

DATA IN THE DIGITAL ECONOMY: THE “ANTI-HERO” OF ANTITRUST OR JUST “BAD REPUTATION?”



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Today, data are not a passive by-product of economic activity but can be used as an input in the production process and by firms to make other significant business decisions. While it is well documented that consumers have greatly benefitted from this emergence of data-driven business activity, the current antitrust debate around data focuses on whether the use of data by businesses can confer a competitive advantage that distorts fair competition and, in turn, reduces consumer welfare. We discuss theories of potential anticompetitive harms arising out of the use of data as a direct input into production and the use of data in strategic decision making. We document theories of potential anticompetitive harm associated with each use case and discuss the state of the current economic research that speaks to these issues.

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I. INTRODUCTION

In the modern digital economy, consumers have a sprawling and ever-growing digital footprint, and data are generated at unprecedented pace; the total data generated reached 64 zettabytes in 2020 and is expected to exceed 180 zettabytes by 2025.² Virtually all businesses collect, store, analyze, and rely on some form of data in their ordinary course of business. In a 2015 survey by *The Economist*, about 90 percent of executives reported integrating data into “almost all parts” or “a majority” of their business operations.³ Today, data are not a passive by-product of economic activity but can be used as an input in the production process and by firms to make other significant business decisions.

It is well documented that consumers have greatly benefitted from this emergence of data-driven business activity. Data have allowed businesses to enhance the quality of their existing products and services and to innovate and introduce new technologies. For example, ridesharing services and maps with live traffic use real-time data to optimize routes, reduce travel times, and enhance the user experience. Furthermore, data allowed for the emergence of new business models for monetization, resulting in a proliferation of free services.⁴

The current antitrust debate concerning data centers around whether the use of data by businesses can confer a competitive advantage that distorts fair competition and, in turn, reduces consumer welfare.⁵ Some policymakers have raised concerns that the accumulation of data by a few large firms may result in market dominance, potentially limiting competition.⁶ In particular, due to their outsized role in the provision of online services, the collection and control of massive amounts of data by large tech firms has been the subject of private litigations and investigations from antitrust regulators in the United States and around the world.⁷

Although numerous theories exist regarding the anticompetitive harm resulting from the collection and control of data, they can be broadly categorized based on the use cases of data in the specific markets under examination. The economic literature has focused on two use cases of data that are not mutually exclusive.⁸ First, data can be a direct input in the production of goods and services. Second, data can be used more indirectly in firms’ decision-making processes, playing a role in fostering innovation and leading to the development of new products and services. We discuss theories of potential anticompetitive harms arising out of the collection and control of data corresponding to each of these use cases and discuss the current economic and legal approaches to dealing with allegations surrounding data as a source of anticompetitive outcomes. We find that there is a lack of consensus on the implications of the collection and control of data for competitive dynamics and the scope of antitrust enforcement.

II. POTENTIAL FOR ANTICOMPETITIVE HARMS ARISING OUT OF THE USE OF DATA AS AN INPUT

Many businesses rely on the use of data as an input to enhance their existing products and services, inform decision making, and improve operational efficiencies. As businesses increasingly use data as part of their operations, consumers benefit from more tailored, efficient, and potentially lower-cost products and services, leading to higher consumer welfare.⁹

2 One zettabyte is equal to one trillion gigabytes. See *Volume of data/information created, captured, copied, and consumed worldwide from 2010 to 2020, with forecasts from 2021 to 2025*, STATISTA (June 2021), <https://www.statista.com/statistics/871513/worldwide-data-created/>.

3 *The Business of Data*, THE ECONOMIST, 7 (2015).

4 D. Daniel Sokol & Rosin E. Comerford, *Antitrust and Regulating Big Data*, 23 GEO. MASON L. REV. 1129, 1133-1134 (2016).

5 MAURICE E. STUCKE & ALLEN P. GRUNES, *BIG DATA AND COMPETITION POLICY* (2016); Jacques Crémer, Yves-Alexandre de Montjoye, & Heike Schweitzer, *Competition Policy for the Digital Era*, PUBLICATIONS OFFICE OF THE EUROPEAN UNION, 5-7 (2019).

