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Federal Trade Commission**

All (Industries) in the Same Boat: Staying the Course on the High Seas of High Tech

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I. Introduction

Many thanks to CCIA for the kind introduction. I'm pleased to be here today to discuss key issues regarding the role of antitrust enforcement in high technology markets. Legislators, think tanks, policy wonks, and others have all opined on this topic recently. At bottom, much of this discussion revolves around a simple question: Do we need special antitrust rules for high technology markets?

It is certainly true that some digital firms have grown very large. By pretty much any measure, large technology firms continue to get larger. Today the four largest U.S. firms by market capitalization are all technology firms: Apple, Microsoft, Amazon, and Alphabet, which owns Google.¹ By comparison, ten years ago the list looked much different; the top four firms were Exxon Mobil, General Electric, Microsoft, and AT&T.² These firms have also expanded into new lines of business. For example, Amazon offers a large package of services, including streaming video and cloud computing, and intends to add aerial drone delivery service.³ Not to be outdone, Apple announced earlier this week that it is launching both a subscription News service and its own streaming television service.⁴

Speaking of the news, some folks now complain that technology firms have become *too* big. For example, Senator Elizabeth Warren recently proposed rules that would break up technology platforms with annual global revenues over \$25 billion and impose various

¹ As of midday on Monday, March 25, the *Wall Street Journal* reported the firms' respective market capitalizations as: Apple, \$900 billion; Microsoft, \$898 billion, Amazon, \$860 billion, Alphabet, \$839 billion, and Facebook, \$469 billion. By comparison, J.P. Morgan had a market capitalization of \$326 billion. See Quotes, WALL ST. J., <https://quotes.wsj.com> (last accessed Mar. 25, 2019).

² Stephen Johnston, *Largest Companies 2008 vs. 2018, A Lot Has Changed*, MILFORD ASSET MANAGEMENT LTD., <https://milfordasset.com/insights/largest-companies-2008-vs-2018-lot-changed> (last accessed Mar. 25, 2019).

³ See *Amazon PrimeAir*, AMAZON.COM, <https://www.amazon.com/Amazon-Prime-Air/> (last accessed Mar. 25, 2019).

⁴ Tripp Mickle, *With the iPhone Sputtering, Apple Bets Its Future on TV and News*, WALL ST. J., Mar. 25, 2019, <https://www.wsj.com/articles/with-the-iphone-sputtering-apple-bets-its-future-on-tv-and-news-11553437018>.

behavioral regulations upon the divested platform.⁵ She would impose the same behavioral rules, but not structural separation, upon smaller companies.⁶

We hear similar proposals from other quarters. In the U.K., the Furman Report states that “traditional competition tools” are insufficient to police anticompetitive conduct in digital markets.⁷ This belief is founded in large part upon the twin assumptions that “[i]n many cases, digital markets are subject to ‘tipping’ in which a winner takes most of the market” and that “competition for the market cannot be counted on, by itself, to solve the problems associated with market tipping and ‘winner take most.’”⁸ Consequently, the Report recommends the imposition of special rules for digital markets, including the creation of a special regulator, a special “strategic market status” for the very largest firms, a special “code of conduct,” and expanded use of interim measures, particularly in fast-moving digital markets.⁹

Of course, this is not the first time we have heard calls for special rules for technology companies. This was a lively topic of debate in the 1990s and 2000s, as discussed in both the *Microsoft* opinion and the final report of the Antitrust Modernization Commission.¹⁰

⁵ 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.”).

⁶ *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.”).

⁷ JASON FURMAN ET AL., UNLOCKING DIGITAL COMPETITION: REPORT OF THE DIGITAL COMPETITION EXPERT PANEL 2, 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.

⁸ *Id.* at 3-4.

⁹ *Id.* at 5-6.

¹⁰ See *United States v. Microsoft Corp.*, 253 F.3d 34, 49-50 (D.C. Cir. 2001) (en banc) (per curiam); ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATION 9 (Apr. 2007), available at https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

Today's proposals contain several different strands. In an attempt to discuss these strands in a tractable way, I'd like to focus today on three proposals that all assume the need for special rules for technology markets.

First, the idea that some favored goals, such as the protection of privacy, are exempt from the traditional antitrust requirement that the challenged conduct impair competition.

Second, the idea that emerging technologies and business models, such as "Big Data," create competitive harms that cannot be handled under the antitrust *status quo*, and therefore require special antitrust rules.

