PRIORITIZING DIGITAL PLATFORMS FOR ANTITRUST REVIEW

CENTER FOR DEMOCRACY & TECHNOLOGY

CENTER FOR DEMOCRACY & TECHNOLOGY

Prioritizing Digital Platforms for Antitrust Review

April 2, 2020

Digital platforms are all the rage. Most of us use them all day long, and at times of crisis, they matter all the more. We check our social media apps in the morning, buy Halloween costumes from retail websites, and plan our next vacation apartment rental while browsing on a home-sharing platform during our lunch breaks. We listen to music on our commutes home on music platforms, dash out to run an errand via a car sharing service, and watch movies on streaming platforms after dinner. For many of these platforms, the fact that they have massive scale is part of their inherent value to us. If your college friends were scattered among ten social media platforms, would you check all ten to see back-to-school pictures of their kids?

But that inherent value that scale brings comes with a downside: platforms can become so big that they monopolize a sector. Having fended off all of their competitors, the resulting platform winner can raise prices, degrade service, skimp on data security, or otherwise perform worse than it would if it faced competitive pressures.

Our antitrust agencies are hearing loud and clear that they should do *something* about digital platforms, especially those that face waning competition. Big tech and antitrust have been on the front page of our national newspapers for weeks at a time. House and Senate subcommittees are holding hearings on the topic. Two unprecedentedly enormous coalitions of state attorneys general are investigating digital platform companies. Presidential candidates on the campaign trail have been talking about what they would do if elected to address the rise of dominant platform businesses.

How, though, should our nation's antitrust enforcers figure out what the *something* is or where, among all the digital platforms, they should start? There are thousands of different digital platforms, and they have many different business models. Our nation's antitrust enforcers cannot possibly investigate them all.

This white paper offers some answers to the question of where our antitrust agencies should start as they tackle the competition issues posed by large digital platforms. Specifically, we identify characteristics of ones that raise significant competition policy concerns. This paper hopes to inform the discussion about when digital platforms and their conduct should face scrutiny by the Federal Trade Commission, the Antitrust Division at the Department of Justice, and state attorneys general.

Antitrust enforcement actions are, by their very nature, backward-looking because they challenge past conduct. Those enforcement actions are incredibly important because they establish the legal framework for other businesses too. But to support a digital economy of the future that works for everyone, enforcers and policy-makers should not just look in the rearview mirror. Instead, they must anticipate how markets will develop and shape those developments in ways that are pro-consumer. Thus, this paper uses the same characteristics that are likely associated with competition-thwarting conduct by large digital platforms to suggest forward-looking frameworks and solutions that will promote competition as the digital economy advances.

To address these issues, this white paper proceeds in three parts:

1. We briefly describe network effects and competition regulatory challenges associated with digital platforms.
2. We draw on past studies to identify characteristics that likely indicate potential competitive problems as a way of helping antitrust enforcers prioritize their investigative work on digital platforms.
3. We use those same principles to suggest areas in which various stakeholders might agree to a set of best practices to reduce competitive concerns among digital platforms.

A note on terminology: we use the term "digital platform" to mean a company that aggregates and connects those with products or services to consumers who seek to have them. This definition includes firms like Etsy, Orbitz, eBay, Amazon, Facebook, DoorDash, Lyft, OpenTable, Apple and Google's app stores, and StubHub. Many brick-and-mortar retailers with online presences (hence, most brick-and-mortar retailers) also qualify under this definition, e.g., Walmart.com brings third-party sellers together and offers products to online shoppers. For some policy matters, a precise definition is essential, but the issues discussed in this white paper are amenable to a more flexible definition of "digital platform." This paper does, however, focus on digital platforms that are primarily consumer-facing[1], not business-to-business platforms. Sometimes, but not always, a digital platform's services are free for consumers.

[1] This paper focuses on services that intentionally aggregate sellers and buyers, not those that may incidentally do so because, for example, they may allow users to purchase other user-generated content as an aside to another primary business.

