

A NEW OPPORTUNITY FOR DIGITAL COMPETITION: FACEBOOK, LIBRA, AND ANTITRUST

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In a lot of ways, Facebook is more like a government than a traditional company.¹

– Mark Zuckerberg

[A]lmost all independent countries choose to assert their nationality by having, to their own inconvenience and that of their neighbors, a peculiar currency of their own.²

– John Stuart Mill

I. INTRODUCTION

Following an unstoppable trend for expansion, in June of 2019 Facebook aimed at a new market and announced its own cryptocurrency: Libra.³ Libra's potential to become a worldwide phenomenon with billions of users is unprecedented. Libra combines the digital nature of the Bitcoin with the low-volatility of a fiat currency, like the Dollar.⁴ Moreover, there are partners involved in this project, such as Uber or Spotify, who could widespread Libra's popularity and acceptance among users.⁵ Facebook's audience alone is over 2.6 billion

* © 2020. All rights reserved. Articles and Symposia Editor, *Stetson Law Review*, 2019–20. Candidate for Juris Doctor, Stetson University College of Law, 2020. Candidate for LL.B., University of Granada (Spain), 2020. I would like to thank Professor Mark Bauer, my writing advisor, for his extensive feedback and support. Many thanks also to my Notes and Comments Editor, Peyton Marshall, and to Articles & Symposia Editor, Tyler Lipsky, for their guidance and tireless editorial work throughout the writing of this article. Finally, thank you to all the editors and associates whose skills and dedication made this Article possible.

1. David Kirkpatrick, *The Facebook Defect*, *TIME* (Apr. 12, 2018), <https://time.com/5237458/the-facebook-defect/>.

2. JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY* 479 (1848) (available at <https://www.gutenberg.org/files/30107/30107-pdf.pdf>).

3. Libra Association, *An Introduction to Libra: White Paper*, LIBRA 3–4 (June 18, 2019), <https://libra.org/en-US/white-paper/> [hereinafter *Libra White Paper*].

4. *Id.* at 7.

5. *Id.* at 4.

users—larger than any country’s population.⁶ These factors make Libra’s stated goal of reaching billions of people likely to be met. Libra’s potential to start a financial revolution gained immediate attention from governments worldwide.⁷

The Libra Association will manage Libra.⁸ Under this structure, Facebook would be an equal member of the association.⁹ However, Facebook has stood as the leader of the project in the ongoing efforts to gain the trust of the public opinion.¹⁰ Most importantly, Facebook created and fully owns Novi, which is a company that will provide the digital wallet for Libra and other currencies.¹¹ Novi will be a payment system available as both a standalone app and as one integrated into WhatsApp and Facebook Messenger.¹² Through this operation, Facebook will be a company dedicated to social media (Facebook and Instagram); texting (WhatsApp and Messenger); retail (Checkout with Instagram and Facebook Marketplace); virtual reality (Oculus VR); video advertisement technology (Live Rail); drone-making (Ascenta); fitness

6. Form 10-Q, UNITED STATES SEC. & EXCH. COMM’N (Mar. 31, 2020), <http://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/bfe31518-2e18-48fb-8d98-5e8b07d94b2a.pdf> (Facebook’s quarterly report providing number of monthly active users on Facebook as of March 31, 2019); *World Population*, U.S. CENSUS BUREAU, <https://www.census.gov/popclock/print.php?component=counter> (last visited Aug. 23, 2020) (The world’s most populated country, China, has 1.39 billion citizens—one billion less than Facebook.).

7. Ryan Browne, *Facebook’s Libra Cryptocurrency Again Comes Under Fire From Global Policymakers*, CNBC (July 11, 2019), <https://www.cnbc.com/2019/07/11/facebook-libra-cryptocurrency-under-fire-from-global-policymakers.html>. The President of the United States remarked: “Facebook Libra’s ‘virtual currency’ will have little standing or dependability. If Facebook and other companies want to become a bank, they must seek a new Banking Charter . . . [w]e have only one real currency in the USA, and it is stronger than ever. . . . It is by far the most dominant currency anywhere in the World, and it will always stay that way. It is called the United States Dollar!” @realDonaldTrump, Twitter (July 11, 2019, 9:15 PM), <https://twitter.com/realDonaldTrump/status/1149472284702208000>.

