

**Comments of Stacy Mitchell, Institute for Local Self-Reliance**  
**U.S. House of Representatives Committee on the Judiciary**  
**Subcommittee on Antitrust, Commercial and Administrative Law**  
**Investigation into Competition in Digital Markets**  
**May 4, 2020**

Chairman Cicilline and Ranking Member Sensenbrenner, thank you for the opportunity to share the views of the Institute for Local Self-Reliance on the adequacy of our existing antitrust laws, competition policies, and current enforcement levels.

We commend the Subcommittee on its critically important investigation into the state of competition in digital markets. Through this investigation, the American public and lawmakers are gaining an in-depth understanding of the risks and problems created when a few dominant digital platforms control the infrastructure of modern commerce and communications. This centralized control has enabled the tech giants to, in essence, regulate parts of American life and economic activity. We hope this investigation will be a first step toward implementing the policy changes and interventions needed to restore competition and reassert democratic authority.

U.S. antitrust laws, as written, are strong and, in theory, provide the tools needed to protect competition. However, decades of misguided enforcement and jurisprudence have allowed antitrust policy to stray far from Congress's intent. It's not simply that enforcement has been weak. Rather it's that enforcement has been guided by a flawed ideological framework that chases scale efficiencies at the expense of maintaining competitive markets, thus directly contradicting the intent of the statutes.

ILSR believes that the FTC and DOJ can and should more aggressively enforce the antitrust laws and that the FTC should use its rule-making authority to address unfair methods of competition, particularly in digital markets. That said, we also believe that Congressional action is urgently needed to reaffirm the goals of the antitrust laws, correct the course of the enforcement agencies and the courts on crucial questions of policy, and enact new law to address the outsized power of dominant digital platforms and the threat they pose to competition, entrepreneurship, and democracy.

Here we highlight six policies that we see as especially critical.

## **1. Bar dominant digital platforms from engaging in lines of business that compete with companies that depend on their platforms.**

As I noted in testimony before this committee last July, “[a] growing share of our commerce now flows through a handful of digital platforms. These powerful gatekeepers not only control market access, but also directly compete with the businesses that depend on them.”<sup>1</sup> As we have seen over the past several weeks, these digital platforms have become even more dominant as the pandemic has compelled people to rely even more completely on the big tech companies for shopping, communication, and news.

There is ample evidence that the platforms exploit their roles as gatekeepers to hobble competitors, extract rents from suppliers and competitors, and expand into new markets with a built-in advantage. Amazon, for example, has compelled third-party sellers to purchase its warehousing and shipping services in order to have a shot at “winning the buy box” — that is, being chosen as the default seller of a product, which significantly affects a seller’s volume of sales on the site.<sup>2</sup> A seller that prefers a different shipper, because of lower cost or some other factor, risks losing much of their sales on Amazon if they opt to use that shipper over Fulfillment By Amazon (FBA). By leveraging its platform power in this way, Amazon has impeded competition and built a package delivery service that now rivals FedEx in scale.<sup>3</sup>

Amazon also leverages its ability to selectively police counterfeiting and other nefarious practices on its platform to compel suppliers of its Retail division to purchase additional services or make other concessions. Brands have reported that, in order to get Amazon to remove counterfeit versions of their products from its Marketplace, they must agree to Amazon’s contract terms. The CEO of PopSockets, for example, testified to this Committee that his company had to agree to spend \$2 million on Amazon’s marketing services before Amazon would take action against counterfeiters.<sup>4</sup> Book publishers have similarly reported

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<sup>1</sup> “Testimony of Stacy F. Mitchell, Co-Director, Institute for Local Self-Reliance Before the United States House of Representatives Committee on the Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law, Hearing on: Online Platforms and Market Power Part 2: Innovation and Entrepreneurship, July 16, 2019.

<sup>2</sup> “How Amazon Rigs Its Shopping Algorithm,” Stacy Mitchell and Shaoul Sussman, *ProMarket*, Nov. 6, 2019.

