Responses to Questions for the Record

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Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy,
and Consumer Rights

Hearing on

"Competition in Digital Technology Markets:
Examining Acquisitions of Nascent or
Potential Competitors by Digital Platforms"

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QUESTIONS FROM SENATOR BOOKER

1. The metaphor of data as "the new oil" is somewhat inaccurate,[1] but there is no denying that venture capital investors oftentimes evaluate startups based on their ability to access or build data sufficient to extract rents, and gain insights into which competitors to copy, buy, or block.

    a. What is the best metaphor for the role data play in the platform economy?

    I agree that data as "the new oil" is an inaccurate metaphor; although, it does work on one level. Raw oil does not provide much value until it is refined and turned into a final product such as gasoline. In a similar way, data in and of itself has no value unless it is processed and utilized in a way to help a firm innovate or improve its products. That being said, big data is one input, among many, that a firm uses to maximize profits, including through innovation. The success of a new product, new feature, or other types of innovation, whether from an entrant or an incumbent, relies on a mix of factors that the firm combines to help it take advantage of concurrent market opportunities, e.g., shifts in consumer preferences or changes in rivals' behavior. Indeed, even with potential network effects and associated feedback effects from the use of big data, the fundamental reality is that data lacks worth unless it is combined with ingenuity, skill, and market conditions to unlock its value. Nearly all research on big data has affirmed this central point. For example, the Centre on Regulation in Europe state in their report on big data: "data are one input, which is important but not unique, to developing successful applications and algorithms. Other inputs are also important…the skills and creativity of the labour force will be key to the success of the applications."[2]

    Perhaps the best metaphor is given by Xavier Boutin and Georg Clemens: "In our view, data is not comparable to oil; it is rather comparable to wind. Data flows and is largely accessible. Just like wind, it needs to be captured to be transformed into something valuable. Both windmills and data processing technologies certainly improve when tested in real conditions. However, in this context, it is the accumulated experience that is valuable, and not the accumulated wind, nor the historical data."[3]

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[1] *See, e.g.*, Antonio García Martínez, *No, Data Is Not the New Oil*, WIRED (Feb. 26, 2019), https://www.wired.com/story/no-data-is-not-the-new-oil.

[2] Centre on Regulation in Europe (CERRE), "Big Data and Competition Policy: Market Power, Personalised Pricing and Advertising, Project Report," February 16, 2017, p. 7.

[3] Xavier Boutin and Georg Clemens, "Defining 'Big Data' in Antitrust," *CPI Antitrust Chronicle*, August 2017, pp. 1-7 at 6.

b. How important is it for a startup to have the data in the first place, compared with being able to invent with the research and infrastructure necessary to develop and cultivate those data? Which is the bigger barrier to entry?

The paradigmatic antitrust concern involving big data is when it is perceived as an essential and exclusive factor in the production of a final good or service—typically as it relates to multi-sided platforms and/or other digital markets. Yet, all assessments of big data must, at some point, address how big data fits into the larger production function of firms—whether in a digital or widget market. While there are instances where data is the final product, e.g., commercial databases, this is not the primary concern in terms of competition policy as it relates to big data.

Looking at past entry events, it seems fairly clear that big data is not always and everywhere a barrier to entry that prevented successful challenges to incumbency. For instance, there are well-documented examples including Facebook's disruption of MySpace; Google's disruption of Yahoo and Alta Vista; Chrome's disruption of Internet Explorer; and Spotify's disruption of Apple's iTunes.

The central point is that big data must be considered in the larger context of a firm's production function. Further, it is not necessarily the relative size of the collected data that can confer a competitive advantage but the quality of the data and/or the quality of the data analytics.[4] *Given the rise of cloud computing and the resources it offers to even start-ups, it is unlikely that infrastructure, in of itself, represents a barrier to entry in a meaningful way. It boils down to the fundamental reality that the mere possession of big data does not necessarily accord a competitive advantage to a firm. As in almost every dimension of competition, firms differ, not only in the attributes of their final products, but in how they organize themselves—including the extent and efficiency of their use of big data via analytics.*[5]

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[4] *See* Eliana Garces, "Data Collection in Online Platform Businesses: A Perspective for Antitrust Assessment," CPI Antitrust Chronicle, May 2018, at 3 ("Access to data is not normally at the root of an online platform's success.").

[5] Global Antitrust Institute, Comment on the Canadian Competition Bureau's White Paper, "Big Data and Innovation: Implications for Competition Policy in Canada," November 17, 2017 ("The implication is that, when considering the role that big data plays in a given market, rivals might speciously suggest that a market leader is succeeding due to the leader's sheer volume of data, when it is not data which is scarce but the skill and talent needed to combine the data with other inputs to produce something of value," p. 3).