And third, the idea that all of these poorly-defined ills can be solved simply by breaking up large technology firms into smaller pieces.

II. Special Rules for Favored Goals, Such as Privacy

We start with the first proposal, requiring antitrust to take account of goals like protecting privacy or small business regardless whether they affect competition in any relevant market. Although there are several goals that have been proposed,¹¹ let us focus today solely on one, privacy.

There has been growing interest in using the antitrust laws to protect consumers' electronic privacy. For example, the German Bundeskartellamt (BKA) recently addressed this topic in its Facebook decision.¹² Although the BKA case is interesting, it is not directly applicable in the U.S., where privacy and antitrust law have developed separately.

¹¹ 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.").

¹² 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

As Maureen Ohlhausen and Alex Okuliar explain in an excellent article, the FTC’s antitrust and consumer protection authorities are based upon separate statutory provisions that were enacted at different times and for different reasons.¹³ 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.

Competition law in the United States developed around concerns about large “trusts” and their ability to overcharge consumers. In response we passed the Sherman Act and, later, the FTC and Clayton Acts.¹⁴ Although statutory, the underlying framework dates back to common law limitations upon restraints of trade.

In contrast, U.S. privacy protections developed much differently. The U.S. Constitution created a right to be free from certain kinds of unreasonable governmental intrusions.¹⁵ In the late 18th century, the federal government prohibited opening someone else’s mail.¹⁶ In the late 19th century, state courts recognized a limited common law right to privacy under state tort laws.¹⁷ As Ohlhausen and Okuliar note,¹⁸ this change was a response to the rapid growth of portable cameras and gossip newspapers. In 1970 the U.S. government passed the Fair Credit Reporting Act to regulate credit bureaus such as Equifax.¹⁹ The Act was an attempt to balance the benefits of real-time credit reporting with consumers’ right to privacy.

Feb. 6, 2019), available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4.

¹³ See Maureen K. Ohlhausen & Alexander P. Okuliar, *Competition, Consumer Protection, and The Right [Approach] to Privacy*, 80 ANTITRUST L.J. 121, 138-150 (2015).

¹⁴ See 15 U.S.C. §§ 1, 2, 7, 45.

¹⁵ E.g., U.S. CONST. amend. IV.

¹⁶ See Daniel J. Solove, *A Brief History of Information Privacy Law*, in PROSKAUER ON PRIVACY § 1:3.1[B] (PLI Treatise 2006).

¹⁷ See, e.g., JOHN M. SHARP, CREDIT REPORTING AND PRIVACY 52-53 (1970).

¹⁸ See Ohlhausen & Okuliar, *supra* note 13, at 125.

¹⁹ 15 U.S.C. § 1681.

The separation of antitrust and consumer protection continues today. On the consumer protection side, the U.S. has a robust privacy and data security enforcement program. Sector-specific laws protect the privacy and security of several categories of information. We have the Gramm-Leach-Bliley Act for financial information, HIPPA for health data, the Fair Credit Reporting Act for credit, the Fair Debt Collection Practices Act for debt, and the Children’s Online Privacy Protection Act (COPPA) for data from children. We also have statutes protecting our privacy from unwanted intrusion, such as CAN-SPAM and the Telemarketing Sales Act.

We also have the Federal Trade Commission Act. As you know, Section 5 of this statute prohibits “unfair or deceptive acts or practices in or affecting commerce,”²⁰ which we call UDAP for short. The FTC has used its UDAP authority under Section 5 to bring many privacy and data security cases.

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 time. Rather, the main point I wish to convey today is that, because we have many tools available to address privacy *qua* privacy directly, there is no need to shoehorn it into competition analysis.

That said, conceptually, 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.

