2021 ACCC/AER Regulatory Conference

Session – Opening Plenary

Chair: **Rod Sims**

Speakers: **Cristina Caffarra**

Tommaso Valletti

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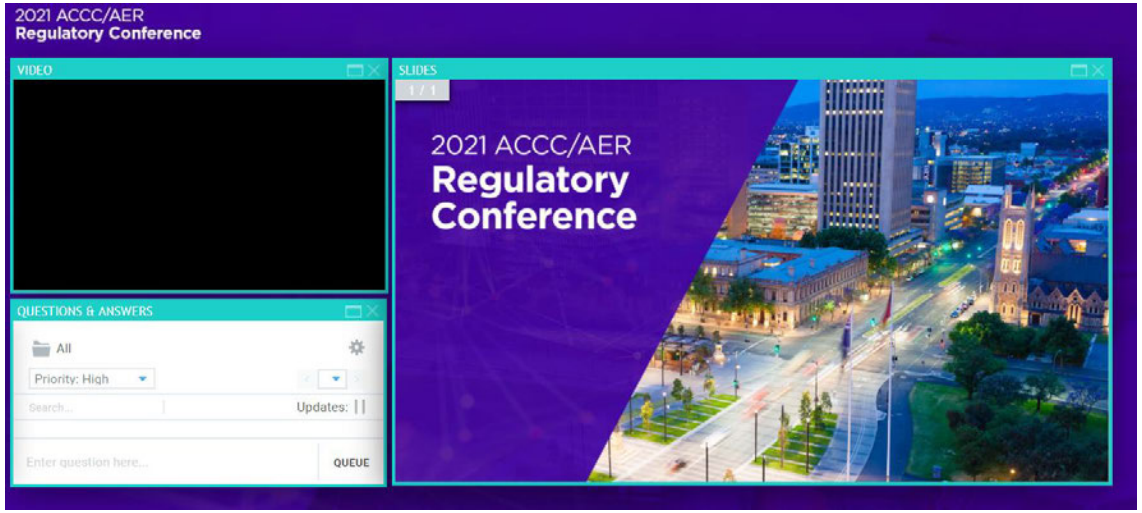

AUSTRALIAN COMPETITION & CONSUMER COMMISSION

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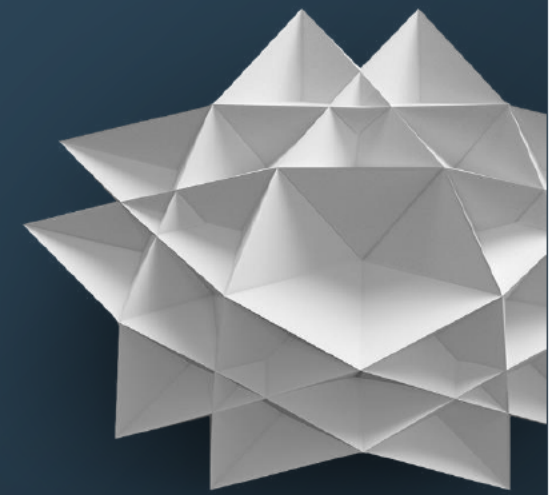
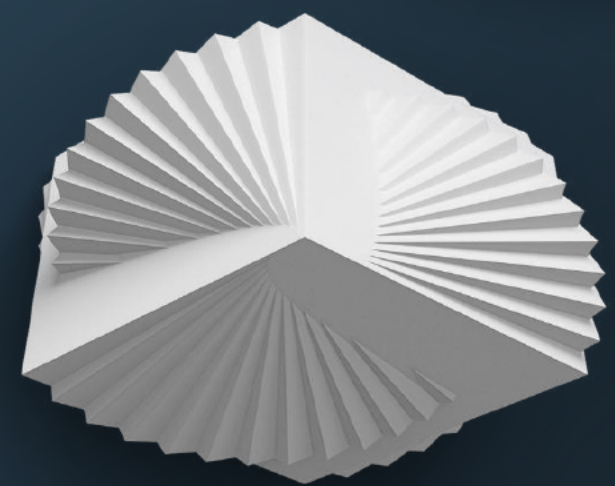
Next up…

Cristina Caffarra:

A Big Agenda for Big Tech Regulation:
Solve Antitrust Failures, Integrate Data Protection, & Decentralize Innovation?