CENTER FOR DEMOCRACY & TECHNOLOGY

Part 1: The Good, Bad, and Ugly of Digital Platforms (From a Competition Perspective)

For many digital platforms, the value of the platform is directly tied to its scale and size. Consider house-sharing platforms, like VRBO and Airbnb. When you're searching for an apartment to rent on your next vacation to Chesapeake Bay, you'd probably rather use a platform that has a large number of listings across a broad array of variables (e.g., size, price, waterview, accessibility, pet-friendliness). The platform is inherently more valuable to you if it has size and scale. Similarly, when you're looking for a reservation for Valentine's Day, you prefer to use a platform that has all the restaurants in your area, or anywhere you might be willing to travel, and full access to all of those restaurants' inventory. To use the language of economists, there are network effects associated with the platform's size. In the examples of home rental and restaurant reservation platforms, that effect occurs on both sides of the platform: the buy side and the sell side.[2]

But from a competition policy perspective, there is an obvious downside to the direct network effects: it favors platforms that get very large, which makes it harder for small platforms to gain a toehold to compete. Many competition policy experts refer to this as a "winner take all" market. The existence of direct network effects benefit the incumbent to the detriment of would-be challengers. Without the pressure of small platforms to challenge their dominance, large platforms can become competitively complacent. That competitive complacency can manifest itself in the form of sluggish innovation on the platform, higher prices, or direct quality degradation, such as failure to safeguard sensitive data. It may also engage in conduct that is competitively suspect, such as designing its technology and business practices to make it hard for customers to switch platforms.[3]

It is really quite simple: platform growth benefits users in a virtuous cycle at first, until it spirals out of control into a vicious cycle that harms users. The trick is to spot when the cycle changes from virtuous to vicious.

In the United States, our antitrust laws emphasize enforcement, not direct regulation. There is no government agency tasked with identifying that virtuous to vicious tipping point for digital platforms. (Many have observed that government agencies are notoriously unskilled at identifying such moments

[2] Economists speak of both direct and indirect network effects. Direct network effects stem from the benefits of having more users on the platform, such as on a social media platform. Indirect network effects flow across various sides of a platform, that is, having more consumers on a shopping platform makes the platform more valuable to sellers, and vice versa. *See* Report from the Committee for the Study of Digital Platforms at 15, available at https://www.judiciary.senate.gov/imo/media/doc/market-structure-report%20-15-may-2019.pdf

[3] For more discussion of switching, lock-in, and related issues, see part 2.

for regulatory intervention. Others have noted that for government agencies to have such power would require an act of Congress.)

That lack of regulatory power does not, however, mean that our hands are tied when it comes to the potentially pernicious effects of dominant digital platforms. Antitrust enforcement actions in the form of court cases carry the potential for huge financial penalties and forced changes to business models. If antitrust enforcers identify anticompetitive conduct and prosecute it, other large platforms are likely to change their ways voluntarily, lest they be the next target of an enforcement action. In this way, antitrust enforcers can affect the broad swath of digital platforms with similar business models, but doing so requires that they identify the offending types of conduct, prosecute it thoroughly and repeatedly, and that they win those cases in court.

If our government antitrust enforcers want to have this positive effect on the digital economy, they will need to bring many more antitrust cases. That would require a significant change in the way the antitrust agencies have acted over the last three decades. During that time frame, the federal government has brought very few cases challenging dominant companies, and it has litigated (as opposed to settled out of court) even fewer. The same pattern is true for the states, all of which have antitrust enforcement powers but most of which have not used it.

The next section describes the characteristics of dominant platforms that are most amenable to increased enforcement activity.

Part 2: When Good Platforms Go Bad

As discussed above, when platforms get larger and more powerful due to positive network effects, users usually benefit. But when they tip into that vicious cycle of using market power to exclude competition, users usually suffer. It can be difficult to discern between the two, as either could look like hard-nosed competition.

Past studies have examined possible concerns associated with dominant platforms. We draw from that body of work to form a roadmap for antitrust enforcers, to help them discern between aggressive competition that is beneficial and aggressive conduct that excludes competition and is harmful. To cut to the chase, antitrust enforcement in this area should focus on powerful platforms that exhibit four characteristics: (1) low switching rates, (2) single-homing, (3) actual or attempted market power extensions, and (4) distorting information availability.

***Switching*.** When companies fear that their customers might switch to a competitor's offering, they work harder to keep the customers. In working harder to keep the customer, they lower prices, improve quality and service, and innovate. That is a fundamental tenet of competition policy. A case in point: Amazon announced a new one-day shipping program on April 25, 2019. On May 14, Walmart announced its new one-day shipping program. That's competition at work.

There are some digital platforms that make switching easy and others that do not. Antitrust enforcers should examine switching rates as a screening tool for competitiveness. Where there are high degrees of switching, there is a lower likelihood that the platform is acting anticompetitively. But if very few customers switch, that is an indicator of a potential competitive problem.

