

## U.S. HOUSE REPORT ON COMPETITION IN DIGITAL MARKETS FOCUSES ON BIG TECH DOMINANCE AND NEED FOR ANTITRUST REFORM

On October 6, 2020, the U.S. House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law issued a [449-page report](#) on competition in digital markets, with a clear focus on the dominance of the "GAFA"—Google, Apple, Facebook and Amazon. The report is the culmination of a sixteen-month investigation launched in June 2019 into the state of online competition. Although the investigation was bipartisan, the House majority released its own report. The Subcommittee requested detailed information from the tech giants, as well as other market participants and digital competition experts, and held several public hearings with testimony from GAFA executives and other participants in the digital marketplace.

The purpose of the investigation was multifold: to determine the state of competition in digital markets, whether firms are acting anti-competitively, and whether existing antitrust laws, policies, and enforcement levels are sufficient to address these issues. The Subcommittee concluded that the GAFA—branded "dominant platforms" by the House report—possess monopoly power due to factors including their role as "gatekeepers" of key distribution channels, which allows them to control access to digital markets.<sup>1</sup> "To put it simply," the report states, the "companies that once were scrappy underdog startups that challenged the status quo have become the kinds of monopolies we last saw in the era of oil barons and railroad tycoons."<sup>2</sup>

Additionally, the investigation found that the GAFA engaged in a series of anti-competitive conduct to maintain their market power, including self-preferencing and so-called "killer acquisitions" of potential competitors.<sup>3</sup> An appendix to the report lists over 560 GAFA acquisitions going back to as early as 1988,<sup>4</sup> and the report

<sup>1</sup> STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION OF DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS 39 (Comm. Print 2020) [hereinafter Majority Report].

<sup>2</sup> Majority Report at 6.

<sup>3</sup> *Id.* at 11.

<sup>4</sup> *Id.* 405-449.

underscores that the federal antitrust agencies investigated few of these hundreds of transactions.<sup>5</sup>

The Subcommittee issued a series of potential reforms for consideration aimed at "(1) address[ing] anticompetitive conduct in digital markets; (2) strengthen[ing] merger and monopolization enforcement; and (3) improv[ing] the sound administration of the antitrust laws through other reforms."<sup>6</sup> Its recommendations include:

- Legislative reform of antitrust laws, including revitalizing the "essential facilities" doctrine requiring dominant firms to provide non-discriminatory access to their services and overriding recent jurisprudence to make clear that two-sided platforms can compete with one-sided firms<sup>7</sup>;
- Breaking up the dominant platforms through structural separations and line-of-business restrictions<sup>8</sup>;
- Non-discrimination provisions to prevent the dominant platforms from self-preferencing<sup>9</sup>; and
- Shifting presumptions for future acquisitions by the dominant platforms and requiring HSR notification for all acquisitions by the dominant platforms.<sup>10</sup>

House Republicans, led by Representative Ken Buck (R-CO), issued a response agreeing with the report's conclusion that the GAFAs dominate the digital economy and have "engaged in myriad forms of anticompetitive behavior."<sup>11</sup> But Republican pushback on some of the proposed reforms, particularly some of the policy recommendations—such as eliminating arbitration clauses—that could affect the broader business community.

The GAFAs wasted no time responding, with all four companies issuing statements the same day the House majority report was released. A Facebook spokesperson defended the company's acquisitions of Instagram and WhatsApp, asserting that the apps "reached new heights of success because Facebook has invested billions in those businesses. A strongly competitive landscape existed at the time of both acquisitions and exists today."<sup>12</sup> In its statement, Google characterized both reports as "featur[ing] outdated and inaccurate allegations from commercial rivals about search and other services," while warning that "many of the proposals bandied about ... would cause real harm to consumers, America's technology leadership and the U.S. economy – all for no clear gain."<sup>13</sup>

The House report's findings of anticompetitive conduct by the GAFAs heightens the anticipation of lawsuits yet to be filed in the DOJ and FTC tech investigations.

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<sup>5</sup> *Id.* at 11.

<sup>6</sup> *Id.* at 20.

<sup>7</sup> *Id.* at 396-98; see, e.g., *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *United States v. Sabre Corp.*, 452 F. Supp.3d 97 (D. Del. 2020).

<sup>8</sup> Majority Report at 377-381.

<sup>9</sup> *Id.* at 381-83.

<sup>10</sup> *Id.* at 386-87.

<sup>11</sup> KEN BUCK, U.S. HOUSE OF REPRESENTATIVES, *THE THIRD WAY: ANTITRUST ENFORCEMENT IN BIG TECH 3* (2020).

<sup>12</sup> Marcy Gordon, *Democrats call for Congress to rein in, break up Big Tech*, WASH. POST (Oct. 6, 2020), [https://www.washingtonpost.com/politics/courts\\_law/democrats-call-for-congress-to-rein-in-break-up-big-tech/2020/10/06/08166c76-0832-11eb-8719-0df159d14794\\_story.html](https://www.washingtonpost.com/politics/courts_law/democrats-call-for-congress-to-rein-in-break-up-big-tech/2020/10/06/08166c76-0832-11eb-8719-0df159d14794_story.html).

<sup>13</sup> Eric J. Savitz, *House Report Attacks Tech Giants as Monopolists That Stifle Competition*, BARRON'S (Oct. 6, 2020), <https://www.barrons.com/articles/house-report-attacks-tech-giants-as-monopolists-that-stifle-competition-51602029016>.

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