

# A NEW DIGITAL SOCIAL CONTRACT TO ENCOURAGE INTERNET COMPETITION



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# CPI ANTITRUST CHRONICLE

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### Big Data and Online Advertising: Emerging Competition Concerns

By Hon. Katherine B. Forrest (fmr.)



### Public Goods, Private Information: Providing an Interesting Internet

By J. Howard Beales III



### What *Times-Picayune* Tells Us About the Antitrust Analysis of Attention Platforms

By David S. Evans



### Online Advertising and Antitrust: Network Effects, Switching Costs, and Data as an Essential Facility

By Catherine E. Tucker



### Attention Oligopoly: Comments on the Paper by Prat & Valletti

By David Parker & Federico Bruni



### Competition in Display Ad Technology: A Retrospective Look at *Google/DoubleClick* and *Google/Admob*

By Dan Bitton, David Pearl, Maurits Dolmans & Henry Mostyn



### Advertising as Monopolization in the Information Age

By Ramsi A. Woodcock



### A New Digital Social Contract to Encourage Internet Competition

By Dipayan Ghosh



### From Demoting To Squashing? Competitive Issues Related to Algorithmic Corrections: An Application to the Search Advertising Sector

By Frédéric Marty



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## I. THE NEW TRAJECTORY OF THE DIGITAL ADVERTISING ECOSYSTEM

Over the past year, the common conception that the lion's share of the digital advertising market would securely remain the dominion of Facebook and Google for the foreseeable future was turned on its head with the emergence of an entirely new player: Amazon. The company's emergence in digital advertising has raised the idea that it might present a major challenge to the market power that Facebook and Google have developed in the sector over the past many years.<sup>2</sup>

The numbers seem to illustrate this dynamic: Whereas Amazon's market presence totaled around 6.8 percent a year ago, its share has grown to an estimated 8.8 percent this year, and is expected to increase to 10 percent as the other firms gradually drop.<sup>3</sup> As some experts have noted, this precipitous jump — which affirms Amazon as third in the rankings of internet firms that participate in the digital advertising market — does not appear to have been induced by an artificial blip or an accounting update; rather, it represents a concerted strategy by the firm to engage the digital advertising ecosystem and make itself a major player in that sector to generate high-margin profits into the future. Reports meanwhile suggest that Facebook and Google, which enjoy a collective share totaling nearly 60 percent, are becoming increasingly worried as Amazon's position in the market climbs.

In fact, Amazon's emergence in digital advertising appears to have come quite late; it is a behemoth of a firm that has come to dominate another U.S. consumer market — e-Commerce — and the platform visibility and audience that comes with that market dominance. Amazon last year had revenues of over \$230 billion — a sum that is a jaw-dropping one-hundredth of the entire U.S. gross domestic product. The vast majority of those revenues are generated by Amazon's signature shopping service — a presence that trumps that of any other American e-Commerce firm.

And through that platform, Amazon has generated the capacity to collect inordinate amounts of highly valuable data on its users. This practice of data collection likely happens through two primary means. First and foremost is user engagement with Amazon's shopping service, through which customers can search for anything from Apple products to zipper handles. Second, is the user's engagement with Amazon Prime, and particularly Prime Video, through which customers can search for and view many of the latest media offerings, including television series and films. To add a note to this, given the tremendous opacity associated with business practices across the internet sector, we are largely uninformed about the reach and magnitude of other data collection practices in which the firm might engage, including, for example, the purchase of personal informa-

<sup>2</sup> Suzanne Vranica, "Amazon's Rise in Ad Searches Dents Google's Dominance," *The Wall Street Journal*, April 4, 2019.

