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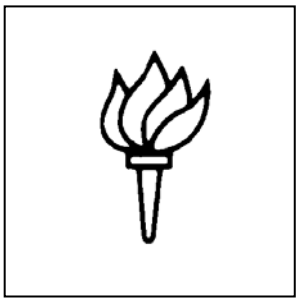

Platforms, Power and the Antitrust Challenge: A Modest Proposal to Narrow the U.S.–Europe Divide

Eleanor M. Fox

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ABSTRACT

Big platforms dominate the new economy landscape. Colloquially known as GAFA[1] or FAANG,[2] the high tech big data companies are charged with using the power of their platforms to squelch start-ups, appropriate rivals' ideas, and take and commercialize the personal data of their users.

Are the platforms violating the antitrust laws? Should they be broken up? Or are they the agents of progress in the new economy?

On these points, the United States antitrust law and the European Union competition law may diverge. The Competition Directorate-General of the European Commission has brought proceedings against or is investigating Google, Amazon, Apple, and Facebook. Germany, under its own competition law, has condemned Facebook's conduct in a decision now under appeal. Meanwhile, in the United States, authorities have commenced investigations.

This Article is a comparative analysis of U.S. and EU law regarding monopolization/abuse of dominance as background to understanding why EU law is aggressive and U.S. law may be meek in the treatment of the big tech platforms. First, it examines the factors that underlie the two perspectives. Second, it considers three cases or problems—Google/Comparative Shopping (EU), Facebook-Personal Data (Germany), and dominant platforms' acquisitions of start-ups that are inchoate competitive threats, such as Facebook's acquisitions of WhatsApp and Instagram. The Article considers what lessons the latest Supreme Court antitrust decision, Ohio v. American Express (AmEx),[3] holds for the analysis of the big data antitrust issues. Third,

* Eleanor M. Fox is the Walter J. Derenberg Professor of Trade Regulation at New York University School of Law. She thanks the participants in the conference on Platform Antitrust hosted by the Classical Liberal Institute for their helpful questions and comments. She thanks the Filomen D'Agostino Foundation for its research support.

1. Google, Amazon, Facebook, and Apple.
2. Facebook, Amazon, Apple, Netflix, and Google.
3. Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018). The case is highlighted because it is a focus of this symposium issue.

it asks what U.S. antitrust law and enforcement should do. It concludes that U.S. antitrust law should reclaim its role as watchdog to stop abuses of economic power, and makes suggestions for U.S. antitrust law to meet the big-platform challenge in a modest but meaningful and practicable way.

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I. INTRODUCTION

The high tech/big data platforms have been labeled as BAADD—"big, anti-competitive, addictive and destructive to democracy."[4] They dominate our lives, "steal" and sell our data, manipulate our minds, and use the power of their platforms to destroy or demote their rivals. The platforms tell a different story: they are creators of new systems that people want; they provide their popular services often at no charge; their popularity is the fruit of invention and the hallmark of success; any antitrust challenges will chill innovation. Moreover, the problems that exist are in the realms of data protection or consumer protection. The problems are boot-strapped into antitrust only by

4. *How to Tame the Tech Titans: The Dominance of Google, Facebook and Amazon Is Bad for Consumers and Competition*, ECONOMIST (Jan. 18, 2018), https://www.economist.com/leaders/2018/01/18/how-to-tame-the-tech-titans [https://perma.unl.edu/S3D6-696E].

hipster populists who are anti-capitalist and would destroy the free market system by handicapping creativity.[5]

This tug-of-war of the extremes distracts from the middle. There is a large middle space for antitrust law—control over uses of economic power to suppress competition and undermine the workings of the market. To understand the claims of anticompetitive conduct, it is instructive to examine the antitrust treatment of big tech platforms by the European Union and by Germany, for these jurisdictions have been in the forefront in studying the issues and considering their antitrust dimensions. To understand the comparative reticence in the United States (although this may be changing), it is useful to consider the state of U.S. antitrust law. Since EU law and U.S. law are the dominant antitrust models in the world, a focus on them is fitting.

This Article begins with a lay-of-the-land description of how the EU law on abuse of dominance differs from the U.S. law of monopolization. It examines three matters in which Europe has acted or has signaled its concerns with big tech. It considers the probable U.S. treatment of the same problems, including implications of the latest Supreme Court antitrust decision, *Ohio v. American Express (AmEx)*.[6] In *AmEx*, the Supreme Court reinforces U.S. conservatism—even while public rhetoric demands greater antitrust activism especially with a view to taming big tech.[7]

5. Hipster antitrust was coined as a derogatory term by antitrust experts who argue that antitrust illegality should be reserved for conduct that harms consumer welfare.

6. *AmEx*, 138 S. Ct. 2274.

7. *See* Chris Hughes, *It's Time to Break Up Facebook*, N.Y. TIMES (May 9, 2019), https://www.nytimes.com/2019/05/09/opinion/sunday/chris-hughes-facebook-zuckerberg.html [https://perma.unl.edu/5UVF-XQRE]; Greg Ip, *Beware the Big Tech Backlash: Overreaction to Content, Privacy Abuses Overlooks Real Problems: Lack of Competition*, WALL ST. J. (Dec. 19, 2018, 10:58 AM), https://www.wsj.com/articles/beware-the-big-tech-backlash-11545227197 [https://perma.unl.edu/WM2A-CA5W]. Senator Elizabeth Warren has proposed legislation to roll back acquisitions by the big tech firms, including Facebook's WhatsApp and Instagram, Amazon's Whole Foods, and Google's Waze. She would require the dominant platforms such as Google to structurally separate their platform business from the products offered on it. Smaller platforms would be subject to duties of fair dealing. *See* Asted W. Herndon, *Elizabeth Warren Proposes Breaking Up Tech Giants Like Amazon and Facebook*, N.Y. TIMES (Mar. 8, 2019), https://www.nytimes.com/2019/03/08/us/politics/elizabeth-warren-amazon.html [https://perma.unl.edu/Y4JF-5H9L]. Senator Amy Klobuchar and others have introduced the Consolidation Prevention and Competition Promotion Act of 2019, which would, in the case of mega-mergers, shift the burden to the merging parties to prove that the merger does not harm competition. S. 307, 116th Cong. (2019). Both U.S. federal antitrust agencies, all but two states, and both branches of Congress are investigating big tech. *See* Steve Lohr, *Google Antitrust Investigation Outlined by State Attorneys General*, N.Y. TIMES (Sept. 9, 2019), https://www.nytimes.com/2019/09/09/technology/google-antitrust-investigation.html [https://perma.unl.edu/BVR8-ZRQ7].

