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BLOG

Remarks by DOJ's Antitrust Division Head Signal Intensified Scrutiny by U.S. Antitrust Enforcers of Digital Markets and Use of Aggregated Data

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Recent events and commentary have signaled a broadening of government antitrust scrutiny of the use of aggregated data in digital markets. While the DOJ, FTC, and virtually all states' attorneys general are engaged in highly publicized investigations of several "Big Tech" companies, there have been indications that enforcers also have set their sights on other industries where customer data plays an important competitive role—including recent remarks by Makan Delrahim, Assistant Attorney General for the DOJ's Antitrust Division, at a November 8, 2019 conference at Harvard Law School.

During his discussion of industries where anticompetitive "abuse" of customer data might occur, Delrahim referred to digital transportation apps, food and restaurant recommendation apps, and the use of image-posting apps in connection with product promotion:

> Need a ride? Your current location data can help get a driver to you within minutes. Looking for a new outfit? A recently pinned image can help suggest new staples for that evolving wardrobe. Looking for a place to dine? You get the picture. . . . **The aggregation of large quantities of data can [] create avenues for abuse.** . . . Such data, for example, can provide windows into the most intimate aspects of human choice and behavior, including personal health, emotional well-being, civic engagement, and financial fitness. It is becoming increasingly apparent that this uniquely personal aspect of consumer data is what makes it commercially valuable, especially for companies that are in the business of directly or indirectly selling predictions about human behavior.

Delrahim noted that many companies with business models premised on collecting and monetizing data—especially companies providing digital services with "zero price" to consumers—have escaped antitrust scrutiny thus far in the United States, as enforcers probing for anticompetitive effects traditionally have looked for higher-than-competitive prices and high market shares based on sales figures.

Significantly, Delrahim stated that it would be a "grave mistake" for antitrust assessment of digital markets going forward to focus solely on those traditional indicators of competitive harms. Rather, he said, to assess competitive harms in the digital marketplace, it is necessary to understand first that data itself is part of the price being paid by consumers, and that when a company's market dominance leaves consumers little choice but to turn over their

personal data to obtain a service, that in itself could be anticompetitive harm in the form of reduced quality and consumer choice. As Delrahim explained:

> [D]ata has economic value and some observers have said it is analogous to a new currency. . . . [F]irms can induce users to give up data by offering privacy protections and other measures to increase consumer confidence in the bargain. . . . We can, however, assess market conditions that enable dominant companies to degrade consumer bargaining power over their data. . . . **[I]t would be a grave mistake to believe that privacy concerns can never play a role in antitrust analysis.** . . . [S]ome consumers appear to hold revealed preference for privacy. . . . The goal of antitrust law is to ensure that firms compete through superior pricing, innovation, or quality. . . . Price is therefore only one dimension of competition, and non-price factors like innovation and quality are especially important in zero-price markets. **Like other features that make a service appealing to a particular consumer, privacy is an important dimension of quality.** For example, robust competition can spur companies to offer more or better privacy protections. Without competition, a dominant firm can more easily reduce quality—such as by decreasing privacy protections—without losing a significant number of users. . . . [T]hese non-price dimensions of competition deserve our attention and renewed focus in the digital marketplace.

Delrahim's stated view of customer data as potentially part of the consideration paid by the consumer, if adopted by the courts, would represent a sea change in how modern U.S. antitrust law is applied. Organizations seeking to assess their potential antitrust liability will face novel and difficult questions of how to account for data in determining their market share and the competitive effects of their business practices, which will require careful legal analysis.

In that regard, Delrahim quoted an OECD report concluding that "in markets where zero-prices are observed, market power is better measured by shares of control over data than shares of sales or any other traditional measures." European competition enforcers have made similar statements about how to assess digital market power, with Germany's competition authority recently concluding that "[t]oday data are a decisive factor in competition" and can be "*the* essential factor for establishing the company's dominant position," since "the attractiveness and value of the advertising spaces increase with the amount and detail of user data."

While Delrahim couched his discussion of consumer harms from data misuse in terms of economic injuries recognized under federal antitrust law—such as loss of quality and consumer choice—his strongly stated view that values like privacy and other "non-price dimensions of competition" must be taken into account nevertheless represents a shift from how enforcers and courts have analyzed anticompetitive harms in recent decades, having tended to focus on objective competitive measures such as price and output levels.

Deputy Attorney General Jeffrey Rosen likewise signaled a broadening of antitrust enforcers' focus beyond price and output levels in remarks to the ABA on November 18, 2019, quoting Justice Black's opinion in *Northern Pacific Railway v. United States*—a decision from 1958, in an era when courts still often held that the legitimate concerns of the Sherman Act extended beyond purely economic harms and benefits:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institutions.[1]

Compounding the growing antitrust risks for companies reliant on aggregated data is the fact that there appears to be a bipartisan desire in Washington for stronger data-related antitrust enforcement. In September 2019, the House Judiciary Committee issued document requests "demanding emails and other records from some of the [technology and data] industry's top chief executives as they look for evidence of anticompetitive behavior," as the *Wall Street Journal* recently reported. In October 2019, several Democratic and Republican U.S. Senators introduced legislation that would "requir[e] social media giants to give consumers ways to move their personal data to another platform at any time," in order to "loosen the grip social media platforms have on their consumers through the long-term collection and storage of their data" and "give rival platforms a chance at competing," declaring that "'[c]onsumers should have the flexibility to choose new online platforms without artificial barriers to entry.'"

While assessing an organization's risk exposure from this apparent shift in antitrust policy would require an individualized legal analysis, U.S. antitrust enforcers have hinted at the types of businesses they currently are focused on. For example, Delrahim alluded to "zero-price" digital services reliant on consumers submitting personal data, in markets where "a new entrant often cannot compete successfully . . . because it lacks access to the same volume and type of data," and he referred specifically to digital apps involving transportation, restaurant recommendation, and image posting. The types of conduct European competition enforcers have challenged in recent years, which we reviewed previously, also may provide insight into the business activities that U.S. enforcers are probing. Notably, some firms facing government scrutiny of planned acquisitions raising data issues have capitalized on the ongoing investigations of top technology companies, persuading regulators that their planned transactions will enable them to compete more effectively against that handful of top technology companies.

It is not clear how courts will resolve the difficult new questions of antitrust law raised by data-driven markets. But what is clear is that the U.S. antitrust enforcement landscape is changing quickly, resulting in significant risks and uncertainties for companies in the digital marketplace—particularly those whose business models are reliant on aggregated customer data. It likely will be prudent for such companies to develop legal strategies for mitigating those risks while this enforcement activity is still in its early stages.

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[1] 356 U.S. 1, 4 (1958).

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