

Testimony of Fiona Scott Morton¹

“Reining in Dominant Digital Platforms: Restoring Competition to Our Digital Markets”

Before the Senate Committee on the Judiciary, Subcommittee on Competition Policy, Antitrust, and Consumer Rights

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I. Introduction

The modern interpretation and application of U.S. antitrust laws has failed to preserve competition in today’s digital platform markets. While there are numerous problems with judicial interpretations of antitrust laws that deserve legislative attention,² there are also unique problems involving digital platforms that would require special attention even if judicial decisions in recent decades had not been so cramped. Digital platform markets suffer from a lack of new entry and expansion for a variety of reasons. Economies of scale and scope and network effects make it difficult for new entrants to reach the scale necessary to compete.³ Large digital platforms are also in a unique position to combine their unprecedented access to user data with

¹ Theodore Nierenberg Professor of Economics, Yale School of Management. I thank Yale students Michael Enseki-Frank and Natalie Nogueira for their expert assistance in preparing this statement.

² See Jonathan B. Baker et al., *Joint Response to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets*, Wash. Ctr. Equitable Growth (Apr. 30, 2020).

³ See generally Stigler Committee on Digital Platforms, *Final Report*, Stigler Center For The Study Of The Economy And The State 23-138 (2019) (“Market Structure and Antitrust Subcommittee Report,” Fiona Scott Morton, Chair), <https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf>; Jason Furman (Reporter), et al., *Unlocking Digital Competition: Report of the Digital Competition Expert Panel* (2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf; Jacques Crémer, et al., *Fairness and Contestability in the Digital Markets Act*, 40 Yale J. Regul. (forthcoming 2023).

sophisticated algorithms in order to exploit consumers and exclude competitors.⁴ Barriers to entry can be especially high when platforms take advantage of the behavioral biases of consumers, or when platforms modify API's or degrade interoperability in other ways in order to handicap rivals.⁵ These techniques often favor the status quo, or can be taken advantage of by the platform to make it difficult for entrants with superior offers to attract new consumers and achieve scale.⁶ Incumbent digital platforms are able to exploit structural characteristics of their markets, consumer behavior, and lax antitrust enforcement to acquire, maintain, and expand their market power.

More aggressive antitrust enforcement focused on digital market abuses should have started up a decade ago, but lack of understanding of the new technologies, lack of experience in matching the resulting strategies to established jurisprudence, as well as an increasingly hostile litigation environment, discouraged action. The antitrust enforcement agencies, state attorneys general, and private litigants are now working valiantly to dislodge the monopolies that have taken root in digital platform markets. But the success of their efforts is uncertain. Under modern antitrust jurisprudence, it may be difficult for the government to prevail. Even if the cases are successful, the litigation may take years to resolve, at which point it will be difficult for the courts to fashion remedies that are effective in restoring the lost competition. Consider that the Department of Justice's case against Google alleging anticompetitive behavior in general search, which was filed in October 2020, is not scheduled to go to trial until September of 2023.⁷ The government's cases generally will be tried to judges rather than juries, and so there will be additional time after trial briefing and for the judge to write an opinion, after which (we hope) there will be proceedings on remedies. And after all that, there will be appeals and possible remand of issues back to the district court.⁸ Even in the most optimistic of scenarios, the harmed

⁴ See Stigler, *supra* note 3, at 34-40; Fiona M. Scott Morton & David C. Dinielli, *Roadmap for an Antitrust Case Against Facebook*, 27 Stan. J.L. Bus. & Fin. 267 (2022); Gregory S. Crawford, et al., *Equitable Interoperability: The "Super Tool" of Digital Platform Governance*, 40 Yale J. Regul. (forthcoming 2023); Jacques Crémer, et al., *Special Advisors' Report on Competition Policy for the Digital Era*, European Commission at 2-3 (2019), <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

⁵ See, e.g., Susan Athey & Fiona Scott Morton, *Platform Annexation*, 84 Antitrust L.J. 677, 81 (2022) (observing that a dominant platform can cement its market power by reducing interoperability in ways that interfere with multihoming that might otherwise benefit rivals); <https://siepr.stanford.edu/publications/working-paper/platform-annexation>.

⁶ See Stigler Comm. on Digit. Platforms, *supra* note 3.

