

# **Public** Knowledge

**Testimony of  
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**Before the  
United States Senate  
Committee on the Judiciary**

**Subcommittee on  
Antitrust, Competition Policy and Consumer Rights**

**Hearing On:  
Competition in Digital Technology Markets: Examining Self-Preferencing by Digital Platforms**

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<sup>1</sup> I want to thank Charlotte Slaiman, Competition Policy Director, and Alex Petros, Policy Counsel, for their support in preparing this statement.

Digital platforms are today’s marketplace, library, and public square. Yet key elements of these markets are dominated by one or two firms. As experts across the globe examine digital platform markets, they have identified problems of persistent market power and very little entry or expansion.<sup>2</sup> If this is accurate and sustained, the likely results will be less innovation, limited consumer choice, and lower quality products.<sup>3</sup> The United Kingdom’s Competition and Markets Authority (CMA) recently released its interim report on digital advertising markets. At this preliminary stage, it found—in the UK—that Google has significant market power in search advertising, general search, and parts of the ad ecosystem.<sup>4</sup> It also found that Facebook has such power over social networks.<sup>5</sup> While this may not apply precisely to the U.S. market, it certainly should set off alarm bells that we need to assess what antitrust can do, how it needs to change, and which other policy tools are needed to generate robust competition in our exploding digital marketplace.

There are many vertical relationships and platform rules that favor one combination of services over another which may cause heartburn for a specific company but do not violate the antitrust laws. Many of these relationships and rules can result in synergies that benefit the competitive process and consumers. However, self-preferencing and other forms of anti-competitive discrimination are often harmful to competition and consumers.

## **Self-Preferencing in Digital Platforms**

### *Self-Preferencing in the Ad Exchange*

In the complex digital ads marketplace, the CMA report found that Google “holds a strong position at each level” of what it calls the “ad tech stack.”<sup>6</sup> To simplify somewhat, the levels are the ad exchange where bidding takes place and ad slots are awarded, the publisher ad server tool that allows publishers access to the exchange, and the demand side platform tool that allows advertisers access to the exchange. By owning the leading exchange and leading access tools for

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<sup>2</sup> “[T]raditional competition tools are compromised when dealing with various examples of market failure brought about by a combination of shifting market boundaries, indirect network effects, customer acquiescence and information asymmetries with their digital providers, and varying levels of dependency on key players which undermine the exercise of effective countervailing bargaining power.” Peter Alexiadis & Alexandre de Streel, *Designing an EU Intervention Standard for Digital Platforms* (EUI Working Papers, RSCAS 2020/14) 19 [https://cadmus.eui.eu/bitstream/handle/1814/66307/RSCAS%202020\\_14.pdf?sequence=1&isAllowed=y](https://cadmus.eui.eu/bitstream/handle/1814/66307/RSCAS%202020_14.pdf?sequence=1&isAllowed=y).

<sup>3</sup> See Fiona Scott Morton, *Reforming U.S. antitrust enforcement and competition policy*, Washington Center for Equitable Growth (Feb. 18, 2020) <https://equitablegrowth.org/reforming-u-s-antitrust-enforcement-and-competition-policy/>.

<sup>4</sup> See Appendix A for highlights from the report. In the UK, the CMA has found in its interim report that Google likely has greater than 90% market share at the Publisher Ad Server level, 50–70% of the Demand Side Platform purchases, and 40–60% of the Supply Side Platform sales. Competition and Markets Authority, *Online platforms and digital advertising: market study interim report* 197 (Dec. 18, 2019) [https://assets.publishing.service.gov.uk/media/5dfa0580ed915d0933009761/Interim\\_report.pdf](https://assets.publishing.service.gov.uk/media/5dfa0580ed915d0933009761/Interim_report.pdf).

<sup>5</sup> *Id.* at 107.

<sup>6</sup> *Id.* at 150.

each side of the auction,<sup>7</sup> Google has the opportunity to use self-preferencing in multiple ways. The report describes claims that Google has used different strategies to give its own publisher and advertiser tools better access over competing tools.<sup>8</sup> This may be a method to get more advertisers and publishers to use Google’s tools. If they use a competing ad tool, they know their bids will likely be disadvantaged by Google. This type of behavior would allow Google to charge higher prices for advertisers than they might in a more competitive market and allow Google to pay less out to publishers for the right to advertise on their content. The abuse of power could reduce the quality of ad services by limiting advertiser control over the types of content their ad runs near, known as “brand safety,” less accurate or usable analytics to assess the effectiveness of ads or popularity of publisher content, and less effective protections against bots and other sources of click fraud. This is the type of conduct that antitrust enforcers should investigate to determine if it rises to the level of illegality.<sup>9</sup> If Google has caused these harms, enforcers must determine whether a non-discrimination rule may be enough, or whether a more severe structural remedy is needed to remedy the abuse of market power.

### *Self-Preferencing in Interoperability*

Digital platforms have many tools that could be used to restrict competition. Platforms can refuse to make their own services—which may reach a vast customer base—interoperable with those of nascent competitors, while at the same time enabling such interoperability with the services they own and control. This disparity in access to customers often delivers a crippling blow to small players entering the market. One potential example of this was Facebook’s “Find My Friends” feature. The feature allowed a user of other social networks to quickly interface with Facebook to “find their friends” on that social networking site. They could then add their Facebook friends to non-Facebook sites with just one click of a button. Good for consumers and good for competition. Unfortunately, Facebook discontinued the feature for upstart competitors, such as the video app Vine and the messaging app MessageMe.<sup>10</sup>

Cross-posting is another important interoperability feature. This allows users to easily send their social media posts, at the time of posting, to another platform in addition to the one they are using. If users prefer one platform but have many friends on another platform, they can use cross-posting to reach those friends on the other platform. Facebook currently offers cross-posting between Facebook and Instagram, two companies that it owns. It also offers cross-

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<sup>7</sup> CMA Interim Report, *supra* note 4, at 199.

<sup>8</sup> *Id.* at 203-215.

<sup>9</sup> Put another way, “[i]nsofar as a dominant undertaking operates a digital platform that is open to all traders, acts of discrimination, self-preferencing and other related acts of leveraging may be unlikely to generate efficiencies which outweigh the restrictions to competition arising from such acts.” An issue certainly arises when “customers switching between platforms is not viable or attractive, especially where access to key competitive data is not available to all operators.” Alexiadis & de Stree, *supra* note 2, at 32.

<sup>10</sup> Adi Robertson, *Mark Zuckerberg personally approved cutting off Vine’s friend finding feature*, THE VERGE (Dec. 5, 2018) <https://www.theverge.com/2018/12/5/18127202/mark-zuckerberg-facebook-vine-friends-api-Block-parliament-documents>.

posting with Twitter, but not with other companies. Entrepreneurs considering entering the market for social networking know they cannot count on cross-posting with Facebook. This makes entry harder for those potential competitors.