<sup>3</sup> “Amazon Logistics parcel volume will surpass UPS and FedEx by 2022, Morgan Stanley says,” Emma Cosgrorve, *Supply Chain Dive*, Dec. 13, 2019.

<sup>4</sup> Testimony of David Barnett, CEO of PopSockets before the House Judiciary Committee, Field Hearing: Online Platforms and Market Power, Part 5: Competitors in the Digital Economy, January 2020.

having to surrender their distribution more completely to Amazon — thus harming competing distributors and retailers — in order to get relief from counterfeits.<sup>5</sup>

Companies that sell products on Amazon also must contend with Amazon using their sales, cost, and pricing data to create products that compete directly with theirs. As the *Wall Street Journal* recently reported, executives in Amazon’s private label division “had access to data containing proprietary information that they used to research bestselling items they might want to compete against, including on individual sellers on Amazon’s website.”<sup>6</sup>

America’s entrepreneurs used to focus their time and resources on developing new ideas and better ways of operating. Now many are consumed with trying to stay in Amazon’s good graces. They’re turning over a growing share of their revenue to Amazon. Amazon’s cut of the sales made by third-party sellers on its site is now 32 percent, up from 19 percent five years ago.<sup>7</sup> Suppliers have likewise reported increasing demands for discounts and payments.<sup>8</sup> As these companies cede more revenue to Amazon, they lose the capacity to develop new products and invest in growing their businesses. America’s workers and consumers ultimately pay the price for this lost innovation and growth.

Congress should prohibit dominant digital platforms from engaging in other lines of business when doing so creates inherent competitive harms. In the case of Amazon, adopting this policy would compel Amazon to spin off its Retail, Private Label, and Logistics divisions each as separate, stand-alone companies divorced from its online marketplace.

Structural separation was once “a standard regulatory tool and key antitrust remedy in network industries,” applied in industries including railroads, bank holding companies, television networks, and telecommunication carriers.<sup>9</sup> Today, the inherently anti-competitive dynamics of dominant digital platforms, including their ability to appropriate data and manipulate platform outcomes to entrench their market power and advantage their other lines of business, call for picking up this tool once again.

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<sup>5</sup> “What Happens After Amazon’s Domination Is Complete? Its Bookstore Offers Clues,” David Streitfeld, *New York Times*, June 23, 2019.

<sup>6</sup> “Amazon Scooped Up Data From Its Own Sellers To Launch Competing Products,” Dana Mattioli, *The Wall Street Journal*, April 2020.

<sup>7</sup> Amazon’s Annual Reports, 2014 and 2019.

<sup>8</sup> Testimony of David Barnett, CEO of PopSockets before the House Judiciary Committee, Field Hearing: Online Platforms and Market Power, Part 5: Competitors in the Digital Economy, January 2020.

<sup>9</sup> “The Separation of Platforms and Commerce,” Lina M. Khan, *Columbia Law Review*, Vol. 119, No. 4.

## **2. Impose standards of nondiscrimination and common carriage on dominant digital platforms.**

Dominant e-commerce platforms should be subject to oversight similar to that governing other common carriers. Congress should instruct an agency such as the FTC to establish rules for dominant platforms to ensure these infrastructure companies provide fair and reasonable terms and pricing for producers and do not use their gatekeeper power to favor some firms over others or to impose onerous costs on market participants. This oversight would need to include auditing of algorithms and rules about data collection and use.

In our view, the FTC already has the authority to establish this kind of regulatory regime under the mandate given to it by the FTC Act. Yet, even though the platforms clearly function as core network infrastructure for commerce and communications, the agency has yet to act to address the obvious problem of allowing unchecked private control of these critical pipelines. We encourage Congress to remedy this by mandating such action in the case of the platforms and, more broadly, reaffirming the FTC's obligation to use its rulemaking authority to prevent unfair methods of competition.<sup>10</sup>

It's important to note here that applying this kind of regulatory oversight to the big tech firms will not be effective unless it's done in conjunction with breakups. In the case of Amazon, it's my view that several factors make it virtually impossible to establish a system of oversight and adjudication that would be robust enough to protect competition and fair market access, absent spinning off its shopping platform from its other divisions. These factors include the enormous number of sellers and transactions, the low dollar value of most transactions, and the many subtle and hard-to-detect ways that Amazon can skew outcomes to favor its own interests. Therefore, oversight must be combined with structural separation, which would do much of the work by removing the underlying conflicts of interest, thus allowing for an effective and less bureaucratic system of oversight.