⁷ See Lauren Feiner, *DOJ case against Google likely won't go to trial until late 2023, judge says*, CNBC (Dec. 12, 2020), <https://www.cnbc.com/2020/12/18/doj-case-against-google-likely-wont-go-to-trial-until-late-2023-judge-says.html>.

⁸ Data in 2019 indicated the median time interval in the U.S. Court of Appeals for the District of Columbia Circuit was almost ten months. See https://www.uscourts.gov/sites/default/files/data_tables/. We can assume that appeals from complex antitrust matters such as these may take far longer to resolve than the ten-month median.

consumers are unlikely to experience competition in these platform markets for many years after investigations are opened and complaints filed.

In addition, there is the vexing problem of how to restore competition in the face of entrenched market power and many years of technological change deployed by the platform for its own benefit. In the absence of prompt and effective remedies that create competition in platform markets, a good alternative is a set of rules that stimulates competition *on* a dominant platform. For example, until there is entry of additional mobile operating systems that offer developers choice, neither of the two vertically integrated app stores available to US consumers has much reason to compete for developers on price or quality. However, when regulation requires that rival app stores have equal access to the mobile OS platform, then a developer can choose to distribute its app through a rival store with a more favorable curation policy, installed base, or fee level. Competition *on* the platform will benefit developers, and through lower prices and more innovation, will benefit end consumers as well.

I understand that this hearing will focus on two bills this committee advanced in the prior Congress: the American Innovation and Choice Online Act (AICOA), and the Open App Markets Act (OAMA). Both bills made it out of committee last year and so I will not provide a detailed analysis of their provisions. But, taking them as a whole, I am convinced the two bills give enforcers many of the tools they need to effectively and promptly increase competition to digital markets. These bills control the damaging behavior of dominant digital platforms by opening up markets and allowing for entry and innovation. The American Innovation and Choice Online Act forbids harmful self-preferencing, anti-competitive contractual limitations, abuse of data, impeding interoperability, and unfair discrimination in search and rankings. By limiting that conduct, the law can be expected to create opportunities for entry and expansion, new innovations and lower prices for consumers. Similarly, by allowing competition for app store payment and curation options, the Open App Markets Act will open the door for app store competition and innovation.

II. Concerns About the Bills and Their Potential Negative Consequences Are Overblown

I have read a number of opinion pieces expressing concern about the significance of the behavioral changes these bills mandate. Many of the critiques seem to presume that laws that require significant changes are bound to generate a set of equally significant negative consequences, both predicted and unforeseen. I believe this is an over-reaction.⁹ The bills are carefully crafted to target a narrow range of activity while at the same time containing significant

⁹ This observation served as motivation for me to join with two co-authors to write a letter in support of AICOA, which we also published publicly. See Fiona M. Scott Morton et al., *Why Congress Should Pass The American Innovation and Choice Online Act*, ProMarket (July 8, 2022), <https://www.promarket.org/2022/07/08/why-congress-should-pass-the-american-innovation-and-choice-online-act/>.

protections for platforms. Any new enforcement will occur within existing conceptual and legal frameworks which militate against extreme outcomes.

For example, AICOA is at heart a competition policy bill; it aims to restore competition to digital markets that are concentrated or monopolized. The bill is fit to its purpose, and makes actionable only those violations that *injure competition*. For some prohibitions enforcers must prove harm to competition, and for others the platforms can defend by showing their conduct *has not* harmed competition. Companies that will be subject to the prohibitions are large and sophisticated. They understand what sorts of behaviors might injure competition and which sorts would not. They therefore will make the investments necessary to avoid actions that could harm competition (this is what we want platforms to do) but are unlikely to eliminate popular products or features simply due to the risk of misinterpretation of the law.

Another concern commonly voiced is that some prohibitions will expose user data to hacking or force platforms to change their architecture in ways that make them more vulnerable to hostile foreign interests. AICOA has a built-in safeguard against this sort of risk in the form of an affirmative defense: conduct that violates one of the prohibitions nonetheless cannot support liability if it was reasonably necessary to protect user privacy, data or platform security, or, importantly, user safety.