The CMA interim report concludes:

*The Facebook ‘family’ of apps further insulates Facebook.com from competitive pressure. We have also received some evidence demonstrating that new entrants may, in some circumstances, be reliant on Facebook. This appears to primarily occur through . . . providing access to the Facebook social graph, or cross-posting capabilities. By permitting and then restricting other social media platforms’ access to these APIs, Facebook may be able to affect the competitive constraints it faces.*<sup>11</sup>

Interoperability can be enormously beneficial to both consumers and competition, yet is rarely in the economic self-interest of an already dominant digital platform like Facebook. The solution to this is simple: mandate interoperability by law. Congress should pass the bipartisan ACCESS Act, championed by Senators Warner, Hawley, and Blumenthal to open up competition for social networks.

#### *Preferencing Owned Products on the Platform*

Another potential competitive issue arises when a platform sells its own products on the platform it controls. When companies face a competitor that is also the market referee setting its own rules for competition, the competitive dangers are not hard to grasp.

Two examples best illustrate this problem. Although originally just an online bookstore, Amazon has grown into a massive online market known as “the Marketplace.”<sup>12</sup> Amazon is also a retailer, selling directly on the Marketplace in competition with the other retailers. The Amazon retailer could unfairly benefit from its vertical relationship with the Amazon Marketplace if Amazon puts a thumb on the scale to make sure it is among the first to appear in search results, get more space on the page, or are more likely to win the coveted “Buy Box,” where consumers click to purchase.

Similarly, Apple’s iOS operating system works most fluidly with Apple’s own apps. Email on an iPhone defaults to Apple’s Mail app, directions to Apple’s Maps, in the latest iOS’s shortcut menu, hitting the “play” button will default to Apple Music or iTunes over Spotify, etc. Although

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<sup>11</sup> CMA Interim Report, *supra* note 4, at 107.

<sup>12</sup> As recently as 2019, eMarketer pegged Amazon’s market share at 38% of the retail ecommerce market after a revision down from 47%. Amazon has not been forthcoming with more reliable information. Matt Day & Spencer Soper, *Amazon U.S. Online Market Share Estimate Cut to 38% From 47%*, BLOOMBERG (June 13, 2019), <https://www.bloomberg.com/news/articles/2019-06-13/emarketer-cuts-estimate-of-amazon-s-u-s-online-market-share>.

some consumers would prefer to stay in the Apple ecosystem, the potential harm could be akin to tying or bundling in antitrust: consumers are pushed into imperfect choices on ancillary products and services. Apple appears to hear an outcry from app developers complaining about these issues and is reportedly considering changes.<sup>13</sup>

Even if such preferencing is more convenient for some consumers in the short run, the impact on competition may harm consumers with fewer choices, lower quality products, and higher prices in the long run. Investigations can establish whether these concerns are valid, whether they are doing more harm than enabling benefits, and if they rise to the level of an antitrust violation. Congress should also establish a framework to protect competition and consumers from this potential conflict of interest for dominant platforms that act as a gatekeeper.<sup>14</sup>

### *Data & Self-Preferencing*

Digital platforms often require that in exchange for access to their platform, companies must give the platform access to some of their important data. Sometimes this is actually required to provide the service, sometimes it is not. Either way, this could have harmful anticompetitive effects if the platform is a gatekeeper distribution system where access to the platform can make or break a company's commercial viability.

One popular example might be Amazon. Amazon competes as a retailer on its own ecommerce Marketplace. Competing retailers must share with Amazon certain data about their products and customers in order to use the platform. The data advantage this grants Amazon over rivals, together with the tools of self-preferencing available to the platform, can enable a platform to compete unfairly by better predicting consumer behavior. In the case of a bottleneck or gatekeeper platform, this would be a powerful barrier to entry. Any retailer that might one day impose competitive pressure on the platform itself could be easily identified through the data and limited by the self-preferencing power.

The CMA report found that Facebook also has a significant data advantage over competitors. This makes advertising on Facebook much more appealing than advertising on another large publisher site. These publishers, like the New York Times or BuzzFeed, are competing with Facebook for advertising, but they also rely on Facebook as a distribution tool for their content.

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<sup>13</sup> Mark Gurman, *Apple to reveal new home-grown apps, software features at WWDC*, BLOOMBERG (May 6, 2019) <https://www.bloomberg.com/news/articles/2019-05-06/apple-wwdc-2019-ios-13-macos-10-15-watchos-6-tvos-features>.

<sup>14</sup> See Appendix B for details on this framework. For a description of “bottleneck power,” see George J. Stigler Center for the Study of the Economy and the State, Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report (Jul. 1, 2019) <https://research.chicagobooth.edu//media/research/stigler/pdfs/marketstructurereport.pdf?la=en&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C>. For a description of “gatekeeper power,” see Digital Competition Expert Panel, *Unlocking digital competition* (Mar. 13, 2019) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/785547/unlocking\\_digital\\_competition\\_furman\\_review\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf).

Facebook gets some data about how users interact with their content. CMA describes how Facebook's own terms and conditions for publishers on their site govern which company gets access to which sources of data. Due to Facebook's strong market position and barriers to entry and expansion like network effects, the CMA interim report found that Facebook has market power.<sup>15</sup> The CMA expects this market power may allow Facebook to extract more data from consumers, which it can use in ways that are valuable to Facebook, but consumers likely do not fully understand.<sup>16</sup> And the CMA found that Facebook has significant market power over advertisers.<sup>17</sup> It may be that this also allows Facebook to extract more data and money from advertisers as well. If so, this would be another appropriate area for Congress to protect business proprietary data.

### *Self-Preferencing to Prevent Future Competition*

Crucially, self-preferencing can be used as a tool to prevent future competition. It is very difficult to compete against a gatekeeper platform, but one of the few methods available is to start in one "vertical," one service that the platform provides like a voice assistant or travel service, and expand from there. A potential competitor must identify a lucrative vertical—one with expansion potential—and then thrive there so that it can expand or build business relationships with nearby verticals to provide an alternative to the platform. If the potential competitor's vertical is dependent on a platform owned by the gatekeeper it is trying to compete against, the platform can use its self-preferencing power to prevent that potential competitor from ever getting the scale it needs to compete.

Some have argued that Google's purchase and subsequent treatment of the maps and directions app Waze may have been one such example. Waze may have had the opportunity to become a meaningful independent competitor to the Google Maps app. But the importance of the Waze acquisition was not just about competition for mapping applications. Maps and directions are an important source of location data, useful for building an advertising competitor. And, maps and directions are an important "vertical" that can be used for expansion to one day build an offering that could actually exert competitive pressure on Google. One can imagine a world where companies swallowed by Google like Waze and ITA get together with Expedia, TripAdvisor, or similar firms, either by contract or acquisition, to offer a complete travel search experience for users. People in that world might still use Google for a lot of their searches, but for lucrative travel-related searches likely to turn into an expensive purchase, there might be stronger competition from this alternative. Of course, it is hard to prove what might have happened, but specialized search companies growing organically or working with each other and complimentary service providers could provide the best path to challenge dominant platforms. Merger enforcement and exclusionary conduct enforcement should pay closer attention to this

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<sup>15</sup> CMA Interim Report, *supra* note 4, at 108.

