



POLICY

THE MONOPOLY-BUSTING CASE AGAINST GOOGLE, AMAZON, UBER, AND FACEBOOK

What tech companies have to fear from antitrust law

By [Russell Brandom](#) Sep 5, 2018, 8:14am EDT

Illustrations by [William Joel](#)



Antitrust crusaders have built up serious momentum in Washington, but so far, it's all been theory and talk. Groups like Open Markets have made a strong case that big companies (especially big tech companies) are distorting the market to drive out competitors. We need a new standard for monopolies, they argue, one that focuses less on

consumer harm and more on the skewed incentives produced by a company the size of Facebook or Google.

Someday soon, those ideas will be put to the test, probably against one of a handful of companies. For anti-monopolists, it's a chance to reshape tech into something more democratic and less destructive. It's just a question of which company makes the best target.

To that end, here's the case against four of the movement's biggest targets, and what they might look like if they came out on the losing end. (Note: Apple was too much of a conventional retailer to make the list, but if you're wondering what an antitrust lawsuit against Cupertino might look like, [this is a pretty good place to start.](#))



GOOGLE: THE CONGLOMERATE

Our best model for tech antitrust is the Department of Justice's anti-bundling case against Microsoft in the '90s, which argued that Microsoft was using its control over the PC market to force out competing operating systems and browsers. If you're looking for a contemporary equivalent, Google is probably the closest fit. On a good day, Google (or Alphabet, if you prefer) is the most valuable company in the world by market cap, with dozens of different products supported by an all-encompassing ad network. Google also has clear and committed enemies, with Microsoft, Oracle, Yelp, and even the Motion Picture Association of America calling for restrictions on the company's power.

Some of those restrictions are already starting to take shape in Europe, as Google faces [a \\$5 billion fine for alleged anti-competitive Android bundling](#) and [a separate \\$4 billion GDPR case](#) that alleges stingy opt-out provisions. Last week, Sen. Orrin Hatch [called on the Federal Trade Commission](#) to investigate anti-competitive effects from Google's dominance in online ads and search, hinting that similar regulatory pressure may not be far off in the US.

But according to Open Markets' Matthew Stoller, the best long-term remedy for Google's dominance has more to do with Google's acquisitions. "If you're looking for a silver bullet, probably the best thing to do would be to block Google from being able to buy any companies," says Stoller. "Suddenly, you have to compete with Google, you can't just be bought out by Google."

That might sound tame compared to Europe's billion-dollar fines, but it cuts to the core of how Google is organized. The company has acquired more than 200 startups since it was founded, including central products like YouTube, Android, and DoubleClick. The

company's modular structure is arguably a direct result of that buying spree, and it's hard to imagine what Google would look like without it. More recent buys like Nest have fallen under the broader Alphabet umbrella, but the core strategy hasn't changed. Would Google still be an AI giant if it hadn't bought DeepMind? Probably, but everyone involved would have had to work a lot harder.

Even better, anti-monopoly activists would have a bunch of different ways to block those acquisitions. The Department of Justice's antitrust division hasn't contested Google's acquisitions so far, but it could always change its approach. The strongest fix would come from Congress, where Sen. Amy Klobuchar (D-MN) has introduced a bill that would place [an outright ban on acquisitions](#) by any company with a market cap higher than \$100 billion. (As of press time, Google is worth roughly \$840 billion.)

Of course, Klobuchar's bill doesn't focus on Google or even tech giants, but Stoller says that kind of blockade would have a unique effect on how big companies shape the startup world. "All of these companies, from Amazon to Facebook to Google, they proactively find their competitors and buy them out," says Stoller. "This would push VCs and entrepreneurs to truly compete with Google. Right now, their strategy isn't to do that because they want to get acquired."





