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Federal Trade Commission
Office of the Secretary
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Comments of ACT | The App Association to the Federal Trade Commission on Competition and Consumer Protection in the 21st Century (Question 3: "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")

I. Introduction and Statement of Interest

ACT | The App Association (App Association) appreciates the opportunity to submit views to the Federal Trade Commission (FTC) to inform its hearings on whether broad-based changes in the economy, evolving business practices, new technologies, or international developments might require adjustments to competition and consumer protection enforcement law, enforcement priorities, and policy,[1] specifically regarding "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." The potential for societal benefit from the internet of things (IoT) —an all-encompassing concept that includes everyday products that use the internet to communicate data collected through sensors— is vast, and we have yet to see the exciting new innovations and efficiencies it will create. Moreover, apps hosted on mobile platforms are leading the charge for this IoT revolution.

The App Association represents more than 5,000 small and medium-sized app development companies and technology firms across the globe. The world has adopted mobile technology faster than any other innovation in human history. This dynamic app ecosystem continues to produce more innovative and efficient solutions that leverage mobile technologies to drive the global digital economy across modalities and

[1] Federal Trade Commission, *Hearings on Competition and Consumer Protection in the 21st Century*, Notice of Hearings and Request for Comments, 83 FR 38307 (August 6. 2018).

segments, augmenting consumer interactions and experiences throughout their personal and work lives. The App Association appreciates the opportunity to comment on this topic because our members use mobile platforms (e.g., Apple's App Store or Google Play) to provide their innovative products to consumers.

Additionally, we seek to illustrate the symbiotic relationship between apps and mobile platforms because the relationship affects our members directly. Specifically, we demonstrate how mobile platforms provide app developers with:

- **lowered overhead costs,**
- **greater consumer access,**
- **simplified market entry, and**
- **strengthened intellectual property (IP) protections.**

America's measured regulatory framework has enabled platforms to provide market-driven, diverse pricing structures for small business app companies. App developers have autonomy on platforms to dictate their own marketing and pricing models because of this procompetitive agency-sale relationship. Thus, antitrust agencies, like the FTC, must ensure that the integrity of this relationship remains strong to propel the United States into the next generation of innovative technologies and services.

II. The Symbiotic Agency-Sale Relationship Between Mobile Platforms and App Developers

The relationship between platforms and app companies is mutually beneficial, and one that should be fostered and supported. Not only do platforms provide app companies with secure market access, consumer trust, developer autonomy, dispute resolution, and meaningful consumer analytics, but they also provide a vital resource to bring the ingenuity and innovations of app companies to consumers around the globe. Further, the developer-platform partnership is procompetitive and lowers costs for consumers. These relationships provide app developers with a significant amount of disintermediation to reach consumers around the globe without having the developer forfeit the ability to control their business and pricing structure.[2]

[2] *See* Deloitte, *The App Economy of the United States: A Review of the Mobile App Market its Contribution to the United States*, Report (2018) (finding that "app stores do not set the prices of apps, this decision being the sole prerogative of developers") (Deloitte Study).

A. Platforms Lower Overhead Costs that Simplify Market Entry

Before centralized platforms, app developers were forced to absorb significant costs and manage various relationships to distribute their product to a wide consumer base.[3] Much more complex than a direct developer-consumer exchange, software companies used distributors to reach and engage with end users. Developers had to sacrifice valuable time from product development to establish relationships with distributors and were beholden to strict and costly rules even before they made their products available to consumers. Today, the app economy represents $568.47 billion of the U.S. economy and has 317,673 companies active in the U.S. mobile app market; the app economy is also responsible for creating 5,744,481 American jobs.[4]

Before the advent of mobile platforms, independent software developers either paid to offload the overhead to a publisher or absorbed the cost and uncertainty of sales internally. These costs were formidable barriers to entry that impacted hundreds of thousands of software developers and companies around the world; thus resulting in higher prices and fewer choices for consumers. While the concept of mobile platforms existed in both BlackBerry and WindowsCE, it did not gather steam until 2008, when Apple paired its then-new iPhone with an integrated application storefront. Multiple companies quickly followed Apple's direction and launched stores or marketplaces designed for various products. This created an entirely new internet-enabled economy that incorporated small businesses and reduced financial and temporal costs for developers.

