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Overview

It would have been difficult to envisage 15 years ago the changes that the arrival of the digital platforms made to our society. These changes have been rapid for both consumers and businesses. Many of these changes have been positive and enhanced the welfare of consumers. They have provided individuals with ready access to information and the ability to connect with family, friends and groups to support each other in ways they may not have been able to before. They have also allowed more efficient and effective advertising, connecting businesses with consumers who want to purchase their products and services.

Despite the magnitude of the changes, there has not been significant reflection on the implications and consequences of the business models of digital platforms for competition, consumers, and society. Until recently, there has also been little reflection on the responsibilities of digital platforms in the markets in which they operate.

In Australia, and in other jurisdictions, wide-ranging questions are being asked about the role and impact of digital platforms, stretching from alleged anti-competitive conduct to privacy concerns, and from disparity in media regulation to copyright issues. Further issues range from deep concerns over disinformation and harmful content, to the scope and scale of user information collected by platforms, and to the risk of exploitation of consumer vulnerabilities.

This Report looks specifically at the impact of digital platforms on: consumers, businesses using platforms to advertise to and reach customers, and news media businesses that also use the platforms to disseminate their content. As directed by the Government in the Terms of Reference, the Report has a particular focus on the impact of digital platforms on the choice and quality of news and journalism.

The ubiquity of the Google and Facebook platforms has placed them in a privileged position. They act as gateways to reaching Australian consumers and they are, in many cases, critical and unavoidable partners for many Australian businesses, including news media businesses. Dominant firms, of course, have a special responsibility that smaller, less significant businesses do not have. The opaque operations of digital platforms and their presence in inter-related markets mean it is difficult to determine precisely what standard of behaviour these digital platforms are meeting.

For many news media businesses, the expanded reach and the reduced production costs offered by digital platforms have come at a significant price. For traditional print (now print/online) media businesses in particular, the rise of the digital platforms has marked a continuation of the fall in advertising revenue that began with the loss of classified advertising revenue in the early days of the internet. Without this advertising revenue, many print/online news media businesses have struggled to survive and have reduced their provision of news and journalism. New digital-only publications have not replaced what has been lost and many news media businesses are still searching for a viable business model for the provision of journalism online. The impact of this reduction in advertising revenue is most evident in relation to local and regional news providers, which do not have the large potential audience of metropolitan and national titles.

The profound impact of digital platforms on media markets requires careful consideration. News and journalism generate important benefits for society through the production and dissemination of knowledge, the exposure of corruption, and holding governments and other decision makers to account. While recognising the important function that public broadcasters, the Australian Broadcasting Corporation (ABC) and Special Broadcasting Service Corporation (SBS), perform in providing news and journalism across Australia, the Australian Competition and Consumer Commission (the ACCC) considers that commercial news media businesses perform a central role in providing journalism and contributing to media plurality.

The ACCC’s research has highlighted concerns with the reduced production of particular types of news and journalism, including local government and local court reporting, which are important for the healthy functioning of the democratic process. There is not yet any indication of a business model that can effectively replace the advertiser model, which has historically funded the production of these types of journalism in Australia.
The ACCC considers that the regulatory frameworks governing media, communications and advertising also need to be addressed, as they do not allow competition on the merits. While the ACCC does not consider the functions of digital platforms and news media businesses to be comparable in all cases, where digital platforms do perform comparable functions to media businesses, they should be regulated similarly. The imbalance in the regulatory treatment of content delivered via traditional broadcasting, as compared to digital platforms, is distortionary and should be addressed.

Businesses looking to advertise their services and products, on the other hand, have largely benefited from the rise of the digital platforms. For many advertisers, digital platforms have provided a cheaper and more targeted way of reaching consumers who spend an increasing amount of their time online, particularly on the websites and apps controlled by the two major digital platforms in Australia: Google and Facebook.

Advertisers have always sought to use information collected on potential audiences to target their advertising, but the granularity and immediacy of the targeting ability of digital platforms and the volume and scope of information that digital platforms have access to is a substantial step-change in the ability of advertisers to target their intended audience. However, this too has not been without complexities.

Where Google’s and Facebook’s business users are also their competitors, there are questions about whether there is a level playing field, or whether they have the ability to give themselves advantages by favouring their own products. As Google and Facebook continue to expand into adjacent markets through acquisitions and organic expansion, these risks increase.

The competition concerns extend beyond specific sets of advertisers. The dominance of Google and Facebook means that many businesses are reliant on the services provided by these platforms in order to reach customers. Such businesses are potentially exposed, given the ability and incentive of digital platforms to favour either their own or a related business and the lack of transparency in their operations compounds this risk.

The problems for business users advertising via digital platforms are magnified by the black box nature of online advertising products and services. The automated or ‘programmatic’ advertising supply chain is particularly opaque. It can be difficult for advertisers to know where their advertising dollar goes and for websites and apps offering advertising opportunities to know the true value of their advertising inventory. The opacity of this ad tech supply chain leads participants to question its efficiency. Where problems do occur, they may be impossible for participants to detect.

The collection of user data is central to the business model of most advertiser-funded platforms. User data enables digital platforms to offer highly targeted or personalised advertising opportunities to advertisers. The breadth and scale of the user data collected by Google and Facebook is relevant to both the assessment of their market power and consumer concerns. Do the advantages conferred by access to multiple data points create a barrier to entry to both new and future markets? Does access to user data give digital platforms a competitive advantage in entering new markets in competition with their customers? Do consumers make informed choices in relation to how their user data is collected and used by digital platforms? Can the collected data be used in ways that harm society?

The breadth of this Inquiry has enabled the ACCC to consider the linkages between these critical questions of substantial market power and competitive harm, consumer protection and privacy. Enforcement of consumer and privacy laws as well as competition law is critical in addressing potential harms associated with the impact of digital platforms on markets and consumers in Australia. Indeed, consumer law is just as important as competition law in protecting and enhancing consumer welfare.

Australian consumers benefit from the many ‘free’ services offered by digital platforms and most users now have at least some understanding that certain types of user data and personal information are collected in return for their use of a service. However, the ACCC’s view is that few consumers are fully informed of, fully understand, or effectively control, the scope of data collected and the bargain they are entering into with digital platforms when they sign up for, or use, their services.
There is a substantial disconnect between how consumers think their data should be treated and how it is actually treated. Digital platforms collect vast troves of data on consumers from ever-expanding sources and have significant discretion over how this user data is used and disclosed to other businesses and organisations, both now and in the future. Consumers also relinquish considerable control over how their uploaded content is used by digital platforms. For example, an ACCC review of several large digital platforms’ terms of service found that each of the terms of service reviewed required a user to grant the digital platform a broad licence to store, display, or use any uploaded content.

The ACCC is concerned that the existing regulatory frameworks for the collection and use of data have not held up well to the challenges of digitalisation and the practical reality of targeted advertising that rely on the monetisation of consumer data and attention. These concerns are not limited to digital platforms, with an increasing number of businesses across the economy collecting and monetising consumer data.

The volume of consumer data collected, as well as the opportunities to interrogate and leverage such data, are expected to increase. The ACCC considers that the Privacy Act needs reform in order to ensure consumers are adequately informed, empowered and protected, as to how their data is being used and collected. This will increase trust in the digital economy and spur competition between businesses on the basis of privacy.

Digital platforms have also provided an important new avenue for scammers to exploit consumers and businesses. The number and sophistication of scams conducted on, or facilitated by, the use of these platforms is rapidly increasing.

The ACCC considers that now is the time to consider the current and likely future issues associated with digital platforms and their business models and to put in place frameworks that enable adverse consequences to be addressed and that reduce the likelihood of new issues arising. Policy makers must ask whether the principles that have applied in the past are still fit for purpose and must review legislative tools, principles and oversight to address further technological and consumer-driven developments.

The pace of technological change needs to be matched by the pace of policy review. As digital markets and the use of data continue to grow and change, governments need to continue to consider the appropriate level of oversight. The recommendations in this Report allow for this: they both address current problems and allow the Government to identify and address new problems as they arise.

The nature of the ACCC’s Terms of Reference has necessarily led to the assessment of many interrelated issues. This has brought many benefits to the insight the ACCC can provide, as it is clear that a holistic approach that takes into account the close links between competition, consumer, and privacy issues is needed; a siloed approach will fail to address the core interrelated issues associated with the ubiquity of digital platforms. The ACCC also recognises that the issues covered by this Report are part of an even wider set of policy issues being considered by the Government on the role of digital platforms in our society.

The benefits that digital platforms have brought to consumers and businesses have not come without costs and consequences. It is these costs and consequences that governments must now grapple with, both in Australia and in other countries.
Executive Summary

Introduction

In December 2017, the ACCC was directed to consider the impact of online search engines, social media and digital content aggregators (digital platforms) on competition in the media and advertising services markets. In accordance with the Terms of Reference (Appendix A), the ACCC has examined the implications of these impacts for media content creators, advertisers and consumers, focussing, in particular, on the impact on news and journalism.

The ACCC has benefited from extensive engagement in the course of the Inquiry. Over 120 submissions were received in response to the Preliminary Report published on 10 December 2018, and 60 submissions were received in response to the Issues Paper published on 26 February 2018. The ACCC issued approximately 60 statutory notices under section 95ZK of the Competition and Consumer Act 2010 requiring the provision of information and documents to the ACCC. ACCC Commissioners and staff also spoke directly to participants in multiple forums conducted as part of the Inquiry.

Since the Preliminary Report was published in December 2018, there have been a number of significant reports commissioned and published by overseas government agencies and expert panels, which have reached many similar findings to the ACCC. The increased international focus on the impact of digital platforms, their business models and the significance of the user data they collect demonstrates the substantial and widespread impact of digital platforms, irrespective of geography.

The digital platforms at the focus of this Inquiry

The ACCC’s Inquiry has focussed on the three categories of digital platforms identified in the Terms of Reference: online search engines, social media platforms and other digital content aggregation platforms.

A large part of this Inquiry has focussed on Google and Facebook. This reflects their influence, size and significance. Google and Facebook are the two largest digital platforms in Australia and the amount of time Australian consumers spend on Google and Facebook dwarfs other rival applications and websites. This focus also reflects the submissions received from interested parties and consumers, almost all of which concerned Google and Facebook.

While other digital platforms such as online marketplaces were not considered by the ACCC (including Amazon, which is currently relatively small in Australia), considerable attention has been paid to ensuring that the recommendations in this Final Report are forward-looking and adaptable to other digital platforms where appropriate.

The Inquiry’s focus on three user groups

While the ACCC recognises the significant benefits provided by digital platforms, there are potentially adverse consequences of their growth that need to be considered.

In accordance with the Terms of Reference, the Report focuses on the impact of the digital platforms on competition in the advertising and media markets and on three groups of users:

- advertisers (the largest category of business users of the platforms)
- media content creators
- consumers.
As required by the Terms of Reference, the ACCC has had particular regard to the impact of digital platforms on news and journalism, including their effects on the sustainability of the commercial news sector and their influence on the consumption, choice and quality of news in Australia.

Other important concerns, including the role of digital platforms in promoting terrorist, extremist or other harmful content and how social media is used for political advertising\(^1\), are outside the scope of this Inquiry.

**Overlapping issues in data protection, competition and consumer protection**

This Inquiry has highlighted the intersection of privacy, competition, and consumer protection considerations. Privacy and data protection laws can build trust in online markets. They can increase consumer protections by addressing sources of market inefficiencies such as information asymmetries and bargaining power imbalances. Strengthened privacy and data protection laws can also empower consumers to make more informed choices about how their data is processed. This, in turn, is likely to increase competition between digital platforms regarding the privacy dimension of their services. It may also encourage the emergence of alternative business models that generate value for, and from, consumers in other ways.

*Figure 1: Overlap between data protection, competition and consumer protection*

> Compatibility / substitutability / data portability increases competition
> 
> Transparency and accurate, intelligible information regarding data practices protects consumers
> 
> Competitive data-driven markets competing for well-informed consumers on all dimensions of price and quality, including level of privacy protections
> 
> Competition enhances consumer welfare by lowering prices and increasing choice

*Source:* Adapted from the European Data Protection Supervisor, Privacy and competitiveness in the age of big data, March 2014.

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\(^1\) This Inquiry does consider the spread of political material on digital platforms when this material is presented as news and journalism. It also considers regulatory imbalance in media regulation more generally which can include content and advertising restrictions (see Chapter 4).
The rise of digital platforms

Chapter 1 of the Report documents the growth of the digital platforms. It finds that Australian consumers are frequent users of digital platforms and, in particular, the platforms operated by Google and Facebook. The use and significance of these platforms has grown substantially over the past ten years and they are now an integral part of life for most Australians.

Australians’ use of Google and Facebook

Each month, approximately 19.2 million Australians use Google Search, 17.3 million access Facebook, 17.6 million watch YouTube (which is owned by Google) and 11.2 million access Instagram (which is owned by Facebook). Given Australia’s current population of 25 million, with 21 million over the age of 13, it is clear that a large majority of the population are regular users of these platforms.

Figure 2 identifies which apps and websites Australians spend the most time on. As can be seen, the amount of time Australians spend on Google or Facebook platforms dwarfs the amount of time spent on other websites or apps.

Future growth of digital platforms

There is no sign that Australians’ use and engagement with digital platforms, and in particular with Facebook and Google, is slowing.
The share prices of Facebook and Alphabet Inc (owner of Google) suggest investors expect continued growth and higher profits in the future. The current share price valuation of each of Alphabet and Facebook incorporates a substantial margin for projected growth. The ACCC’s broad calculations indicate that approximately:

- 50-67% of the current share price for Facebook can be attributed to expectations for future growth.
- 46-64% of the current share price for Google can be attributed to expectations for future growth.

The ACCC does not have concerns with digital platforms pursuing growth and profitability. The pursuit of growth and profits by businesses underpin the effective functioning of a market economy. However, policy makers, and society more generally, must keep in mind that the actions of digital platforms, like all businesses, will be underwritten by a profit motive. This does not mean that digital platforms do not seek to address harms to consumers and society, but that they will do so within this profit model. Policy makers should consider the extent to which important decisions about the dissemination of information, the collection of personal data and business’ interaction with consumers online, should be left to the discretion of certain large digital platforms, given their substantial market power, pervasiveness and inherent profit motive (including their need for very strong profit growth).

There are no recommendations made in Chapter 1 of the Report.

**Digital platforms: their business models and their market power**

Chapter 2 of the Report sets out the ACCC’s views on the market power of the two leading digital platforms, Google and Facebook, with a focus on the markets most relevant to this Inquiry.

**Google’s and Facebook’s business models: using consumer attention and data to sell advertising**

Google and Facebook provide very different services to consumers. However, Google and Facebook both operate multi-sided platforms. On one side, they offer services to consumers for a zero monetary price in order to obtain consumers’ attention and data, which they monetise. On the other side, they sell advertising opportunities to advertisers.

Both companies generate most of their revenue from advertising.

The fundamental business model of both Google and Facebook is to attract a large number of users and build rich data sets about their users. The ubiquity of these platforms and their presence in related markets enable them to build particularly valuable data sets. This enables them to offer highly targeted or personalised advertising opportunities to advertisers.

The advertising revenue can in turn be used to invest in the functionality and services provided, improving the consumer experience and attracting greater numbers of users to their platforms, as well as improving data gathering techniques. As discussed below, the breadth and depth of the ongoing data collection reinforces their market power.

The advertising businesses of both Google and Facebook now extend well beyond their core owned and operated platforms. Both platforms sell advertising opportunities on third party websites and apps which are part of their respective advertising networks, as well as on the platforms they own and operate.

The collection of user data by both major digital platforms (and other digital platforms) also extends far beyond the collection of data provided or observed via a user’s interaction with the owned and operated apps and services. Data collected from the user’s interaction with vast numbers of other websites and apps is combined with the data from the owned and operated platforms, and, in Google’s case, with data collected from a user’s device, where the device uses the Android mobile operating system.

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2 Based on the share price for Facebook on 20 June 2019.
3 Based on the share price for Alphabet on 20 June 2019.
**Google has substantial market power**

The ACCC has found that Google has market power in a number of markets relevant to this Inquiry and that this power is unlikely to erode in the short to medium term.

The ACCC considers that Google has:
- substantial market power in the supply of general search services in Australia
- substantial market power in the supply of search advertising services in Australia
- substantial bargaining power in its dealings with news media businesses in Australia.

There are high barriers to entry and expansion in the markets for the supply of general search and search advertising services and data plays a key role in these barriers. For example, there are network effects from Google's ability to accumulate large quantities of user data that it can then use to improve its online search and search advertising services.

Google also enjoys advantages of scope in accumulating data from consumers using its wide range of services, including Google Search, Google Maps, YouTube and Gmail; and most mobile phones that use the Android operating system. The advantages are compounded by Google's ability to track consumers on the more than two million websites that use Google advertising services or offer sign-in options through Google.

Google's position across a range of markets, such as mobile operating systems (Android), and web browsers (Chrome), enables Google to set Google Search as a default option. As consumers infrequently change defaults, this has the effect of further entrenching its market power. As set out above, while the data collected by Google increases its market power, the market power held by Google and its presence across related markets can also enable it to collect greater quantities and qualities of data.

Strategic acquisitions also appear to have performed an important role in entrenching Google's position in search and search advertising. Through a series of acquisitions, Google has obtained further advantages of scope and reduced potential competition. By expanding into related markets, Google has been able to remove possible rivals to its core products which, in the medium term, weakens the constraints from dynamic competition.

The ACCC has also identified that substantial economies of scale and sunk costs and the strength of Google's brand are barriers to entry and expansion.

These high barriers to entry and expansion underpin Google's substantial market power and its significant share of relevant markets. At the time of writing, approximately 95 per cent of general searches in Australia are performed through Google and Google earns almost 96 per cent of all search advertising revenue in Australia.

The ACCC has carefully considered the role of dynamic competition and the threat of new entry in these markets. The ACCC reached the view that Google is largely insulated from dynamic competition due to the features identified above, which work together to create particularly high barriers to entering the general search market and, therefore, the search advertising market.