A Big Agenda for Big Tech Regulation: *Solve Antitrust Failures, Integrate Data Protection, & Decentralize Innovation?*





ACCC Regulatory Conference

28 July 2021

Cristina Caffarra

Disclosure

> I have worked adverse to Google (*EC Shopping, Android, Texas Complaint, Nebraska/Colorado complaint)* never for/against FB, for Amazon, Apple, Microsoft, Uber….

“Companies don’t have good character or bad character; they just have incentives”

Cory Doctorow 21 May

Cory Doctorow

Writer, blogger, activist. Blog: https://pluralistic.net; Mailing list: https://pluralistic.net/plura-list; Twitter: https://twitter.com/doctorow

Run through

1. So what are we worried about? (*really? in 2021?)*
2. Antitrust failed (*has it? and why?)*
3. The Great Regulation Pivot *(but with differences)*
4. What's on the table? *(can it work?)*
5. Missing key pieces…privacy/data protection
6. What about innovation?

So what are we worried about?

Consumers are funnelled into 3-4 main "attention brokers" that soak up most attention online, and **certain markets HAVE ACTUALLY TIPPED**

Many reasons – **the virtuous cycle of "aggregators", economies of scope in data, larger than expected economies of scale, behavioural factors on the demand side…**

"Insufficient competition" overall – exclusion and exploitation

"Enveloping" markets

"Unfair bargains" all over the place, for user data, but also between platforms and businesses relying on the platform…

…but also privacy violations and use of privacy rules to protect "the moat", all the way to surveillance capitalism…

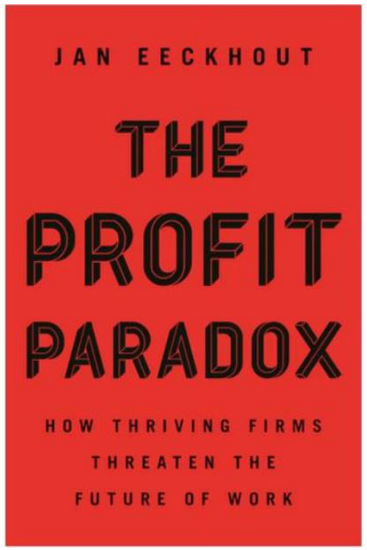
“Invest in unregulated monopolies…”

Yesterday: Google’s adrevenue +69% (Youtube +83%), Apple’s profits nearly doubled to $21.7bn, sales +36%, iPhone sales +50%...

We underenforced… now big shift in the *political economy*

Massive market power build-up for a few players

- Explosive growth: cocktail of network effects, data economies of scale/ scope
- Pandemic role
- BUT **also major underenforcement, concentration/margins increasing**



Complete pendulum swing…

BIG shift in the US

Platforms lie to users to extract their data, degrade privacy protection after acquiring potential threats and use vast trove of personal data to addict/ manipulate us with behavioral ads, all the way to surveillance and fake news…

US tradition of antitrust as a tool to **disperse economic power, hence political power**

Current progressive movement IN POWER is ANTIMONOPOLY, focused on SIZE in contrast with the past 40 years…

BREAK'EM UP!

Europe different, but also militant

Ordoliberal tradition

At core, we protect ***freedom of economic choice,*** **a view that only decentralized decision making could deliver good outcomes.**

Ordoliberal idea: "competition" is a "process of rivalry" *built on individual economic freedom*

Traditional values are "special responsibility" of the dominant firm, behavioural remedies.

