

August 20, 2018

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW, Suite CC-5610 (Annex C)
Washington, DC 20580
Via Online Submission

Re: Competition and Consumer Protection in the 21st Century Hearings, Project Number P181201; Topic 1, The state of antitrust and consumer protection law and enforcement, and their development, since the Pitofsky hearings

Dear Chairman and Commissioners,

We thank the Federal Trade Commission (“the Commission”) for engaging in this inquiry into the matter of maintaining consumer protection and competition in American markets.

In the present inquiry, the Commission has asked whether the growth of the technology industry in particular presents novel concerns to the ongoing protection of consumers and the maintenance of adequate competition in American markets. We agree that this is the area that deserves greatest examination in the days ahead; the manners in which this industry operates, particularly the “platforms” explicitly raised in the Commission’s inquiry, have largely evaded the impacts of any new legislation or regulation that can truly limit the harms they have perpetrated on American consumers. Our chief concern is that it is the business model that sits at the core of the major platform companies in and of itself that has caused these harms, and yet we have yet to see regulatory enforcement at the national level that can treat these side effects. Our goal in this comment is thus to illustrate this business model at play and call for regulatory innovations that can better protect the individual consumer and assure competition in the American marketplace.

The growth of platform companies and resulting market power

Internet platform companies — leading examples among them including Facebook, Google, and Twitter — are created with an eye toward fast growth by way of total usership. They typically are backed financially by investors or through other support structures with the expectation that

they will initially operate at a loss. They then work aggressively to grow by attracting more and more users, often thinking about revenues second. This aggression is driven by the need to establish to the financial industry that there is something ‘there’; that the company’s platforms can and will attract users and grow its usership, thus certifying that the company can and will ultimately be a commercial success. But to establish this, these companies necessarily must be aggressive in gaining users — often by using whatever means they can and which are presumably within legal boundaries.

It is this aggressiveness that in turn drives such companies to the edge of what is moral, or even right by consumers. One example that illustrates this is that of Amazon’s apparent predatory pricing, a business tactic about which others have written extensively.¹ Another is in the case of Facebook’s reported use of services that can detect what mobile applications a user has installed, which can contribute something to the company’s operative efficiency over its own mobile applications on mobile devices, but can also help determine which new services are staking a ground in the global competition amongst internet-based services like Facebook itself.² In a sense, then, these companies regularly approach the boundaries of what is fair play in their drive for growth.

This is all done to achieve a corporate scale, usership level and market dynamic that contributes to the holy grail in internet platform services: the network effect. This feature can be characterized as the effect that a marginal user of a product or service increases the value of the product to all its users. It is most often exhibited over networks: telephone companies, internet service providers, and internet platform services all subscribe to its benefits. Markets exhibiting such features, wherein the services emblematic of it are networks and therefore have network effects, necessarily tend toward concentrated power amongst a few rivals.³ This has proven to be the case with internet-based services as well.

¹ M. Lewitt, “How Long Can Amazon's Ingenious Antitrust Avoidance Last?,” *Forbes*, May 1, 2018.

² D. Seetharaman and B. Morris, “Facebook’s Onavo Gives Social-Media Firm Inside Peek at Rivals’ Users,” *The Wall Street Journal*, August 13, 2017.

³ N. Economides, M. Mitchell and A. Skrzypacz, “Dynamic Oligopoly with Network Effects,” 2004.

How can it be established that the present market for internet services does indeed constitute oligopoly? As is often argued by many, after all, users can switch from one internet service to another whenever they wish. The first indicator is the extreme barrier to entry into this market. A company that wishes to challenge a major internet company in offering a rival internet-based service to one like Twitter, Messenger, Gmail or Amazon must defeat the network effect already established by these rival services; it must gain a foothold in usership that is near-prohibitive to fledgling startups. Because underlying the network effect for an internet platform service that has achieved it at scale is a bevy of advantages: copious amounts of user data that help shape the company's decision-making in regard to many business matters (e.g., acquisitions, corporate investments, new product launches, geographies to target with new services, etc.); a loyal user base; the capacity to absorb rival services that are newly having an impact and should be considered for acquisition; and many others. It is near-impossible for a rival to meaningfully challenge the core services in this sector because of these tremendous barriers.