6 For example, during the Senate Judiciary Subcommittee on Competition Policy, Antitrust, and Consumer Rights hearings, Senator Amy Klobuchar commented that “the control that big data has serious implications for healthy, competitive marketplaces.” News Release, Amy Klobuchar, Chairwoman Klobuchar Opens Antitrust Hearing Highlighting How Big Data Can Threaten Competition (September 21, 2021). See also *Executive Order on Promoting Competition in the American Economy*, THE WHITE HOUSE (July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

7 *Investigation of Competition in Digital Markets*, SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, 9-10 (2020), <https://s3.documentcloud.org/documents/7222833/House-Tech-Antitrust-Report.pdf>. See also Blair Levin & Larry Downes, *Microsoft, Google, and a New Era of Antitrust*, HARVARD BUSINESS REVIEW (February 2023), <https://hbr.org/2023/02/microsoft-google-and-a-new-era-of-antitrust>; *Antitrust Reform and Big Tech Firms*, CONGRESSIONAL RESEARCH SERVICE (September 2023), <https://crsreports.congress.gov/product/pdf/R/R46875>.

8 See e.g. Veldkamp discusses the use of data as an input that enhances productivity, data as a factor of production, and the use of data by firms to make significant decisions. Laura Veldkamp, *Valuing Data as an Asset*, 27 REVIEW OF FINANCE 1545, 1547-1548, 1558-1559 (2023); Kean Birch, DT Cochrane, & Callum Ward, *Data as Asset? The Measurement, Governance, and Valuation of Digital Personal Data by Big Tech*, 8 BIG DATA SOC 1 (2021).

9 John M. Yun, *The Role of Big Data in Antitrust*, in THE GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY 220, 224 (Joshua D. Wright, et al. eds., 2020).

On the other hand, some have argued that the use of data may lead to anticompetitive concerns. For example, it has been alleged that the collection and control of data can not only serve as a source of market power but can also perpetuate it by creating a competitive advantage and erecting barriers to entry for smaller firms.¹⁰ For example, in litigations against various platforms, plaintiffs have alleged, among other things, that the platform's alleged monopoly power depends on a critical mass of accumulated data that would-be competitors cannot overcome.¹¹ Others have also argued that restricting data access rights can be anticompetitive, particularly when large incumbent firms foreclose smaller rivals from accessing what rivals claim is an essential input. For example, PeopleBrowsr, a social media analytics firm whose core business involves monetizing its analysis of every tweet posted on Twitter, sued Twitter for blocking its access to Twitter's Firehose API that provides full access to all public tweets in real time and sought a preliminary injunction "to prevent Twitter from destroying its business, PeopleBrowsr's contractual and prospective business relations, and restraining competition in markets using Twitter data."¹²

It should not be presumed that the collection and control of data necessarily creates market power or leads to competitive advantage. In fact, there is no consensus in the economics literature that the collection and control of data is a source of market power. The mechanism that some researchers have articulated by which data would lead to a source of market power has been referred to as a "feedback loop,"¹³ whereby the collection of data leads to an entrenchment of a dominant position. The stated logic of the feedback loop theory is that firms with better access to data can offer superior products, attract more customers, and, in the process, collect even more data to further improve their products. Smaller competitors with limited access to data would neither be able to match the product quality offered by dominant firms nor be able to compete as effectively, ultimately creating an entry barrier for new competitors. For example, Stucke & Ezrachi argue that inequality in access to data can lower the competitive pressure on dominant firms and lead to the potential degradation of quality for consumers.¹⁴ On the other hand, other economists and legal scholars have expressed reservations about the potential for data to act as an entry barrier. For example, Lambrecht & Tucker argue that for data to be a source of competitive advantage and a barrier to entry, they would have to be rare and difficult to replicate and substitute, and most transaction data do not satisfy these features.¹⁵ Similarly, Sokol & Comerford argue that data-driven markets have "low entry barriers" and that concerns related to the strength of network effects are "grossly overstated."¹⁶

The feedback loop theory presumes that there are strong economies of scale and scope associated with the collection and control of data; however, empirical evidence suggests that this may not be a foregone conclusion. Even when "the right data are being collected and controlled," which is a strong assumption (more on this below), academic research suggests that after a certain threshold, the benefits derived from data may in fact exhibit diminishing returns to scale. For example, economic research suggests that the search engine learning curve is S-shaped, with increasing returns at low scale of data and decreasing returns at higher scale of data, and the threshold between the two depends on the frequency of keyword queries.¹⁷ Lerner confirms this when noting that "[c]lick-and-query data are an important input into search algorithms, but the value of incremental data in providing relevant search results decreases as the amount of data available to those algorithms increases."¹⁸ Similarly, Bajari, et al. show that Amazon's ability to forecast demand does not improve as more customer and sales data are utilized.¹⁹

10 Inge Graef, *Market Definition and Market Power in Data: The Case of Online Platforms*, 38 WORLD COMPETITION 473, 484 (2015).

