Statement of the Open Markets Institute

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

On
Online Platforms and Market Power, Part 2: Innovation and Entrepreneurship

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Strong Antitrust Enforcement is Good for Entrepreneurs & Small Business

Wide-ranging concentrations of power within a few companies in the American economy hurt small businesses and the American economy as a whole. From pet food to coffin makers, peanut butter to eye glasses, only a handful of companies control enormous shares of the economic activity in this country.[1]

Small businesses in particular have been suffering over the past decades. The rate at which people start new businesses is half of what it was in the 1970s.[2] According to Census Bureau data, there were only 433,000 new startups in 2016, a 22 percent decrease from pre-recession levels.[3]

Monopolists, especially platform monopolists, can hurt small businesses and entrepreneurs in a number of ways. These including preventing competitors from even forming in the first place or deciding what competitors gain visibility and market access as well as exploiting their size or market share to drive competitors out of business. A particularly pernicious effect of monopoly can occur when a monopolist controls an essential intermediary to commerce. That bottleneck power gives it enormous power to dictate the actions of dependent companies and competitors.

I. Monopolists Can Chill or Dictate Innovation and Entrepreneurship

When investors today consider a company to fund, platform monopolists' control over a range of industries restrict investors choices. Often, investors' strategy is not to establish a sustainable, independent business. Instead, as researchers Jonathan Tepper and Denise Hearn write, "Most

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[1] Open Markets Institute, "America's Concentration Crisis: An Open Markets Institute Report," https://concentrationcrisis.openmarketsinstitute.org/.
[2] Stacy Mitchell, "Monopoly Power and the Decline of Small Business," Institute for Local Self-Reliance, August 2016, https://ilsr.org/wp-content/uploads/downloads/2016/08/MonopolyPower-SmallBusiness.pdf.
[3] Olivia Solon, "As Tech Companies Get Richer, is it 'Game Over' for Startups?" *The Guardian*, October 20, 2017, https://www.theguardian.com/technology/2017/oct/20/tech-startups-facebook-amazon-google-apple; "Firm Age," Firm Characteristics Data Tables, Census Bureau, 2016, https://www.census.gov/ces/dataproducts/bds/data_firm2016.html.

small companies now do not expect to succeed on their own and their only goal is [to] 'exit' to one of the big tech companies before they are crushed."[4]

This pattern is especially stark in the online advertising industry, where Google and Facebook control 58 percent of the U.S. digital advertising market, followed by Amazon.[5] In the advertising technology industry, venture capital money for startups in the advertising technology industry has fallen by more than half since 2015, while the total number of advertising technology companies has fallen 20 percent since 2013.[6] Facebook and Google's dominance in online advertising, capturing over 90 percent of the industry's growth in 2017, is responsible for much of the decline.[7]

This relationship between new businesses and giant platform monopolists like Amazon, Apple, Facebook, and Google is not unique to the advertising technology industry. As *Financial Times* columnists Rana Foroohar and Edward Luce put it, "There are entire areas of innovation that are now functionally closed to start-ups."[8]

Since 2000, Google and Microsoft have acquired over 200 companies each while Amazon and Facebook have acquired roughly 80 each.[9] To a large extent, platform monopolists' innovation comes from wielding their enormous size to acquire the innovations of other startups.

II. Monopolists Can Use Their Size or Market Share to Hurt Small Business Competitors and Suppliers

Monopolists can also use their size or large market share to disadvantage other, smaller competitors, independent of their product or business sill. One prominent example of this is Amazon's competition and eventual acquisition of rival e-commerce site Diapers.com, owned by a company called Quidsi. Amazon aggressively cut diaper prices, dumping cheap product into the market to undercut a competitor, and intentionally losing nearly $100 million in one

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[4] Jonathan Tepper and Denise Hearn, "If You Don't Think Today's Tech Giants are Vicious, Just Ask Venture Capitalists," *ProMarket*, November 27, 2018, https://promarket.org/silicon-valley-vicious-dark-jungle/.
[5] Alexandra Bruell, "Amazon Forecast to Be No. 3 Digital Advertising Player in 2018," *The Wall Street Journal*, September 19, 2018, https://www.wsj.com/articles/amazon-forecast-to-be-no-3-digital-advertising-player-in-2018-1537351201?mod=article_inline.
[6] Claire Ballentine, "Google-Facebook Dominance Hurts Ad Tech Firms, Speeding Consolidation," *The New York Times*, August 12, 2018, https://www.nytimes.com/2018/08/12/technology/google-facebook-dominance-hurts-ad-tech-firms-speeding-consolidation.html.
[7] Ibid.
[8] Rana Foroohar and Edward Luce, "Art Imitates Life in the Digital Age," *Financial Times*, April 23, 2018, https://www.ft.com/content/538a29a4-4660-11e8-8ae9-4b5ddcca99b3.
[9] Tim Wu and Stuart A. Thompson, "The Roots of Big Tech Run Disturbingly Deep," *The New York Times*, June 7, 2019, https://www.nytimes.com/interactive/2019/06/07/opinion/google-facebook-mergers-acquisitions-antitrust.html.

quarter.[10] Faced with huge losses, Quidsi agreed to let Amazon buy it in 2010; afterwards, "Amazon went on to raise prices."[11]

Throughout the early 20th century, two sets of policies avoided these conditions and sustained open and competitive marketplaces. One type was called "fair trade" laws. The Robinson-Patman Act for instance, prohibited the practice of selling an item below cost to drive a competitor out of business. Another, the Miller-Tydings Act, gave states the power to let manufacturers set a floor on the prices at which big retailers could sell their products. Specifically, the legislation encouraged competition among retailers that would involve more than just price discounting.