<sup>3</sup> "US Digital Ad Spending Will Surpass Traditional in 2019," *eMarketer*, February 19, 2019.

tion from data brokers, or the use of web cookies on third-party websites — which many have argued damages individual privacy online.<sup>4</sup>

It is this combination of data collection practices that has encouraged Amazon to think more creatively about how it could enter the digital advertising space with force; in one hand, it controls an expansive consumer audience through its dominating shopping search platform and fulfillment system, and in the other, it has knowledge of the personal preferences and desires of each and every individual user of that platform. This is a compelling combination that engenders enormous commercial success for any company that masters the art of effectively setting up a digital advertising platform. Why did Amazon not place its bet on digital advertising years ago? There are multitudes of possible reasons, and the answer is most likely a combination of them: (1) That Amazon was more intently focused on other business areas, including the expansion of its e-Commerce platform or the buildout of its commercial cloud computing offering, Amazon Web Services, which today contributes just 11 percent of the firm's revenues, but accounts for around half its operating margin; (2) That it wanted to give its platform service more time, perhaps after one of its recent marketing pushes, to settle into broad use with the mainstream public; (3) That it was fearful that introducing display advertising alongside its core services, especially for Prime members, could jeopardize its relationships with its customers early in the product cycle; (4) That it saw a more compelling opportunity when it started making larger investments in the space than ever before, perhaps because of the recent policy troubles that some of its competitors had been facing; or (5) That the firm simply did not possess the intellectual ingenuity or technical expertise to construct a robust digital advertising platform that it could integrate into its platform offerings until very recently.

Regardless, the fact is that Amazon is now fully invested in digital advertising, and it is here to stay for the foreseeable future. In addition, it is worth mentioning that some other platform firms have also made notable strategic moves in the digital advertising market. Snapchat's share, for instance, rose by more than 80 percent of its less than one percent of the market, from \$600 million to a little over \$1 billion. Twitter, Verizon, and AT&T have each also made recent moves in the industry with varying success. But, even collectively, the efforts beyond those of Amazon and the Google-Facebook duopoly appear to be minor, if that.

## II. NEW COMPETITION FOR THE GOOGLE-FACEBOOK DUOPOLY?

Many have concluded that Amazon's surge in the digital advertising market constitutes real competition to the likes of Facebook and Google. For those two firms, watching Amazon's steep climb to nine percent in such a short space of time will without question have raised eyebrows among internal advertising and business development executives.

But such claims should be discarded out of hand. American competition policy is chiefly concerned with two principal desired market outcomes. The first is the support and maintenance of consumer welfare — which the developing jurisprudence in the United States has over several decades deemed to translate primarily to the prices that consumers perceive or pay in currency in exchange for goods and services. The second is the ongoing protection of dynamic markets whereby those firms that rise to the top of the American industry shall do so due to the merits of their competitive strategy — be it on their pricing or quality of service.

Consider the possibility that Amazon's presence in the market will not challenge Facebook's or Google's principal digital advertising practices; nor will Amazon's emerging digital advertising practice itself be challenged by Facebook or Google. We have already seen the evidence that Amazon's force in the market as illustrated by its precipitous rise in share. Could it be the case that Amazon's emergence will induce Facebook and Google to vastly change their own practices — be it in the ways that they curate content, or target ads, or collect data on individual users? I would contend that it cannot be. As a matter of fact, we could even see the quiet emergence of a new three-pronged hegemony over digital advertising in the United States led by Amazon, Facebook, and Google.

Why will Amazon's growing presence not force Google or Facebook to modify their practices in the market? It is because online advertising is a wholly different sort of market. Yes, it has cash-rich patrons, the most revenue-contributing of them being large and medium-sized businesses, but the money they net from advertisers — indeed, their direct revenue — is a mere byproduct of the actual payment they receive for their core services, whether they are social media firms, or search engines, or e-Commerce platforms: The amalgamation of the aggregate minutes of attention and data of their individual users.

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<sup>4</sup> See e.g. H. Nissenbaum, "A Contextual Approach to Privacy Online," *Daedalus*, Vol. 140, Iss. 4, Fall 2011.