<sup>16</sup> *Id.* at 108.

<sup>17</sup> *Id.* at 226.

potential source of competition. However, to maximize opportunities for such competition to develop, we need more than antitrust; this is also an area where new pro-competition regulatory tools could be employed to require merging parties to demonstrate that their transaction will expand competition.

## **Digital Platform Markets**

Not all self-preferencing is problematic. A frequently heard refrain is that CVS is free to give the CVS brand acetaminophen premier placement in the store over Tylenol. Consumers may be well served by this, since the CVS brand is likely cheaper and chemically identical. The reason this example is different from self-preferencing by dominant digital platforms is the platforms' dominance and the fact that digital platform markets are prone to tipping toward monopoly.<sup>18</sup> In markets where competition is largely aiming to take down and try to replace a monopoly, it is critical to promote all sources of competition. Even the threat of competition from a potential competitor can exert pressure on a monopoly to behave. Unfortunately, it is easy to quash such small nascent threats without incurring the ire of the antitrust agencies.

Experts have identified economic characteristics of digital platform markets that lead them towards tipping and make competition against these gatekeepers extremely difficult. In these markets, network effects, economies of scope and scale, and taking advantage of consumer behavior like through defaults, are powerful and may be exacerbated by the platforms themselves to prevent consumers from shifting to competitors. Both the Stigler Committee on Digital Platforms Report (the "Stigler Report") and the UK's Digital Competition Expert Panel (the "Furman Report"), examined these economic characteristics of digital platforms in depth.

*Network effects.* Users prefer to be where other users are, sellers prefer to sell where there are a lot of consumers to buy their products, and advertisers want to submit their bids to the exchange that has a lot of publishers where they can show their ads. Digital platforms exhibit network effects when they have locked in a significant user base. The more dominant a digital platform is, the more enticing it will be to additional users. This can create a market where the dominance of a platform reinforces itself as it grows its user base. Network effects deter users from switching to a new service, making entry and expansion to compete against an entrenched incumbent more difficult.

*Economies of scope and scale.* Economists have a term, marginal cost, signifying the additional cost to produce one more good. Digital platforms, once they reach adequate market scale, have very low marginal costs. While there is certainly some cost to increasing scale (additional server

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<sup>18</sup> Another important difference is that there may be network effects at the product level, not just at the platform level. For example, Google may want to direct more users to Google Flights not only to get more advertising revenue, but also to improve Google Flights with more search and click data from users.

space, etc.) it is much less than the costs incurred by new entrants. The additional search query, Facebook user or Amazon sale is thus very easily profitable for a company. This problem is also seen in the main currency of online platforms: data. Certain types of data can provide specific unique insights about tastes, preferences, and behavioral prompts and is thus incredibly valuable for a platform to pitch to advertisers. The more of this data that a company has on you, the more valuable you are as an advertising target. And the more valuable you are as an advertising target, the more that advertisers will pay platforms to reach you.<sup>19</sup> As companies grow larger and start being your home for more services—from flights, to email, to search, to maps—the company can assemble a holistic digital portrait of you. When a smaller company tries to compete in just one of those verticals, its data is much less valuable than that of a behemoth. Similarly, as a company gets access to more of these data streams on more and more people, the value of that aggregated data also increases significantly. It can make more accurate inferences with data about more people. In the digital advertising market, this means that a large company with access to many data streams can run a very effective ads platform: it has the most detailed data and can best predict who will click on which ad. Smaller competitors have a tougher time obtaining such detailed data, so they cannot offer the same level of targeting, which advertisers demand.<sup>20</sup>

*Single-homing.* Consumers do not have time to compare the results of two search engines or read through page three of their search engine results page each time they need information. In the ideal competitive utopia, consumers would constantly be evaluating their options and choose the one that has the best combination of quality and cost-effectiveness. Instead, we naturally rely on shortcuts to find the best options in an efficient manner. That normal behavior makes it harder for digital platform competitors to demonstrate better alternatives. Consumers tend to default to one service, known as single-homing. Even if it only takes a few seconds, many users will not change default settings that come with their phone. Powerful incumbent platforms may also make design choices to exacerbate this inclination, nudging people to stay put.

## **Antitrust Solutions**

Given these fundamental forces driving the digital marketplace, it is not surprising that we would have very few firms capable of becoming full-scale competitors in online search, social networking and similar markets. However, this also means that if any of the dominant firms are misbehaving, putting their thumbs on the scale to unfairly exclude or limit the growth of competitors, it must be challenged under the antitrust laws. While it is difficult to say whether any one company has violated the law without access to the internal documents of the companies, there is enough public information to indicate that the Federal Trade Commission,

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<sup>19</sup> Also, this high rate of payment incentivizes the platform to serve up engaging content to keep you in their ecosystem to serve you as many ads as possible. *See e.g.*, The Center for Humane Technology, <https://humanetech.com/problem/>. This is a potential quality harm.

<sup>20</sup> Even if a smaller competitor could amass enough data to have accurate ads, it would be difficult to prove this to customers, since Google and Facebook could limit access to outside analysis of their advertising metrics.

the Department of Justice, and state attorneys general should proceed with their current investigations to identify and remedy any violations. This includes allegations by industry participants that exclusive contracts and self-preferencing have harmed the competitive environment.

For example, some competitors assert that Google created impediments for specialized search products that could become a competitive threat in lucrative areas where consumers are more likely to make a valuable purchase, like local search, travel, shopping, and finance. This is something that antitrust enforcers should investigate.

Publishers, including newspapers and other sources of web content, are also very concerned that Google is engaged in anticompetitive conduct that prevents other ad exchanges and tools from competing, leading to lower rates of return for their ad inventory. This is something that antitrust enforcers should investigate.

Facebook engaged in a series of acquisitions of smaller companies in adjacent markets, including the acquisition of Instagram at the moment of Facebook's transition from desktop to mobile devices. It is important to know whether this series of acquisitions may have been designed to buy up potential competitors rather than just competing. This is something that antitrust enforcers should investigate.

Mergers also intersect with the problem of self-preferencing. Dominant platforms may purchase a company that competes or could compete on its platform, giving the platform an opportunity to self-preference and distort competition on the platform. This makes it much harder for independent competitors to stay afloat and provides fewer options for consumers. Without that competitive pressure, dominant firms may innovate less, reduce quality, raise prices, and offer less favorable terms and conditions to users. Merger enforcement must also take the potential vertical challenge from companies that compete on the platform more seriously.

Perhaps even more important are mergers with small nascent competitors, where it may be difficult for agencies and courts to identify anticompetitive impacts and agencies must investigate technology trends to properly enforce. These cases may take extra time to investigate, and it is important that the uncertainty, almost inherent in this type of merger, not be a barrier to enforcement. One option would be to establish a dominant platform presumption as part of the upcoming Vertical Merger Guidelines being considered at the FTC and DOJ.<sup>21</sup> Other policy tools will also be needed to consider how acquisitions by platforms of very small companies can exacerbate platform dominance.