There is a two-way relationship between news media businesses and Google. Google provides a referral service to news media businesses, offering a channel through which an online audience can be reached. Links to, and snippets of, news media content enhance the attractiveness of the service Google is able to offer consumers. A significant number of media businesses rely on news referral services from Google to such a degree that it is an unavoidable trading partner. Many news media businesses would be likely to incur a significant loss of revenue, damaging their business, if Google users could no longer click on links to their website in search results. For commercial news media businesses, having links to their websites on Google is a necessity. The ACCC therefore considers that Google has significant bargaining power in its dealings with these media businesses.
Except to the extent relevant to the core markets the subject of this Inquiry, the ACCC has not undertaken a detailed assessment of other markets in which Google offers services. These include markets for advertising technology services offered by Google in the delivery of automated or programmatic display ads (the ad tech supply chain) or the markets for operating systems or app stores. However, the ACCC notes that other international competition agencies, including the European Commission, have found Google to be dominant in both mobile operating system and app store markets.4

**Facebook has substantial market power**

The ACCC has reached the view that Facebook has substantial market power in a number of markets and that this market power is unlikely to erode in the short to medium term.

The ACCC considers that Facebook has:

- substantial market power in the supply of social media services in Australia
- substantial market power in the supply of display advertising services in Australia
- substantial bargaining power in its dealings with news media businesses in Australia.

Large social media platforms such as Facebook and Instagram have a greater ability to attract users than a smaller scale social media platform. This is because the number of users of a platform directly increases the benefit of that platform to the user.

The size of Facebook’s audience is more than three times larger than the size of Snapchat’s audience (the closest competitor to the Facebook platforms). This network effect creates a significant barrier to entry and expansion.

Facebook also benefits from significant economies of scale, which are characteristic of large digital platforms, with large fixed costs incurred with expenditure on research and development.

Facebook benefits from advantages of scope in its accumulation of data from consumers using the Facebook owned and operated platforms—including the Facebook platform, Instagram, Messenger and WhatsApp. This advantage is compounded by its ability to track users on websites that utilise Facebook business tools or are part of Facebook Audience Network.

Numerous strategic acquisitions by Facebook are also likely to have increased Facebook’s advantages of scope and entrenched its market power.

The ACCC has carefully considered the threat of potential new entry in social media markets. While the ACCC considers that the threat of new entry may, in theory, provide a competitive constraint on Facebook, the considerable scale and reach of Facebook (over 20 times that of MySpace at its peak) appears to protect it from dynamic competition.

The display advertising market identified by the ACCC is much broader than advertising on social media services, encompassing display advertising on a huge range of apps and websites. Despite this breadth of options available, no other online supplier of display advertising has a market share of greater than 5 per cent. In contrast, Facebook and Instagram’s combined share of the online display advertising market in Australia is estimated to be 51 per cent. This likely reflects the large quantity of ‘eyeballs’ that Facebook and Instagram attract, as is apparent from figure 2. It also reflects the significant advantages that social media advertising (and, in particular, advertising on Facebook) provides advertisers, which is differentiated from other websites and apps, not just by the size of the audience, but also the level of user engagement on the platform.

The ACCC also considers that Facebook has substantial bargaining power in its dealings with news media businesses. Similar to the case with Google, there is a two-way relationship between news media businesses and Facebook. Facebook is a vital distribution channel for a number of media businesses, particularly those seeking to target particular demographic groups. News content enhances users’

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experience of the Facebook platform, providing a significant benefit to Facebook. While the number of referrals from Facebook to news media businesses has declined since the Preliminary Report, it remains the case that many news media businesses in Australia would likely lose significant revenue, with adverse impacts on their business, should they forego referrals from Facebook. The opposite is not the case for Facebook. Access to the news content of any one news media business is unlikely to have a material effect on Facebook or its users.

Implications of substantial market power

Australian law does not prohibit a firm from possessing a substantial degree of market power. Nor does it prohibit a firm with a substantial degree of market power from ‘out-competing’ its rivals by using superior skills and efficiency to win customers at the expense of firms that are less skilful or less efficient. However, a firm with substantial market power could damage this competitive process by preventing or deterring rivals, including potential rivals, from competing on their merits. That is, a firm with substantial market power could maintain or advance its position by restricting or undermining its rivals’ ability to compete, rather than by offering a more attractive product.

It is important to note that the Terms of Reference for this Inquiry do not require the ACCC to focus on whether digital platforms have misused their market power. The Terms of Reference instead pose broader questions, including whether the digital platforms are exercising their market power in their dealings with advertisers and content creators in ways that could, for example, cause market failure.

Updating Australia’s merger framework

The ACCC’s analysis found that a range of factors contributed to each of Google’s and Facebook’s dominant positions in their respective markets. The acquisition of potential competitors by the dominant firms and economies of scope created via control of data sets are two such factors.

The ACCC considers that the mergers framework in Australia should be updated to make it clearer that these factors should be taken into account in assessing whether an acquisition has the effect or likely effect of substantially lessening competition. Identifying these factors in legislation signals their importance to merger parties, the courts and the Australian Competition Tribunal.

Notification of mergers and acquisitions to the ACCC is voluntary in Australia, but the ACCC may request certain businesses to notify the ACCC in advance of all proposed acquisitions of entities that carry on business in Australia. The ACCC considers it appropriate that the large digital platforms should each agree to a protocol to notify the ACCC of proposed acquisitions that may impact competition in Australia.

Addressing default bias

Consumer behaviour favours the use of incumbents, particularly those with strong brands. The operation of default settings further entrenches the market power of incumbents, and increases the barriers to entering these markets.

Google benefits from its position as the default search engine on both the Chrome browser (owned by Google), and the Safari browser (owned by Apple), which together account for more than 80 per cent of the Australian market for browsers. The substantial amount paid by Google to Apple for default status on Safari (estimated at approximately US$12 billion in 2019) reflects the value of this default status.

Google Chrome is pre-installed on nearly all Android devices and Google Search is the default option on Google Chrome and Apple’s Safari mobile browsers. Google’s Android and Apple’s iOS operating systems are present on over 40 and 55 per cent of mobile devices in Australia respectively. This means Google’s search engine is effectively the default search engine on over 95 per cent of Australian mobile devices.

Competition agencies in other jurisdictions have also recognised the effect of default bias on consumer behaviour and its effect on Google’s dominance in the general search services market. To address this issue, Google is implementing changes to Android devices offered in Europe, to provide consumers with
a choice of search engine and internet browser. The ACCC considers offering Australian consumers this choice would have the effect of improving competition in the search services market and recommends that Google also implement this change in Australia.

**The role of data in market power**

The ACCC considers that the role of data in future markets is likely to be significant and will be an important factor to be taken into account in assessing the likely competitive effect of relevant mergers and acquisitions.

The breadth and depth of user data collected by the incumbent digital platforms provides them with a strong competitive advantage, creating barriers to rivals entering and expanding in relevant markets, and allowing the incumbent digital platforms to expand into adjacent markets. The multiple touchpoints that Google and Facebook each have with their users enable them to collect more user data, improve their services and attract more users and advertisers, creating a virtuous feedback loop. While user data is not rare, and a large number of businesses track consumers’ digital footprints, no other businesses come close to the level of tracking undertaken by Google and Facebook. It is estimated that more than 70 per cent of websites have a Google tracker and more than 20 per cent of websites have a Facebook tracker. It is also estimated that of the apps available on the Google Play store, 88 per cent send user data back to Google and 43 per cent send user data back to Facebook.

The data held by Google and Facebook is particularly valuable not just because of the scale and scope of user data collected, but also its quality and accuracy, given key data (for example, gender and age) are provided by users directly on sign-up.

Yet access to data is not the sole barrier to entering these markets. For example, the social media market, dominated by Facebook’s platforms, demonstrates strong network effects that are independent of the amount of user data Facebook collects. The value of Facebook to individual users depends on the participation of other users (particularly family and friends) and groups. For both the general search market and the social media market, the benefits to advertisers of using these platforms increase with the number of consumers using them. Their businesses also benefit from significant returns to scale.

The leading digital platforms have performed a critical role in developing data-driven technology and applications. Their multiple touch points with users, and their resulting access to large data sets, as well as their experience with artificial intelligence, including machine learning, mean that they are likely to be well-placed to be at the forefront of new data-driven technology.

The ACCC considers that opening up the data, or the routes to data, held by the major digital platforms may reduce the barriers to competition in existing markets and assist competitive innovation in future markets. This could be achieved by requiring leading digital platforms to share the data with potential rivals. One potential mechanism is the application of the Consumer Data Right. Another is to require the platforms to provide interoperability with other services. However, there are practical considerations that need to be carefully addressed, by both market participants and the Government, before such proposals could be implemented. These considerations include the extent to which other network effects in these markets may restrict the incentives for portability, privacy concerns and identifying the extent of data to be shared.

The ACCC considers that data portability is unlikely to have a significant effect on barriers to entry and expansion in certain digital platform markets in the short term. If data portability or interoperability were identified to be beneficial in addressing the issues of market power and competitive entry or switching, the ACCC could recommend this to the Government. However, the ACCC recognises that aside from addressing issues of market power, portability of data held by digital platforms may deliver significant benefits to current and potential future markets, including through innovation and the development of new services. The ACCC will consider the benefits associated with digital platform data portability in the ordinary course as it considers sectors to which the Consumer Data Right regime may apply in the future.
Recommendations in Chapter 2

Recommendation 1: Changes to merger law
Recommendation 2: Advance notice of acquisitions
Recommendation 3: Changes to search engine and internet browser defaults

Direction for future ACCC work: Data portability for digital platforms

Digital platforms and advertisers

Chapter 3 of the Report focuses on the relationship between digital platforms and advertisers. It finds that online advertising is on the rise and that Google and Facebook have captured most of that growth. It also finds that the supply of online advertising is complex and opaque.

Lack of transparency

The ACCC has found that there is a lack of transparency in the online advertising markets. In particular, it is unclear how Google and Facebook rank and display advertisements and the extent to which each platform self preferences their own platforms or businesses in which they have interests.

A lack of transparency makes it difficult for advertisers to understand the factors that influence the display of their advertising to consumers and, in particular, to identify whether Google or Facebook are favouring their own business interests at the expense of rival advertisers and consumers. While the ACCC appreciates the significance of minimising the opportunity for businesses to 'game' the key algorithms, it is not clear that the appropriate balance has been struck between avoiding this risk and ensuring advertisers are appropriately informed of the outcomes.

To compound the lack of transparency in the operation of Google’s and Facebook’s key algorithms, there is significant opacity in the operation of the ad tech supply chain. The ad tech supply chain involves a range of advertising technology services offered by Google and other businesses to advertisers, websites and apps in order to match advertising demand and supply, and enable the instantaneous delivery of advertisements targeted at particular online users. The opacity of the ad tech supply chain means that the sum of the prices charged by suppliers of ad tech services and the share of advertising expenditure they retain are unknown to many advertisers and websites.

Risk of self-preferencing and other potentially anti-competitive conduct

Google and Facebook have both the ability and incentive to favour their own related businesses (self-preferencing) at the expense of other business users of the platform. They also have the ability and incentive to favour a business with which they have an existing relationship (and through which additional revenue may be generated), such as websites that are members of their display or audience network or use their ad tech services.

Given the substantial market power of each of Google and Facebook, their presence in a significant number of related markets and the opacity of their key algorithms, there is significant potential for self-preferencing by Google and Facebook to substantially lessen competition.

The extensive amount of data available to Google and Facebook provide these platforms with a competitive advantage and assist with entry into related markets. After entering the market, the role of Google or Facebook as a host or gateway then enables these platforms to advantage their own related businesses.

Anti-competitive discrimination by digital platforms in favour of a related business has been established by cases in other jurisdictions. For example, in the European Commission’s 2017 decision, Google was found to have systematically given prominent placement to its own comparison shopping service (Google Shopping) and to have demoted rival comparison shopping services in its search results. The European Commission found that this conduct was capable of having, or was likely to have, anti-competitive effects in a comparison shopping services market.
Discrimination may occur in multiple ways where a digital platform is active in related markets. For example, owned and operated platforms may be given advantages in the operation of auction processes (for example, by enabling a last look in auctions for ad inventory) or a greater degree of interoperability. Data obtained by key platforms or interfaces may also be used to advantage their own related businesses at the expense of rivals.

Monopoly or near monopoly businesses are often subject to closer oversight due to the risks of competitive harm. The risk of competitive harm increases when the monopoly (or near monopoly) business operates in related markets. The ACCC considers that Google and Facebook each have substantial market power and each have activities across the online advertising supply chain.

The potential harm caused by dominant firms to business users (principally advertisers) can extend beyond self-preferencing. Other areas where there is a risk of potentially anti-competitive conduct by digital platforms include restrictive clauses in customer contracts, preventing customers partnering with rival businesses and restrictions on access to data and the promotion of competing products.

The ACCC notes two recent decisions of the European Commission that found evidence of anti-competitive conduct by Google:
- the decision in March 2019 that Google had abused its dominant position by imposing unfair restrictions on owners of publisher websites which prevented them from partnering with rival suppliers of advertising services
- the decision in July 2018 that requirements imposed by Google on mobile manufacturers to pre-install certain apps as defaults in order to licence other proprietary apps amounted to an abuse of Google’s dominance in licensable smart mobile operating systems.

**Significance of digital platforms to the online economy and the need for proactive investigation, monitoring and oversight**

Digital platforms such as Google and Facebook occupy a critical position in the digital economy and are the gateways for businesses seeking to access Australian consumers online.

This role, combined with the leading platforms’ substantial market power and activities in related markets, and the opacity and complexity of these markets, creates significant risks to the efficient and effective operation of these markets.

While the existing tools and goals of competition law and consumer law frameworks remain applicable to digital markets, the opacity and complexity of these markets make it difficult to detect issues and can limit the effectiveness of the broad principles. As a result, the ACCC considers that existing investigative tools under competition and consumer law should be supplemented with additional proactive investigation, monitoring and enforcement powers to achieve better outcomes for Australian businesses and consumers.

Recommendation 4 gives effect to this by proposing the creation of a branch within the ACCC to focus on digital platforms.

An ongoing focus on digital platforms will facilitate greater and more consistent scrutiny of potentially anti-competitive behaviour and consumer harms. It will shine a light on inefficient outcomes in these markets in order to improve outcomes for consumers and business users. It may also act as a catalyst for sector-driven change. It will enable the ACCC to build on its knowledge and expertise in the markets in which digital platforms operate, which will facilitate more timely outcomes of any competition or consumer enforcement action. The proactive investigation and collection of data and information is central to this. For this reason, the ACCC considers it should be provided with the power to hold an extended public inquiry, enabling it to periodically and systematically collect data, and compel information on an ad-hoc basis that may be used to assess the functioning of markets and for future enforcement action.

It should be noted that since the Inquiry commenced, the ACCC has begun several investigations into the conduct of digital platforms under the *Competition and Consumer Act 2010*. It is unlikely that these investigations would have commenced without the proactive examination made possible by this Inquiry.
The information and evidence collected by this new ACCC branch could also be used to inform potential policy recommendations to Government. The impact of digital platforms on both current and future markets is difficult to predict and proactive monitoring and investigation will enable an evidence base to be established to inform policy decisions.

**Concerns with the operation of the ad tech supply chain and the role of advertising and media agencies**

The ACCC has identified specific concerns with the complexity and opacity of the services offered by suppliers involved in the ad tech supply chain, including advertising and media agencies. The concerns with the ad tech supply chain go beyond the operation of the auctions and the risk of self-preferencing and include concerns with a lack of transparency as to the effective price paid for each ad tech service.

Advertisers are unable to determine whether the services they purchase offer ‘value for money’. Competition is undermined if advertisers are unable to compare and select the most efficient ad tech partners and publishers with whom to place media spend. The owners of websites are likewise unable to determine whether the ad tech platforms they contract with are the most efficient or not, as comparison between platforms is difficult.

Advertising and media agencies perform a key role in the purchase of advertising inventory, including the purchase of programmatic advertising. The ACCC has concerns about the lack of transparency in the way advertising and media agencies operate, including where the agencies or their holding companies act as intermediaries and purchase advertising opportunities from large platforms or media for resale to clients.

This is a complex area and the ACCC’s experience in this Inquiry suggests that advertisers and others may be unwilling to publicly identify their concerns.

In order to consider these issues more fully and to comprehensively assess whether the ad tech supply chain is operating efficiently, the ACCC recommends that an inquiry into ad tech services and advertising and media agencies be held. Such an inquiry would assist in increasing the transparency in the operation of the ad tech supply chain and the operation of advertising and media agencies, and in determining whether any competition or efficiency concerns exist.

**Questions over advertisement verification**

In the Preliminary Report, the ACCC identified potential concerns about whether advertisers are able to adequately verify whether advertisements on digital platforms are served to their intended audience.

Further inquiries by the ACCC indicate that the availability of independent third party ad verification and the information available to ad verification businesses will likely address these concerns, should advertisers seek to employ these services. The role of media rating and accreditation bodies in verifying and setting standards also appears likely to address these concerns and provide advertisers with the transparency they seek.

Nevertheless, the ACCC recognises the potential for concerns to arise, given the size and significance of this market and the inherent difficulties in advertisers verifying the delivery of online advertisements. Should any concerns arise, these issues could potentially be identified by the above inquiry and considered by the digital platforms branch proposed under Recommendation 4 below.
Digital platforms and news media businesses

Chapter 4 of the Report analyses the regulatory frameworks that operate in relation to similar services supplied by news media businesses and digital platforms and Chapter 5 of the Report details the commercial relationships between news media businesses and digital platforms.

Regulatory imbalance between news media businesses and digital platforms

Digitalisation and the increase in online sources of news and media content highlight inconsistencies in the current sector-specific approach to media regulation in Australia that gives rise to an uneven playing field between digital platforms and some news media businesses. Digital platforms increasingly perform similar functions to media businesses, such as selecting and curating content, evaluating content, and ranking and arranging content online.

