

BEFORE THE
UNITED STATES CONGRESS

SENATE JUDICIARY COMMITTEE

SUBCOMMITTEE ON COMPETITION POLICY, ANTITRUST, AND CONSUMER RIGHTS

“REINING IN DOMINANT DIGITAL PLATFORMS: RESTORING COMPETITION TO
OUR DIGITAL MARKETS”

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STATEMENT OF
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I. Introduction

Thank you, Chairwoman Klobuchar and Ranking Member Lee and full committee Chairman Durbin and full committee Ranking Member Graham for the honor of testifying before this Subcommittee on Competition Policy, Antitrust, and Consumer Rights.

A. Background

The views presented in this Statement reflect my personal views based on my experience to date as an antitrust lawyer.¹ My experience includes nearly a decade as an enforcer at the Federal Trade Commission, including the several years I spent as a counsel-detailee to the House Judiciary Committee—working on that Committee’s bipartisan Digital Markets Investigation and co-authoring the Digital Markets Report.

My time in private practice has informed and strengthened my views regarding the need for legislation to address a very broken digital marketplace. From this vantage point, I have observed and advised businesses and labor as they seek to navigate the significant challenges of an economy that is increasingly dominated by just a handful of online gatekeeper platforms.

B. Bipartisan Progress Last Congress

Last Congress, we saw significant and widespread bipartisan support for antitrust reform—particularly for bills aimed at curbing the Big Tech platforms’ abuse of monopoly power.

Congress’s enactment of the bipartisan Merger Filing Fee Modernization Act was a significant first step toward ensuring that the agencies fighting to promote competition for the American people have the resources they need to go up against some of the biggest and most well-capitalized companies in the world. The law strengthened state enforcers by putting State Attorneys General Offices on the same footing as federal enforcers when it comes to choosing the appropriate venue to bring cases. The new law also serves to advance our national security interests by providing regulators with the information they need to thoroughly examine the influence of foreign governments in business mergers.

Both the Senate and the House Judiciary Committees held an impressive number of hearings, with testimony from a wide range of witnesses, including representatives of affected businesses, economists, experts on antitrust law, and government enforcers. In the Senate, under the leadership of Chairman Durbin, Ranking Member Grassley, Chairwoman Klobuchar, and

¹ I currently represent clients with an interest in the subject matter of this hearing. For example, I serve as outside competition policy counsel for several business coalitions including the Coalition for App Fairness and the Responsible Online Commerce Coalition, and I also serve as an antitrust advisor to the International Brotherhood of Teamsters.

Ranking Member Lee, the Judiciary Committee held several hearings that dealt with antitrust reform and digital markets.

The House Judiciary Committee also did significant work on these important issues. Under the bipartisan leadership of Chairman Nadler, Ranking Member Collins, Chairman Cicilline, and Ranking Member Sensenbrenner, the Committee conducted a 16-month Investigation of Competition in Digital Markets. As part of that investigation, the Committee examined the dominance of Amazon, Apple, Facebook, and Google, and their business practices to determine how their power affects our economy and our democracy. In addition, the Committee performed a review of existing antitrust laws, competition policies, and current enforcement levels to assess whether they should be updated and modernized to adequately address market power and anti-competitive conduct in digital markets.²

After this intensive and painstaking period of gathering the facts and assessing various proposed solutions, Senator Klobuchar and Senator Grassley introduced the American Innovation and Online Choice Act (AICOA) on October 18, 2021, as a companion to H.R. 3816, introduced by Representative Cicilline and Representative Buck. AICOA represents a comprehensive bill that would effectively limit the ability of large platforms to engage in anti-competitive practices such as unfairly leveraging nonpublic data or instituting discriminatory policies to disadvantage competing products. AICOA was advanced on a bipartisan basis by the House Judiciary Committee on December 21, 2022 and the Senate Judiciary Committee on March 2, 2022.

In a separate effort, Senator Blumenthal and Senator Blackburn introduced the Open App Markets Act (OAMA) on August 11, 2021, as a companion to H.R. 7030, introduced by Representative Johnson and Representative Buck. In contrast to AICOA, OAMA is a narrow bill that applies only to mobile app markets and, within those markets, targets a very specific set of harmful conduct. OAMA was advanced on a near-unanimous bipartisan basis in a markup on February 17, 2022.

Neither AICOA nor OAMA became law last Congress. After the thorough vetting of both the problems and proposed solutions that took place over the past several years, there is no need for further discussion or study. Congress should move forward with urgency to enact the American Innovation and Choice Online Act and the Open App Markets Act without further delay in order to clarify and supplement current antitrust law.

