

A Radical Antitrust Manifesto for Digital Platforms?



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What RADICAL *really* looks like (never mind “populist”...)

Big US debate: antitrust has moved away from traditional ANTIMONOPOLY values and settled on hyper-technocratic approach

Populist diagnosis: “Consumer welfare is killing us!”

Radical critique: the bounds of standard antitrust are “arbitrary”, need to go beyond the conventional scope

Common motivation: perceived massive growth of market power across economy, antitrust enforcement too narrow, ignores domains that account for most market power in the economy

Monopsony power in Labor Markets

Pervasive power of Institutional Investors (“the octopus”)

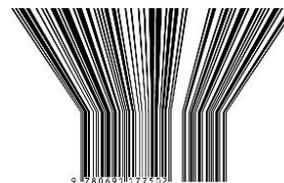
Allowed acquisitions of nascent potential rivals to squash any threat



A memo to big tech

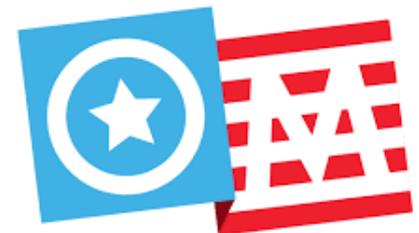
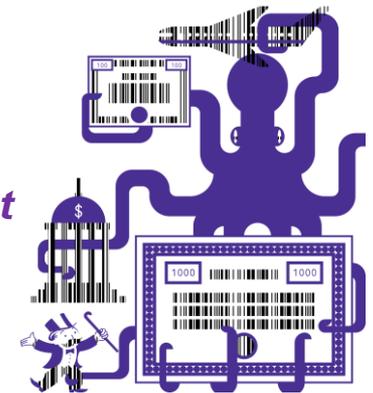
The techlash against Amazon, Facebook and Google—and what they can do

Which antitrust remedies to welcome, which to fight



ERIC A. POSNER & E. GLEN WEYL

**RADICAL
MARKETS**



Digital platforms: *what we are NOT saying*

- We **don't have "tech envy" in Europe**
- We **don't do this to protect competitors**
- We absolutely **understand the economics**: two sidedness, network effects, economies of scale and scope, "free" paradigm on the user side which requires monetisation on the other side. **Got it.**
- We understand **not all digital platforms are the same** and don't worry about all of them: we don't *"have a problem with tech"*.
- We understand Google, FB, Amazon are where they are because **the product is good, they innovate a lot, they integrate lots of complements and scout talent** (startups) that may otherwise fail to execute
- We understand that **rivals should go get their own data and there are multiple ways to generate "some" data**

COUNTRIES WITH EMERGING UNICORNS IN 2017

32		United States
18		China
4		United Kingdom
1		United Arab Emirates
1		India
1		Indonesia

Why do we worry then?

Multihoming, differentiation, no switching costs online, rapid disruptive innovation, seamless downloading – **were all expected to protect us from “tipping”**

In fact, consumers are funnelled into 3-4 main “attention brokers” that soak up most attention online: **some markets HAVE ACTUALLY TIPPED**

Many reasons – the virtuous cycle of “aggregators”, larger than expected economies of scale in logistics and behavioural factors on the demand side.

Concerns:

- “Insufficient competition” overall – **exclusion and exploitation** insufficiently diagnosed, **less choice and innovation**
- **“Unfair bargains” for user data** (no “sunshine” or “wind” or sand”....)

Why does antitrust feel unequal to the task

“where’s the tie?” – but not everything needs to look like an “applications barrier to entry” (Microsoft 2001)

- Some diagnostic tools are too narrow and inapt to grasp current concerns
- “Common law” structure of antitrust is founded on precedent, but may not strictly “fit”
- Cumbersome processes and exceedingly slow progress.
- Gap between decisions based on sensible TOH and agencies’ ability to design remedies

Political reaction getting stronger, reflecting public anxiety and vocal reminders that originally, **antitrust laws were not solely motivated by economic efficiency but also a response to popular concerns about power of very large companies**

Multiple initiatives: FTC Hearings, Furman panel (UK Treasury), CMA future Hearings, multiple panels working on theories of harm

Mergers

The Instagram problem: acquisition of nascent future competitors

The Whatsapp problem: acquisition of the future replacement

Systematically look at acquisitions where the purchase price is out of whack with expected profits.

Also closely look at cases where target could be a threat or help a rival become a more serious threat
WHAT FILTERS should WE USE to spot problematic deals?

Measuring market power - attention markets?

Conduct

Exclusion: not everything needs to fit into hegemony tying/leveraging paradigm

Exploitation: coercive deals and imposing “unfair” terms and conditions of trade on counterparties

**“User exploitation on the data side”:
“unfair bargain” with consumers
forcedly giving away their data for free as a condition for using the service.**

Interim measures

“Interim stock taking go-no go decisions” like at the UK CMA.

Interim measures. Would Google have been terminally hurt if it had been told to suspend FCF for a while?

Equivalent in mergers: presumptions that (with some filters) cases will be taken to Phase 2 Would Facebook really be hurt if it cannot close for a while?

Better than lowering threshold for intervention!

Remedies design

Address circumvention when a **“cease and desist” order is handed down.**

Reputational effects do not pre-empt recidivism because of lack of transparency...

Broader remit for remedies involving exclusionary abuses in industries subject to lock-in/network effects which permits going further to reset market conditions to what they would have been but for the conduct. A remedy that would have worked at the outset falls far short of what is required after multiple years, and some degree of resetting needs to be considered.

Regulation of data access and use

What models for regulation? Could the “**end to end connectivity**” analogy in telecom (another industry with massive network effects, investment costs etc) be useful?

Supply side:

- **Access to data** – could involve access pricing but in limited circumstances e.g. bulk data for training algos? (we want to preserve incentives for generation / acquisition of own data)
- **IP-style restrictions limiting data exclusivity in time?**

Demand side:

Mandating portability ie FB has to make it easier to port own data elsewhere.

Mandating interconnection and interoperability between platforms on data use?

Need to figure out how it would work.

New institutions with stakeholder participation?

Private bodies could be facilitated/set up with regulatory oversight or inducement to negotiate solutions or to provide some balancing power on the other side.

Jean Tirole => “collaborative antitrust” approach. May involve bodies which – like SSOs in standard setting – include stakeholders on different sides (e.g. patentees and implementers, here platforms, advertisers, publishers, data users, and consumers?) to work through issues. We need to make this concrete.

Glen Weyl => Private entities which “collectively negotiate on the value of data”. Like “collecting societies” for performing rights.

- “Data unions”?
- Mediators of Individualised Data?