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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 these firms wield too much power in the marketplace. And many policymakers have advanced what they characterize as simple fixes.

In the U.S., Senator Elizabeth Warren recently proposed rules that would break up technology platforms with annual global revenues over $25 billion and impose various behavioral regulations upon the divested platform.[1] She would impose the same behavioral rules, but not structural separation, upon smaller companies.[2]

A Washington think tank similarly favors special antitrust rules that depend upon the type of business.[3] Platforms would be subject to additional antitrust rules, including price regulation and a complete ban on vertical integration.[4] On the other side of the equation, favored groups –

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[1] Elizabeth Warren, *Here's How We Can Break Up Big Tech*, MEDIUM, Mar. 8, 2019, https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c ("Companies with an annual global revenue of $25 billion or more and that offer to the public an online marketplace, an exchange, or a platform for connecting third parties would be designated as 'platform utilities.' These companies would be prohibited from owning both the platform utility and any participants on that platform. Platform utilities would be required to meet a standard of fair, reasonable, and nondiscriminatory dealing with users. Platform utilities would not be allowed to transfer or share data with third parties.").

[2] *Id.* ("For smaller companies (those with annual global revenue of between $90 million and $25 billion), their platform utilities would be required to meet the same standard of fair, reasonable, and nondiscriminatory dealing with users, but would not be required to structurally separate from any participant on the platform.").

[3] Open Markets Institute, Restoring Antimonopoly Through Bright-Line Rules, Apr. 26, 2019, https://openmarketsinstitute.org/op-eds-and-articles/restoring-antimonopoly-bright-line-rules/

[4] *Id.* ("First, treat corporations in sectors that are natural monopolies or that have strong network effects in much the same vein as we treat public utilities. As such, mandate fair, reasonable, and non-discriminatory pricing and terms of service, and outlaw all such corporations from competing with their customers through vertical integration.").

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 example, one Washington think tank believes Congress "should grant workers, professionals, and small businesses (as defined by assets or revenue) the right to engage in coordinated activity."[17] "Coordinated activity" includes collusion, which is *per se* unlawful under Section 1 of the Sherman Act. Indeed, it is often prosecuted as a criminal offense.[18]

I see little reason to create different antitrust laws for different entities. As I have explained, there is little about today's high technology markets that requires treating firms in those markets differently. Some appear to believe it is inherently anticompetitive for a firm to both operate an online platform and sell goods on it.[19] Yet many analogous offline businesses – from grocery stores to department stores – have sold their own private label brands for years. For example, nobody objected on antitrust grounds when Sears purchased the clothing brand Lands' End in 2002, nor did anyone predict a burst of new competition when Sears spun the brand off in 2014.

Given my belief that we should apply the same laws regardless of the industry, I similarly do not see any reason to exempt a favored group – here, professionals and small businesses – from the antitrust laws. A person's chosen line of work should not determine whether she or he is subject to the antitrust laws. Nor should it matter, for antitrust enforcement purposes, whether a firm employs 10 people or 10,000. Rather, the law is meant to apply equally to all; indeed, the inscription on the front of the U.S. Supreme Court reads "Equal Justice Under Law."

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[17] Open Markets Institute, Restoring Antimonopoly Through Bright-Line Rules, Apr. 29, 2019, https://openmarketsinstitute.org/op-eds-and-articles/restoring-antimonopoly-bright-line-rules/

[18] *See, e.g.*, U.S. Dep't of Justice, Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For (Jan. 2, 2001, rev. Sept. 28, 2005), https://www.justice.gov/atr/file/810261/download.

[19] *See, e.g.*, Warren, *supra* note 1 (proposing rules that would prohibit a firm "from owning both the platform utility and any participants on that platform").

Exempting these favored groups would also run contrary to longstanding Supreme Court precedent. In 1975, the Supreme Court ruled that professions *were* subject to the antitrust laws.[20] Three years later, the Court rejected an argument that civil engineers could only build safe bridges if they were permitted to collude on their fees.[21]

Although the proposal does not acknowledge it, allowing professionals and small businesses to collude would harm everyone. In the 1975 case, *Goldfarb*,[22] a young FTC attorney trying to buy a home successfully challenged collusion among real estate professionals.[23] The case ultimately settled, with more than 2,000 home buyers receiving monetary redress.[24] In a 1990 case, the FTC successfully challenged collusion among private lawyers who received public funds to serve as public defenders.[25] And in 2007, the FTC successfully challenged collusion among dentists in South Carolina that barred other dental professionals – such as dental hygienists – from offering economically disadvantaged schoolchildren free preventative teeth cleanings unless the child had recently received a (paid) dental examination from a dentist.[26] Had the proposed immunity rules been in effect, the antitrust laws would not have been able to halt these collusive schemes, harming homeowners, taxpayers, and economically disadvantaged schoolchildren.[27]

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[20] Goldfarb v. Virginia State Bar, 421 U.S. 773, 786-87 (1975); *see, e.g.*, Richard B. Tyler, Goldfarb v. Virginia State Bar: *The Professions Are Subject to the Sherman Act*, 41 MO. L. REV. 1 (1976).
[21] Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692-96 (1978).
[22] Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).
[23] *See* Louis M. Kohlmeier, *Price-Fixing in the Professions*, N.Y. TIMES, Apr. 18, 1976, page F2, *available at* https://www.nytimes.com/1976/04/18/archives/pricefixing-in-the-professions.html
[24] *Id.*
[25] FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990).
[26] South Carolina Bd. of Dentistry; Analysis of Agreement Containing Consent Order to Aid Public Comment, 72 Fed. Reg. 35,049, 35,050 (June 26, 2007).
[27] *See* Mark C. Schechter & Christine S. Wilson, *The Learned Professions in the United States: Where Do We Stand Thirty Years After Goldfarb?*, *in* EUROPEAN COMPETITION LAW ANNUAL 2004 555 (Claus-Dieter Ehlermann & Isabela Atanasiu eds., June 2006).

