

“Understanding The Digital Advertising Ecosystem And The Impact Of Data Privacy And Competition Policy”

Responses to Questions for the Record for Jan M. Rybnicek Freshfields Bruckhaus Deringer

Questions from Senator Whitehouse

1. As we consider federal legislation regulating online data collection, data privacy, and data security, what are the most exploitative practices used to coerce consumers into granting consent that federal law should prohibit?
2. Are there best practices with respect to customer consent that we use should to model federal legislation?

I have not researched this issue in detail. I would only add that any legislation intended to deal with the issue of effective customer consent should recognize that there may be design trade-offs between business practices and services that give customers the best user experience on the one hand and policies intended to provide additional measures of assurance that customers have effectively consented on the other hand. For instance, you could imagine that redundant customer notices may overall reduce the customer experience without giving significantly more in terms of protections to ensure effective consent. Any regulatory regime should require an appropriate cost-benefit analysis so as not to inadvertently reduce consumer welfare or stifle innovation.

Questions from Senator Booker

1. The German Bundeskartellamt now prohibits Facebook from combining data gathered from WhatsApp or Instagram and assigning those data to a Facebook user account without a user’s voluntary consent.
 - a. Is this the most effective remedy available to address consolidation in the advertising technology market?
 - b. Does this one decision in Europe open opportunities for new entrants into the market? Or are the major platforms still too large to compete with?

Without speaking to the particulars of the German case, I generally would be concerned that requiring companies to disaggregate or cordon off their data will lessen the user experience and digital platforms’ ability to deliver better products and services. It is precisely the combination of the data that often leads to innovation and improved products by these companies. The irony of the debate about the size and power of digital platform companies is that it is often their size and scope (and the associated network effects) that allows them to

provide better products to consumers. As was discussed at the hearing, there are fewer benefits from having your friends scattered across 10 different mini-Facebooks versus having a single platform where you can conveniently engage with all your friends. That same size, of course, is why we should take antitrust enforcement of digital platforms seriously and be vigilant to potential violations, but that enforcement should come with regulatory humility and not at the expense of consumers.

2. The Microsoft, IBM, and AT&T antitrust cases each took the better part of a decade and were prohibitively expensive. However, Professor Tim Wu of Columbia Law School has argued that the IBM case was worth bringing because—despite the costs and delays—the litigation immediately caused IBM to change some of its anticompetitive conduct. Others have made similar claims about Microsoft. Do you believe that society and industry can benefit from enforcement agencies simply commencing antitrust litigation?

It is important that the antitrust agencies bring cases when they have concluded that there has been a violation of the antitrust or consumer protection laws and there is no more efficient way to promote consumer welfare (e.g., through a consent agreement). Consumers can and do benefit significantly from the US agencies bringing cases where there is an underlying violation, and the US agencies are not shy about bringing cases when they believe it is necessary. Whether litigation is the most effective tool in any particular case must be weighed against the probability of success (and the impact of a potential loss on developments to the law), the incremental benefit that will be achieved through the litigation (as compared to a potential settlement agreement), and the required resources. It is important therefore that Congress provide the agencies with sufficient funding so that resource restrictions do not inhibit effective enforcement and so that the agencies are able to make enforcement decision based on what benefits consumers. Of course, it is important that the agencies bring cases only where there is a sound basis to believe a violation of the law has occurred and not simply to use litigation to change commercial practices that are not proscribed by the laws passed by Congress..

3. Apple dominates podcast listening via its podcast app. However, because of Apple’s privacy policies, podcast advertisers complain that they receive almost no data from Apple beyond anonymized user statistics. For example, a brand purchasing a web ad can tell how many people viewed it, how many people clicked on it, and, with cookies, possibly how many people visited the website without clicking through. However, generally speaking, when a brand purchases a podcast ad, they cannot even be certain about how many people listened to the ad.

Furthermore, a recent PricewaterhouseCoopers analysis of the media marketplace predicts that increased consolidation is a foregone conclusion in the podcast industry: “The podcast market is ripe for M&A activity, as potential targets in the space include content networks, hosting services, distribution platforms, and advertising and analytics services.”³ Indeed Spotify recently purchased the podcasting firms Gimlet and Anchor for a combined \$340 million.

- a. Do you believe that a wave of consolidation in the podcast market is inevitable?

- b. Why did this consolidation not take place earlier? Did Apple's focus on privacy change the way the podcast advertising market developed?

Tech markets are dynamic and it is hard to predict too far into the future what is likely to happen in any particular business. As others have noted, over the past five years we have witnessed an unexpected podcast renaissance. It is difficult to say whether this is attributable to improvements in technology, improvements in content, or something else (such as it simply being easier today to listen to podcasts in modern cars during the morning commute). Growth in consumer demand for podcasts naturally has spurred commercial interest and investment in podcast companies and content, and that investment has in turn increased output (i.e., the number of podcasts available to consumers) and the quality of the content. Unsurprisingly, it also has increased advertiser desire to reach the growing population of podcast listeners and the ability of podcast producers to monetize their podcast products. This increased revenue then has helped support additional investment in new content and innovation. This is to the benefit of consumers. Whether acquisitions of podcast companies either by direct competitors (i.e., other podcast companies) or adjacent competitors (i.e., companies providing services in similar areas such as music streaming) makes sense will depend on several factors, but there are many obvious and potentially procompetitive benefits, including diversifying your content portfolio and becoming less dependent on major music labels for content. That such transactions may be becoming increasingly likely it likely the result of podcasts growing popularity and overall commercial success.

