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Committee for the Study of Digital Platforms
Market Structure and Antitrust Subcommittee
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Overall

Market self-correction is unlikely in the digital market economy. Greater antitrust enforcement is needed to address harms caused by tech giants. Who should be the main actor to enact change? Case law is slow to move. Plus the current judiciary is motivated more by ideology than fact-finding by district court judges. Enacting legislation is faster but prone to politicization. The Report recommends digital platform interventions by a sectoral regulator rather than via traditional antitrust enforcement.

Problems	**Proposed Solutions**
<u>Institutional</u> ● There has been underenforcement so far of antitrust law (esp regarding vertical mergers). No Supreme Court antitrust case since Microsoft in 1998. ● Judges seem to adhere to outdated Chicago School approach (aka the market will self-correct) despite updates in economic literature ● Case law is generally slow to react to change <u>Features of the Digital Market</u> The combination of features makes the digital market uniquely **subject to tipping** (a cycle leading to a dominant firm and high market concentration) ● strong network effects that strengthen incumbents over new entrants, ● increasing returns to scale for information goods, ● economies of scope, ● low marginal and distribution costs, and ● global reach.	<u>Judiciary</u> ● Recalibrate the balance between **risk of false positives** (good conduct judged to be bad) **and false negatives** (anticompetitive conduct judged to be good); reconsider assumption that false positives are difficult to correct but that false negatives will be quickly corrected by market forces ● Where there is direct **proof of harm to competition,** antitrust law should not require circumstantial evidence via a defined relevant market. S Ct held in *American Express* that case involving vertical restraint must define and prove relevant mkt, based on notion that vertical restraints almost always never harm competition. This is not true. (77) ● **Set up a competition court**--judges see antitrust cases only rarely. A specialized antitrust court on which a certain number of Art. III judges would sit for a term of several years could help develop antitrust expertise among judges (78) <u>A New Sector-Specific Regulator</u> ● **Sectoral regulator ("Digital Authority")** could be endowed with authority to enhance antitrust enforcement; more ex ante analysis to complement merger enforcement, which is largely backward-looking; permit antitrust authorities and courts to design antitrust remedies and rely on an expert sectoral regulator to oversee their implementation (78)

	○ FCC has served as the sector-specific regulator for telecom; have a similar regulator with pro-competition mandate for the digital industry (83) ○ This regulator will be tasked with non-competition digital goals (i.e. privacy, media, data-use restrictions, consumer protection); having **forward-looking regulations** will increase business certainty ○ Antitrust enforcement agencies could designate DA as administrator & architect of remedies in antitrust cases ● **Remedies for Antitrust violations enforced by DA.** Reducing entry barriers often requires remedy that involves ongoing monitoring. In addition to remedies by existing antitrust agencies, DA could enforce: ○ **Data sharing -** Data sharing can help restore lost competition and help level the playing field. The relevant data to share may not be just historical data, but present and future data also. Because data are non-rivalrous, an incumbent can both share its data with a competitor and also keep it. (96) ○ **Full protocol interoperability -** DA could require a bottleneck business to interoperate with its competitors (96) ○ **Non-discrimination -** Behavioral non-discrimination remedy might be more appropriate than divestiture of one of the businesses; speedy adjudication mechanism would be key (97) ○ **Unbundling -** Unbundling contracts may be less onerous than a divestiture; such a remedy would require ongoing monitoring (97)
<u>Quality Harms Arising from Digital Market</u> Exploiting biases by framing choices, inducing addictive behaviors/impulsive consumption, exploiting consumers' disinclination to search; further enabled by machine learning (amassing data), diversification of products, control over timing of offers	Greater competition would eliminate some of these problems arising from there being powerful platforms with market power. Competition causes a shift of surplus to wiser consumers; profit from exploitation of biased consumers is used to compete for well-informed consumers. But the report also acknowledges that broad consumer protection concerns identified here may not be solved through greater competition. (38)