Under pressure: "we need to do more"

The Great Regulation Pivot

Diffuse effort to design regulation to bring Big Tech under control… though experimenting with different approaches…

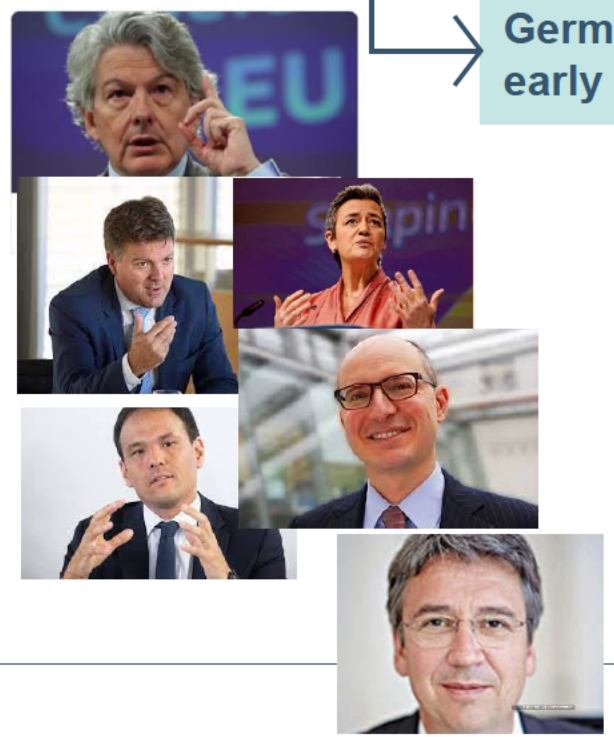
EC: Digital Markets Act (+ Digital Services Act) – first draft circulated on 15 Dec 2020, currently being rushed through Europarl for expected approval in early 2022.

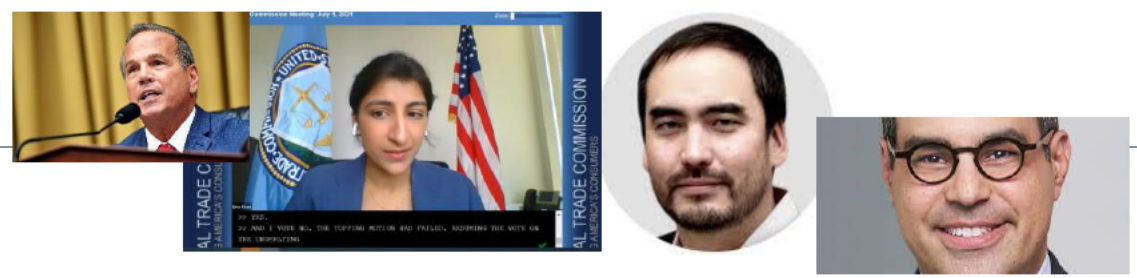
UK: new digital rules and Digital Markets Unit, introduced late 2020, awaiting green light but ready to go with multiple plans

Germany: Amendments to competition law (GBW) approved in early 2021, hybrid competition law and regulation

France: very active /animated on DSA

US, wow! Major revival of antitrust (State AGs), Regulation Draft Bills in Congress, Biden Competition Order, Wu-Khan-Kanter "trifecta"….





Australia: a unique model (“decentralised regulation”)

VOX EU CEPR

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The ACCC’s ‘bargaining code’: A path towards ‘decentralised regulation’ of dominant digital platforms?

Cristina Caffarra, Gregory Crawford 26 August 2020

New law for a Mandatory Bargaining Code has been introduced in Australia to implement a decision that publishers should be compensated for use of news content by giant digital platforms. This reflects a policy view that the large disparity in bargaining power between platforms and individual publishers requires positive intervention to support quality journalism and news production. This column argues that the Code as formulated by the ACCC has desirable properties in line with bargaining theory (including the use of ‘final offer arbitration’ as a backstop); it also leaves implementation of the regulation to the parties involved, not to an agency suffering from extreme asymmetric information. At a time when the design of regulation for ‘gatekeeper’ platforms is very much top of the agenda, this ‘decentralised regulation’ approach should be considered as part of a menu of possibilities in multiple settings.

