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The Australian approach to “consumer protection” policy is a threat to consumer welfare and free speech
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The US Senate Subcommittee on Antitrust, Competition Policy, and Consumer Rights recently held hearings to see what, if anything, the U.S. might learn from the approaches of other countries regarding antitrust and consumer protection. US lawmakers would do well to be wary of examples from other jurisdictions, however, that are rooted in different legal and cultural traditions. Shortly before the hearing, for example, Australia’s Competition and Consumer Protection Commission (ACCC) announced that it was exploring broad new regulations, predicated on theoretical harms, that would threaten both consumer welfare and individuals’ rights to free expression that are completely at odds with American norms.

The ACCC seeks vast discretion to shape the way that online platforms operate — a regulatory venture that threatens to undermine the value which companies provide to consumers. Even more troubling are its plans to regulate free expression on the Internet, which if implemented in the US, would contravene Americans’ First Amendment guarantees to free speech.

The ACCC’s errors are fundamental, starting with the contradictory assertion that:

> Australian law does not prohibit a business from possessing significant market power or using its efficiencies or skills to “out compete” its rivals. But when their dominant position is at risk of creating competitive or consumer harm, governments should stay ahead of the game and act to protect consumers and businesses through regulation.

Thus, the ACCC recognizes that businesses may work to beat out their rivals and thus gain in market share. However, this is immediately followed by the caveat that the state may prevent such activity, when such market gains are merely “at risk” of coming at the expense of consumers or business rivals. Thus, the ACCC does not need to show that harm has been done, merely that it might take place — even if the products and services being provided otherwise benefit the public.

The ACCC report then uses this fundamental error as the basis for recommending content regulation of digital platforms like Facebook and Google (who have apparently been identified by Australia’s clairvoyant PreCrime Antitrust unit as being guilty of future

violations). It argues that the lack of transparency and oversight in the algorithms these companies employ *could* result in a range of possible social and economic damages, despite the fact that consumers continue to rely on these products. These potential issues include prioritization of the content and products of the host company, under-serving of ads within their products, and creation of "filter bubbles" that conceal content from particular users thereby limiting their full range of choice.

The focus of these concerns is the kind and quality of information that users are receiving as a result of the "media market" that results from the "ranking and display of news and journalistic content." As a remedy for its hypothesised concerns, the ACCC has proposed a new regulatory authority tasked with overseeing the operation of the platforms' algorithms. The ACCC claims this would ensure that search and newsfeed results are balanced and of high quality. This policy would undermine consumer welfare in pursuit of remedying speculative harms.

Rather than the search results or news feeds being determined by the interaction between the algorithm and the user, the results would instead be altered to comply with criteria established by the ACCC. Yet, this would substantially undermine the value of these services. The competitive differentiation between, say, Google and Bing lies in their unique, proprietary search algorithms. The ACCC's intervention would necessarily remove some of this differentiation between online providers, notionally to improve the "quality" of results. But such second-guessing by regulators would quickly undermine the actual quality–and utility — of these services to users.

A second, but more troubling prospect is the threat of censorship that emerges from this kind of regime. Any agency granted a mandate to undertake such algorithmic oversight, and override or reconfigure the product of online services, thereby controls the content consumers may access. Such regulatory power thus affects not only what users can read, but what media outlets might be able to say in order to successfully offer curated content. This sort of control is deeply problematic since users are no longer merely faced with a potential "filter bubble" based on their own preferences interacting with a single provider, but with a pervasive set of speech controls promulgated by the government. The history of such state censorship is one which has demonstrated strong harms to both social welfare and rule of law, and should not be emulated.

Undoubtedly antitrust and consumer protection laws should be continually reviewed and revised. However, if we wish to uphold the principles upon which the US was founded and continue to protect consumer welfare, the US should avoid following the path Australia proposes to take.

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