For the purposes of competition policy, it is critical to understand precisely why a product is successful. Even in the presence of big data, building a better mousetrap is the foundational paradigm of competition. The path to a better mousetrap can differ across markets and within firms in a given market.

Finally, when assessing the role that big data should play in competition policy, what must not be lost is that big data can lower a firm's costs through a more efficient production process and/or result in greater demand through higher quality or a greater matching to consumers' taste and preferences. This benefit is decidedly procompetitive and consumer welfare enhancing.

2. I have focused extensively on how millions of American workers are limited in their ability to switch jobs because of "noncompete" and "no poaching" agreements—contractual provisions that forbid employees from leaving their job, and working for a competitor or starting their own business.[6] These provisions have been shown to reduce employee motivation, entrepreneurship, and knowledge sharing, all of which are integral to fostering innovation and growth.

   There are similarly restrictive contractual provisions throughout the tech platform industry— namely, exclusive contracts and loyalty contracts—that can be used to exclude nascent competitors. For example, long-term contracts that prohibit advertisers from using new entrants can stifle demand from that new provider, causing them to exit the industry prematurely. Similarly, contracts between platforms and advertisers that provide for individual negotiation can keep incumbents from losing unique targeted sales to new competitors without requiring the incumbent to lower prices across the board.

   a. There is a very strong case to be made that no-poaching agreements are unfair trade practices in violation of Section 5 of the Federal Trade Commission (FTC) Act. Should the FTC consider a rule banning these agreements?

      No-poaching agreements are certainly an area that rightly deserves scrutiny as to its impact on labor markets. The question regarding whether or not these agreements are a violation of Section 5 of the FTC Act comes down to whether or not the agreements

[6] *See, e.g.*, Cory Booker, *The American Dream Deferred*, BROOKINGS INST. (June 2018), https://www.brookings.edu/essay/senator-booker-american-dream-deferred; Office of Sen. Cory Booker, Press Release, Booker, Warren Introduce Bill To Crack Down on Collusive "No Poach" Agreements (Feb. 28, 2018), https://www.booker.senate.gov/?p=press_release&id=760.

serve a function other than to nakedly restrict the movement of labor. The costs of no-poaching agreements are well-documented: reduced labor mobility and greater, although not absolute, lock-in with the current employer. Yet, we should always fully examine the evidence before arriving at a policy conclusion. That being said, agreements between competitors to nakedly fix prices, quantity, R&D, wages, et cetera should be condemned by antitrust laws.

Noting the importance of this issue, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have issued a joint Antitrust Guidance for Human Resource Professionals.[7] The guidance properly concludes: "From an antitrust perspective, firms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the firms make the same products or compete to provide the same services. It is unlawful for competitors to expressly or implicitly agree not to compete with one another, even if they are motivated by a desire to reduce costs."[8]

In terms of whether or not the FTC should consider an outright rule banning these agreements, the conduct or practice must be so overwhelmingly harmful to workers with almost no exceptions that we are never willing to examine the actual evidence for each specific situation. While this is effectively the law today in regard to no-poaching agreements between firms, the question is whether the ban should apply to no-poaching agreements within a franchise.[9] While I am not as well-versed in this area of research, it appears the benefits of non-poaching agreements, from an efficiency perspective, are very limited.

b. Are there potential efficiency benefits that make it particularly difficult to challenge this behavior under existing antitrust law?

In terms of no-poaching agreements, a nice summary of a potential efficiency argument is provided by Alan B. Krueger and Orley Ashenfelter: "If the labor market is imperfect to begin with because of search and matching frictions, credit constraints, imperfect information, or the absence of binding contracts, (both specific and general) human capital investment could be suboptimal prior to the implementation of a no-poaching agreement. By limiting workers' outside options, a no-poaching agreement reduces worker bargaining power over any net surplus created from the employment

[7] Department of Justice, Antitrust Division, and Federal Trade Commission, *Antitrust Guidance for Human Resource Professionals*, October 2016, https://www.justice.gov/atr/file/903511/download.
[8] *Id* at 2.
[9] *See* Evan Starr, "The Use, Abuse, and Enforceability of Non-Compete and No-Poach Agreements," Economic Innovation Group, February 2019 Issue Brief, at 14.

relationship, including from training. Because they capture a larger share of the net surplus, employers have a stronger incentive to invest in human capital with a no-poaching agreement. The net effect on workers is ambiguous, however, as the decline in their bargaining power clearly reduces the share of the net benefit they receive from training investment, while the size of the net surplus could potentially be increased because of additional training investment (Grout, 1984)."[10] *It is important to note that Krueger and Ashenfelter are only working through the logic of this potential efficiency argument and are not necessarily endorsing its applicability to current labor markets.*

In terms of non-competes, the efficiency justifications are likely more valid and extensive. For a summary, see Evan Starr (2019): "Firms may invest more in R&D and other innovation-related activities if they believe a competitor is less likely to capture some of their knowledge investment thanks to non-competes. For this reason, non-competes and their enforceability can spur firm-level investment and innovation."[11] *It can also spur greater incentives by firms to invest in their workers.*

c. Do the current safe harbors for "short-term" exclusive dealing arrangements capture the market power of dominant platforms, which, arguably, do not need long-term contracts to create the desired outcome from their partners?

