

Public Knowledge and the Consumer Federation of America are pleased to offer the following comments in response to the Competition & Markets Authority's call for information for the new pro-competition approach for digital markets. At the outset, we would like to commend the CMA for their thorough study and report into the digital advertising document. The final report has become an invaluable resource for scholars and policymakers across the globe as they grapple with the competitive problems posed by digital platforms. The comment below responds to the three main areas of which the CMA has requested feedback: scope of a new approach, remedies for addressing harm, and procedure and structure of a new pro-competition approach. Given the CMA's interest in both Apple and Amazon, a short description of Public Knowledge's and the Consumer Federation of America's competitive concerns and proposed solutions for both companies are also included in the comment.

Scope of a New Approach

We agree with the CMA's overall approach of focusing on firms with Strategic Market Status (SMS). In developing your test and definition of SMS, we would urge the CMA to adopt the approach from a recent report on the study of digital platforms. The Stigler Center Report's discussion of "bottleneck power" relies in part on the Furman Report's discussion of "gatekeeper power." The Stigler Report defines "bottleneck power" as "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."¹

Focusing on this definition has several important implications. First, the emphasis on single-homing addresses consumer preferences towards using a single provider, usually the default provider. Platforms know and take advantage of consumers' single-homing preferences, resulting in lower quality and higher prices for consumers than they would face otherwise. Second, the discussion of the strategic positioning of these platforms is crucial to understanding the power wielded by certain platforms. The Internet is a vast place abuzz with booming commerce and ideas. However, access to certain areas, usually the most lucrative ones, can be controlled by the online platforms. Think of how many users begin their Internet service with a Google search to point them where they want to go. Control over what shows up on a search results page can thus have profound implications for digital competition on the whole. The final point of this definition gets to the platforms' ability to foreclose access to competitors and favor themselves. As platforms have expanded the capabilities and services they offer, there is an incentive to use

¹ 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, 84 (Jul. 1, 2019) <https://research.chicagobooth.edu//media/research/stigler/pdfs/marketstructurereport.pdf?la=en&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C>.

dominance in one area to prop up fledgling services or those in more competitive markets. Regulation needs to ensure that platforms are unable to do this. The best products and services for consumers should be the ones that win out, not the products and services attached to an otherwise dominant firm.

Remedies for Addressing Harm

Public Knowledge and the Consumer Federation of America would recommend two major remedies be included in the Digital Taskforce's toolkit: interoperability and non-discrimination.

Interoperability

The CMA has correctly identified network effects as one of the most potent tools in the platforms' arsenal. Especially given the low cost of scaling up in a digital environment, platforms can quickly grow to an enormous size. Once they become big enough to control a market, a platform can squash smaller rivals in their infancy. Upstart competitors against a dominant platform—such as Facebook's social network—thus face a particularly steep climb to taking on the incumbent.

The regulatory solution to this problem would be interoperability. If new services could bootstrap on the networks of dominant platforms, they could get off the ground far easier. This would allow for greater innovation on the market and would put greater competitive pressure on the dominant platforms to either continually improve or become obsolete. Of course, mandatory interoperability for every potential competitor could have tradeoffs in the areas of privacy or security. That is why a digital regulator would be best equipped to develop the details of an interoperability rule to ensure that the rule is technologically feasible, cognizant of the privacy tradeoffs, yet also effective in increasing competition in stagnant markets.

Non-discrimination

Digital platforms have greatly expanded in scope and size. This has led to areas where one company can play both a market overseer and market player role. This could be Google's own services appearing in Google's search results or Amazon's own brands being sold on Amazon's marketplace. The conflict of interest in situations like this is obvious. Large platforms have every incentive to favor their own products or services and disfavor the products or services of their competitors. And since immediate head-to-head competition with a platform can be daunting, sometimes the best competition can be through beginning in one vertical and expanding out from there. The retailer on Amazon

can steadily expand to one day take on Amazon itself. Without oversight, however, Amazon can foreclose such competition by leveraging its role as a market overseer.

The solution here would be a strong non-discrimination rule. This rule would authorize the Taskforce to monitor platform markets and ban the favoring of separate services over those of competitors. A regulator such as the Taskforce is best equipped to handle a problem like marketplace discrimination due to its speedy adjudication (especially compared to the slow pace of antitrust litigation). The Taskforce could also watch for the platforms taking advantage of vendor proprietary data to prop up the platform's own products.

Procedure and Structure of a new Pro-Competition Approach

The proposed key characteristics of speed, flexibility, clarity and legal certainty all are on point for the Taskforce. In particular, the emphasis on regulatory agility is to be lauded. Digital markets move very quickly. The increasing pace of technological change can leave prospective regulators struggling to keep up. What is dominant one minute can become obsolete the next. Antitrust enforcement, while important, can move slowly. It takes time to build an evidentiary record, bring a case, and then litigate it to a final judgment. Meanwhile, consumers suffer in the years it can take to fully resolve a strictly antitrust issue.

