

## ADDITIONAL VIEWS OF ZOE LOFGREN

There is scarcely any part of modern life that has not moved online. If this was not already clear before the COVID-19 pandemic, it certainly is now. Digital technologies and platforms have become central to – indeed, inseparable from – much of our daily lives, as well the larger currents of our economy, government, and civil society. This success stems from the genius of the internet’s original design, which gave users at the ends of a network default control over how to use it, rather than centralizing decision-making in the network’s owners and operators. Openness – not only in the internet’s core protocols but in many of the systems and services layered on top of them – enabled cascades of unpredictable and decentralized innovations, unleashing new forms of competition in all sorts of goods, services, and content.

It is therefore useful that the Judiciary Committee give attention to digital markets and competition. This Report is a step forward in that effort. Its publication last year as a staff-produced document garnered significant public attention and helped prompt debates about the power of major platform companies and their possible regulation. I commend Chairman Cicilline, Chairman Nadler, and all of the members of the Subcommittee on Antitrust, Commercial, and Administrative Law – as well as their staffs – for their tireless work.

As I mentioned at the time, my vote to approve the report should not be taken as agreement with each and every one of its specific findings and recommendations. As the Chairs’ Forward expressly acknowledges, the document covers such a wide range of factual claims and policy issues that it is unrealistic to expect unanimity from each individual member.

This would be true as to any particular conclusions about a specific company or dispute. The bulk of the report’s 400 pages is devoted to the Subcommittee’s investigation of four companies – Facebook, Google, Amazon, and Apple. I understand the Subcommittee undertook such a detailed factual investigation to inform the report’s legislative recommendations. However, enforcement agencies and the courts are far better suited than a Congressional Committee to conduct full adjudications to reach definitive conclusions about whether anticompetitive conduct has in fact occurred in a specific case. Indeed, major litigation is already pending against several of these companies, which apparently limited the evidentiary record that the Subcommittee was able to assemble.<sup>1</sup>

Looking forward, any new regulatory authority or adjustments to existing antitrust laws should focus not only on the dominant firms themselves, but on the larger ecosystems that their platforms enable, and from which they derive most of their power. Monopolists of the past typically accumulated power through scarce supplies and/or expensive distribution channels, leaving end consumers in a given market with few or no alternatives. In contrast, the biggest online platforms tended to build their positions by attracting users first – delivering far better

---

<sup>1</sup> Report at 8 (stating that among other documents withheld from production to the Subcommittee were those “produced to antitrust authorities in ongoing investigations, or that related to the subject matter of these ongoing investigations”).

user experiences than their initial competitors, and often by offering free services. By growing massive user bases (along with the valuable data they generated), more market participants – developers, advertisers, suppliers, and content creators – inevitably followed. This sort of growth triggered a virtuous cycle in which more users attracted more content, applications, and services to a given platform, and vice versa. The end result often was greater competition in many adjacent markets, as a successful platform allows users to connect more directly with and choose among an exponentially greater number of suppliers, creators, and so forth than were ever available in the pre-digital world.

These dynamics can cut in both directions, in terms of how much a given platform and ecosystem stays open and competitive. On one hand, even for an already-dominant platform, its prospects for continued success and future growth may depend on keeping its cycle going – continuing to expand the size and value of its ecosystem. In this situation, the platform’s own interests may often favor staying relatively open to additional users and providers, and not alienating or unduly restricting the existing users of its platform. On the other hand, as the Report discusses, network effects and other winner-take-all dynamics within a platform’s ecosystem can entrench dominance and become insurmountable barriers to potential competitors. In the worst case, this entrenchment could eventually tip a platform’s incentives away from fostering the ecosystem that led to its success, towards self-dealing and a focus on maintaining market power even at the expense of its user base.

To be sure, this is why our competition laws should foster direct competitive pressure on dominant platforms. The record of mergers and acquisitions by leading firms over the past several decades – not only in online services but in many other sectors of the economy – raises concern about whether regulators have been aggressive in challenging potentially anticompetitive mergers, and whether the evolution of the antitrust laws in the courts and the agencies has unduly restricted merger enforcement.

The more difficult questions are in deciding how and when to regulate single-firm conduct, which the report often describes as a platform exercising its “gatekeeper power” over who uses it and under what terms. Our laws should promote open platform ecosystems as a central objective, but this is far from a simple matter in practice, because many of a digital platform’s assertions of gatekeeping power can be good faith efforts to serve user interests – such as privacy, security, and/or quality of service – and may protect the long-term health of the larger ecosystem. In certain instances, platforms may need to exclude certain parties or content outright – for example, moderating hate speech and the advertisement of fraudulent or harmful products – to ensure that a platform otherwise remains open and vibrant for other speakers and transactions.

A platform company could also abuse gatekeeping power – to promote its own products and services, to lock in users from leaving for other platforms, and so on. The challenge for Congress is to craft a legal framework to allow regulators to distinguish abusive gatekeeping from legitimate efforts to serve user interests and prevent ecosystems from breaking down. These

sorts of cases will often resist easy categorizations and generalized answers, as regulators are forced to consider how deeply to intervene in the details of a platform's operations, such as its precise terms of services or particular design aspects of its user interface.

Many of the business practices discussed in the Report revolve around the valuable data that dominant platforms tend to accumulate, including vast repositories of sensitive data on the identity and activities of their users. The exploitation of such data carries a multitude of inherent risks. I strongly agree that comprehensive federal regulation of these practices is long overdue. My colleague from Silicon Valley, Congresswoman Anna Eshoo, and I introduced the Online Privacy Act to remedy that.

It is likely that direct privacy and data regulation could be the most effective remedy in this area. The Report contends that privacy abuses by online platforms are symptoms of inadequate competition. This can be true in some cases, and in those instances competition policy could play a useful supporting role to give consumers more privacy-protective alternatives in the marketplace. But it is a mistake to treat privacy largely as a competitive problem with competition-focused remedies. Abusive data practices are found not only in large platforms but also from many smaller companies, as the latter are more likely to buy and sell sensitive user data to data brokers and other third parties. Even in more competitive digital markets, users often do not have enough visibility or understanding into how their personal data is being collected, used, and disseminated, and face insurmountable barriers to defending their own privacy interests, through either individual or collective action.

Effective privacy and data regulations can and will promote competition, both by restricting abusive business models that otherwise can trigger a race to the bottom, and by giving users more practical control over who holds their data and how it is used. The Report's call for greater authority to promote data portability and interoperability is important. However, as with other privacy measures, it's unlikely this can be accomplished through the ex post enforcement of generalized antitrust laws. Instead, it requires more specialized, expert, and prospective privacy regulation.

In all of this – competition, privacy, and or any other fundamental objective in platform regulation – we must be vigilant against regulatory and legislative agendas being co-opted to serve narrower interests. As I noted above, the rise of digital platforms unleashed a flood of new competition for earlier incumbents in many other industries. While these incumbents can have legitimate complaints about their treatment within platform ecosystems, this does not justify special regulatory protections that would lock down such ecosystems, favor conventional business models against digitally-native content and services, or attempt to restore markets to their pre-digital states.

I look forward to working closely with Chairman Cicilline, Chairman Nadler, and other committee members, as we develop legislation to address the concerns detailed in this report.