I am not a lawyer. However, I have worked with lawyers to develop cases and then advised them as the cases proceed, most notably when I served as chief economist in the Antitrust Division. I have also served as a testifying witness, including in matters where plaintiffs have shown harm to competition and those where defendants have demonstrated affirmative defenses. These experiences bolster my confidence that the harm to competition requirements will screen out actions that are not likely to benefit competition or consumers. The deference generally given to affirmative defenses in our current system indicates that the law is very unlikely to penalize reasonable actions platforms take to protect themselves and their users. By achieving this balance, AICOA ensures that platforms as well as businesses dependent on platforms have a full opportunity to flourish and meet consumers' needs.

Another concern is that the language of the prohibition is new, or varies slightly from language used to describe similar concepts in other laws. This is a feature, not a bug. The whole idea is to set up new rules for platforms that will generate more competition. If there was nothing new in the law, it would not be doing its job. Novelty will generate some uncertainty, but this is inevitable if the goal is change. Moreover, the bill has provisions that directly address this concern as well. AICOA requires that the Department of Justice and the FTC work together to generate, develop, and issue joint enforcement guidance. Because the process for developing the guidance will include an opportunity for public comment, firms with concerns about the clarity of particular provisions can help bring about the needed clarity by explaining the ambiguities and

suggesting solutions. Moreover, each agency will bring to the process its own experience, perspective, and expertise. Importantly, by requiring that the DOJ and FTC jointly develop enforcement guidance, any legitimate concerns about how the balancing of factors called for in this legislation will reflect the statutory goals will be worked out by officials who already have the duty to protect security, privacy, and consumers alongside their antitrust enforcement roles.¹⁰

I am one of many academics, advocates, and policy makers who contend that a specialist regulator, instructed by Congress to issue guidelines that implement specific goals, would be a more effective and lower cost solution to regulating digital platforms. Such a regulator could respond more quickly than courts and be more nimble in responding to new technologies. Such a regulator could employ or consult with technological specialists and take into account issues such as national security, safety, and privacy, as well as competition. Senators Bennet and Welch have proposed legislation that would create such an agency.¹¹ Their proposal is an excellent starting point and should be seriously considered. I expect it will take many years until we have a digital regulator, just as it took much human suffering before Congress chose to create regulators for industries like pharmaceuticals and railroads. Until we have such a regulator, the laws being proposed today are the best route to immediate improvements in the welfare of consumers.

III. The Global Context of Digital Regulation Demonstrates the Urgent Need for These Laws

The pair of bills we are discussing today come at a time when the rest of the world is already moving ahead on reforming competition law in digital markets. The European Union has already passed the Digital Markets Act regulating the conduct of digital gatekeepers. The British Parliament has also announced its intention to create a Digital Markets Unit, housed within the British competition authority, which will be endowed with broad powers to regulate digital markets.

A description of the duties and obligations imposed by the European Digital Markets Act illustrates how the largest tech platforms are already obligated to adjust their business practices across Europe - with compliance required by January 2024 - to meet many of the requirements proposed in the legislation under discussion today. Below I provide a partial list, including

¹⁰ The Department of Justice maintains a Computer Crime and Intellectual Property Section within the Criminal Division, which in turn houses a Cybersecurity Unit. See <https://www.justice.gov/criminal-ccips/cybersecurity-unit>. The Office of Justice Programs maintains a special feature on Internet Safety. See <https://www.ojp.gov/feature/internet-safety/general-information>. All specialized components of the Department, including the Antitrust Division, report to the Attorney General who harmonizes input from across the Department in response to legislative mandates.

¹¹ See Digital Platform Commission Act of 2022, S. 4201, 117th Cong. (2022) (proposing a new federal regulator of digital platforms).

highly abbreviated text, of the rules in Articles 5 and 6 of the DMA to illustrate similarities with the content in the bills under discussion today:¹²

Article 5(2) — Prohibition of the combining of data across core platform services.

“The gatekeeper shall not do any of the following:

...combine personal data from the relevant core platform service with personal data from any further core platform services or from any other services provided by the gatekeeper or with personal data from third-party services”

Article 5(3) — Prohibition of wide and narrow most-favored nation clauses.

“The gatekeeper shall not prevent business users from offering the same products or services to end users through third-party online intermediation services or through their own direct online sales channel at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper.”

Article 5(4) — Anti-steering and anti-gag rule allowing business users to disintermediate the platform .

“The gatekeeper shall allow business users, free of charge, to communicate and promote offers, including under different conditions, to end users acquired via its core platform service or through other channels, and to conclude contracts with those end users, regardless of whether, for that purpose, they use the core platform services of the gatekeeper.”