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<sup>21</sup> See Public Knowledge & Open Technology Institute, *Comments on the draft vertical merger guidelines* (Feb. 26, 2020) <https://www.publicknowledge.org/documents/comments-to-doj-and-ftc-on-vertical-merger-guidelines/>.

Over the last forty years, antitrust jurisprudence has become increasingly hostile to previously accepted enforcement practices.<sup>22</sup> To deal with today’s market problems and new understanding of market dynamics, this must change. We must sharpen the tools of antitrust to better take on digital platforms.

Senator Klobuchar’s recently introduced bill, the Anticompetitive Exclusionary Conduct Prevention Act, cosponsored by Senator Blumenthal, is exactly the kind of legislation needed to modernize antitrust enforcement. She has long been a leader in proposing smart fixes to antitrust, and this bill continues that effort. The bill has several targeted fixes which would make it harder for companies to get away with anticompetitive exclusionary conduct, increase civil penalties for antitrust violations, and eliminate unnecessary hoops to establish an antitrust case. This will bring our antitrust laws more up-to-speed with modern economic findings and reverse many misguided limits placed on this doctrine by the courts.<sup>23</sup> The bill makes several important changes in response to a slew of antitrust decisions out of step with modern economic reasoning that have handicapped rigorous enforcement such as *Trinko* and *American Express*.<sup>24</sup>

## Regulatory Tools

Even if current antitrust investigations successfully identify and remedy antitrust violations by dominant platforms, that will not be enough to overcome the natural tendency for these markets to tip toward monopoly, and therefore more oversight is needed to protect consumers and give them the benefits of competition.<sup>25</sup> Fundamentally, antitrust waits for illegal conduct and seeks to remedy that conduct. For gatekeeper platforms, significant market power is sustained without effective entry or expansion thanks in part to the powerful position that dominant platforms hold in our economy and market forces that reinforce their advantages. Long-term innovation and competition will require tools—like those used to open the telecommunications market to competition after the breakup of the AT&T monopoly—to sustain the work that effective antitrust enforcement can achieve.

This means it is up to Congress to take the baton and enact meaningful reform to rein in the power of these platforms. We need a new expert agency, focused on digital platforms and

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<sup>22</sup> See Fiona Scott Morton, *Competitive edge: there is a lot to fix in antitrust enforcement today*, Washington Center for Equitable Growth (July 18, 2018) <https://equitablegrowth.org/there-is-a-lot-to-fix-in-u-s-antitrust-enforcement-today/>.

<sup>23</sup> Academics like Jonathan Baker have long advocated for antitrust law to do more to address exclusionary conduct. See Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 *Antitrust Law Journal* 527 (2013).

<sup>24</sup> *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

<sup>25</sup> In situations where “markets may have already ‘tipped’ before effective intervention is possible, or they may be characterized by market failure rather than abusive strategic market behavior, or even because customer inertia reinforces entrenched market positions . . . it may be *ex ante* regulation rather than competition law that is best placed and most effective to address competition concerns.” Alexiadis & de Streel, *supra* note 2, at 17.

equipped with pro-competition regulatory tools. Congress should lay out a non-discrimination framework, bolstered by pro-competition tools like interoperability, data controls, and merger review concurrent with the antitrust agencies, administered by a regulatory authority expert in digital platforms.<sup>26</sup> This, together with Senator Klobuchar’s bill sharpening the tools of the antitrust laws, is the best way to address the harmful instances of self-preferencing by digital platforms that appear to be going on now or may happen in the future. If Congress waits to see the results of the antitrust investigations currently ongoing, which could take years, the marketplace will suffer. The time to act is now. We must get started right away building the regulatory tools necessary to jump-start and sustain competition against dominant digital platforms.

## **Conclusion**

Today’s exploding digital marketplace is characterized by a tendency to tip toward monopoly in an environment with inadequate public policy tools available to counteract this trend. Lack of public duties to protect personal information, the inadequacies of current antitrust jurisprudence and a vacuum in sector-specific regulation over the dominant tech platforms leaves society at enormous risk. Network effects and economies of scale, when connected to the enormous power of data control in the hands of the leading tech platforms is likely harming innovation, preventing the growth of healthy competition, and enabling the exploitation of personal privacy. We therefore propose, in addition to strong antitrust enforcement, the creation of a federal agency agile enough to handle the oversight of data abuses, gaps in competition policy, and capable of establishing corporate duties that promote fair market practices.

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<sup>26</sup> See Appendix B. Public Knowledge has examined a broad array of solutions to address these and other important policy concerns. To that end, I highly recommend “The Case for the Digital Platform Act” by Harold Feld, available at [www.DigitalPlatformAct.com](http://www.DigitalPlatformAct.com).

# **Appendix A**

# Shot Across the Pond: UK Competition Authority Makes the Case for How to Regulate Google and Facebook



By [Charlotte Slaiman](#) February 6, 2020



The United Kingdom's [Competition and Markets Authority](#) (“CMA”) released its interim report on digital advertising markets in December. The report deserves careful attention by U.S. policymakers and the public. Of course, the findings are “interim,” so they may change as the CMA receives feedback and compiles its final report. (In case you are not inclined to read [the 283-page report plus very interesting appendices yourself](#), I’ve summarized some of the most interesting points in a document [here](#).)

Despite being interim proposals, I believe the proposals in this report deserve immediate attention by U.S. policymakers and antitrust enforcers. If these findings turn out to accurately describe the forces driving current market conditions in the U.S., we will need both aggressive antitrust intervention and an entirely new regulatory structure to open the digital market to broad-based competition.

**Facebook and Google have market power.** It may seem obvious that Facebook and Google are powerful, but it’s really significant that the UK has done the economic analysis to actually show that they have market power in the ways the law requires. The legal analysis for determining market power is similar in the UK and the U.S., and the market share data and industry structures are reasonably likely to be similar as well.

**Even where companies have not committed antitrust violations, the CMA wants to regulate companies with strategic market position.** In the U.S., the University of Chicago’s [Stigler Center Report on Digital Platforms](#) referred to it as “bottleneck power.” The U.K.’s [Furman Report on Digital Competition](#) called it “gatekeeper power.” Now, the CMA is calling it “strategic market status,” or SMS. All these ideas are getting at the same thing. The UK goes more in depth on defining it, which is really helpful for our discussions in the U.S. as well. The key is that these companies have a lot of power and are very difficult to compete against, even if they have not violated the antitrust laws. Companies in this situation should still be required to follow rules that promote fair competition on the platform and promote competition against

the platform. A new regulator is needed to address legitimate policy concerns, like discriminatory practices that are difficult or impossible to address under antitrust law.