11 See e.g. Complaint, Maximilian Klein, et al. v. Facebook Inc., 5:20-cv-08570-LHK, ¶ 264 (N.D. Cal. 2021); Amended Complaint, *The State of Texas, et al. v. Google, LLC*, 4:20-CV-957-SDJ, ¶ 269 (E.D. Tex. 2021).

12 PeopleBrowsr and Twitter settled their dispute in April 2013 and agreed that PeopleBrowsr could access Twitter's "firehose" data through December 2013, and then it would get access from an authorized Twitter data reseller. See Linda Chiem, *Analytics Co. Wins TRO In Suit Over Twitter Data Access*, LAW360 (November 29, 2012), <https://www.law360.com/articles/397592/analytics-co-wins-tro-in-suit-over-twitter-data-access>; David McAfee, *Twitter, PeopleBrowsr Settle Dispute Over Data Access*, LAW360 (April 29, 2013), <https://www.law360.com/articles/436973/twitter-peoplebrowsr-settle-dispute-over-data-access>.

13 Maurice E. Stucke, *Should We Be Concerned about Data-opolies?* 2 GEO. L. TECH. REV. 275, 281-283 (2018); Daniel L. Rubinfeld & Michal S. Gal, *Access Barriers to Big Data*, 59 ARIZ. L. REV. 339, 355-356 (2017).

14 Maurice E. Stucke & Ariel Ezrachi, *When Competition Fails to Optimize Quality: A Look at Search Engines*, 18 YALE J.L. & TECH. 70, 102-103 (2016).

15 Anja Lambrecht & Catherine E. Tucker, *Can Big Data Protect a Firm from Competition?* (2015). Hagiu & Wright also argue that data-enabled network effects are weaker than "regular" network effects, as buying data is relatively easier and alternative sources of data can often be used to gain market share. See Andrei Hagiu & Julian Wright, *When Data Creates Competitive Advantage*, HARVARD BUSINESS REVIEW (January 2020), <https://hbr.org/2020/01/when-data-creates-competitive-advantage>.

16 Sokol & Comerford, *supra* note 4, at 1148.

17 Bertin Martens, *What Should Be Done about Google's Quasi-Monopoly in Search? Mandatory Data Sharing Versus AI-Driven Technological Competition* (Bruegel, Working Paper, October 2023).

18 Andres V. Lerner, *The Role of 'Big Data' in Online Platform Competition*, 36 (2014).

19 Patrick Bajari, et al., *The Impact of Big Data on Firm Performance: An Empirical Investigation*, 109 AEA PAPERS AND PROCEEDINGS 33, 35-37 (2019).

In addition, the usage of large datasets makes analysis and the corresponding decision making susceptible to spurious correlations. For example, Fan, Han & Liu show that large sample size and high dimensionality of data lead to noise accumulation and spurious correlations.²⁰ Similarly, Calude & Longo show that large enough datasets “have to contain arbitrary correlation,” increasing the risk of misleading insights.²¹

Lastly, given that data are generally non-rivalrous and easy to produce, it is unlikely that a single business controls the right data. This was recognized by the U.S. Federal Trade Commission (“FTC”) during its investigation of Google’s acquisition of DoubleClick in 2007, noting that the data available to Google did not constitute an essential input to a successful online advertising product and that a number of Google’s competitors have at their disposal valuable stores of data not available to Google.²² Further, the existence of data brokers and sellers – who buy and collect information from consumers and small businesses, aggregate it, and then offer data products to third parties – reinforces the notion that any single firm’s data are not a barrier to entry or expansion. For example, Acxiom is a data broker that provides comprehensive consumer data, including demographic, financial, and past purchase information, that enables firms to gain insights into their consumers and allows marketers to appropriately target advertisements.²³ Similarly, Experian collects and processes consumer financial data and provides credit scores that are used by banks, credit card companies, landlords, and employers.²⁴

