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Why We Should All Play By the Same Antitrust Rules, from Big Tech to Small Business

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I. Introduction

Many thanks to Bret Swanson for the kind introduction, and to AEI for having me. I'm pleased to be here with you to discuss recent proposals to radically change the way we enforce the antitrust laws.

Although these proposals run the gamut, today I will focus primarily upon complaints dealing with the new economy, particularly large high technology firms. Many complain that

especially professionals and small businesses – would not have to follow the antitrust laws at all, allowing them to collude with impunity.[5]

There are similar calls for special antitrust rules for technology in the U.K. For example, the Furman Report recommends the creation of a special platform regulator, a special "strategic market status" for the very largest tech firms, a special "code of conduct" for tech firms, and expanded remedies.[6]

At bottom, these proposals – and many others now under consideration around the world – ask a simple question: Do we need special antitrust rules for every situation, including special rules for high technology markets? For today's purposes, I would like to focus today on four types of special rules.

First, special rules for favored goals, such as privacy.

Second, special rules for certain technologies, such as "Big Data."

Third, special rules for different kinds of businesses.

And fourth, special remedy rules, especially for platforms.

II. Special Rules for Favored Goals, Such as Privacy

We start with special rules for favored goals, such as privacy.

There has been growing interest in using the antitrust laws to protect consumers' electronic privacy.[7] For example, the German Bundeskartellamt (BKA) recently addressed this

[5] *Id.* ("Fifth, protect workers, professionals, small businesses, and all other powerless actors from antimonopoly investigations and prosecutions. . . . [Congress] should grant workers, professionals, and small businesses (as defined by assets or revenue) the right to engage in coordinated activity, including collective bargaining and the building of cooperative businesses.").

[6] JASON FURMAN ET AL., UNLOCKING DIGITAL COMPETITION: REPORT OF THE DIGITAL COMPETITION EXPERT PANEL 5-6, Mar. 2019 [hereinafter FURMAN REPORT], *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

[7] *See, e.g.*, Dissenting Statement of Commissioner Pamela Jones Harbour, Google/DoubleClick, FTC File

topic in its Facebook decision.[8] Although I agree wholeheartedly with the goal of protecting privacy, this case is not directly applicable in the U.S., where privacy and antitrust law are handled separately.

The FTC's antitrust and consumer protection authorities are based upon separate statutory provisions that were enacted at different times and for different reasons.[9] Today, they are enforced by different bureaus – the Bureau of Competition for antitrust and the Bureau of Consumer Protection for privacy and data security – within the FTC.

As we speak, the U.S. Congress is considering national privacy and data security legislation. While I do support federal privacy legislation, I will leave that topic for another day. Rather, the main point I wish to convey today is that, because we have many tools available to address privacy *qua* privacy, there is no need to shoehorn it into competition analysis. So I disagree with those seeking to install privacy as an independent aspect of antitrust analysis.

That said, privacy and data security *could* be non-price facets of competition in some antitrust cases. If firms compete on the basis of privacy or data policies to attract customers, we might properly consider those aspects of non-price competition. But if firms do not compete that way, then they are appropriately omitted from our competition assessment.[10] In other merger

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No. 071-0170, Dec. 20, 2007, *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf; Letter from Electronic Privacy Information Center to Chairman Marino and Ranking Member Cicilline, House Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, Dec. 12, 2018, https://epic.org/testimony/congress/EPIC-HJC-AntitrustOversight-Dec2018.pdf (acknowledging that the United States does not "address privacy as a competition issue" today but arguing it should do so).

[8] *See* Bundeskartellamt, Case Summary: Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing, Ref. No. B6-22/16 (Feb. 15, 2019) (summarizing the as-yet-unreleased decision dated Feb. 6, 2019), *available at* https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4.

[9] *See* Maureen K. Ohlhausen & Alexander P. Okuliar, *Competition, Consumer Protection, and* The Right *[Approach]* to Privacy, 80 ANTITRUST L.J. 121, 138-150 (2015).

[10] *See, e.g.*, Statement of the Federal Trade Commission, Google/DoubleClick, FTC File No. 071-0170, Dec. 20, 2007, *available at* https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-

investigations, such as *Facebook-WhatsApp* and *Radioshack*, we identified potential consumer privacy questions and addressed them separately through the Bureau of Consumer Protection.[11]

In summary, we view privacy and data protection as topics distinct from antitrust law. We may consider privacy as a facet of non-price competition when the facts so warrant. To date, though, we have not brought a case on that basis.