Despite this, virtually no media regulation applies to digital platforms. This creates regulatory disparity between some digital platforms and some more heavily-regulated media businesses that perform comparable functions. This regulatory disparity has two potential consequences:

- first, the regulation may be less effective and unable to meet the goals set by policy makers (for example, protecting children from inappropriate advertisements or content)
- second, the disparity risks distorting competition, such as competition between the digital platforms and media businesses supplying advertising opportunities.

The disparity exists due to the failure of current regulatory frameworks to keep pace with changes in technology, consumer preferences and the way in which media businesses now operate.

The ACCC recommends that media regulatory frameworks be updated, to ensure comparable functions are effectively and consistently regulated. The framework should, as far as possible, be platform neutral, clear and contain appropriate enforcement mechanisms and meaningful sanctions.

The relationship between news media businesses and digital platforms

Digital platforms are both rivals to, and essential business partners of, content creators including news media businesses in the supply of display advertising opportunities.

The 2019 University of Canberra Digital News Report found that that 33 per cent of Australian consumers report accessing news through social media, with 25 per cent using search engines to search for news brands and 20 per cent using search engines to search for particular news stories.

Google is a critical source of internet traffic (and therefore audiences) for news media businesses.

A news media business risks losing a significant source of revenue if it prevents Google from providing links to its websites in search results. While Facebook contributes a significantly lower proportion of traffic to news media businesses, it remains a vital distribution channel for a number of media businesses, particularly those seeking to target a particular demographic group.

The content produced by news media businesses is also important to digital platforms. For example, between 8 and 14 per cent of Google search results trigger a “Top Stories” result, which typically includes reports from news media websites including niche publications or blogs.
While the digital platforms clearly value the news media content that they are able to display to their users, Google and Facebook each appear to be more important to the major news media businesses than any one news media business is to Google or Facebook. As set out above, this provides each of Google and Facebook with substantial bargaining power in relation to many news media businesses.

The reliance by news media businesses on traffic from Google and, to a lesser extent, on traffic from Facebook also means the digital platforms and their business models have a significant effect on news media businesses. Particular concerns raised during the course of the Inquiry include:

- the lack of warning provided by digital platforms to news media businesses of changes to key algorithms relating to the display of news content or news referral links
- the implementation of policies and formats that may have a significant and adverse impact on the ability of news media businesses to monetise their content and/or to build or sustain a brand and therefore an audience
- the impact of such policies on the incentives for news and journalistic content creation, particularly where significant effort is expended to research and produce original content.

A key concern relates to Google’s use of news media businesses’ content in snippets, the short summaries or extracts of text that accompany links to a news story and are displayed when a consumer searches for a news story. A similar concern exists in relation to the posts of news stories that appear in a user’s Facebook News Feed.

The ACCC recognises that news media businesses, digital platforms, and importantly, consumers benefit from the reproduction of news content in snippets.

Media businesses benefit because a snippet provides context and an indication to the user of the value of that content, increasing the likelihood of consumers clicking through than if no snippet were provided (although this may depend on the length of the snippet). Consumers value snippets for a related reason, as the context enables them to make an informed choice of which article to click on. While Google does not generally sell advertising opportunities next to search queries that are considered by Google as having a ‘news intent’, Google benefits because the inclusion of news stories and snippets in search results increases the attractiveness of the Google search engine. This in turn increases the likelihood that consumers will use the search engine for other queries, which can be directly monetised. Facebook benefits because news stories appearing on a user’s news feed retain the user’s attention, enabling more advertisements to be displayed.

However, the inability of news media businesses to individually negotiate terms over the use of their content by digital platforms is likely indicative of the imbalance in bargaining power. Individual news media businesses require Google and Facebook referrals more than each platform requires an individual media business’s content.

**Proposed codes to address the imbalance in the bargaining relationship between leading digital platforms and news media businesses**

Given the imbalance in the relationships between the leading digital platforms and Australian news media businesses, the ACCC recommends that designated digital platforms should each separately be required to provide a code of conduct to the Australian Communications and Media Authority (the ACMA) to govern their commercial relationships with news media businesses. The ACMA would be responsible for designating which digital platforms should be required to implement a code. The development of each code should be informed by a consultation process with news media businesses and contain a strong enforcement mechanism. The ACMA would closely consult with the ACCC in performing its role under this recommendation.

Breaches of the code would be dealt with by the ACMA, which should be vested with appropriate investigative and information gathering powers and the capacity to impose sufficiently large sanctions for breaches to act as an effective deterrent.

The ACCC considers that if a digital platform is unable to submit an acceptable code to the ACMA within nine months of designation, the ACMA should create a mandatory standard to apply to the designated digital platform.
**Recommendation in Chapter 5**
Recommendation 7: Designated digital platforms to provide codes of conduct governing relationships between digital platforms and media businesses to the ACMA

**Copyrighted media content and digital platforms**

Digitalisation has made copyrighted material more accessible than ever, amplifying existing policy issues in copyright regulation and enforcement.

In this environment, digital platforms are also increasingly important marketplaces for the distribution of, and access to, copyright-protected content, including that produced by Australian media businesses. As such, the ability of content creators and media businesses to monetise copyright-protected content distributed online rests on their ability to ensure that existing copyright law obligations can be enforced against digital platforms that host copyright infringing content.

The ACCC considers that the enforcement of these obligations could be assisted by a code that provides clear standards to ensure the timely and effective take-down of copyright-infringing content on platforms, including content belonging to Australian news media businesses and smaller rightsholders.

**Additional recommendation in Chapter 5**
Recommendation 8: Mandatory ACMA take-down code to assist copyright enforcement on digital platforms.

**The disruption of Australian media and the risk of underinvestment in journalism**

Chapter 6 of the Report outlines the impact that digital platforms have had on the revenue of many Australian media businesses, and their effects on the quality and choice of news and journalism in Australia.

**Reduced advertising revenue and a decreasing number of journalists**

Digitalisation and the growth of digital platforms have had both positive and negative impacts on the production of news and journalism in Australia.

Digital platforms have created opportunities and cost savings for online media by enabling news media businesses to reach a larger potential audience and by lowering the costs of research, production and distribution.

However, the reduction in advertising revenue over the past 20 years, for reasons including the rise of online advertising, appears to have reduced the ability of some media businesses to fund Australian news and journalism.

Australian commercial media, and in particular traditional print media (now print/online media), first suffered a significant reduction in advertising revenue through the unbundling of classified advertisements from newspapers.

This resulted in a decline from AU$2 billion in classified advertising revenue in 2001 to AU$200 million in 2016 (nominal figure).\(^5\) If these figures are adjusted for inflation \(^6\), the decline over the same period is from AU$3.7 billion to AU$225 million.

During this same period, Australian traditional print media (now print/online media) faced increased competition from international sources and other media providers, both commercial and publicly funded.

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\(^5\) Commercial Economic Advisory Service of Australia (CEASA) data.

\(^6\) Inflation adjusted to 2018.
Over the past decade, a strong fall in the print advertising revenue of commercial Australian media publishers has been accompanied by a rise in spending on online advertising (figure 3, left panel). It is clear that digital platforms have taken an increasing share of advertising expenditure, with a significant portion of the increase in online advertising revenue from 2014-2018 going to Google and Facebook (figure 3, right panel).

**Figure 3**  
Australian advertising expenditure by media format and digital platform

Importantly, the revenue of the traditional print publishers, including from their print and online advertising businesses, continued to decline even after the vast majority of classified revenue had shifted online.

Census data shows that from 2006 to 2016, the number of Australians in journalism-related occupations fell by 9 per cent overall, and by 26 per cent for traditional print journalists (including those journalists working for print/online news media businesses). Data provided by the main media companies show the number of journalists in traditional print media businesses fell by 20 per cent from 2014 to 2018. This is at a time when Australia’s population and economy were growing strongly.

The ACCC recognises Australian consumers can now access a wider range of news and journalism sources (including international outlets, podcasts, blogs and ‘citizen journalism’). However, the ACCC is concerned by the declining number of professional journalists focussing on Australian news and the reduction in certain forms of reporting beneficial to society that are unlikely to be the focus of newer forms of journalism.

**Types of journalism at risk of under-provision**

Since the Preliminary Report, the ACCC has carried out further research to ascertain the impact of the reduction in advertising revenue earned by media businesses on types of journalism that may be at risk of under-provision in Australia.

Data collected by the ACCC show that between 2008 and 2018, 106 local and regional newspaper titles closed across Australia, representing a net 15 per cent decrease in the number of these publications. These closures have left 21 local government areas previously covered by these titles without coverage from a single local newspaper (in either print or online formats), including 16 local government areas in regional Australia.

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7 Advertising market shares identified in this report are the ACCC’s best estimate based on information from a number of sources, including data from CEASA. Where the ACCC has requested information from firms it has done so on the basis of the revenue received from advertisers in Australia. This may include some portion of expenditure that is spent by Australian advertisers targeted at users located outside Australia. Conversely, it does not include expenditure by advertisers located overseas targeted at users in Australia. As with all estimates, there is a potential that this may underestimate or overstate the actual market share of each firm or the total size of the market. The ACCC notes that the most recent data referenced in this Report relates to the 2018 calendar year and market shares may have changed from this point in time.
The ACCC also carried out a quantitative assessment of print articles published in all metropolitan and national daily newspapers by the three largest Australian news publisher groups.\(^8\)

This analysis indicates a significant reduction in provision of multiple categories of reporting related to public interest journalism; that is, journalism that performs a critical role in the effective functioning of democracy at all levels of government and society.

In particular, the research indicates a significant fall in the number of articles published covering local government, local court, health and science issues during the past 15 years. The reduction exists in both the absolute number of articles published in each of these categories and the percentage of total articles published attributed to these categories.

The decline in provision of each of these categories of journalism coincides with reductions in Australian metropolitan journalists and reductions in print (now print/online) media revenue over the period surveyed.

As these two studies focussed on traditional news publishers, the ACCC recognises that it is important to consider whether new market entrants, and in particular the so-called ‘digital natives’, can offset the reduced provision of particular types of journalism in Australia.

While coverage of specialist topics such as health and science have broad and indeed global interest and may be provided by specialist digital natives such as Croakey Health Media and international sources, it appears unlikely that emerging news outlets will compensate for the reduced coverage of local court and local council issues. The business models of the most prominent digital natives in Australia, such as Crikey, The Guardian Australia and BuzzFeed News Australia, all seek large national audiences, and their journalists are accordingly unlikely to focus on local government or local court reporting. Recent redundancies of journalists employed by digital natives also demonstrate that these new entrants are not immune to the commercial forces affecting production of journalism by more traditional news outlets.

The reduction in the reporting of local and regional affairs likely reflects the consequences of the unbundling of classified advertising from print publications and the shift in display advertising to digital platforms. While there may not be a large audience for such reporting, local court, local government and regional reporting perform an important role in exposing corruption, holding governments, corporations and individuals to account, as well as in the production and dissemination of knowledge.

The role of the public broadcasters

In Australia, the two publicly funded broadcasters, the Australian Broadcasting Corporation (ABC) and Special Broadcasting Service Corporation (SBS), are the predominant means by which the Government has addressed the potential under-provision of public interest journalism.

In recognition of the role performed by the ABC and SBS in addressing the public good nature of journalism and consequent risk of under provision of public interest journalism, the ACCC recommends that stable and adequate funding be provided to the ABC and SBS.

However, while the public broadcasters have performed, and will continue to perform, an extremely important role in addressing under-provision of certain forms of journalism and contributing to media plurality, a wider range of news sources should also be active in the provision of all categories of journalism in order to ensure depth of coverage and broader range of media voices throughout Australia. Further, the public broadcasters are not currently resourced to fully compensate for the decline in local reporting previously produced by traditional commercial publishers.

Targeted funding to support particular categories of journalism at risk

The ACCC considers that continued production of the types of public interest journalism most at risk of under-provision is likely to require government assistance, and that the form of this assistance should be carefully evaluated. While the Preliminary Report identified tax offsets and making personal

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\(^8\) Due to limitations in the database used, the ACCC’s research was limited to articles published in print editions. However, the ACCC understands that content of these print publications closely mirrored the online versions of the same publications throughout the period assessed.
subscriptions for publications tax deductible as policy approaches for further analysis, such analysis has indicated that these mechanisms are not the most effective or efficient ways to address the risk of under-provision of particular types of journalism.

This Report recommends a new program of direct grants targeted at local reporting, to replace the Regional and Small Publishers Jobs and Innovation Package, which is due to terminate in June 2021.

This program should provide total funding in the order of AU$50 million per annum to support the production of local reporting, to be defined as original journalistic coverage of matters relevant to local and regional communities – such as local courts, local issues and local government. These grants should be administered at arm’s length and be platform neutral, with print, online and broadcast news providers all eligible to apply.

The nature and scale of this recommendation has been informed by the ACCC’s consideration of existing and announced measures taken by governments in other countries, which have faced comparable concerns about the risk of under-provision of local journalism.

**Support for philanthropically-funded journalism**

The ACCC also considers that philanthropically-funded and not-for-profit journalism could perform a more significant role in addressing the risk of under-provision of public interest journalism in Australia, noting the increasing prevalence and success of this kind of journalism overseas.

Philanthropic support for journalism could be encouraged in Australia by enabling donors to make tax-deductible contributions to not-for-profit organisations that produce, promote or assist the production of public interest journalism. To do so, the ACCC recommends that the Government amend tax settings to create a specific charitable purpose and a new category of deductible gift recipient (DGR) status for not-for-profit organisations that carry out such activities.

The recommendation to create both a new charitable purpose and a new DGR category reflects Government policy that registered charity status will become a prerequisite for DGR status from 1 July 2020.

To be eligible for registered charity and DGR status through these new categories, organisations would need to comply with existing accountability measures overseen by the Australian Charities and Not-for-profits Commission (ACNC).

Applying the existing requirements for charity status overseen by the ACNC would appropriately disqualify organisations that engage in political advocacy. It would guarantee that journalism-focussed organisations seeking tax-deductible philanthropic funding maintain a high level of public accountability.

The new charitable purpose and DGR categories should also require minimum levels of transparency, impartiality and independence. For organisations that produce journalism, this should include compliance with existing industry codes such as the Australian Press Council Standards of Practice.

### Recommendations in Chapter 6

- Recommendation 9: Stable and adequate funding for the public broadcasters
- Recommendation 10: Grants for local journalism
- Recommendation 11: Tax settings to encourage philanthropic support for journalism

### The impact of digital platforms on the consumption of news and journalism

Chapter 6 also discusses the impact of the digital platforms on the consumption of news, noting the role of digital platforms in fundamentally altering the way that many users find and interact with news. This part of chapter 6 looks at the possible risks that arise from this interaction.
Risk of less reliable and lower quality news on digital platforms and measures to address this risk

Australians are now more easily and frequently able to access news from local and international sources free-of-charge. Digital platforms, and in particular search engines such as Google, have performed an important role in increasing the diversity of news sources accessed by Australian consumers.

The 2019 Digital News Report found that algorithm-driven digital platforms are among the most popular sources of journalism for Australian news consumers, with 33 per cent reporting accessing news through social media, 25 per cent using search engines to find a particular news brand, 20 per cent using search engines to find specific news stories, and 12 per cent accessing content through news aggregators. By comparison, 30 per cent of Australian news consumers accessed online news directly from the websites of news media businesses.

However, as identified in the Report, accessing news and journalism through digital platforms may increase consumers’ risk of exposure to less reliable and lower quality news. This is because news and journalism accessed via digital platforms has been de-coupled from the news media business, often limiting a consumer’s familiarity with and knowledge of the original source of the story.

Leading digital platforms have taken or are taking steps to help users identify the reliability, trustworthiness and provenance of news. For example, Facebook, Google and Bing work with the ‘Trust Project’ to incorporate independent assessments of news sources into the way they display news to users and prioritise different sources through algorithms. Both Facebook and Twitter use badges to verify the authenticity of public figures and organisations distributing information on their services.

While these are important initiatives, the ACCC is of the view that efforts in this area should not be designed and implemented at the sole discretion of the digital platforms. The ACCC therefore recommends that an independent regulator such as the ACMA provide oversight of these voluntary initiatives by monitoring digital platforms’ efforts to enable users to identify reliability, trustworthiness and provenance of news content featured on their services. This would ensure that these initiatives continue to protect the interests of Australian news consumers.

The ACCC also recommends measures to improve digital media literacy across the community, to ensure all Australians are well equipped to identify and appropriately scrutinise low quality or unreliable news encountered through digital platforms.

In particular, the ACCC recommends that a Government program be established to fund and certify non-government organisations for the delivery of digital media literacy resources and training. It should be based on the frameworks currently used by the Online Safety Grants Program and Be Connected program, which are administered by the Office of the eSafety Commissioner. The resources and training should be broadly delivered through community centres, libraries, schools and senior centres for the benefit of all Australians. The ABC and SBS are already involved in the provision of digital media literacy resources, and the ACCC considers that organisations participating in the proposed program could partner with these entities in the development and delivery of education and training.

The ACCC also considers that there should be separate consideration of the approach to digital media literacy in Australian schools as part of the broader review of the Australian Curriculum scheduled for 2020.

A digital platforms code to address the risk of deliberately misleading and harmful news stories

The ACCC also considers that there is a risk of consumers being exposed to deliberately misleading and harmful news when using digital platforms. The ACCC is particularly concerned about the risk of consumers being exposed to serious incidents of disinformation - false or inaccurate information deliberately created to harm a person, social group, organisation or country.

The ACCC recognises that while the platforms have taken steps in this area, there is a need for consistency of treatment of serious incidents of disinformation, which is an increasing concern in Australia and internationally.
The ACCC therefore recommends that digital platforms establish an industry code to govern the handling of complaints about disinformation. This would relate to news and journalism or content presented as news and journalism, where that content has the potential to cause serious public detriment. This proposal seeks to improve transparency and help consumers by publicising and enforcing the procedures and responses that digital platforms must apply when dealing with these complaints. The proposed code would also consider appropriate responses to complaints about malinformation – information deliberately spread by bad faith actors to inflict harm on a person, social group, organisation or country, particularly where this interferes with democratic processes. While such malinformation has recently become an issue overseas, the ACCC considers it to be a more remote threat than disinformation in the Australian context. If the digital platforms fail to establish an industry code within a designated timeframe, a mandatory standard should be imposed.

