March 7, 2023

Senator Amy Klobuchar, Chair
Senator Mike Lee, Ranking Member
U.S. Senate Committee on the Judiciary
Subcommittee on Competition Policy, Antitrust, and Consumer Rights
Washington, DC 20510

Re: March 7, 2023 Senate Judiciary Subcommittee on Competition Policy, Antitrust, and Consumer Rights Hearing to Examine Reining in Dominant Digital Platforms, Focusing on Restoring Competition to Our Digital Markets

Dear Chair Klobuchar and Ranking Member Lee:

On behalf of the Computer & Communications Industry Association ("CCIA"),[1] I write to express concerns regarding legislation considered by the Subcommittee during the 117th Congress including (i) the American Innovation and Choice Online Act (AICOA); (ii) the Journalism Competition and Preservation Act (JCPA); and (iii) the Open App Markets Act (OAMA). CCIA requests that this statement be included in the record of the hearing scheduled for March 7, 2023.

Summary

As the Committee takes up aspects of digital competition policy, the deficiencies of these previous legislative proposals merit attention. Legislative initiatives such as AICOA represented a fundamental shift from the market-oriented principles and a consumer welfare standard that enabled the U.S. to become the world leader in technology innovation. Rather than focusing on potential harms or benefits to consumers, these bills instead attempted to regulate specific American companies based on size and function, while ignoring foreign competitors.

Some of these proposals could have impeded content moderation efforts by companies designed to remove dangerous hate speech, harassment, and other harmful content. These

[1] CCIA is an international, not-for-profit trade association representing a broad cross-section of technology and communications firms. For more than 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more, visit www.ccianet.org.

proposals also presented significant privacy and security concerns for consumers, and would have restricted innovation in the digital sector, removed products that consumers love, harmed the U.S. economy, and potentially put U.S. national security at risk.

As the Committee takes up digital policy questions again, defects of previous efforts should be avoided. More generally, Congress should avoid industry policy in the guise of antitrust. The competitiveness of the U.S. digital sector can be traced in considerable part to broadly applicable principles that have placed consumers' welfare at the center of competition policy.

The American Innovation and Choice Online Act (AICOA)

Rather than focusing on potential consumer harms, AICOA aimed to regulate a select group of digital service providers, or "covered platforms" (Covered Platforms) solely on the basis of size. AICOA would restrict these Covered Platforms — all U.S. technology companies — from engaging in pro-competitive or competitively benign conduct, which would significantly harm U.S. technological innovation and global leadership while placing no corollary restrictions on foreign competitors including major Chinese technology companies such as Alibaba, Baidu, and Tencent.

AICOA's discriminatory obligations were based on three cumulative conditions, namely: number of active users based in the U.S., market capitalization (USD 550 billion), and the critical nature of the service. These arbitrary requirements would introduce negative incentives for corporations to keep innovating and growing lest they breach the U.S. user and market cap thresholds.

AICOA also restricted commonly used business practices on Covered Platforms such as self-preferencing. The economic literature shows that promoting "house brands'' or new products is a business strategy considered to be healthy for competition. Banning self-preferencing practices for Covered Platforms would distort market dynamics in a discriminatory fashion and take away from consumers desirable services that they want to keep.

Another significant concern was the 'access' mandate included in AICOA. While interoperability is a key element of open ecosystems, forced data sharing poses risks to user privacy. This obligation could affect integrity and security, since tools and technologies to fight spam, scams, and other harmful activities would be compromised if third-party apps are not obligated to meet those same standards and allow such tools to work on their networks. In

addition, there was the risk of disclosing businesses' confidential information, facilitating collusion, theft or corruption of data, unauthorized cyber intrusion, widespread disinformation, and manipulation.

As written, AICOA seriously curtailed content moderation policies by limiting the ability of companies to remove hate speech, harassment, and misinformation online. In June 2022, Senators unsuccessfully requested that the legislative language be clarified or it would risk "supercharg[ing] harmful content online and make it more difficult to combat."[2]

Importantly, the proposals' provisions also harmed U.S. national security by preventing American companies from eliminating foreign government disinformation campaigns.

AICOA empowered the FTC with broad authority over "data" without any definition of its regulatory ambit or a guarantee that any shared personal data will be protected. The proposal also introduced new legal concepts unfamiliar to U.S. jurisprudence such as 'materially harm competition', 'generated data', or 'core functionality' that would lead to legal uncertainty, expensive litigation, and expansive or unjust regulatory rulings. Finally, AICOA imposed draconian fines for non-compliance, departing from international best practices, and levying up to 15% of total United States revenue — not profit — of the Covered Platform for the previous calendar year.