## **3. Reaffirm that the intent of the antitrust laws is to safeguard the competitive process and disperse economic power.**

In the 1980s, enforcers and the courts turned antitrust policy on its head. They adopted a new ideological framework for antitrust that discounted the harms arising from market concentration on the grounds that bigger companies deliver greater efficiencies. In other words, this new approach prioritized chasing the idea of scale efficiencies over protecting

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<sup>10</sup> "The Case for 'Unfair Methods of Competition' Rulemaking," Rohit Chopra & Lina M. Khan, *The University of Chicago Law Review*, 2020.

competition. This was a radical departure from the goals and orientation of the antitrust laws as passed by Congress.<sup>11</sup> Among many other consequences, this shift paved the way for a few tech companies to seize control of our digital markets. As long as their behavior did not appear to be harming consumers, they faced no antitrust scrutiny.<sup>12</sup>

This “consumer welfare” framework has failed in at least two key ways. First, it ignores the fact that the exercise of market power can harm people not only as consumers, but also as producers of value — as entrepreneurs and workers. There is now ample evidence of this harm. It’s become much harder, for example, to start and sustain a business. The number of new firms launched each year has fallen by nearly two-thirds since 1980, while small businesses in many sectors have seen a sharp decline in their numbers and market share.<sup>13</sup> Market concentration has also suppressed wage growth, widened geographic disparities, and contributed to growing inequality.<sup>14</sup>

Second, the consumer welfare standard relies heavily on complex economic models to predict future price impacts. This is problematic for several reasons. One is that it means that antitrust decisions are based on questionable predictions about the future, rather than observable information about the present. Indeed, evidence indicates that these models are not reliable. John Kwoka, an economics professor at Northeastern University, studied the outcomes of major mergers and found that, in most cases, they led to price increases.<sup>15</sup>

Congress should reaffirm the goals of antitrust laws and clarify that they exist to protect the competitive process and disperse economic power. Given how far enforcers and the courts have strayed, this is urgently needed. By turning the focus of antitrust enforcement back to questions of market structure, competitive process, and power, Congress can ensure that these laws once again work to promote their intended values and goals.

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<sup>11</sup> “The Ideological Roots of America’s Market Power Problem,” Lina M. Khan, *Yale Law Journal*, June 2018.

<sup>12</sup> “Amazon’s Antitrust Paradox,” Lina M. Khan, *Yale Law Journal*, Jan. 2017.

<sup>13</sup> “The View from the Shop—Antitrust and the Decline of America’s Independent Businesses,” Stacy Mitchell, *The Antitrust Bulletin*, 61(4), 498–516.

<sup>14</sup> “Dynamism in Retreat: Consequences for Regions, Markets, and Workers,” *Economic Innovation Group*, Feb. 2017; “The Best \$100,000+ Tech Jobs Are Increasingly Concentrated in Just 8 Cities,” Josh Zumbrun, *Wall Street Journal*, Jul. 26, 2017; “In Superstar Cities, the Rich Get Richer, and They Get Amazon,” Emily Badger, *New York Times*, Nov. 7, 2018;; “Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers’ Wages, 1978 to 2014,” Nathan Wilmers, *American Sociological Review*, Mar. 27, 2018; “Labor Market Concentration,” Azar, José Azar, Ioana Marinescu, and Marshall Steinbaum, Dec. 10, 2018.

<sup>15</sup> “Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes,” John E. Kwoka Jr, *Antitrust Law Journal*, April 4, 2012.