In addition to looking at quantitative data on switching, antitrust enforcers should consider whether the digital platform engages in conduct that locks in customers. For example, a platform might try to lock in customers by requiring multi-year contracts with heavy termination fees. That lock-in can cause competition concerns because it insulates the platform from the fear that the customer will switch to a competitor's offering.

***Single- or multi-homing*.** Some platforms encourage or require users to use the platform exclusively. When users are exclusive to one platform in the market, we call it single-homing. Other platforms allow users to use the platform and its competing platforms, which is called multi-homing. By way of illustration, when you call for an Uber ride, the car that picks you up will probably have both Uber and Lyft signs on it – in that case the driver is multi-homing.

Multi-homing allows users to shift between platforms. To continue the ride-sharing example, if a driver wants more money than Lyft is offering at that moment, she can switch over to Uber. Similarly, if a user sees that a planned fare is too expensive in Uber, he can switch almost seamlessly to Lyft.

Multi-homing is, in general, procompetitive. Users can dynamically shift among platforms, which puts a competitive pressure on each to respond to the other. Multi-homing can be a more powerful force for competitive good than high switching rates because the users do not just switch once; they constantly evaluate which platform is superior for their needs at a given moment. That pressure helps the platforms stay competitive on service, price, and innovation.

Many users multi-home on a variety of platforms. In addition to ride-sharing apps, we often multi-home for food delivery (Uber Eats, DoorDash, Postmates, etc.), travel planning (Orbitz, Travelocity, Priceline, Kayak, etc.) dating (many users are on Bumble, Hinge, eHarmony, Match, and Tinder at the same time), home-sharing (renters switch back and forth between VRBO and AirBnB), and

others. Because platforms with high levels of multi-homing tend to face meaningful competitive pressures, they are less likely to warrant antitrust scrutiny. Some types of platform businesses, like transaction-centered platforms, are more likely to benefit from multi-homing than others, like some social network platforms, depending on the types of scale benefits. In some cases, consumers multi-home with off-line providers in ways that can exert positive competitive pressures.

On the other hand, some platforms consciously put up barriers to multi-homing. In its complaint against Surescripts, an e-prescription platform, the FTC alleged that the company structured its contracts to restrict pharmacies from multi-homing: "Surescripts designed its new pricing to ensure that its customers would pay a higher price on all Surescripts's transactions unless they were 'loyal' to Surescripts, i.e., used Surescripts exclusively."[4] If that allegation is true, it is an example of a large technology platform trying to fend off multi-homing. The same strategy could be used to reduce multi-homing on other types of platforms. For example, a ride-sharing service could offer bonuses to drivers who logged a minimum number of trips on their platform, setting the minimum so high that drivers would find it very difficult to drive for another service. Similarly, delivery services like Postmates and DoorDash could try to restrict their couriers from working for other platforms. Such restrictions on consumer-facing platforms should raise competition concerns for antitrust enforcers.

Antitrust enforcers should view a high degree of multi-homing as an indication that a digital platform is less likely to engage in anticompetitive conduct. It is, of course, not a guarantee that a large digital platform is not abusing its market power. But holding all else equal, high levels of multi-homing are a positive indicator for competitiveness.

However, antitrust enforcers should be on alert when multi-homing platforms are wholly owned by the same corporate parent. For example, while many dating app users multi-home, many of those apps are owned by the same company. The Match Group owns 45 different dating apps, including Match.com, OkCupid, and Tinder. Common corporate ownership, especially when the apps are wholly owned by the same company, may reduce incentives to compete vigorously because profits ultimately go into a common pot. In those situations, the fact that users multi-home may not be as significant an indicator of the level of competition.

Market power extensions. There is a reason we call it "big tech" – constant market pressure to get larger and larger. One of the regular questions at tech companies' earnings calls with market analysts is

[4] FTC Complaint against Surescripts at paragraph 3, available at https://www.ftc.gov/system/files/documents/cases/surescripts_redacted_complaint_4-24-19.pdf.

how many active users they have. Indeed, many companies report on it regularly without even being asked.

- Facebook, in its 2019 third quarter earnings report, stated that it had 1.62 billion daily active users and 2.45 billion monthly active users, and noted that those figures were eight and nine percent higher year-over-year.
- Uber, in its 2019 third quarter earnings report, stated that it had 103 million monthly active platform consumers, up 26%.
- eBay, founded back in 1995, stated in its 2019 third quarter earnings report that it had 183 million global active buyers, up 4%.