The ACCC also recognises concerns that accessing news via digital platforms exposes consumers to an increased risk of ‘filter bubbles’ and ‘echo chambers’. While the ACCC is not of the view that further intervention or regulation is necessary at this time, the ACCC’s recommendations will allow the Government to continue to monitor this area and take further steps as appropriate.

### Additional recommendations in Chapter 6
- Recommendation 12: Improving digital media literacy in the community
- Recommendation 13: Digital media literacy in schools
- Recommendation 14: Monitoring efforts of digital platforms to implement credibility signalling
- Recommendation 15: Digital Platforms Code to counter disinformation

### Digital platforms and consumers

**Chapter 7** of the Report discusses the bargain between consumers and digital platforms and the ability of consumers to both be informed about their data and exercise meaningful control over it.

#### Consumers’ bargain with digital platforms

Digital platforms provide a wide range of valuable services to Australian consumers, often for zero monetary cost. The ubiquity of digital platforms in the daily lives of consumers means that many are obliged to join or use these platforms and accept their non-negotiable terms of use in order to receive communications and remain involved in community life.

The ACCC considers that Australian consumers are better off when they are both sufficiently informed about the collection and use of their data and have sufficient control over their data. Transparency over the collection and use of data is important so that consumers have the opportunity to understand what data they are providing to others and how it is being used.

However, this transparency is not enough. Consumers, once they understand what is being collected and how it is used, must be able to exercise real choice and meaningful control.

The future of the digital economy relies on trust, by both consumers and business users. As the Productivity Commission has noted:

> Businesses, as much as governments, rely on the willingness of the public – the source of so much of the data – to continue to trust data handling and use. Against the background of an ocean of personal data that is already public, there is now, and will be in the future, a need for continued community acceptance and trust in the handling of personal data by both governments and business.

**Social licence will develop if people:**
- have a sound basis for believing in the integrity and accountability of entities (public and private) handling data

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feel they have some control over how their own data is used and by whom, and an inalienable ability to choose to experience some of the benefits of these uses themselves

better understand the potential community-wide benefits of data use.

The ACCC’s proposals will provide sufficient information to enable consumers to make informed and genuine choices, to increase the accountability of entities handling user data, and to provide the ability for consumers to exercise some control over their user data. The ACCC considers that the most efficient way to make these changes is to amend the existing privacy law and extend protections under consumer law.

A lack of informed and genuine choice

Many digital platforms increasingly collect a large amount and variety of user data. The data collected often extends far beyond the data users actively provide when using the digital platform’s services. Digital platforms may passively collect data from users, including from online browsing behaviour across the internet, IP addresses, device specifications and location and movement data. Once collected, digital platforms often have broad discretions regarding how user data is used and also disclosed to third parties.

The user data collected can enable digital platforms to create more detailed segmented user profiles that are then available for use by advertisers wishing to target advertisements. Consumers have informed the ACCC that they have concerns about the extent and range of information collected by digital platforms.

The ACCC is of the view that consumers’ ability to make informed choices is affected by:

- The information asymmetry between digital platforms and consumers. The ACCC found that consumers are generally not aware of the extent of data that is collected nor how it is collected, used and shared by digital platforms. This is influenced by the length, complexity and ambiguity of online terms of service and privacy policies. Digital platforms also tend to understate to consumers the extent of their data collection practices while overstating the level of consumer control over their personal user data.

- The bargaining power held by digital platforms compared to consumers. The ACCC also found considerable imbalance in bargaining power between digital platforms and consumers. Many digital platforms use standard-form click-wrap agreements with take-it-or-leave-it terms and bundled consents, which limit the ability of consumers to provide well-informed and freely given consent to digital platforms’ collection, use and disclosure of their valuable data.

Without adequate information on how digital platforms collect and use users’ data, or the ability to choose between digital platforms on the basis of their data practices, consumers are unable to make informed decisions. This is likely to impede potential competition between digital platforms on the privacy and data protection offered. This may also impede the new entry of rival services that use alternative business models.

Lack of consumer protection and effective deterrence under existing laws

The lack of both consumer protection and effective deterrence under laws governing data collection have enabled problematic data practices and a lack of transparency and control which undermine consumers’ ability to select a product that best meets their privacy preferences. The lack of deterrence under current laws is compounded by individual consumers’ inability to bring direct actions for breaches of their privacy under the Privacy Act or for serious invasions of their privacy that cause financial or emotional harm.

The need for strengthened protections in the Privacy Act

The ACCC notes the announcement from the Australian Government on 24 March 2019 of tougher penalties and other measures to protect Australians’ online privacy. The announced changes include:

- increased penalties for serious or repeated breaches to whichever is the greater of: AU$10 million, three times the value of any benefit obtained through the misuse of information, or 10 per cent of a company’s annual domestic turnover
- new infringement notice powers for the Office of the Australian Information Commissioner (OAIC) and other expanded options available to the OAIC to address breaches
- a requirement for social media and online platforms to stop using or disclosing an individual’s personal information upon request
- specific rules to protect vulnerable groups such as children.

The ACCC welcomes these changes, a number of which also form part of this Report’s recommendations. The ACCC also recommends the Government consider further legislative changes to strengthen privacy regulations in Australia, in particular:

1. Updating the definition of personal information in line with current and likely future technological developments to capture any technical data relating to an identifiable individual.

2. Strengthening notification requirements to ensure that the collection of consumers’ personal information directly, or by a third party is accompanied by a notice of the collection that is concise, intelligible and easily accessible, written in clear and plain language, provided free of charge, and accompanied by appropriate measures to reduce the information burden on consumers.

3. Strengthening consent requirements to require that consents are freely given, specific, unambiguous and informed and that any settings for additional data collection must be preselected to ‘off’. Consents should be required whenever personal information is collected, used or disclosed by an entity subject to the Privacy Act, unless the personal information is necessary to perform a contract to which a consumer is a party, required under law, or otherwise necessary in the public interest.

4. Requiring entities subject to the Privacy Act to erase the personal information of a consumer without undue delay on receiving a request for erasure from the consumer, except in certain circumstances.

5. Introducing direct rights for individuals to bring actions or class actions before the courts to seek compensation for an interference with their privacy under the Privacy Act.

The ACCC also notes that privacy law reform responding to the increasing collection and use of personal information is not unique to Australia. In recent years, a number of jurisdictions have introduced strengthened privacy regulations including in Europe (via the General Data Protection Regulation), certain states in the United States (including California), and Japan.

**Future concerns – review of privacy regulation**

Innovation and rapid technological change has transformed the ability and incentive of entities to collect, use, and disclose the personal information of Australian consumers in the digital economy. These changes are accompanied by the growing awareness and concern of Australian consumers regarding privacy and data protection.

As observed by the ALRC in their report on Australian privacy law and practice more than a decade ago, ‘rapid advances in information, communication and surveillance technologies have created a range of previously unforeseen privacy issues’. The Productivity Commission has also echoed these comments in noting that the Privacy Act may have a limited application in a highly data-driven future.

The ACCC therefore considers that, in addition to its recommendations for targeted amendments to the Privacy Act, broader reform of the Australian privacy regime may be necessary to maintain effective protection of consumers’ personal information in the longer term, including a consideration of the current objectives and scope of the Privacy Act (recommendation 17).

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Some privacy law changes should apply economy-wide

The ACCC’s inquiries indicate that potentially problematic data practices, and the associated potential for consumer harm, extend beyond digital platforms to other markets. For example, many businesses seek consent to data practices using click-wrap agreements, bundled consents, and take-it-or-leave-it terms where consumers are not provided with sufficient information or choice regarding the use of their personal information.

This results in an increased exposure to data breach risks, a reduction in trust which could result in consumers avoiding transactions, and the potential for particular risk to vulnerable consumers, including children.

Therefore, changes to laws which give consumers greater control over their personal information and increase the accountability of businesses for data practices and the deterrence effect of Australian privacy laws are needed.

The ACCC considers that the proposed amendments to Australian privacy law and the introduction of a statutory tort for serious invasions of privacy (recommendations 16, 17 and 19) should apply across the economy. The ACCC does not consider that only implementing specific changes applicable to digital platforms would be sufficient to protect the long-term interest of consumers or to maintain their trust to facilitate the free flow of information necessary for data-driven markets in the digital economy.

Digital platforms – OAIC Privacy Code of Practice

The Inquiry has identified that, in addition to the large volume of Australian consumer personal information collected by digital platforms, several aspects of digital platforms’ notification and consent processes raise particular concerns. As such, it is necessary to supplement the economy-wide amendments to the Privacy Act outlined above with additional obligations specific to digital platforms’ data practices, including in relation to notification and consent requirements, opt-out control, the handling of children’s data, information security, retention of data and complaints handling.

For example, to address the acute information asymmetry between digital platforms and consumers without increasing the information burden on consumers, digital platforms should be required to provide multi-layered notices about their data practices. This should range from a first layer containing concise statements targeted to areas of potential concern to a consumer to a final layer which can set out all relevant details of how a consumer’s data may be collected, used, disclosed and shared by a business (including with third parties).

The ACCC recommends that this be achieved via an enforceable Privacy Code of Practice to be developed by the OAIC to apply to digital platforms. It should also be enforced by the OAIC and accompanied by the same penalties as are applicable to an interference with privacy under the Privacy Act.

The Privacy Code of Practice should be developed through extensive consultation with relevant stakeholders, including consumer and privacy advocates. The ACCC should also be involved in developing the code in its role as the competition and consumer regulator.

As above, the ACCC notes that, in March 2019, the Government announced the creation of a legislated code to apply to social media and online platforms which trade in personal information. The ACCC views that this recommendation could align with and be taken into account in the Government’s consideration of the substance and reach of that code.

Consumers require additional protection under consumer law

In the course of this Inquiry the ACCC has identified a number of examples of conduct which are detrimental to consumers that may not be effectively addressed or neatly fit under the existing Australian Consumer Law (ACL).

The ACCC has observed terms in contracts that can involve a significant imbalance in the rights of consumers and digital platforms but which, if held to be an unfair contract term, would not be subject to penalties. While individual terms that are unfair could be declared ‘void’ by a court, this remedy may not be of much benefit to a consumer and does not effectively deter businesses from using such terms.
Therefore, the ACCC considers that the introduction of civil pecuniary penalties for unfair contract terms in standard form consumer or small business contracts would more effectively deter businesses, including digital platforms, from leveraging their bargaining power to include unfair contract terms in their terms of use or privacy policies.

The ACCC has also observed a range of practices that are significantly detrimental for consumers but which may not neatly fit under existing consumer laws. These practices are driven in part by the significant increase in the amount of consumer data now collected and the increased sophistication in data analysis and consumer targeting, which also creates the potential for significant consumer harm. These practices include:

1. Changing terms on which products or services are provided without reasonable notice or the ability to consider the new terms, including in relation to products with subscriptions or contracts that automatically renew.
2. Adopting business practices to dissuade a consumer from exercising their contractual or other legal rights, including requiring the provision of unnecessary information in order to access benefits.
3. Inducing consent or agreement by very long contracts or providing insufficient time to consider them or all or nothing ‘click wrap’ consents.

Accordingly, the ACCC recommends that the Australian Consumer Law be amended to include a prohibition on certain unfair trading practices, noting that such prohibitions have been used to address similar practices overseas. The ACCC recognises that the scope of such a prohibition should be carefully developed such that it is sufficiently defined and targeted, with appropriate legal safeguards and guidance. It also notes the current work on this issue being undertaken as part of the Consumer Affairs Australia and New Zealand (CAANZ) process, and will progress its support for the recommendation through that forum.

The ACCC, as the Commonwealth consumer protection agency, will actively enforce the Australian Consumer Law to ensure consumers are protected from any conduct of digital platforms that may raise consumer protection concerns. The digital platforms branch proposed under Recommendation 4, in addition to monitoring and investigating instances of potentially anti-competitive conduct, will have an important role in monitoring the impact of digital platforms on Australian consumers and digital platforms’ compliance with the Australian Consumer Law.

The ACCC is also currently investigating conduct identified during the Inquiry that raise concerns under the Australian Consumer Law (see page 38).

### Recommendations in Chapter 7

- Recommendation 16: Strengthen protections in the Privacy Act
- Recommendation 17: Broader reform of Australian privacy law
- Recommendation 18: OAIC privacy code for digital platforms
- Recommendation 19: Statutory tort for serious invasions of privacy
- Recommendation 20: Prohibition against unfair contract terms
- Recommendation 21: Prohibition against certain unfair trading practices

### Scams on digital platforms and other emerging issues

Chapter 8 of the Report seeks to address issues raised with the ACCC in the course of the Inquiry that the ACCC considers are currently emerging or will arise in the foreseeable future. This includes scams via digital platforms, developments in artificial intelligence and voice activated devices.

Based on complaints received by the ACCC between 2014 and 2018, reports of scams occurring via social media have increased by 188 per cent in the past four years, and the value of losses incurred via scams on social media jumped by 165 per cent. By way of example, in the week of 6-12 May 2019, the ACCC scamwatch team received 165 reports of scams where Facebook was mentioned, with an estimated AU$70 000 in losses.
Prepared Statement of

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Before the

U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Antitrust, Commercial, and Administrative Law

Investigation into the State of Competition in the Digital Market Place
11 May 2020

I am currently teaching my Spring Platforms and Networks course. The students have been fully engaged with the early material in the course on the history of the U.S. post office, railroads as common carriers, the creation of the U.S. interstate highway system, rural electrification in 1930s, rural broadband today and the 1982 break-up of AT&T. The students were, I am sure, eager to get to smartphones, Amazon and Facebook but there is an important, deeply relevant history that they should encounter before then. In normal times, the intelligence and engagement of my students would be something that I would appreciate but probably, alas, take a little for granted, but these of course are extraordinary times. Countries across the globe face a joint medical and economic crisis that most of us have not seen in our lifetimes.

The fact that my course continues over Zoom successfully with me at home in Chicago and my students scattered across the country is by itself a small point—not to me to be clear or I hope to my students—but the fact that education continues during the crisis is not a small point, but rather is essential. There is no more obvious investment in the future than education. And that so many other activities are still moving forward even as so many are staying at home is a testament to the digital communications and computing infrastructure in place. Not uniformly even in the U.S.—and that was part of our class discussion of rural broadband—but at sufficient scale that the entire economy hasn’t shut down even as many have stayed home to slow the spread of the coronavirus. Had this crisis hit five years ago, I don’t know that we could have done this and I am quite skeptical that we could have ten years ago.
As you note in your letter to me, your subcommittee has been investigating the state of competition in the digital marketplace. I very much appreciate the invitation to participate in your process and I will focus my response on that digital marketplace. There are certain companies that we associate with that digital marketplace, say Google, Apple, Facebook, Amazon and Microsoft—Intel often gets less attention here—and I find it impossible to discuss Amazon without talking about Walmart and other companies that compete with Amazon’s retail operations. I have in teaching and writing given these companies and these issues a great deal of thought, but I find these issues quite complex. All I can do is offer my best understanding of them right now, but that understanding continues to evolve as I consider new and old situations.

This statement is divided into six sections. Section I summarizes my answer to your questions. Section II sets out a brief history of the firms that you have been looking at in your inquiry. Section III tries to set out what some might see as key problems in the digital marketplace. Section IV looks at each of those situations in depth. Section V looks at the opportunities for and challenges of regulation in these areas and Section VI concludes. This statement is pretty long, but still incomplete in other ways, and there aren’t as many footnotes and citations as there otherwise might be as the Law School is closed given the Covid-19 pandemic and I do not have access to any of the materials in my office.

I. Overview

Your letter focuses on three specific areas of inquiry. This statement runs 35 pages and that sets out my full analysis of your questions, but I also understand that you might like something upfront that is directly responsive to your questions:

- Adequacy of Existing Laws That Prohibit Monopolization and Monopolistic Conduct
  - I take the existing laws to refer to current U.S. antitrust law. U.S. antitrust law is primarily a fault-based system administered by the Antitrust Division of the Department of Justice and the Federal Trade Commission with appeals to federal courts.
  - If you believe that we should change how competition currently works in the digital marketplace, I am skeptical that anything like traditional U.S. antitrust law is your tool of choice. Fault is a hard standard and the companies at the heart of your investigation are built on products that succeeded in the marketplace in the face of real competition. How these companies have behaved once they achieved their leading positions is something very much within traditional antitrust analysis, but their success in achieving those positions initially is something that the United States should celebrate and is outside traditional antitrust analysis. This is market success, not fault. And, based on the enforcement record so far, I am doubtful that a more encompassing European Union-style competition law would be effective either.
• Of course, you could change antitrust law to move it away from a fault-based system, but doing that moves in the direction of more direct regulation of the digital marketplace. Instead of organizing these rules around fault as antitrust typically does, an alternative set of new rules would be based on market competition triggers and would impose new competition obligations on leading firms at the point of being triggered. I discuss that in more detail below.

• **Adequacy of Existing Laws on Anti-Competitive Acquisitions**
  - While this overstates a little, the starting point here is that competitors have no real interest in competition. Society benefits from competition while competitors have a frequent desire to limit competition. They might do that through direct agreements limiting competition, but those of course are per se illegal under Section 1 of the Sherman Act and there is a broad consensus that that is the right policy. But competitors can also limit competition through acquisitions, where the purchase operates as a split of the profits associated with monopoly power. These are presumably the type of anti-competitive acquisitions that you have in mind in your letter.

• Current U.S. antitrust law regarding mergers is organized around the horizontal merger guidelines and the Hart-Scott-Rodino pre-merger notification regime, thought there is an ongoing process by the FTC and the Antitrust Division to produce new vertical merger guidelines. A natural alternative to this process is to adopt more bright-line rules that limit acquisitions by particular types of firms (perhaps a system tied to meeting certain conditions (status)), with either a hard limit or a strong presumption that would restrict acquisitions. Yet another alternative would be to allow acquisitions but then review them after the fact with the possibility of subsequent required divestitures. That structure would return to the early days of antitrust where mergers were considered after they were completed. The 1911 breakup of Standard Oil matches that pattern.