The Journalism Competition and Preservation Act (JCPA)

Numerous constitutional problems were apparent in the JCPA, including likely First Amendment violations through the mandate that private companies *must carry* speech by publishers, bar any removal of the speech, and require payment when users link to the speech. Such mandates could also be considered an unconstitutional "Taking" under the Fifth Amendment. In addition, the arbitration regime created by the JCPA was so one-sided that it constituted an unprecedented government intervention in the operation of the marketplace.[3]

[2] Letter from Senators Schatz, Wyden, Luján, and Baldwin to Senator Klobuchar (June 14, 2022), *available at* https://www.freepress.net/sites/default/files/2022-06/senate-letter-asking-klobuchar-for-content-moderation-fix-on-s2992.pdf.

[3] Under Sec. 3(b)(4), the offer for the price of access to the news content must reflect a fair market value of the access to the platform, without any offset for the value the publishers receive from the platform accessing their content, such as the ad revenue the publishers receive from the traffic the platform directs to the publishers' sites. As a result, under the JCPA, the offer reflects the benefit to only one party of the transaction, while completely ignoring the benefit to the other party.

The JCPA also conferred advantages on a specific group of content producers, of a specific size, that meet the bill's idiosyncratic definition of "news." This makes the JCPA a content-based regulation, subjected to the strictest constitutional review.[4] In addition, despite a unanimous Supreme Court decision that there is no ownership or copyright in facts, the JCPA mandate that required digital services to pay for facts also violated the First Amendment.[5]

The JCPA also prohibited content moderation practices that are used to remove hate speech and fight misinformation online. Such regulations would inhibit online services' ability to take down dangerous information and protect their users. Policymakers should be empowering content moderation rather than interfering with websites' ability to engage in First Amendment-protected editorial discretion.

Lastly, the JCPA remixed two failed 20th-century competition policies: it granted a special interest antitrust exemption in a government-guided effort to make prices subjectively "fair" when such previous government attempts at "fairness" regulation for pricing has been widely regarded as a disaster.[6] The JCPA also permitted favored businesses to form cartels, contrary to U.S. antitrust principles, fostered harmful collusive pricing, and significantly harmed its beneficiaries as it would allow them to avoid necessary steps to modernize and render themselves more efficient companies.

The Open App Markets Act (OAMA)

OAMA aimed to regulate relationships around the distribution of mobile apps, with potential consequences for how leading app stores operate, and how they keep their users safe. A case for such utility-style regulation of mobile ecosystems has not and cannot be made. Currently, app developers and consumers can choose from a wide range of platforms to use open system app stores including Google Play Store, SlideME, 1Mobile Market, Mobile9, Opera Mobile Store, Mobango, F-droid, GetJar, and more. Consumers and app developers can also move from one

[4] The Supreme Court concluded that cable must-carry rules were "content-neutral," meaning that the regulations applied without reference to the content of the speech. As a result, the cable must-carry rules were held to a lower standard of scrutiny. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994). But the JCPA subsidizes a *particular* set of publishers: U.S.-oriented producers of "original content concerning regional, national, or international matters of public interest."

[5] *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

[6] Newspapers in the United States have already had a partial antitrust exemption for over 50 years. Unfortunately, the Newspaper Preservation Act of 1970 ("NPA") failed to achieve Congress' stated goal to maintain independent competing voices. In fact, historians and journalists have argued that the NPA fostered monopolies and chains instead of producing independent voices. Given the cautionary history of the previous exemption for local newspapers, the implementation of another exemption is obviously ill-advised.

app store to another freely without being locked into any of these services, reflecting robust competition in open ecosystems.

Closed ecosystems, like Apple's App Store, also provide an alternative to developers and users. These ecosystems have offered customers access to nearly 2 million apps, the overwhelming majority of which is free. The ecosystems also support 2.1 million U.S. jobs. Continuing to provide choices to developers and users fosters competition where customers can choose between app stores that have differing privacy and security systems. However, regulations mandating interoperability as proposed in OAMA would have required companies to share their proprietary information with others, potentially weakening user privacy and security.

App stores invest significant resources in research and development to maintain the privacy and security systems that protect consumers. Restrictions on app stores' ability to charge developers could deter investments or innovation in software distribution and would disincentivize companies to invest in their app store ecosystems. The broad mandates of OAMA and the excessively narrow affirmative defenses would harm consumers and developers alike.

Conclusion

Instead of pursuing these flawed legislative proposals, we urge the Senate to instead work with the new House Majority to consider legislation that truly benefits consumers and the U.S. economy and that can successfully pass through both chambers of Congress.

Sincerely,

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Computer & Communications Industry Association (CCIA)