This constant pressure to keep and gain users is a natural consequence of network effects. As we noted in the introduction to this white paper, many platforms are inherently more valuable if they achieve scale because of the benefits of network effects. And under U.S. antitrust law, being big is not presumably bad and is not illegal. Antitrust law is concerned with abuses of market power, not the mere acquisition of market power.

In addition to building their user base organically, platforms can expand into new types of services as a way of gaining users. A ride-sharing platform (Uber) might expand into food delivery (Uber Eats). An online bookseller (Amazon) might expand into electronics (Amazon). A payments provider (PayPal) might expand into e-coupons (Honey). These extensions can occur through expansion or acquisition.

Offering new products and services to users in a seamless fashion may be procompetitive. But there are opportunities for anticompetitive conduct, and enforcers should be attuned to those risks. Two in particular bear mention; both are examples of potential abuses of market power:

- *Data leveraging.* Many companies use data to improve. For example, companies can use data about when consumers shop to make sure they have enough customer service representatives available to help at peak demand times. Companies use data to identify bottlenecks in manufacturing processes. Data analysis is often essential to a firm's continuous improvement efforts.

  But data could also be leveraged in ways that harm competition. For example, if the ability to leverage data from one part of its business into another makes a firm so entrenched that it is very difficult for any new entrant to offer services in either business, those barriers to entry warrant examination.

- *Market power leveraging.* A firm that has market power in one side of its business might try to leverage it into another business. For example, a platform could require users to be customers of its new business as a condition of getting service in its original business. The antitrust laws have long barred such conduct. Any indications that digital platforms are trying to leverage power from one market to another should be a trigger for investigation by antitrust enforcers.

Distorting information availability. Lastly, one of the great virtues of the internet is that it puts information at our fingertips. It can also, of course, be used as a force for spreading disinformation. If digital platforms manipulate the availability of truthful information or promote disinformation as a means of achieving competitive advantages, that has the potential to distort competition. Consumers need truthful information to make informed purchasing decisions.

There are examples of disinformation affecting politics and elections, and that raises serious concerns. But the type of information distortion that should trigger antitrust concerns is different. It focuses on information available to consumers. In general, markets are more competitive when consumers have ready access to competitively-relevant information such as what is available, at what price, and for what quality. For example, a targeted campaign to post fake negative reviews for competitors could affect competition. Relatedly, suppressing truthful but potentially negative information on digital platforms distorts what information is available for consumers. This type of conduct has been alleged in a lawsuit (which the court dismissed in March 2020) against the real estate platform Zillow. According to that complaint, a group of prominent realtors paid Zillow to suppress Zillow's estimates of home values for their listings. That type of conduct can harm consumers directly, and it can also reinforce the market dominance of the preferred sellers.

Some digital platforms are in the business of providing information to consumers. For example, restaurant reservation platforms show consumers what reservation slots are available and then let consumers make reservations. If a restaurant wanted to thwart a competitor, it could – theoretically – cut a deal with the reservation platform to exclude the competitor's slots. (This is a hypothetical example only, and such a deal would undercut the network effects that stem from the app's fundamental business model.) Such a payment to distort the information available to consumers reduces consumer choice and could harm competition.

Antitrust enforcers should be attentive to the incentives that companies and digital platforms may have to suppress information, assess their competitive effects, and consider taking action[5] against

[5] The Department of Justice took action in a similar, non-tech, context against a hospital group in North Carolina that blocked insurance companies from sharing truthful information about competing hospitals' lower prices.

platforms that engage in such practices if competition is harmed. One challenge in bringing such actions is that such deals are often confidential, so antitrust enforcers should consider requiring disclosure – ideally, publicly – of any payments from companies to restrict consumer access to information that could distort competition. Enforcers can also send subpoenas to platforms that may have the incentive or ability to engage in anti-competitive information suppression so as to ferret out such misconduct.

Part 3: A Step Toward Improving Competition in Digital Platforms

Two approaches are key to addressing these issues - increased enforcement actions and greater transparency.