The second clear indicator that oligopoly has taken hold is in examining shares in the market. Here we should not observe the shares in the service being provided itself; doing so can yield misleading results. Instead we should directly examine the revenues underlying the commercial operation of the platform companies' services to establish the fact of market domination; without established revenues a market player cannot survive. It is well-known that for the internet platform services, the key line of revenue is in digital advertising. This is a space that is dominated by the few that act most aggressively to proactively grab the users' attention through sometimes-dubious means; it is thus a marketplace that currently rewards commercially those who operate at or beyond the boundary line of what should be considered right by the consumer.⁴ These facts indicate a necessity for changes in regulatory policy in the way forward.

The interaction between assuring consumer privacy and competition policy

The assurance of consumer privacy and the protection of market competition with respect to internet platform companies are intertwined goals for federal regulators. The collection of marginal personal data clearly implicates individual privacy. At the same time, the collection of

⁴ "Google and Facebook Tighten Grip on US Digital Ad Market," *eMarketer*, September 21, 2017.

marginal personal data also contributes to a firm's market power. The regulator's challenge is thus to bring the right form of enforcement action in the right instance.

A central point that deserves consideration by the Commission is that the amassing of large sets of consumer data necessarily contributes to the commercial dominance of internet platform companies. The more data that a company like Facebook collects, the more advanced the inferences it can make about the individual's behavioral profile, and the more sophisticatedly it can tailor its content curation and ad-targeting algorithms. And when the platform company already possesses market-dominating practices in these lines, and is collecting more data than any other provider to further strengthen and refine those practices, the possibility of anticompetitive behaviors presents itself.

Nevertheless, federal regulators have a poor track record in recognizing the adverse impacts to market competition posed by the uninhibited collection and processing of data by market leaders, though some modest interest in starting such examination has been expressed in the past.⁵ The Commission should think beyond the level of direct and explicit harm to consumers, including as exhibited by price hikes, and consider how the collection of data by a dominating firm can implicate competitive markets.

We wish to note additionally that this dominating collection of data enables those few firms with access to it and the resource to analyze it to develop industry-standard algorithms, including artificial intelligence – a matter that European regulators have taken note of already.⁶ This begets a vicious cycle by which only firms that are members of the club will have the ability to compete in the field of development of artificial intelligence.

Abuses against consumers and the market

⁵ L. Esposito and B. Boyle, "Big data may become big antitrust concern," *DLA Piper Antitrust Alert*, September 19, 2017.

⁶ M. Ross, "Artificial Intelligence Pushes the Antitrust Envelope," *Bloomberg*, April 28, 2017.

We have written about the companies approaching the boundary of fairness in the face of the individual consumer. To be explicit we describe the most prevalent of these negative impacts that have harmed the marketplace below, though non-exhaustively. Underlying these is the essential fact that the major internet platform companies have become too difficult for consumers to avoid, as others have argued.

- *Prevalence of privacy and security incidents.* We have seen every manner of breach afflict the platform firms and hurt consumers. We need not look further than the Cambridge Analytica incident, which may have swung the last U.S. presidential election.
- *The dissemination of political disinformation.* The platform companies, Facebook and Twitter especially, have perpetuated the dissemination of political disinformation, including by Russian government operatives during the last presidential election.⁷
- *The spread of hateful conduct online.* The leading internet platforms have become hosts of vicious forms of hate speech, both explicit and subtle, but universally emotionally harmful to certain segments of their respective user populations.⁸
- *A lack of accountability.* There exists a general lack of accountability amongst the internet companies with respect to responsibility for the offensive or harmful content spread over their platforms. With no one accountable, there is little impetus to push back against the idea that we should institute novel forms of content regulation to protect users of these platforms. Conflated here as an additional concern is that the commercial interests of the platforms and those of malicious actors are, in some ways, aligned because both parties wish to see users absorbing as much content as possible.⁹

⁷ E. Dwoskin and T. Romm, “Facebook says it has uncovered a coordinated disinformation operation ahead of the 2018 midterm elections,” *The Washington Post*, July 31, 2018.