Harms from an advertising supported-business model

- Market power leads to markups (opacity gives ability to exercise market power and to engage in fraud)
- Markups create more incentive for anticompetitive behavior
- Because cheapest way to keep users is to show inflammatory content, quality of content suffers

Online Exploitation and Addiction

- Business model based on acquiring large volume of data to generate income has led to investment in addiction

Privacy

- Integration of many different services/infrastructures (Facebook Messenger, WhatsApp, Instagram, for instance) raises probability of data leaks
- Usage of data across platforms without a user's explicit & voluntary consent
- Can't delete--Ownership may also not give a person's ability/right to delete it. Even if an individual user removes the initial entry, the machine learning methods do some amount of memorization of the subset of their training data.

In response to behavioral exploitation

- Antitrust courts should be more willing to **assess product design decisions** that could harm competitors (app stores, mobile device screen layouts, data storage & analysis, interface design) (77)
- **Restrictions on practices that enhance behavioral "mistakes."** Suggests that a sector-specific regulator should have a mandate to create "light touch" rules to make markets more competitive (i.e. maybe prohibit automatic renewals that discourage consumers from comparison shopping when contract ends) (87)

On the privacy front

- To give **consumers more control over their data,** sector-specific regulator can play a role to ensure that users can easily transfer their data from one service to another in industries where there is a common business model (e.g., social media, banking, online grocery shopping); this regulator can identify industries where **porting** is likely to aid the competitive process. (88)
- Regulator can propose **porting standard** for exchanging data, informed by industry preferences to make sure that the format is not itself an entry barrier (88)
- While a porting regulation lowers consumer switching costs greatly, they may still be high enough that demand is not sufficiently to induce entry. A regulator could set up process by which a customer can choose to **send her data to an entrant** by authorizing it to be transferred directly from her former service provider. (88)
- Regulator could create an **open standard for digital identity** so that new entrants can easily offer their own digital identity product that allows users to access goods and services online; blockchain can potentially help with self-sovereign identity solutions that facilitate micro-payments among consumers and digital entities (89)

Assessment Problem--Consumer Welfare Standard ● When facing zero-money price, no price signals to indicate quality of the content or social value of consumption; price doesn't reflect economics of transaction ● When advertising efficacy relies on psychological nudges, more advertising may well mean less consumer welfare; more advertising induces wasteful spending and rent-seeking	Dealing with Assessment Problem Must weigh social concerns as well as traditional economic effects; quantitatively **link quality to price** rather than adhere to old, price-centered jurisprudence (67) ● Incorporate role of exploitative content in the way that antitrust analysis commonly deals with low quality and **quality-adjusted prices** (one litigated case in 2018 Ohio v. American Express Co., but shouldn't apply to digital platforms) (75) ● Develop tools to assess consumer welfare in a **two/multi-sided market**. Insights from platform economics suggest that change in the two sided price or change in the transaction volume is not a sufficient statistic for increase in consumer welfare. Whether platform's increased output will increase economic welfare depends on how the benefits and costs of that output are allocated across two sides. (75)
Harms to Investment & Innovation ● Digital platforms careful to maintain complete control over user relationship as to eliminate threat of disintermediation from market entrants and partners who target the same customers ● They obtain higher margins by making all of the necessary complements themselves or positioning themselves as a mandatory bottleneck btw partners and customers	● **Unilateral refusals** to deal prohibited only under very narrow circumstances right now; should reconsider this doctrine because large platforms have substantial freedom to deal with actual or potential rivals, including complements, and deal with them only on onerous terms (76) ● Define **"bottleneck power"** and make determination of companies that have bottleneck power case by case (to be done by sector-specific regulator) (85)
Harm to Entry, Including Discrimination ● Use of exclusive contracts and loyalty contracts to achieve exclusion, as well as bundling of services, foreclosure of complements to capture rent ● Merchants find themselves banned, demoted in search results, or required to bear higher costs without the ability to move to a competing platform b/c either there is none or b/c the customers single-home, will not depart the platform b/c of the loss of one vendor & cannot be reached elsewhere.	● **Predatory pricing law** permits some forms of anticompetitive pricing conduct. The rigid notion of recoupment (query price below cost?) to assess anticompetitive pricing conduct must be modified where digital goods have a marginal cost close to zero. (76) ● Antitrust law should not rely exclusively upon predatory pricing standards to assess **loyalty discounts,** which are different from low prices. Unlike low prices, even above-cost loyalty discounts do not necessarily increase static welfare. (76) ● There should be **no safe harbor** based on short-term of exclusive dealing agreements and other restrictive vertical agreements when used by