Strong antitrust enforcement against mergers and monopolistic practices also ensured a competitive economy. Government officials understood that concentrated industries made it harder for new businesses to gain entry to a market. As a result, they banned mergers that would increase the size of incumbents.

However, by the mid-1970s, a bipartisan group of politicians worked to repeal these policies. The Consumer Goods Pricing Act of 1975 overturned the Miller-Tydings Act of 1937 and led to the end of most "fair trade" laws. In the early 1980s, the Reagan Administration's Justice Department stopped enforcing the Robinson-Patman Act and re-wrote the Department of Justice's Merger Guidelines. The Supreme Court also revised predatory pricing law and gave dominant firms the freedom to drive out rivals and control markets through below-cost pricing. These changes drove consolidation among retailers, giving them tremendous power over their independent suppliers.

III. Platform Monopolists Leverage Their Intermediary or Bottleneck Position to Squeeze or Shut Out Competitors

Platform monopolists like Amazon, Apple, Facebook, and Google benefit from their ability to place themselves in the middle of countless commercial transactions. Using their position as intermediaries or gatekeepers to commercial life, platform monopolists have enormous power to dictate the terms on which other small, and even large, businesses operate.

One prominent example is Amazon's e-commerce marketplace. Amazon's Marketplace has become an essential site for small businesses and independent sellers to list their goods on. This is because nearly half of all online shopping takes place on Amazon's Marketplace and approximately four out of every five online product searches begin on either Amazon or Google.[12] Marketplace hosts 2.5 million "third-party sellers," or independent businesses who sell

[10] Tepper and Hearn, "Just Ask Venture Capitalists;" Lina M. Khan, "Amazon's Antitrust Paradox," *Yale Law Journal* 126, no. 3 (January 2017): 768-774, https://www.yalelawjournal.org/note/amazons-antitrust-paradox.
[11] Khan, "Amazon's Antitrust Paradox," 770.
[12] Matt Day and Jackie Gu, "The Enormous Numbers Behind Amazon's Market Reach," *Bloomberg*, March 27, 2019; https://www.bloomberg.com/graphics/2019-amazon-reach-across-markets/; Krista Garcia, "More Product Searches Start on Amazon," eMarketer, September 7, 2018, https://www.emarketer.com/content/more-product-searches-start-on-amazon.

their goods on Amazon.[13] An independent, small business that sells goods on the internet today must be on Amazon to be successful.

At the same time, however, Amazon has access to detailed data on sellers, including what items are becoming more popular. It also extracts significant commissions from sellers and can decide arbitrarily whether to list or de-list a product. Amazon can, according to a 2016 *Bloomberg* report, use that information to determine what products to offer under its own name.[14] The result is that a small, independent business today that sells goods almost always has to do business on, with, and – should they prove too successful – *against* Amazon.[15]

Even relatively successful, bigger businesses are not immune from depending upon platform monopolists. Those small business startups that avoid being crushed or acquired by a dominant platform monopolist are, according to a recent *Bloomberg* investigation, "likely beholden to the tech giants in other ways." The report found that 17 out of 22 technology initial public offerings trying to raise over $100 million since the beginning of 2018 cite Amazon or Google as a competitor or a business risk.[16] Many companies are still dependent on platform monopolists to operate.

For example, in Uber's S-1 filing from April 2019, the ride-hailing company said that it relies on Apple's and Google's respective marketplace for applications in order to reach customers.[17]

Additionally, Uber relies on Google Maps to guide drivers and does "not believe that an alternative mapping solution exists."[18] In the case of Apple cutting Uber off from its App Store or Google cutting Uber off from its application marketplace or mapping software, Uber worries that that would "adversely affect our business."[19]

Apple possesses a particularly strong hold on what applications thrive and which fail. Because users of Apple products must download applications from Apple's App Store, Apple has enormous power over application developers. This includes enacting a 30 percent tax on apps that developers choose to sell. App developers can either give Apple 30 percent of their revenues (plus a fee to be in the App Store at all) or not reach Apple customers.

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[13] David Dayen, "The Biggest Abuser of Forced Arbitration is Amazon" *The American Prospect*, July 10, 2019, https://prospect.org/article/biggest-abuser-forced-arbitration-amazon.

[14] Spencer Soper, "Got a Hot Seller on Amazon? Prepare for E-Tailer to Make One Too," *Bloomberg*, April 20, 2016, https://www.bloomberg.com/news/articles/2016-04-20/got-a-hot-seller-on-amazon-prepare-for-e-tailer-to-make-one-too.

