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Contents

Voluntary Portability: A Procompetitive Solution to Data Enclosure

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Big Data is big business. Given the explosion of computing power in the 21st Century, firms are now able to organize "high-volume, high-velocity, and/or high-variety information" assets.[2] And it is no secret that American tech companies leverage the value made possible by the Internet and data.[3] For example, Mark Zuckerberg has stated that the continued success of Facebook is "not just about building the best features. It is about building the best community."[4] And Satya Nadella, CEO of Microsoft, has said that "data and digital is a new *factor of production*."[5]

Some firms have valuable positions that allow them to take advantage of this trend, especially firms whose business models involve platforms or networks. In a platform business model, "there is more surplus, more value that is built on top of the platform,"[6] and in a network, the firm operates the "roads for information traffic" to connect people or things.[7] In both, the firm's central position allows it to obtain troves of data from both the products that firm offers, as well as from third parties who operate on their platforms or networks.[8] After aggregating and analyzing the data, the firm can then monetize it by offering better, more innovative products in its primary market, and/or offering secondary products such as advertising.[9]

Some argue that aggregated data is not like other strategic inputs. Unlike other assets, which generally have "declining marginal utility, the value of any piece of data *increases* in combination with additional data."[10] Because of this, the enclosure[11] of large swaths of

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[1] Wyatt Fore is an associate in the Washington, D.C. office of Constantine Cannon.
[2] Big Data, *Gartner IT Glossary*, https://www.gartner.com/it-glossary/big-data/.
[3] Evan Osnos, *Can Mark Zuckerberg Fix Facebook Before It Breaks Democracy?*, NEW YORKER, Sept. 17, 2018.
[4] *Id.*
[5] Lianna Brinded, *Microsoft CEO Satya Nadella: We need to do to data what we did with electricity*, YAHOO FINANCE UK, Jan. 24, 2019 (emphasis added).
[6] *Id.*
[7] Network, *Gartner IT Glossary*, https://www.gartner.com/it-glossary/network.
[8] *See* Jonathan Taplin, MOVE FAST AND BREAK THINGS 76-77 (2017).
[9] *See* James Paine, *Big Data in Marketing: 5 Use Cases*, INC., Nov. 25, 2017.
[10] Sen. Mark Warner, Potential Policy Proposals for Regulation of Social Media and Technology Firms (Aug. 2, 2018) (citing Stucke & Grunes, BIG DATA AND COMPETITION POLICY (Oxford Univ. Press, 2016)); OECD, Data-Driven Innovation for Growth and Well-Being: Interim Synthesis Report 29 (Oct. 2014) [hereinafter *OECD Report*].
[11] By enclosure, I mean the creation of private property rights from "things that were formerly thought of as either common property or uncommodifiable," like information. James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMPORARY PROBLEMS 33, 37 (Winter 2003).

information within a handful of firms creates potential barriers to entry for nascent firms that rely on certain types of data as a critical factor of production.

But that view is not universally shared. Some commentators have noted that even if Big Data may give a firm an advantage in the primary market, it does not necessarily diminish competition because "users do not use a service because of a superior database but because of a superior experience."[12] Further, Big Data might not give an insurmountable position because data is not valuable in itself but rather relies on "talent knowing how to derive meaningful insights" from it.[13] And, of course, data is replicable and tends to go "stale," *i.e.*, it is "subject to . . . considerable value reduction" over time.[14] As a result, Big Data may offer firms only a temporary competitive advantage.[15]

Regardless, data enclosure is not just a potential issue for tech companies. Many industries, including retail, payments, agriculture, pharmaceutical distribution, and airlines, have shifted their business models to take advantage of Big Data. There are no easy solutions to potential concerns, but as described below, voluntary data portability can help prevent data enclosure by lowering barriers to entry for new market entrants.

