

August 20, 2018

The Honorable Joseph Simons
Chairman
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, D.C. 20580

Dear Chairman Simons:

I write pursuant to the Federal Trade Commission's (FTC) request for comments in preparation for the Competition and Consumer Protection in the 21st Century Hearings (Project Number P181201), which are expected to begin next month and continue through January 2019. This comment – one of several I am submitting, pursuant to the FTC's request for a separate comment for each topic – responds to "Topic 3" of the announcement: "The identification and measurement of market power and entry barriers, and the evaluation of collusive, exclusionary, or predatory conduct or conduct that violates the consumer protection statutes enforced by the FTC in markets featuring 'platform' businesses."

As you prepare your review of FTC enforcement and oversight procedures and policies, I urge you to be mindful of the consumer and commercial impact of ever-growing platform dominance, with special consideration to the following issues during the upcoming review:

I. Take a More Proactive Role in Policing Abuses of Platform Dominance

Individual internet platforms have captured power in distinct ways. One significant commonality among the most powerful firms is the degree to which they control the platforms on which other firms rely. From search engines and app stores to cloud storage and logistics networks, a handful of technology firms have come to dominate the means by which goods and services come to market online. Social media and other online platform products are heavily concentrated and the firms that dominate these industries have substantial market power. For instance, Google has a 64% market share in desktop searches and a 94% share in mobile and tablet searches;¹ 49% of all e-commerce spending occurs on Amazon;² Google's Android operating system holds 86% of the mobile OS market.³

¹ Open Markets Institute, "Monopoly by the Numbers," <https://openmarketsinstitute.org/explainer/monopoly-by-the-numbers/>.

² Ingrid Lunden, "Amazon's Share of the US E-Commerce Market is Now 49%, or 5% of All Retail Spend," *TechCrunch* (Jul. 13, 2018), <https://techcrunch.com/2018/07/13/amazons-share-of-the-us-e-commerce-market-is-now-49-or-5-of-all-retail-spend/>.

³ Global Mobil OS Market Share in Sales to End Users from 1st Quarter 2009 to 1st Quarter 2018, <https://www.statista.com/statistics/266136/global-market-share-held-by-smartphone-operating-systems/>.

Many online businesses compete directly with the firms that maintain platforms in other products and sectors. Unfortunately, these platforms are rarely neutral—having been found giving preferential treatment to their own products and services over those of competitors. Amazon, for example, has been accused of prioritizing its AmazonBasics private label over competing brands that rely on the Amazon Marketplace.⁴ Observers have also noted that Amazon’s exclusionary conduct in the books market may leave them vulnerable to antitrust enforcement.⁵ Further, two recent European Union cases demonstrated that Google has unlawfully abused their dominance, first by prioritizing Google Shopping over vertical search competitions,⁶ and second, by leveraging the Android operating system over mobile device manufacturers in order to support Google-branded mobile applications.⁷

The FTC has not done enough to address instances in which platforms abuse their dominant positions. While the European Commission has used the legal tools at their disposal to protect consumers and competition, the FTC has done little to address anti-competitive exercises of platform power. A staff report from the FTC’s bureau of competition, for instance, detailed number of ways in which Google had engaged “in tactics that resulted in harm to many vertical competitors, and likely helped to entrench Google’s monopoly power over search and search advertising.”⁸ This report urged the commissioners to challenge Google’s conduct. In the face of a competing report from the FTC’s economic bureau that didn’t favor legal action, the commissioners ultimately declined to pursue a legal challenge. With platforms growing in dominance and further evidence of harm, continued inaction is increasingly hard to justify. This upcoming set of hearings provides an opportunity for the FTC to revisit these market trends and investigate the risks and harms associated with platform dominance. The FTC must confront these issues and take action to protect consumers and markets.