Payment for personalized ad space is only the way in which prices are extracted from the commoditization of attention and data. In other words, for Facebook and Google, the principle arena for competition is not the attention of advertisers. It is the attention of individual users — which, once secured, encourages the uninhibited collection of data on the consumer. That collective attention is something that Facebook and Google — and now, Amazon — will possess for the foreseeable future. Their presence in this way is absolutely secure — as well as the advertising profits that are a byproduct of that hegemony over consumer attention. The fact is that the commodity they are paid and which they forwardly monetize — combined consumer attention and data — is only that. It is both a currency and instrument that these firms implement to operate their respective internet service platforms, which at this stage have established tremendous power over their respective consumer markets — be they internet search, social media, video sharing, email, e-Commerce, or internet-based text messaging. Thus, to claim that Amazon's growing presence in the digital advertising market represents stiff competition is, at best, an inaccurate or incomplete designation. These three firms are pseudo-monopolists in their respective markets that serve individual consumers and, through persistent leverage of their market power, charge monopoly rents as they convert the voluminous currency paid by end-customers (in the form of their aggregate time and data) into large cash outlays made by advertising clients.

It should be noted that one reason that the currency collected from the end customer — which comes in the form of personal data and attention — is so voluminous is because of the nature of the collection of that currency. It is organic, unlike the situation of a customer making a physical or digital monetary payment; and as scholars have noted, consumers do not immediately ascribe a fair market value to their personal information in the moment of its collection.<sup>5</sup> This dynamic results in a situation whereby the consumer lacks sensitivity to the collection of personal information — or as we have put another way, his or her “privacy prices.”<sup>6</sup> These prices are in turn perfectly inelastic because of the combination of the average consumer's lack of knowledge or understanding about the fair value of personal information, the use of that information for commercial purposes,<sup>7</sup> and the simultaneous frictionless experience in submitting to such prices, extortionate as they may be.

This situation has triggered a recent charge by the Federal Cartel Office (“FCO”) of Germany, which brought forward a novel case against Facebook earlier this year. The FCO argues that Facebook has monopoly status in the German social media market: the firm has 32 million users in Germany, representing 80 percent of the market share, just over double the threshold that traditionally invites particular scrutiny from European regulators. This presence practically forces the service on many German citizens, the FCO argues, and the fact that the firm additionally forces its users to submit to the unchecked collection of personal information constitutes commercial abuse. The agency noted in February:

In view of Facebook's superior market power, an obligatory tick on the box to agree to the company's terms of use is not an adequate basis for such intensive data processing. The only choice the user has is either to accept the comprehensive combination of data or to refrain from using the social network. In such a difficult situation the user's choice cannot be referred to as voluntary consent.<sup>8</sup>

It is worth noting that while Mundt's arguments are intellectually honest to the commercial situation at hand, this case represents a new direction for antitrust regulation: It is the first clear and open acknowledgement, backed by the force of the regulatory stick in the air, that the systematic encroachment against the data privacy of the individual and the individual's relative paucity of alternatives for service access are closely intertwined and should be approached together wherever the political opportunity exists. We had not, until this point, witnessed such a clear tying of regulatory powers toward the maintenance of market competition and individual privacy.

While Amazon's increasing market share might appear alarming to companies like Facebook and Google in terms of the numbers, the reality is that the industry overall is expanding rapidly, including the absolute advertising revenues that Facebook and Google appreciate each year. While their aggregate market share has diminished over the past several years, they have both experienced double-digit growth in advertising revenues year over year in the same period. Amazon's growing presence in digital advertising in reality does not threaten Facebook or Google because of their absolute control over the markets about which they are truly concerned; their presence in the markets for the internet services they offer end-consumers is secure, as is the magnitude and value of the currency they extract from their customers through it.

5 See e.g. Luc Wathieu & Allan A. Friedman, “An Empirical Approach to Understanding Privacy Valuation,” *Harvard Business School*, Marketing Research Paper No. 07-075, April 2007.

6 D. Ghosh & B. Scott, “Digital Deceit II: A Policy Agenda to Fight Disinformation on the Internet,” *Shorenstein Center for Media, Politics, and Public Policy*, Harvard Kennedy School, September 2018.

7 John Gramlich, “10 Facts about Americans and Facebook,” *Pew Research Center*, February 1, 2019.

8 Elizabeth Schulze, “Germany accuses Facebook of abuse, slaps restrictions on how it can gather data,” *CNBC*, February 7, 2019.

