

9/18/2023

To: Lina M. Khan

Chairwoman,

Federal Trade Commission

600 Pennsylvania Avenue NW, Washington, D.C. 20580

**Re: FTC and DOJ Seek Comment on Draft Merger Guidelines**

If implemented appropriately, certain proposed draft Merger Guidelines could help achieve the following policy changes:

***Ensure enforcement of antitrust law and reform or modernize antitrust laws where necessary.***

- Enforce existing antitrust laws through scrutiny of Big Tech mergers—past, present, and future—and anti-competitive behavior using the Department of Justice and/or the Federal Trade Commission (FTC).<sup>i</sup>
  - Launch and prompt aggressive antitrust investigations (for example, through committee oversight and relevant federal agencies) to ensure that Big Tech companies are not utilizing legitimate oligopoly power in one market to gain an unfair advantage in another market. At a broader level, these investigations should also verify that Big Tech companies are not engaging in other illegal antitrust actions.<sup>ii</sup>
    - For Big Tech platforms that leverage their market dominance to shape the public square, prohibit these platforms from preferencing their own products or combining the “buy-side” of the market with the “sell-side” (for example, Google’s ad practices or even cross-market permutations of this behavior such as Google creating an anti-competitive tie with its operating system, app store, and search app).<sup>iii</sup> Companies to which this scrutiny broadly applies include Alphabet, Amazon, Apple, Meta, and Microsoft.
    - Like per se violations under the Sherman Act, prohibit collusion by firms across the entire digital stack, including social media platforms, which would deny consumers access to a specific type of Internet service or Internet access. If collusion exists, this should be subject to penalties under both federal and state law. For example, Amazon Web Services, Apple, and Google’s combined takedown of Parler across the cloud services and app markets within approximately 48 hours in January 2021 would be prohibited by this recommendation.<sup>iv</sup>
  - Ensure that antitrust enforcement agencies have the necessary resources to investigate Big Tech mergers properly and effectively.<sup>v</sup>
- Launch aggressive antitrust investigations to determine whether Big Tech companies are colluding on content moderation and viewpoint discrimination against legitimate speech.<sup>vi</sup>
- Develop arguments that the limitation of access to legitimate political speech and the exploitation of user data constitute harm to consumers.<sup>vii</sup>

- Clarify that the consumer welfare standard, which should be codified into law, applies to zero price markets that consist of “free” services in terms of fees for the use of social media platforms, search functions, etc. Clarify for all stakeholders (legislatures, the courts, etc.) that antitrust law *must* be applied to Big Tech firms, which often leverage and hide behind their zero price practices as a justification for behavior that would otherwise be constrained by the proper application of existing antitrust rules.<sup>viii</sup>
- If the enforcement of existing antitrust law does not sufficiently address Big Tech’s abuse of market dominance, business practices, and harm to consumers, then Congress should reform or modernize antitrust laws to contend with this abuse more effectively.<sup>ix</sup>

***Scrutinize Big Tech companies' ad tech model.***

- Prompt the FTC to investigate unfair and exploitive data collection, storing, and sharing; excessive online surveillance; and anti-competitive digital advertising practices such as those mentioned above.<sup>x</sup>
- Severely curtail current microtargeting practices that exploit user privacy. For instance, companies can collect generic consumer information under a certain threshold of identifiable information, but biometric data should be classified as “sensitive data” and be given additional privacy protections and strictures including strict time limits on data retention, third-party data sharing, and the prohibition of indefinite data storage.<sup>xi</sup> Privacy-preserving technologies should be encouraged at all times.

Respectfully Submitted,

*/s/ Kara Frederick & Jake Denton*

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<sup>i</sup> Kara Frederick, “Combating Big Tech’s Totalitarianism: A Road Map,” Heritage Foundation Backgrounder No. 3678, February 7, 2022, <https://www.heritage.org/technology/report/combating-big-techs-totalitarianism-road-map>.

<sup>ii</sup> *Ibid.*

<sup>iii</sup> An example of a useful criterion for this sub-recommendation is the definition of a “covered company” put forth by U.S. Representatives Cathy McMorris (R-WA) and Jim Jordan (R-OH) in their discussion draft proposal to preserve constitutionally protected speech; a company covered by this legislation would include those that generate at least \$3 billion in revenue and maintain 300 million or more monthly active users. Discussion Draft, “To amend section 230 of the Communications Act of 1934 to provide that immunity under such section does not apply to certain companies and to require internet platform companies to implement and maintain reasonable and user-friendly appeals processes for decisions about content on the platforms of such companies and to submit quarterly filings to the Federal Trade Commission regarding content enforcement decisions and appeals, and for other purposes,” 117th Congress, 1st Sess., § 101(2)(A)(B), <https://republicans-energycommerce.house.gov/wp-content/uploads/2021/07/1-CMR-Censorship.pdf> (accessed February 5, 2022); Rachel Bovard, “Congress Needs to Take Seriously the House Reports on Big Tech’s Anticompetitive Behavior,” *The Federalist*, October 15, 2020, <https://thefederalist.com/2020/10/15/congress-needs-to-take-seriously-the-house-reports-on-big-techs-anticompetitive-behavior/> (accessed February 5, 2022); Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law, Committee on the Judiciary, U.S. House of Representatives, 2020, p. 206; and Mike Wacker, “App Stores, Google Play Services, and the Red Paddle,” *Medium*, February 2, 2022, <https://medium.com/@mikewacker/app-stores-google-play-services-and-the-red-paddle-1be3da0605f8> (accessed February 5, 2022).

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<sup>iv</sup> Kara Frederick, “Combating Big Tech’s Totalitarianism: A Road Map,” Heritage Foundation Backgrounder No. 3678.

<sup>v</sup> Ibid.

<sup>vi</sup> Ibid.

<sup>vii</sup> Ibid.

<sup>viii</sup> Ibid.

<sup>ix</sup> Ibid.

<sup>x</sup> Ibid.

<sup>xi</sup> Kara Frederick, “The Razor’s Edge: Liberalizing the Digital Surveillance Ecosystem,” Center for a New American Security, September 3, 2020, <https://www.cnas.org/publications/reports/the-razors-edge-liberalizing-the-digital-surveillance-ecosystem> (accessed February 5, 2022).