergers. Presumptions facilitate more efficient enforcement actions while still allowing merging companies the opportunity to disprove them in extenuating circumstances. In particular, a **dominant platform presumption** would presume anticompetitive any merger between a dominant platform and a firm with either a substantial likelihood of becoming a competitive rival or in an adjacent market. Other presumptions against categories of vertical mergers are also needed.⁵ Shifting the burden of proof is also one important goal of the *Anticompetitive Exclusionary Conduct Prevention Act*, introduced in the Senate by Senators Klobuchar, Blumenthal, and Booker. The Act would shift that burden of proof so that companies with substantial market power (greater than 50% market share or equivalent) have the burden of showing any exclusionary conduct does not present "an appreciable risk of harming competition." This is another important reform PK supports.

The following bills, already introduced in the Senate, would all represent tangible improvements to competition policy.

The **Monopolization Deterrence Act of 2019 (S. 2237)** would allow enforcers to seek a monetary penalty from Sherman Act Section 2 violators up to 15 percent of their total US revenue.

The **Anticompetitive Exclusionary Conduct Prevention Act of 2020 (S. 3426)** would make it easier to stop exclusionary conduct with "an appreciable risk of harming competition" and would eliminate unnecessary market definition requirements.

The **Merger Enforcement Improvement Act (S. 306)** would increase merger filing fees, as well as increase funding to the antitrust enforcement agencies and would require the FTC and GAO to conduct studies on the efficacy of merger settlements and overlapping investor control.

The **Consolidation Prevention and Competition Promotion Act (S. 307)** would clarify that "monopsony" power falls under the purview of the Clayton Act and would shift the burden to the merging parties in "mega-mergers."

⁵ See attached, PK & OTI Comments on Draft Vertical Merger Guidelines.

The Need for a Platform-Specific Competition Regulator

While changes to antitrust law would improve how we deal with platforms, antitrust is simply not enough. We will still need targeted regulations to open up platform markets to competition.

A new expert regulator equipped by Congress with the tools to promote entry and expansion in these markets could actually expand competition to benefit consumers, entrepreneurship, and innovation. The regulatory authority could be housed within an existing agency, such as the FTC, or it could be a new expert body, focused on digital markets. Most important are the pro-competition regulatory tools with which Congress must equip such an agency.

Interoperability: First, the agency should be authorized to require dominant platforms to be interoperable with other services, so competitors can offer their customers access to the dominant network. Allowing interconnection to the dominant network was a crucial component of the breakup of AT&T, and it can create competition against Facebook, with or without a break-up. Online platforms that benefit from network effects and control an important market bottleneck⁶ may be appropriate targets for an interoperability rule. An expert regulator is especially useful for a tool like this because it will require technical detail, frequent updates, and complaint resolution to make sure the interoperability requirement is working as intended.

The ACCESS Act, already introduced in the Senate, would also represent a tangible improvement to competition policy. The ACCESS Act would require large communications platforms to make their services interoperable with competitors. It would also allow users to easily port their data between platforms and to delegate custodial services to act in their best interest to manage their data stored by the platforms. This would be a key tool to mitigate the massive network effects and scale advantages dominant platforms currently enjoy.

Non-Discrimination & Un-Bundling: Online platforms know that companies that use their platform can “disintermediate” them by connecting directly with the consumer, effectively cutting out the platform middleman. This means their customers, the companies that use the platform, are also potential competitors. In some cases those companies are actual direct competitors, like when the same company owns a platform and one of the competitors on the platform. (This is the example of the Amazon Marketplace where many retailers, including Amazon, compete for customers.) As a result of this competitive dynamic, platforms might discriminate against companies that pose a competitive threat, or use data to disadvantage them. Congress should authorize a regulator to monitor and ban discrimination by digital platforms

⁶ Here we adopt the definition from the Stigler Report. “‘Bottleneck power’ describes a situation where 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.” Stigler Report, at 9.

with bottleneck power, either discrimination in favor of their own services or discrimination against their competitors that use the platform. Similarly, the agency should be authorized to ban certain “take it or leave it” contract terms that require any company doing business with a dominant digital platform to turn over its customer data for the dominant platform to use however it pleases. This effectively bundles the service the companies need with data sharing they may not want to participate in. By prohibiting these practices, we can give potential competitors a fighting chance.

Merger Review: Another major concern with digital platforms is their acquisition of potential competitors. Acquisitions of potential or nascent competitors are often small, even falling below the value threshold for pre-merger notification of the competition authorities under the Hart Scott Rodino (HSR) Act. It is very difficult to effectively assess how likely such companies in adjacent markets are to truly be potential competitors to the acquiring digital platform. The small size or lack of pre-existing direct competition of these types of mergers can make it much harder for antitrust enforcement agencies to block them, even if there are indications the merger may be anticompetitive. Markets move quickly and a competitor’s window of opportunity to gain traction against the incumbent is short, making mergers an even more effective tactic at preventing competition, and making effective merger enforcement even more important. Thus, the regulator should also have the power to review and block mergers, concurrently with the existing antitrust agencies. For particularly important industries, like communications, energy, and national security, we have an expert agency merger review process in addition to antitrust. Similarly, the most powerful digital platforms occupy a special role in our economy and society and face inadequate competition. They too require merger review under a new and different standard, in addition to traditional antitrust review.

The new regulator would have a different standard than the antitrust agencies. This standard should place a higher burden on dominant platforms to demonstrate overall benefits to society that antitrust enforcers do not have the tools to thoroughly measure. It should only review mergers involving platforms with bottleneck power. It should only allow those mergers that actually expand competition and do not impede market entry by new potential competitors. And, there should be no size limit for mergers to warrant pre-merger review by the agency. Any acquisition by a platform with bottleneck power should be reviewed for its competitive impact. This would prevent increased concentration of power when the company being purchased is too small or the competitive consequences are too uncertain. Mergers that provide no clear competitive benefit would be blocked. The standard also must take account of the particular ways that competition happens in digital platforms. For example, non-horizontal mergers may be particularly harmful here due to the economies of scope in data-driven platforms, as well as the importance of interoperability between complementary products.

Congress must use all the tools at its disposal to address the broad challenges presented by the

power of digital platforms. This includes improvements to the existing antitrust laws, as well as new laws and rules specifically focused on digital platforms. Only then will we be able to enjoy the benefits of a competitive marketplace for our communities, consumers, citizens, entrepreneurs, and workers.

Public Knowledge is continuing our in-depth research into this industry and would welcome the opportunity for further conversation with the Committee on this important issue. Thank you for your attention.

Sincerely,

/s/ Charlotte Slaiman

Charlotte Slaiman

Competition Policy Director

Public Knowledge