As alluded to earlier, software companies incurred an extraordinary financial burden to bring their products to market before the introduction of mobile platforms. For instance, they had to engage in costly and time-consuming marketing campaigns to establish consumer trust and contract others to process financial transactions for them.[5] Platforms have since created a one-stop shop that mitigates these costs so that more small businesses, like our members, can take part in the app economy.[6]

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[3] *See* Timothy F. Bresnahan, Jason P. David, and Pai-Ling Yin, *Economic Value Creation in Mobile Applications*, UNIVERSITY OF CHICAGO PRESS (July 2015). Available at http://www.nber.org/chapters/c13044.pdf (writing "[t]he rapid growth of mobile devices has been accompanied by an equally rapid growth in app development, in substantial part because platform providers Apple and Google have lowered the costs of development and distribution of mobile applications.").

[4] *See* Deloitte Study.

[5] Adam Jaffe & Benjamin Jones, *The Changing Frontier: Rethinking Science and Innovation Policy*, National Bureau of Economic Research (2015) Available at https://books.google.com/books?id=QdopCwAAQBAJ&pg.

[6] *See id.* At p. 238 (2015) (writing "[t]he rapid emergence of many demanders, together with the very low barriers of entry created by the platform providers, has led to a rapid and very substantial expansion in the number of overall apps.").

In the late '90s, a software company had to spend about $10 million just to get up and running.[7] Today, the advent of free or inexpensive cloud services, internet connectivity, and software tools have enabled small-business app developers to bring their innovative products to market with just a $100,000 check.[8] Platforms help lower the barrier to entry for small app companies by shouldering the costs of privacy measures, security, and intellectual property protections for their users, thereby freeing up substantial amounts of capital that startups can use to build and grow their business. With lower costs and barriers to entry, both fledgling and established app developers can succeed. For example, French educational app company L'Escapadou secured 1.3 million downloads and earned more than $1.5 million from app sales.[9] Founder Pierre Abel specialized the language, content, and pricing of each of his apps based on consumers and market needs and marketed them on different platforms to reach a variety of consumers around the world. L'Escapadou attributes its success to the centralized nature of platforms.[10]

This lower overhead is why the app economy is highly competitive and one of the most innovative spaces on the internet-enabled ecosystem. For example, Apple's App Store provides a service that eases financial transactions (such as billing to consumers) and provides consumers assurances that all the apps sold are compliant with relevant tax codes—something that software developers had to handle themselves. Popular platforms also may choose to absorb credit card fees to prevent them from transferring the cost to the developer. Without this platform-enabled service, it would fall on the app developer to handle each transaction; falling outside the bounds of an app developer's core competencies which, at times, is almost exclusively limited to writing the code for their app.

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[7] *See* TEDx Talks, The New Startup Economics: Stephen Forte at TEDxHKUST, Youtube (Apr. 2, 2013), https://youtu.be/t4IiYEtJU_s.

[8] *See id.*

[9] Steve Young, *Making $1.5 Million with Educational Apps with Pierre Abel*, App Masters (Apr. 30, 2015) Available at: http://bit.ly/2hgDzZH.

[10] *See id.*

B. Platforms Give App Developers Instant Access to New Markets

Successful platforms, like Apple's App Store or Google Play, have changed the app ecosystem by providing app developers ubiquitous access to a broader swath of consumers. Platforms provide a centralized framework for app developers to engage and secure visibility with the 3.4 billion app users worldwide.[11] For instance, Apple's App Store is available in 155 countries around the globe.[12] By companies hosting an app company's product on their respective mobile platforms, that app company now has immediate access and reach to the same markets as the platform company for a nominal fee without having to build a brick-and-mortar store or pay for an expensive an international ad campaign.