	dominant platforms (77) ● **Burden shifting--**Argue for presuming anticompetitive harm on the basis of preliminary showings by antitrust plaintiffs and shifting burden of exculpation to the defendant who have greater knowledge and access to relevant information (77) ● Courts should not presume efficiencies from **vertical transactions**; crediting of efficiencies should require strong supporting evidence showing merger-specificity and verifiability (78) ● Design **data sharing rules** with goal of reducing single-homing and promoting entry (by sector-specific regulator) (85) ● **Regularly collect data** on market transactions with an emphasis on data from businesses with bottleneck power (benchmark real-time regulation in financial services) (86) ● **Nondiscrimination rules**--Could be helpful a tool in creating a competitive environment in which entrants are protected and can thrive, while allowing a platform to vertically integrate to some degree (93); U.S. regulator may be able to build on concept of "business to platform" regulation that is developing in Europe to create effective nondiscrimination rules (94) ● **Prohibit antitcompetitive bundling** by firms with bottleneck power. Sector regulator could establish regulations and require unbundling (95)
<u>Harm to Innovation</u> ● Because startups in search and social media do not fair well, VCs also do not invest in this area ("killer zones"), leading to a self-fulfilling prophecy; reduced VC investments causes less entry and less differentiated innovation in the sector ● Entrepreneurs may expect a low payoff to developing a free-standing product b/c of entry barriers/exclusionary conduct by incumbent; although large platform acquisition also stimulates some level of innovation, acquisition payoff is much smaller than if entrepreneurs could compete for 100% of the profits; results in lowered incentive for entrepreneurs to innovate	● When applying regulatory tools, include a **small business exception** and perhaps even a **new business exception** to allow very small entrants, who may benefit competition (86) ● In a market where Congress wants to prevent creation of market power in the first place due to the importance of the market, regulator could develop **open interoperability standards** to promote entry (i.e. allow consumers to switch easily from Amazon to Apple product); possible that such open standards could slow down innovation that depends on the interface, but open standards will drastically reduce lock-in and market power, leading to greater incentive to innovate on the service itself (92)

Mergers ● Behavior of greatest concern to the many policymakers is the acquisition of potential competitors by powerful digital businesses. These acquisitions often fall below the value threshold under which the buyer would need to notify competition authorities in advance of the deal. Consequently, authorities have limited or no ability to assess whether a given deal is procompetitive or harmful to competition (89)	● **Mergers** between dominant firms and substantial competitors or uniquely likely future competitors should be **presumed to be unlawful**, subject to rebuttal by defendants (78) ● Congress should give **sector regulator merger review authority.** Similarly to FFC's merger review role, this could be conducted concurrently with the antitrust review done by the FTC or DOJ. It would not be prudent to alter nation's antitrust laws to accommodate one difficult, fast-moving sector where false negatives are particularly costs. (89) ● Merger regulations should require merging firms to demonstrate that the combination will **affirmatively promote competition** (90) ● **Burden-shifting** such that burden of proof is not with government but primarily placed on the merging parties who have the incentive, data, and resources to deliver information to the authority (91) ● **Notification and pre-clearance** could be required for any acquisition by a business designated as having **bottleneck power** (90)