Seen in this light, Amazon is participating in a new three-pronged dominance of the digital advertising market whose respective shares are largely determined by the other side of the two-sided ecosystems operated by these three leading firms — determined, in particular, by the reach and effectiveness of the internet services that these companies develop. This suggests that Amazon's growing presence in the digital advertising market is nominal at best; it does not imply new competition to Facebook and Google — but rather does little to the competitive dynamics in digital advertising overall.

As for the smaller firms that possess some market share, it should be noted that the industry can be cyclical; the leading internet platform firms have had an extended period of low public perception. This takes nothing away from the enterprising nature of firms such as Snap, whose principal social media service Snapchat brings in the vast majority of its advertising revenues. But we must see its near doubling in market share in digital advertising as no more than a result of a vigorous strategy of growth and entrepreneurship with data and novel practices and new offerings for advertisers. Indeed, Snapchat has introduced several new key features for advertisers over the past two years, much of which has likely occurred because the larger internet firms have had a bad year. For instance, Facebook, in the wake of the Cambridge Analytica revelations, was in practice compelled by public sentiment to shutter Partner Categories, the service that enabled data brokers to inject their data into the Facebook advertising platform at the behest of advertisers.<sup>9</sup> This was the tool that allowed, for instance, Audi to target an ad campaign for a new sports car at persons who had walked into a BMW or Mercedes dealership any time in the past few months. Of the four major American data brokers, it is Oracle that collects this information on the potential sports car customers. Audi could target walk-ins to the other manufacturers' dealers by selecting that audience through Facebook's Partner Categories interface, and for each dollar spent in disseminating marketing messages to that segment over Facebook's platforms, Oracle would take a cut. On the heels of the revelations shared by the Cambridge Analytica whistleblower, Facebook quietly announced that it would shut the service down in a three-line press release — which they likely did to avoid further scrutiny over the questionable and opaque transfer of millions of people's personal data between various companies at the click of a button, in combination with the fact that Facebook itself could likely recoup much of the lost business by investing more in its own analytical technologies designed to infer consumer behaviors and preferences. Within days, Snap announced that it would commence a very similar targeting capacity with brokered third-party data<sup>10</sup> — which it could do because of the lack of scrutiny over the firm at a time when the public was attuned to the disservices of others in the industry.

### III. THE ESTABLISHMENT OF A NEW THREE-WAY HEGEMONY?

It is thus inaccurate and misleading to suggest that competition is stiffening in digital advertising; this false conclusion suggests Facebook, Google, and Amazon five years may suffer in maintaining their trajectories of growth in digital advertising, and more fundamentally, that there is a capacity for other players to enter the market. Neither of these is likely, namely because of the markets in internet services that these firms already control — which predicate their advertising revenues. At their core these firms' collective ad space is only as valuable as the size of the audiences they command in combination with their respective audiences' propensity to spend dollars; the reality is that these three firms have each secured that valuable audience in their own way. As a matter of fact, we could actually see these three firms become more powerful over time should the regulatory community fail to take commensurate action to curb their hegemony.

This argument hinges on an accurate conceptualization of the business model that prevails across the digital advertising sector — and more fundamentally, the consumer internet.

The first pillar of this business model is predicated on the creation and expansion of tremendously compelling platforms like the News Feed, Messenger, Instagram, Amazon, Google Search, or YouTube — platforms that are algorithmically designed to maximize user engagement. These platforms, each of which leverages an established network effect, are so popular and pervasive, even for non-users, that it is hard to entirely avoid them, whether in terms of active use or simply in terms of external surveillance.

The second pillar is the unchecked collection of personal information on the individual through those services — collection that empowers these firms to develop and maintain robust and detailed behavioral profiles on individual users. These profiles are developed based on inferences made in real time about the individual using the amalgamation of data that firms like Amazon, Google, and Facebook collect, including: Search and browsing history on the internet and specifically on the respective platform; connections made with others through the platform and otherwise; precise location information using GPS technology; location information gleaned through wireless network connections, cellular

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<sup>9</sup> Shutting Down Partner Categories, Facebook Newsroom, March 28, 2018.