I. Data Enclosure: A Possible Problem for Competition?

The effect of Big Data on competition is a hotly-debated topic. For example, the OECD notes that Big Data may cause a "'winner takes all' result" for certain firms.[16] This might occur for two reasons. First, because Big Data offers "increasing returns to scale," whereby data accumulation "can lead to significant improvements of data-driven services which in turn[] can attract more users, leading to even more data that can be collected."[17] And second, "increasing returns to scope," whereby the "diversification of services leads to even better insights if data linkage is possible."[18] When firms retain exclusive access to Big Data, this "can lead to market concentration and dominance as the inevitable outcome of market success."[19]

At least one European authority has taken an enforcement action that advances this theory of competitive harm. The German competition regulator recently ruled that Facebook abused its dominance in the German market for social networks "based on the extent of collecting, using and merging data" in violation of German competition law and the European

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[12] Jakob Kucharczyk, *Competition and Big Data: Some Trends Never Go Out of Fashion*, DISRUPTIVE COMPETITION PROJECT (Jan. 12, 2018).
[13] *Id.*
[14] *Id.*
[15] Anja Lambrecht & Catherine Tucker, *Can Big Data Protect a Firm from Competition?*, ANTITRUST CHRONICLE, Winter 2017, at 11.
[16] *OECD Report*, *supra* note 10, at 7.
[17] *Id.* at 29.
[18] *Id.*
[19] *Id.* at 30.

General Data Protection Regulation ("GDPR").[20] There, the German regulator asserted that data enclosure affected competition at two levels. First, in the primary market: Facebook's Big Data gave it undue market power "to the detriment of other providers of social networks."[21] Second, in ancillary markets that rely on Big Data, Facebook caused "competitive harm . . . for advertising customers and competitors in the advertising market" as well.[22] Under this rubric, advertising is not the only ancillary market that could suffer harm; following this argument one could imagine that the social network could leverage its market power to distort competitive markets in, for example, third-party applications.

So far, U.S. antitrust law has directly addressed the possible effects of data enclosure on competition in a few cases.[23] Generally, American enforcers have hesitated to endorse theories of anticompetitive harm from Big Data.[24] And historically enforcement decisions—including the landmark 2011 consent decree between the FTC and Facebook—have focused on the harm to consumers' privacy, rather than harm to competition.[25]

This reluctance mirrors the general rule that a company generally has a "right . . . freely to exercise [its] own independent discretion as to parties with whom [it] will deal,"—including for its data resources.[26] Of course, this rule against a duty to deal is not absolute, and courts have occasionally recognized that a dominant firm must deal with a rival.[27] However, the presumption is strong—and applies even for dominant firms, such as the defendant Verizon in *Trinko*, whose monopoly power was based on a physical network infrastructure. Although compelling that firm to share its infrastructure may temporarily boost competition, "it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities."[28] While, this "right to refuse" is "not unqualified" and exclusion "can

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[20] *See* Press Release, Bundeskartellamt, *Bundeskartellamt prohibits Facebook from combining user data from different sources* (Feb. 7, 2019).
[21] Frequently Asked Questions, Bundeskartellamt, *Bundeskartellamt prohibits Facebook from combining user data from different sources: Background Information on the Bundeskartellamt's Facebook proceeding* (Feb. 7, 2019).
[22] *Id.* The German regulator also found a consumer harm in "loss of control" that under German law was a harm to competition as an exploitative business term. *Id.*
[23] *See, e.g.*, Statement of the Federal Trade Commission concerning Google/DoubleClick at 12-13, *Proposed Acquisition of Hellman & Friedman Capital Partners V, LP by Google, Inc.*, No. 071-0170 (F.T.C. Dec. 19, 2007); *Realcomp II v. FTC*, 635 F.3d 815 (6th Cir. 2011) (regarding association website preventing information distribution to public real-estate advertising websites).
[24] *See* Victoria Graham, *'High' Threshold for Regulating Big Tech's Data: Justice Dept.*, BLOOMBERG LAW, Aug. 20, 2018.
[25] Press Release, Fed. Trade Comm'n, Facebook Settles FTC Charges That It Deceived Consumers By Failing to Keep Privacy Promises (Nov. 29, 2011).
[26] *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398, 408 (2004) ("*Trinko*") (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).
[27] *See, e.g.*, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 586 (1985).
[28] *Trinko*, 540 U.S. at 408.

