

Big Data and Competition Policy: A US FTC Perspective

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(Views set forth herein are solely attributable to me)

Introduction

- Delighted to be here today, my thanks to Professor Christopher Yoo for having invited me, as well as to the three cosponsoring institutions, the University of Pennsylvania Law School's Center for Technology, Innovation, and Competition; the Universität Mannheim; and the University of International Business and Economics.
- The views expressed today are my own, they are not attributable to the Federal Trade Commission or any Federal Trade Commissioner.
- Today I will discuss the FTC's enforcement approach with regard to "big data," and comment on the way in which U.S. competition law agencies approach matters having a "big data" component.

Big Data: The Big Picture

- Before turning to specifics, let me take a very high level look at potential competitive issues raised by possession and use of big data.
- A 2016 FTC report explains that the term “big data” refers to a confluence of factors, including the nearly ubiquitous collection of consumer data from a variety of sources, the plummeting cost of data storage, and powerful new capabilities to analyze data to draw connections and make inferences and predictions.
- It is a mistake to discuss “big data” in the abstract. Access to big data, alone, should not be presumed to create market power or competitive advantages such as entry barriers.

The Big Picture, continued

- 3 big data characteristics caution against assuming that the possession of big data automatically conveys market power: (1) many types of data are readily available and replicable; (2) multiple entities can often collect and use the same set of data without foreclosure concerns; and (3) data can quickly become obsolete.
- Thus, it is necessary to determine whether big data create a competitive concern on a case-by-case basis. Whether control of a particular type of data harms the competitive process will depend on the specific markets at issue.

The Big Picture, continued

- Competition authorities should carefully analyze what (if any) competitive advantages stem from mere possession of a data set.
 - Shelf life may be short, much data may become obsolete relatively quickly. The focus should be on potential for actual competitive effects, such as the creation and strengthening of entry barriers and market foreclosure.
 - U.S. antitrust law disfavors requiring access to an “essential facility,” e.g., big data (see *Verizon v. Trinko* (2004), severely limiting essential facility claims).
 - See 2014 FTC *Report on Data Brokers* (data available and abundant from many sources)
- Treating the mere possession of data as a barrier to competition could have a significant chilling effect on innovation. Concerns about foreclosure risks stemming from network effects must be weighed against efficiency benefits generated by such effects.
- Does big data holder engage in exclusionary behavior? (monopolization).
- Will combining big data holders threaten credibly to reduce competition in particular markets? (merger analysis).

Big Picture, continued: Monopoly Leveraging

- U.S. antitrust law does not recognize a standalone monopoly leveraging offense, i.e., use of monopoly in one market to gain competitive advantage in a second market.
- In a leveraging scenario involving a monopolist, US law finds no violation unless monopoly is seriously threatened (there must be a “dangerous probability of success” in monopolizing second market, *Verizon v. Trinko*).
- Many forms of “leveraging,” such as technological ties, can represent an efficient form of product integration or product enhancement that benefits consumer and is therefore procompetitive. Thus, as a practical matter, monopoly leveraging highly is viewed most skeptically in the U.S.
- The EU and other jurisdictions find abuse of a dominant position in the first market when competition is merely distorted in the second market.

Big Picture, continued – Remedies

- AS TO PROPOSED REMEDIES, note that legally mandated data access, data sharing, or data pooling involves significant administrative costs.
- There may be less incentive to develop a collection of data if it is likely that the collection will be subject to forced sharing. Mandatory sharing may also cause enhanced risks of cartelization.
- To the extent remedies are required to offset anticompetitive effects connected to the control of a set of data, those remedies should be narrowly tailored to specifically address the perceived harm.
- When antitrust does intervene, competition agency should ensure that (1) feasible remedies to address the competitive concern exist; and (2) those remedies do not pose their own prohibitive costs or other risks to the competitive process.
- Take care that any remedy does not lead to worse competitive outcomes, whether due to a chilling effect on incentives to innovate or due to the increased risk of collusion that information sharing presents.

FTC Tech-Related Antitrust Enforcement

- The FTC's antitrust enforcement wing, the Bureau of Competition, formed a Technology Task Force in February 2019 dedicated to monitoring competition in high tech markets, taking appropriate enforcement actions.
- The Task Force is monitoring tech products and services, including industries within the online advertising, social media, software and application, and mobile spaces. Along with exploring industry practices and law enforcement investigations, the Task Force will review consummated and proposed technology mergers.
- Big data issues will, of course, be confronted by the Task Force.
- Big data issues were also examined at recently concluded FTC Hearings on Competition and Consumer Protection in 21st Century, stay tuned for possible FTC policy developments based on the findings of the Hearings.