<sup>10</sup> Marty Swant, "Snapchat and Nielsen Partner to Integrate Offline Data For Audience Targeting," *Adweek*, July 19, 2018.

network connections, and IP addresses; biometric and biological information provided by the individual; information purchased or provided by data brokers; information provided by other outside entities including advertisers; and third-party websites that have installed cookies on their websites — among other sources.

The third pillar is the development and ongoing refinement of highly opaque and increasingly intricate artificial intelligence designed to do two things: Curate social feeds and target advertisements at the individual.

All consumer internet firms — by which I mean the firms that participate in and host digital advertising, excluding those business practices or companies that primarily make money from subscription revenues — follow this structure to make money. Notice that a key feature of this business model, consistent across the firms that implement it, is that the only element of it that directly contributes to corporate revenues — the targeting of digital ads — is a relatively small piece of the proposition these firms offer the market. They must practice the other elements with great effectiveness before they can participate in advertising. Correspondingly, this is precisely what we have seen in the case of the three firms we have principally discussed: they have established leadership in various respective consumer internet markets before seriously entering the digital advertising market.

Placing this trajectory of the digital advertising market in juxtaposition against our intent to keep the market free of anticompetitive practices, and analyzing the actions of these players as they have amassed their current market power, a fair argument can be made that Google, Facebook and Amazon have collectively impeded the vibrancy and dynamism of the internet — and tinged the perception of the internet's contemporary impact on the world.

*Diminished privacy and autonomy.* The aforementioned commercial regime that lies behind the front of digital advertising for direct revenue extraction is wholly dependent on the ongoing consumer usage of the digital platform, the collection of data pertaining to the individual through that usage, and the injection, filtering, and ordering of content for the individual through the platform service and beyond — including such external third party contexts as those promoted by Facebook's Audience Network, Google's Display Network, or Twitter's Audience Platform. This constitutes an economic logic that organically encourages the relegation of consumer privacy as a mere afterthought for the purposes of the firm hosting the advertising platform. As many have commented and researched, this market activity encourages a fundamental erosion of the individual's privacy and autonomy — elements over which rival firms could compete should they be able to overcome the barriers to entry erected by the sector's current dominators.<sup>11</sup>

*Diminished social welfare.* The platform firms' dependency on data for content curation and ad-targeting has directly encouraged diverse negative externalities that have shaken the foundations of democracies. At issue is the fact that the business models prevalent in the sector encourage ongoing use of the relevant platforms by predicting the content that algorithms have predicted are likeliest to engage the consumer for the longest period of time — no matter what the nature of that engagement might be. Meanwhile, the platforms have traditionally allowed any third-party advertiser able to pay to initiate ad campaigns to do so, thus instituting an unflinching and vicious dynamic by which the economic incentives of the content disseminators and those of the platform operator are absolutely aligned — even if the content disseminator happens to be a propagandist looking to spread harmful content such as fake news. This economic alignment between the two entities — and the internet firms' singular profit-maximization objective — has directly encouraged damaging negative externalities such as the spread of hate speech, the prevalence of disinformation, and systemic algorithmic discrimination, among others.

*Reduced innovation.* The leading internet platform firms have leveraged monopoly, likely at the expense of competition in the digital sector and the vibrancy of the internet itself. Perhaps the most crucial illustration of this involves the diminishment of journalism. Firms like Facebook and Google represent journalistic content on platforms such as the Google News and the News Feed, and in so doing, often include snippets of news stories. Up until around a decade ago, the newswriting industry regarded the impact of Facebook and Google as positive, or at least pareto optimal; consumers had for the most part shifted their habits and gravitated toward news readers and social media, and for a time, the internet companies that operated these services rewarded news outlets with increased traffic. Move forward several years and the tides have reversed; platform firms have recognized that instead of linking directly to a news article, they could render it in inbuilt browsers and appreciate any click-through revenues themselves. Journalists, attuned to this strategic policy change, have responded vociferously, including through new demands that they be remunerated for display of their content on third-party platforms, and that the government apply a social media "tax" that would redistribute wealth from the platforms to the creators of the news. Ironically, this would represent a paring down of openness of the internet and

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<sup>11</sup> See e.g. Ryan Calo, "Digital Market Manipulation," *George Washington Law Review*, Vol. 82, Iss. 4, August 2014.

free information flow across it. One might say this is the story of the three leading internet firms more broadly; they have holistically diminished vibrancy across the web in manners that appear to have negatively affected end-consumers.