The Article concludes that the big tech markets are conducive to behavior to suppress competition. This behavior is occurring. Yet its harms are totally discounted by influential antitrust experts and policy makers who insist on a minimalist antitrust and maximal freedom of even dominant firms. There are ways in which the U.S. antitrust laws can protect the public from this suppression of competition despite the constant narrowing of the law by the Supreme Court of the United States.

II. A BRIEF COMPARISON OF U.S. AND EU LAW OF MONPOLIZATION/ABUSE OF DOMINANCE

A. The United States

The U.S. Sherman Act was enacted in 1890, famously, to control the power of the big trusts. Major legislation in 1914 and again in 1950 extended the reach of the law to control exclusionary practices that had become rampant and to stem a rising tide of economic concentration that was thought to threaten democracy.[8] For most of a century the U.S. antitrust law was akin to the economic democracy of markets.[9] But beginning in the third quarter of the twentieth century, the Supreme Court reversed course in the name of efficiency and freedom. Today U.S. monopoly law—Section 2 of the Sherman Act—has a cabined scope. To run afoul of the law, a firm must not only misuse monopoly power; it must create *more* power. Moreover, the courts apply a default presumption that conduct of even a monopoly firm is efficient and good for consumers; thus, that it does not increase power.[10]

But the U.S. antitrust laws have one more weapon to combat unilateral (non-conspiratorial) use of economic power: Section 5 of the Federal Trade Commission Act. Section 5 prohibits "unfair methods of competition." "Unfair" is construed to mean "anticompetitive." Given the statutory language of "unfair methods," the meaning of "anticompetitive" attributed to Section 5 can appropriately be more elastic than the meaning of "anticompetitive" attributed to the Sherman Act. It *should* be more elastic, for the Federal Trade

8. *See* 95 Cong. Rec. 11486 (1949) (statement of Rep. Emmanuel Celler on the Celler-Kefauver Amendment to Section 7 of the Clayton Act); Eleanor Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981) [hereinafter Fox, *Modernization*].

9. *See* Fox, *Modernization*, *supra* note 8.

10. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004); Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438 (2009); Eleanor Fox, *The Efficiency Paradox*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 77 (R. Pitofsky ed., 2008).

Commission Act was adopted as "a way to stop incipient Sherman Act violations, or, more broadly, undeserved growth."[11] Typically, however, the FTC hesitates to stray from the narrow path of the Sherman Act.

B. Europe

Meanwhile in Europe, at the end of World War II, a core of European nations resolved to create a new structure of governance so as never to have a war again. Six nations, led by Germany, France, and Italy, formed the European Coal and Steel Community in 1951–1952 and then the European Economic Community in 1957–1958. This visionary project depended upon the realization of community—a single European market. As Montesquieu said, "people who trade together tend not to fight."[12] They come to respect one another, and hatreds dissolve. Free trade and free movement in the internal market was at the heart of the European conception. That meant nations' border-barriers had to fall. As the founders presciently anticipated, once tariffs and quotas were abolished, private firms would re-erect them. Moreover, the member nations had nurtured their own national champions, typically state-owned enterprises, entrenching nationalistic barriers. Thus, it was necessary to embed antitrust in the Treaty[13] itself, to prevent private power and privileged enterprises from defeating the project for economic community. As a result, the Treaty (now, the Treaty on the Functioning of the European Union) contains Article 101, which prohibits anticompetitive agreements, and

11. *See* Marc Winerman, *The Origin of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 88 (2003) (quoting proponents of the Act). It was meant to be administrative and guiding, not penal. Two members of the current Federal Trade Commission, Commissioners Rohit Chopra and Rebecca Kelly Slaughter, dissenting from a report demurring on excessive pharmaceutical prices, explain how the FTC's unfair-methods-of-competition jurisdiction was intended to reach beyond the antitrust laws to "policies that those laws were intended to promote." Statement of Commissioners Rohit Chopra and Rebecca Kelly Slaughter, Federal Trade Commission Report on the Use of Section 5 to Address Off-Patent Pharmaceutical Price Spikes, June 24, 2019, at 2, https://www.ftc.gov/system/files/documents/public_statements/1531606/p180101_section_5_report_dissenting_statement_by_chopra_and_slaughter_6-27-19.pdf [https://perma.unl.edu/S2MX-YAP7]. Use of the Federal Trade Commission Act is particularly appropriate in cutting-edge cases because there is no punitive consequence of a declaration and order that conduct violates the law. No follow-on private actions are authorized.
12. *See* BARON DE MONTESQUIEU, SPIRIT OF THE LAWS, Book XX (1951).
13. Treaty Establishing the European Economic Community, 25 March 1957.

Article 102, which prohibits abuses of a dominant position,[14] as well as other integral provisions to control public and private economic power.

Like the U.S., the EU went through two important phases with regard to the question: When is single-firm conduct anticompetitive? In the first stage, EU law was formalistic. The law was aggressive against dominant-firm conduct that excluded rival firms. It contained a broad presumption against exclusive contracts by dominant firms. The second phase came in the 1990s, and, even more dramatically, in the first decade of the new millennium. This was epitomized by the European Commission's 2009 guidance paper on dominant firm conduct.[15] In this second phase and in the guidance paper, the European Commission adopted, and the courts followed, a more economic approach.[16] While incorporating economic analysis into the law, Europe retained certain guiding principles and approaches reflecting the place of antitrust in the Treaty. These approaches include that EU law is about community and integration. EU competition law is sympathetic with EU internal market free-movement law, which stresses the importance of free movement of goods, services and people across Member State lines. Likewise, EU law is antagonistic to Member State restraints and the privileges states grant to favored firms. Such restraints and privileges are distortions of competition. Both aspects—respect for free movement and antagonism to state restraints—are imported into EU competition law and specifically into abuse of dominance law. EU competition law stresses market access and the right of firms to contest markets on the merits. It is sympathetic to firms' access to networks.[17] It is hostile to dominant firms' use of leverage to take advantages for themselves at

14. *See* Alan Ryan, *Antitrust Laws and Unilateral Conduct–Transatlantic Divergences and How to Manage Them, New Frontiers of Antitrust Conference*, CONCURRENCES COMPETITION L. REV. 3 (2018).

15. Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, 2009 O.J. (C 45/7).

16. *See* Nils Wahl, *Recent Trends at the Court of Justice of the European Union*, CONCURRENCES COMPETITION L. REV. 4 (2018).

17. Then-President of the European Commission, Jean-Claude Juncker, listed a "Digital single market" second among his ten Commission priorities for 2014–2019. EUROPEAN COMMISSION: 10 COMISSION PRIORITIES FOR 2014–2019, https://ec.europa.eu/comission/priorities_en [https://perma.unl.edu/YM9P-RWNY]. He said: "A Digital Single Market (DSM) is one in which the free movement of persons, services and capital is ensured and where the individuals and businesses can seamlessly access and engage in online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence." EUROPEAN COMMISSION: SHAPING THE DIGITAL SINGLE MARKET, https://ec.europa.eu/digital-single-market/en/policies/shaping-digital-single-market [https://perma.unl.edu/8YVR-7425].

the expense of competitors, thereby unleveling the playing field. EU competition law does not aim to protect inefficient competitors, but rather its precedents forge a clearer path for firms to access markets on their merits, free from obstructions by dominant firms. Still, detractors (including many in the U.S. antitrust community) contend that the EU excessively enforces its antitrust law against dominant firms (often American ones), and insist that the EU approach does protect competitors at the expense of consumers.

C. Presumptions and Divergences

EU competition law adopted its more economic approach nearly two decades ago. However, it never adopted the "Chicago School" premises. It does not assume markets work well. It does not admonish us to trust the market—especially not when the market is concentrated and dominated by a single firm. It does not presume that antitrust intervention is likely to mess up the market and chill competition and innovation. Its teaching implies a belief that lowering barriers to entry and keeping a clear path for challengers is likely to make the market more dynamic and thus serve consumers better. When dealing with innovation incentives, U.S. cases are likely to assume that antitrust action against a dominant firm will chill the firm's incentives to invent,[18] while EU law is more likely to find that the dominant firm's challenged conduct will chill the outsiders' incentives to invent. EU cases have documented this lost innovation.[19] U.S. competition law abhors duties of dominant firms to deal with competitors, calling such duties "forced sharing" and undermining incentives to invent.[20] EU law applies a contrary principle: dominant firms, especially firms with power in one market that compete in an adjacent market, have a special responsibility not to impair rivals' competition on the merits.[21]

18. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004); Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438 (2009); Novell, Inc. v. Microsoft Corp., 731 F.3d 1064 (10th Cir. 2013). *But see* United States v. Microsoft Corp., 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc).

19. *See* Case T-201/04, Microsoft Corp. v. Commission, 2007 E.C.R. II-3601 654 (examples of products by Sun and Novell that were stymied); European Commission Press Release, Antitrust: Commission Fines Google €4.34 Billion For Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine (July 18, 2018), http://europa.eu/rapid/press-release_IP-18-4581_en.htm [https://perma.unl.edu/4XA6-52U5] (discussing the Android forks example).

20. *See Trinko*, 540 U.S. 398.

21. *See* Eleanor Fox, *Monopolization and Abuse of Dominance: Why Europe is Different*, 59 ANTITRUST BULL. 129 (2014); James Keyte, *Why the Atlantic Divide on Monopoly/Dominance Law and Enforcement Is So Difficult to Bridge*, 33 ANTITRUST 113 (Fall 2018); Francisco Marcos, *The Prohibition of Single-Firm*

Both jurisdictions aim to preserve and facilitate sustainable low pricing even if it displaces firms that cannot keep up with the competition. U.S. law, however, makes it harder than EU law to successfully challenge below-cost pricing. U.S. law requires the plaintiff to prove a probable recoupment scenario—that is, after the predatory siege, defendant must be likely to recover its losses by charging monopoly prices high enough and long enough.[22] EU law does not require proof of probable recoupment.[23] It is enough that the predator thought the scheme was worth it. Because of the strict U.S. requirements, predatory pricing violations are virtually never proved under U.S. law.

Apart from these different presumptions and principles, much of the law governing unilateral conduct is very similar on both sides of the ocean. But the different presumptions and principles have resulted in diametrically different results on nearly identical facts in key cases, especially when the conduct challenged is a refusal to deal with competitors or customers.[24] The differences reveal themselves in assessing the conduct of the big data platforms, as the Article shows below.

III. IMPLICATIONS FOR HIGH TECH, BIG DATA

A handful of high tech giants dominate markets. The firms were started from scratch by entrepreneurs with great ideas, and they attract millions of users every day. They are networks and platforms, have economies of scale, and feature network effects and winner-take-all markets. On the one hand, the network effects please users (who get more "friends" or suppliers or buyers), but on the other hand, they create uncommonly high barriers to entry and reinforce their market power. The firms offer their products "free" on one side of the market (but users give up their data); on the other side, they make huge revenues from advertising, including by selling the data of their users. The high tech firms operate with low-price models, not the high prices that traditionally attract antitrust attention. Some have been exposed

Market Abuses: US Monopolization Versus EU Abuse of Dominance, INT'L CO. & COMM. L. REV. 9 (2017).

22. *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 224 (1993).

23. *See* Case C-62/86, Akzo Chemie v. Commission, ECLI: EU:C:1991:286. This case was published in 1991 *European Court Reports* I-03359.