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But why the Pivot?

Perceived (real) failure of antitrust (Europe/US)…

Some **inherent –the piecemeal nature of enforcement** – missing big picture

Some **avoidable – lengthy procedures** gamed incessantly by incumbents

Some **real blunders on mergers** – some inexcusable

Timidity of regulators and fear of losing on appeal

Ankle tag of **precedent** and not calling a spade a spade

Remedies utterly hopeless.

…combined with the narrow lens of antitrust

Siloing antitrust from data protection

Failing to see that data protection violation is market power abuse **(“a price increase”)** and leaving hapless DPAs to **fight monopolies with a plastic knife**

Does not deal with the real serious problem of the **pace and direction of innovation**

Unpacking a few…

Missing the big picture, focusing on yesterday's issue

Antitrust enforcement looks narrowly at **ONE issue at a tim**e. Wood/trees. Always **yesterday's issue.**

- ***Shopping***: do we really care about comparison shopping? Was THAT the way to curb Google's tentacles in SEARCH? And while focusing on that in 2010-14, EC totally missed Google **occupying mobile** *(Android* started in 2015). Then **occupying adtech**. Now starting to occupy **health.** And **IoT.**

Lengthy processes gamed grotesquely by defendants

Agencies are slow and underresourced. Defendants game grotesquely. Rights of defence theatre.

Total VACUUM of enforcement in mergers: those that got away

….practically EVERYONE. No acquisitions by GAFAM ever prohibited

Only a handful vetted… Google/DC, FB/WA, FB/Instagram, … all the way to Google /Fitbit!

“The [550] acquisitions we have not looked into”

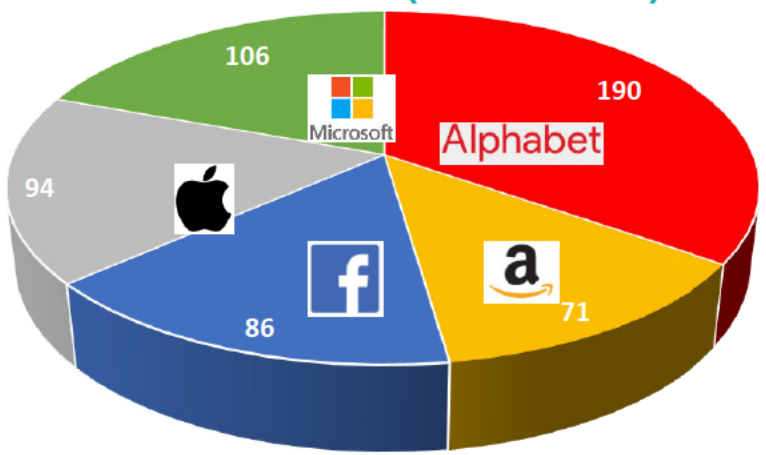
GAFAM have made 547 acquisitions in the last decade (2009-2020)

- Targets integrated to build complementary offerings (e.g. YouTube/ Google) and expand reach
- Likely an underestimate as some not public

COVID: acceleration of acquisitions since March 2020

But “we have not looked at any of them” (except a handful)

Publicly known transactions (2009-2020)



Source: Wikipedia

Failure to deal with market power *ab initio* is major problem in tech

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Google/Fitbit will monetise health data and harm consumers

Marc Bourreau, Cristina Caffarra, Zhijun Chen, Chongwoo Choe, Gregory Crawford, Tomaso Duso, Christos Genakos, Paul Heidhues, Martin Peitz, Thomas Rønde, Monika Schnitzer, Nicolas Schutz, Michelle Sovinsky, Giancarlo Spagnolo, Otto Toivanen, Tommaso Valletti, Thibaud Vergé 30 September 2020

