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Questions for the Record
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QUESTIONS FROM SENATOR BOOKER

1. *In your testimony, and many times before, you have argued that "antitrust is not enough" to tackle the problems of digital platforms. You have said that antitrust "is not a tool to address monopoly, it's made to address monopolization. A lot of people jump over that."*

    a. *What is unique about digital platforms such that, in your assessment, the antitrust laws will not be able to rein in their market power appropriately?*

Digital platforms have three features that make them difficult for the antitrust laws to properly regulate: 1) strong network effects, 2) economies of scale and scope, and 3) consumer "single-homing." Network effects are where the platform users naturally prefer to be on the platform where other users are, creating an incumbency advantage that's difficult to overcome. Mature platforms also have low marginal costs so they have enormous advantages over smaller players, and data, which many platforms run on, has significantly more value when collected holistically and aggregated in bulk. Finally, a variety of characteristics of online life often mean consumers naturally gravitate towards a single platform, or home, for their needs rather than shopping around or changing defaults. Together, these factors make new entry into the market extremely difficult.

    b. *Can you explain how the antitrust laws address "monopolization" without addressing "monopoly"?*

The mere act of having a monopoly is not in itself an antitrust violation. However, obtaining or maintaining one through anticompetitive means ("monopolization") is an antitrust violation. Digital platforms have become at the very least dominant like monopolies—Google over search, Facebook over social media, etc. Legislators should gather facts on exactly how these companies became dominant in their markets, how they have maintained dominance for so long, and if anticompetitive practices were used to do so.

    c. *Do you think the antitrust laws as they currently exist are robust enough to properly rein in anticompetitive behavior in any other sectors?*

I do not. The antitrust laws should be recalibrated to balance the concerns of underenforcement with overenforcement. Chicago School reasoning has led to undue fear of overenforcement while in reality, underenforcement can lead to greater peril. Our antitrust laws should be reformed to make it easier for enforcers to bring a case against anticompetitive conduct and mergers through recalibrating presumptions and shifting burdens of proof.

2. *On the same day as this Subcommittee's hearing on self-preferencing, Senator Klobuchar, Senator Blumenthal, and I led the introduction of the Anticompetitive Exclusionary Conduct Prevention Act (S. 3426). This bill would enable stronger enforcement against harmful anticompetitive behavior across the economy.*

   Do you think the Anticompetitive Exclusionary Conduct Prevention Act would be likely to have a significant impact on the deleterious self-preferencing practices of large tech platforms? How so?

I believe that the Anticompetitive Exclusionary Conduct Prevention Act is an excellent step forward in modernizing and strengthening antitrust enforcement. Some types of self-preferencing by dominant platforms will be easier to stop if it is enacted into law. However, it's important to continue the important work you and the other Senators are doing, because this bill on its own will not fully address all types of harmful self-preferencing that large tech platforms may engage in. I believe the best option would be a sector-specific regulator equipped with a non-discrimination rule, as described in my testimony and the appendix to my testimony [Shorenstein].

3. *In your testimony, you mentioned the notion of a "nondiscrimination standard" that would prevent companies from harmfully discriminating against potential competitors on their platforms.*

   a. *Can you explain how that might work in practice, and why it would make an important difference in enforcement?*

As they've expanded, platforms now play multiple roles in a transaction. They can be the referees but also the players in the game of online competition. While some self-preferencing is okay—CVS favoring its own cheaper and equivalent brand of Advil—self-preferencing by platforms can be more insidious. A proper non-discrimination standard would prohibit self-preferencing by firms with "bottleneck power." This would only apply to firms that serve a gatekeeper role in the digital marketplace. Ongoing enforcement would be through a sector-specific regulator, rather than just relying on antitrust. The non-discrimination standard could also include discriminating against competitors, rather than being limited to a prohibition on preferencing the platform's own products.

b. *Why isn't existing antitrust law enough to prevent such discrimination by major tech platforms, in your assessment? What else is needed?*

Such discrimination can be difficult to prove as an antitrust violation. Many of the potential violations are hard to prove and easy to conceal from users of the platform. Antitrust is slow, so the violations may have accomplished their goals and changed by the time an antitrust complaint is filed, let alone litigation completed. Some harmful kinds of discrimination do not fit neatly into an antitrust box. Typical antitrust violations like exclusive dealing or refusals to deal are not applicable here. The platforms are usually not fully excluding or refusing to deal with the smaller company that relies on them. Instead, they are offering a lower quality platform service, one where their access is degraded in the form of lower rank or other discrimination. This represents a potential hurdle for a plaintiff trying to bring a case. Also, the major harm from self-preferencing may be less innovation in the marketplace and lower quality products, since innovative new competitors are discouraged from entering or thwarted at an early stage by discrimination. Innovation harms are difficult to quantify, difficult to prove, and difficult to remedy, as compared to the more common price or output effects. The best option is a sector-specific regulator to keep a constant eye on the platforms, with the authority of a non-discrimination rule.

4. *A majority of all Google searches on desktop and mobile devices in the United States last year resulted in zero clicks to a non-Google website, at least based on one measure of clickstream data reporting. What conclusions would you draw from this reporting in terms of Google's ability to keep consumers using its own websites and products, rather than those of its competitors?*

Google has expanded its online search business to become a digital services home for everything from maps to calendars. Your question can best be summarized as an example of how economies of scope and scale can reinforce dominant platforms. As Google has expanded its suite of services, customers are much less likely to want to go outside the Google ecosystem. Most importantly, it makes competition in just one market that Google operates in—say a rival calendar app—much more difficult. According to Yelp's testimony at the hearing, Google search appears to be preferencing other Google products in the search results, putting the new competitor at a severe disadvantage.