**The government interventions the UK is considering have two goals, fairness and competition.** The theory is that competition interventions will help in the long term, by creating competitive pressure to keep dominant firms in line, as well as making it possible for a new competitor to actually provide a real alternative to Google or Facebook in some industries they currently dominate. In the meantime, they propose fairness interventions to improve the nature of competition on the platforms, while they still retain the market power they currently have. I think of [nondiscrimination as a regulatory tool](#) that addresses both of these concerns. Protections against [“dark patterns”-style manipulation](#) seem to fit more in the fairness category. And [interoperability](#) remedies are more in the competition category. However, both dark patterns prohibitions and interoperability requirements also may benefit competition and fairness respectively.

**The report provides a roadmap for policymakers in the U.S.** The UK’s report may support the antitrust investigations at the federal and state level that are already underway. Antitrust enforcers can use this report to supplement their learning and guide their research and document requests so they can conduct comprehensive and aggressive investigations. The report also includes important research on the types of regulations that would be useful and why they are needed. This means it will also be helpful in building the record for why a new regulator with a specific set of tools is needed to promote competition here. The House Judiciary Committee and its Antitrust Subcommittee are conducting [an investigation](#) with similar goals, which Subcommittee Chairman David Cicilline says will be released as a report [in April](#). This, together with the antitrust investigations into dominant platforms by our federal antitrust enforcement agencies and [state attorneys general](#), constitute the U.S. side of this discussion from policymakers. However, just as in the UK, it is high time for U.S. policymakers to begin developing a framework that would augment antitrust enforcement to make sure that digital markets do not tip toward monopoly.

[Charlotte Slaiman](#)



## Regulatory Highlights from the CMA's Interim Report on Online Platforms

In December 2019, the Competition and Markets Authority (CMA) in the United Kingdom [released a report](#) as part of its ongoing examination of online platforms.<sup>1</sup> These findings are preliminary, and its final report will be published this year.

The report makes interim findings that in the UK, both Google and Facebook have dominant positions in some of the most critical elements of the digital advertising market, substantially undercutting opportunities for meaningful competition.

### **Facebook and Google Have Market Power**

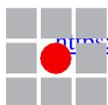
The report finds that:

- Google has “significant market power in search advertising” (5.286). Google is seen as a “must have,” and there are incentives for advertisers not to use any competitors. Because of Google’s broad data streams from across the internet, it is able to derive advertising analytics that are much better than any competitor. This increases the value of its advertising and makes it even harder for smaller companies to compete.
- Google has significant market power in “general search” (3.92). Google has a high market share and there are significant barriers to entry and expansion. This means Google faces very little competition or even potential competition. For example, search engines benefit immensely from scale for improving the quality of their product. Google has also paid to be the default search engine on so many devices, browsers, and other ways people access the web.
- Facebook has significant market power in social media (3.165). The UK identified no other social networks that have a strong competitive impact on Facebook. They also identified three key components of Facebook’s product that competitors cannot match: the range of services, the huge network of users, and the social graph. They found that network effects are a strong barrier to entry, and as a result, new startups also do not pose any potential competitive threat to Facebook.
- Facebook’s ownership of Instagram and Whatsapp also prevents competition (3.169). In order for a new social network to thrive, it needs access to Facebook’s social graph - who is friends with who - and it needs to be able to communicate from one platform onto the others - “cross-post.” The social networks that Facebook owns have access to these functions, but anyone else either does not have access, or is at risk for having access revoked. This means Facebook can control whether it faces competition or not.

### **Regulating Companies With Strategic Market Status**

The report preliminarily concludes that the new regulatory authority under consideration in the UK should have a broad array of tools to promote market competition. While the UK report preserves the opportunity to initiate further antitrust investigations based on its findings, it immediately calls for regulatory intervention to limit Google’s and Facebook’s enormous power in the market.

The report proposes the creation of a new regulator in order to implement the interventions they recommend (6.16). The goals they specify for the agency are to promote competition by helping new entrants to the market overcome barriers to entry and expansion, protect consumers and competi-



<https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study>

tion in areas where platforms have market power, and to prevent exploitation or exclusion (6.6). To do this, the UK proposes certain rules will apply to platforms with “strategic market status” (6.35).

While antitrust punishes anticompetitive behavior by firms with market power, the UK wants to implement a regulatory regime to address these potential problems in advance. Antitrust would still apply in the industry, so these rules would be concurrent (6.25).

These new rules are preferable to existing antitrust law because:

- they will change platforms’ behavior much more quickly, important in a fast moving market like this one;
- they will go farther than existing antitrust law to capture additional bad behavior that is still harmful to competition;
- they will provide increased business certainty;
- a dedicated regulator can do a better job in such a complex industry, increasing their expertise over time;
- the regulator can do audits and get greater transparency into how the platforms are functioning. (6.22)

The report suggests these new rules should apply to platforms that have enduring market power and “act as an important gateway for businesses to access a significant portion of consumers,” when those consumers are on the other “side” of a two-sided market (6.30). To determine if platforms meet these criteria, they suggest examining:

- consumer time spent on the platform as a share of a market;
- what percentage of consumers use the platform, also called “reach”;
- the share of digital ad revenue in a particular ad market;
- if the company controls the rules or standards of the market;
- “the ability to obtain and control unique data.” (6.31)

For digital platforms, these criteria are important for getting a realistic picture of the power that platforms have.

Using these criteria, the report suggests Google and Facebook would likely count as having “SMS.” It finds that Google has had around 90% or higher market share in search for over ten years, as well as over 90% share in the ad server market. These are both key markets that give them a lot of consumer time spent, very broad “reach,” and a high share of digital ad revenue. They also found that Google has “unrivalled” access to consumer data through the many different Google services they provide, as well as their tracking tags on other websites across the web and the data they collect from Android devices (6.32).

It finds that Facebook has a “reach” of 85% of UK internet users, and over 75% of time spent in social media, as well as 40% of digital ad revenue in display ads. Facebook also has control of unique data, the data that advertisers find most valuable for certain ad campaigns (6.33).

## Potential Interventions

The new regulatory regime would have two aims: to create fairness in spaces dominated by market power and to promote competition to try to fight Google’s and Facebook’s market power (6.11-6.14). The regulatory suggestions include:

- A nondiscrimination principle

Companies with SMS would be required to not preference their own products or services above those of competitors, specifically identifying search and ranking algorithms as potential sources of self-preferencing (6.43). In fact, SMS should give customers a neutral choice between their own ser-

vices and those of competitors, and not impose any restrictions on customers' ability to use competitors' products (6.43). The nondiscrimination principle also applies to standards that an SMS platform may develop: Such standards should not favor the platforms' other businesses (6.44).

- A "fairness by design" requirement (6.41)

This could address some of the "dark patterns" concerns that advocates have. Platforms can use what they know about user behavior to encourage certain choices that users might not otherwise make, such as making the "Accept Tracking" button bright red and in the center, while making the "Refuse Tracking" button grey and inconveniently located. Similarly, they could push users towards accepting affiliated products instead of letting them choose freely among competitors.