⁸ P. McPherson, “Facebook says it was 'too slow' to fight hate speech in Myanmar,” *Reuters*, August 15, 2018.

⁹ D. Ghosh and B. Scott, “Digital Deceit: The Technologies Behind Precision Propaganda on the Internet,” *New America and the Shorenstein Center*, January 2018.

- *The perpetuation of algorithmic bias.* The platforms have played host to the spread of algorithms that discriminate and, more broadly, yield results that are harmful or offensive to certain (particularly marginalized) classes of the user population.¹⁰
- *The imposition of inhibition to competition.* The companies behind the major platform services have wielded their commercial weight to block off competition by engaging, some argue, in such practices as predatory pricing and merger-and-acquisition strategies, among other more subtle anticompetitive practices.
- *The adverse impacts on the failure of the information ecosystem.* In serving as the modern gateway to information online, the internet platforms have become the primary or effectively solitary pathway to access to news for many Americans. At the same time, though, they have not developed platform regulations that can assure the clean operation of their platforms as discussed above. Meanwhile, by undercutting the traditional media they have helped along the ongoing decimation of open journalism.¹¹
- *Psychological impacts.* The platforms have, as some have argued, become an obsession for many. Some additionally argue that this tendency is designed into the applications designed by the leading platform companies. These features may have exacerbated impacts on children.¹²

These and other impacts are negative externalities that have taken hold of the market for internet services. The fact of their prevalence necessitates regulatory intervention to arrest the business practices that encourage their growth and reassess what can better promote competition in the marketplace for internet platform services and, in the end, better the situation for end consumers. We can say this despite the extant U.S. consumer protection and antitrust regulatory regimes, including those administered by the Commission; the fact of the existence of these negative

¹⁰ “Racism is Poisoning Online Ad Delivery, Says Harvard Professor,” *Technology Review*, February 4, 2013.

¹¹ N. Statt, “The news industry is worried Facebook and Google have far too much power,” *The Verge*, July 10, 2017.

¹² B. Bosker, “The Binge Breaker,” *The Atlantic*, November 2016.

externalities in and of itself indicates that moving forward, something must change to more effectively harness the power of the internet while assuring greater protection of the individual.

The platform companies' business model necessitates regulatory changes

How can we approach the question of what needs to change on the regulatory front? We are aware that the Commission and other federal agencies possess regulatory tools that have in the past been seen as robust protections against the perpetration of commercial abuses by dominant market players. But the growth of the major internet platform companies has rendered the umbrella regulatory regime ineffectual in the face of its now vast interface with American consumers.

As a premise, it is the core business model of the internet platform companies that results in the prevalence of these negative externalities. Thus we should begin with an analysis of that business model. It is built upon three primary practices. The first is the creation and ongoing advancement of tremendously compelling services that many have argued are addictive and therefore potentially harmful. This first piece relates to our earlier point that the internet platform companies often engage in overly aggressive tactics that abuse competition and implicate principles of consumer protection to establish market leadership and beat rivals to the end of establishing market-dominating network effects before other players. The second is the presently unchecked collection of personal data through those services, in such a way and to such an extent that presents novel challenges to consumer privacy. And the third is the continual development of commercial algorithms trained to curate dialogical content for consumers (e.g., in contexts like news feeds and video recommendation services) and target digital advertising at consumers.

The combination of these three central business practices has beset the American public with the bevy of negative externalities discussed above. That is to say that the practices that are core to the profit motive for the major internet platform companies necessarily produces such undesirable effects as the buttressing of political disinformation operations and the exacerbation of algorithmic discrimination.

To curtail these we must reign in these business practices or otherwise regulate the platform companies such that they can topically be restrained; the federal regulatory community has until now not adequately accomplished this. This is partly because it is difficult to do so given the inability to create new rules or, more broadly, institute a regulatory regime that can tackle this industry with enhanced agility.