## IV. NOVEL POLICY REGIMES FOR CONSIDERATION IN THE WAY FORWARD

Many have argued that, in response to growing competition policy concerns with the leading internet firms, the global regulatory community, particularly in the United States where developing jurisprudence has moved in a staunchly conservative direction, should bring novel forms of antitrust regulation and enforcement to bear against the industry.<sup>12</sup> Others have argued that the consumer harm standard prevalent in the United States exhibits the important virtue of providing antitrust regulators clear guidelines on judicial interpretations — which in turn empowers other parts of the law and other enforcement regimes to act when necessary, and obviates the critical problem of regulatory capture, and offers the business community credible certainty over what business practices are allowed and disallowed respectively.<sup>13</sup> Still other scholars recommend caution in reform movements, noting that novel enforcement cases that might seek to take advantage of progressive interpretation of the still ambiguous Section 5 of the Federal Trade Commission Act should carefully consider the typically long timeline of prosecuting monopoly cases, the tremendous resources required to pursue such prosecution, and the potential deleterious effects of antitrust enforcement in the long run.<sup>14</sup>

When considered according to the constituent markets they serve, Facebook, Google, and Amazon are rational monopolists that leverage monopoly in manners that have harmed the economy in various ways — and have the potential to do further harm should their power go uncurbed. Without some form of intervention, the situation will not change; these firms have protected their status and this will continue into the future absent appropriate governmental interventions. These firms have over time established their strength by cultivating powerful two-sided markets that have leveraged network effects through the collection of data, the development of sophisticated algorithms using that data, and frequent outlays of financing for creation of the infrastructure that supports that scalable activity. The only future perceivable is one in which their lead in their respective markets is untouchable which begets natural monopoly.<sup>15</sup>

A progressive approach to competition policy is thus necessary to break the market control exhibited by these three firms — the theory being that it is the dominance of these firms in their respective markets that has encouraged the aforementioned negative externalities, including the disinformation problem and the spread of hate speech, because of the security of their positions with end-consumers. Only through the destabilization of their present domination in consumer attention, behavioral profiling, and filtered content dissemination can we break the hegemony that has forced these varied harms on the public — and effectuate market outcomes that would better protect the public interest. Among the many options available to the European and American regulatory community among others are the following.

*Antitrust reform and application against monopolistic consumer internet firms.* As we have seen in the case of firms such as Facebook, Google, and Amazon, the present mode of antitrust enforcement — characterized by a strict focus on harm to consumers, particularly on price — is likely ill-equipped to assess the damages pushed by the digital advertising giants onto consumers unless, as discussed above, an earnest attempt is made to ascribe a value on the proprietary data that firms maintain on the individual. And even if competition policymakers place such a monetary value on data, this leaves on the table the second-order effects that a lack of competition in markets might have on the individual, be they negative effects on the labor markets or diminishment in product quality. American policymakers should, whether through a reassessment of the Federal Trade Commission's 2015 Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, or through broader legislative reform efforts, attempt to reorient the jurisprudence cemented in the courts and commit to giving the U.S. competition regulatory agencies the purview to examine and act against the leveraging of internet monopoly. Such a reassessment could effectively return to competition regulators the ability to bring to bear the appropriate remedies to combat anticompetitive practices, be they the mandate against certain harmful business practices, the imposition of critical break-ups, or the requirement for a duty to deal.

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<sup>12</sup> See e.g. Shahid Buttar & Mitch Stoltz, "Antitrust Enforcement Needs to Evolve for the 21st Century," *Electronic Frontier Foundation*, February 27, 2019.