AMAZON: THE PLATFORM

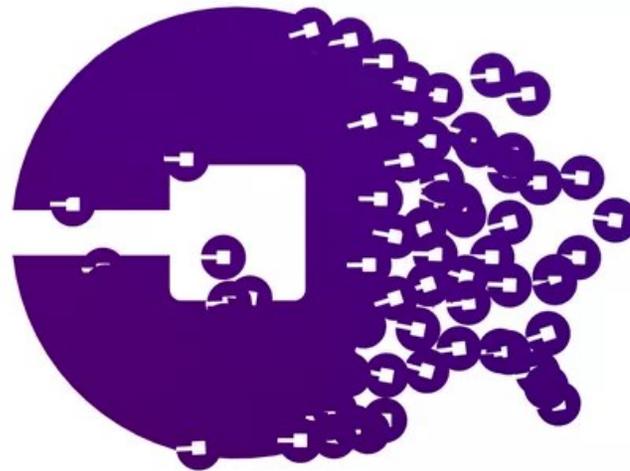
Amazon makes life hard for its competitors — and by now, the company is competing against nearly everyone. The most notorious example is [the company's wholesale pillaging of Diapers.com in 2010](#), which saw Amazon drop diaper prices by as much as 30 percent and matching Diapers.com's pricing move for move until the smaller outfit agreed to be acquired. More recently, smaller retailers say they're being targeted and priced out by generics from Amazon Basics, which benefits from Amazon's wealth of data on who's buying what. Since Amazon has the money to out-discount any competitors, there's not much anyone can do about it. With a laser focus on consumer benefit (usually meaning lower prices), the company has become a major player in nearly every market it enters.

Since the modern antitrust standard is mostly focused on consumer harm, Amazon has largely avoided regulatory scrutiny, making it a prime target for the new generation of policy minds that are focused on how big companies can distort markets. Anti-monopoly lawyer Lina Khan laid out the case against the retail giant in [a 2017 article called "Amazon's Antitrust Paradox,"](#) in which she argued that the Amazon store had become a utility infrastructure that the company was subverting for its own benefit. (The argument seems to have found favor with FTC commissioner Rohit Chopra, who hired Khan in July.)

In that view, the problem is that Amazon the store gives too much advantage to Amazon the manufacturer. And thanks to acquisitions such as Whole Foods and the power of Prime, Amazon the store keeps getting bigger.

But Stacy Mitchell, co-director at the Institute for Local Self-Reliance, says that could be solved with a Microsoft-style antitrust suit, carving Amazon up into distinct parts and setting new rules for each part. “Amazon needs to be broken up so that the platform is separated from its retail and manufacturing operations,” says Mitchell. “The platform needs to be treated like a common carrier, so it’s required to serve all comers equally.”

In short, it would be court-mandated net neutrality for The Everything Store. It would take a pretty aggressive Department of Justice to get us there, but [Khan’s analysis is gaining favor in surprising corners of Washington.](#)



UBER: THE PRICE-FIXER

Uber might not seem as scary as it did during the Kalanick years, but it's still the largest single crowd-labor platform and a vital piece of transportation infrastructure in 600 cities across the world. Sitting between one-off customers and independently contracted drivers, there are lots of ways for Uber to subtly manipulate the market for its own benefit. The most notorious method was surge pricing, which added a multiplier whenever the supply of nearby drivers was running low. More recently, Uber switched to upfront pricing, but the company still has near total control over how much a given ride costs, and how much of that money makes it back to drivers.

That would be fine for a normal business, but it might be a bigger problem for Uber. The company has long insisted that drivers are independent contractors, not employees. That means Uber can't be a monopoly in the Standard Oil sense, but it could be a part of a price-fixing conspiracy, in which an entire industry colludes to raise prices at once. That usually looks like a bunch of companies secretly agreeing not to compete with each other, like when [UK supermarkets all agreed to boost milk prices](#) or [Apple convinced publishers to sell ebooks at a single rate](#). In both cases, the companies were found to be in violation of the Sherman Act, and the conspiracy was broken up.

Marshall Steinbaum, research director at the Roosevelt Institute, says the "independent contractor" structure makes Uber uniquely vulnerable to a conventional antitrust case. "The nature of the business is fundamentally a conspiracy among hundreds of thousands of independent businesses," Steinbaum says.

One customer has already tried to cast surge-pricing as a price fix [in civil court](#), suing over the higher prices paid as a result of the conspiracy. The case was ultimately thrown out because of an arbitration clause in Uber's Terms of Service (although not before Uber got in trouble for [spying on the plaintiff](#)). Still, the Justice Department isn't bound by Terms of Service, and it could bring the same case any time it likes.

If the case were successful, Uber and other crowd-labor platforms would be faced with a tough choice. If it keeps drivers as independent contractors, it'd be forbidden from any kind of price control and forced into a flat Airbnb-style marketplace as it scraps it out with competing networks. It could escape those limits by recognizing drivers as employees, but that would subject the company to a battery of new requirements on minimum wage, benefits, and workers' compensation, immediately becoming the largest employer in the country. Either way, Uber would face a lot more limits on how it treats drivers and passengers.