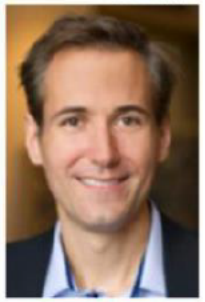
The European Commission is conducting an in-depth investigation of the Google/Fitbit deal. A static, conventional view would suggest limited issues from a merger of complements. Yet, as this column outlines, unprecedented concerns arise when one sees that allowing for Fitbit's data gathering capabilities to be put in Google's hands creates major risks of "platform envelopment," extension of monopoly power and consumer exploitation. The combination of Fitbit's health data with Google's other data creates unique opportunities for discrimination and exploitation of consumers in healthcare, health insurance and other sensitive areas, with major implications for privacy too. We also need to worry about incen… threaten Google's data collection dominance. As the consensus is nc… key tool for competition policy vis-a-vis acquisitive digital platforms, t… authorities should be very sceptical of this deal, and realistic about th… monitor appropriate remedies.

Marc Bo…
Professor of Economics

'How tech rolls': Potential competition and …verse' killer acquisitions

…ina Caffarra, Gregory Crawford, Tommaso Valletti 11 May 2020

Cristina Caffarra
Senior Consultant, Charles River Associates



Gregory Crawford
Professor of Economics, University of Zurich; Co-Director of …

…and a few more…

Timidity of regulators
Overwhelmed by fear of tackling “the new” (exploitation, data theories)

Ankle tag of precedent
Lawyers (legal service) paralyzed by precedent, the only authority they know

Fear of losing in court
High profile losses are a major deterrent for the institution – see *O2/Three* before *Google/Fitbit…*

Remedies utterly useless
“Cease and desist”
Design of the remedy left to the defendant
Behavioural remedies unmonitorable

So let’s swing to REGULATION!

What does the EC draft regulation (DMA) look like so far?

“Digital Markets Act”

- Designation of **“gatekeepers”** for “core platform services” first
- Gatekeepers are subject to a list of **Obligations** (Art 5. blacklist/ Art 6. greylist)
- Except that they are a **game of charade, a collection of points drawn from past antitrust cases**
- None the wiser.
- **Is this how you design optimal regulation?**

Obligations for gatekeepers, DMA Art. 5	Who
(a) refrain from combining personal data sourced from these core platform services with personal data from any other services offered by the gatekeeper or with personal data from third-party services, and from signing in end users to other services of the gatekeeper in order to combine personal data	**Facebook, Google**[5]
(b) allow business users to offer the same products or services to end users through third party online intermediation services at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper	**Amazon, OTAs**[6]
(c) allow business users to promote offers to end users acquired via the core platform service, and to conclude contracts with these end users regardless of whether for that purpose they use the core platform services of the gatekeeper or not, and allow end users to access and use, through the core platform services of the gatekeeper, content, subscriptions, features or other items by using the software application of a business user, where these items have been acquired by the end users from the relevant business user without using the core platform services of the gatekeeper;	**Apple**[7]
(d) refrain from preventing or restricting business users from raising issues with any relevant public authority relating to any practice of gatekeepers	Standard
(e) refrain from requiring business users to use, offer or interoperate with an identification service of the gatekeeper in the context of services offered by the business users using the core platform services of that gatekeeper;	**Facebook, Google**[8]

What's wrong with it? (in substance)

This is not telco regulation!

Not precise enough and certainly not "self-executing"

Need some organising principles…

Mostly about b2b and nothing much on personal data

Nothing on mergers ("perhaps you would let us know"..)

Only behavioural remedies ("three strikes and (maybe) you're out"…)

The European Commission Digital Markets Act: A translation

Cristina Caffarra, Fiona Scott Morton 05 January 2021

The European Commission has finally issued the proposed Digital Markets Act, its bid to complement antitrust intervention in digital markets with ex-ante regulation in the form of a set of obligations that platforms identified as "gatekeepers" should abide by. This column argues that the current proposal makes good progress, but lacks the translation tools to map the rules from the settings that inspired them to other businesses that are deemed gatekeepers, that the rules may not do enough to recognise the direct consumer harm that flows from the exploitation of data and the extraction and appropriation of consumer value, and that merger control remains a significant lacuna in the Commission's digital regime that will need to be addressed separately. In contrast, the UK CMA proposals condition the rules on business models and fold merger control into the digital regime.