Article 5(5) — “reader app” rule allowing business users to disintermediate the platform.

“The gatekeeper shall allow end users to access and use, through its core platform services, content, subscriptions, features or other items, by using the software application of a business user, including where those end users acquired such items from the relevant business user without using the core platform services of the gatekeeper.”

¹² Interested readers can find the complete English language text of the DMA here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2022.265.01.0001.01.ENG&toc=OJ%3AL%3A2022%3A265%3ATOC. A “print friendly” PDF of the English language text can be found here: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6423.

Article 5(7) — Prohibition on tying a platform with in-app purchase payment systems.

“The gatekeeper shall not require end users to use, or business users to use, to offer, or to interoperate with, an identification service, a web browser engine or a payment service, or technical services that support the provision of payment services, such as payment systems for in-app purchases, of that gatekeeper in the context of services provided by the business users using that gatekeeper’s core platform services.”

Article 5(8) — Prohibition on tying.

“The gatekeeper shall not require business users or end users to subscribe to, or register with, any further core platform services... as a condition for being able to use, access, sign up for or registering with any of that gatekeeper’s core platform services...”

Article 5(9) — Transparency for advertisers.

“The gatekeeper shall provide each advertiser to which it supplies online advertising services, or third parties authorised by advertisers, upon the advertiser’s request, with information on a daily basis free of charge, concerning each advertisement placed by the advertiser, regarding:

- (a) the price and fees paid by that advertiser, including any deductions and surcharges, for each of the relevant online advertising services provided by the gatekeeper,
- (b) the remuneration received by the publisher, including any deductions and surcharges, subject to the publisher’s consent; and
- (c) the metrics on which each of the prices, fees and remunerations are calculated.

Article 5(10) — Transparency for publishers.

“The gatekeeper shall provide each publisher to which it supplies online advertising services, or third parties authorised by publishers, upon the publisher’s request, with free of charge information on a daily basis, concerning each advertisement displayed on the publisher’s inventory, regarding:

- (a) the remuneration received and the fees paid by that publisher, including any deductions and surcharges, for each of the relevant online advertising services provided by the gatekeeper;
- (b) the price paid by the advertiser, including any deductions and surcharges, subject to the advertiser’s consent; and
- (c) the metrics on which each of the prices and remunerations are calculated.

Article 6(2) — Prohibition of use of non-public business user data to compete against the business users.

“The gatekeeper shall not use, in competition with business users, any data that is not publicly available that is generated or provided by those business users in the context of their use of the relevant core platform services or of the services provided together with, or in support of, the relevant core platform services, including data generated or provided by the customers of those business users.”

Article 6(3) — Obligation to offer right to un-install software and make choices over defaults.

“The gatekeeper shall allow and technically enable end users to easily un-install any software applications on the operating system of the gatekeeper, ... The gatekeeper shall allow and technically enable end users to easily change default settings on the operating system, virtual assistant and web browser of the gatekeeper that direct or steer end users to products or services provided by the gatekeeper.”

Article 6(4) — Obligation to open operating systems to third-party apps and app stores.

“The gatekeeper shall allow and technically enable the installation and effective use of third-party software applications or software application stores using, or interoperating with, its operating system and allow those software applications or software application stores to be accessed by means other than the relevant core platform services of that gatekeeper.”

Article 6(5) — Prohibition of self-preferencing in indexing and ranking.

“The gatekeeper shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party. The gatekeeper shall apply transparent, fair and non-discriminatory conditions to such ranking.”

Article 6(6) — Prohibition of blocking switching among apps and services accessed on the platform.

“The gatekeeper shall not restrict technically or otherwise the ability of end users to switch between, and subscribe to, different software applications and services that are accessed using the core platform services of the gatekeeper...”

Article 6(7) — Free interoperability for business users equivalent to that enjoyed by the platform’s own hardware or software.

“The gatekeeper shall allow providers of services and providers of hardware, free of charge, effective interoperability with, and access for the purposes of interoperability to, the same hardware and software features accessed or controlled via the operating system or virtual assistant ... as are available to services or hardware provided by the gatekeeper.”

Article 6(8) — Obligation to provide tools to measure ad verification for publishers and advertisers.