The approach taken by the FTC in Google-DoubleClick is illustrative. There, the Commission analyzed whether the merger would allow the merging firms to exploit consumer

²⁰ 15 U.S.C. § 45(a)(1).

information “in a way that threatens consumers’ privacy.”²¹ The Commission rejected any independent relevance for privacy considerations in antitrust merger reviews, explaining that “the sole purpose of federal antitrust review of mergers and acquisitions is to identify and remedy transactions that harm competition.”²² Finding no evidence that the proposed transaction would harm competition, including “non-price attributes of competition, such as consumer privacy,”²³ the Commission closed its investigation.²⁴

When privacy or data security issues not related to competition do arise in the course of a merger review, we handle those aspects as consumer protection matters. For example, in the *Facebook-WhatsApp* merger, the FTC’s Bureau of Competition cleared the merger but the FTC’s Bureau of Consumer Protection sent a separate side letter to Facebook explaining how WhatsApp’s existing privacy obligations would affect what Facebook could do with WhatsApp data.²⁵ The FTC’s Bureau of Consumer Protection issued a similar letter in a matter involving the bankruptcy of an electronics retailer and the sale of its database of customers.²⁶

In summary, we view privacy and data protection as topics distinct from competition 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 competition case on that basis.

²¹ Statement of the Federal Trade Commission at 2, Google/DoubleClick, FTC File No. 071-0170, Dec. 20, 2007, available at https://www.ftc.gov/system/files/documents/public_statements/418081/071220googlecdc-commstmt.pdf.

²² *Id.*

²³ *Id.* at 3.

²⁴ *Id.* at 1. *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.

²⁵ 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.

²⁶ 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.

III. Special Rules for New Technologies

That brings me to the second proposal, which is the idea that some new technologies, 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.²⁷ We appreciated the participation of the CCIA’s own Marianela Lopez-Galdos in these hearings.²⁸ With respect to the antitrust analysis of Big Data, the presenters at our hearings argued, and I agree, that any attempt to use antitrust to restrain the use of Big Data must demonstrate that the use of Big Data harms competition. To name just two, both Professor Michael Baye and Professor Jonathan Baker identified situations in which Big Data *could*, at least theoretically, harm competition: (i) if Big Data raises barriers to entry or (ii) if it reduces the quality of a product.²⁹ Indeed, Professor Baker laid out several possible theories of harm, albeit with the qualification that they “are purely hypothetical.”³⁰

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.

²⁷ 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>.

²⁸ FTC Hearing #6: Privacy, Big Data, and Competition, Day 2, Nov. 6, 2018 (panel “The Business of Big Data”), <https://www.ftc.gov/news-events/events-calendar/ftc-hearing-6-competition-consumer-protection-21st-century>

²⁹ Transcript at 9-20, FTC Hearing #6: Privacy, Big Data, and Competition, Day 2, Nov. 6, 2018 (statements of Professors Michael Baye and Jonathan Baker), available at https://www.ftc.gov/system/files/documents/public_events/1418633/ftc_hearings_session_6_transcript_day_2_11-7-18.pdf

³⁰ *Id.* at 17 (statement of Professor Jonathan Baker).

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.³¹

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 to create special antitrust rules for mergers and conduct cases that implicate its use.

IV. Special Structural Remedies

That brings me to the last set of proposals, those suggesting structural relief. I mentioned a few minutes ago that Senator Warren has proposed breaking up essentially any online business above a certain revenue threshold.³² Just to make sure we understood her message, she explicitly listed both Amazon and Google.³³ She has also proposed behavioral remedies for a far broader group of firms.³⁴

The proposal is premised upon the belief that platform businesses in particular are special, and therefore require special remedies. The Furman Report voices the same concern,

³¹ 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>.

³² Warren, *supra* note 5 (“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.’”).

³³ *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.”).

³⁴ *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.”).

arguing that online markets typically have network effects that make them susceptible to “tipping” toward one dominant firm.³⁵ We heard similar concerns at our hearing on Big Data.³⁶

But network effects are hardly a new phenomenon. Many “old economy” industries, such as landline telephones and railroads, also enjoy network effects. More recently, the concept played a significant role in the U.S. Department of Justice’s case against Microsoft.³⁷ As you may recall, Microsoft was found to have violated the antitrust laws but was not broken up.³⁸

That may have been for the best; Section 2 retrospectives have found that structural relief – which is to say, forced divestitures – frequently fail to increase consumer welfare. For example, economist Robert Crandall studied the economic effects that followed the imposition of structural remedies in nine cases, most of which involved monopolization claims.³⁹ Apart from the AT&T divestiture, he found “very little evidence that such relief is successful in increasing competition, raising industry output, or reducing prices to consumers.”⁴⁰ That finding is particularly telling when one considers that these are the very metrics antitrust enforcement is supposed to maximize. In another paper, Crandall and Jackson reviewed three antitrust cases seeking structural remedies – *IBM*, *AT&T*, and *Microsoft* – and concluded that the dynamism of those high technology industries made fashioning appropriate remedies difficult.⁴¹

As in other areas, theory matches reality: The U.S. antitrust agencies have proven ill-equipped to engage in the kind of industrial engineering that large-scale break-ups would require.