C. Before Platforms, App Developers Struggled to Build Trust with End Users

In the internet economy, end user trust – an established relationship between the app company and consumer where the consumer demonstrates confidence to disclose otherwise personal information to an app company – is extremely difficult to earn and maintain, especially when a single incident (e.g., a breach or cyber attack) can easily and permanently damage a business's trust with their customer. However, for a small business app developer, this event can easily spell death for their company. While brick-and-mortar retailers may be able to operate without the use of most of a customer's personal information, app companies need different types of personal information to develop and provide their innovative services to customers (e.g., geolocation data, financial information, health data). App companies are also different in that, without end user trust, consumers are unlikely to disclose essential information to an app company. Therefore, consumer trust and willingness to share information are critical for an app developer to succeed in the market, more so than for brick-and-mortar.

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[11] Hugo Delgado, *The App Economy Forecast: A $6 Trillion Market in the Making*, App Annie (2017) Available at: http://bit.ly/2xfDqtB.

[12] Ketan Pratap, *Apple Says Developers Earned Over $70 Billion Since App Store's Launch*, Gadget 360 (Jun. 1, 2017) http://gadgets.ndtv.com/apps/news/apple-says-app-store-earned-developers-70-billion-since-launch-1706781.

Even before the advent of digital commerce, consumer trust was a critical aspect of a software developer's ability to bring a product to market.[13] Prior to platforms, software developers often had to hand over their products to companies with a significant reputation in order to break through the trust barrier. Even "shareware" products that could be digitally distributed would end up partnering with trusted brands to gain consumer trust.[14] For example, in 1996, developers of the computer game *Ultimate Doom* contracted with Chex cereal to augment its consumer base. Developers converted their game software to create the child-friendly game Chex Quest.[15] Today, most games, like *Ultimate Doom*, are free to download on platforms in app form like Apple's App Store, Google Play, or game-specific, independent platform Steam. These platforms not only lower cost but can reach consumers beyond those who buy a particular brand of cereal or trusted product. Now, platforms are the trusted product.

But the trust mechanism provided by the platforms is not merely an aspect of size. Consumer trust requires constant maintenance and vigilance because a loss of trust hurts platforms and the developers that depend on them.[16] The immediate consumer trust embedded into platforms' brands is worth billions of dollars.[17] Platforms' trusted brands allow developers to clear the critical hurdle of achieving trust from consumer adoption.

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[13] Erik Brynjolfssn & Michael Smith, *Frictionless Commerce? A Comparison of Internet and Conventional Retailers*, MIT (1999) Available at: http://bit.ly/2yrEJ8W (writing "[r]ecent scholars have argued that trust is among the most important components of any effective Internet marketing program.").

[14] Stew Chyou, *The History of Shareware*, Thunderbolt (May 5, 2011) Available at: http://bit.ly/2xvPuJ7.

[15] *See id.*

[16] Zack Whittaker, *Millions of Steam game keys stolen after hacker breaches gaming site*, ZDNet (2016), Available at: http://zd.net/2byBRLV (reporting "[t]he data also includes an estimated 3.3 million unique site and forum accounts.").

[17] *The Economics Of Trust*, Forbes (2010), Available at: http://bit.ly/2wJr76Y (writing "[t]he reason why the U.S. is richer than Somalia is mostly not because of culture. The great thing about formal systems, when well designed, is that they make a little bit of public spirit, altruism or professionalism go a long way," says Paul Seabright, an economics professor at the University of Toulouse.").

D. Platforms Strengthen Intellectual Property Protections for App Developers

In the age of retail software distribution, companies struggled to secure and protect their intellectual property from theft and copyright abuse. Platforms provide an important framework for app companies to engage with consumers, but also assist in preventing infringement of app companies' intellectual property. For example, Apple's platform provides a content dispute mechanism that allows app companies to submit a claim to connect with entities that have allegedly violated their intellectual property.[18] While maintaining a database of all the apps it hosts, the platform provides a mechanism that reduces the hurdles companies must go through to tackle copyright infringement.[19] Without the dispute resolution mechanisms of platforms, app companies are often left with an untenable alternative: copyright infringement litigation in federal court. Federal litigation poses an oppressive burden on app developers, particularly small businesses with limited resources. Within these cases, the rightful owners of the copyright may be faced with several thousand dollars per month in legal fees, the expense of new license compliance, and months or years diverted from company matters, not to mention the cost if the litigation is unsuccessful.[20] Platforms provide a vital, cost-effective avenue for app developers and copyright holders to dispute and address intellectual property theft and infringement.