II. Explore the Potential of Data Portability and Interoperability as Means of Addressing Incumbent Platform Power

One aspect of the online environment that makes the issues associated with internet platforms particularly difficult to address is the prevalence of network effects. In social environments, users want to be where other users are. In heavily networked industries, as more users sign up for a platform, the more valuable the platform becomes to users. However, such network externalities often imperil competition; by tethering user value to the number of people on a given platform, network effects make it incredibly difficult for entrants to challenge

⁴ “Amazon: By Prioritizing its Own Fashion Label Brands in Product Placement on its Increasingly Dominant Platform, Amazon Risks Antitrust Enforcement by a Trump Administration,” *Capitol Forum* (Dec. 13, 2016), <https://thecapitolforum.com/wp-content/uploads/2016/07/Amazon-2016.12.13.pdf>.

⁵ Sally Hubbard, “Amazon: As EU Continues Scrutiny of US Tech Giants, Amazon is Increasingly Vulnerable in US to Antitrust Enforcement for Exclusionary Conduct in Books,” *Capitol Forum* (June 8, 2016), <http://createsend.com/t/j-3B6A398601C6EAE5>.

⁶ Natalia Drozdziak and Sam Schechner, “Google Slapped With \$2.7 Billion EU Fine Over Search Results,” *Wall Street Journal* (June 27, 2017), <https://www.wsj.com/articles/google-slapped-with-2-7-billion-eu-fine-over-search-results-1498556971>.

⁷ Adam Satariano and Jack Nicas, “E.U. Fines Google \$5.1 Billion in Android Antitrust Case,” *New York Times* (July 18, 2018), <https://www.nytimes.com/2018/07/18/technology/google-eu-android-fine.html>.

⁸ The FTC Report on Google’s Business Practices, *Wall Street Journal*, (Mar. 24, 2015), available at: <http://graphics.wsj.com/google-ftc-report/>.

entrenched and data-rich incumbents. If users can only benefit from a platform if other users are on the platform, then entrants are at a steep competitive disadvantage.

One proposal to address the network effect problem is to encourage internet platforms to take data portability seriously. This would allow users to take the data collected and produced on one platform and bring it to a different platform. By making data portable, the switching costs associated with moving platforms are reduced. The FTC should investigate the benefits of enabling platform users to download their data in a machine-readable format. Network effects can also be addressed by improving interoperability between social platforms. If the infrastructures of various platforms are capable of working together, firms will be better able to compete, third party developers will be better able to innovate, and users will have greater choice in the marketplace.

In preparation for the hearings, I urge you to engage with the growing conversation surrounding the implementation of data portability and interoperability initiatives and explore how the FTC can encourage more widespread use of interoperability.⁹

III. Address the Widespread Abuse of Most Favored Nations provisions

In commercial agreements, a “most favored nation” (MFN) provision is a contractual provision in which a seller promises a buyer that it will not offer better terms (typically on price) to other buyers. When applied in the context of internet platforms, the use of MFN provisions can be particularly pernicious. Especially in cases in which platforms serve as intermediaries between end consumers and service providers, MFNs can raise prices and facilitate collusive and exclusionary conduct.¹⁰

U.S. antitrust authorities, including the FTC, have brought actions against firms wielding MFN provisions in an anti-competitive manner.¹¹ I applaud past enforcement actions against anti-competitive MFNs, but enforcers must continue to be vigilant in policing internet platforms’ use of these provisions. Because MFN provisions—particularly in a platform context—harm both consumers and competition, we urge the FTC to subject MFN provisions to greater scrutiny in today’s changing economy.

⁹ See, e.g., David N. Cicilline and Terrell McSweeney, “Competition is at the Heart of Facebook’s Privacy Problem,” *Wired* (Apr. 24, 2018), <https://www.wired.com/story/competition-is-at-the-heart-of-facebooks-privacy-problem/>; Joshua Gans, “Enhancing Competition with Data and Identity Portability,” *Brookings Institution* (June 13, 2018), available at: <https://www.brookings.edu/research/enhancing-competition-with-data-and-identity-portability/>; Luigi Zingales and Guy Rolnik, “A Way to Own Your Social-Media Data,” *New York Times* (June 30, 2017), <https://www.nytimes.com/2017/06/30/opinion/social-data-google-facebook-europe.html>.