However, the discussion above on the potential diminishing returns to scale associated with data presumed that “the right data were being collected and controlled.” It is important to recognize that the collecting and storing of data by a business does not necessarily confer a competitive advantage to that business through the ownership of that data. Industry research suggests that while businesses are collecting increasing amounts of data, a large fraction of data are essentially of limited value. A large survey of industry leaders shows that only 16 percent of data are considered critical to the operational success of businesses, while 84 percent of data are either redundant, obsolete, or of unknown value.²⁵ Similarly, it is estimated that a large fraction of executives are worried about the quality of the data they base their decisions on²⁶ and report that the data are “too soiled to make any sense of it.”²⁷ In an academic study, Neumann, et al. find that the consumer profiles sold by data brokers are often “economically unattractive” for advertisers.²⁸

The reported lack of the value of data often stems from the quality or unstructured nature of data. Data are not homogeneous but rather are differentiable along many dimensions, including structure, timing, quality, volume, and granularity. Data collected by firms encompass a wide range of formats, including text, images, audio, and video, making it difficult for businesses to gain insights from them. A stream of research suggests that the value derived from data depends on other firm-specific factors such as technological infrastructure, managerial expertise, and domain-specific knowledge. For example, Wu, Hitt, & Lou show that a firm’s ability to use data analytics depends on its inventor networks.²⁹ Ghasemaghaei finds that knowledge sharing within firms (e.g. sharing information between employees) is a necessary condition for data analytics to contribute productively to quality decision making.³⁰ In fact, investing in data capabilities is in itself a form of competition.

This discussion should not be misconstrued to imply that data are never valuable. When firms utilize data effectively, their reliance on data can almost certainly result in higher output, increased productivity, and enhanced innovation. For example, retailers like Walmart and Costco

20 Jianqing Fan, Fang Han, & Han Liu, *Challenges of Big Data Analysis*, 1 NATL. SCI. REV. 293 (2014).

21 Cristian Claude & Giuseppe Longo, *The Deluge of Spurious Correlations in Big Data*, 22 FOUND. SCI. 595 (2017).

22 *Statement of Federal Trade Commission Concerning Google/DoubleClick*, FTC File No. 071-0170, 12-13 (December 20, 2007).

23 *The World’s Most Powerful Consumer Insights – Enhance, Engage, and Acquire Infobase*, ACXIOM (2020), <https://www.acxiom.com/wp-content/uploads/2020/07/ac-2490-19-fs-acxiom-infobase.pdf>.

24 *Frequently Asked Questions*, EXPERIAN BUSINESS SERVICES, <https://smallbusiness.experian.com/pdp.aspx?pg=helpfaq>.

25 *The Databerg Report: See What Others Don’t. Identify the Value, Risk, and Cost of Your Data*, VERITAS, 4 (March 15, 2016), https://www.veritas.com/content/dam/Veritas/docs/reports/scd_veritas_strike_summary_a4-ls-usa_final.pdf.

26 *Now or Never: 2016 Global CEO Outlook*, KPMG, 42 (2016), https://images.forbes.com/forbesinsights/StudyPDFs/KPMG-Global_CEO_Outlook-REPORT.pdf.

27 *Dun & Bradstreet Survey Reveals One in Five Businesses Loses Revenue and Customers Due to Incomplete Data*, PR NEWSWIRE (June 24, 2019), <https://www.prnewswire.com/news-releases/dun--bradstreet-survey-reveals-one-in-five-businesses-loses-revenue-and-customers-due-to-incomplete-data-300873093.html>.

28 Nico Neumann, Catherine E. Tucker, & Timothy Whitfield, *How Effective is Third-Party Consumer Profiling and Audience Delivery?: Evidence from Field Studies*, 38 MARK. SCI. 918 (2019).

29 Lynn Wu, Bowen Lou, & Lorin Hitt, *Data Analytics Supports Decentralized Innovation*, 65 MANAG. SCI. 4863 (2019).

30 Maryam Ghasemaghaei, *Does Data Analytics Use Improve Firm Decision Making Quality? The Role of Knowledge Sharing and Data Analytics Competency*, 120 DECIS. SUPPORT SYST. 14 (2019).

use data-driven analytics for price optimization, inventory management, and supply chain management.³¹ Using data on 18,000 manufacturing establishments in the United States, Brynjolfsson and McElheran show that data-driven decision making is associated with statistically significant increases in productivity.³² In another paper, Ghasemaghaei & Calic find that data variety (i.e. the types of data being analyzed) and data velocity (i.e. the speed and frequency of data processing and integration) lead to enhanced firm innovation performance.³³

In conclusion, despite the public discourse around the potential for anticompetitive harm arising from the reliance on data as an input, the academic literature does not support the presumption that the collection and control of data by large online service provider firms by itself necessarily conveys an unfair competitive advantage to these businesses.