III. The FTC Should Develop a Framework that Inspires and Encourages More Investment

The App Association implores the FTC to observe and uphold the widely-accepted elements of competitive harm: 1) a clear definition of the relevant market; 2) a clear demonstration of market power; and 3) abuse of that market power. Therefore, we offer the following considerations for the FTC's review:

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[18] Apple Inc., *iTunes App Store Content Dispute*, Available at: http://apple.co/2xrvK9c.

[19] *E.g.*, Dan Russell-Pinson, *OMG! Someone Copied My App. What Do I Do Now?*, ACT | THE APP ASSOCIATION (August 30, 2017) Available at: http://bit.ly/2wKvm23.

[20] Kelly Johnson Swan, *United States: The True Cost of Defending Against Copyright Infringement Litigation*, Scott & Scott LLP (August 19, 2015) Available at: http://bit.ly/2xsdOvf.

A. *The Meaningful Distinctions Between Platforms When Defining the Platform Economy's Relevant Market*

The FTC must first observe the meaningful distinctions of various online platforms. In the United States, monopoly enforcement under Section 2 of the Sherman Act requires a party to demonstrate that the defendant has dominant market power in the relevant market.[21] However, certain lower courts, particularly in the Ninth Circuit, have been cavalier in their interpretation of what constitutes a "relevant market," sparking concern from legal experts seeking to reconcile courts' determinations in the matter.[22] Most believe the definition of a relevant market "is the most critical tool in antitrust enforcement..."[23] but unfortunately, Congress did not provide courts with a test to determine an industry's relevant market.[24] In order to make this determination, courts will look to the elasticity of demand in the entire market, and the cross-elasticity of supply of substitutes.[25] In essence, a court must assess the availability of a substitute product for the customer—and whether the customer would favor the substitute product if there were a slight increase in the price of the main product—to determine the relevant market.[26] However, there is a lot of ambiguity in a product's elasticity, which may invite undisciplined interpretations that could defeat its purpose.

Moreover, the issue of relevant market assessment is further complicated by the Department of Justice's (DOJ's) Merger Guidelines (Guidelines). Scholars have long lamented the Guidelines and their effectiveness.[27] Before the Guidelines, three leading cases served as the bedrock for courts engaging in relevant market analysis.[28] Those cases are: 1) *Cellophane*; 2) *Brown Shoe Co. v. U.S.*;[29] and 3) *Grinnell.*[30] These cases represent the myriad ways in which courts define a relevant market and are incidentally cumbersome when applied to the internet economy.

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[21] *U.S. v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

[22] E.g., Robert Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 Colum. L. Rev. 1805, 1806-07 (1990).

[23] E.g., Pitofsky at 1806-07.

[24] See *Brown Shoe v. U.S.*, 370 U.S. 294, 321 (1962).

[25] *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956) [hereinafter Cellophane].

[26] *Grinnell*, at 571-72.

[27] Pitofsky at 1808 ("[m]any of the problems that have plagued definition of relevant market in the antitrust field can be traced to the inherent difficulty of measuring market power, and to the inadequate analysis used in three important Supreme Court decisions. Various problems have emerged as a result of the inconsistent approaches taken in these cases.").

[28] *See id.* at 1813.

[29] 370 U.S. 294 (1964).

[30] *See* Pitofsky, at 1813-16.

Though the internet provides remarkable economic growth and interconnectivity to the global community, it continues to befuddle judges and legal scholars in the antitrust context.[31] In fact, many courts are reticent to even attempt to define the relevant market in an internet context for fear of limiting the internet's expansive reach.[32] This inability to define the relevant market becomes even more problematic because the two premier antitrust agencies—the DOJ and the FTC—use these decisions to inform their enforcement actions.

Within the digital ecosystem, internet platforms differ widely based on the business model they maintain, the industries they serve, and the utility they provide.[33] The FTC should not conclude that a harm to digital trade exists until it better defines the various platform types and their respective business models. Without any substantive definition of a digital platform, the FTC would thereby ignore the unique structure and nuanced offerings of each service, which, in turn, encourages a monolithic interpretation of these entities. In doing so, the FTC would engage in a "one-size-fits-all" style regulation that would inevitably harm the utility and potential of all players in the ecosystem. We strongly urge the FTC to observe the unique type of service each platform provides when evaluating the relevant market for a firm operating in the platform economy.