24. Fox, *supra* note 21, at 136–39; The Polish Telecom case has since been affirmed by the General Court. Case T-486/11, Orange Polska S.A., formerly Telekomunikacja Polska S.A. v. European Commission, ECLI:EU:T:2015:1002. Moreover, the EU Court of Justice decided *Intel*, which leans more than previously towards an economic approach. C-413/14 P, Intel v. Commission, ECLI:EU:C:2017:632.

for serious misuses or lax protection of data as well as for acquiring personal data from third party sources without permission. Some have waged media campaigns of false information against critics. They offer services in competition with the firms they host on their platforms, and they prefer their own products and demote their rivals, undermine creative start-ups by appropriating their ideas, mine the data of the firms they host to preempt the next big thing, snap up the start-ups that are potential competitive threats, and breach privacy rights of the platform's users. Much of this conduct may violate consumer protection and privacy protection laws. A question is whether the firms are also violating the competition laws. Does the answer depend on whether the laws are those of the U.S. or those of the EU (and the many jurisdictions that follow EU law)? It might.

The conduct we shall examine poses challenging questions under Section 2 of the Sherman Act, which prohibits monopolization. The first step of analysis is defining the market, and the exercise of market definition is difficult.[25] The second step is proof of monopoly power. Monopoly power is traditionally defined as the power to raise price above a competitive price and reduce output for a significant time.[26] In platform markets, this proof may not be possible. The third step is proof of conduct that is anticompetitive. The court may require the plaintiff to establish that the conduct lowers output and raises prices[27] by anticompetitive means. This may not be possible. The platforms are accumulating and using new forms of power. The big tech abuses do not fit neatly into the "Chicago School" requirements.

Under EU competition law, the case for abuse of dominance is easier to make. EU law is less demanding of proof of definition of the market. Moreover, a firm might hold a dominant position even when it does not have monopoly power under the neoclassical economists' definition. Status as a "gatekeeper" (power over a dominant platform)

25. *See* Makan Delrahim, Assistant Attorney Gen., Antitrust Div., Keynote Address at the University of Colorado Law School Silicon Flatirons Annual Technology Policy Conference: "I'm Free": Platforms and Antitrust Enforcement in the Zero-Price Economy (Feb. 11, 2019); JACQUES CRÉMER, YVES-ALEXANDRE DE MONTJOYE, & HEIKE SCHWEITZER, COMPETITION POLICY FOR THE DIGITAL ERA, REPORT TO THE EUROPEAN COMMISSION (Apr. 5, 2019), http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf [https://perma.unl.edu/Y5AE-E34U] (drawing diametrically opposite inferences on whether to overcome the difficulties with a view towards possible enforcement or as a reason to retreat).

26. *See* Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451 (1992).

27. *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2288 (2018) ("There is no such evidence ['that output was restricted or prices were above a competitive level'] in this case." (quoting Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 237)); Cal. Dental Ass'n v. FTC, 526 U.S. 756 (1999). *But see* United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (en banc).

might suffice.[28] A firm might abuse its dominance when it uses its power in one market to get significant competitive advantages in an adjacent market and does so by conduct that blocks rivals' access and has no competitive merit,[29] even if it does not get market power in the second market.

These qualities of EU law make it a more flexible tool than the Sherman Act to deal with the new problems posed by high tech/big data. Section 5 of the Federal Trade Commission Act, which prohibits unfair methods of competition, also has this flexibility, at least in theory.[30]

IV. THREE EXAMPLES OF ALLEGED PLATFORM ABUSE

A. Google/Comparative Shopping

1. EU Law

In the *Google/Comparative Shopping* case, the European Commission condemned Google, as the dominant search engine, for demoting its rivals and preferring itself on its platform. Here are the salient facts it found:

Google held more than 90% of the general search market in Europe. It launched comparison shopping services. Google was not the first to offer comparative shopping services on its platform; others preceded it. Google entered this market in 2004 with a product called Froogle. But Froogle was not a good product. When Google Search treated Froogle neutrally with its rivals, Froogle performed poorly. This means, under neutral treatment, Froogle did not rank high on the responses to consumer search queries; it was relegated to back pages where it did not get many clicks—and clicks are the way products generate revenues through advertising. In 2008, Google changed its strategy fundamentally to automatically give a prominent

28. *See* CRÉMER ET AL., *supra* note 25. If a platform is a gatekeeper or unavoidable trading partner, this may imply sufficient market power to warrant examination and possible proscription of conduct that suppresses competition.

29. *See,* e.g., Case C-549/10P, Tomra Systems ASA v. European Commission, ECLI:EU:C:2012:221 (possibly qualified by C-413/14 P, Intel v. Commission, ECLI:EU:C:2017:632).

30. The Federal Trade Commission Act provides an especially good basis on which to formulate a new rule or standard to deal with new economic problems because the consequence would simply be an injunction rather than high fines and treble damage consequences. In fact, the imposition of high fines on a firm for conduct that could not be known to be illegal feeds the claim of illegitimate application of the law. This is especially so when the target of the enforcement is a foreign firm. A vehicle that nurtures the development of legal principles in a context not burdened with punishment is more likely to give rise to better law.

place to Google's product (which was renamed and revamped as Google Shopping). Thereafter, Google Shopping appeared at or near the top of search results for comparative shopping services, and it began to appear with rich graphical features. Google Search demoted rivals' services. Even the services of rivals that were most highly ranked by the original neutral algorithm began to appear on average only on page 4. Users seldom access, much less click on, links on page 4. (The top search result on the computer page receives about 35% of the clicks; page 1 results receive about 95%; the first result on page 2 receives about 1%.) As a result of Google Search's software program change, traffic on Google Shopping increased substantially and traffic on the rivals, in spite of their merit, decreased substantially. While the Commission did not question Google's choice to display rich graphic features for the Google service at the top of the page of search results, the Commission did question the fact that rivals could not get the same advantage. As a result of its strategy, Google Shopping increased its share in all thirteen markets in the European Economic Area, in many by a large amount.

Summarizing the changes caused by the demotions, the Commission said:

- "Since the beginning of each abuse, Google's comparison shopping service has increased its traffic 45-fold in the United Kingdom, 35-fold in Germany, 19-fold in France, 29-fold in the Netherlands, 17-fold in Spain and 14-fold in Italy."
- "Following the demotions applied by Google, traffic to rival comparison shopping services on the other hand dropped significantly. For example, the Commission found specific evidence of sudden drops of traffic to certain rival websites of 85% in the United Kingdom, up to 92% in Germany and 80% in France. These sudden drops could also not be explained by other factors. Some competitors have adapted and managed to recover some traffic but never in full."[31]

The Commission concluded that Google abused its dominance by using its leverage in search to give its own comparative shopping service a significant advantage. The Commission found that Google had no objective justification for this conduct. It found that Google's change to prefer its own comparative shopping service was not a product improvement. Google had claimed as an improvement its addition of rich format on top of the results presented for the Google

31. *See* European Commission Press Release, Antitrust: Commission Fines Google €2.42 Billion For Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service (June 27, 2017) (quoting Commission Decision Case AT.39740, Google/Comparative Shopping (27 June 2017)).