• I find it most useful to discuss these issues in the context of concrete examples—for example, Facebook’s acquisition of Instagram was, I think, quite different from Amazon’s purchase of Whole Foods—and I do that below, but again, to offer an answer upfront, I am skeptical that we should create broad new limits on mergers.

• **Institutional Structure of Antitrust Enforcement**
  - This raises questions that are, in the main, I think, separate from your inquiry into the digital marketplace. I don’t know how many antitrust agencies we should have though I am skeptical that the right number is 52 (or more depending on how you count). The question raises hard problems about the respective role of the federal government and
individual states and also then about having two agencies at the federal level with overlapping jurisdiction. Sorting all of that would go beyond anything that I have thought about carefully in the context of this letter.

- On narrower questions—say should more money be allocated to the Antitrust Division or to the FTC?—I think that you would be better served to rely on individuals who have been inside those agencies and who can better assess than I can exactly how more money would be spent. It is easy to say, for example, that we should have more retrospective studies of mergers, but that is to treat the money as free and agencies always face tradeoffs, as does Congress in assessing how to allocate funds among competing worthy programs.

II. A Brief History of the GAFAM

The companies that you are focusing on in your inquiry in the digital marketplace have achieved those positions by building products embraced in the marketplace and those products succeeded in the face of robust competition. It would be easy to overlook the path that those companies took to reach this point. To replay that history briefly, start with August 9, 1995, the date that Netscape became a publically-traded company. That date is a useful milestone for a discussion of the digital marketplace, even as that date ignores the origins of the internet in the early 1960s work of ARPA; the 1980s work of the National Science Foundation; and the early 1990s work at CERN in Switzerland and at the National Center for Supercomputing Applications at the University of Illinois at Urbana Champaign. We should not forget that it was the work of the government and these research institutions that put in place the foundations for the commercial internet era.

In July 1995, Amazon launched its website to sell books, Google and Facebook didn’t exist yet, and Apple was in deep financial trouble and would report unexpectedly large losses at the beginning of 1996. Microsoft and Intel were very large, successful companies. They had had grown into those positions when IBM launched its personal computer on August 12, 1981 and as the IBM PC became a standard as it was duplicated by countless clone makers. In July 1994, Microsoft had settled its initial antitrust conflict with the Department of Justice over Microsoft’s licensing practices for MS-DOS. Microsoft would be required to change how it licensed MS-DOS, but it wasn’t clear how much day-to-day-operations would change.¹

Consider these companies one by one in a little greater detail.

A. Google/Alphabet

Sergey Brin and Larry Page were computer science graduate students at Stanford when they launched Google in 1998. In their 1998 research paper, Brin and Page noted a core problem with using advertising to fund a search engine: “... we expect that advertising funded search engines will be inherently biased towards the advertisers and away from the needs of the consumers.” They noted that search engine bias would be “particularly insidious” given the difficulty for even experts to detect it. Their conclusion was that it was “crucial to have a competitive search engine that is transparent and in the academic realm.”

Indeed, the search industry was looking for a business model that worked as lines between various forms of advertising blurred. In July 2001, the FTC launched an investigation in response to a complaint regarding possible Section 5 deceptive practices by search engines. The inquiry focused on few firm names that we still recognize today, such as Microsoft and AOL Time Warner and other names that we have largely forgotten—AltaVista, Direct Hit Technologies, iWon, Looksmart and Terra Lycos—but Google didn’t even make the list.

But that all changed rapidly. By April 2002, Google had become the number three search site—trailing only MSN and Yahoo—and it had left its pure search competitors such as Overture and AltaVista in the dust. And Yahoo wasn’t really generating its own search results but instead had contracted for search from Google. By October 2003, Google was seen as the clear leader of the search market and indeed was seemingly attracting attention from Microsoft about a possible Microsoft purchase of Google. Google of course stayed independent and went public in August 2004.

While Google’s organic search business has continued to grow, Google has also expanded its business in a series of acquisitions, including buying, among other companies, YouTube.com for $1.65 billion in October 2006; DoubleClick for $3.1 billion in April 2007; certain Motorola assets for $12.5 billion in 2012; Nest for $3.2 billion in 2014; and most recently Looker for $2.6 billion in 2019. That is not a comprehensive list as it omits, among others, the pending purchase of Fitbit, the purchase of Android (discussed below) and smaller acquisitions that may have been valuable in building up other products like Google Maps. All of Google’s completed large acquisitions were

reviewed by antitrust authorities here and often elsewhere and were approved under the applicable standards.5

B. Apple
Apple was losing money in 1996 and entered the year as a possible acquisition target. By the end of 1996, Apple purchased NEXT Computer, a company that Steve Jobs had founded after he had left Apple, and that purchase brought Jobs back to Apple. But Apple Computer started on the path to the Apple of today on October 23, 2001 when it launched the iPod. In doing that, Apple was introducing a product different from anything that it had produced before and it was entering a crowded marketplace of MP3 players. There was no obvious reason to think that Apple would succeed in this market, though at least in this market it wasn’t facing substantial leading competitors.

That would be exactly the position Apple encountered when it launched the iPhone on January 9, 2007. Research in Motion had moved from its original Blackberry—a handheld email device—into a combined phone/email tool, but Nokia was the clear market leader. Apple would not have been in a position to build the iPhone absent the success of the iPod, but there was no good reason to think that Apple would revolutionize smartphones or that it could succeed in the face of successful well-funded incumbents like Nokia and RIM. And it is worth remembering that the iPhone didn’t take off immediately. It was, at least in some ways, a limited device and Apple wouldn’t open up the App Store until July 11, 2008.6

C. Facebook
“Social Networks” made The New York Times end-of-the-year list of the big ideas of 2003. The article described Friendster.com as the best known of the new social networks, even though it had only launched in March 2003. Friendster was competing with Tribe.net (launched in late July 2003), Tickle (a dating service) and LinkedIn. The social networking idea wasn’t new—SixDegrees.com had launched in 1997 and failed—but as the underlying internet infrastructure grew in power, meaningful online social networks were possible.7

In November 2003, Harvard University undergraduate Mark Zuckerberg was hauled before a Harvard administrative board on charges that he had violated Harvard policies in building his facemash.com website. The website had created a Harvard version of the then-popular Hot or Not website to compare the attractiveness of Harvard undergraduates. Zuckerberg survived the hearing but would take a leave from Harvard to launch in 2004 a new website, thefacebook.com. Reflecting its roots,

Facebook grew rapidly on college campuses through 2004 reaching roughly 1 million users by December 2004.8

But, as suggested already, Facebook was just one of any number of competing social networks. Friendster was fading as MySpace grew in popularity, a point capped off in July 2005 when News Corp., a traditional media firm, purchased MySpace for $580 million. MySpace had more than 16 million monthly users and was the sixth most visited internet site, trailing only Yahoo, eBay, MSN, Google and AOL. News Corp. was clearly buying the premier social networking site. MySpace was advertising supported and was seen as an attractive place to reach young consumers. Indeed, Google struck a deal with MySpace to spend $900 million for advertising over three years.9

We know of course how this ended so there is no reason to linger here. Facebook overtook MySpace notwithstanding MySpace’s initial strong position in social networking, one that MySpace had achieved by outcompeting other firms like Friendster and Tribe. Do note that Yahoo reportedly tried to buy Facebook in January 2006 for $750 million and then later in September 2006 for $900 million. And Facebook hadn’t even opened up to the public generally when Yahoo sought to buy it and wouldn’t do so until roughly September 2006. Facebook stayed independent and went public in May 2012, but in the middle of that process, on Apr 9, 2012, Facebook announced that it was buying Instagram for $1 billion. The FTC investigated that deal and voted 5-0 to not to take any action to block the deal. And in February 2014, Facebook bought WhatsApp for $16 billion. Antitrust regulators in the U.S. and Europe evaluated the deal but eventually took so steps to block the purchase.10

D. Amazon

When Jeff Bezos launched Amazon in July 1995 to sell books online, it faced well-established growing book store competitors. Barnes & Noble had a little over a billion dollars in revenue for its 1992 fiscal year but that had grown to roughly $2.4 billion for 1996. As its 1996 annual report put it, “[w]e have created a dominant, growing and defensible position in an expanding marketplace, along with a franchise value second to none.” Its principle competitor, Borders, was a little smaller reaching almost $2 billion in revenues in its 1996 fiscal year. Amazon’s net sales in 1996 totaled $15.7 million. And

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for comparison, Walmart’s 1996 revenues were $93.6 billion, though presumably no one thought that Walmart and Amazon were meaningful competitors in 1996.\(^{11}\)

Amazon’s business model harkened back to an earlier era. Sears and Montgomery Ward had grown into some of the U.S.’s largest sellers on the strength of their catalog businesses. Montgomery Ward opened its catalog business in 1872 and Sears followed in 1887. By the early 1920s, Sears was the second largest retailer in the world, just slightly smaller than The Great Atlantic & Pacific grocery store chain, while Montgomery Ward was the fourth largest retailer. The growth of these catalogue merchants had been spurred in part by the 1913 decision of the U.S. Post office to create its new parcel post business to enter into competition with private services in delivering larger packages. Sears was built on the mail-order catalogue business, as Sears did not open its first retail store until 1925. And Sears started selling its own private-label brands in 1927 when it acquired the Craftsman brand, which applied initially to tools but expanded to other products as Sears grew its private-label business. Sears presumably was selling its own in-house products in competition with those from outside producers.\(^{12}\)

Amazon had built an infrastructure to attract customers to its website, process payments and deliver goods at a distance and adding more products just meant adding items to it warehouses. Amazon added other products to its website (CDs in July 1998, DVDs in November 1998 and Electronics in July 1999), plus in October 1999 it started selling third-party products through its new zShops program. By October 2006, it had taken its core internal skill sets and turned them into wholesale businesses by launching Fulfillment by Amazon and Amazon Elastic Cloud Compute. In each case, Amazon had built a skill set that it used to operate its own first-party inventory business and it was now making those skills available at wholesale to other firms that wanted to buy those services.

E. Microsoft

Microsoft was a small but growing computer languages company when IBM approached it for a new computer project that IBM was undertaking. IBM wanted to license programming languages from Microsoft but it also asked whether Microsoft would be able to provide an operating system for the computer that would become the IBM PC. Microsoft didn’t have an operating system, so it turned down IBM and instead directed IBM to a second company, Digital Research, the maker of the then-leading operating system for personal computers, CP/M. IBM would eventually return to Microsoft to push the company to produce an operating system. Microsoft in turn


licensed an operating system from a third party and used that to produce the software that became MS-DOS.\textsuperscript{13}

On August 12, 1981, IBM launched its new IBM PC and that in turn transformed the personal computer market. IBM announced its new computer with three different operating systems (including one from Digital Research), but Microsoft’s MS-DOS eventually carried the day. And as a new clone market emerged — companies effectively copying the IBM PC architecture — the clone makers turned to Microsoft for its operating system and to Intel for the microprocessor that was the calculating heart of the machine. As IBM moved to regain control over the platform it had created through a new operating system, OS/2, and new hardware standards, Microsoft successfully built a new layer, Microsoft Windows, on top of MS-DOS. IBM never regained control over the PC platform that it launched and Microsoft and Intel rose to dominance of it.

Microsoft would eventually face a series of antitrust actions in the U.S. and Europe. In July 1994, the U.S. and Microsoft resolved concerns about Microsoft’s licensing practices for MS-DOS with an agreed final judgment. In May 1998, the U.S. brought a new antitrust action against Microsoft related to how Microsoft responded to the entry of Netscape Navigator. Microsoft would eventually lose that case in 2001 before the D.C. Circuit, sitting en banc, where the court found that Microsoft had engaged in illegal monopoly maintenance in violation of Section 2 of the Sherman Act. Microsoft subsequently faced actions in Europe focused on, among other things, allegations that Microsoft had impermissibly tied other products — notable Windows Media Player and Internet Explorer — to Windows. Those cases would result in, in the one case, to a finding of a violation resulting in a large fine and an imposed market remedy and, in the second case, to an agreed settlement with a different market remedy.\textsuperscript{14}

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I offer this short history of these companies to situate their success a little. I want to make two other introductory points before turning to consider problems in competition in the digital marketplace. First, even though those companies have operations across the globe, they were all founded in the U.S. and continue to be based here. I do not think that we should take that point as a given or that we as a country would be indifferent to having all of those companies based in say Japan, Europe or China.

There is clearly concern right now about competition between the U.S. and China in the development of 5G wireless, as seen in the recent order issued by the Federal Communications Commission to show cause against China Telecom (Americas) Corporation given possible concerns that the corporation is controlled by the People’s


\textsuperscript{14} United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001) (en banc); European Commission, Commission concludes on Microsoft investigation, imposes conduct remedies and a fine, Mar 24, 2004; European Commission, Antitrust: Commission accepts Microsoft commitments to give users browser choice, Dec 16, 2009.
Republic of China government. In an earlier era, the concern was not China, but Japan. The fear was that the U.S. was trailing Japan in producing new generations of semiconductors. That fear would eventually lead to a new antitrust exemption for joint research projects and to an industry wide consortium, Sematech, to try to restore the U.S. position in semiconductors with backing from the U.S. Department of Defense.\(^{15}\)

And of course ARPA—the government agency that drove the formation of the early internet—was founded in the response to the launch by the then Soviet Union of its first Sputnik satellite on October 4, 1957. Then Senator John F. Kennedy writing in *The New York Times* on December 8, 1957 said “Sputnik has come; American complacency has gone.” He went on to argue for “reappraisal—for a reassessment of our strength and strategy, a reevaluation of our basic policies.” APRA was part of that reassessment. We want U.S. companies to succeed and the scale of that success will be driven first and foremost by the quality of their products and by key features of the economics of digital marketplaces.\(^{16}\)

That gets us to the second point, namely that our starting point when looking at these firms should be—and traditionally has been within U.S. antitrust law—that firms that compete and win on the merits and that achieve a leading, even dominant, market position do not violate U.S. antitrust law in doing that. Again, that is to emphasize that U.S. antitrust law is, in the main, organized around a conception of fault. Firms that conspire to fix prices break Section 1 of the Sherman and should be held liable. The Sherman Act is a criminal statute and the Antitrust Division enforces it in just that way. But success in the marketplace doesn’t equate to monopolization under Section 2 of the Sherman Act. Successful firms violate Section 2 of the Sherman Act when they misuse their positions to either maintain monopolies or to distort competition. That is how fault arises under Section 2.\(^{17}\)


\(^{17}\)United States v. Standard Oil Co., 173 F. 177, 191 (E.D. Mo. 1909), aff’d, 221 U.S. 1 (1911) (“It was enacted, not to stifle, but to foster, competition, and its true construction is that while unlawful means to monopolize and to continue an unlawful monopoly of interstate and international commerce are misdemeanors and enjoinable under it, monopolies of part of interstate and international commerce by legitimate competition, however successful, are not denounced by the law, and may not be forbidden by the courts.”; United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2nd Cir. 1945) (“In such cases a strong argument can be made that, although, the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: finis opus coronat. The successful competitor, having been urged to compete, must not be
Of course, subject to constitutional constraints, Congress can reset antitrust law to abandon a fault-based system or to create other laws outside of antitrust to reset competition. I take your inquiry to be raising exactly the question of whether that should be done. To assess that, we should turn to considering the current state of competition in the digital marketplace.

III. Possible Problems in Digital Marketplace Competition

We need to identify what we think are the competition problems that we see in the digital marketplace and then identify what we think are possible tools to solve them. I am sure that others will raise different issues, but I will focus this statement on four issues: (1) Google’s dominance of search; (2) digital advertising dominance by Google and Facebook; (3) Amazon’s dual role as seller and platform; and (4) the smartphone operating system duopoly.

A. Google’s dominance of search

Statcounter.com puts Google’s April 2020 search engine market share across all devices (meaning desktop, tablet and mobile) at 88.21%. Bing, Yahoo and DuckDuckGo make up the rest of the market at, respectively, 6.5%, 3.65% and 1.24%. Google’s worldwide share is just lower at 86.02%. These statistics reflect a particular way of framing search. They, for example, exclude product searches run directly on Amazon.com, but Google’s position in the general search market is remarkable. As discussed below, Google has faced antitrust inquiries in the past in the U.S. and in Europe related to these markets and there are reports on pending investigations by both federal and state antitrust agencies. Should we regard Google’s dominant position in search as an antitrust problem? Has Google used that position to thwart new competitors? What should we take away from the prior antitrust investigations of Google’s search position? And if antitrust is not the right tool, what other tools are available?

B. Digital advertising dominance

The search figures above measure how consumers search but of course Google is really a media company and it charges advertisers to reach the consumers produced through its search engine. Google and Facebook are the leading digital advertising firms, though Amazon is growing rapidly. Newspapers are in a state of decline and given the role that newspapers play in a vibrant democracy, there is understandable concern about the state of newspapers, now and going forward. What role has antitrust played to get to this point? Is there a good antitrust tool to address this issue or is a different response outside of antitrust required?
C. Amazon’s dual role as seller and platform

Amazon is by far and away the leading ecommerce company though ecommerce of course is only one part of overall retail and Amazon’s 2019 net sales of roughly $280.5 billion are only about 55% of Walmart’s 2019 total revenues of $514.4 billion. Amazon’s position has been achieved mainly through internal growth, though it has made a number of substantial purchases, perhaps most prominently buying Whole Foods in 2017 for $13.7 billion. Those mergers went through the normal DOJ/FTC procedures under the Hart-Scott-Rodino pre-merger notification regime. The central concern with Amazon seems to be that it sells inventory on its own account while simultaneously acting as a platform for third-party sellers. Senator Warren has described the problem here as that Amazon can’t be both a player and a referee. Is this actually a problem? If so, have past antitrust failures created this problem? Would it be better if Amazon was forced to divest its retail operations from its platform operations? If so, is there an antitrust basis for doing that or would such a divestiture need to be implemented through new legislation?