#### **4. Prohibit mergers and acquisitions by firms with significant scale and market power, including dominant digital platforms.**

To address the extreme levels of concentration across the economy, Congress should prohibit mergers involving corporations that already have significant scale and market power, including acquisitions that are currently too small to trigger notice and review under the Hart-Scott-Rodino Act. If Congress chooses not to impose an outright ban, at the very least mergers involving firms with significant market power should be subject to heightened scrutiny and a more stringent standard for approval by the FTC and DOJ.

Banning acquisitions of any size is particularly crucial to restoring competition in digital markets. Dominant digital platforms have acquired hundreds of small firms over the last decade.<sup>16</sup> There is substantial evidence that these acquisitions have allowed the four big tech firms to deepen their market power, including by absorbing potential competitors, moving into new markets with a significant head-start, and taking key technologies off the market, thus rendering these innovations out of reach of their rivals.

Amazon, for example, has made a number of acquisitions that have helped to entrench and extend its market power.<sup>17</sup> Many innovations that we credit to the company are in fact technologies that it bought through mergers. The sophisticated robots that move through its warehouses were developed by Kiva, which Amazon bought in 2012 and then promptly canceled the firm's contracts with rival e-commerce retailers.<sup>18</sup> The next-generation chips that have helped Amazon dominate the cloud computing market originated with a team at Annapurna Labs, a 2015 acquisition.<sup>19</sup> The core functionality behind Amazon's voice interface, Alexa, came from a UK startup that Amazon acquired in 2012.<sup>20</sup>

These acquisitions all fell below the threshold for notification and thus were not subject to review by antitrust enforcers. Yet each of these acquisitions has contributed to Amazon's market dominance in crucial ways.

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<sup>16</sup> "Unlocking Digital Competition," report of the U.K.'s Digital Competition Expert Panel, March 2019.

<sup>17</sup> "Amazon Has Acquired or Invested in More Companies Than You Think--at Least 128 of Them," Zoë Henry, *Inc.*, May 2017. For a complete list of Amazon's acquisitions see List of mergers and acquisitions by Amazon, Wikipedia, [https://en.wikipedia.org/wiki/List\\_of\\_mergers\\_and\\_acquisitions\\_by\\_Amazon](https://en.wikipedia.org/wiki/List_of_mergers_and_acquisitions_by_Amazon)

<sup>18</sup> "Amazon Planning To Bring Robots In-House, Forcing Rivals To Look Elsewhere," Rebecca Borison, *The Street*, Feb. 14, 2016.

<sup>19</sup> "How An Acquisition Made By Amazon In 2016 Became The Company's Secret Sauce," Janakiram MSV, *Forbes*, March 10, 2019.

<sup>20</sup> "How Amazon's Alexa Was 'Born' and Where Voice-Controlled Tech Will Take Us Next," Emma Bryce, *Wired*, Feb. 14, 2017.

Even when an acquisition does trigger notice, the enforcement agencies' current approach to evaluating these deals is deeply flawed and lacks an understanding of platform business models. Amazon's 2017 acquisition of Whole Food, for example, won quick approval from the FTC, which chose not to issue a second request.<sup>21</sup> Presumably, the FTC viewed the deal as a merger between two small players in the retail grocery market. But this way of looking at the merger misses the fact that acquiring Whole Foods allowed Amazon to fortify its monopoly power in the online shopping market in several crucial ways. The deal enabled Amazon to integrate an extensive line of private label grocery products into its online offerings, gaining a foothold in a pivotal product category for dominating online shopping. It also gave Amazon more than 400 well-placed properties for staging last-mile deliveries. And not least, it supplied the company with a rich source of new data about the offline behavior of a core online shopping demographic.

For these reasons, we believe an outright ban of acquisitions by firms with significant scale and market power, including the dominant platforms, is appropriate and warranted.