- An interoperability requirement (6.44)

This could include requirements that "core services" of an SMS business be designed to be interoperable. SMS companies could charge a fee for interoperability, as long as the fee is "cost-based" and "objectively justifiable." They could also be required to comply with common standards where such standards exist, presumably to address the concern that dominant platforms can impose their own standards through their market position even where independent standards are already in place.

### Enforcement Procedures

The CMA discussed how the new regulations would be enforced by what they are calling the new Digital Unit of the CMA. The powers of the Unit for enforcement could include the power to:

- audit companies;
- open its own enforcement investigations;
- hear complaints from market participants;
- resolve disputes;
- impose interim measures, such as temporarily undoing a recent decision of an SMS platform while it investigates the change;
- impose injunctive relief at the end of an investigation, such as undoing a recent decision of an SMS platform;
- appoint a monitor to oversee ongoing compliance with the regulations or a particular Digital Unit decision. (6.49, 6.50)

The CMA is considering the possibility of major divestitures, such as separating Facebook and Instagram (6.79). It suggests that such a "significant step" may be warranted if other measures such as interoperability are not successfully implemented (6.79). Similarly, it discusses the possibility of separating parts of Google's vertically integrated business (6.160 et seq.). Stating that "the threshold for such interventions is high," they go on to say they are seeking views on a few particular separations they're considering: Google separating its publisher ad server from the rest of the company; requiring that any company, including Google, cannot operate both a Demand-Side Platform (advertiser facing) and a Supply-Side Platform (publisher facing); and/or Google separating its advertising business from key parts of its data business (6.163). They plan to consider whether such separations are appropriate now, or if a trial period for the regulatory interventions is appropriate first to see if that may be sufficient on its own (6.174).

# **Appendix B**

# Key Elements and Functions of a New Digital Regulatory Agency

February 12, 2020, 5:03 pm

Gene Kimmelman, Senior Fellow, Digital Platforms and Democracy Project

***This Policy Paper is part of the Digital Platforms & Democracy Project's efforts to explain and disseminate ideas about regulation of major technology and digital platform companies. [Click here to read more of their research and commentary.](#)***

**This paper is an evolution on the ideas first laid out in Gene Kimmelman's September 2019 Policy Paper, [The Right Way to Regulate Digital Platforms](#). They can be read in sequence or independently.**

*The views expressed in Shorenstein Center Policy Papers are those of the author(s) and do not necessarily reflect those of Harvard Kennedy School or of Harvard University.*

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A [report issued](#) by the United Kingdom's competition authority (CMA) provides interim findings that both Google and Facebook have a virtual lock on key elements of and inputs to the digital advertising market. As a result the U.K. proposes an extensive set of policy interventions through an anticipated new regulatory body that many expect the U.K. to establish in the near future.

Although the U.K. findings are interim and the U.S. market may have somewhat different attributes, it is almost certainly the case that the U.S. market is likely subject to similar forces that tend to constrain competition. It is time for U.S. policy makers to at least plan for this likelihood and therefore begin working on the development of a similar oversight body to ensure accountability and fair competition in the digital marketplace. What follows is one approach to such an oversight body.

Congress should create a new regulatory authority that is focused on digital markets. The most important institutional change needed to address monopolistic tendencies arising in digital markets is competition-expanding regulation that addresses the problems antitrust cannot solve – even with strong enforcement. A new expert regulator equipped by Congress with the tools to promote entry and expansion in these markets

could actually expand competition to benefit consumers, entrepreneurship, and innovation.

The new regulator should also be responsible for consumer protection regulations relating to digital platforms, such as privacy protections for users (except for existing privacy protections established by Congress and overseen by other agencies). These rules may also have pro-competitive benefits. For example, if the incredibly detailed data streams that the large platforms are continuously collecting on their users are significantly curtailed by data protection legislation that limits collection and use of personal data, it may be easier for smaller or new companies which don't have access to those data streams to compete. But these rules are also crucially important to protect users' rights and people's freedom from the type of control that detailed data collection can provide to companies.

One primary goal of the regulator, however, should be promoting competition. This is an important distinction: actively promoting competition, not simply maintaining existing competition, as most antitrust generally does. As a result of the economic constraints described in the Stigler Report on Digital Platforms and Market Structure,<sup>1</sup> digital platforms require an additional jolt from a regulator to promote new competition. There is not enough competition here for us to merely "maintain" it. Here are three key tools with which Congress must equip the regulator to work towards this goal: interoperability, non-discrimination, and merger review.

## **Interoperability**

First, the agency should be authorized to require dominant platforms (defined below) to be interoperable with other services, so competitors can offer their customers access to the dominant network. For example, if Facebook, with its dominant position in social networking and ownership of Instagram and WhatsApp, were required to allow Snapchat users and new alternative platforms to communicate with their Facebook friends easily using these other services, Facebook's network effect advantages would be reduced and competition could more easily expand.

In many of the services that we use the most, we've come to take interoperability for granted, and often don't even realize how essential it is. For telephone networks, the [1996 Telecom Act](#) included interoperability requirements, which it referred to as "interconnection," between competing carriers. The Act built upon Federal Communications Commission (FCC) regulations, setting forth a regulatory regime of duties to connect, and of parity in quality between connections, offered to the incumbent's own affiliates and competitors. This duty to deal created the possibility of more competition, and allowed for there to be just one national (indeed, global) telephone network, made up of thousands of independent carriers, including multiple competitors in many geographic markets. Allowing interconnection to the dominant network was also a crucial component of the breakup of AT&T. Many early internet services, as well, such as email and the world wide web, were designed in such a way as

to permit many different entities to interoperate. Today, online platforms that benefit from network effects and control an important market bottleneck are also appropriate targets for an interoperability rule.

Of course, a rule requiring the transfer of user data depends on strong privacy protections either as part of the rule or *guaranteed* by another statute such as comprehensive privacy law. However, it's also important that privacy improvement efforts don't inadvertently make interoperability harder or impossible, for example by banning any transfer of data from one company to another. The data protection and data empowerment tools that must be joined with *interoperability* should be the responsibility of the same regulator or carefully coordinated across two agencies. Basic protections like affirmative consent, access, correction, and deletion rights, a private right of action to supplement agency enforcement, and explicit protections for states that want to require stronger privacy rules are all important components of any comprehensive data protection law.<sup>2</sup>

Creating open interoperability regimes for the digital economy is a complex task that should be undertaken by an expert regulator, not generalist law enforcers. A regulator is especially useful for a tool like this because it will require technical detail, frequent updates, and speedy dispute resolution to make sure the interoperability requirement actually promotes competition effectively. Antitrust enforcers, focused on competition, are not well positioned to effectuate user intent and protect users' personal data on an ongoing basis.