¹⁰ Jonathan B. Baker & Fiona Scott Morton, “Antitrust Enforcement against Platform MFN,” *Yale Law Journal* 127, no.7 (2018): 2176.

¹¹ The FTC entered a consent order against a Tennessee-based pharmacy service administrative organization, enjoining the use of MFN provisions, claiming that the provisions facilitated cartel pricing. In re RxCare of Tennessee, Inc., 121 F.T.C. 762 (1996). The Department of Justice has also enjoined the use of MFN provisions in the healthcare and digital goods markets. See, e.g. *United States v. Delta Dental of Rhode Island*, 943 F. Supp. 172 (D.R.I. 1996) (holding that MFN used by dominant dental carrier discouraged competitive pricing from market entrants); *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015) (holding that Apple’s use of an MFN in the e-book market violated Sherman Act § 1).

IV. Vigilantly Apply the Antitrust Laws in Two-Sided Markets

The Supreme Court recently ruled for American Express in *Ohio v. American Express Co.*¹² In *American Express*, 11 state attorneys general brought a claim against American Express for their use of “anti-steering provisions.” These provisions effectively gag merchants by preventing them from informing or encouraging consumers to use credit cards with lower transaction costs. This case is particularly important because American Express, like many internet platforms, is a two-sided market, meaning American Express serves two separate but related sets of consumers—merchants and cardholders.

The Court held that American Express’ anti-steering provisions were not a violation of the antitrust laws. The Court developed a novel argument that, when analyzing such a case, the Court did not need to separately analyze the impact of the anti-steering provisions on cardholders or merchants. Rather, the Court treated both sides of the transaction as the market of interest. In other words, the Court decided that showing harm to merchants alone was insufficient. Under the terms of the Court’s novel market definition, the states failed to meet their burden in showing substantial harm.

I disagreed with the Court’s ruling. First of all, the Court flagrantly ignored the facts produced at trial.¹³ Second, the requirement that courts look to both sides of the market simultaneously is at odds with prior rulings.¹⁴

While I question the Court’s decision, I also recognize that the ruling does not apply to all firms serving multiple sets of consumers. I hope the FTC recognizes the case’s nuances as well and does not avoid enforcement actions and legal challenges in light of the decision. Given the narrow scope of the ruling, I urge the FTC to recognize that they still have a duty to police the actions of firms serving multiple sets of consumers. Even in a post-*American Express* world, the FTC must be vigilant in policing the misconduct of platforms.

Conclusion

I welcome this opportunity to help evaluate whether our antitrust and consumer protection laws are adequate to respond to today’s changing economy. The growing prevalence of technology platforms present fresh challenges to enforcers and regulators. I hope that this formal self-reflection will lead to stronger and more robust enforcement of our laws. As you conduct your review, I hope you take these issues seriously and address them in your upcoming hearings.

¹² *Ohio v. American Express Co.*, 138 S.Ct. 2274 (2018).

¹³ The Supreme Court claims that American Express “uses higher merchant fees to offer its cardholders a more robust rewards program.” *American Express* at 2278. However, facts produced by the U.S. District Court of the Eastern District of New York show that merchant fee hikes far outstripped increases in the value of cardholder benefits. *U.S. v. American Express Co.*, 88 F.Supp.3d 143, 215 (EDNY 2015).

¹⁴ *American Express* at 2295 (2018) (Breyer, J., dissenting) (citing *Times-Picayune Publishing Co. v. United States*, 245 U.S. 594, 610 (1953) (holding that antitrust courts “should begin its definition of a relevant market by focusing narrowly on the good or service directly affected by a challenged restraint.”)).

Sincerely,

Richard Blumenthal
United States Senate