D. Smartphone operating systems duopoly

Apple and Google dominate smartphone operating systems and their control over iOS and Android means that they act as gatekeepers for the app stores associated with their platforms. That mean that they collect substantial fees—typically a 30% cut—on paid transactions for apps and the like. And there are allegations that Apple and Google give themselves advantaged access to the platform. For example, Spotify has claimed that Apple’s own music offering has superior access to iOS compared to Spotify’s competing music streaming service. Again are these problems? If so, can they be addressed though antitrust? If not, what would remedies look like outside of antitrust?

IV. Analysis of Possible Problems in Digital Marketplaces

I turn to considering each of the above situations in greater detail.

A. Google Dominance of Search

As I set out in the brief Google history above, everything suggests that Google constructed a superior product and achieved its original position in search through legitimate competition. Assuming that is right, a traditional antitrust case against Google would need to focus on some sort of misuse of that position. The natural place to look is for an illegitimate reaction by Google to some type of threat to Google’s search product. Two situations come to mind, so-called vertical search and then the transition from computer desktops to mobile devices. I discuss vertical search in this section and the transition to mobile devices in the section below on smartphone operating systems.

Google faced parallel investigations by the U.S. and Europe on these issues in the early 2010s. The European Commission announced on November 30, 2010 that it was looking at whether Google was preferring its own services and had abused a dominant market position when faced with competition by vertical search services. It was...
believed that the U.S. Federal Trade Commission was undertaking a similar investigation over related issues.\textsuperscript{18}

1. THE THREATPOSED BY VERTICAL SEARCH
The case against Google was based on the new competition posed by vertical search. Google’s traditional approach to search relied on indexing websites and assessing which website offered the best response to a user’s inquiry. Google took the internet as a given and relied on the information presented by each website. Think of this as first-party information, meaning the information that, say, a restaurant presented about itself on its own website. Of course, first-party information providers rarely say anything negative about themselves.

Contrast that with third-party information of the sort created on websites like Yelp. People who eat at a restaurant post reviews for other people looking for restaurants. This isn’t preexisting information but instead is created by users for users and facilitated by the website. Vertical search sites might not compete with Google over the full range of searches but each specialized search might compete in its area. And much local search—a good restaurant, doctor or dentist—might be best sourced from actual consumers of the relevant services.

Google constantly changes how it produces organic search results, but a particularly big change was the move in 2007 to so-called universal search and the Google onebox. Google moved away from just responding with ten blue organic links (and the associated advertising of course) to providing a grouping of possible answers to search queries (such as “what is the best restaurant in Chicago?”). And in doing that, two different issues arose. One was that Google was copying reviews and ratings—scraping as the industry talked about it—from vertical search sites like Yelp directly into the onebox result so that a Google searcher need not visit the vertical search engine to see the results. Yelp of course sells advertising as well, so lost visits meant lost revenues. The second allegation was that Google was preferring its own review sites over outside sites and that it wasn’t creating links to review sites based on its normal organic algorithms.

2. FRAMING AN ANTITRUST CASE AGAINST GOOGLE
The broad vertical search engine case eventually died, at least so far. On January 3, 2013, the U.S. Federal Trade Commission announced that it was closing its investigation into these issues. The Commission concluded that Google’s move to universal search and the onebox was an effort to be more directly responsive to consumers and was not, “on balance, demonstrably anticompetitive.” And the investigation in Europe moved away from the broad inquiry into vertical search engines and instead narrowed into a case focused on one particular product, Google Shopping. The European case resulted

in a substantial fine against Google and a back-and-forth over remedies, though Google recently announced that it was dropping its original approach entirely.\footnote{Federal Trade Commission, Statement of the Federal Trade Commission Regarding Google’s Search Practices, In the Matter of Google Inc., Jan. 3, 2013; European Commission, Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service, June 27, 2017; Bill Ready, It’s now free to sell on Google, google.com, Apr 21, 2020.}

The FTC was almost certainly right that the move to universal search was responsive to the needs of consumers, a central concern of U.S. antitrust law. That said, Google could have moved to its onebox result format while still allowing review links to be produced organically. The FTC inadvertently released part of an internal report staff report on the case, and the FTC staff was in favor of pursuing Google, even as the five commissioners voted against doing so.

The case against Google would have framed the situation as, when Google was finally facing an upstart search competitor with a new data model, Google moved to restrict distribution of the competitor’s product by rejiggering its product to reduce the chance that consumers would click over to the competitor’s website, either through scraping ratings and reviews or by providing only its own reviews. We should not expect new competitors to attack directly in the core market of a dominant firm but instead expect them to enter in a related market at the edge. The hope is that they will gain meaningful traction in the related adjacent market and then will grow over time into a more direct competitor for the original firm.

That was, for example, the structure of the competition between Microsoft and Netscape. Netscape didn’t build a competing operating system to try to unseat Windows. It built a browser but Microsoft feared that the browser would grow into a replacement for the operating system—that it would, in Bill Gates’s memo on that competition, “commoditize” the operating system—and seeing that competitive threat, Microsoft moved to squelch Netscape. It was that effort that resulted to the D.C. Circuit finding a violation of Section 2 of the Sherman Act in 2001.\footnote{Bill Gates, The Internet Tidal Wave, May 26, 1995; United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001) (en banc).}

The parallel here is that Google, faced with new vertical search competitors, changed how it presented organic search results, which presumably reflected before what Google believed consumers wanted, to limit access to the nascent competition. Again, the issue here isn’t universal search or the onebox—as the FTC concluded, that switch could easily have benefited consumers and therefore been procompetitive—but it was exactly how that box was populated with review information that might have been framed as anticompetitive. That would then be framed as a monopoly maintenance claim violating Section 2 of the Sherman Act or a tying claim or, in the FTC’s case, as a violation of Section 5 of the Federal Trade Commission Act. Of course, presumably something like this story was presented to and rejected by both the FTC and the European Commission.
3. POSSIBLE REMEDIES

What would the remedy have been had a violation been found? Separating out YouTube, for example, wouldn’t have changed Google’s incentives in providing organic search results. Thinking through possible antitrust remedies starts to push towards considering alternatives to an antitrust approach such as imposing a nondiscrimination obligation on Google or, relatedly, creating some sort of right to be carried in Google search results. Carriage obligations are the essence of common carrier status, but pure common carriage wouldn’t do the trick, as the key issue on Google is whether you are on page 1 or page 20 of the search results. The issue is priority more than carriage.

A nondiscrimination obligation might address that and these are common in public utilities, going back at least as far as the 1887 Commerce Act. The regime implemented in electricity is an interesting comparison. The Energy Policy Act of 1992 moved toward separating transmission of electricity—seen as a natural monopoly—from generation of electricity, which was increasingly seen as being subject to competition. FERC Order 888 implemented that regime by requiring transmission companies who were also generating electricity to gain access to the grid through the same interface that outside merchant generators were using. But access and nondiscrimination regimes aren’t easy to implement, as the extended litigation over the local telephone competition rules of the 1996 Telecommunications Act and the corresponding litigation over network neutrality should make clear. I discuss those issues in more detail in Section V below.

B. Digital Advertising Dominance

There is concern in democracies across the globe about the weakened state of newspapers. The Pew Research Center Newspapers Fact Sheet sets out the basic facts for newspapers in the U.S. and those are declining print circulation numbers and a steep drop in advertising dollars from 2006. There is less agreement on exactly what has caused that state affairs, on how much should be attributed to advertising dollars moving to Google and Facebook and how much is the general rise of the internet and sites like Craigslist, which have severely impacted print newspaper’s classified advertising revenues.21

I am not going to try to resolve that here. Instead, I want to focus on what role antitrust policy has played and whether antitrust is the right tool to address the state of newspapers. I see three different possibilities here: (1) a more aggressive antitrust policy would have blocked mergers by Google and Facebook and doing so would have benefited newspapers (and could now be achieved by breaking up Google and Facebook); (2) newspapers should be given a broad antitrust exemption to allow them to negotiate jointly with Google and Facebook; and (3) Google and Facebook should be forced to pay newspapers, a move that would parallel where France and Australia seem to be heading. I will also note another approach, not based in antitrust, which is to

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create new property rights for newspapers vis-à-vis the internet, though as the French case makes clear, there may be an overlap between new property rights and antitrust. Individual countries in Europe—notably Spain and Germany—have gone down this path and the European Parliament approved a new copyright directive last year with parallel provisions.22

1. GOOGLE’S ACQUISITIONS

Start with prior mergers by Google. Google’s large mergers have gone through the normal antitrust review process in the U.S., Europe and other countries. In some of these cases, such as Google’s 2007 merger with DoubleClick, Google was building up its internal advertising and data capabilities. In other cases, such as the 2006 purchase of YouTube.com, Google was adding content on which it could bring to bear its advertising and data technologies, as well as adding to its data trove. And the 2005 purchase of Android, discussed below as part of the larger discussion of smartphone operating systems, was important to Google’s ability to expand from the desktop to smartphones.23

My assumption is that each of these mergers made Google a stronger competitor for advertising dollars. That is what a successful merger is supposed to do. Media properties have long been financed, in whole or in part, by advertising. That was true at the advent of radio in the 1920s and of free over-the-air television in the 1950s and 1960s. Media firms compete with each other to attract individuals to engage with their properties and they then pitch those individuals—eyeballs as it is often put—to advertisers who actually write the checks. Consumers didn’t pay cash to listen to radio or to watch TV and they don’t pay cash to use Google (or Facebook of course). There is no requirement that firms like Google and Facebook charge dollars for their services, just like there was no such requirements for radio or TV. Free advertising-supported media is a key part of the history of media in the United States.

Advertisers, like all consumers, vote with their feet and that precisely is the kind of competition that we should expect and that advertisers find valuable. Unfortunately, advertisers aren’t necessarily interested in running their ads next to hard news stories about subjects that they think readers will find unpleasant—keyword blacklisting terms like “murder” and “coronavirus”—and that means that the core business model of print news organization faces real disadvantages compared to the text content offered by Google and Facebook.24


23 I should disclose that I served as a consultant to a telecommunications firm that unsuccessfully opposed the DoubleClick merger.

24 Tiffany Hsu & Marc Tracy, News Outlets Suffer as Advertisers Shun Articles About Coronavirus, The New York Times, May 8, 2020, pB3. On content and advertising conflicts, see the
It is far from clear to me what breaking up Google would do. It is certainly possible that, given their market positions, Google and Facebook have pushed up advertising prices, but that of course would make it easier for print media to compete with them today. Breaking up Google—saying forcing a divestiture of YouTube—might split the data held by Alphabet, especially going forward, but the revamped Alphabet and the new YouTube would both have large amounts of data. It isn’t at all obvious that that would meaningfully improve the posture of newspapers. A breakup could just push down advertising prices without benefiting newspapers.

2. FACEBOOK’S ACQUISITIONS

Turn to Facebook. Like Chairman Cicilline, I am more skeptical about the Facebook acquisitions, especially the Instagram purchase, though I obviously have the benefit of hindsight. It seems clear now that the Instagram purchase occurred at a critical time for Facebook. This was at the cusp of the transition from desktop-based social networking to smartphones. The emergence of the iPhone and Android-based handsets (discussed in Section IV.D below) had put in place the infrastructure required to move from social networking based on text to a version organized around photographs. Companies can botch these transitions and once dominant products can lose ground. In an earlier era, Lotus 1-2-3 misplayed the moved from a text-based operating system (MS-DOS) to the graphical user interface (Macintosh and then Windows) and lost its market position to Microsoft Excel.25

Instagram had already achieved the hardest part of creating a rich social network, which is millions of users interacting with each other. This creates powerful dynamics—network effects in a phrase—that are very hard to start. And with a large base of users, Instagram could have added other features that would have overlapped much more directly with Facebook. This was the risk that Instagram posed to Facebook. Instagram had not figured out how to monetize that but, at least from the outside, online advertising seems easier to make work if you have lots of users producing rich data. Indeed, in 2008, Facebook hired Sheryl Sandberg from Google to boost its own approach to advertising. WhatsApp had also built up a large base of users and, again, that seems like the difficult undertaking.26

Again, with the benefit of hindsight, I could see either of these deals being rejected, though I will note that the antitrust regulators looked at these deals and approved them, and I am instinctively cautious about assuming that I have a better understand of this than teams of professionals who have looked at more inside information than I have. The common thread here is, perhaps, an under-appreciation of exactly what are the core characteristics of the competition here. The FTC statement on the Instagram merger characterized it as a photo app, which was to suggest that it

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25 Letter of Mar 19, 2019 regarding Facebook by Chairman David N. Cicilline to the FTC Commissioners.

somehow was in a different market than Facebook. What was probably more important was the fact that both firms competed to attract time and attention from users so as to sustain business models based on engagement feedback loops. Text vs. photos was a small point compared to the more basic point.

3. BREAKING UP GOOGLE AND FACEBOOK

But return to the real question: would newspapers be in a better posture if the deals had been blocked or if Google or Facebook were forced to divest one or more of their prior acquisitions? The best case here for newspapers is not that they would be able to be competitive using their own data and targeted advertising—that still seems unlikely—but if instead you created enough firms with large amounts of data, publishers could play them off against each other when they purchased advertising services from a third party. To frame that idea, the 1982 breakup of AT&T mattered some in how it introduced better competition into long-distance telephone service among AT&T, MCI and others, but I think the real payoff came down the road when a new technology—wireless—became important.

In 1995, when the FCC conducted its first major spectrum auction, the breakup of AT&T meant that AT&T was competing with the regional Bell operating companies to buy the newly-available spectrum. That auction would probably have played out differently had we not created eight substantial telecommunications firms from the original AT&T. Having more firms with substantial amounts of data in hand might mean that newspapers would be able to get better deals when they negotiate with firms to supplied targeted advertising for their website.27

If you wanted to breakup either Google or Facebook, I am skeptical that you can do that within antitrust proper. I have trouble identifying a nonconsensual breakup of a large firm in the Hart-Scott-Rodino era, meaning a retroactive breakup of a large merger that had gone through the pre-notification process. Recall that the 1982 breakup of AT&T was consensual. The initial remedy in the Microsoft case called for the firm to be broken in two, though that remedy was eventually rejected and Microsoft didn’t involve mergers. I do not think that breaking up these firms in the fault-based system of antitrust would occur any time soon and speed is one of the issues that we should be paying attention to as we consider possible adjustments to competition in the digital marketplace. Congress presumably could do this through direct legislation—think a modern version of Glass-Stegall, which separated commercial and investment banking—but I have not considered all of the issues associated with that carefully.

4. MORE DIRECT INTERVENTIONS

I will close this section briefly with two other issues. The possible benefits of breakups of Google or Facebook and how that would create more competition for the targeted ads outsourced by newspapers is pretty speculative and one could imagine a desire for

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more direct intervention. Consider two related ideas. Last year, Chairman Cicilline introduced H.R. 2054, the Journalism Competition and Preservation Act of 2019. That bill would have effectively created a four-year exemption from possible antitrust liability for certain joint efforts by professional news organizations to withhold content from large online sites like Google and Facebook.

I take it the hope would be that if all U.S. news organizations agreed together to deny their links to Google or Facebook—perhaps by agreeing to a setting in their robots.txt files, though we are now at the edge of my technical knowledge—with the hope that Google and Facebook would then negotiate a deal for the use of links on their websites. I don’t know how those negotiations would work out. I get that an individual publisher would likely have weak leverage with Google or Facebook and that allowing the publishers to work together might boost their leverage, but I would just be speculating on how that might play out.

Other jurisdictions have recently taken a different path. France is forcing Google to negotiate with publishers to pay them for the use of their content under so-called neighboring rights obligations, where the French Competition Authority understood Google’s response to that new regime to be an abuse of a dominant position. That was obviously a mouthful, but all of that suggests exactly how contextual the French case is. I don’t think that the U.S. really has such a regime and its recent creation in Europe was hotly contested. And I don’t think that earlier versions of new rights regimes in Spain and Germany were successful. Australia has recently announced a parallel move though the basis for the decision isn’t fully public yet, so that makes it hard to evaluate.28

I don’t think that I know a great deal about what France and Australia have done. From the outside, this looks like a kind of tax regime, where the new media entrants, Google and Facebook, are being taxed for the benefit of the old-line media firms. A full discussion of those issues would be beyond the scope of this statement, but I think that approach is pretty far removed from a traditional antitrust approach where liability is based on fault assessed in a competition framework. To an outsider at least, it appears as if France and Australia believe that Google and Facebook have competed too successfully for advertising dollars. Transferring money from Google and Facebook to newspapers may be a perfectly sensible social policy—I’m not opining on that—but it is clearly a political fight far removed from U.S. antitrust policy.29


C. Amazon’s Dual Role as Retailer and Platform

Amazon opened for business in July 1995 as just another online retailer. Over time, it added products, but it changed its business model in 1999 when it started selling third-party inventory on its website. Before that, it had been just a first-party inventory seller, meaning like countless other offline and online sellers, it bought inventory at wholesale from suppliers and sold it at retail. Third-party inventory sales have grown substantially overtime from 3% of Amazon’s retail sales to 58% in 2018.\(^{30}\)

1. REFEREE AND PLAYER?

Much of the recent attention to Amazon’s sales practices have been directed at this dual role of traditional retailer and third-party sales platform. It is important to be precise about exactly what is has happening here. Retailers have always been the sellers of third-party goods in the basic sense that they do not produce and sell all of their own goods. Doing that is to engage in a private label business. Retailers have been doing that for years—recall that Sears started selling in 1887 and first went into selling its own private-label goods in 1927—but for most retailers, most of the goods they sell are produced by third parties.