#### **5. Establish "bright-line" rules that ban anti-competitive conduct by firms with significant scale and market power, including dominant digital platforms.**

Congress should establish bright-line rules prohibiting particular kinds of conduct for companies that meet a certain threshold of scale and market power. For these firms, specific behaviors should be considered per se violations of the law.

In particular, we'd like to highlight two types of conduct that should be barred for firms with significant market power, including dominant digital platforms. The first is tying. Amazon, for example, has made the success of sellers on its platform largely contingent on using its warehousing and shipping service. As noted above, under the parameters of Amazon's "buy box" algorithm, sellers that use Fulfillment By Amazon (FBA) are much more likely to be selected as the default seller of a product, while sellers that choose competing logistics companies are more likely to be placed under the "see other sellers" link, resulting in significantly lower sales.<sup>22</sup> By tying success on its platform to sellers'

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<sup>21</sup> "Senator questions quick approval for Amazon's Whole Foods purchase," David Shepardson, Reuters, Aug. 25, 2017.

<sup>22</sup> "How Amazon Rigs Its Shopping Algorithm," Stacy Mitchell and Shaoul Sussman, ProMarket, November 6, 2019; "Amazon Accused of Forcing Up Prices in Antitrust Complaint," Spencer Soper, Bloomberg, November 8, 2019.

choosing FBA, Amazon has blocked competition from rival shippers and rapidly grown its share of the package delivery market.

The second is predatory pricing. Dominant companies can use revenue from other lines of business or investors' backing to sell products below cost, driving rivals out of business not on the merits, but simply through their superior financial resources and ability to sustain losses. Amazon has long used sustained below-cost selling to grow its market share and eliminate competition. During its first six years, Amazon lost more than \$3 billion selling books below cost, driving rivals out of business; it now sells half of all print and digital books in America.<sup>23</sup> When the popular upstart online retailer Zappos refused Amazon's takeover offer in 2007, Amazon began selling shoes at a loss, reportedly losing about \$150 million on the strategy. It worked: Zappos agreed to a takeover.<sup>24</sup> Amazon continues to use this tactic. According to Morgan Stanley, the average order placed under Amazon's new Prime one-day shipping service comes to about \$8, but costs the company nearly \$11 just to fulfill and ship.<sup>25</sup> By incurring sustained losses on these orders, Amazon impedes nascent delivery competitors and undermines competing neighborhood grocers, pharmacies, and convenience stores that lack the financial resources to match its below-cost pricing.

Current case law considers predatory pricing largely irrational, extremely rare, and unlikely to succeed as a strategy for monopolization.<sup>26</sup> Based on these assumptions, the courts have established a standard of proof that renders predatory pricing claims virtually impossible to bring. The current "recoupment" standard wrongly assumes that the only route for recouping losses is through charging inflated consumer prices in the future. But a growing body of scholarship shows that a firm that uses predatory pricing to expand its market share can reap rewards in other ways, including through an increase in its stock price and greater monopsony power to squeeze workers and suppliers.<sup>27</sup>

ILSR believes that sustained below-cost selling, tying, and other forms of conduct should be considered per se violations of the law when undertaken by firms with significant market power and scale, including Amazon and other dominant digital platforms. This would

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<sup>23</sup> "Amazon Doesn't Just Want To Dominate The Market - It Wants To Become The Market," Stacy Mitchell, *The Nation*, Feb. 15, 2018.

<sup>24</sup> *Ibid.*

<sup>25</sup> "Amazon's Profit Falls Sharply As Company Buys Growth," Karen Weise, *The New York Times*, October 24, 2019.

<sup>26</sup> "Predatory Pricing and Recoupment," Christopher Leslie, *Columbia Law Review*, November 2013.

<sup>27</sup> "Amazon's Antitrust Paradox," Lina Khan, *The Yale Law Journal*, January 2017; "Prime Predator: Amazon and the Rationale of Below Average Variable Cost Pricing Strategies Among Negative-Cash Flow Firms," Shaoul Sussman, *Journal of Antitrust Enforcement*, Feb. 15, 2019.



promote competition by preventing these companies from using their outsized financial resources and gatekeeper power to monopolize other markets.