5. *As the owner of the iOS platform and the Apple App Store, Apple has dominion over transactions involving mobile apps, including those from potential competitors. For example, Apple can charge large substantial fees, it can make it easier for consumers to access Apple's own apps through voice activation, and it can prevent third-party applications from contacting customers by e-mail.*

Do you believe Apple should be able to engage in these practices to the detriment of competitors who rely on iOS to reach customers?

If Apple is found to have bottleneck power from owning iOS and/or the App Store, practices that disadvantage competitors should be heavily scrutinized by antitrust enforcers. Ideally, Apple should offer interoperability with its products on a fair basis. If interoperability is better with products Apple owns, there should be a good technological reason for it. Apple's voice activation and e-mail contact policies are both examples of the type of issue that should be examined by an expert regulator.

6. *Publications from Forbes to Wired to the Economist, among many others, have all written some version of the phrase "data is the new oil." These reports liken digital data to crude oil because of its immense value as a commodity, its utility as a component in several different types of businesses, and because of the potentially dangerous effects of its misuse.*

    a. *Do you agree with this comparison? If not, what is the best metaphor for the role data play in the platform economy?*

I would agree only in the sense that data have enormous market value today, generating a form of power we associate with oil and other critical resources. Data have immense value to platforms, has varied uses including revenue-generating targeted advertising, and can be very dangerous if misused. Another important characteristic of data that we do not see in oil, is the way that economies of scope and scale apply in data-driven markets. The value of one data point is very low, but as it is aggregated with more and more data, its value increases non-linearly, perhaps exponentially. As a result, data collection and use must be regulated to prevent a harmful aggregation of power in a few corporate hands.

    b. *The collection and use of American consumers' data raises significant privacy concerns. In what ways does it also raise competitive concerns?*

User data are the lifeblood of platforms. Over 99 percent of Facebook's 2019 revenue came from advertising. My colleague, Charlotte Slaiman, has written more on how privacy is also a competitive concern. She writes:

> We need rules that prevent harmful types of collection and harmful types of uses of data about us, regardless of which company is doing it. We need rules that protect users regardless of whether the data was collected "directly" or shared. Only this will really protect users from manipulation and discrimination. It will also level the competitive

> field. Today, some of the most powerful digital platforms hold the most data about us, as well as access to the most (and most valuable) continuing streams of data about us. Instead of relying on these powerful companies to simply block others from collecting that same data again, we need to set consumer-focused rules of the road that apply to all. We should not rely on Google and Facebook to protect our privacy. We need privacy laws to protect consumers from *any* company collecting data we're concerned about, or using it in ways we're concerned about.

Available at: https://www.publicknowledge.org/blog/data-protection-is-about-power-not-just-privacy/.

c. *How important is it for a startup to have the data in the first place, compared with being able to invent with the research and infrastructure necessary to develop and cultivate those data? Which is the bigger barrier to entry?*

Some data is easy to replicate, such as basic user information like name and picture. However, there are many important data sets that are incredibly difficult or practically impossible for a new startup to build on its own. In those cases, it can be among the biggest barriers to entry. Take social networks as an example. Any upstart social network would need data on a user's social graph—who you're connected with—to get off the ground. This is incredibly difficult to replicate. Making this data available to competitors, and allowing competitor apps to interface with dominant social networks like Facebook would be a huge boon to competition. For more, see Gabriel Nicolas and Michael Weinberg, *Data Portability and Platform Competition* at https://www.law.nyu.edu/centers/engelberg/pubs/2019-11-06-Data-Portability-And-Platform-Competition.

7. *I have long been a proponent of having the government take a closer look into the actions of dominant companies that seek to become even larger, across all sectors of the economy. Several investigations, from the Justice Department to the Federal Trade Commission to the House of Representatives, are underway into practices by some of the nation's largest tech platforms.*

   a. *In your view, what can Congress do now while awaiting the results of those investigations?*

Congress can pass antitrust reform bills like the exclusionary conduct bill mentioned above. It should also get started on building a record of why a new agency to specialize in digital platform regulation is needed, and drafting the plans for how it would work.

b. *Why should, or shouldn't, Congress wait until those investigations are completed before taking any legislative action?*

Congress should absolutely not wait for the investigations to be completed before taking legislative action. Solutions like the aforementioned exclusionary conduct bill will have positive effects no matter the result of the investigations. While Congress should continue to build the record for why platform regulation is needed, the information we have now on the power of the platforms shows the inadequacy of our current laws and regulatory regime. Congress should act as soon as possible to enact pro-competition rules to govern dominant platforms.

c. *Do you think federal regulators should do more to investigate self-preferencing activities by major tech platforms? Why or why not? And what should the specific criteria for such an investigation be?*

Yes, federal antitrust enforcers should do more to investigate self-preferencing by major tech platforms. The exact contours of the current investigation are not yet public, so it's possible they are currently working on such an investigation. Self-preferencing by a dominant platform has the power to further entrench market power and deserves investigation.