There's also the question of how far interoperability should extend. In the telephone networks example, the essential nature of the network and the Telecom Act's mandate to promote affordable access to all Americans drove the need for network equipment and infrastructure to work seamlessly. In order to simply promote competition and consumer choice in the diverse digital platform market, that exacting level of interoperability may not be necessary. For example, the old "Find My Friends" feature that Facebook used to offer when a Facebook user joined another social network provides a certain level of interoperability, making it easier for users to link up with friends who are already using the new network. But the users of the new network would still be isolated from friends who did not switch. A further level of interoperability would allow communication from Facebook onto the new network. However, sometimes competing social networks will offer vastly different features, and this diversity is great for competition. A key component of Twitter, for example, is short messages. It may dampen innovation if every new feature must be perfectly mirrored across networks. Some types of data may be particularly sensitive from a privacy perspective, for example, Facebook tracks users' browsing history across the web. While privacy protections must be in place at the receiving platform for **any** data that a user chooses to transfer, some data may not provide significant competitive benefits and does not need to be shared. Policymakers should take on this question, and decide, with the help of experts and relevant stakeholders, what level of interoperability should be required. This would include which types of data should be part of an interoperability mandate, and under which conditions.

## Non-Discrimination

Competing against an incumbent digital platform is hard. But it can happen in two ways: head-to-head platform entry and/or expansion from one vertical to many. Recently we have experienced very little market entry into areas where one platform has gained enormous market share, like Google in search and Facebook in social networking. Therefore, it is important to assess other ways in which competition may grow.

Online platforms know that companies which use their platform can “disintermediate” them by connecting directly with the consumer, effectively cutting out the platform middleman. Online platforms know that a company which competes with them in one vertical can expand to compete in other verticals, becoming stronger as it takes advantage of synergies from the multiple verticals. This means that for platforms, the companies that use the platform are also potential competitors. As a result of this competitive dynamic, some platforms have the incentive and ability to discriminate in ways that may harm competition. The platform has a variety of mechanisms it can use to disadvantage companies that pose a competitive threat, including its access to transaction data, its prioritization of search results, its allocation of space on the page, etc. In the most extreme versions of this behavior, antitrust can prevent abuse, but it is less useful to prevent many subtle discriminatory practices.

Congress should authorize the new regulator to monitor and ban discrimination by digital platforms with bottleneck power (defined below) in favor of their own services and against their competitors who rely on their platform to reach customers. This is another tool that particularly requires speedy adjudication and an expert regulator. There is a difficult line drawing problem in identifying which aspects of business are features of a platform, and which are products competing on the platform. For example, an app store may be an essential part of a smartphone operating system, so preferencing the operating system’s own app store by having it pre-loaded on the phone may not be appropriately understood as “discrimination.” On the other hand, a grocery store is probably not an part of an e-commerce platform, so preferencing Whole Foods over a competing grocery retailer on the Amazon Marketplace might be a good example of the type of discrimination that would be subject to the rule. The slow pace and complexity of antitrust litigation does not lend itself to fast-paced digital markets where discrimination can quickly make or break a competitive outcome.

Similarly, the agency should be authorized to ban certain “take it or leave it” contract terms that require companies doing business with a dominant digital platform to turn over customer data for the dominant platform to use however it pleases. This effectively bundles the service the companies need with data sharing that could undermine their competitive market position. By prohibiting these practices, we can give potential competitors a fighting chance.

## **Enforcement Handoffs from Antitrust Agencies**

Neither the Department of Justice (DOJ) nor the Federal Trade Commission (FTC) have extensive ongoing oversight personnel who monitor companies or industry sectors on a day to day basis. For this reason and other enforcement goals, antitrust officials are often not comfortable with behavioral and other regulatory tools when fashioning consent decrees. Therefore tools like data portability, interoperability, non-discrimination and transparency— even when recognized as effective ways to open markets to competition — are often treated as sub-optimal or short-term fixes by antitrust officials.

However, if the digital regulatory authority is empowered by Congress to use these regulatory tools when requested by antitrust officials through an enforcement process, we could expand the current toolkit available to remedy competitive harms in highly concentrated markets. It therefore makes sense to create this opportunity to synchronize antitrust and regulatory engagement as part of either merger review, monopolization or other antitrust enforcement activity.

We believe Congress should promote such interagency collaboration. However given the case by case nature of antitrust enforcement, it makes sense to give the agencies flexibility to develop the most effective and efficient way to operationalize this process.

## **Merger Review**

Another major concern with digital platforms is their acquisition of potential competitors. Acquisitions of potential or nascent competitors are often small, even falling below the value threshold for pre-merger notification of the competition authorities under the Hart Scott Rodino (HSR) Act. It is very difficult to effectively assess how likely such companies in adjacent markets are to truly be potential competitors to the acquiring digital platform. The small size or lack of pre-existing direct competition of these types of mergers can make it much harder for antitrust enforcement agencies to block them, even if there are indications the merger may be anticompetitive. Markets move quickly and a competitor's window of opportunity to gain traction against the incumbent is short, making mergers an even more effective tactic at preventing competition, and making effective merger enforcement even more important.

Thus, the regulator should also have the power to review and block mergers, concurrently with the existing antitrust agencies. For particularly important industries, like communications, energy, and national security, we have an expert agency merger review process in addition to antitrust. Similarly, the most powerful digital platforms occupy a special role in our economy and society and face inadequate competition require merger review under a new and different standard, in addition to traditional antitrust review.

The new regulator would have a different standard than the antitrust agencies. This standard should place a higher burden on dominant platforms to demonstrate overall benefits to society that antitrust enforcers do not have the tools to thoroughly measure. It should only review mergers involving platforms with bottleneck power. It should only allow those mergers that actually *expand* competition and do not impede market entry by new potential competitors. And, there should be no size limit for mergers to warrant pre-merger review by the agency. Any acquisition by a platform with bottleneck power should be reviewed for its competitive impact. This would prevent increased concentration of power when the company being purchased is too small or the competitive consequences are too uncertain. Mergers that provide no clear competitive benefit would be blocked. The standard also must take account of the particular ways that competition happens in digital platforms. For example, non-horizontal mergers *may* be particularly harmful here due to the economies of scope in data-driven platforms, as well as the importance of interoperability between complementary products.

## Jurisdiction

To which types of companies should these regulations apply? Some of the regulations, such as limits on data collection and use, are not related to levels of competition and therefore must apply broadly to be effective. Some others, like the requirement of non-discrimination, need only apply to especially powerful companies that have the incentive and opportunity to disadvantage competitors. Identifying which companies are powerful enough to be subject to those rules will require some additional work by the agency. Using the definitions of market power from the jurisprudence of antitrust is likely not sufficient. Instead, the regulator would need to make a determination of which companies hold important “bottlenecks” in the marketplace. This might be because they hold the buying power of many customers, so that anyone who wants to sell must be on their platform to reach those customers. Or it might be because they have a monopoly on a key product that is complementary to many others, creating lock-in for a suite of related products as well. The Stigler Report describes “bottleneck power” as a situation where buyers or sellers primarily rely upon a single-service provider, a “single-home,” which makes obtaining access to those buyers or sellers for the relevant activity *prohibitively* costly without them. It might be more efficient for the regulator to assess companies for their bottleneck status at regular intervals. Or the regulator may prefer to assess them at the point of investigation, but have that assessment remain “sticky” for a period of time. Either way, it will be important for companies to know in advance if they are deemed to be bottlenecks, so that they will know which rules apply to them. This will improve predictability for the companies, and more importantly it will improve compliance with the law, since companies will know they risk an enforcement action by engaging in certain proscribed behavior.