III. POTENTIAL FOR ANTICOMPETITIVE HARMS ARISING OUT OF THE USE OF DATA IN STRATEGIC DECISION MAKING

Data generated as part of providing a product or service can play a role in strategic decision making for many businesses. These data can be used in innovation and can lead to the development of new products or allow firms to expand into adjacent markets. The increased use of data by firms leads to higher consumer welfare through increased product counts and varieties, increased competition, and potentially lower prices. For example, Netflix uses its data on content consumption and viewer preferences to produce original content. As another example, using its consumer health data, Fitbit has expanded beyond traditional fitness trackers and into digital health care with Fitbit Premium, a platform that offers consumers coaching and personalized wellness insights.³⁴

Some argue that because large online service providers operate in multiple lines of business – often as the operator of a marketplace as well as a seller in the same marketplace or in adjacent lines of business – they can leverage their access to massive amounts of data to gain unparalleled market intelligence about their actual or would-be competitors that would enable them to gain an unfair competitive advantage.³⁵ In the EU, a variety of theories for anticompetitive harm have been considered as it relates to digital platforms operating in such a dual role as a platform operator and platform participant, such as monopoly leveraging, self-preferencing, and anticompetitive product design, to name a few.³⁶ The recently released 2023 Horizontal Merger Guidelines include for the first time specific considerations for multi-sided platforms and consider “competition between platforms, competition on a platform, and competition to displace the platform,” suggesting a partial convergence between approaches in the EU and the United States.³⁷ In particular, the U.S. Department of Justice and the FTC discuss a “‘conflict of interest’ as the divergence that can arise between the operator’s incentives to operate the platform as a forum for competition and its incentive to operate as a competitor on the platform itself.”³⁸

A recent example is that of Amazon, where in 2020, the EC investigated Amazon’s reliance on marketplace sellers’ non-public business data to calibrate its retail decisions. In the EC’s view, Amazon’s dual role as a platform that provides a marketplace where independent sellers can sell their products and as a seller on the same marketplace that competes directly with those sellers allowed it to have access to non-public business data of third-party sellers, avoid the normal risks of retail competition, and leverage its dominance in the market for the provision of

31 *5 Ways Walmart Uses Big Data to Help Customers*, WALMART (August 7, 2017), <https://corporate.walmart.com/news/2017/08/07/5-ways-walmart-uses-big-data-to-help-customers>; *4 Ways Companies Use Big Data to Make Smarter Decisions*, IMMENSE NETWORKS (February 21, 2018), <https://immense.net/4-ways-companies-use-big-data-make-smarter-decisions/>.

32 Erik Brynjolfsson & Kristina McElheran, *Data in Action: Data-Driven Decision Making in U.S. Manufacturing*, (U.S. Census Bureau Center for Economic Studies, Paper No. CES-WP-16-06, 2016); Erik Brynjolfsson & Kristina McElheran, *The Rapid Adoption of Data-Driven Decision-Making*, 106 AEA PAPERS AND PROCEEDINGS 133, 133-134 (2016). See also Erik Brynjolfsson, Lorin Hitt, & Heekyung Hellen Kim, *Strength in Numbers: How Does Data-Driven Decisionmaking Affect Firm Performance?* (2012).

33 Maryam Ghasemaghaei & Goran Calic, *Assessing the Impact of Big Data on Firm Innovation Performance: Big Data is not Always Better Data*, 108 J. BUS. RES. 147 (2020).

34 Heather Landi, *Fitbit Expands Healthcare Ambitions with New Devices, Subscription Service*, FIERCE HEALTHCARE (August 2019), <https://www.fiercehealthcare.com/tech/what-fitbit-s-new-product-and-services-say-about-company-s-health-ambitions>.

35 See e.g. *Investigation of Competition in Digital Markets*, *supra* note 7, at 16.

36 *Investigation of Competition in Digital Markets*, *supra* note 7, 395-397.

37 *2023 Merger Guidelines*, U.S. DEPARTMENT OF JUSTICE AND THE FEDERAL TRADE COMMISSION, 23-24 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.