8. *Libra White Paper*, *supra* note 3, at 7–9. While the Libra Association defines itself as a not-for-profit organization, the White Paper reserves the right to “pay dividends” to Libra members, a fundamental characteristic of corporations. *Id.*

9. *Id.* at 4.

10. Jacob Kastrenakes, *Facebook Tells Congress How It Thinks Libra Should Be Regulated*, THE VERGE (Jul. 15, 2019), <https://www.theverge.com/2019/7/15/20694740/facebook-libra-senate-testimony-regulatory-oversight>.

11. Joe Light et al., *Facebook Weighs Libra Revamp to Address Regulatory Concerns*, BLOOMBERG (Mar. 3, 2020), <https://www.bloomberg.com/news/articles/2020-03-03/facebook-weighs-libra-revamp-to-win-over-reluctant-regulators>; *see also About, Novi*, NOVI, <https://novi.com/about> (last visited Aug. 23, 2020). Formerly, the digital wallet was named “Calibra,” but Facebook renamed it to Novi. *Welcome to Novi*, FACEBOOK (May 26, 2020), <https://about.fb.com/news/2020/05/welcome-to-novi/>.

12. Examining Facebook’s Proposed Digital Currency and Data Privacy Considerations: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs, 116th Cong. (2019) (statement of David Marcus, Head of Calibra/Novi, Facebook, available at <https://www.banking.senate.gov/imo/media/doc/Marcus%20Testimony%207-16-19.pdf>).

and health monitoring (ProtoGeo Oy); and now finance (Libra and Novi).¹³

The central inquiry of this Comment is to ascertain if and how antitrust law plays a role in Facebook's unprecedented power. Antitrust laws have remained dormant regarding markets for "free" services, which do not have a monetary cost.¹⁴ However, Facebook's unprecedented expansion into financial services could be the big step that alerts enforcers and regulators in the United States. Margrethe Vestager, the European Commissioner for Competition, announced that the Commission has already started investigating Facebook's Libra for competition concerns to "be ready to act swiftly if an intervention were to prove necessary."¹⁵ Libra represents a broader challenge to ensure competitiveness in the digital market, which is a sector of the economy so remarkable that its participant companies expect growth amidst an extraordinary global depression.¹⁶ Libra's expected launch during an economic crisis in 2020 could also contribute to its success.¹⁷

The application of antitrust would not lead to company failure. In the 1990s, a landmark antitrust case against Microsoft stopped the software giant from extending its dominance into the new area of web browsing.¹⁸ The case made the Internet a competitive arena and gave companies like Google and Facebook an opportunity to start.¹⁹ Today, Microsoft remains a very successful company. Thus, this Comment is not about destroying businesses; Libra and Novi are significant innovations and would still exist under this analysis. On the contrary, this Comment

13. Nathan Reiff, *Top Companies Owned By Facebook*, INVESTOPEDIA, <https://www.investopedia.com/articles/personal-finance/051815/top-11-companies-owned-facebook.asp> (last updated Apr. 1, 2020).

14. *Infra* pt. II(A).

15. Margrethe Vestager, Executive Vice-President, European Comm'n, *Global markets and a fair deal for consumers* (Sept. 4, 2019) (transcript available at https://wayback.archive-it.org/12090/20191130061303/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/global-markets-and-fair-deal-consumers_en); *see also* Nicholas Hirst, *Facebook's Libra Draws Old Antitrust Questions and New Regulatory Concerns*, MLEX (Aug. 30, 2019), <https://mlexmarketinsight.com/insights-center/editors-picks/antitrust/cross-jurisdiction/facebooks-libra-draws-old-antitrust-questions-and-new-regulatory-concerns> (describing the European Commission's probe into Libra).