## **6. Mandate that the FTC and DOJ operate with greater public engagement, transparency, and accountability.**

In response to your question about whether the institutional structure of antitrust enforcement is adequate, ILSR believes that there are many problems with how these agencies function. Here I'd like to highlight in particular their lack of transparency and engagement with the public, and the negative impact of this closed approach.

In recent decades, antitrust policy-making and enforcement has been allowed to slip into the bureaucratic shadows, becoming the domain of a small cadre of technocrats and economists. As a consequence, antitrust now suffers from what the scholars Harry First and Spencer Weber Waller have described as a debilitating "democracy deficit."<sup>28</sup> They write that "the imbalance between democratic control and technocratic control has put antitrust on a thin diet of efficiency, one that has weakened antitrust's ability to control corporate power... We need to move the needle back."

Part of the solution, as I note above, is for Congress to restate the goals of the antitrust statutes and establish more "bright line" rules so that policy-making is less in the hands of economists and judges.

Another part of the solution is opening the doors of the FTC and DOJ to allow the public to provide more input into and scrutiny of the agencies' major enforcement decisions and actions. Doing so would improve enforcement and accountability. It would also help to equip Americans with the knowledge they need to discuss the direction of anti-monopoly policy and debate the best ways to resolve critical competition issues affecting their lives.

At present, the DOJ and FTC regularly close investigations and approve mergers without offering any explanation to the public about their decisions. In 2012, for example, the DOJ closed a three-year antitrust investigation of Monsanto without issuing a statement, even though the case had significant implications for farmers and rural communities.<sup>29</sup> In 2013, the DOJ abruptly reversed course on the merger of US Airways and American Airlines; it

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<sup>28</sup> "Antitrust's Democracy Deficit," Harry First and Spencer Weber Waller, *Fordham Law Review*, 2013.

<sup>29</sup> "How Monsanto Outfoxed The Obama Administration," Lina Khan, *Salon*, Mar. 15 2013.

had initially sued to block the merger, but then, a few months later, approved it.<sup>30</sup> Yet, the agency provided no information to Americans about why it changed its mind.

Similarly, it's only because of an inadvertent disclosure of documents to *The Wall Street Journal* that we know that career officials at the FTC concluded in 2012 that Google was abusing its monopoly power in ways that had resulted "in real harm to consumers and to innovation in the online search and advertising markets."<sup>31</sup> Staff had recommended that the FTC file suit against the company, but commissioners voted not to do so. They did not disclose to the public the fact that staff had recommended action and thus did not have to account for how they reached a different conclusion.

Congress should open the actions of the FTC and DOJ to greater public input and scrutiny. In particular, Congress should require the agencies to solicit public comment for all merger reviews. Currently, under the Antitrust Procedures and Penalties Act, they solicit public comment only when they're proposing a consent decree with the merging parties. Among other benefits, requiring a comment period for mergers would allow the public (including other firms, workers, and consumers in the affected industry) to provide relevant information, which would improve enforcement decisions.

Secondly, the agencies should be required to issue written explanations for all of their significant enforcement decisions, including opening and closing investigations and the outcome of merger reviews. These explanations should summarize and respond to the broad themes of any public comments received in the matter.

## **Conclusion**

I thank the Committee for the opportunity to submit these comments and welcome any questions you may have. ILSR strongly believes that Congress must step in to resuscitate our antitrust laws. We believe doing so is essential to restoring entrepreneurship to its previous levels, freeing Americans who participate in our markets from bullying and exploitation by monopolistic corporations, and protecting democracy from concentrated power.

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<sup>30</sup> "The American Way," Justin Elliot, ProPublica, Oct. 11, 2016

<sup>31</sup> "Inside The U.S. Antitrust Probe of Google," Brodie Mullins, Rolfe Winkler and Brent Kendall, *The Wall Street Journal*, Mar. 19, 2015.