38 *2023 Merger Guidelines*, *supra* note 37, at 24.

marketplace services.³⁹ In response to the EC's objections, Amazon has committed to not use non-public data relating to, or derived from, independent sellers' activities on its marketplace for its retail business.⁴⁰ Amazon's practices have also been under scrutiny in the United States, but to date, theories focused on monopoly leveraging and predatory pricing have not been pursued against Amazon.⁴¹ The differences between the EU and United States in approaches and outcomes may be explained, at least in part, by continued divergence between Section 2 of the Sherman Act and Article 102 of the Treaty of the Functioning of the European Union, as well as subsequent case law on both sides of the Atlantic.⁴²

The regulation of the collection and control of data is far from settled, especially in the United States. Despite bipartisan calls to rein in large technology firms, there does not exist a clear consensus on the right approach. Across the Atlantic, new regulations that govern the collection and use of data are being introduced in Europe and the United Kingdom. For example, the EC's Digital Markets Act aims to regulate large online platforms, so-called "gatekeepers,"⁴³ by imposing obligations to provide certain types of data access to their business users and advertisers, ensure data portability, and prohibit the use of non-public data generated by their business users to compete with them.⁴⁴ Similarly, the United Kingdom has introduced its own legislative framework to address issues related to the conduct of large online platforms, including data-related practices.⁴⁵

IV. CONCLUSION

In the increasingly digitized world, policymakers and practitioners appear to be at a crossroads, contending with the relationship between data, their economic utility, and their effect on competitive dynamics. As we document in this article, the potential for anticompetitive harm associated with the collection and control of data depends, at least in part, on the use case of the data. At the heart of the matter is a lack of consensus on the implications of the collection and control of data for competitive dynamics and the scope of antitrust enforcement.⁴⁶ While some argue for increased antitrust intervention to curb the dominance of data-rich firms,⁴⁷ others contend that the case for antitrust enforcement centered around the collection and control of data is weak.⁴⁸ Whatever the path forward, we believe that sound economic analysis should drive decision making, weighing any potential procompetitive benefits against any potential anticompetitive harms.

39 *Antitrust: Commission Sends Statement of Objections to Amazon for the Use of Non-Public Independent Seller Data and Opens Second Investigation into its E-Commerce Business Practice*, EUROPEAN COMMISSION, (November 10, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077.

40 *Antitrust: Commission Accepts Commitments by Amazon Barring It from Using Marketplace Seller Data, and Ensuring Equal Access to Buy Box and Prime*, EUROPEAN COMMISSION (December 20, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7777.

41 In fact, the Federal Trade Commission's antitrust lawsuit against Amazon, filed in late 2023, takes a notably different approach from that of the European Commission. It does not focus on the leveraging theory of harm linked to data, and instead attempts to use a more traditional theory of harm, linking Amazon's aggressive business practices to higher prices and a degraded experience for customers. See *Federal Trade Commission, et al. v. Amazon.Com Inc.*, 2:23-cv-01495 (W.D. Wash. 2023).

42 For a detailed discussion of the Atlantic divide between the EU's and U.S.'s approaches to monopoly and dominance law, see James Keyte, *Why the Atlantic Divide on Monopoly/Dominance Law and Enforcement Is So Difficult to Bridge*, 33 ANTITRUST 113 (2018).

43 The Digital Markets Act describes several criteria for a digital service to be considered a "gatekeeper," including but not limited to having "an entrenched and durable position" in the market, providing a service that is an "important gateway" between businesses and end users, and having "significant impact on the internal market." See Digital Markets Act, European Parliament and Council of the European Union, Article 3 (2022).

44 Digital Markets Act, *supra* note 43, Article 6.

45 Digital Markets, Competition and Consumers Bill, Bill No. 003 of 2023-2024, House of Commons (2023).

46 In addition, several commentators have discussed privacy as a form of non-price competition and have explored its intersection with antitrust considerations. However, addressing these issues falls beyond the scope of this article. See e.g. Geoffrey A. Manne & Ben R. Sperry, *The Problems and Perils of Bootstrapping Privacy and Data into an Antitrust Framework*, CPI ANTITRUST CHRONICLE (May 2015); Ginger Zhe Jin & Liad Wagman, *Big Data at the Crossroads of Antitrust and Consumer Protection*, 54 INF. ECON. POLICY 100865 (2021).

47 See e.g. Daniel McIntosh, *We Need to Talk About Data: How Digital Monopolies Arise and Why They Have Power and Influence*, 22 J. TECHNOL. LAW & POLICY 185 (2019); Graef, *supra* note 10.

48 See e.g. Darren S. Tucker & Hill Wellford, *Big Mistakes Regarding Big Data*, THE ANTITRUST SOURCE, (December 1, 2014); Sokol & Comerford, *supra* note 4; Yun, *supra* note 9.

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