[15] See Josh Dzieza, "Prime and Punishment: Dirty Deadling in the $175 Billion Amazon Marketplace," *The Verge*, December 19, 2018, https://www.theverge.com/2018/12/19/18140799/amazon-marketplace-scams-seller-court-appeal-reinstatement.

[16] Gerrit De Vynck, "The Power of Google and Amazon Looms Over Tech IPOs," *Bloomberg*, July 1, 2019, https://www.bloomberg.com/news/articles/2019-07-01/google-s-and-amazon-s-power-looms-over-procession-of-tech-ipos.

[17] Uber, Form S-1, (April 26, 2019), 53, https://www.sec.gov/Archives/edgar/data/1543151/000119312519120759/d647752ds1a.htm.

[18] Ibid.

[19] Ibid.

Lastly, Google's dominance in the web browser market demonstrates how it stifles innovation and entrepreneurship to the ultimate detriment of users. Small, independent developers looking to improve users' web browsing experience realize that Google owns the software base on which nearly all competing browsers are built, Chromium. That's in large part because other dominant Google services that people use on the internet, like YouTube, Google Docs, and Gmail, don't work as well as browsers built on other bases. But improvements, especially major ones, are approved "by a small circle of senior Google employees."[20]

Yet even despite its dominance in web browsing, Google is not immune from the intermediary power of other competitors. Google will reportedly pay Apple $12 billion in 2019 so that its Search function will remain the default in Apple's Safari browser.[21]

IV. Stronger Antitrust Enforcement and Anti-Monopoly Rules Can Give Entrepreneurs and Small Businesses a Fair Chance

Antitrust enforcement and strong anti-monopoly rules can work to prevent dominant platforms from unfairly exploiting their size, structure, or strategic position in commerce against small businesses.

Federal enforcers could begin this work today with stronger antitrust enforcement. This could take the form of stopping mergers and acquisitions at a lower level of market concentration as well as prosecuting exclusionary and predatory practices. Northeastern University economist John Kwoka has carefully documented the Justice Department and the Federal Trade Commission's recent trend of near-complete abdication of challenging all mergers except for those in the most concentrated situations.[22] At the same time that enforcers have neglected their duty to police mergers that hurt competition, they have allowed dominant platforms to acquire bevies of startups that have only worked to fortify their power.

Stronger antitrust enforcement also includes confronting exclusionary and predatory practices. Predatory pricing (or pricing a good below the cost required to produce it so as to drive out competitors) appears to be an integral element of Amazon's strategy to hurt rival online retailers. Predatory pricing and other below-cost selling strategies allow dominant platforms to use their size to subsidize practices to drive out smaller competitors.

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[20] Gerrit De Vynck, "Google's Chrome Becomes Web's 'Gatekeeper' and Rivals Complain," *Bloomberg*, May 28, 2019, https://www.bloomberg.com/news/articles/2019-05-28/google-s-chrome-becomes-web-gatekeeper-and-rivals-complain.

[21] Lisa Marie, Segarra, "Google to Pay Apple $12 Billion to Remain Safari's Default Search Engine in 2019: Report," *Fortune*, September 29, 2018, https://fortune.com/2018/09/29/google-apple-safari-search-engine/.

[22] John Kwoka, "Reviving Merger Control: A Comprehensive Plan for Reforming Policy and Practice," American Antitrust Institute, October 9, 2018, 22, https://www.antitrustinstitute.org/wp-content/uploads/2018/10/Kwoka-Reviving-Merger-Control-October-2018.pdf.

At the same time, structural separations, or limitations on the lines of businesses that certain companies may enter into, can also be appropriate, especially for dominant platforms. This is because those dominant platforms are, in many ways, essential pathways to commerce. A small business selling online must be on Amazon's Marketplace to survive. At the same time, Amazon extracts commissions from those dependent sellers and sometimes competes against them too. Thus, structural separations prohibiting dominant platforms from using their size and power in one market to enter and dominate another can be a useful tool to structure markets to neutralize dominant platforms' power.[23] One can see a ready example of this in the reports of a proposal from the leadership of the House Financial Services Committee that would forbid technology platforms from acting as financial institutions.[24]

Lastly, additional support and cooperation between federal enforcers and legislators with state attorneys general across the country would help police abusive actions by dominant platforms.

(Portions of this statement were taken from the Open Markets Institute website at openmarketsinstitute.org).

[23] See Lina Khan, "The Separation of Platforms and Commerce," *Columbia Law Review* 119, no. 4 (2019): 973-1098.

[24] Peter Schroeder and Ismail Shakil, "U.S. Proposes Barring Big Tech Companies From Offering Financial Services, Digital Currencies," *Reuters*, July 14, 2019, https://www.reuters.com/article/us-usa-cryptocurrency-bill/us-proposes-barring-big-tech-companies-from-offering-financial-services-digital-currencies-idUSKCN1U90NL.