435 A A

Cristina Caffarra
Senior Consultant, Charles River Associates

What should be the organizing principle?

David Carroll

LRI @profcarroll PDI

Facebook and Google make good profits appropriating your data. Apple makes the same profits selling you gear instead of fake free services. Amazon is colonizing your cabinets and it's weird. Microsoft still recovering from anti-trust actions but doing fine thanks.

10/05/2021, 03:06

“Follow the money” : business models as the organizing principle

e-Competitions

Antitrust Case Laws e-Bulletin

Concurrences

Antitrust Publications & Events

Platforms

“Follow the Money” - Mapping issues with digital platforms into actionable theories of harm

DOMINANCE (NOTION), FOREWORD, COMPETITION POLICY, ECONOMIC ANALYSIS, ONLINE PLATFORMS

Cristina Caffarra | CRA International (London)

e-Competitions Special Issue Platforms | 22 August 2019

Much more going on than DMA…

UK approach cuts the nonsense and gets to the point

UK established Digital Markets Unit (DMU) to implement new regulatory regime for "the most powerful digital firms" – "Strategic Market Status (SMS) regime".

Note critical difference to EC DMA: no fixed, pre-established list of rules

Individual code of conduct

Germany hybrid approach with revamp of competition rules

Art. 19-20 GBW

US new draft Bills

"Platform Antimonopoly Act" (!)

"Ending Platform Monopolies Act" (!)

Biden's Competition Order and…

Meantime, antitrust is also not giving up...

The talkback of the EU Antitrust wagon: we are not irrelevant!

EC: opened new case against Facebook (Marketplace), nearly there with Google Adtech, investigation of IoT…

Germany: ambivalent towards DMA, revamped its competition law instead (19-20 GBW), launched new cases on Facebook, Google Newsroom, Amazon…

UK: new cases (hybrid competition/regulation) on Apple and Facebook and Google…now Amazon

Also expect revitalized antitrust effort from FTC/DOJ

What's left out: Data protection/privacy!

We have failed to integrate antitrust with privacy and data protection (not "intersect"!)

- **GDPR 2018 was a great start**
- But **we have operated in silos: market power vs data protection (consumer protection)**
- We created Data Protection Agencies to enforce GDPR at national level which are **underresourced and fragmented** and cannot fight the giants.
- Because we failed to tame the market power of the giants, we have now thrown these DPAs into war with these giant entities. **Guess who's winning.**
- And we have failed to fashion TOHs that take into account that **it is the market power that allows for violations of data protection and the violations of privacy and data protection enable the persistence of market power** through abusive and exploitative conduct – **need to INTEGRATE NOT INTERSECT!**

fitbit

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The antitrust orthodoxy is blind to real data harms

Cristina Caffarra, Gregory Crawford, Johnny Ryan 22 April 2021

Cristina Caffarra
Senior Consultant, Charles River Associates

Gregory Crawford
Professor of Economics

And finally, innovation…

Enforcement / regulation vs innovation – that old chestnut…

…“regulation will kill incentives to innovate”… “Type 1 errors will chill innovation”… “startups are created only to be acquired”…

Some data points…

Kill zones

Monika Schnitzer et al on AT&T

Valletti et al on agrochemical mergers

Do we think Silicon Valley will stop innovating if we block 4 startup acquisitions a year?

But yes, designing regulation that does not undermine incentives is hard.