16. Daisuke Wakabayashi et al., *Big Tech Could Emerge from Coronavirus Crisis Stronger Than Ever*, N.Y. TIMES (Mar. 23, 2020), <https://www.nytimes.com/2020/03/23/technology/coronavirus-facebook-amazon-youtube.html>.

17. Oliver Knight & Colin Rivet, *Will Facebook's Libra Launch at the Perfect Time?*, YAHOO! FINANCE (Mar. 11, 2020), <https://finance.yahoo.com/news/facebook-libra-launch-perfect-time-150025053.html?> ("Libra could well be launching at an ideal time. . . . [P]ublic distrust of banks could spike as it did in 2008, which coincidentally caused the creation of Bitcoin.").

18. *See* *United States v. Microsoft Corp.*, 65 F. Supp. 2d 1 (D.D.C. 1999).

19. Richard Blumenthal & Tim Wu, *What the Microsoft Antitrust Case Taught Us*, N.Y. TIMES (May 18, 2018), <https://www.nytimes.com/2018/05/18/opinion/microsoft-antitrust-case.html?>

is about the next generation of U.S. technology companies having the opportunity to compete equally in a more diverse market where consumers do have a choice.

Part II of this Comment will review the history of antitrust in digital markets and how the law has struggled to adapt to the new economy. To understand Libra's impact, this analysis presents a broader picture of the markets in which Facebook operates. Part III describes Facebook's power in the social media market. Part IV will look into the online advertisement market and its connections with Facebook. Part V analyzes how Libra could worsen market concentration in social media and online advertising and the consequential harms for consumers. Finally, Part VI proposes solutions to reconcile Libra with market competitiveness.

II. THE HISTORY OF ANTITRUST IN DIGITAL MARKETS

This Part first examines the origin and evolution of antitrust and its relation to digital markets where services are allegedly offered for free, the so-called zero-price markets. Then, it explains how network effects play an important role for competition in digital markets. This Part concludes by offering the *Microsoft* case as an example that provides guidelines for assessing Facebook and Libra.

A. Zero-Price Services and Dormant Antitrust

Antitrust law has suffered an intense shift, which helps to explain the current challenges of applying antitrust to Big Tech.²⁰ Originally, the concentration of wealth and power laid the foundation for the enactment of antitrust statutes.²¹ Senator John Sherman, during the legislative debate on the antitrust act, stated: "If we would not submit to an emperor, we should not submit to an autocrat of trade."²² A paradigmatic example of this notion of antitrust is the case *Standard Oil Co. of N.J. v. United States* against Rockefeller's empire, which was broken up into smaller companies.²³ Today, all of Facebook's power is

20. Antitrust law has experienced so many different interpretations that some authors have used antitrust as the perfect subject for double session deconstruction, where the inconsistencies of each interpretation are revealed by encountering different sentences together. Arthur D. Austin, *Antitrust Deconstructed*, 22 STETSON L. REV. 1101, 1102 (1993).

21. See generally Sherman Anti-Trust Act of 1890, 15 U.S.C. §§ 1-7 (2018).

22. Willis M. West, *American History and Government* 666 (Allyn and Bacon eds., 1913).

23. 221 U.S. 1 (1911). Structural separations have also been imposed as an antitrust remedy under modern antitrust theory. See *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982) (enforcing a structural separation for AT&T).

concentrated in its CEO, Mark Zuckerberg, who owns sixty percent of the voting shares of Facebook's board.²⁴ A co-founder of Facebook expressed concern that Zuckerberg is the sole decisionmaker of the world's biggest social media platform, deciding alone "how to configure Facebook's algorithms to determine what people see in their News Feeds, what privacy settings they can use, . . . how to distinguish violent and incendiary speech from the merely offensive, and he can choose to shut down a competitor by acquiring, blocking or copying it."²⁵ Facebook's co-founder advocated for breaking up Facebook into smaller companies, as done with Rockefeller's company, to limit its power.²⁶