Shopping entry, but the Commission concluded that this addition could not be counted as an improvement because Google gave the embellishment to its product alone.

The Commission required Google to treat its own service equally with rivals' services. As usual, it required the undertaking to submit a plan to achieve compliance with the decision. As well, the Commission fined Google 2.42 million euros.

The case is on appeal to the European General Court. It will be judged in view of the Court of Justice's case law including the recent *Intel* judgment,[32] which emphasizes competitive effects. Whether a dominant firm's use of leverage to shift significant market share to itself, seriously narrowing market opportunities for competitors, violates EU competition norms will be decided on appeal.[33]

2. U.S. Law

How would the *Google/Comparative Shopping* facts be analyzed under Section 2 of the Sherman Act? The jurisprudence suggests several good arguments for Google. First, market definition and market power would be contested matters. Google asserts that vertical searches are good alternatives to general search, enlarging the market so as to minimize Google's monopoly share of general search. Enlarging the market to include advertising (the paid side of the market) would likewise expand proof problems, even though Google has been labeled as dominant in online advertising with a 37% share. Second, whatever the market, Google's market power will be seriously contested, with Google insisting that it cannot and does not raise prices, reduce output, or lower quality. Third, in a similar comparative shopping case, it would be difficult for a U.S. court to find an anticompetitive abuse under Section 2 of the Sherman Act. Google is not an essential facility under U.S. law. It has no antitrust duty to deal fairly, let alone to deal at all, with firms that want to use its platform, except in rare circumstances.[34] Moreover, it may be unlikely that, by reason of its demoting strategy, it acquired market power in the adjacent market (comparative shopping web services). It may be doubtful that it has power to limit output either in general search or in comparative shopping web services. As a result of the conduct,

32. Case C-413/14P, Intel v. Commission, ECLI:EU:C:2017:632.

33. The Commission has an advantage; the court is obliged to give significant deference to Commission decisions, especially regarding complex factual and economic findings. *See* José Luís da Cruz Vilaça, *The Intensity of Judicial Review in Complex Economic Matters—Recent Competition Law Judgments of the Court of Justice of the EU*, 6 J. ANTITRUST ENFORCEMENT 2, 173–88 (2018).

34. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004); Novell, Inc. v. Microsoft, 731 F.3d 1064 (10th Cir. 2013).

consumers/users are not confronted with a price rise, even though they do suffer a non-quantifiable loss by being given second-best information in answer to their queries, loss of the benefits of the improved performance that stronger head-on competition could bring, and loss of access to innovative products squeezed out by the demotions. (Whether the impugned conduct elevates prices charged to advertisers remains to be explored.)[35] The losses, including chilling incentives of the demoted rivals, is speculative and, even if true, Google would urge that the antitrust enforcement itself chills Google's incentives to deliver innovative products. U.S. law is sympathetic to the assumption that it does.[36]

The facts of *Google/Comparative Shopping* find parallels across the GAFA platforms. The abuse problem is probably not one of output limitation. The problem is the distortion of the market so that the firm with power, leverage and a conflict of interests succeeds for reasons other than its merits, and the meritorious competition of rivals is suppressed.

What might the *AmEx* case add to the analysis? *AmEx* could open the door to full two-sided-market analysis, minimizing the market power and the antitrust harm.[37] *AmEx* makes it hard to infer market power from exclusionary effects. *AmEx* puts a set of incumbent-preferring arguments into the mouth of Google.[38]

We suggest below that the Federal Trade Commission, enforcing Section 5 of the Federal Trade Commission Act (which prohibits unfair methods of competition), could overcome the above obstacles more easily than could a court under Section 2 of the Sherman Act.

35. *See* Delrahim, *supra* note 25.

36. The Federal Trade Commission investigated Google for search bias in 2012–2013 but chose not to bring proceedings. *See* In the Matter of Google Inc., Statement of FTC Regarding Google's Search Practices, FTC File No. 111-0163 (2013) (closing the investigation).

37. Lower courts might limit *AmEx*—as the case itself suggests—to situations in which there is a simultaneous transaction on both sides of the market. But the logic of the case (majority opinion) may go further.

38. For example, *AmEx* provides encouragement for the following arguments: Google must continually invest in its platform services. Its zero-price user model requires consideration of all avenues for recovering costs, including the need for more clicks on the Google offerings to recover costs through the advertising side of the market. Moreover, Google cannot degrade service and give less than optimal search returns to its users because, once users discover a misfit between their request and the search engine return, the users will merely click to a competitor. Further, the court cannot infer competitive injury to anyone because there is no "evidence that tends to prove that output was restricted or prices were above a competitive level." Ohio v. Am. Express Co., 138 S. Ct. 2274, 2288 (2018); *see supra* note 27.

B. Facebook–Abuse of Data

1. German Law

On February 7, 2019, the German Federal Cartel Office (FCO) held that Facebook has violated the German abuse of dominance law by gathering personal data from sources beyond Facebook (e.g., every time the user clicks on "like") without the users' knowledge or permission, and using the data to compile a unique database on each user, enabling Facebook to offer advertisers distinctly targeted advertising and thus to enhance its revenues. The FCO characterized the violation as an exploitative one—Facebook exploited users, rather than excluded rivals. The appellate court, however, has suspended the FCO's order pending appeal, after expressing doubts about the legal basis for the decision.[39] The following are some of the findings and analysis, as summarized by the FCO.[40]

Market, Market Power, and Dominance

Facebook is the largest social network in the world. It holds a dominant position in the German market for social networks, having more than a 90% market share. It has 2.3 billion active users worldwide, with 1.5 billion using Facebook daily. Facebook users in Germany number some 323 million monthly and 23 million daily. As to competition in Germany, Facebook faces only some small German providers, and their suitability as an alternative social network is limited in view of Facebook's economies of scale and network effects.