³⁵ FURMAN REPORT, *supra* note 7, at 3-4.

³⁶ 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

³⁷ *E.g.*, *United States v. Microsoft Corp.*, 253 F.3d 34, 49-50, 83-84, 95 (D.C. Cir. 2001) (en banc) (per curiam).

³⁸ *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).

³⁹ See Robert W. Crandall, *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, 80 ORE. L. REV. 109 (2001).

⁴⁰ *Id.* at 109.

⁴¹ See Robert W. Crandall & Charles L. Jackson, *Antitrust in High-Tech Industries*, 38 REV. INDUS. ORG. 319, 358 (2011).

The FTC and the DOJ spent the entire decade of the 1970s attempting to re-engineer various markets. For example, the Commission pursued a “shared monopolization” case against three leading manufacturers of ready-to-eat cereal for 10 years, including a loss before an FTC administrative law judge. Following the election of Ronald Reagan as President, the Commission dismissed the case with prejudice in 1982,⁴² ending plans to break the three firms into as many as twelve.⁴³ In the interim, the Commission had spent tens of thousands of hours and more than \$6 million – or \$16 million in today’s dollars – to prosecute the case.⁴⁴ Not to be outdone, the Department of Justice spent more than 13 years pursuing IBM for allegedly monopolizing the market for mainframe computers.⁴⁵ That case also ended in 1982.⁴⁶

I draw three conclusions.

First, given the questionable efficacy of structural remedies in monopolization cases, we should think very carefully about whether there is an effective remedy in any such case *before* we bring it. Assistant Attorney General Bill Baxter made this point when he terminated the IBM case he had inherited from his predecessors. He explained that “even assuming that the government could prove IBM’s liability, there is no assurance that appropriate relief could be obtained.”⁴⁷

⁴² See *Kellogg Co.*, 99 F.T.C. 8 (Jan. 15, 1982) (dismissing the case with prejudice and vacating the initial decision of Administrative Law Judge Alvin L. Berman).

⁴³ Michael DeCourcy Hinds, *U.S. Drops 10-Year Antitrust Suit Against 3 Largest Cereal Makers*, N.Y. TIMES, Jan. 16, 1982, at 1, available at <https://www.nytimes.com/1982/01/16/business/us-drops-10-year-antitrust-suit-against-3-largest-cereal-makers.html>.

⁴⁴ *Id.* (\$6 million figure); Bureau of Labor Statistics, CPI Inflation Calculator, <https://data.bls.gov/cgi-bin/cpicalc.pl>.

⁴⁵ Michael DeCourcy Hinds, *supra* note 43 (“Before that landmark day was over, the Justice Department also dropped 13-year-old antitrust charges against the International Business Machines Corporation intended to break up that company.”).

⁴⁶ *Id.*

⁴⁷ *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)).

Second, this analysis is necessarily forward-looking: We must compare the likely future state of competition *with a structural remedy* 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. The passage of time typically will prove more effective than several years of litigation that, if successful, will impose an inflexible order for another 10 or 20 years.

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 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. To paraphrase the eminently quotable Winston Churchill, litigation is the worst way to resolve an antitrust dispute, except for all the others that have been tried from time to time.⁴⁸

Putting these lessons together, we should be skeptical of recent proposals to impose structural remedies on high tech firms, and we should be particularly skeptical of attempts to do so without proving an antitrust violation before an impartial judge.

V. Conclusion

I began today’s speech by posing a simple question: Do we need special antitrust rules for high technology markets? I think by now my answer to that question is abundantly clear: I

⁴⁸ See Winston S. Churchill, *The Worst Form of Government*, Nov. 11, 1947, *available at* <https://winstonchurchill.org/resources/quotes/the-worst-form-of-government/> (“Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed it has been said that democracy is the worst form of Government except for all those other forms that have been tried from time to time.”).

emphatically reject any suggestion that these markets are different enough to warrant different treatment.

We should stick to the same sound, economically-driven analysis that has served us well for many years. Thus, 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.

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, American consumers and producers of digital services deserve the same rigorous, evidence-based approach that we apply to all other markets, from gasoline to generic drugs. Thank you.