But those retailers buy those goods from third parties and then resell them. When Amazon is acting as a third-party platform, it never owns the goods that it is selling. That can have consequences—who is responsible if there is a problem with the good?—but the competition concern that has been expressed is whether these is a conflict between playing both roles simultaneously. Amazon can’t be, as it is put, at the same time, a player and a referee. On July 17, 2019, the European Commission announced an antitrust investigation into this dual role based on concerns about how Amazon was using “competitively sensitive information” in playing those dual roles. That investigation is still pending.\(^{31}\)

And in the last month, The Wall Street Journal reported that Amazon looked at sales data by individual third-party sellers to assess which markets to enter. My understanding is that Amazon has said that that would violate its internal policies, though of course that statement wouldn’t tell us whether those policies were actually violated. On May 1, 2020, the House Committee on the Judiciary sent a letter to Jeff Bezos, Amazon’s CEO, asking him to appear before the committee to address these issues. The letter set out the Committee’s concern with the underlying behavior as well as concerns that Amazon’s prior statements to the committee had been, at a minimum, misleading.\(^{32}\)

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\(^{30}\) 2018 Amazon Shareholders Letter.
\(^{31}\) European Commission, Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon, July 17, 2019.
\(^{32}\) Dana Mattioli, Amazon Scooped Up Data From Its Own Sellers to Launch Competing Products, The Wall Street Journal, Apr 23, 2020; James Leggate, Amazon says it doesn’t use sellers’ data after Wall Street Journal Story, foxbusiness.com, Apr 23, 2020; U.S. House of Representatives, Committee on the Judiciary, Letter to Mr. Jeff Bezos, May 1, 2020. That letter mentioned by name Nate Sutton, Amazon’s Associate General Counsel for Competition. Mr. Sutton is a 2000 graduate of The University of
2. PLATFORM EFFICIENCIES

We should start with the natural question: why is it useful for Amazon to both be a traditional retailer and then also operate as a platform? Amazon has become a multi-faceted corporation with many features, but to just focus on the goods-selling part of Amazon, we should probably think about it as a product search engine front end matched with a fulfillment back-end. As Amazon sees product searches, it has a number of choices as to how to respond: (1) offer a product owned by Amazon or (2) offer a product owned by a third party. Products owned by Amazon will either be acquired by Amazon from third parties or produced by Amazon for itself. Products owned by third parties will be offered either through pure advertising, where the prospective customer might leave Amazon’s site after clicking on an ad or through continued engagement with Amazon’s site. On the latter, Amazon may provide payment and identity services—Amazon has my credit card information on file and the firm selling probably does not—and Amazon may provide other services, as it does through its Fulfillment by Amazon service.

That breakdown should give us a sense of some of the regulatory choices that might be possible here. Do a few thought experiments on how you might reconfigure Amazon. Amazon reverts to its original incarnation as an online retailer. It sees searches for products that it isn’t selling. It can either add those products, again as a private-label product or by purchasing them at wholesale, or it can sell advertising for those products on its site and then refer those customers outside of Amazon. Barring Amazon from running these ads would presumably raise First Amendment issues. And the key advantage of having Amazon run a platform is that everything suggests that they are a strong competitor in providing back-end transaction and fulfillment services to third parties. We would weaken competition in that market if we excluded Amazon from it. Each time we bar a firm from a market, we run the risk of reducing competition in that market.

Everything suggests that third parties want to take advantage of the front-end and back-end services that Amazon provides. Sellers would almost certainly prefer that potential customers go to their websites directly but it is hard for sellers to get attention from customers. Amazon has succeeded in doing that. When businesses say that they have to be on Amazon, they mean that they want access to the huge volume of product searches that occur there. Customers go to Amazon ready to buy. Amazon is going to charge for bringing those customers to these third parties and that is true whether the sale is through the platform or directly through Amazon when it has purchased the sold product at wholesale. And of course some sellers want Amazon’s back-end services.

There certainly are competitors in the back-end services market. I recently searched for face masks on Walmart.com and was presented with the chance to buy

Chicago Law School. That of course was twenty years ago, so I don’t know whether or not he took any of my classes, but it is certainly possible. I have not looked at Amazon’s statements to the Judiciary Committee, so I have no view on the possible concern about misrepresentations to the Committee.
from many third parties. And Shopify is perhaps the best-known provider of pure back-
end services. My understanding is that Amazon’s move into provision of services to
third parties indicated that it had built a capability that it could use for its own retail
sales as well as those of third parties. We should not waste resources by leaving that
capacity on the sideline and we should not reduce competition by barring Amazon
from selling its capabilities wholesale.

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My best judgment is that we want a more tailored intervention here. I want to focus on
three different issues: (1) Amazon’s use of individual third-party seller data to enter
product markets; (2) broader concerns about Amazon entry into product markets
(sometimes framed as Amazon cloning products); and (3) concerns that Amazon favors
its own products in product search results, especially as to how it populates the Buy
Box.

3. PLATFORM DATA AND ENTRY

The use of individual seller data is a nice, stark case. Amazon purports to say that it
doesn’t use that data and that it is against its official policy to do so. The data itself, if
managed appropriately, would almost certainly qualify for trade secret status and
would be protected from misappropriation. But the relationship between Amazon and
its third-party sellers is contractual and presumably those contracts establish the
respective rights and obligations of the parties regarding this data. I doubt that antitrust
law is the best tool to regulate this issue or third-party sellers would have strong
antitrust claims under U.S. antitrust law.

But we should see that is at stake here and the recent FTC 6(b) filing by a group
of unions offers a couple of relevant examples. U.S. antitrust law doesn’t bar firms from
entering new markets and selling new products, even firms with the market position
held by Amazon. Consumers generally benefit from entry when customers are
presented with new versions of existing products or products at lower prices. The 6(b)
petition offers two interesting examples of this pattern:

In one example, Amazon introduced a laptop stand that was
indistinguishable from the very popular stand that a third-party seller,
Rain Design, had been selling on the Marketplace for ten years. The
primary distinction between the two products was price: the Amazon
Basics-branded stand was $19, compared to Rain’s $43 stand.

There is so much information in that paragraph. There is no allegation that
Amazon was violating any of Rain’s intellectual property rights. Indeed, in the original
Bloomberg piece on this conflict, Rain acknowledged that Amazon was not violating the
relevant patent. There is no claim that Amazon was selling below cost. The description
is that for ten years, Rain had been able to sell its product at what seems to have been a
very high price and consumers have been paying what seems to be above a competitive
price that entire time. In some ways, the interesting point that needs to be explained is
why other firms didn’t enter to compete with the Rain Design product. That suggests
something about the real difficulty of assessing market opportunities and the consequences to consumers from that.\textsuperscript{33}

Take the second example from the 6(b) filing. Amazon is said to be producing shoes that “bear a striking resemblance” to Allbirds. Part of what Allbirds pitches is that its shoes are sustainably produced. Allbirds sell for $95, while the Amazon knockoff, which is not produced sustainably, sells for $35. Again, there is no allegation of an intellectual property violation and Amazon has entered to offer a different product for a lower price. Individuals who want sustainable higher-priced products get those, while people who want the style at a lower price presumably buy the Amazon knockoffs. Again, Amazon itself says it has a policy against using individual seller data and there is an instinctive appeal to that policy, but as these examples suggest, even that policy is likely to result in meaningful harm to consumers.

Go up one level and focus on aggregated data from third-party sales. As the April 2020 \textit{Wall Street Journal} article suggests, there could be difficult lines to draw between individual data and aggregated data (are data aggregated if two sellers are added together?). Blocking all uses of third-party data, individual or aggregated, through direct regulation almost certainly would be the cleanest way to resolve this issue.

In some sectors, we have direct regulations on how firms can use customer data. Direct regulation of this sort avoids the core antitrust issue of showing some type of antitrust violation and instead would impose a statutory limit on how firms like Amazon, Walmart and others could use data. To take a prominent example from another area, the 1996 Telecommunications Act imposed limits on how telecommunications firms could use so-called customer propriety network information. See 47 USC 222. This is a type of internal data siloing which limits the ability of firms to moosh together all of the information that they see about customers. That said, data siloing may raise First Amendment issues and so new laws would need to tread carefully in structuring competition while avoiding limits on important constitutional rights.\textsuperscript{34}

Assume that regulations are put in place to address the use of platform seller data and turn next to the broader question of Amazon’s entry into product markets. General product searches on Amazon presumably give it a great deal of information on

\textsuperscript{33} Petition for the Investigation of Amazon, Inc., Submitted to the Federal Trade Commission by The International Brotherhood of Teamsters et al, Feb 27, 2020; Spencer Soper, Got a Hot Seller on Amazon? Prepare for E-Tailer to Make One Too, bloomberg.com, Apr 20, 2016.\textsuperscript{34} On data limits, see Randal C. Picker, Competition and Privacy in Web 2.0 and the Cloud, 103 Northwestern Univ. L. Rev. Colloquy 1 (2008). On possible First Amendment concerns, see U.S. West, Inc. v. Federal Communications Commission, 182 F.3d 1224 (10th Cir. 1999) (finding that FCC had not narrowly tailored its CPNI regulations as required by the First Amendment). The German competition authority has attempted to implement data siloing regarding how Facebook uses data from Facebook, Instagram and WhatsApp. Its initial decision requiring siloing was overturned on appeal in the German court system, though I think a further appeal is still pending. See Sara Germano, Facebook Wins Appeal Against German Data-Collection Ban, The Wall Street Journal, Aug 26, 2019.
what consumers are interested in, as do clicks on ads on Amazon as do of course sales data on Amazon’s sales of its own inventory. Those sources presumably give Amazon a rich stream of data to assess possible markets to enter. Again, the FTC investigation petition is useful:

A former Amazon product manager confirmed the researchers’ findings, explaining that “not only can Amazon track what shoppers are buying, it can also tell what merchandise they’re searching for but can’t find,” and then, she said, “Amazon can just make it themselves.”

Note the starting point here: Customers search for products but can’t find them. Any business having to turn down a customer is in that position, but the fact that, I assume, Amazon is the first destination for many product shoppers means that Amazon is incredibly well situated to see unmet demand and limiting the use of individual seller data won’t change that basic point.

4. INTELLECTUAL PROPERTY LAW AND ENTRY

As already suggested, intellectual property law—prominently, patent, copyright, trademark and trade secrets—determines in part the extent to which Amazon, Walmart and other firms are able to enter new markets in competition with their sellers. For example, Williams-Sonoma sued Amazon for copying its products and believed that Amazon had violated Williams-Sonoma trademarks through the copying. IP law draws carefully considered boundaries barring entry in some circumstances and allowing entry in others and I think that we should be careful about undercutting the careful balances drawn in those rules.35

5. CONTROL OVER THE BUY BOX AND DISCRIMINATION

As noted above, Amazon effectively runs a product search engine: I search for a product and Amazon returns results. Amazon’s algorithms control which results they return, and especially what shows up in the “buy box,” Amazon-speak for the box presented where you can click to buy the product. The pending investigation in Europe is looking at that issue. Amazon might prefer its own private label products there or might preference products using its Fulfillment by Amazon service. If Amazon is doing that just to boost its profits—because it makes more money when it sells its own products or products it is fulfilling directly—I do not think that there is a straightforward winnable claim under current U.S. antitrust law. The essential facilities doctrine in antitrust and the corresponding mandatory access regime seen in Aspen Skiing and Trinko are quite narrow and of uncertain application.36

The best claim might be that Amazon is tying its fulfillment product to its product search engine, but none of that would be easy to litigate. The 6(b) filing

suggests that Amazon is tying product search rankings and placement in the buy box to the use of other Amazon services, especially Fulfillment by Amazon, but I am skeptical that the rankings qualify as a separate product under the Jefferson Parish test. Again, a different approach outside of antitrust would be some type of neutrality or nondiscrimination regime regarding how Amazon returns product search results. The United States has a rich experience with nondiscrimination rules going back at least as far as the Interstate Commerce Act of 1887 and nondiscrimination obligations are frequently imposed in public utility industries. Implementing that type of discrimination limit would probably require an associated federal agency to enforce the rules.37

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That was a pretty extended discussion, so let me offer a few conclusions regarding Amazon’s dual role as an inventory seller and an inventory platform. The customer base, transaction processing and delivery infrastructure that Amazon has built over time makes possible Amazon’s first-party inventory business. And the behavior of third-party sellers suggests that Amazon is providing valuable services to those sellers in using its internal skill set in wholesale transactions on the Amazon platform. Requiring Amazon to exit one business or the other would reduce competition and would risk destroying these valuable arrangements.

If the central concern is that Amazon is exploiting individual third-party seller information, there are much more direct interventions possible. In some sectors, we silo data and we could do that here. That said, do note, as the Rain Design example suggests, the real possible costs to consumers from limiting entry by Amazon into new product markets. And if there is a belief that product cloning is too easy, the natural place to fix that problem is in intellectual property law. On the buy box, the central allegation seems to be that Amazon uses the buy box to make money for Amazon. That of course is the business that Amazon is in and U.S. antitrust law doesn’t create some sort of general nondiscrimination and access regime for third-party sellers. Congress could of course create a new nondiscrimination regime of the sort that we typically associate with public utilities. The merits of doing that would depend, I would think, on an overall assessment of competition in retail markets, plus a sense of how easy or difficult it is for a government agency to run a nondiscrimination regime. I don’t begin to have the data to do a real assessment of retail competition, so I won’t try that and I turn to the challenges of government regulation in Section V below.38

38 My discussion of Amazon has focused on the concerns about its operation of a platform. You letter also asked about acquisitions by these firms, especially purchases designed to thwart competition. It is hard to imagine that Amazon thought that Whole Foods posed a real competitive threat to Amazon. And Amazon obviously didn’t buy Whole Foods to shut it down. Instead, Amazon seemingly wanted to move quickly into physical stores to make it possible to run a more mixed online/physical store company. We could have barred that merger and forced Amazon to build up its physical presence store by store by, say, building a new store right next to each existing Whole Foods. Moving assets into hands that can make them more valuable faster is an important way in which we produce new value in the
D. Smartphone Operating Systems

The starting point on smartphone operating systems is the remarkable success of Apple and Google even though they entered a market dominated by firms like Nokia and Research in Motion (Blackberry). The iPhone’s new touch interface, introduced by Apple in January 2007, transformed the market. That was a point of robust competition among, especially, Apple, Google and Microsoft. Those three firms were playing very different strategies. Apple was offering expensive devices with the operating system and hardware provided by Apple. Microsoft tried to replicate its strategy for PCs by creating a new Windows-based mobile OS that it would sell to handset makers. And Google offered a free operating system to handset makers, Android plus Google’s proprietary store, Google Play, though it came bundled with Google search and Google’s Chrome browser.

1. Core Market Leveraging and Adjacent Market Competition: The Lessons of Microsoft

A frequent concern expressed about dominant technical firms is that they will extend their positions from their core market into adjacent markets and that we should be especially concerned when what starts as an adjacent market could evolve over time into a market that competes with the original core market. That pattern matches reasonably closely the 1998 Microsoft middleware/browser antitrust case. The government proved that Microsoft tried to maintain its operating systems monopoly in how it limited competition by Netscape Navigator. Microsoft feared Navigator as it thought that the browser might evolve into a competitor to the operating system. And, as I suggested above, that pattern might match how Google responded to vertical search, though, again, presumably, both the FTC and the European Commission considered that claim and rejected it.

Take two other examples both involving Microsoft. The European Commission cases against Microsoft were based in part about adjacent market leverage. In 2001, the European Commission issued a statement of objections against Microsoft based, in part, on concerns that Microsoft was tying Windows Media Player to Windows. The fear is that that would give Microsoft a powerful advantage in the competition over media player and more broadly in music and video. By 2004, after a five-year investigation, the Commission concluded that Microsoft had indeed broken EU competition law. The Commission required Microsoft to offer to computer makers versions of Windows with and without the media player, though Microsoft did not have to charge different prices for the two products.

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Two years later, Microsoft set out an update on the uptake of Windows XP N, the version of Windows without Microsoft’s media player. At that point, Microsoft had sold roughly 35.5 million copies of Windows XP with its media player included. And it had sold 1787 copies of Windows XP N, or about 0.005 percent of total Windows sales. I am not aware of information that describes whether Microsoft paid anything to computer manufacturers to distribute its media player, but if the point of the Commission remedy was to change the distribution of media players, it was an abysmal failure. And of course Microsoft didn’t come to dominate media players, as we might have expected given the original theory of the Commission’s investigation. It doesn’t seem to be that easy for even a successful firm to leverage its position in one market into an adjacent related market. The Apple iPod succeeded and the Microsoft Zune didn’t.  

The second Microsoft example arose again in Europe in 2009. The European Commission issued a statement of objections reflecting its preliminary conclusion that Microsoft was impermissibly tying Internet Explorer to Windows in ways that would “harm[] competition between web browsers, undermine[] product innovation and ultimately consumer choice.” The theory of the case was that by distributing Internet Explorer with Windows, Microsoft had a strong advantage in competing in the browser market. Rather than face the potential threat to the delay of the introduction of Windows 7, Microsoft reached a settlement with the European commission in which it agreed to make available a browser ballot or browser choice screen. When Windows 7 computers were turned on in Europe, consumers were offered a choice among 14 different possible browsers rather than simply having Internet Explorer pre-installed.

It was subsequently discovered that Microsoft broke the original browser choice screen when it updated Windows 7. I have not seen anything to suggest that that was intentional, but the European Commission nonetheless issued another large fine. More to the point is that the browser choice screen was broken for 17 months before anyone complained. That gives some sense of how unimportant the remedy was and of course Google Chrome rose over time to market leadership and Internet Explorer faded away. Again, the European Commission’s concern that a dominant firm would leverage its position in one market to another simply was not borne out. Product quality seems to matter.

2. ENTRY LIMITS

In both of the European Microsoft examples, government regulators were trying to limit how a dominant firm could enter other markets. As I noted above, I do not think that

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40 Microsoft News Center, Fact Sheet: Windows XP N Sales, Apr 2006.
42 European Commission, Antitrust: Commission opens proceedings against Microsoft to investigate possible non-compliance with browser choice commitments, July 17, 2012; European Commission, Antitrust: Commission fines Microsoft for non-compliance with browser choice commitments, Mar 6, 2013.
U.S. antitrust law blocks firms from entering markets. When Apple, Google and Microsoft took steps to enter the smartphone operating system market, there was no basis in U.S. antitrust law to block that entry. Again, U.S. antitrust law is fault-based and, as just suggested, U.S. law has a less-expansive approach to tying law than Europe.