The FCO expressly based the assessment of market power on more than market share. It referenced recent amendments to the German Competition Act to include as indicia of market power: "competitively relevant data, economies of scale based on network effects, the behaviour of users who can use several different services or only one service and the power of innovation-driven competitive pressure . . . ."[41] Identity-based direct network effects were deemed an important factor in assessing Facebook's market power. Also important were indirect network effects stemming from advertiser-financed services: the larger the user base, the more audience for ads and the more profits to advertisers. Economies of scale that produce cost-savings "provide Facebook with a far greater scope for strategic

39. Higher Regional Court, Dusseldorf (Aug. 26, 2019).

40. Bundeskartellamt [Federal German Cartel Office], Bundeskartellamt prohibits Facebook from combining user data from different sources: Background information on the Bundeskartellamt's Facebook proceeding (Feb. 7, 2019).

41. *Id.* at 4.

decisions than its competitors have."[42] Facebook invoked multi-homing as a countervailing force, but the FCO found the contention not established. Moreover, the FCO found: "Facebook has superior access to competition-relevant data, in particular the personal data of its users. As social networks are data-driven products, access to such data is an essential factor for competition in the market."[43] Lack of access to data "can be an additional barrier to market entry."[44]

The Harm to Competition

The FCO found that Facebook imposes exploitative business terms. "The damage for the users lies in loss of control: They are no longer able to control how their personal data are used. They cannot perceive which data from which sources are combined for which purposes . . . ."[45] Facebook "violates the constitutionally protected right to informational self-determination."[46] Further competitive harm is caused to advertising customers, who are faced with a dominant supplier of advertising space in social networks.

In finding an exploitative abuse, the FCO drew on contract principles and data protection principles, importing their values into antitrust analysis. Reference to the General Data Protection Regulation, the FCO said, helped to confirm Facebook's lack of justification for exploiting users' data. The FCO recognized Facebook's legitimate interests in processing the data, but found that the legitimate interests did not outweigh the harm to users' interests.

Facebook's Conduct Poses a Competition Problem

The FCO said that access to market data is essential to the market position of social network companies. "Access to data, above all in the case of online platforms and networks,"[47] is specified as a relevant factor for dominance by the German Competition Act. "Monitoring the data processing activities of dominant companies is therefore an essential task of a competition authority, which cannot be fulfilled by data protection officers."[48]

42. *Id.* at 5.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 7.
48. *Id.*

Remedy

The FCO imposed no fine. Its aim was to change behavior. Facebook was required to submit a plan for compliance.

* * *

The German Federal Ministry for Economic Affairs and Energy is further studying digital platforms and abuse of market power to determine whether modernization of the law is necessary. An expert committee issued a report,[49] and a follow-up committee is tasked to suggest means to implement the initial report.

European Competition Commissioner Margrethe Vestager, while studying the report, noted "the importance of monitoring data monopolies and internet gatekeepers that can choke off data access to rivals."[50] Moreover, the Directorate-General for Competition commissioned its own report.[51] Meanwhile, a new Commission has been constituted. Vestager has not only been reappointed the Competition Commissioner, she has been appointed Executive Vice President for the EU's digital policy.

2. U.S. Law

Abuse in the collection and use of data, especially by the big data companies, is a big concern in the world. The abuses and their remedies are being studied in many jurisdictions in addition to Germany and the EU, including Australia, Japan and the UK.

Section 2 of the Sherman Act offers no parallel application to the German case. In the United States, a plaintiff would face difficulties at the outset in defining the market and proving monopoly power. But more basically, the claim of violation by abuse of data collecting, including from third party sites, and collecting and using the data surreptitiously and deceitfully, does not fit with the U.S. *antitrust* laws. The Sherman Act imposes no special responsibility, not even on a monopoly firm, to have regard for rivals or users. The right to refuse to deal (or to deal on chosen terms) is strong. Moreover, the German Facebook violation is an exploitative violation, not an exclusionary one, and Section 2 does not prohibit exploitative behavior (e.g.,

49. Heike Schweitzer et al., *Modernising the Law on Abuse of Market Power: Report for the Federal Ministry for Economic Affairs and Energy*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3250742 [https://perma.unl.edu/H8LA-E29H] (last visited June 29, 2019).

50. Aoife White & Lenka Ponikelska, *Germany's Facebook Order Will Be Studied by EU, Vestager Says*, BLOOMBERG NEWS (Feb. 8, 2019, 5:49 AM), https://www.bloomberg.com/news/articles/2019-02-08/germany-s-facebook-order-will-be-studied-by-eu-vestager-says [https://perma.unl.edu/HQ5V-VNEK].

51. CRÉMER ET AL., *supra* note 25.

excessive prices).[52] The German *Facebook* proceeding did not include exclusionary practices. Such practices, alleged elsewhere, include Facebook's cutting off user access to an improvement by Vine, a video-creating and sharing platform, apparently because Facebook took the Vine product to be a competitive threat to it.[53]

Might lessons from *AmEx* play a role in the analysis? Let us postulate that consumers, including business users, are harmed on one side of the market. Their valuable data is coerced from them, aggregated from third party sources, and monetized lucratively. The social network charges zero (plus the data) to users and sells curated space to advertisers, making possible the zero user-charge. *AmEx* and other decisions would counsel to count positively Facebook's efficiencies in data use and improvement of its services though collection and use of its data trove.

The FCO did consider the advertiser side of the market. It concluded that Facebook exploited advertisers as well as users. It did take note of efficiency benefits through increased accuracy of advertisers in targeting likely buyers, and benefits of the network's declining marginal costs, but it counted those advantages as contributors to Facebook's power, not as contributors to the public's or consumers' welfare. The FCO determined that the users' interests outweighed Facebook's interests. It so concluded not because, if monetized, the Euro-amount of the gains to Facebook was less than the Euro-amount of the losses to users, but on quasi-constitutional grounds: people have a right to control their data and to know how it is going to be used; it was wrong for a dominant firm to coerce users to give up their data rights if they were to use Facebook's service at all.

