

Congress, Private Litigants Challenge Digital Titans' Impact on Competition and Speech

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During the July 29, 2020 [video hearing](#)^[1] by the House Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law, lawmakers from both parties expressed concerns about the size and influence of companies like Amazon.com, Inc., Apple Inc., Facebook, Inc., and Google-parent Alphabet Inc. The lawmakers' questions for the CEOs of these companies—Jeff Bezos, Tim Cook, Mark Zuckerberg, and Sundar Pichai, respectively—largely broke down along party lines and focused on two main topics: (1) the potential for tech companies to abuse their market positions to acquire competitors and otherwise stifle competition; and (2) the potential for tech platforms to be used to selectively silence specific viewpoints.

Alleged Monopolistic and Anticompetitive Conduct

During the hearing, the Democrats on the subcommittee largely focused on the tech titans' alleged anti-competitive practices, challenging conduct such as purchasing start-ups to stave off competition or using their extensive data caches to replicate and eliminate a competitor's business. Comparing the testifying CEOs to John D. Rockefeller and Andrew Carnegie, panel head David Cicilline (D-RI) stated, "the names have changed, but the story is the same." But each CEO challenged the lawmakers' conclusions, insisting their respective company operated in highly competitive markets.

Subcommittee members scrutinized each company's past deals, including Facebook's acquisitions of WhatsApp and Instagram. Facebook CEO Zuckerberg stated that Facebook always viewed WhatsApp and Instagram as complements to Facebook's services, not just competitors, and Zuckerberg argued that the acquisitions were successful, allowing Facebook to improve these services by leveraging Facebook's infrastructure, adding features, and managing content.

As to Amazon, subcommittee members expressed concerns that Amazon employs predatory pricing to devalue competitors before acquiring them and uses data gleaned from third-party sellers on its platform to aid its private label business. Amazon CEO Bezos responded that Amazon policy prohibits leveraging third-party data to benefit its private label, and while he "can't guarantee [] that that policy has never been violated," he emphasized that Amazon was continuing to look into any potential violations of that policy.

As to Apple, the lawmakers challenged whether Apple uses its power over its app store to control app developers' access to consumers to benefit itself. In one instance, Apple allegedly prevented Random House publishing from launching its own app as a way of forcing it to join Apple's eBooks app. In another instance, Apple allegedly delisted a third party parental control app that competed with its own app. Apple CEO Cook insisted that there are numerous reasons why a third party app—like Random House's—might not launch, including technical or other issues. Cook also explained that Apple delisted the competing parental control app due to child safety and privacy concerns because the underlying technology used in that app could allow third parties to see a child's screen. Cook also noted that the parental control app space is highly competitive with a significant number of providers and Apple does not derive revenues from its proprietary product. One lawmaker also argued that Apple's guidelines for app developers provide that Apple can use any information that an app developer provides to Apple for any purpose, allegedly allowing Apple to copy third party apps while also admonishing such behavior by other app developers. But Cook dismissed these concerns stating that, "We respect innovation. It's what our company is built on. We would never steal somebody's IP." Cook emphasized that Apple's apps are subject to the same review guidelines as third-party apps and that the "gate to the app store is very wide," making the app store "likely the highest job creator in the last decade."

Alleged Anti-Conservative Bias and Viewpoint Discrimination by Tech Firms

Republicans on the subcommittee primarily targeted allegations of anti-conservative bias within tech and policies that might silence conservative voices on digital platforms.

One subcommittee member suggested that Google blocked various conservative websites from its search results months ago but then reversed course upon receiving notice of this hearing. However, Alphabet CEO Pichai affirmed his belief that Google's platforms feature more conservative voices than ever before and that Google's search and email algorithms are politically neutral.

When asked similar questions with respect to Facebook, Zuckerberg stated that Facebook strongly supports free expression. He further clarified that political ideology does not factor into Facebook's hiring of content moderators and that there is "diversity in where they're hired" from all over the world, including in the United States.

Though not mentioned during the hearing, the Republican focus on eliminating anti-conservative bias within big tech appears to build on President Trump's May 28, 2020 executive order and the DOJ's June 17, 2020 review of safe harbors for content moderation and proposed revisions to the Communications Decency Act. Days after the hearing concluded, at least one report suggested that Facebook does not unfairly silence conservative groups—contrary to the questions posed at the hearing—but might be giving preferential treatment to accounts affiliated with right wing political beliefs instead. Likewise, the D.C. Circuit declined to revive a \$1.5 billion antitrust and First Amendment case against Google, Facebook, Twitter, and Apple only a few days after the hearing. *Freedom Watch, Inc v. Google Inc.*, No. 19-7030, 2020 U.S. App. LEXIS 24796 (D.C. Cir. Aug. 5, 2020). Without a written opinion, the court denied conservative group Freedom Watch and activist Laura Loomer's motion for rehearing *en banc* on its action alleging the tech titans entered into a "plainly anti-competitive" and "illegal agreement to refuse to deal with conservative news and media outlets." The motion followed after Freedom Watch and Loomer unsuccessfully appealed a 2019 dismissal in which the district court found Freedom Watch and Loomer failed to demonstrate that the tech companies colluded to censor conservative voices or that they were "quasi-state actors" precluded from viewpoint censorship. *Freedom Watch, Inc. v. Google Inc.*, No. 19-7030, 2020 U.S. App. LEXIS 16948 (D.C. Cir. May 27, 2020).

Conclusion

Each CEO emphasized that antitrust scrutiny is appropriate and reasonable in the tech space but insisted that his respective company exists in a competitive market and does not abuse its position therein for its own benefit. While subcommittee members challenged these representations, the disparate approaches by Democrats and Republicans during the hearing suggest it is unlikely Congress will achieve any meaningful, bipartisan legislative

efforts in the near future to remedy any of the issues discussed. Nonetheless, given the increasing attention on these tech titans at various levels of government and through private suit, practitioners in these industries and their related markets should be alert to potential enforcement efforts and private litigation based in antitrust and content moderation that may alter the competitive landscape.

[1] All language herein quoted from the hearing derives from this source.

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