An important aspect of the pro-competition approach that the Taskforce should take into account is the interplay between privacy and competition. Many of the online platforms have zero-price to the consumer at point of sale, yet consumers still pay for them mostly through exploitation of their data. This can result in targeted advertisements and consumers spending their money on products that they might not have otherwise. Thus, both the competitive metric for these markets and the currency which they deal in can be user privacy. A pro-competition approach must take privacy into account while developing regulatory solutions.

Apple - Competitive Concerns

Any pro-competitive regime must be able to account for the ways in which platforms can privilege their own services, as Apple may have within the context of the App Store. Apple's use of its own apps as defaults provide them with a significant advantage due to users' likelihood of choosing default choices even when they can freely choose alternatives or change them. Furthermore, Apple's own apps routinely rank above others in App Store search results. Apple has engaged in the practice of 'Sherlocking' or taking a concept from a third-party application and creating a similar application to duplicate its functionality; it also reserves basic, generic terms for its own products (i.e 'Notes' for the notes app). Finally, Apple's own apps often enjoy

special privileges of access to certain sensors or data on its phones and take advantage of private system APIs that provide key, useful functionality that are not available to third-party developers and can change without notice.

The Taskforce must also account for how platforms control payment mechanisms in ways that provide sub-optimal mechanisms for funding software development and disadvantage rival products. For example, Apple's charging of a mandatory 30% commission incentivizes developers to adopt subscription models that create software development and maintenance complexity while also leading to subscription fatigue among users who must keep track of multiple subscriptions instead of one-time purchases. It also requires its own in-app purchase system for many apps, which provides Apple with a major advantage in sectors where it directly competes, like media and digital services (it can offer in-app payments without paying 30% to a third party while its competitors must pay Apple its 30% commission). This was demonstrated recently in Apple's dispute with the Hey email service, where Apple inconsistently applied a rule requiring Hey to offer iOS users the ability to purchase a subscription to the service from within the App Store.

To address these concerns, a pro-competition regime should help ensure that platforms apply in-app purchase rules to genuine app functionality that could otherwise have been a single up-front purchase; that platforms allow users to "sideload" apps but only from recognized developers (under a code-signing system that recognizes multiple certificate authorities, the way that web encryption works); that platforms follow certain guardrails to ensure the ability of independent app and hardware developers to compete on an even playing field; that platforms allow archiving, emulation, and transfer of apps and digital content; and that developers be given more business model flexibility, such as offering traditional free trials of paid apps, and upgrade pricing. A pro-competitive regime must also be able to account for the ways in which platforms may arbitrarily enforce rules that can prevent developers from creating certain apps without violating written rules. Platforms like the App Store often do not explain rejections for apps beyond referring to general rules; they provide little individualized guidance or feedback, no formal due process rights and sometimes apply rules that either do not exist or develop new interpretations of existing rules on the fly.

For a more detailed analysis of these concerns, please see the attached paper "Tending the Garden: How to Ensure App Stores Put Users First" by John Bergmayer.

Amazon - Competitive Concerns

The Taskforce must consider the ability of platforms to use third-party proprietary information whereby vendors are required to expose valuable information in order for a platform service to work. Remedies for any pro-competition regime should encompass the protection of third-party

proprietary information, for example through an affirmative duty on digital platforms to protect such information and not use it for any reason other than to provide a service for which the information is disclosed. This need is grounded in observed behavior by firms like Amazon, which uses third-party proprietary data like sales information, customer demographics and more from vendors who use affiliate services like Amazon Fulfillment Services in order to privilege themselves at the expense of vendors, such as by using such data to decide which product lines to expand into, often in direct competition with vendors on their platform.

Amazon has leveraged its market power to engage in promotional pricing that possibly could be predatory, such as when it used below-cost pricing (cutting prices up to 30%) to buy out Quidsi after they declined a buy-out offer. Amazon's ability to leverage market power in adjacent markets supports the designation of SMS status to corporate groups as a whole given its ability to leverage market power in adjacent markets through the use of data and / or consumer attention, in line with the CMA's recommendations (7.65-7.66). This would allow the DMU to ensure it has the ability to require all the information it needs from companies like Amazon and avoid frustration from a lack of compliance by subsidiaries of a parent org or from corporate reorganizations.

A pro-competition regime must be able to account for platforms' ability to privilege their own products to an extent far greater than what is possible by brick and mortar retailers. Amazon ranks product recommendations based on which sales will generate the most revenue for Amazon – this was demonstrated recently when delays in Amazon's delivery service due to prioritizing critical food and medical supplies for the Covid-19 epidemic disincentivized vendors from using their own faster shipping options because buy box recommendations favored either Amazon's own products or those going through its fulfillment centers. Other ways in which platforms like Amazon can privilege their own offerings is by obscuring price changes, which are rapid, constant and personalized and occur more than 2.5 million times a day.

For a more detailed analysis of these concerns, please see the attached paper "Mind Your Own Business: Protecting Proprietary Third-Party Information From Digital Platforms" by Harold Feld.

Conclusion

Digital platforms present thorny competition issues but a properly structured and empowered Digital Taskforce can be up to the task. Hopefully, the Taskforce will become a successful model that other jurisdictions, such as the United States, can build within their own enforcement systems. Please do not hesitate to contact us at [REDACTED], [REDACTED] and [REDACTED] if you have any questions or wish to work with our organizations further.



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