4. The major digital advertising markets essentially operate as black-box auctions. Each platform runs its own internal exchange and, in the milliseconds required to load a page, makes decisions about the ads you will be served. At the same time, advertising fraud is rampant, with computer programs (bots) either creating fake traffic on websites with embedded ads or automatically generating clicks on banners. One research firm estimated that ad fraud cost advertisers \$19 billion in 2018, the same year in which Facebook, for example, shut down 583 million fake accounts in the first quarter alone. Google recently agreed to refund advertisers for ads purchased on its ad marketplaces that ran on websites with fake traffic. In addition to the trackers meant to follow us from site to site and from device to device, there are also trackers set up simply for verifying ad fraud. Thus, in effect, the watchers themselves are being watched, as companies resist paying for the delivery of ads that never reach the intended audience. Given the lack of transparency about this process, how confident are you that this is a functioning market? How do we know that it is competitive? How do we know whether it is efficiency enhancing?

It is in the interest of digital platforms to improve the quality of their advertising tools and to convey the benefits of their services to their advertiser customers in order to attract and retain those customers. As you note, digital platform companies today already take steps to thwart advertising fraud in order to bring greater value to their advertiser customers. The mere existence of fraud alone is not a basis on which to conclude an industry is not competitive. Indeed, the fact that digital platforms must work (i.e., compete) to keep advertisers happy by remedying fraud and that advertisers resist paying for delivery of ads that never reach the intended audience, potentially is good evidence of competition in the marketplace. The FTC should play an important role in this space by continuing to use its

tools to protect against fraud.

5. Last fall, at an FTC hearing on the economics of Big Data and personal information, Professor Alessandro Acquisti of Carnegie Mellon University previewed findings from his research indicating that targeted advertising increases revenue, but only by approximately 4 percent. Meanwhile, purchasing behaviorally targeted ads versus nontargeted ads is orders of magnitude more expensive. If ultimately proven true, what should advertisers do with this information?

I am not familiar with the details of the methodology used in the Acquisti paper or whether the results have been confirmed, but I generally believe that this type of research is incredibly important for policy discussions. It is unlikely that one paper will resolve all open questions or present a simple and clear policy solution. Indeed, there are several potential takeaways from the Acquisti paper alone, including that targeted advertising generates benefits. More research should be done to understand the key factors (including potentially market power) influencing pricing and margins for targeted advertising.

6. Earlier this year, rather than running the risk of incurring the large maximum fines set forth in the European Union's General Data Protection Regulation (GDPR), the *New York Times* decided it would simply block all open-exchange ad buying on its European pages. What this means is that the *Times* completely eliminated behavioral targeting on its European sites and focused entirely on contextual and geographical targeting. Surprisingly, the *Times* saw no ad revenue drop as a result; in fact, quite the opposite happened—it was able to increase its ad revenue even after cutting itself off from ad exchanges in Europe. Does this episode tell us anything at all about the efficacy of behavioral targeting? Or can this outcome simply be attributed to the strength of certain brands?

*I am not familiar enough with the event and circumstances surrounding it to comment in detail, but would agree that it is an opportunity for additional study to understand whether behavioral advertising is effective. As you point out, in any such study it is important to accurately understand causation and to make sure that observations are not attributable to some other aspect of the marketplace (such as the *New York Times* brand name).*

Questions from Chairman Graham

1. How is the current digital advertising marketplace impacting publishers like the Wall Street Journal and New York Times? How will privacy legislation change that?

News publishers have called on Congress to pass an antitrust exemption that would allow them to act collectively to negotiate better terms and conditions with the large digital platform companies. They feel that today they individually have little leverage to negotiate reasonable and fair terms. The vitality of our news organizations is an important issue and we should continue to take steps to promote a free and open press in the United States. Economic learning, however, has taught us that exemptions from the antitrust laws are unlikely to benefit

consumers and would allow precisely the type of collusive behavior that is well understood to most likely be harmful.

2. As a result of GDPR, we understand that Google limited third-party ad serving on YouTube and also restricted the data received by publishers through AdSense. Do you agree with Google's interpretation of GDPR? Could the law be clearer?

I am not an expert on GDPR or what the correct or most reasonable interpretation is of any particular provision. However, it is unsurprising that a massive new regulatory regime will have significant consequences (some intended and some unintended) as businesses struggle with the high cost of compliance and seek to limit the risks associated with perceived failures to comply. The irony is that these costs often will be borne disproportionately by smaller companies that are seeking to enter and compete against incumbents with deeper pockets.