V. Special Remedy Rules

That brings me to the last set of proposals, those demanding special remedy rules for the high tech industry. I mentioned a few minutes ago, for example, that Senator Warren has proposed breaking up essentially any online business above a certain revenue threshold.[28] Just to make sure we understood her message, she explicitly listed both Amazon and Google.[29] She has also proposed behavioral remedies for a far broader group of high tech firms.[30] The Furman Report proposes similar special remedies for digital markets in the U.K.[31]

Proposals like these are premised upon the belief that platform businesses enjoy network effects that make them susceptible to "tipping" toward one dominant firm.[32] But network effects are hardly a new phenomenon. Many "old economy" industries, such as railroads, also enjoy network effects. Yet few, if any, argue that the presence of network effects requires us to break today's railroads into bite-sized pieces.

More recently, the concept of network effects played a significant role in the U.S. Department of Justice's case against Microsoft.[33] Ultimately, Microsoft was found to have violated the antitrust laws but was not broken up.[34]

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[28] Warren, *supra* note 1 ("Companies with an annual global revenue of $25 billion or more and that offer to the public an online marketplace, an exchange, or a platform for connecting third parties would be designated as 'platform utilities.'").
[29] *Id.* ("Amazon Marketplace, Google's ad exchange, and Google Search would be platform utilities under this law. Therefore, Amazon Marketplace and Basics, and Google's ad exchange and businesses on the exchange would be split apart. Google Search would have to be spun off as well.").
[30] *Id.* ("For smaller companies (those with annual global revenue of between $90 million and $25 billion), their platform utilities would be required to meet the same standard of fair, reasonable, and nondiscriminatory dealing with users, but would not be required to structurally separate from any participant on the platform.").
[31] FURMAN REPORT, *supra* note 6, at 6, 64.
[32] *Id.* at 3-4, 64, 84, 102; *see also* Transcript at 24, FTC Hearing #6: Privacy, Big Data, and Competition, Day 2, Nov. 6, 2018 (statement of Alan Grunes), *available at* https://www.ftc.gov/system/files/documents/public_events/1418633/ftc_hearings_session_6_transcript_day_2_11-7-18.pdf
[33] *E.g.*, United States v. Microsoft Corp., 253 F.3d 34, 49-50, 83-84, 95 (D.C. Cir. 2001) (en banc) (per curiam).
[34] United States v. Microsoft Corp., 231 F. Supp. 2d 144, 202-03 (D.D.C. 2002) (entering Final Judgment), *aff'd sub nom.* Massachusetts v. Microsoft Corp., 373 F.3d 1199 (D.C. Cir. 2004).

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 these are the very metrics antitrust enforcement is supposed to maximize.

Nor is there any real-world evidence that breaking up Microsoft would have resulted in even greater consumer welfare. Since the case ended, the computer software industry has exploded with new products and services.

I draw three conclusions from the studies of past Section 2 enforcement.

First, given the questionable efficacy of past break-ups, we should think very carefully about whether there is an effective remedy – break-up or otherwise – *before* we bring a case.[36]

Second, this analysis is necessarily forward-looking: We must compare the likely future state of competition if we break up a firm to the likely future state of competition under other scenarios, including what we think would happen if we did not take any action. This is particularly important in dynamic markets that can – and, given our past experience, often do – evolve in ways that naturally erode the monopoly we set out to address in the first place.

Third, proposals that simply assume liability and then impose a legislative remedy are attractive in part because they avoid grappling with thorny legal and factual questions. It is far easier to simply impose a preordained solution – whether a break-up or a special behavioral rule

[35] Robert W. Crandall, *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, 80 ORE. L. REV. 109, 109 (2001); *see* Robert W. Crandall & Charles L. Jackson, *Antitrust in High-Tech Industries*, 38 REV. INDUS. ORG. 319, 358 (2011).

[36] Assistant Attorney General Bill Baxter made this point when he terminated the IBM case he had inherited from his predecessors. *See In re* Int'l Bus. Machines Corp., 687 F.2d 591, 594 (2d Cir. 1982) ("In a memorandum explaining his decision to dismiss the suit, Mr. Baxter observed that even if the government prevailed at trial, 'the likelihood of success on appeal is small' in light of *Berkey Photo, Inc. v. Eastman Kodak Co.* Mr. Baxter also stated that 'even assuming that the government could prove IBM's liability, there is no assurance that appropriate relief could be obtained.'" (citations omitted)).

– 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.

Putting these lessons together, we should be skeptical of recent proposals to impose special remedy rules on certain industries, and we should be particularly skeptical of attempts to do so without proving an antitrust violation before an impartial judge.

VI. Conclusion

I began today's speech by posing a simple question: Do we need special antitrust rules for every situation, and especially high tech markets? I answer with a resounding "no."

Rather, we should stick to the same sound, economically-driven analysis that has served us well for many years. We should focus on conduct that we can properly tie to a cognizable antitrust harm, including a reduction in output or an increase in price. And we should apply the same rules to everyone, regardless of what they do for a living and how many employees they have.

I do not reject the possibility that we might find unlawful conduct in the high tech industry. Indeed, the Commission's new Tech Task Force will take a hard look at some of these markets, and I support that effort. But I reject attempts to short-circuit the traditional process by simply assuming a problem and imposing a preordained solution.

In short, ***all*** American consumers deserve antitrust protection, which requires us to apply the same rigorous, evidence-based approach in all markets, from gasoline to generic drugs to digital markets. Although the facts will necessarily vary from one industry to the next, the law should remain the same. Thank you.