For instance, eBay and Amazon provide digital marketplace platforms to enable consumers and companies to exchange goods effectively and efficiently. In many ways, their business model and the services they provide resemble traditional retail stores, like IKEA. This platform is starkly different from Google, a business where 90 percent of its revenue comes from advertising. Driven by an advertising business model, a search engine platform has more in common with TV stations and newspapers like the *Financial Times* than with retailers like Amazon. Whether through its search engine, its YouTube video platform, or apps on their Android operating system, Google's mobile platform is in the business of using targeted advertising to link consumers with the products they want or need. Advertising is also Facebook's revenue driver, but the social networking platform operates differently in how it gathers and handles information for its users. Apple is yet another entity – unique in its ability to provide consumers hardware like phones, tablets, computers, and watches, while also providing a reliable portal for innovative apps, products, and games through its platform.

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[31] *E.g.*, Jared Kagan, *Bricks, Mortar, and Google: Defining The Relevant Antitrust Market For Internet-Based Companies*, 55 NYL Sch. L. Rev. 271, 278 (2010) (writing "While newly emerging Internet companies may very well raise antitrust concerns, it is not certain how the relevant antitrust markets in which these companies operate will be defined. This is due to the fact that courts have not yet had much experience defining these markets. David S. Evans, the scholar who has predicted many of these antitrust issues, even recognizes that defining the relevant market for these Internet firms involves some uncertainty.").

[32] *E.g.*, *American Online, Inc. v. GreatDeals.Net*, 49 F.Supp.2d 851 (E.D. VA 1999) (holding "With respect to the relevant geographic market in which competition takes place, the Court finds that the Internet cannot be defined with outer boundaries. It is not a place or location; it is infinite. Internet is a "giant network which interconnects innumerable smaller groups of linked computer networks." The network "allows any of literally tens of millions of people with access to the Internet to exchange information.").

[33] *See Id.*

In the context of mobile platforms, companies like Apple and Google provide app developers an access point to consumers around the globe. However, they remain distinct from one another, especially regarding their respective business models and revenue generation models. For example, Google receives a large share of its revenue through selling anonymized data analytics, in part, by using third-party apps on its platform.[34] This is contrary to Apple's model, which receives almost all of its revenue from the sale of its devices (e.g., iPhone, iPad, and Apple Watch).[35] These distinctions are important because they greatly impact how and why platform companies engage with third-party app developers. The platform's business model dictates the curation and collection practices, which is why the FTC should make these necessary distinctions between platforms. Moreover, these functions are also dependent upon the source of the revenue stream.

It is essential that the FTC account for the nuanced and different offerings of each platform when drawing any conclusions and refrain from categorizing distinct platforms in a single group when considering regulations. Once the FTC makes those key distinctions, then we implore it to observe the following steps of the tried-and-true framework as articulated above.

B. FTC Should Demonstrate that the Platform Company has Clear Market or Monopoly Power

Market power and monopoly power are related concepts but are not the same. As the FTC is aware, the Supreme Court defined market power as "[the seller's] ability to raise prices above those that would be charged in a competitive market."[36] However, the Court defined monopoly power as a firm that has "power to control prices and exclude competition."[37] Thus, courts distinguish the two concepts as a matter of degree, monopoly power being higher. However, a firm's mere possession of either market power or monopoly power is not enough for the FTC or any other party to find a competitive harm; it must demonstrate, in part, that the firm unfairly values its products that yield harms to consumers and competitors.

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[34] Statista, *Google's Ad Revenue from 2001 to 2016* (2016) https://www.statista.com/statistics/266249/advertising-revenue-of-google/.

[35] Skye Gould, *Here's Where Apple Really Makes Money*, Business Insider, http://www.businessinsider.com/heres-where-apple-really-makes-its-money-2015-7 (22 Jul. 2015, 2:10 PM).

[36] *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 109 n.38 (1984)

[37] *United States v. E. I. du Pont de Nemours & Co. (Cellophane)*, 351 U.S. 377, 391 (1956).