While Section 2 of the Sherman Act has strict limits, Section 5 of the FTC Act is a more flexible vehicle. The FTC is not bound to ignore a problem just because Facebook's conduct may be exploitative rather than exclusionary or just because it interfaces with data privacy. Moreover, the FTC has consumer protection powers and Facebook's behavior raises serious consumer protection concerns. Indeed, the FTC already has a file on Facebook and has just penalized Facebook $5 billion for sharing with Cambridge Analytica, a political consultant to then-candidate Trump, data of 87 million Facebook users, which it used to compile voter profiles.[54] If a data privacy problem is mixed with

52. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004). As for exclusionary, there have been complaints against Facebook (Vine), but they are not part of the FCO case.

53. *See* Adi Robertson, *Mark Zuckerberg Personally Approved Cutting off Vine's Friend-Finding Feature*, THE VERGE (Dec. 5, 2018, 10:35 AM), https://www.theverge.com/2018/12/5/18127202/mark-zuckerberg-facebook-vine-friends-api-block-parliament-documents [https://perma.unl.edu/PST7-N23K].

54. *See* Press Release, FTC, FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook (July 24, 2019), https://www.ftc.gov/news-

a consumer protection problem and possibly an antitrust problem (e.g., an abusive cut-off of access, or an anticompetitive acquisition), the FTC is well placed to consider the abuses together for whatever synergies may be mined. If vested with the multi-faceted matter, the FTC could consider formulating some rules and controlling principles, such as banning self-dealing and disallowing efficiency as a defense to coercion and deception.

C. Start-Ups: Nipping Competition in the Bud

Major platforms such as Facebook, through their massive data troves collected in part from the targets themselves, are well positioned to identify the promising start-ups that pose the greatest competitive threats to the platform, and buy them up or stamp them out. Because the start-ups typically lack significant revenues, the acquisition may be below the turnover thresholds required for premerger filing in some jurisdictions. Moreover, any single such acquisition may just be ignored as too insignificant.

Competition authorities in several jurisdictions are considering the need to be tougher on dominant platforms' systematically buying their most promising and threatening would-be rivals. Germany has revised its merger control thresholds to add a value-of-the-transaction test and to include debt as part of value, so that these rising-star start-ups do not escape assessment.[55] The most commonly cited examples of allegedly anticompetitive "snap-ups" is Facebook's acquisitions of Instagram and of WhatsApp, both of which platforms provide important alternatives for social network users seeking a model friendlier to younger users.

The future of such start-ups may be highly speculative at the time of acquisition. But what if, as it has been alleged, the dominant platform either buys up or stamps out all potentially threatening start-ups to preserve its dominance? The tale of Snapchat may be a cautionary one. Facebook pursued Snapchat. Snapchat said no. Then Facebook appropriated Snapchat's signature innovation: stories—a

events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions [https://perma.unl.edu/N4QK-949Z].

55. Ninth Amendment to the German Act Against Restraints of Competition, effective 9 June 2017. *See* Falk Shoening et al., *Mind the Gap—New Size-Of-Transaction Test in German Merger Control—New German Competition Law: Germany Takes A Pioneering Role in Adapting Its Competition Law to The Digital Economy*, HOGAN LOVELLS (June 21, 2017), https://www.hlregulation.com/2017/06/21/mind-the-gap-new-size-of-transaction-test-in-german-merger-control/ [https://perma.unl.edu/RB5S-GEPB].

photo and video post-platform. The story is told in *Facebook is Killing Snapchat with the Format It Created*.[56]

The big data strategies are reminiscent of tales of the Standard Oil Trust. By some reckoning the conduct may be called efficient. So was Standard Oil's conduct, as insisted by historian John S. McGee.[57] But the efficiencies of Standard Oil's strategies did not prevent the giant predatory trust from being Exhibit A to the very enactment of the Sherman Act and did not dissuade the Supreme Court from breaking it up.[58]

There are several big challenges to thwarting the so-called "killer acquisitions." One is to be able to identify the anticompetitive qualities of the acquisition at the time of vetting. The second is this: suppose the acquisitions are indeed harmful to competition today. It is possible under existing U.S. antitrust law, although not common, to obtain divestiture of assets whose acquisition turned out to be anticompetitive. The challenge, however, is to prove both that the consolidation is on balance anticompetitive (in spite of efficiency aspects such as better use of data), and that divestiture will noticeably produce competition and make consumers/users better off. Third, the possibility of sale to the dominant platform has been an incentive for start-ups to start up in the first place. One would want to be able to predict that the loss of this route to "success" would not cause more harm than good.

V. PROPOSALS

The "do nothing" and the "break them up" approaches are extreme policy approaches that at the one end would leave real competition problems unaddressed and at the other would apply blunt instruments to cure huge state-of-the-world dilemmas that pose daunting implementation problems and are sure to leave unfilled expectations in their wake.

There are three reasons why the United States might wish to take Europe's big data initiatives more seriously. First, European competition law is the law in a substantial part of the world. If the U.S. wants to be relevant in international transactions, it must appreciate European perspectives. Second, top down regulation is a possible substitute for antitrust. If the antitrust agencies ignore abuses of economic power that people care about, more intrusive

56. Bryan Clark, *Facebook is Killing Snapchat with the Format It Created*, THE NEXT WEB (May 21, 2018), https://thenextweb.com/socialmedia/2018/05/21/facebook-is-killing-snapchat-with-the-format-it-created/ [https://perma.unl.edu/YLE9-B359].

57. *See* John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. ECON. 137 (1958).

58. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).

regulation is likely to fill the gap. European competition policy gives some insight into how antitrust, complemented with consumer protection and privacy protection, can be an alternative to more intrusive regulation.[59] Third, Europe may be right in some not insignificant ways.

We focus on the third point. Europe may be right. We address the skeptics who insist that there is no competition problem and that, if there is, it cannot be solved except by remedies that are worse than the disease. Is there a competition problem? Let us return to the three problems analyzed: (1) the *Google/Comparative Shopping* problem; (2) the German Facebook problem; and (3) acquisitions by dominant platforms of potentially threatening start-ups. Starting with the last, it is now recognized that the acquisitions of nascant competitors might be anticompetitive. If so, they are fair game for divestiture—if divestiture will indeed produce the desired competition. Going forward, these acquisitions should be vetted more seriously.