Without the specifics of a given exclusive dealing arrangement and without determining the precise scope and length of the short-term agreement, it is difficult to arrive at a firm recommendation. Importantly, platforms are not uniform in their level of market power and that power might not necessarily extend uniformly over all aspects of the market including the various "sides" or groups on a platform (e.g., users, advertisers) as well as the workers. Finally, exclusive dealing—as a general matter—are considered under a rule of reason because there are plausible efficiency justifications for their use under certain circumstances.

3. As we navigate the contours of crafting federal privacy legislation, one of the most intense recurring debates centers around interoperability provisions, i.e., the ability of consumers to control the use of the information they provide on one service on another service.

a. What kinds of data should be portable?

Interoperability is an enormously important policy discussion. Of course, there are

[10] Alan B. Krueger and Orley Ashenfelter, "Theory and Evidence on Employer Collusion in the Franchise Sector," Princeton University, Industrial Relations Section, September 2017, Working Paper No. 614 at 18.
[11] *Supra* note 9 at 9.

natural tendencies to desire interoperability and the related concept of data portability. The idea is to reduce switching costs and foster greater competition since there is effectively one "standard" that all firms and users can plug into. Yet, this aspect also points to the potential shortcomings from forced interoperability and data portability. The first is that competition manifests itself on a number of dimensions including quality and features. Yet, the more quality and features start to become differentiated, the more likely products start to be developed along different paths, which almost inevitably will lead to incompatibilities and some degree of switching costs.

That being said, in terms of data portability, there are no easy answers. The question of who has "ownership" over content and interactions on social media, for example, is not a straightforward question—yet it is at the heart of the debate. For example, if a user has hundreds of contacts that they want to port over to another social media account, and further suppose that some of those contacts do not want their data in the hands of the new social media company (e.g., due to concerns about security controls and features which are unproven and untested on a new platform). What is the resolution? Who has the "property right" over that data? Of course, these are not insurmountable questions, and there are creative solutions that could emerge. What is important to consider is that regulating data portability specifically or interoperability more generally can have unintended consequences and should be pursued only after a thorough review.

b. Generally speaking, how would a law giving consumers control of their data affect the viability and valuation of nascent tech companies?

My view is that nascent technology companies succeed or fail based on the level of quality and differentiation of their products relative to the incumbents'. Of course, all else equal, a greater compatibility with existing products could facilitate consumer adoption of a new product. Yet, this is not always the case. For instance, Snapchat (est. in 2011) is used more intensely per user than all other social media messaging apps in the U.S., including Facebook, Instagram, Messenger, and Pinterest.[12] *Yet, part of the value of Snapchat for certain demographics most likely includes the fact that it is expressly not Facebook nor is it compatible with Facebook's platform. Thus, my view is that a law giving consumers control of their own data would have little impact on the viability and valuation of nascent competitors in the digital economy due to a belief*

[12] *See* App Annie ("2018, Top Social & Communication Apps by Average Monthly Sessions Per User"). Among users aged 12 to 17, Snapchat is the market leader with 16.8 million users, while Instagram and Facebook are second and third at 12.8 million and 11.5 million, respectively. *See* eMarketer, "Facebook is Tops with Everyone but Teens," August 28, 2018, https://www.emarketer.com/content/facebook-is-tops-with-everyone-but-teens.

that successful entry in this sector is based largely on differentiation rather than compatibility.

c. Does the FTC, as currently constructed, have the resources to effectively manage a behavioral remedy that mandated data sharing from bad actors?

While behavioral, or conduct, remedies have recently come under fire, they represent a legitimate class of remedies for agencies to utilize. The primary advantage of behavioral remedies is the ability to preserve the efficiencies from certain conduct (e.g., a merger) while carving out conditions to mitigate the anticompetitive harm. Assuming, arguendo, that mandating data sharing is an appropriate remedy, it certainly would be a difficult area to monitor for the FTC. Most likely, a third party would have to be the monitor. It is difficult to know whether, in practice, such an arrangement would make sense and as it involves a great deal of uncertainty and unobservable behavior. In this circumstance, it would seem moving to a more structural solution would save enormous administrative costs.