III. Special Rules for New Technologies or Business Models

That brings me to the second proposal, which is the idea that some new technologies or business models, like "Big Data," require special antitrust rules.

Big Data has become such a hot topic that the Commission devoted a day and a half to it during one of our recent hearings on Competition and Consumer Protection in the 21st Century.[12] During that discussion, the presenters at our hearings argued that any attempt to use antitrust to restrain the use of Big Data must demonstrate that the use of Big Data harms competition. I agree.

At bottom, most concerns about Big Data focus on its use as an input into the provision of online services. In this setting, data is an input into the production process. It serves the same role that raw materials play in many goods markets. We have ample experience evaluating this type of issue.

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commstmt.pdf. *But see* Dissenting Statement of Commissioner Pamela Jones Harbour, Google/DoubleClick, FTC File No. 071-0170, Dec. 20, 2007, *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf.

[11] *See* Letter from Jessica Rich, Director of the Bureau of Consumer Protection, Fed. Trade Comm'n, to Erin Egan, Facebook, Inc., and Anne Hoge, WhatsApp Inc., Apr. 10, 2014, *available at* https://www.ftc.gov/system/files/documents/public_statements/297701/140410facebookwhatappltr.pdf; *See* Letter from Jessica Rich, Director of the Bureau of Consumer Protection, Fed. Trade Comm'n, to Elise Frejke, Frejke PLLC, *In re RadioShack Corp.*, May 16, 2015, *available at* https://www.ftc.gov/system/files/documents/public_statements/643291/150518radioshackletter.pdf.

[12] Press Release, FTC Announces Hearing on Competition and Consumer Protection in the 21st Century (June 20, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st.

On occasion, data itself is the product. In this context, data may be packaged and sold as a database to paying customers. This situation is also familiar. For example, the FTC used traditional antitrust analysis when it blocked the 2008 merger of CCC and Mitchell, two firms that sold "estimatics" data products used by auto insurers and repair shops.[13]

Although much interesting work remains to be done, I see little about Big Data that is inherently different from the types of markets and types of cases that we have seen before. I therefore see little reason for special antitrust rules.

IV. Special Rules for Different Kinds of Businesses

Some commentators propose yet a third type of special antitrust rules, those that vary depending upon the kind of business.[14] Some go even further, arguing the United States should pair far stricter antitrust rules for some, such as large corporations or tech platforms, with much more relaxed antitrust rules for favored groups.[15]

On one side of the coin, some argue technology firms should face more stringent antitrust rules than other businesses. For example, many argue that online platforms are inherently different because they provide both the marketplace and some of the goods on it.[16]

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[13] *See* Press Release, FTC Granted Preliminary Injunction Preventing CCC's Merger with Mitchell (Mar. 9, 2009), *available at* https://www.ftc.gov/news-events/press-releases/2009/03/ftc-granted-preliminary-injunction-preventing-cccs-merger.

[14] *See, e.g.*, Senate Democrats, A Better Deal: Cracking Down on Corporate Monopolies, at 1 (2017), *available at* https://www.democrats.senate.gov/imo/media/doc/2017/07/A-Better-Deal-on-Competition-and-Costs1.pdf ("A Better Deal on competition means that we will revisit our antitrust laws to ensure that the economic freedom of all Americans—consumers, workers, and small businesses—come before big corporations that are getting even bigger.").

[15] *See, e.g.*, Open Markets Institute, *supra* note 3 (proposing heightened rules for firms that enjoy network effects, use algorithms, or collect personal data, which is to say many tech companies, but complete antitrust immunity for "workers, professionals, [and] small businesses").

[16] *See, e.g.*, *id.* (proposing to "outlaw" firms, particularly those that enjoy network effects, use algorithms, or collect personal data, "from competing with their customers through vertical integration"); Warren, *supra* note 1 (proposing rules that would prohibit a firm "from owning both the platform utility and any participants on that platform").

On the other side of the coin, some of the same folks argue that favored groups should face less stringent antitrust rules. For exampl

Exempting these favored groups would also run contrary to longstanding Supreme Court

And empirical studies suggest that outcome may have been for the best. A study of past break-ups by the economist Robert Crandall found, with the possible exception of AT&T, "very little evidence that such relief is successful in increasing competition, raising industry output, or reducing prices to consumers."[35] That finding is particularly telling when one considers that

– than it is to prove both that the defendant committed an antitrust violation and that the government's preferred remedy is in the public interest.