

December 16, 2020

VIA EMAIL

Dear President-elect Biden,

Monopolists across the economy have coerced or bribed customers, distributors, or suppliers not to do business with competitors. Such exclusionary contracts are a favored tactic of dominant firms to preserve their market power and block the entry and growth of rival businesses.

This fall, federal and congressional probes highlighted exclusionary contracting in the tech sector. In October, the U.S. Department of Justice filed a monopolization suit against Google alleging, among other unfair practices, exclusionary arrangements with handset makers and wireless carriers.<sup>1</sup> The House of Representative's Subcommittee on Antitrust, Commercial and Administrative Law, in its landmark 450-page report, detailed that Apple and Google routinely used exclusionary contracts to suppress competition, exclude new entrants, and entrench their monopoly power.<sup>2</sup>

Such exclusionary conduct is pervasive across the economy. Monopolists in food distribution,<sup>3</sup> manufacturing,<sup>4</sup> professional sports,<sup>5</sup> and consumer electronics<sup>6</sup> have all been found liable or accused of exclusive dealing. Through exclusionary contracts, dominant firms use their power to prohibit or discourage customers, distributors, and suppliers from dealing with the dominant firm's competitors. Dominant firms marginalize existing competitors and lock out new entrants by depriving them of essential outlets or inputs. By perpetuating their market power, dominant firms can inflict substantial injury on consumers and sellers, in the form of higher prices and lower quality products for purchasers, and lower prices and other less favorable terms of trade for suppliers.

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<sup>1</sup> Complaint, *United States v. Google* (D.D.C. 2020) (No. 20 Civ. 3010), <https://www.justice.gov/opa/press-release/file/1328941/download>.

<sup>2</sup> *Id.* See generally MAJORITY STAFF OF HOUSE SUBCOMM. ON ANTITRUST, COMMERCIAL & ADMIN. LAW, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS (2020), [https://judiciary.house.gov/uploadedfiles/competition\\_in\\_digital\\_markets.pdf](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf). See also Sandeep Vaheesan, *What the Next President Can Do About Big Tech's Power*, SLATE (Oct. 7, 2020), [https://slate.com/technology/2020/10/big-tech-and-antitrust-one-thing-the-next-president-can-do-to-curb-techs-power.html?via=recirc\\_recent](https://slate.com/technology/2020/10/big-tech-and-antitrust-one-thing-the-next-president-can-do-to-curb-techs-power.html?via=recirc_recent); Claire Kelloway, *Report Exposes System of Big Food Kickbacks to Cafeteria Contractors, Cutting out Local Producers*, FOOD & POWER (May 20, 2020), <https://www.foodandpower.net/latest/2020/05/20/report-exposes-system-of-big-food-kickbacks-to-cafeteria-contractors-cutting-out-local-producers?rq=aramark>. Daniel A. Hanley, *The First Thing a Biden FTC Should Tackle: We need the right to repair our products*, SLATE (Nov. 18, 2020), <https://slate.com/technology/2020/11/biden-ftc-right-repair-exclusive-contracts.html>. Complaint at 42, *Fed. Trade Comm'n v. Facebook, inc.* (D.D.C. 2020).

<sup>3</sup> Complaint, *Food Lion, LLC v. Dairy Farmers of America, Inc.*, (M.D.N.C. 2020) (No. 20 Civ. 442), <https://www.courtlistener.com/docket/17175947/1/food-lion-llc-v-dairy-farmers-of-america-inc/>.

<sup>4</sup> *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254 (3d Cir. 2012).

<sup>5</sup> Antitrust Class Action Complaint at 7, *Cung Le v. Zuffa, LLC*, 108 F. Supp. 3d 768 (N.D. Cal. 2015) (No. 14 Civ. 5484), <https://bergermontague.com/wp-content/uploads/2018/03/0001-2014-12-16-complaint.pdf>

<sup>6</sup> Hanley, *supra* note 2.

The Open Markets Institute, forty-one labor and public interest organizations, and seven scholars (identified below) call on the Federal Trade Commission to ban exclusionary contracting by dominant firms through rulemaking. Through exclusionary contracts, powerful corporations use their market might to perpetuate their dominance—as opposed to competing by offering better terms and improving their products and processes. In July of this year, we petitioned the Commission and asked it to enact a rule that will prohibit dominant firms from using exclusive dealing contracts that substantially foreclose rivals from customers, distributors, or suppliers of critical inputs.<sup>7</sup> The petition proposes multiple definitions of what should constitute substantial foreclosure.

In addition to the harms described above, our petition also explains how the justifications for exclusionary contracts rest on unpersuasive and incomplete theories. We have attached our full petition with the cover email.

The FTC has long recognized the harms from exclusionary contracts. Over the past decade, it has brought a number of enforcement actions against monopolists for exclusionary contracting.<sup>8</sup> These cases produced many settlements and the affirmance of a Commission decision by the Eleventh Circuit.<sup>9</sup> These enforcement efforts are commendable but not enough given the complicated, time-consuming character of antitrust litigation under the rule of reason today.<sup>10</sup> We believe the Commission should build on its litigation activities and enact a bright-line rule prohibiting exclusionary contracts by dominant firms.

**We ask that you appoint commissioners to the FTC who are committed to using the agency’s entire range of statutory powers to prohibit exclusionary contracts by dominant firms. We also request your administration to affirmatively endorse the agency’s use of its rulemaking authority to prohibit exclusionary contracts and other practices the agency deems unfair methods of competition.**

Respectfully,

Open Markets Institute  
American Economic Liberties Project  
American Grassfed Association  
AMIBA  
Bold Alliance  
Color of Change

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<sup>7</sup> See generally Sandeep Vaheesan, *Resurrecting “A Comprehensive Charter of Economic Liberty”: The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645, 651-57 (2017). See also Rohit Chopra & Lina Khan, *The Case for Unfair Methods of Competition Rulemaking*, 87 U. CHI. L. REV. 357 (2020).

<sup>8</sup> See Open Markets Institute et al., *Petition for Rulemaking to Prohibit Exclusionary Contracts 83-86* (July 2020), <https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5f1729603e615a270b537c3d/1595353441408/Petition+for+Rulemaking+to+Prohibit+Exclusionary+Contracts.pdf>.

<sup>9</sup> *McWane, Inc. v. FTC*, 783 F.3d 814, 840-42 (11th Cir. 2015).

<sup>10</sup> Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827 (2009); Kevin Caves & Hal Singer, *When the Econometrician Shrugged: Identifying and Plugging Gaps in the Consumer-Welfare Standard*, 26 GEO. MASON L. REV. 395 (2018).

Community Coalition for Real Meals  
Cornucopia Institute  
Demand Progress Education Fund  
Demos  
Economic Policy Institute  
EPIC  
Fair World Project  
Family Farm Action Alliance  
Farm Aid  
Farmworker Association of Florida  
Food and Water Action  
The Freedom Bloc  
Friends of Family Farmers  
Friends of the Earth  
HEAL Food Alliance  
iFixit  
In the Public Interest  
Initiative for Medicines, Access & Knowledge  
Institute for Local Self-Reliance  
Jobs with Justice  
Johns Hopkins Center for a Livable Future  
Main Street Alliance  
Northern Plains Resource Council  
Oklahoma Stewardship Council  
Organization for Competitive Markets  
People's Parity Project  
Public Justice  
Repair.org  
Rural Advancement Foundation International  
San Luis Valley Local Foods Coalition  
Service Employees International Union  
Socially Responsible Agricultural Project  
Towards Justice  
US PIRG  
Warehouse Worker Resource Center  
Warehouse Workers for Justice

In their individual capacities

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