However, market concentration is no longer the main concern of antitrust.²⁷ A historical change in antitrust occurred in the 1970s when a group of scholars known as the *Chicago School* used economic analysis to advocate for a twofold change in the doctrine.²⁸ First, the laws should be concerned with "consumer welfare," not market concentration alone.²⁹ Second, antitrust analysis should be based on pricing theory.³⁰ While none of those proposals were in the statutory language of the Sherman Act, the Supreme Court embraced the Chicago School theory.³¹ The main advantage of the law and economics analysis was that their models had greater predictive abilities than previous antitrust

24. Emily Stewart, *Mark Zuckerberg Is Essentially Untouchable at Facebook*, Vox, <https://www.vox.com/technology/2018/11/19/18099011/mark-zuckerberg-facebook-stock-nyt-wsj> (last updated Dec. 19, 2018).

25. 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?>

26. *Id.*

27. *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) ("[T]he possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*."); 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* § 100-01, at 3-11 (Aspen Law & Bus. 2d ed. 1996) (emphasizing that antitrust is concerned with competition, not company size).

28. See Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 928 (1979). While law and economics analysis began in the 1960s, the Chicago School pushed further its neoclassical doctrines into antitrust during the 1970s. See *id.*

29. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 66 (1978).

30. Posner, *supra* note 28, at 928. Robert Bork and other proponents of this school were "firmly embedded in neoclassical price theory and based on an assumption of perfect competition. The Chicago School assumes that, in the long run, most markets tend to correct their own imperfections, and, accordingly, to interject government interference will only prolong the distortion or create new imperfections." Mark D. Bauer, "Give the Lady What She Wants"—As Long as It Is Macy's, 80 TEMP. L. REV. 949, 956 (2007) (footnotes omitted).

31. 15 U.S.C. §§ 1-7 (2018); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (emphasizing that consumer welfare was the objective of the Sherman Act) (quoting BORK, *supra* note 29, at 66); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19 (1979) (discussing the effects of economic theory in antitrust analysis); see also *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 69-70 (1977) (White, J., concurring) (expressing concern for the majority's use of a "purely economic approach" to overrule precedent).

doctrines.³² The shift to economic analysis transformed antitrust into a technical area of law, far from the understanding of general public.³³

The Chicago School paradigm has benefited Big Tech because this analysis has been deficient in zero-price markets.³⁴ In a zero-price market, services are offered without a monetary price, as with Facebook where usage is “free.”³⁵ The Chicago School’s pricing theory asks whether a monopolist could raise prices, but this approach is obsolete when there is no monetary price for the services.³⁶ Inadequate antitrust tools are among the factors that have enabled Big Tech to grow with few restrictions.³⁷ For example, the Federal Trade Commission approved Facebook’s one-billion-dollar acquisition of Instagram without even explaining its decision.³⁸

Yet, Facebook services are not free—users pay with their data and attention.³⁹ Moreover, Facebook operates on two sides of the market: by obtaining data and attention through the social media side and monetizing them through the advertising side.⁴⁰ Antitrust agencies can more easily analyze the advertising side of the market because advertisers pay a monetary price to Facebook.⁴¹ However, antitrust should also apply to the social media side because users pay Facebook

32. GIULIANO AMATO, ANTITRUST AND THE BOUNDS OF POWER 22 (Hart 1997). Some authors argued that economic analysis provided more “certainty” to the law. *Id.* Antitrust is not precisely characterized to be a predictable and certain area of law. However, the Chicago School gained the antitrust arena applying mathematician Henri Poincaré maxim: “It is far better to foresee even without certainty than not to foresee at all.” 1 CITIZEN SCIENTISTS LEAGUE, SCIENTIFIC WORK AND CREATIVITY: ADVICE FROM THE MASTERS 166 (Reginald D. Smith ed., 2012).

33. ROBERT REICH, THE WORK OF NATIONS 39 (Alfred A. Knopf ed., 1991). For criticism of the Chicago School and a discussion of the economic and political implications of trusts, see Sandeep Vaheesan, *The Twilight of the Technocrats’ Monopoly on Antitrust?*, 127 YALE L.J. F. 980 (2018).