To elaborate on this point we would raise the concern that the Commission's ability to tackle harmful practices in the digital ecosystem via its consumer protection capacities appears limited. The Cambridge Analytica incident is representative of this contention; despite extensive external review by a third-party consulting firm of Facebook's data-sharing practices per the consent order the Commission settled with Facebook years earlier, the data associated with 87 million users was shared and accessed illegitimately.¹³ While this is not squarely the company's fault, it is without a doubt that all involved entities require greater accountability to and transparency with federal regulators, not to mention the public. And as others have argued, it has proved similarly difficult for the Commission to tackle novel matters of competition policy in the age of global internet platforms, in large part because of the evolution of our national mode of antitrust regulation and enforcement into one that stresses the criticality of establishing consumer harms — leading in turn to a focus on pricing.¹⁴

This inability to tackle these practices is borne from the fact that they are largely novel in the industry with respect to past decades. But given the clear capacity for them to perpetuate harms against the consumer in tandem with the industry's lack of commercial interest to tackle them adequately because of contentions with their core business models, the individual consumer requires greater protection from federal regulators. This suggests that consumers may benefit from expanded enforcement using its current capacities on the part of the Commission, and also speaks to the need for new legislation affording the regulatory community greater authority and resource in the way forward.

¹³ N. Tiku, "Facebook's 2017 Privacy Audit Didn't Catch Cambridge Analytica," *WIRED*, April 19, 2018.

¹⁴ L. Khan, "Amazon's Antitrust Paradox," *Yale Law Journal*, Vol. 126, No. 3, January 2017.

The need for a meaningful and agile enforcement regime in the way forward

Though we think the Commission should join advocates in calling for greater authority that could be brought forward through a legislative proposal that meaningfully tackles privacy, consumer protection and competition policy principles, the Commission also presently possesses ample tools that it can use more effectively to assure a sound and safe marketplace.

First and foremost is the Commission's authority to bring enforcement actions against actors that engage in unfair and deceptive practices. While the Commission has often wielded this authority against the internet platform companies in various ways in the past, there nevertheless remains a feeling of deep distrust of internet companies among consumers, and many similarly feel as though maintaining their privacy online is a lost cause. This suggests that the Commission should examine new ways to stretch its range of enforcement against firms that engage in such practices, perhaps by further extrapolating through analysis of consumer feelings what constitutes deception wrought by platform companies operating over the internet.

Second, the Commission should carefully examine the possibility of bringing greater scrutiny over mergers and acquisitions in this sector, and additionally, pursue antitrust inquiries where appropriate. We have seen several cases of the major internet platform companies executing acquisitions without a great deal of regulatory examination of any anticompetitive effects that could come of them. This is partly because at the time of acquisition, some of the purchased firms did not hold the market positions that they have since taken up in the constellation of major internet platforms. And yet in most of the cases in which the acquired services have become respective industry leaders — from Instagram to WhatsApp to DoubleClick — many argue retrospectively that we should have inspected them to far greater a degree, and perhaps instituted conditions of acquisition or blocked them altogether.

More broadly, it is now clear that the American consumer requires an agile regulatory regime at the federal level that can match the pace at which the industry introduces new offerings and innovates. Part of this can be accomplished using the Commission's existing authorities. The Commission should do the utmost to bring these capacities to bear.

Conclusions

We are encouraged by the Commission's inquiry into these subjects and believe it is a positive first step. We hope that this initiative and the broader underlying inquiry can inspire positive changes in regulatory execution and policy to the end of better assuring consumer protection and market competition. The major internet platforms now occupy a space in the media ecosystem that seems unavoidable for the average American; meanwhile, these companies operate under a regulatory system that has so far done little to contain the harms associated with the uninhibited collection, sharing and use of personal data and the harms to the market wrought by this sector. The Commission must take far greater strides in the way forward — in regards to both regulatory execution and policy development — to protect the individual consumer.

Respectfully submitted,

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