Enforcement. Dominant digital platforms should be subject to more antitrust enforcement actions. Our federal government has undertaken hardly any cases about potential abuse of market power by tech platforms, or any other sector of the economy. Indeed, official workload statistics from the Department of Justice's Antitrust Division show that in the years 2016-2018, it initiated only one single investigation into monopoly power by any company.[6]

But while we should ask the federal government to step up its antitrust enforcement activity against companies with market power, that is unlikely to be sufficient. Antitrust enforcement is notoriously slow and resource-intensive. The FTC and DOJ should increase their enforcement activity, but they simply do not have the resources to move far enough fast enough. We call on Congress to give them more resources, and on the agencies to prioritize bringing more cases challenging anticompetitive conduct by dominant platforms.

But there is also another avenue. Our antitrust laws also provide for something remarkable: what lawyers call "a private right of action." That means that any company or person injured in a way that the antitrust laws are designed to protect can sue for damages. By law, if damages are assessed by a jury, they are tripled, and the winning plaintiff also recovers his or her attorney's fees. That creates a massive incentive for private enforcement of the antitrust laws, and it is a distinguishing feature of American antitrust law compared to other legal regimes. If the government – either state or federal – is unwilling to increase its level of antitrust enforcement, then it is time for more private antitrust enforcement.

[6] The FTC has brought a handful of cases about abuse of monopoly power in that same timeframe, including cases against Qualcomm, Surescripts, and Vyera Pharmaceuticals, but the number of cases is still small.

Transparency. Part of that gap can be bridged by voluntary commitments by digital platforms on the four key areas described in this white paper: (1) switching rates, (2) single-homing, (3) market extensions, and (4) information availability. We urge digital platforms to consider adopting some or all of the following commitments around those topics.

Commit to disclose data. Antitrust enforcers, Congressional committees, politicians, reporters, and the public are all concerned about the increasing power of digital platforms, but the dearth of data on a variety of topics makes it hard to find the competition problems that many suspect plague this increasingly important sector of the economy. Commitments by digital platforms to report data on a quarterly basis on the following topics could both encourage discussions about competition and help identify areas of concern:

- How many new users the platform acquired (both consumers and, if relevant, vendors and suppliers)? To the extent possible, this data should be broken down by geography and segment.
- How many users has the platform lost? This data should also be broken down by geography and segment.
- To the extent the information is known (or estimated), for those users lost, how many switched to each alternative platform?
- To the extent known (or estimated), how many users single-home on the platform for its services, compared to how many are multi-homing?
- For platforms that offer more than one service, how many of its users for each service are also active users of the firm's other services? Does the firm offer incentives for those who use multiple services offered by the platform?

Commit not to suppress truthful information. We know relatively little about whether companies are paying digital platforms to suppress information. Digital platforms should:

- Disclose whether they accept requests to suppress truthful information that could be competitively relevant, and if so, whether they are paid to do so. Companies should also disclose how much of their platform is affected by such requests.
- Disclose whether they accept requests to degrade a competitor's results or listings, including not showing results for competitors and distorting rankings for a given company's products and services. If so, is the platform paid to do so? Again, companies should disclose the relative volume of such requests.
- Voluntarily commit that they will not accept requests to suppress competitively-relevant information or degrade third-party listings.

In addition, some companies may contractually bar suppliers, vendors, competitors, or employees from complaining to antitrust authorities about conduct that might be anticompetitive. Qualcomm was accused of imposing such silencing provisions in the FTC's recent case against it. This is a different form

of suppressing truthful information, and it should raise alarm bells. Digital platforms (and indeed, all companies) should pledge that they will not seek or agree to such restrictions. Otherwise, the antitrust enforcers may lose a valuable source of relevant information about abuses of market power.

Conclusion

Digital platforms have been called the "fourth industrial revolution," and they shape our global economy in increasingly important ways. Many digital platforms increase in value as they increase in size. This makes antitrust enforcement tricky: one must be able to identify when sheer size tips from pro-consumer to potentially anti-consumer. Our antitrust enforcers are tasked with identifying those moments for thousands of digital platforms that affect every sector of the economy. It is, truly, an impossible task.

But there are ways to simplify this task. If antitrust enforcers focus on indicia of competitiveness, it will help them find the moments when a platform's size tips into the anticompetitive realm. Those indicia: switching, multi-homing, market extensions, and information suppression can help antitrust enforcers initiate the right investigations and bring the right legal cases to promote competition and protect consumers.

There are, of course, other avenues for competition policy and digital platforms. We may need new thinking about when mergers are reportable, when to require data portability, or how to approach interoperability as the tangled ecosystem of digital platforms grows. But if antitrust enforcers in the U.S. and globally focus on the indicia described in this paper, they will increase the pace of their investigatory efforts and the value of their consumer-protective work.