Special Aspects of Big Data and Platforms

- Specialized data related to personal information — think real estate records or credit data — have previously been subject to antitrust enforcement actions.
- In today's online world, however, the antitrust debate centers around how to treat data about or created by consumers that is collected through online platforms and used by these entities to target ads, improve current offerings, and create new products. This type of consumer data is often an input for other products and services.
- For example, Waze (owned by Google) collects and aggregates the location and speed of travel of individual users' phones and uses it to produce dynamic trip directions based on changing traffic conditions.
- Consumer data is also a commodity asset for advertisers, allowing them to target their ads more precisely, which makes those ads more valuable and thus allows the platforms that hold such data to charge a higher price for that advertising space than other advertising channels.

Data Issues in U.S. Merger Enforcement

- U.S. merger enforcers have examined data-related issues, examples below.
- For instance, in *Bazaarvoice* (2014), the Justice Department (DOJ) successfully challenged a 2012 consummated merger involving companies that provide software platforms for online ratings and reviews (“R&R”) of products created by consumers that manufacturers and retailers host, share, distribute, and display. The court found a relevant market for R&R platforms, noted that the merging parties had called themselves duopolists in this market, and found that the merged firm likely would be able to charge monopolistic prices. In a settlement of the case, DOJ required Bazaarvoice to divest all of the assets it had acquired in 2012.
- And in a series of mergers involving entities with databases of public real estate records used for title insurance underwriting (called title plants), the FTC required the merging parties to sell a copy of their title plant.
- For other examples, see Sher & Yost, *US: Digital Platforms* (Ant. Rev. Am. 2019).

U.S. Merger Enforcement, continued

- In *Corelogic* (2014), CoreLogic, Inc. agreed to settle FTC charges that its proposed \$661 million acquisition of DataQuick Information Systems, Inc. from TPG VI Ontario 1 AIV L.P. would likely substantially lessen competition in the market for national assessor and recorder bulk data. The FTC's settlement order required CoreLogic to license to Renwood RealtyTrac national assessor and recorder bulk data as well as several ancillary data sets that DataQuick provides to its customers. The order allowed RealtyTrac to offer customers the data and services that DataQuick now offers and to become an effective competitor in the market.
- A 2018 FTC order modification (in light of poor compliance) required CoreLogic to provide bulk data to RealtyTrac until at least 2022, an additional three years beyond the term in the 2014 order.

U.S. Merger Enforcement, continued

- In 2015, DOJ sued to block Cox Automotive's acquisition of Dealertrack. Cox owns the AutoTrader and Kelley Blue Book brands.
- As part of its acquisition, Cox sought to purchase Dealertrack's inventory management solution business ("IMS") — a business unit devoted to providing analytics and algorithms to assist car dealers with the management of their vehicle inventory. DealerTrack also held ownership of valuable vehicle information data.
- DOJ was concerned that Cox would not only become an effective monopolist in the IMS market but also would acquire valuable vehicle information data that served as inputs to IMS businesses. With control over that data, Cox could "deny or restrict access" to the data "and thereby unilaterally undermine the competitive viability of Cox's remaining IMS competitors."
- To allow the deal to go through, DOJ not only required Cox to divest the IMS portion of Dealertrack's business, it also required Cox to enable the continuing exchange of data and content between the websites it owns and the divested IMS business.

U.S. Merger Enforcement, continued

- In *CDK/Auto-Mate* (2018), FTC sued to block a merger of two digital tech platforms where firms were current competitors, but one was a market giant—close to a duopolist—while the other was far smaller.
- Complaint alleged harm to current competition, but focused even more sharply on harm to future, or nascent competition. That harm arose from the smaller competitor's substantial efforts to remake itself into a greater competitive threat going forward. The transaction was abandoned by the parties after the FTC filed suit.
- This case illustrates FTC's ability to deal with threats to nascent competition through mergers employing existing legal tools.

Monopolization and Big Data

- U.S. monopolization law can be applied when appropriate to counter anticompetitive actions (“exclusionary conduct”) involving big data
- Professor Hovenkamp, the leading U.S. treatise writer, concludes that exclusionary conduct involves acts that “are reasonably capable of creating, enlarging or prolonging monopoly power by impairing the opportunities of rivals [*need not show actual harm*]; and (a) do not benefit consumers at all, or (b) are unnecessary for the particular consumer benefits the acts produce, or (c) produce harms disproportionate to the resulting benefits”
- Key U.S. monopolization decision is *Microsoft* (D.C. Circuit 2001 en banc), in which the entire U.S. Court of Appeals for the D.C. Circuit (sitting *en banc*) asked “*whether as a general matter the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant’s continued monopoly power*” – widely cited by U.S. courts and scholars and readily applicable to cases involving high tech and big data

