Comments of the International Center for Law & Economics:

Increasingly, people use the Internet to connect with one another, access information, and purchase products and services. The growth in the online marketplace has brought with it numerous concerns, particularly regarding the privacy of personal information and competition issues surrounding this and other data.

While concerns about privacy are not unique to the Internet ecosystem, they are in some ways heightened due to the ubiquitous nature of information sharing online. Though much of the sharing is voluntary, a group of scholars and activists have argued that several powerful online companies have overstepped their bounds in gathering and using data from Internet users. These advocates have pushed the FTC and regulators in Europe to incorporate privacy and more general data collection concerns into antitrust analysis.

Although there are a number of unique dimensions to online data sharing that bear consideration, the necessary analysis is much more nuanced than reform advocates typically admit.

First, despite their best efforts, privacy advocates have yet to make a compelling case that quality-adjusted price may be affected by monopolization of data or a merger of entities with large quantities of data. Making such a case requires considerably more analysis than that offered by privacy advocates to date. Rather, the collection and use of relatively large amounts of information by a large firm actually serves as a tool to help such a firm improve the quality of its products. In the modern tech economy, large pools of data and their effective use frequently permit firms to offer services to consumers for zero price. Improving product quality (by offering more tailored products with collected data) while maintaining a constant zero price — i.e., decreasing quality-adjusted price — is not normally an antitrust injury.

Second, the potential, if any, for price discrimination practices to cause privacy harms to consumers is not subject to a simple analysis. One argument offered by critics of data collection is that price discrimination could become a harm when large tech platforms are able to collect a great deal of data about their users, and could thereby segment their users along certain private characteristics in order to offer tailored services. The resulting price discrimination could lead to many consumers paying more than they would in the absence of the data collection. Therefore, the data collection by these major online companies can be alleged to facilitate price discrimination that harms consumer welfare. This argument misses a large part of the story, however. The flip side is that price discrimination could have benefits to those who receive lower prices from the scheme than they would have in the absence of the data collection. While privacy advocates have focused on the possible negative effects of price discrimination to one subset of consumers, they generally ignore the positive effects of businesses being able to expand output by serving previously underserved consumers.

Finally, little evidence has been presented to bolster the claim that tech platforms can employ large pools of data as barriers to entry against competitors. The various theories of how this can arise all stem from an underlying assumption about the inability or difficulty of competitors to develop alternative products in the marketplace. The argument is that upstarts do not have sufficient data to compete with established players which in turn employ their data to attract online advertisers and to foreclose their competitors from this crucial source of revenue. This argument suffers from a number of deficiencies.

Superior competition, notably through data, is not a barrier to entry. It is a mistake to regard data as essential in many, if not all, cases, particularly in the complex ecosystem of online platforms, where that same data can be used by platforms to facilitate new entry. Further, data is useful to all industries — this is not a new phenomenon particular to online companies. Companies have historically employed a variety of measures to gather data on their customers. It is also a mistake to assume that simply having a large amount of data is worth anything at all. It is not in the possession of data that a firm finds success, but in how intelligently the firm uses that data to optimize its services or otherwise generate a revenue stream. Start-ups are not necessarily less capable of generating value from relatively smaller pools of data simply by virtue of having a small set of data.

And the possession of data provides no absolute advantage to a firm in a world in which competition is just a click or a swipe away. Users can and do defect from products easily. Moreover, access to data is not exclusive to any firm. If one platform collects certain useful data about a user it does not possess that data to the exclusion of all others. Other firms are free to make the same observations about the same sets of users.

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