In the platform economy, regulators and legal authorities struggle to define what a mobile platform's product is. There are some concerning elements within the Supreme Court's opinion in *Ohio, et al. v. American Express, et al.*[38] that should cause many developers pause. This is especially true if the Court intends to categorize mobile platforms (e.g., Apple's App Store or Google Play) as a two-sided market in the context of consumers purchasing mobile apps. This is because, in fact, they may not be, particularly if the transaction is indeed the product as it was for American Express. In the context of mobile platforms, the transaction is not the platform's "product" as defined by the Court in *Amex*, because platforms are not directly interfacing with consumers the same way a credit card company does for purposes of completing a transaction when consumers purchase third-party apps.

At this point, it is unclear whether the Court intended their test in the case to apply to the mobile platform market because their test is made specifically for two-sided credit card markets and not ones where there are at least three distinct markets (possibly four if one considers wireless carriers) to perform one transaction. The relevant markets for mobile platforms are: 1) the consumer to credit card company market; 2) the platform company to app developer market; and 3) the credit card company to platform company market. In the context of a credit card company, Visa or Mastercard charges a rate to both the consumer (i.e., the interest from the monies it credited to the card user) and the vendor (i.e., the card's vendor fee) to manage the one transaction. However, mobile platforms do not operate that same way, because, unlike the vendor who alone dictates the price for everything in her store, platforms do not have a say about the app developer's price for his or her app; the app developer does. Additionally, mobile platforms only impose fees on app developers it hosts and does not charge the consumer separately for every transaction when downloading an app where the developer has either imposed an upfront subscription fee or subsequent in-app purchases. The obvious question then becomes what does the Court consider the "transaction" and who is actually curating it for purposes of determining competitive harm. When purchasing an app, at least three parties are facilitating this transaction; the platform company manages the consumer's purchase for the developer who originally set the price for the app and the consumer's credit card company manages the transaction for them.

If a court interpreted this decision broadly to include mobile platform markets, it could make buyers of apps the sole customer of platforms.

[38] No. 16-1454 (decided on Jun. 25, 2018). Available at https://www.supremecourt.gov/opinions/17pdf/16-1454_new_1a72.pdf (*Amex*).

C. Determining Whether There is a Harm to Consumers or Competition

Section 5 of the FTC Act provides the agency with two distinct jurisdictions, consumer protection and competition, to protect consumers against harmful business practices from certain firms, excluding those that fall within the statutory exemptions (e.g., common carriers). Given its broad statutory jurisdiction, the App Association encourages the FTC to exercise regulatory humility when deciding whether to enter into enforcement proceedings against firms operating within the platform economy.

i. Unfair Acts or Practices

A prong of the Commission's "consumer protection" jurisdiction, the authority to include *unfair* acts or practices has created a lot of controversy. Congress attempted to constrain the FTC's discretion under this prong by clarifying in 1994 that an act or practice is only "unfair" if it is *likely* to cause *substantial* injury and if that injury is not outweighed by countervailing benefits.[39] Previous Commissions have implemented enforcement actions on unfair acts without first demonstrating that the acts caused, or were likely to cause, a substantial injury. We believe these actions also run afoul of the Commission's own policy regarding its analytical framework for enjoining an unfair act or practice.[40]

Section 5(n) provides the Commission with a balancing test to check its enforcement authority over unfair business practices. However, previous FTC chairmen and commissioners interpreted "likely" to merely mean "possible," allowing the FTC to include commercial activity that could result in theoretical harms. The defendants' in such proceedings reluctance to challenge these determinations in court, and the FTC's ability to stray from its statutory constraints, threatens innovations whose effects are not fully understood, including the evolving IoT ecosystem. As a result, we agree with then-Chairwoman Ohlhausen that the Commission should not deem an act or practice unfair unless it is injurious in its net effects. We also support her efforts to hold the Commission to this innovation- and consumer-friendly approach.

Given the procompetitive relationship our members have with mobile platform companies, we strongly encourage the Commission to avoid ensnaring platform companies in costly federal proceedings to fight ill-defined allegations of "unfair" acts or practices. These burdensome, onerous, and often unwanted consent decrees jeopardize both the success of the platform company and the small business app developers that leverage their services to promote the ever-growing IoT ecosystem.

ii. Section 5: Unfair Methods of Competition

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[39] H.R. 5510 114 Cong. (2016).