There is a philosophical divide between those who want to give more breathing space to even dominant platforms to buy promising start-ups whose futures are speculative, and those who are alarmed that the platforms are snapping up all threatening startups and are thereby insulating themselves from the competitive forces that could make them accountable.[60] These are the usual philosophical tugs and play out with little fanfare (or get submerged) in the course of technocratic merger review.

The middle category—the German Facebook case—is largely a problem of deception, privacy invasion, and exploitation of people who provide their data. While the German FCO was able to blend the several disciplines, the underlying problem treated in the German Facebook case is not likely to be seen as an *antitrust* problem in the United States.

We come, then, to category number 1: gatekeepers abuse the users of their platforms who compete with them, systematically downgrading the rivals, sabotaging their inventions, and appropriating their ideas to outcompete them. How to define the market, how to assess market power, how to identify an abuse as anticompetitive, and how to devise a remedy are all contested issues. In part, the divide is ideological. Do we stress that Google (for example) *created* its platform, conclude that it should be able to use it as it likes, and assume that legal duties will handicap invention? Or do we

59. This is not to say that we do not need top-down regulation, as in privacy protection. The Federal Trade Commission supports a national privacy regulation law. *See* Cecilia Kang, *F.T.C. Commissioners Back Privacy Law to Regulate Tech Companies*, N.Y. TIMES (May 8, 2019), https://www.nytimes.com/2019/05/08/business/ftc-hearing-facebook.html [https://perma.unl.edu/WV4X-NU3L].

60. For example, there could be real competition on privacy terms.

highlight Google's conflict of interests and observe that downgrading often-better rivals is inefficient as well as unfair? Do we emphasize that clogging the path to market interferes with the competition process, chills the incentives of the platform users, and defeats expectations of consumers, who expect best answers to their queries? In this late day of the political economy debate, the divide will not be closed by evidence or economics. The popular sentiment, however, tends to coincide with the concerns about power, its abuse, and the unaccountability of the dominant platforms.[61]

Here are six suggestions for U.S. law, based on this author's perception that the big data antitrust abuses are real and pressing:

1. Recognize that the dominant big data platforms have economic power sufficient to cause competitive harms. When conduct of a dominant platform has demonstrable anticompetitive qualities, we should simplify the proofs of power and effects and get quickly to the question of procompetitive justifications.[62] Anticompetitive qualities include clauses and conduct to frustrate multi-homing, interoperability, and data portability. If the platform engages in conduct to raise rivals' costs, to make alternatives infeasible, or to marginalize rivals, the burden should shift; and if defendants offer no credible procompetitive explanation or justification, the conduct should be prohibited. The Federal Trade Commission is well situated to do this job.[63]
2. Much conduct is likely to require deeper study of pros and cons. The FTC should examine the practices, listen to the justifications, and judge the conduct. It should not be required to prove that the platform's conduct will lessen output in the relevant market as a condition precedent to finding an offense. Output limitation is not the problem. To

61. *See supra* note 7. Recent scholarly studies tend to support the concerns. *See, e.g.*, JASON FURMAN, UNLOCKING DIGITAL COMPETITION, REPORT OF THE DIGITAL COMPETITION EXPERT PANEL (Mar. 13, 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf [https://perma.unl.edu/FWY5-64WR] (an independent report on the state of competition in digital markets, with proposals to boost competition and innovation for the benefit of consumers and businesses).

62. The FTC initiated such an approach in Matter of Massachusetts Bd. of Registration in Optometry, 110 F.T.C. 549 (1988), and a similar approach is suggested by Justice Breyer in his dissenting opinions in *AmEx* and in *Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

63. *AmEx* cuts in the other direction. *AmEx* approves a restraint that gags merchants from giving consumers truthful price information because if consumers know their options they might switch. This is wrong.

clarify the law, the FTC might write rules under its rule-making authority.

3. In the case of a dominant platform that also hosts its own services on the platform, the gatekeeper has a conflict of interest. The FTC should seriously consider establishing a duty of dominant platforms to treat all firms that are rivals on the platform (including its own) neutrally. As a first step the FTC should require the platform either to announce clearly regarding search query returns: "You are advised that we give preference to our own product"[64] or to offer neutral, merit-based treatment. This can be done immediately. Writers and implementers of the algorithm should be rewarded on the basis of the system's performance, not on the basis of the platform's own products' performance.
4. More research should address the efficiency and innovation properties of a dominant platform's duties of fair dealing. Framed differently: Do we get more, and more dynamic, innovation (1) in a world in which the dominant platform has no antitrust duties to those who use its platform in competition with it, or (2) in a world in which the platform has the duty of neutral treatment?
5. Strategies of dominant firms to nip emerging competition in the bud by preemptive strike acquisitions should be taken seriously.[65] Anticompetitive acquisitions of start-ups should be prohibited under the merger laws. Strategies of dominant firms to nip competitors in the bud should be prohibited as monopolistic conduct.
6. When the public cries: "Abuse by big data," antitrust technocrats often respond: "Not my problem." This is the wrong answer. We need to break out of silo-thinking that reduces antitrust to output-limiting conduct and assumes that single-firm conduct is efficient.

64. A new EU regulation (not yet in effect) would require online platforms to be more transparent with the businesses that deal on their platforms. It would require the platforms, among other things, to reveal whether they give preference to their own offerings, and how. *See* EU introduces transparency obligations for online platforms, June 14, 2019, https://www.consilium.europa.eu/en/press/press-releases/2019/06/14/eu-introduces-transparency-obligations-for-online-platforms/ [https://perma.unl.edu/RH7K-HTLC].

65. The Federal Trade Commission is in the process of investigating the antitrust implications of Facebook's scores of acquisitions. *See* Brent Kendall, John D. McKinnon & Deepa Seetharaman, *FTC Antitrust Probe of Facebook Scrutinizes Its Acquisitions*, WALL ST. J. (Aug. 2, 2019), https://www.wsj.com/articles/ftc-antitrust-probe-of-facebook-scrutinizes-its-acquisitions-11564683965 [https://perma.unl.edu/Y49U-QKKT].

VI. CONCLUSION

In conclusion, the big data platforms do pose problems that are antitrust problems. There are antitrust means to call big data to account. It is time for the United States to stop the big data antitrust abuses.