34. See John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149, 196–97 (2015) (noting the difficulty of current antitrust theory to tackle zero-price markets).

35. *Id.*

36. *Id.* at 197.

37. TIM WU, THE CURSE OF BIGNESS 114–26 (2018).

38. *FTC Closes Its Investigation into Facebook’s Proposed Acquisition of Instagram Photo Sharing Program*, FED. TRADE COMM’N (Aug. 22, 2012), <https://www.ftc.gov/news-events/press-releases/2012/08/ftc-closes-its-investigation-facebooks-proposed-acquisition>.

39. MARK R. PATTERSON, ANTITRUST LAW IN THE NEW ECONOMY 163 (2017). Companies in the new economy have succeeded at taking free private human experience as raw material for commercial activities, a strategy that has been denounced as “surveillance capitalism.” SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER 232–33 (2019).

40. See Lapo Filistrucchi et al., *Market Definition in Two-Sided Markets: Theory and Practice*, 10 J. COMPETITION L. & ECON. 293, 297 (2014).

41. *E.g.*, European Comm’n Decision M.7217 Facebook/WhatsApp, 2014 O.J. (C 417) at 29–35 (Mar. 10, 2014), https://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf [hereinafter *Facebook/WhatsApp Decision M.7217*] (applying traditional antitrust tools to measure effects for competition in the advertising market).

with their data, which has economic value.⁴² Even before Facebook monetizes data through advertising, antitrust laws should apply to the social media side of the market because Facebook obtains economic gain by acquiring the user's data.⁴³ Acknowledging that Facebook's services are not free and that antitrust applies to the entirety of Facebook's services is the cornerstone of effective antitrust analysis.⁴⁴ And there are signs that these ideas are starting to succeed.

Antitrust is awakening and has again become a topic in presidential debates and congressional hearings, usually with a focus on digital markets.⁴⁵ Commentators have claimed that “[a]ntitrust is having a moment unlike anything the U.S. has seen since 1912.”⁴⁶ Some scholars are even advocating for a structural revival of antitrust that abandons Chicago School theories and comes back to the original interpretation of the Sherman Act; an approach that follows the work of late Supreme Court Justice Louis Brandeis as a model.⁴⁷

Regardless of whether a transformation in antitrust occurs, the tide is already changing for digital markets. The head of the Antitrust Division in the Department of Justice recently reiterated that current

42. Data has become so valuable that it is sold as a product and has its own market. *Data Brokers: A Call for Transparency and Accountability*, FED. TRADE COMM’N 8 (May 2014), <https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf>; see also *United States v. Google, Inc.*, No. 11CV00688, 2011 WL 2444825, at *14 (D.D.C. Oct. 5, 2011) (preventing Google from accessing data of acquired company because data was valuable); *Statement of the Department of Justice Antitrust Division on Its Decision to Close Investigation of the Internet Search and Paid Search Advertising Agreement Between Microsoft Corporation and Yahoo! Inc.*, UNITED STATES DEP’T OF JUSTICE (Feb. 18, 2010), <https://www.justice.gov/opa/pr/statement-department-justice-antitrust-division-its-decision-close-its-investigation-internet> (recognizing that data had economic value and was significant for competition in search markets).

43. See *Agnew v. Nat’l Collegiate Athletic Ass’n*, 683 F.3d 328, 340 (7th Cir. 2012) (internal quotations omitted) (“[T]he Sherman Act applies to commercial transactions, . . . includ[ing] almost every activity from which an actor anticipates economic gain.”). The former Chair of the Federal Trade Commission recognized that data had commercial value and therefore “acquisitions or conduct implicating consumer data can be examined under antitrust laws.” Maureen K. Ohlhausen & Alexander P. Okuliar, *Competition, Consumer Protection, and the Right [Approach] to Privacy*, 80 ANTITRUST L.J. 121, 146 (2015).