<sup>13</sup> See e.g. Herbert Hovenkamp, "The Warren Campaign's Antitrust Proposals," *The Regulatory Review*, March 25, 2019.

<sup>14</sup> See e.g. Phil Verveer, "Platform Accountability and Contemporary Competition Law: Practical Considerations," *The Shorenstein Center for Media, Politics, and Public Policy*, Harvard Kennedy School, November 2018.

<sup>15</sup> See e.g. Patrick Barwise & Leo Watkins, "The evolution of digital dominance: how and why we got to GAFA," in *Digital Dominance: The Power of Google, Amazon, Facebook, and Apple*, *Oxford University Press*, 2018.

*Greater scrutiny concerning mergers and acquisitions.* It is clear that certain acquisitions have been permitted that perhaps should have received far greater regulatory scrutiny. Section 7 of the Clayton Act and the additional Hart-Scott-Rodino Antitrust Improvements Act were passed in the United States to proffer the government the authority to review mergers. Regrettably, they have failed in curbing the acquisition of several key businesses in the digital sector, among them DoubleClick, Instagram, Waze, and WhatsApp. Some have claimed that Amazon's acquisition of Whole Foods too represents a significant problem in regard to the forward amalgamation of data in manners that may ultimately lead to consumer harm.<sup>16</sup> The government should consider ways to improve the mechanisms for possible enforcement against such combinations which might eventually result in broad consumer harms. In particular, regulators should be fully equipped to understand and analyze the potential consumer harms associated with data sharing between merged entities. Not only can such combinations result in privacy harm to the individual; they may also damage market competitiveness itself. Data acquired through the purchase of a firm could, for example, be combined with the purchasing firm's data stores and used for competitive advantage in parallel or ancillary markets. And in this context, of special concern to the regulatory community should be vertical integrations of tracking and targeting; such integrations have systemically encouraged the disinformation problem and other negative externalities now prevalent online.

*Novel data portability for the individual.* A final remedy to the problem of competition could be to unlock the resource that these three firms find so vital to their monopoly positions in their respective two-sided markets: The individual's personal information. Fundamentally, Google, Facebook and Amazon treat consumer information as a proprietary creation bound with their intellectual property and competitive proposition to the market. Even if it were to be construed that these firms' amalgamation of consumer personal information to the end of applying a machine learning algorithm to draw out the customer's behavioral profile once constituted an intellectual practice that necessitated real ingenuity, such claims can no longer be true. In fact, it is the case that artificial intelligence accessible for free off the shelf are capable of learning a behavioral profile given the data. Furthermore, many have perhaps rightly pronounced that a customer's personal information — whether it is the raw data a customer has provided the platform through engagement and interaction or the algorithmic inferences the firm has made about the customer — should be that customer's property.<sup>17</sup> A regime of earnest portability whereby the individual can port his or her data to third parties, be they another internet firm or a bank or healthcare provider, is a remedy the government should consider to induce the formation of a plurality of internet platform services.

## V. A NEW DIGITAL SOCIAL CONTRACT

When undertaken in tandem with comprehensive privacy reforms and the institution of transparency into the collection and use of personal information, a robust new competition policy regime will necessarily redistribute the allocation of power between the industry, the government, and the individual. This would not be the first time for a market trajectory to be redirected in such a way by government — nor will it be the last. But the harms wrought by the largest firms controlling the digital advertising space have become both clear and public. Now, only progressive regulatory reform and the enforcer's stick can begin to counter such commercial and anticompetitive behaviors in an era in which the United States continues to lack a regulatory regime of any import to respond to this sector. What is most of all necessary in this new age of technology is the formulation of a new "digital social contract" that conclusively recognizes the rights of the individual.

<sup>16</sup> Laura Stevens & Heather Haddon, "Big Prize in Amazon-Whole Foods Deal: Data," *The Wall Street Journal*, June 20, 2017.

<sup>17</sup> Editors, "Digital privacy rights require data ownership," *The Financial Times*, March 21, 2018.





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