II. The Digital Marketplace is Broken.

There is global consensus that the digital marketplace is broken. Countless jurisdictions, agencies, and other entities have studied these markets and reached essentially the same conclusion: whether we are talking about the app store ecosystem, online marketplaces, social networking, general online search, or online advertising, these markets are dominated by one or

² I was privileged to work on this investigation as a counsel-detailee from the Federal Trade Commission and to co-author the Majority Staff Report and Recommendations.

two online gatekeeper platforms.³ The unchecked ability of the gatekeeper platforms to abuse their monopoly power deprives consumers, other businesses, and workers⁴ of the concrete benefits of competition. Following up on these studies and analyses, multiple jurisdictions have already enacted legislation or are well on their way to doing so.

If the U.S. fails to act on Big Tech in the very near future, there is no doubt that we will be relegated to rule-takers rather than rule-makers in this critical segment of the global economy. The danger of inaction poses a significant threat to the United States' role as a global leader in technology markets.

III. Congress Should Enact Legislation To Clarify and Supplement Current Antitrust Law

A. Legislation Is a More Efficient and Effective Approach to Injecting Competition into Digital Markets than Litigation.

Enforcers, as well as private plaintiffs, are engaged in lawsuits under current antitrust law to seek relief from the gatekeeper platforms' anti-competitive conduct. However, the unique challenges of digital markets plus the time and resource-intensive nature of litigation make this an inefficient, and also possibly ineffective, tool for the job. Instead, Congress can and should respond to calls for urgent action from consumer groups, the business community, and labor to pass legislation that would inject competition into digital markets.

Several circumstances make it particularly challenging for enforcers and private plaintiffs to bring and win lawsuits under existing antitrust law against the dominant platforms. First, antitrust litigation is often very costly, which disproportionately impacts the government or affected businesses bringing these suits versus companies with virtually unlimited resources.

³ See, e.g., U.S. Dep't of Commerce, Competition in the Mobile Application Ecosystem (Feb. 2023), https://www.ntia.gov/sites/default/files/publications/mobileappcosystemreport.pdf?_ga=2.19535932.565939331.1678125002-153658946.1675264928 [hereinafter NTIA Report]; Secretariat of the Headquarters for Digital Market Competition, Cabinet Secretariat, Competition Assessment of the Mobile Ecosystem: Interim Report Summary (Apr. 26, 2022), https://www.kantei.go.jp/jp/singi/digitalmarket/pdf_e/documents_22220601.pdf; Australian Competition & Consumer Commission, Digital platform services inquiry: Interim report No. 2 – App marketplaces (Mar. 2021), <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-March%202021%20interim%20report.pdf>; UK Competition and Markets Authority, Online Platforms and Digital Advertising Market Study Report (July 1, 2020), <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study>; UK Competition and Markets Authority, Mobile Ecosystems Market Study Report (June 10, 2022), <https://www.gov.uk/cma-cases/mobile-ecosystems-market-study#final-report>; Staff of Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary, 116th Cong., Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations (Oct. 2020) https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf [hereinafter House Judiciary Digital Markets Report].

⁴ There has not been enough attention to the impact that the dominant digital platforms' anti-competitive conduct has on workers. For example, Amazon's self-preferencing of its own logistics services places rivals such as UPS at an unfair disadvantage. The result is a race to the bottom, where workers suffer from lower-paying and lower-quality jobs.

Second, individual cases can be dragged out for over a decade before the government or plaintiff obtains any remedy from the court—which may or may not ultimately be sufficient to address the harm. Third, the platforms have an enormous information advantage and unique access to the evidence that the government or plaintiffs need to meet their burden of proof—which has been ratcheted up by the courts over time to create an extremely high bar.

Related to this last point, there is little incentive and substantial disincentive for businesses that are harmed by the gatekeeper platforms’ anti-competitive conduct to share their concerns with state or federal enforcers. The threat of economic retaliation for businesses or individuals who speak out against these powerful monopolies renders them silent and with zero practical recourse to even attempt to vindicate their statutory rights under antitrust law.⁵ Furthermore, this means that the crucial evidence that enforcers need to prove their cases under current law never see the light of day.

The government’s ability to issue subpoenas to compel the production of evidence from third parties does not solve the problem for two primary reasons. First, if these third parties never speak up, enforcers will not know their identity or what factual information they need to request in a subpoena. Second, even if enforcers identify relevant third parties, the incentive for these third parties is to minimize the amount of information they share in order to minimize the risk of retaliation, the costs of complying with discovery requests, and burden and exposure of being required to appear as a witness at trial. For example, a small third-party seller on Amazon’s marketplace could face legal bills that add up to tens of thousands of dollars if they do not want to go up against Amazon’s lawyers alone and unrepresented. (The government is not permitted to provide third-party witnesses with legal advice.)