constitute anticompetitive conduct,"[29] the precise boundaries of a dominant firm's legal duty to deal is highly contested.[30]

In contrast to Verizon's physical infrastructure, with Big Data there is a threshold issue of ownership. Unlike an intellectual property interest, such as copyright or trademark, there is no property interest for increasing amounts of information alone.[31] Further, data derives from information that *already* exists; thus, as a resource it is non-exclusive and also "non-rivalrous, meaning consumption of [it] does not decrease its availability to others."[32] As a result, commentators—and even some tech leaders—note that firms with access to Big Data are not "owners" of information, but rather merely "custodians" of it.[33] This creates a barrier-to-entry calculus that differs significantly from other resources, such as the physical networks in *Trinko*.

But, at least for now, there is a clear divergence between American and European approaches, particularly given Germany's recent actions against Facebook and similar proposals by the United Kingdom.[34] And unfortunately for most firms handling Big Data, they must comply with multiple regulatory regimes. As a result, it would be sensible for firms with Big Data to consider proactively any alleged anticompetitive effects.

II. Voluntary Data Portability: A Procompetitive Solution

In contrast to the United States, European officials have sought to enforce portability as a matter of regulation. The GDPR states that consumers have a right to "receive personal data they have provided to a controller in a structure, commonly used and machine-readable format," and request that a controller transmit the data directly to another controller.[35] However, commentators have noted that "it would be impractical and ineffective to copy and paste the GDPR to U.S. law—the institutions and legal systems are just too different."[36]

Recognizing that data enclosure poses possible issues for competition, firms and commentators have explored voluntary portability, "a feature that lets a user take their data

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[29] *Id.*
[30] *Compare, e.g.*, Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1989), *with* Sandeep Vaheesan, *Reviving an Epithet: A New Way Forward for the Essential Facilities Doctrine*, 3 UTAH L. REV. 911 (2010).
[31] *See Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) (finding phone book white pages not copyrightable).
[32] Lambrecht & Tucker, *supra* note 15, at 1.
[33] World Economic Forum Annual Meeting, *Digital Trust and Transformation: A Conversation with Satya Nadella*, WeForum.org, Jan. 24, 2019; *cf. also* Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183 (2016) (proposing an "information fiduciary" duty on data collectors to protect privacy rights).
[34] UNITED KINGDOM EXPERT PANEL ON DIGITAL COMPETITION, UNLOCKING DIGITAL COMPETITION (Mar. 2019).
[35] General Data Protection Regulation, Regulation 2016/679, art.20(1), 2016 O.J. (L. 119) 1.
[36] Gus Rossi, *Is the GDPR Right for the United States?*, PUBLIC KNOWLEDGE BLOGS, Apr. 9, 2018.

from a service and transfer or 'port' it elsewhere."[37] Data portability thus lowers switching costs, prevents consumer lock-in, diminishes network effects, and promotes competition between services. This benefits consumers by incentivizing platforms and services to compete on quality, innovation, features, consumer privacy protections, and price.

One example is the Data Transfer Project ("DTP"), an "open source initiative to enhance the data portability ecosystem by reducing the infrastructure burden on both providers and users"[38] by "enabl[ing] consumers to transfer their data directly from one service to another, without needing to download and re-upload it."[39] Current DTP contributors include Facebook, Alphabet, Microsoft, and Twitter, but the project "encourage[s] participation of as many providers as possible."[40]