"It would force them to take away either the ability to charge whatever they want or the ability to treat drivers as independent contractors," says Steinbaum. "Lose either one, and you've undermined the power of having a centralized transportation monopoly."





FACEBOOK: THE STARFISH

In some ways, Facebook is the most urgent case. It's inescapable, opaque, and it wields immense power over the fundamental functions of our society. More than any other tech giant, Facebook's power feels like an immediate threat and the most plausible first target for congressional action. Sen. Mark Warner (D-VA) has already laid out [20 different measures](#) that would rein in Facebook and other tech giants, ranging from GDPR-style data portability requirements to more carveouts of Section 230.

But while Warner's measures focus on nudging Facebook toward more responsible behavior, a growing number of critics see the problem as Facebook itself. It may be that a social network with more than 2 billion users is simply too big to be managed responsibly, and no amount of moderators or regulators will be able to meaningfully rein the company in. For those critics, social networks are a natural monopoly, and no amount of portability requirements will ever produce a meaningful competitor to Facebook or a meaningful check on its power.

If that's true, a classical antitrust breakup ([as some have suggested](#)) would seem like the only option. The best example is the breakup of AT&T, which saw the telecom giant's local phone business split into "baby bells," each bound by serious geographical and regulatory restrictions. It's the classic example of how to cut a giant company into smaller companies

without disrupting service.

Public Knowledge's Harold Feld has been [thinking hard](#) about how that model might apply to Facebook. Feld is best known as a telecom lawyer, but he's become increasingly interested in how the telecom model fits into the new platform era. The obvious answer is to approach it like Google: blocking future acquisitions and breaking off side products like WhatsApp and Instagram.

But if the problem is the all-consuming size of the network, splitting off networks may lead to what Feld calls the "starfish problem." "If you tear up a starfish, the pieces regrow and now instead of one starfish you have five starfish," says Feld. "If you're going to split up Facebook, what's to prevent it from becoming three Facebooks, each one dominant in its particular market segment? That's a hard problem for antitrust."

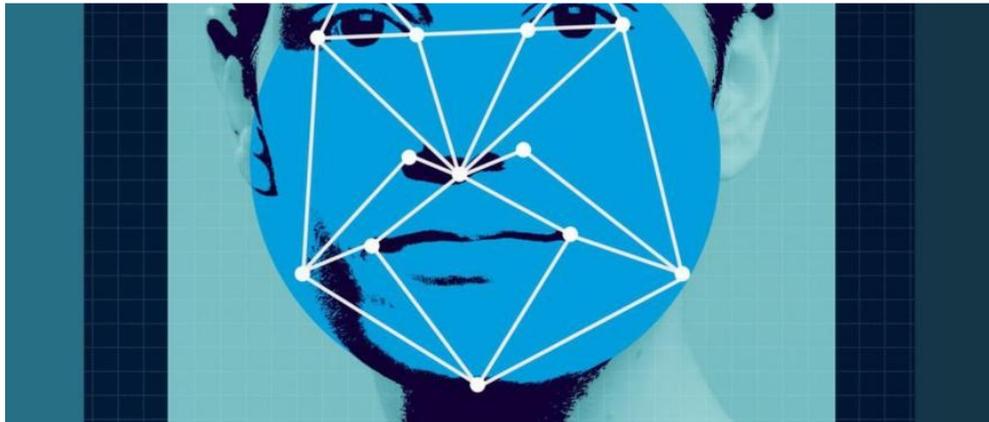
Facebook would be less powerful without WhatsApp and Instagram, in Feld's view, but it wouldn't be entirely de-fanged. Facebook Messenger could pick up most of the slack from WhatsApp, while Facebook photo-sharing tools might start to resemble the severed Instagram in response. You could prohibit Facebook from making any products involving photo-sharing or mobile messaging, but even that wouldn't touch the broader problem of how to govern a universal network.

"It's not that we shouldn't think about a breakup," says Feld. "It's that we should *think* about a breakup. You have to consider how you're going to address these problems."

For Feld, the only complete fix is a specific platform regulation bill akin to the Telecom Act that spells out a new set of requirements for privacy, moderation, and all the other issues

that have dogged Facebook in recent years. That's a lot for Congress to handle, but there may be no other way through. "We're not going to solve it all at once," says Feld. "We need a new and comprehensive law that will address these issues because they've come to have an enormous and out-sized impact on our lives." ■

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