Also worry about the direction of innovation: matters hugely

Dependency, lack of diversity in R&D

"Big Tech's most pernicious effects on economic growth and consumer welfare may stem less from "anticompetitive and exclusionary practices" than from **its role in directing technological change more broadly.** Several factors will determine which alternatives receive the most attention from researchers and businesses (…). **But the needs, business models, and vision of companies spearheading technological innovation may be even more important determinants of trends.**

The problem today is not just that Big Tech has grown to a gargantuan size, such that its investment in R&D determines the overall direction of technological change. It is that **all other market players have little choice but to make their own products and services interoperable, dependent on and subordinate to the major platforms".**

"Breaking up Facebook, Google, Microsoft, and Amazon will not be sufficient to restore the diversity necessary for broad-based innovation. There also needs to be new companies with different visions, and governments willing to reclaim the leadership role they once had in shaping technological change".

And more….

"For all the creative disruption that its leaders promise us, the tech industry delivers an extremely unappetizing dish that **invariably features the same set of ingredients: users, platforms, advertisers, and app developers.**

The industry's key players want to ensure that **any new digital institution is born as a startup or, at least, as an app – to be inserted and monetized through their platforms and operating systems**. But why force every good new idea into the straitjacket of the startup or the app? In most cases, that straitjacket imposes its own imperatives: **users need to be monetized; data needs to be gathered; subscriptions need to be sold. Why limit ourselves to just these few paths?"**

"The institutional imagination of the tech industry simply does not admit other actors who can play a role in shaping the socially beneficial uses of digital infrastructures"…

Conclusions

Enforcement needs powering up YES.

Will we see a new regulation regime alongside antitrust? YES.

Will antitrust pull itself from irrelevance… MAYBE.

(and let's see what happens in the US with Federal/State AG Complaints and new agency heads….FB setback notwithstanding…)

Will we move the dial integrating privacy and antitrust? Depends also on the *economists listening! (RPN at CEPR)*

Worried about the direction of innovation? Absolutely….

China??

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Next up…

Prof Tommaso Valletti:

Data: Privacy & Competition – Friends or Foes?

Data: Privacy & Competition – Friends or Foes?

Professor Tommaso Valletti

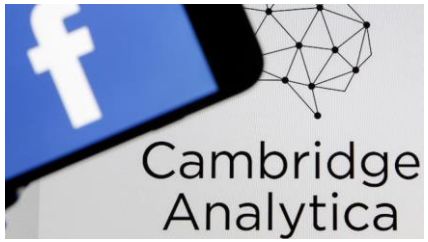
Imperial College London

ACCC/AER Regulatory Conference

26 July 2021

Disclaimer

Two cases



- Network effects
- Data and privacy
- Competition
- Externalities
- Business model

Some economics of data (I). The positive side?

- **Jones and Tonetti** (AER, 2020) “Nonrivalry and the Economics of Data”
- Data are non-rival (infinitely usable) but excludable
- Representative consumers and firms that produce different varieties
- Consumption generates data: Data improve own and other varieties (spillover)
- Contrasting effects: Social gains if many firms use data, but also privacy concerns
- Who should own the data?
  - Firms. Overuse and do not adequately respect consumer privacy
  - Consumers. Better balance concerns for privacy against the gains from selling data
  - Assigning data property rights to **consumers** typically generates higher welfare
- **Total** ban on data very inefficient. (Red herring?)

Policy implications

- Increasing returns to scale associated with data: there exist incentives for merging
- Less obvious effect: If selling data increases the rate of creative destruction, firms may hoard data
- Data is a barrier to entry. As incumbent firms accumulate data, this makes it harder for other firms to enter
- Government shall **jointly** implement antitrust and data policies

Some economics of data (II). The negative side?

- **Acemoglu et al.** (AEJ: Micro, forth.) “Too Much Data: Prices and Inefficiencies in Data Markets”
- Privacy paradox?

- Work of Acquisti et al. (“paradox of the privacy paradox”):
- “Even subtle changes in the way privacy trade-offs are presented to individuals can cause radical changes in people’s valuations of their data or the importance of keeping their data protected. One of the conclusions of my research is that it’s probably fruitless to try to pinpoint with a single number the value of privacy.”