Central to the DTP's stated goals is diminishing anticompetitive effects: "If a user wants to switch to another product or service because they think it is better, they should be able to do so as easily as possible. This concept of allowing users to choose products and services based on choice, rather than being locked in, helps drive innovation and facilitates competition."[41] Thus, this portability aims to promote competition much in the same way that the "local number portability ['LNP'] requirement by Congress in the Telecommunications Act of 1996" helped to "facilitat[e] competitive switching among customers."[42] Before LNP, the practical effect of forcing a customer to give up her telephone number—and then tell all her contacts about her new number—created substantial lock-in effects to incumbent local exchanges. Thus, number portability promoted competition by diminishing switching costs.[43] Similarly here, DTP would lower the switching costs based on the fact that it is "difficult and time-consuming to move data between platforms."[44] Thus commentators have expressed cautious optimism that the DTP is "potentially offer[ing] a solution to a major problem with social networks" because companies "instantly operate with a user's existing data rather than making them start from scratch."[45]

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[37] Gennie Gebhart et al., *What We Mean When We Say 'Data Portability'*, ELECTRONIC FRONTIER FOUNDATION: DEEP LINKS (Sept. 13, 2018).
[38] Data Transfer Project Overview and Fundamentals 3 (July 20, 2018).
[39] Brian Willard, *Introducing Data Transfer Project: an open source platform promoting universal data portability*, GOOGLE OPEN SOURCE BLOG (July 20, 2018).
[40] *Id.*
[41] *Id.*
[42] Sen. Warner, *supra* note 10, at 20; 47 U.S.C. § 251(b)(2).
[43] *See* R. Hewitt Pate, Assistant Attorney General, U.S. Dep't of Justice Antitrust Div., Telecommunications Competition (Dec. 4, 2003) (citing *Telephone Number Portability, CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues*, CC Docket No. 95-116, Mem. Op. & Order & Further Notice of Proposed Rulemaking, FCC 03-284 (Nov. 10, 2003)).
[44] Rep. David N. Cicilline & Terrell McSweeny, *Competition is at the Heart of Facebook's Privacy Problem*, WIRED, Apr. 24, 2018.
[45] John Constine, *Facebook, Google and more unite to let you transfer data between apps*, TECHCRUNCH, July 2018.

Some have voiced skepticism that "data portability could be used by dominant providers *to the detriment* of smaller, emerging providers."[46] Per this concern, one could imagine that dominant firms could circle the wagons to disincentivize "portability requests to new entrants who may pose a competitive threat to them."[47] However, the DTP appears to take these concerns seriously, and the prototype "supports data transfer for several product verticals including: photos, mail, contacts, calendar, and tasks" and "enabled by existing, publicly available APIs [or Application Program Interfaces] from" both major and minor tech firms, including "Google, Microsoft, Twitter, Flickr, Instagram, Remember the Milk, and SmugMug."[48]

Further, even with incumbency advantage, data portability promotes competition in *ancillary* markets, *i.e.*, not just the firms from which data is downloaded, but the firms built on top of those firms. By lowering switching costs for consumers, data portability promotes competition among firms who create surplus value on top of networks and platforms by preventing those firms from becoming locked in to a particular network or platform. If a third-party application can compete on both Facebook and Google, consumers benefit.

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The DTP and other similar voluntary data portability initiatives[49] are in their infancy. Notably, there are "difficult tensions between data portability and privacy that must be balanced,"[50] as well as continuing technical challenges. As a result, firms and commentators should continue to analyze the competitive effects of voluntary data portability and continue the conversation.

Regardless, data portability offers a potential straightforward solution to the problem of data enclosure by lowering switching costs for users and preventing barriers to entry for nascent firms. This promotes competition—allowing consumers to benefit from cheaper and more innovative products as the digital marketplace expands.

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[46] Sen. Warner, *supra* note 10, at 21.
[47] *Id.*
[48] Willard, *supra* note 39.
[49] *E.g.*, Red Hat's Open Shift Container Platform, https://www.redhat.com/en/technologies/cloud-computing/openshift.
[50] New America Open Technology Institute, Comments on Federal Trade Commission Hearing on Competition and Consumer Protection in the 21st Century of New America's Open Technology Institute 4 (Aug. 20, 2018).