More on *U.S. v. Microsoft* (2001)

- D.C. Circuit found Microsoft violated Sherman Act § 2 by commingling computer code for its Windows operating system and its Internet Explorer (IE) web browser, requiring all Microsoft Windows purchasers to accept pre-installed version of Explorer as well.
- Since computer manufacturers did not want to support 2 versions of same program, effect of commingling was virtually to eliminate chief IE rival, Netscape, from original distribution part of browser market.
- This in turn made it much harder for Netscape to develop tools to make computers compatible with different operating systems, thus letting Microsoft inefficiently maintain its operating system monopoly.
- No plausible procompetitive justification for Microsoft's commingling.

Digital Platforms and Antitrust: *AmEx* Case

- In *Ohio v. American Express* (2018), the U.S. Supreme Court required examination of effects on both sides of AmEx's digital platform – services to merchants and services to cardholders.
- It thus held that higher nominal prices to merchants due to Amex contract clauses barring merchants from “steering” customers toward using other credit cards did not show a *prima facie* anticompetitive effect – quality and output on the merchant side of the market also had to be examined to determine if there was competitive harm.
- The Court stressed this case involved a “transactions platform” in which a sale required parties on both sides of platform to simultaneously agree to use AmEx's services. Not all platforms required a “two-sided” market definition to carry out antitrust analysis (future impact of case uncertain).

FTC Platform-Related Monopolization Case

- In April 2019, FTC sued health information company Surescripts (SS) in federal district court, alleging that the company employed illegal vertical and horizontal restraints in order to maintain its monopolies over two electronic prescribing, or “e-prescribing,” markets: routing and eligibility.
- E-prescribing provides a safer, more accurate, and lower-cost means to communicate and process patient prescriptions than traditional paper prescribing.
- FTC alleged SS monopolized two separate markets for e-prescription services: The market for routing e-prescriptions, which uses technology that enables health care providers to send electronic prescriptions directly to pharmacies; and the market for determining eligibility, a separate service that enables health care providers to electronically determine patients’ eligibility for prescription coverage through access to insurance coverage and benefits information.
- FTC asserted that SS intentionally set out to keep e-prescription routing and eligibility customers on both sides of each market from using additional platforms (a practice known as multihoming), using anticompetitive exclusivity agreements, threats, and other exclusionary tactics.
- Among other things, FTC alleged that SS took steps to increase the costs of routing and eligibility multihoming through loyalty and exclusivity contracts. According to the FTC’s complaint, SS successfully used these tactics to stop multiple attempts by other companies to enhance competition in the routing and eligibility markets.

Competition-Consumer Protection Issues

- Finally, what about interrelationship, if any, between competition and consumer protection concerns regarding big data?
- Sharing as a competition remedy has traditionally been invoked where data is difficult or expensive to create, raising an entry barrier that keeps out competitors who need access to such data. In the U.S., this has been imposed typically in a merger analysis, where two holders of such a data set want to combine (see previous discussion).
- By contrast, the concern driving privacy law, like the European Union's General Data Privacy Regulation, or GDPR, is that consumer data has become too widely available, with a perceived loss of consumer control. The GDPR's remedy adopted for privacy concerns limits collection and restricts sharing of data, except at the consumer's direction.
- Tension between competition and consumer protection approaches?

Competition-Consumer Protection: Update

- On July 23 DOJ announced it has opened a broad antitrust review of bit tech companies (WSJ – investigation was prompted by “new Washington threats” from Facebook, Google, Amazon, and Apple).
- On July 24 Facebook revealed it is under FTC antitrust investigation.
- Antitrust and consumer protection raise different issues/concerns.
 - For example, in July 24 press conference discussing settlement order between FTC and Facebook over Facebook’s defective privacy practices, an FTC staffer stressed that deceptive conduct at heart of this settlement implicated consumer protection concerns, not antitrust concerns.
- In February 2019 the German competition agency (BKT) held that Facebook abused its market dominance in Germany by conditioning use of its social network on the collection of user data from multiple sources, and ordered Facebook to change the way it collects data from German users.
 - In August 2019 the Higher Regional Court of Dusseldorf expressed “serious doubts about the legality” of this decision, and suspended it pending a final verdict – BKT is appealing.

Conclusion

- The new high tech platforms and their use of large collections of data raise major questions under both competition and consumer protection law, in multiple jurisdictions.
- My comments, which represent only my views, have only scratched the surface. Expect additional enforcement actions and policy development here.
- Big digital platforms raise various other important policy issues (of course), such as platforms' roles in mediating speech by users and the supervisory (or regulatory) role of government, that are beyond the scope of my presentation.