[40] *See* Fed. Trade Comm'n, FTC Policy Statement on Unfairness, https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness (last visited Oct. 19, 2017) (writing "To justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.").

Section 5 of the FTC Act, as well as the Sherman and Clayton Act, prohibits unfair methods of competition. Congress intentionally did not define specific acts or practices that would constitute unfair methods of competition.[41] Rather, it left the authority with the FTC who would determine the question on a case-by-case basis.[42] The FTC uses the following principles in making an unfair method of competition determination: (1) the public policy underlying antitrust laws and consumer welfare; (2) whether the act or practice causes or is likely to cause harm to competition or the competitive process; and (3) if the Clayton or Sherman Act specifically address the competitive harm.[43] The underlying public policy consideration applied by the FTC enables it to bring unfair methods of competition claims without proof that amount to actual violations of the Sherman and Clayton Act.[44] The determination of whether an act or practice is likely to cause harm resembles that analysis done in unfair acts or practices and considers any compelling consumer or competitor efficiencies.[45] The Clayton Act addresses mergers and interlocking directorates (where the same entity is making business decisions for competing companies).[46] As amended by the Robinson-Patman Act of 1936, the Clayton Act also bans certain discriminatory prices, services, and allowances in dealings between merchants.[47] The Sherman Act outlaws "every contract, combination, or conspiracy in restraint of trade," and any "monopolization, attempted monopolization, or conspiracy or combination to monopolize."[48] The Supreme Court has said that all violations of the Sherman Act also violate the FTC Act.[49] While the FTC cannot technically enforce the Sherman Act, it can bring cases under the FTC Act against the same kinds of activities that violate the Sherman Act.

In the United States, courts are attempting to address the similar types of questions related to measuring indirect network effects within the platform market.[50] The seminal

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[41] Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, Fed. Trade Comm'n, https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf (FTC UMC Statement).

[42] *Id.*

[43] *Id.*

[44] *F.T.C. v. Brown Shoe Co*., 384 U.S. 316, 321 (1966). The Supreme Court, relying on legal precedent and presumed legislative intent, reaffirmed that the FTC can declare practices unfair even though such practices may not actually violate policies within the Sherman and Clayton Act[44] – suggesting that Section 5 has broader reach than antitrust laws.[44]

[45] *See* FTC UMC Statement.

[46] The Antitrust Laws, Fed. Trade Comm'n, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws.

[47] *Id.*

[48] *Id.*

[49] Dep't of Just. Manual Comment. 7-1.100D.

[50] *E.g., Ohio, et al. v. American Express, et al.*, No. 16-1454 (decided on Jun. 25, 2018). Available at https://www.supremecourt.gov/opinions/17pdf/16-1454_new_1a72.pdf.

issue is that platforms serve as an intermediary for two distinct but entangled markets that economists commonly describe as a two-sided market. Generally, the hallmark of a two-sided market is an intermediary platform providing a service to consumers and enterprises to accomplish one transaction. For example, a credit card company (e.g., Visa or Mastercard) strikes a deal with both merchants and, separately, with consumers to facilitate a transaction to purchase products in stores accepting the credit card company's service.

The United States Supreme Court recently held that state agencies cannot examine only one side of the market in which the platform participates to evaluate whether there is an abuse of competition.[51] It must examine both. For example, in context of a credit card company described above, the competition agency cannot make the raising of rates on the merchant market its sole criterion for an affirmative demonstration of an abuse of power; it must further analyze the effects on the consumer market as well. In the event a credit card company imposes an alleged surcharge on merchants, the agency must determine if that surcharge indirectly affects consumer choice in that two-sided market.

Because mobile platforms have similar, but not identical, traits, the FTC should examine both sides of the mobile platform's market (i.e., app developers and consumers) before determining that there exists an issue with competition in that two-sided market.

[51] *See id.*

IV. Conclusion

The App Association appreciates the opportunity to provide these insights and looks forward to working with the FTC and its staff on this important issue.

Sincerely,

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