We have imposed limits on entry as part of antitrust settlements and we sometimes control entry through sectoral regulation. Take telecommunications as a prominent example of this. The 1956 AT&T final judgment—a consensual settlement between the U.S. and AT&T—barred AT&T from entering the computer market. The 1982 breakup of AT&T—another consensual agreement—lifted the computer restriction but imposed other business-line restrictions on AT&T and the new regional Bell operating companies. And the 1996 Telecommunications Act continued to impose a number of quarantines on the RBOCs. These were limits designed to police how regulated natural monopolies competed in adjacent markets. But those agreed settlements and sectoral statutory limits are quite different than saying up front that particular firms were barred from entering new markets. Again, I don’t think the current fault-based U.S. antitrust system does that.

We should not think that entry limits are free. The 1956 AT&T final judgment blocked AT&T from moving aggressively into selling computers. AT&T had invented the building block of the modern age when Bell Labs researchers invented the transistor in 1947 ushering in a world of devices based on semiconductors. AT&T should have been a fearsome competitor in mainframe computers, but instead we ended up with a market dominated by IBM. Teasing out causality is always hard. In 1964, IBM introduced a great product, the IBM 360, and maybe that would have carried the day even had AT&T been a computer competitor, but we should not assume that we can hobble strong competitors without a cost. That meant here that the U.S. government would bring an epic Section 2 case against IBM in January 1969.

That case would eventually be dismissed in January 1982. Try a counterfactual exercise: suppose that the case had been settled a few years earlier. IBM had already unbundled software, services and hardware, one of the key goals of the original 1969 complaint. Suppose that, to get rid of the case, IBM had agreed not to enter the newish personal computer market seeing it as place for hobbyists to experiment but nothing more. That is hardly fanciful. Digital Equipment Corp. (DEC) had successfully built a new business around minicomputers and had carved out a space away from IBM, but DEC didn’t really think that there was going to be a market in the new microcomputers.

Again, causality and counterfactuals are hard, but everything suggests IBM revolutionized the personal computer market when it introduced the IBM PC on August 12, 1981. IBM clearly had a substantial advantage—“no one ever got fired for buying IBM” was the line—that it was carrying into the new adjacent market. But IBM’s entry into the market legitimated the market and made possible the emergence of an incredibly valuable ecosystem of software and IBM PC clones.
3. REGULATING SMARTPHONE PLATFORMS

Return to smartphone operating systems. Before 2007, Nokia and RIM/Blackberry were dominant. What would have happened if we had had in place regulations that limited entry by leading firms into adjacent markets? It would have been natural to apply those regulations to Microsoft, Google and even perhaps Apple. Microsoft was clearly trying to extend its dominant position in PC operating systems into a new market and was building off of the software, relationships and expertise that it had there to do that by selling software to handset makers. Apple once again wanted to create a high-end vertically integrated stack of software and hardware. And Google wanted to extend its advertising-supported search model into a support tool for distributing a new smartphone OS. And, of course, Google wanted to speed its entry into that market by buying a company and its Android software. Each of these firms had strong advantages from their strong positions in related adjacent markets.

I think that broad entry limits would have been a mistake here. Consumers were able to make choices about the products they wanted and about the different business models that these three firms, the incumbents and others were offering. We need to recognize the competition we would lose if we blocked strong firms with deep technical capabilities from entering new markets. We don’t know what consumers want and we rely on robust competition in markets to sort all of that and that was exactly what happened here.

Now what? We have two strong firms, Apple and Google, running competing smartphone platforms. They each charge a 30% fee for paid-transactions on their platforms and we still have allegations of self-preferencing, as captured by Spotify’s pending complaint against Apple before the European Commission. What should we do now, if anything, about this situation?

Ordinary antitrust and competition law are in play here. In May 2019, the U.S. Supreme Court ruled that iPhone owners had standing to bring antitrust claims against Apple relating to the operation of the app store. Apple is likely to face Section 2 monopolization claims and tying claims going forward. Those are the normal tools of antitrust. And on July 18, 2018, the European Commission announced a new €4.34 billion fine over Android and ordered Google to change how it licenses Android software. Those actions are on appeal in the European court system, but Google is in the middle of implementing a remedy very much like the Microsoft browser ballot. This would make it possible for Android owners to easily designate their default search engine. And the Spotify complaint is still open in Europe.43

This looks like the most optimistic story so far for the working of traditional antitrust, but I will admit to skepticism here. The European approach to digital competition for the GAFAM has produced, so far, the two Microsoft cases, the Google

43 Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019); European Commission, Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google’s search engine, July 18, 2018.
Shopping result and now the Google Android result. There is this idea that antitrust enforcement has shifted from Washington DC to Brussels and that that reflects a better competition law in Europe and more aggressive competition regulators in Brussels. I am skeptical that an objective observer would describe the European record as one of success. We are still midstream on the Android remedy but I doubt that it will change the market position of Google search, Chrome or the Google Play store and it isn’t clear that it will change the net flow of euros across the Android platform.

And on the U.S. side, a fault-based antitrust system is slow and underinclusive in the sense that we will want regulation in some cases where a leading firm has done nothing wrong. It is far from clear that there is a winnable antitrust case against Apple for its operation of the app store, but perhaps that is beside the point if the goal is to do a better job of protecting competition on smartphone platforms. We probably need a much more automatic system that is triggered when a firm achieves dominant status, triggers not based on abuse or misuse of a dominant position but instead based on its leading market position. In many ways, the right question is: once a firm has competed and won: what new obligations should it have? I turn to that regulatory question in the next section.

V. Opportunities and Challenges of Regulation

For concreteness, continue with smartphone platforms and consider four possible regulatory approaches: (1) treat the platforms like common carriers; (2) implement a nondiscrimination regime; (3) implement price regulation; or (4) bar actions that block platform devices from accessing competing app stores. The first three regulatory approaches are common in public utilities regulation and the fourth is focused more narrowly on using competition as a core regulatory tool. I will discuss those approaches in the context on pre-installation of apps, then turn to Apple/Spotify and then close with a brief analysis of the challenges of regulating data access/portability.

A. Regulating Pre-installation of Apps

Recall that pre-installation of Google Chrome and Google search as the default search engine was at the heart of the European Commission Android case. Consider pre-installation of software on, say, an iOS device or the setting of default services on the device. iOS devices come with a variety of pre-installed Apple apps and Apple charges third parties for pre-installation and being installed as a default setting on iOS devices. Reports suggest that Google was to pay Apple upwards of $12 billion dollars in 2019 for being set as the default search engine in Safari, Apple’s native browser. Given how easy it is to change defaults or download apps, it isn’t obvious that preloading should be valuable, but Google’s enormous payments to Apple suggest otherwise.44

Consider how a common carrier or nondiscrimination regime would apply here. Would Apple have an obligation to carry—here meaning pre-install—any app requesting that? I hope that merely to state the idea is to make clear why that would be an outcome that would be physically impossible and would create a terrible consumer experience. No blocking of apps found to contain malware, no limits on pornography, no limits on apps that help that help people violate the law or evade law enforcement. Part of what consumers want from app stores (or presumably any store, online or offline) is some assurance of quality and filtering for safety and other important social values. And all of the problems that consumers experience in searching through the app stores would come directly to their devices. So don’t pre-install apps, but pre-install links, say an incredibly long browser ballot for all apps on your device. Again, self-refuting I hope.

Switch to a more tailored nondiscrimination regime for pre-installation. Apple pre-installs an app, say Apple Music. Would a nondiscrimination regime require Apple to pre-install all competing music apps? Would we instead make the browser choice screen universal for any app category where Apple sought to pre-install all apps? Could Apple auction off the sole right to be pre-installed? And could Apple bid in that auction against outsiders? That might sound strange—Apple bidding to pay itself—but that is exactly how some versions of the Google Shopping remedy have operated. A price regulation regime requiring, as in public utility regulation, say, fair, just and reasonable prices would put the government in the business of regulating these carriage deals between Google and Apple. All of these hypothetical efforts to create pre-installation rights or otherwise regulate pre-installation seems fraught.

B. The Apple/Spotify Dispute

Switch to Apple’s dispute with Spotify. Its public statements have focused on two issues. First, Spotify has been able to distribute its free app through Apple’s app store without paying Apple anything but if Spotify users upgrade from free to premium inside the app—meaning they are becoming paying customers of Spotify—Apple charges a 30% fee of the price paid to Spotify. Spotify thinks that price is too high. Second, Spotify believes that it has identified circumstances where Spotify has been denied equivalent functional access to iOS, such as the inability to meld together Siri and Spotify or limitations on how Spotify accesses the Apple Watch.45

Start with the fee dispute. Apple doesn’t charge for ad-supported apps, which means that Spotify has been to reach millions of iOS users without paying Apple a dime for that access. Apple does charge for apps with fees. I paid $14.99 for a fancy camera app and got a 30% cut of that. Spotify charges $9.99 a month for its premium service and if users of the Spotify app sign up for the service within iOS, Apple gets a 30% cut

of that in the first year and 15% after that. Apple, I think, gets nothing if a Spotify user signs up separately outside of the app.\textsuperscript{46}

I have not considered carefully the best way to organize payments in Apple’s iOS ecosystem. There are devices, pre-installation fees and a variety of ways for paying for software. This really does hearken back to the complex payment arrangements that led to the U.S. government’s 1969 antitrust suit against IBM, though recall the government dismissed that suit after a 13 year slog. That said, IBM did make changes to how it organized payments for hardware, software and services. Given that history and the complexities of operating the iOS platform, I certainly would not be ready to recommend some type of price regulation here. I can see a case for boosting app store competition, though I would want to look more carefully than I have at the competing Android app stores before taking that step.\textsuperscript{47}

Switch to Spotify’s claim that they have been disadvantaged relative to Apple’s access to iOS interfaces, especially as to using Siri and the Apple Watch. These types of fights over product interfaces controlled by a platform and a competitor aren’t new. There were similar fights in the 1960s and 1970s between IBM and large tape drive makers who were not competing in the mainframe computer business but who wanted to compete in peripherals. We replayed those in the 1970s when Kodak dominated film and cameras and the upstart Berkey Photo wanted to chip away at the edge of Kodak’s dominance. And there were allegations that Microsoft Office enjoyed better access to Windows than competing programs had. These are not new issues and we have mainly wrestled with them in antitrust because no other tools were available.\textsuperscript{48}

Those issues might be resolved by a nondiscrimination regime that focused on the APIs and the like in iOS to assure that qualified outsiders could use the same tools that Apple uses to create a rich experience in its products in the adjacent markets. This regime would be triggered in a platform market for any platform that had reached a specified leading position in the market. Again, nondiscrimination regimes have been used in these types of industries since at least the era of the railroad and the Interstate Commerce Act of 1887.

But we should not assume that these are easy regimes to create. The 1996 Telecommunications Act opened up and unbundled local telephone networks and made it possible for outsiders to use parts of the local network to build their own products. This was at its heart an access and nondiscrimination regime. Those rules resulted in a decade-long fight over how that would work, going to the Supreme Court twice and forcing the FCC to issue four sets of lengthy, complex rules before the court system finally found the rules consistent with the 1996 Act. And the ongoing fight over

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\textsuperscript{46} Apple Statement, Addressing Spotify’s claims, apple.com, Mar 14, 2019.
\textsuperscript{47} Joe Hindy, 10 best third party app stores for Android and other options too, androidauthority.com, Apr 28, 2020.
\textsuperscript{48} Telex Corp. v. International Business Machine Corp., 510 F.2d 894 (10th Cir. 1975); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2nd Cir. 1979).
\end{flushright}
net neutrality is precisely over the right scope of a modern common
carrier/nondiscrimination regime with the overlay of shifting political winds.\textsuperscript{49}

\textbf{C. Data Sharing and Coordinated Data Exit}

I will close this section with a cautionary thought about creating these access points and
that will take me to a brief discussion of data/privacy regulation. I suspect that data
portability, standing alone, will accomplish relatively little. The default is for the data to
stay in place, but even if some individuals move their data elsewhere, that is not a good
substitute for moving data at scale. Competitors are the natural actors to move data in a
coordinated fashion but regulators have reacted with hostility in the past at these
adversarial efforts to move data at scale.

1. eBay/ReverseAuction.com

In a much earlier era of the internet, a competitor to eBay sought to move user identities
and ratings to its new competing auction site. ReverseAuction.com believed it had a
better approach for auctions but eBay had a strong first-mover advantage. Sellers and
buyers had built up reputations on the site and that made them trustworthy.
ReverseAuction sought to export those ratings to its new site. eBay claimed ownership
of those ratings. The FTC intervened to protect the privacy of the eBay users, even
though, of course, the information was fully public on eBay. This was more than two
decades ago, but it nicely situates the possible conflict over privacy, coordinated data
exit and competition.\textsuperscript{50}

2. Google Scraping

Consider a more recent example. One of the starting points of the investigation of
Google was the claim that Google was scraping ratings and reviews from vertical sites
like Yelp. Presumably Yelp’s terms of service addressed that, but again, I want to focus
instead on coordinated data exit and competition. Here Google is the entrant into the
reviews market and Yelp the incumbent. Restaurant review writers might be delighted
to have their reviews reach new audiences, but, again, the natural default is to leave the
reviews in place at one site. Users benefit from more competition but they want some
other person to invest in creating that competition. Google might have a superior
approach to searching and organizing reviews and Google has the incentive to create
competition in a way that individual consumers do not. Again, antitrust regulators
reacted with hostility to a competitor’s efforts to effectuate a coordinated data exit.

\textsuperscript{49} AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999); Verizon Communications Inc. v.
Federal Communications Commission, 535 U.S. 467 (2002); Covad Communications Co. v. Federal
Communications Commission, 450 F.3d 528 (D.C. Cir. 2006) (“This case involves a series of petitions for
review of the FCC’s fourth attempt. Because we conclude the Commission’s fourth try is a charm, we
deny all of the petitions for review.”). Net neutrality has been to the D.C. Circuit multiple times, starting
in 2010 with Comcast Corp. v. Federal Communications Commission, 600 F.3d 642 (D.C. Cir. 2010) and
most recently in 2019 in Mozilla Corp. v. Federal Communications Commission, 940 F.3d 1 (D.C. Cir.
2019).

\textsuperscript{50} U.S. Federal Trade Commission, Online Auction Site Settles FTC Privacy Charges, Jan 6, 2000.
3. THE FACEBOOK PLATFORM

Take one more example. In May 2007, Facebook announced that it was becoming a platform—calling it, unsurprisingly, Facebook Platform—by moving from being a closed system to one in which the “social graph” would be open to outsiders to build on. Outside firms who been denied access to the inner workings of Facebook would now have new, rich access. I don’t assume that that access was equivalent to the access that Facebook itself had or would continue to have, but this was clearly a step towards competitive parity at the edge of the Facebook network. A step towards a nondiscrimination regime.51

That gets us to Cambridge Analytica. I really don’t what that means exactly. At some point, Facebook told me that I was a Cambridge Analytica victim, meaning that one of my Facebook friends had done something with CA’s tools on Facebook and that in turn had exposed some of my personal information—my birth date for example—to CA. I won’t try to address here how we should think about privacy harms. The bigger picture point is to make sure that see upfront the possible conflicts between data sharing, forced or otherwise, privacy and competition.

VI. Conclusion

In closing, I want to again thank you for asking me to set out my views on digital marketplace competition. This is an important topic worthy of serious government attention and I commend the subcommittee for undertaking its investigation with the care that it has.

The companies that are at the heart of your investigation—Google, Apple, Facebook, Amazon and Microsoft—built their market positions off of incredibly successful products that faced a competitive marketplace. U.S. antitrust law does not condemn firms for doing that and more broadly as a society we should applaud the innovation and hard work that that represents. And the fact that all of those companies were founded in the United States is something that we should take pride in and should not take for granted. I hope all of that is a point of common ground, but I fear that it might not be.

But this achieved market success should not insulate a firm from careful examination so that we ensure robust fair competition for the next set of great markets. We should be especially concerned when leading firms use their market positions to squelch or acquire competitors in adjacent markets. Antitrust law met that challenge in the Microsoft case in the early 2000s. I am skeptical that it has met that challenge recently, though, as I have noted throughout this statement, serious, thoughtful government antitrust officials in the U.S. and Europe clearly have disagreed with that view. How Google responded to vertical search competition was dropped entirely in the U.S. and withered into the Google Shopping case in Europe. And the approval of

Facebook’s acquisition of Instagram seemed to misunderstand both how positive feedback loop competition worked and how firms build competition out of adjacent markets (and of course Instagram may have been in the same market with Facebook even then). That suggests that current antitrust law in the U.S. and the perhaps broader competition law in Europe are not up to the task of regulating adjacent market competition.

For me, that means that we might want to look outside of traditional antitrust for solutions. And I think that the issues posed with regard to digital advertising and newspapers, in how smartphone operating system ecosystems operate and how Amazon operates its platform are not easily addressed in anything like U.S. antitrust law. For example, I do not think that Google and Facebook are not using their strong positions in digital advertising to block newspapers from emerging as real competitors because they fear that possibility. This is not so much about ensuring competition on the merits—unfortunately, in a basic sense, newspapers have competed and lost—but rather about the social choices that could be made to support the role that newspapers and media play in democracies. That is an incredibly important topic, but not really one for competition policy.

And the issues posed as to Amazon and smartphone platforms are similar but again not standard antitrust issues. Amazon doesn’t fear that Rain Design will somehow turn their laptop stand into a serious competitor for Amazon’s core business nor does Apple think that Spotify is going to build a competitor to iOS. The question there is how we establish fair competition on the platform. That is, I think, much more of a regulated industries question than an antitrust question.

Notwithstanding the length of this letter, I am sure that I have not addressed many issues that might be of interest to the committee. Indeed, you raised three broad areas of inquiry and I have addressed one of them in depth and then the second in passing as part of my focused look on competition in digital marketplaces. I have not considered with any care smaller acquisitions by these firms, but I hope that other people have addressed that. And, again, on the question of additional resources for the antitrust agencies, I just don’t think trying to address that question is really my comparative advantage.

I hope that this statement has been useful. Please let me know if there are additional ways that I can help with your inquiry.