Another obstacle for access to evidence necessary to win in court is that defendants sometimes issue or threaten to issue burdensome discovery requests to third parties who have expressed concerns about the defendant company in sworn statements to the government. This appears to be an effort to gain leverage over the individual or business and extract a counter-declaration that makes them a less desirable or compelling witness.

B. Legislative Solutions

Bipartisan legislation advanced by this Committee last Congress is a more efficient and effective approach to restore competition to digital markets than litigation under existing law. The American Innovation and Choice Online Act and the Open App Markets Act are competition bills that avoid many of the pitfalls of existing antitrust law.⁶ For example, AICOA’s threshold of a “critical trading partner,” which must be met for a platform to be covered by the

⁵ See, e.g., House Judiciary Digital Markets Report at 19-20.

⁶ Similarly, this is a key strength of the bipartisan Competition and Transparency in Digital Advertising Act, S. 4258, which was introduced by Senator Lee, Senator Klobuchar, Senator Cruz, and Senator Blumenthal last Congress.

bill, cuts out the resource and time-intensive exercise of defining a relevant market and establishing a company’s market power through the rigid calculation of market share. This is critical for digital markets, where such measures are ill-fitted to capture the extent of the dominant platforms’ practical ability and incentive to abuse their gatekeeper power in ways that harm competition. With respect to OAMA, because of the consensus that the prohibited conduct is anti-competitive, unless one of the narrowly tailored affirmative defenses apply, there is no need to demonstrate market power or harm to competition.

In addition, the simple act of setting forth clear rules of the road will likely result in voluntary and affirmative compliance to a substantial degree. Two recent examples from Europe support this conclusion. Critics of the Digital Markets Act (DMA), including trade associations funded by Apple, said the sky would fall if it were passed, particularly with respect to Article 6(4) of the DMA. However, as part of its efforts to comply with the DMA, Apple is now reportedly preparing to allow third-party app stores on the iPhone.⁷ Notably, Apple already allows users to download apps from alternative app stores on its desktops and laptops, instead relying on the operating system and warning and confirmation screens given to the user to protect the device and user data.⁸ Apple also permits Members of Congress and some large firms to bypass Apple’s App Store to install third-party apps.⁹

Similarly, in response to two investigations by the European Commission (EC) into whether Amazon abused its dominant position in e-commerce, Amazon offered a series of voluntary commitments.¹⁰ Although critics of AICOA, including trade associations funded by Amazon, said that the passage of the bill would “break Amazon Prime,” the commitments that the company voluntarily offered up in Europe overlap with several of AICOA’s requirements. Regarding Prime, for example, Amazon agreed to: (i) set non-discriminatory conditions and criteria for the qualification of marketplace sellers and offers to Prime; (ii) allow Prime sellers to freely choose any carrier for their logistics and delivery services and negotiate terms directly with the carrier of their choice; and (iii) not use any information obtained through Prime about the terms and performance of third-party carriers, for its own logistics services.¹¹

⁷ Jay Peters and Mitchell Clark, *Apple is Reportedly Preparing to Allow Third-Party App Stores on the iPhone*, The Verge (Dec. 13, 2022), <https://www.theverge.com/2022/12/13/23507766/apple-app-store-eu-dma-third-party-sideload>.

⁸ See, e.g., NTIA Report at 29.

⁹ Leah Nylen, *Apple Says US Bill Would Make App Store Less Secure, But Its Critics Aren’t So Sure*, Bloomberg (Jun. 23, 2022), <https://www.bloomberg.com/news/articles/2022-06-23/apple-aapl-defends-app-store-security-from-new-us-antitrust-bill-critics#xj4y7vzkg>; see also Apple, *Apple Developer Enterprise Program*, <https://developer.apple.com/programs/enterprise/> (last visited Mar. 6, 2023).

¹⁰ *Amazon settles two European antitrust investigations*, Responsible Online Commerce Coalition (Dec. 21, 2022), <https://theroccoalition.com/amazon-settles-two-european-antitrust-investigations/>

¹¹ European Commission Press Release IP/22/7777, Antitrust: Commission accepts commitments by Amazon barring it from using marketplace seller data, and ensuring equal access to Buy Box and Prime (Dec. 20, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7777.

IV. Conclusion

I applaud this Committee's serious and substantial efforts to study competition problems in digital markets and come up with effective bipartisan solutions, and urge Congress to swiftly pass the American Innovation and Choice Online Act and the Open App Markets Act.