OECD Competition Committee

Hearing on Big Data and Competition

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Intervention 1

- *What are the risks of incorporating privacy concerns into antitrust analysis?*
- *To what extent can companies monopolise data and use it to exclude rivals?*

The difference between privacy protection and antitrust law

- Privacy is fundamentally a consumer protection or tort issue.
- In theory, antitrust law can deal with privacy as a non-price factor of competition, but this is an uneasy fit — hard to measure against/combine with other effects.
- As an economic matter, in order for privacy to be "antitrust-relevant," an alleged monopolist must have an incentive to degrade privacy in order to realize supracompetitive return.
- But: "*Dominant companies are subject to special obligations... [I]t is essential to also examine under the aspect of abuse of market power whether consumers are sufficiently informed about the type and extent of data collected.*"

  — **Andreas Mundt, President, Bundeskartellamt**

Acknowledging trade-offs

- Mistake to *start* by asking, "How does this conduct violate antitrust laws?"
- First question should be: "What beneficial things does this new conduct allow?" — then determine whether it may cause problems.
- Identifying harm and distinguishing it from pro-competitive product design is extremely problematic.
- The value of privacy is subjective:
  - Non-negotiable for some;
  - Others may prefer to trade some personal data for subsidized/free access to online content and other benefits, for example

Market definition problems

- Although they all involve some form of searching and indexing, the important thing online platforms do is provide access to consumers, monetized as advertising dollars.

- Companies that connect two or more sides of a market compete with one another. *Google competes with Amazon, Facebook, Twitter, Yelp, Kayak, TripAdvisor, etc.*

- There is no "market for data" in most of these contexts — no one buys the data that companies get from users; there isn't really a market exchange.

- Mergers: Is more data "worse" than less data?

Core errors in antitrust analysis of digital platforms

Data Monopolization or the "Big is Bad" Argument

- For a viable antitrust claim, need proof that information is rivalrous, indispensable, and likely to be abused at scale.
- Data is not often a source of foreclosure:
  - Consumers can and do supply data to alternative services and new competitors.
- Even within one "market" there are multiple sources for any given data set.
- Multi-homing is a rampant reality for online services.
- Abuse vs. Product Differentiation
- Network Effects

Core errors in antitrust analysis of digital platforms

Presumption that substitutes can only be developed upon identical data sets.

- There is no one market for a particular platform's data.
- A particular dataset is not necessary for generating alternatives.
- Data needed to run platforms is widely available from a variety of sources.
- "Data" is a simulacrum

Data vs. the *Use* of Data

- Most data is not useful on its own - without the ability to act on it, data is useless.
- Extracting value from data requires many complementary tools.
- Proprietary algorithms make the data a tool that companies can use.
- Even great algorithms fail (e.g. Google continuing to show ads for products I've already purchased) .

Barrier to Entry & Essential Facilities Claims

- Data and Entry
  - Data *for* entry vs. data generated *after* entry
  - Privacy rules and effect on entry
- Disincentives to innovation that come with "essential facility" status
  - Constraints on product design innovation
  - Constraints on privacy innovation
- Price discrimination: Benefit or harm?

Lack of appropriate remedies

- Potential remedies for "data harms" in antitrust law are problematic
- Monitoring would require:
  - Constant oversight
  - Highly technical requirements for understanding software systems
- It would be extremely intrusive to companies and chill innovation by:
  - Interfering with the dynamic development of products and services
  - Requiring a dominant firm to share potentially sensitive information with rivals
- Complex (often inverse) relationship between data-related antitrust remedies and protection of privacy

Procompetitive benefits of “Big Data”

- Information is at the root of most product and service innovations
- There is nothing unique about platform / online firms that makes their need for data different than any other firm’s needs, across industries and throughout history.
- Companies from all industries have long sought to improve the relevance of their data, in order to inform their decision making, and better serve consumers.

Markets respond: differentiating along privacy dimensions

- Information asymmetry — who actually has more information?
- Opt-in vs. Opt-out
- Self-help and product differentiation to serve privacy demands:
  - DuckDuckGo
  - TOR-based browsing
  - Protonmail encrypted private mail
  - Subscription models that remove ad tracking
  - Adblockers, Ghostery, etc.
  - Ad-network opt-outs

Intervention 2

- *Would the protection of consumer data be better addressed by regulations that enhance consumer ownership and control over personal data (data portability rights, privacy standards, etc.)?*
- *What might be the implications of such regulations for market competition?*

Broad classes of relevant regulation

- The Market: Reputation, product design and differentiation, etc.
- Administrative agencies
- Legislatures
- Courts

The market as regulator: mutually beneficial trade

- Mutually beneficial trade was the very first form of "regulation" (and is in many cases still the best form) to govern the transactions of market participants.
- Given the highly dynamic nature of the platform economy, this form of regulation can be very effective.
- Consumers defect at will from platforms that fail to provide whatever it is the consumer seeks.
- To the extent that revealed preferences demonstrate that consumers demand privacy in their products — as opposed to stated preferences which tend to overstate such preferences — firms will deliver.
- Niche businesses and tools already exist for privacy-sensitive consumers.

Mandatory data portability problem

- Mandatory "data portability" is not market regulation, per se, but a form of state intervention.
  - A top-down regulation, it imposes a particular order on the market, shifting the enforcement function from the state itself to the private individual.
- This could also be true of imposing privacy standards on firms:
  - Although a state official could take care of enforcement, others would have some right of action as a result of the regulation.
- Nearly impossible to police the thousands (or millions?) of apps, sites, services, and devices that collect and process data.
  - A single set of standards or technologies is a highly complicated engineering problem.

Administrative regulators

Consumer protection agencies (*e.g.*, the US Federal Trade Commission)

- Case-by-case approach yields optimal balance of innovation and protection of consumer interests, avoids overly prescriptive, *ex ante* formulations of business requirements
- As in the common law system, do not typically regard consumer data as property
- Best approach: When a firm makes representations of certain uses of data, hold it to that promise.

The problem of overlapping jurisdiction: Everyone's a consumer protection regulator now

Targeted legislative solutions

- Where narrow classes of harm may be readily identified, targeted legislation may be appropriate
  - *E.g.*, employment discrimination
- Risk of politics trumping economics
- Other legislation and its problems:
  - Broad privacy protections
  - Revising the rules of administrative regulation
  - Revising the rules of civil procedure

Courts as regulators

- Courts and commercial law systems provide legal recourse for contract breaches
  - Clauses can include data and privacy provisions
  - Torts exist in common law countries for handling invasion of privacy
- Data/privacy does not sit comfortably as a traditional property right
  - Data emerges as a result of the interaction of a party with a provider, not as a standalone artifact
  - Data as a simulacrum again
- Mandatory arbitration clauses, class actions and… antitrust again

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