“The gatekeeper shall provide advertisers and publishers, as well as third parties authorised by advertisers and publishers, upon their request and free of charge, with access to the performance measuring tools of the gatekeeper and the data necessary for advertisers and publishers to carry out their own independent verification of the advertisements inventory, including aggregated and non-aggregated data. Such data shall be provided in a manner that enables advertisers and publishers to run their own verification and measurement tools to assess the performance of the core platform services provided for by the gatekeepers.”

Article 6(9) — Obligation to enable free, real-time, end user data portability.

“The gatekeeper shall provide end users and third parties authorised by an end user, at their request and free of charge, with effective portability of data provided by the end user or generated through the activity of the end user in the context of the use of the relevant core platform service, including by providing, free of charge, tools to facilitate the effective exercise of such data portability, and including by the provision of continuous and real-time access to such data.”

Article 6(10) — Obligation to grant business users access to data resulting from their activity on the platform.

“The gatekeeper shall provide business users and third parties authorised by a business user, at their request, free of charge, with effective, high-quality, continuous and real-time access to, and use of, aggregated and non-aggregated data, including personal data, that is provided for or generated in the context of the use of the relevant core platform services or services provided together with, or in support of, the relevant core platform services by those business users and the end users engaging with the products or services provided by those business users.”

Article 6(11) — Obligation to grant competitors FRAND access to online search data.

“The gatekeeper shall provide to any third-party undertaking providing online search engines, at its request, with access on fair, reasonable and non-discriminatory terms to ranking, query, click and view data in relation to free and paid search generated by end users on its online search engines. Any such query, click and view data that constitutes personal data shall be anonymised.”

Article 6(12) — Obligation for app stores, search engines and social networks to apply FRAND access conditions for business users.

“The gatekeeper shall apply fair, reasonable, and non-discriminatory general conditions of access for business users to its software application stores, online search engines and online social networking services listed in the designation decision pursuant to Article 3(9).”

This list of DMA requirements demonstrates that the DMA prohibits many of the anti-competitive practices addressed in the US bills we are discussing today (perhaps because they are trying to fix the same problems). The DMA is more detailed than the text of AICOA and OAMA, and does not include any efficiency defense. Note particularly, that DMA does not require that the regulator show that each instance of prohibited conduct harms competition. Instead, the rules were chosen to be those that, in the view of the European Parliament, would generally protect and increase competition.

What does this mean for the bills we are discussing today? Unless Congress passes some form of sensible regulation, companies that seek to compete against today’s dominant platforms, or offer services through them, will have an enormous incentive to focus their efforts in Europe, bringing new services, innovations and lower prices to European consumers. The most dominant tech giants will adjust their business models and practices to benefit small businesses and consumers in Europe. American businesses and consumers will be able to read about these innovations, but they will need to launch a product in Europe, or go on vacation there, to experience them. The United States will miss out on opportunities to lead the world in tech sector innovation and experience the benefits it delivers.

The UK is in the process of catching up with Europe through legislation that will allow the UK’s Competition and Markets Authority (“CMA”) to design platform-specific rules. These rules have the goals of both protecting consumers and increasing competition.¹³ The CMA has

¹³ CHANCELLOR OF THE EXCHEQUER, AUTUMN STATEMENT 2022 CP 751 35 (2022) (“The government will bring forward the Digital Markets, Competition and Consumer Bill . . . to provide the Competition and Markets Authority with new powers to promote and tackle anti-competitive practice in digital markets.”), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/111841

already built the team to analyze platform conduct and design such rules, and has carried out several of the initial studies required. The expectation is that regulation in the UK will not long lag that of the EU.¹⁴ As noted above, the DMA takes effect in January 2024 which is only nine months away. Given these substantial changes in Europe and the likely business responses to them, it is important for the US to move quickly to avoid losing the edge in innovation, and ceding the terms for digital market regulation and competition to other nations.

Dated: March 6, 2023

/s/

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¹⁴ See generally *Digital Markets Unit*, Gov.UK, <https://www.gov.uk/government/collections/digital-markets-unit>; see also Her Majesty Queen Elizabeth, *Queen's Speech 2022: Her Majesty's most gracious speech to both Houses of Parliament* (May 10, 2022) ("Draft legislation to promote competition, strengthen consumer rights and protect households and businesses will be published. Measures will also be published to create new competition rules for digital markets and the largest digital firms [Draft Digital Markets, Competition and Consumer Bill]"), <https://www.gov.uk/government/speeches/queens-speech-2022>,