In addition, it is important for this new regulatory authority not to duplicate or interfere with any other agency Congress has already authorized to review mergers or otherwise establish policy goals governing such companies. The purpose of a new agency is simply

to fill in gaps and supplement antitrust enforcement, not to displace existing public oversight functions.

## **Key Features of the Agency**

To accomplish the goals described above, Congress must establish a nimble, 21st century entity empowered to develop rules, adjudicate complaints, review mergers and establish general protocols for information gathering, auditing and similar functions necessary to carry out its duties. To avoid regulatory creep, agency capture and similar well-known weaknesses of existing agencies, Congress should limit the Digital Agency's power and purview precisely. For example, the Agency must only use tools known to expand competitive opportunities (interoperability, data portability, interconnection, prohibit contracts that impede market entry or expansion, and prevent self-preferencing or similar discrimination through rules or separation of functions) for companies it finds to be dominant or have bottleneck power. Congress could prohibit utility regulation, price regulation and ownership regulation, leaving such deeper interventions to antitrust or future reassessment of market conditions, and still achieve enormous opportunities for digital platform innovation and competition. Congress should also limit the Agency's role to prevent duplication with the work of other sector specific regulators, including when such other agencies review sectoral mergers. The only merger overlap should be with the antitrust agencies, ensuring full enforcement of antitrust law and augmenting such enforcement with Digital Agency pro-competitive determinations. The only general powers over the digital marketplace should be limited to consumer protections like privacy, with broad authority to promulgate rules, adjudicate complaints, gather data, require transparent presentation of market practices and comply with targeted audits necessary for the Agency to function.

The Agency must, through rulemaking, determine what companies have dominance or bottleneck power over key elements of the digital market. Following traditional Administrative Procedure Act (APA) rulemaking processes, the Agency should determine whether network effects, economies of scale, economies of scope, power over data and similar factors have created excessive barriers to market entry which gives certain companies a dominant position or bottleneck control over a key aspect of the digital market.

Once the Agency makes this finding, it must devise, through rulemaking, a process for adjudicating complaints alleging harms to actual or potential competitors. For companies found to be dominant or have bottleneck power, the Agency is empowered to require data portability, interoperability, prohibit contractual provisions that impede market entry or expansion, create excessive friction and prevent unreasonable discrimination that favors the dominant/bottleneck company's affiliates through rules or an expedited complaint adjudication process. If such efforts fail to adequately address the harms to competition, the Agency should be empowered to require functional separation to the extent necessary to prevent unreasonable discrimination.

## *Bottleneck Power*

Some rules should apply only to firms with a particular market position, referred to sometimes as “bottleneck” or “gatekeeper” power. The Stigler Report defines bottleneck power this way:

“Bottleneck power” describes a situation where consumers primarily single-home and rely upon a single service provider (a “bottleneck”), which makes obtaining access to those consumers for the relevant activity by other service providers prohibitively costly.<sup>3</sup>

Similarly, the Furman Report defines gatekeeper power:

[O]ne, or in some cases two firms in certain digital markets have a high degree of control and influence over the relationship between buyers and sellers, or over access by advertisers to potential buyers. As these markets are frequently important routes to market, or gateways for other firms, such bottlenecks are then able to act as a gatekeeper between businesses and their prospective customers.<sup>4</sup>

Firms may benefit from bottleneck or gatekeeper power due to economic forces that impede entry and foreclose large swaths of the market from competition. The two reports note the significant impact that high switching costs can have in these markets. For example, users may lose access to communications or photos they value if they switch. Reputational concerns may play a significant role, such as when highly personal data will be collected without much real assurance of data security. There are often technological barriers to switching. There may be technically-necessary tying between two products. Economists have studied the inertia of default choices, which can also push users towards single-homing. Digital businesses that have this incentive and ability to develop and preserve a single-homing environment should be considered entities with bottleneck or gatekeeper power.

The definition of this power and the determination of which firms are subject to the rules should be determined by the new authority, with guidance from the statute. The definition will likely need to be updated over time by the authority.

## *Anticompetitive Contract Provisions*

Factors that encourage single-homing may be inherent to the technology, as described above, or they may be policy decisions made by the incumbents. For example, choosing not to provide interoperability between the old service and the new service is usually a policy choice on the part of the firm. Competitors may find their own way to provide interoperability without permission, sometimes called “adversarial interoperability,” and incumbents may affirmatively choose to block this when they discover it. Firms may impose a product tie or product bundle by contract where it is not technically necessary. Other contract terms may deter switching. The following two examples illustrate what

the Agency needs to devise rules or a complaint process to establish a competitive playing field.

A gatekeeper firm may have a contract with business customers (app developers on an app store, or retailers on an e-commerce platform) that bundles together access to their transaction data along with the regular services they provide. The Stigler Report examines how this type of bundle could have harmful anticompetitive effects.<sup>5</sup> If the gatekeeper also competes against those business customers on its own platform, for example, if it sells apps on its own app store, or if it is a retailer on its own e-commerce marketplace, there's likely an incentive to use the retailers' data to benefit the platform's own plans. "That data advantage over rivals can enable a company to achieve and/or maintain critical economies of scale, better predict consumer behavior, and form a powerful barrier to entry for potential competitors."<sup>6</sup> The platform could use that data to learn which products are selling well and enter the market niche of the business customer, either through acquisition or its own new product development. It could use data to learn about the customer's strategies and how effective they are, either copying them or avoiding them as the data indicates. It could use that data to identify customers and market its competing product directly to them, leaving the costs of identifying potential customers to the independent competitor.

Or a platform company may require installation of a bundle of products on the platform chosen to block the growth of rivals rather than to best serve the user. For example, an operating system company might select a bundle of apps for the user because those are the apps where the operating system company faces real or potential competition. This type of problem could have significant impacts throughout the economy in the context of e-commerce or the Internet of Things. Consumers must be able to change their defaults, make choices, and connect to unaffiliated products and services in a practical way. When a gatekeeper firm is setting up these bundles, an antitrust case may be ineffective in protecting competition due to the complexity of the problem and the slow pace of litigation. This is another reason the specialized Agency is needed. It could promulgate rules prohibiting anticompetitive bundling by digital gatekeepers. It could require unbundling of products and enforce this on an ongoing basis.

## **Conclusion**

Even with the most aggressive antitrust enforcement, there is a clear need for pro-competitive regulations to counteract network effects, economies of scale, data advantages and economies of scope that are tipping many digital markets toward monopoly. By establishing an Agency designed to promote market entry and expansion, Congress could expand competition that will spur innovation and benefit consumers.