Simple example

- One platform and two users i, j
- Platform wants to acquire users' leaked data
- Assume:
  - Valuation of the platform for the users' leaked information = 1
  - Values that users attach to their privacy are vi = ½ and vj = v
  - Correlation of valuations ≈ 1
- Then:
  - User i will always sell her data, because vi= ½ < 1. Hence, the platform will know almost everything about user j
  - User j will be willing to sell her data for approx. 0, leaking information about user i
  - But then user i can only charge a very low price for her data
  - ⇒ The platform **acquires both users' data at approx. 0 price!**

Implications

- Data externalities: when a user shares her data with a platform, she typically reveals relevant information about other users ⇒ “excessive” data sharing
- Individual-level data underpriced and the market generates “too much data” (no privacy paradox)

- Given this: rethink Google-Fitbit and typical antitrust approach (“small” installed base of Fitbit), or the WhatsApp new terms of service (“they don’t apply to EU”)

- Policies:
  - Tax on data transactions
  - De-correlation via a mediator (remove correlation with the information of other users and only share transformed data of those who are willing to sell their data.)

Selling data

- Think of impact on “downstream” markets
- Data provide information: better customization but also price discrimination
- **Montes, Sand-Zantman and Valletti** (Management Science, 2019) “The Value of Personal Information”
- Data provider sells info to downstream competing firms & consumers can protect their privacy
  - If data is sold to all -> intense price competition, no reason to protect privacy
  - However at equilibrium, all data sold **exclusively** (= auction with negative externality)
- Re-focus on allocation of data (exclusivity contracts)
- Recent papers looking at this with various extensions

Attention bottlenecks and mergers

- **Prat and Valletti** (AEJ: Micro, forth.) “Attention Oligopoly”
- Look at platforms as “attention brokers” who sell hyper-targeted ads
- Follow the money: ads are ultimately paid by producers of products
- This impacts downstream competition (“incumbents vs entrants”)
- Different platforms -> different ways to get attention
- With concentrated platforms, ads become more expensive because foreclosure strategies of “incumbents” become profitable
- Mergers even in so-called “zero price” markets cause consumer harm: more expensive final products
- Need to have the right metric: “attention overlaps” not “usage shares”

Challenges to the economics/antitrust orthodoxy

- Challenge 1: “more information is always good”
  - Lack of privacy is an (unobservable) price of using platforms which facilitates mainstream antitrust harms such as exploitation and foreclosure

- Challenge 2: “more data generate more surplus”
  - Data combinations by a dominant firm allow a discriminating monopolist to extract the majority of the rents from “good” customers and jack up prices to “bad” ones -> Google/Fitbit (Chen et al., 2021)

Integrate© Privacy into Antitrust

(© Caffarra & Crawford)

- It's rarely done, TBH: push the agency hierarchy to be bold and visionary! (Even if supporting case law has to be built.)
- Privacy as a "quality" characteristic? Not so sure
- Rather **(lack of) privacy is a price**: deals that allow more collection/combination/use of data raise prices for those services
- Often these prices are unobservable: "obfuscation by design"
- Unobserved prices high also **because** consumers have few ways to say no
- **(Lack of) privacy can facilitate exploitation**

Integrate Privacy into Antitrust

- **(Lack of) privacy can facilitate foreclosure**
- Offensive leveraging/data envelopment (at odds with **purpose limitation**)
- Can reframe classic concerns around personal data as the relevant asset
- E.g., “Privacy-policy tying” to deter entry and lower consumer surplus (Condorelli and Padilla, 2021, adapting dynamic leveraging of Carlton and Waldman, 2002)
- E.g., Google’s “Privacy Sandbox”
  - Is it self-preferencing?
  - Do we then want to preserve “external data free to all”? No

Thanks a lot!

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https://twitter.com/TomValletti 

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