44. MAURICE E. STUCKE & ALLEN P. GRUNES, *BIG DATA AND COMPETITION POLICY* 4–5 (2016).

45. See, e.g., *Competition in Digital Technology Markets: Examining Self-Preferencing by Digital Platforms: Hearing Before the S. Subcomm. on Antitrust, Competition Policy & Consumer Rights of the S. Comm. on the Judiciary*, 116th Cong. 18:44–20:04 (2020) (congressional hearing); *Naomi Nix et al., Democrats Slam Corporate Power with Vow of Antitrust Crackdown*, BLOOMBERG (June 25, 2019), <https://www.bloomberg.com/news/articles/2019-06-27/democrats-slam-corporate-power-with-vow-of-antitrust-crackdown> (presidential debate).

46. Lauren Feiner, *Antitrust Hasn’t Made This Big a Splash in Presidential Campaigns Since 1912, Says House Antitrust Counsel*, CNBC (June 28, 2019), <https://www.cnbc.com/2019/06/28/antitrust-is-taking-center-stage-in-presidential-campaigns-lina-khan.html>.

47. Lina Khan, *The New Brandeis Movement: America’s Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRACTICE 131–32 (2018) (explaining the current intellectual debate on antitrust and the main tenets of this new school of thought).

statutes and doctrines allow antitrust enforcement in zero-price markets like Facebook.⁴⁸ To measure competition effectively, regulators can turn their focus to other protected parameters of competition, like quality and innovation, that are already legally protected.⁴⁹ Further, the current heads of antitrust divisions in both the United States and Europe have acknowledged that data has economic value and competitive implications.⁵⁰ In February 2019, the Federal Trade Commission created a task force dedicated exclusively to monitoring antitrust in technology markets.⁵¹

In line with this change, Facebook is currently facing four different antitrust investigations in the United States, each brought with bipartisan support.⁵² Given the historical development of antitrust, an eventual case against Facebook will have to face not only the challenges of effectively applying the law to the digital market but also more profound questions on the objectives of antitrust and its enforcement.

48. Makan Delrahim, Assistant Attorney General, U.S. Dep't of Justice Antitrust Div., *"I'm Free": Platforms and Antitrust Enforcement in the Zero-Price Economy* (Feb. 11, 2019) [hereinafter Delrahim, *"I'm Free"*] (transcript at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-silicon-flatirons>) ("U.S. antitrust laws apply in full to zero-priced products and services. . . . [W]e do not need a wholesale revision of the antitrust laws to address competitive concerns in these contexts.").

49. *Id.*; see also U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N., *HORIZONTAL MERGER GUIDELINES* 2, 4, 7, 24, 29 (2010), <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf> [hereinafter *Horizontal Merger Guidelines*] (recognizing that competition also comprises non-price factors like quality and innovation). Non-price competition parameters have long been legally protected, but antitrust authorities have mainly focused on price because short-term price effects are easier to measure. STUCKE & GRUNES, *supra* note 44, at 113.

50. Makan Delrahim, Assistant Attorney Gen., U.S. Dep't of Justice Antitrust Div., *"Blind[ing] Me With Science": Antitrust, Data, and Digital Markets* (Nov. 8, 2019) [hereinafter Delrahim, *"Blind[ing] Me With Science"*] (transcript at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-harvard-law-school-competition>); Lewis Crofts & Robert McLeod, *Interview with Margrethe Vestager*, MLEX, Jan. 2015, at 1, 5 (Jan. 22, 2015), https://mlexmarketinsight.com/db_images/special-reports-pdf/MLex-Interview-with-Margrethe-Vestager-Jan-2015.pdf.

51. *FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets*, FED. TRADE COMM'N. (Feb. 26, 2019), <https://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology>.

52. David McLaughlin, *Attorney General Barr Seeks DOJ Facebook Antitrust Probe*, BLOOMBERG (Sept. 25, 2019), <https://www.bloomberg.com/news/articles/2019-09-25/attorney-general-barr-sought-doj-facebook-antitrust-probe> (reporting that Facebook has four antitrust investigations undergoing, from the Department of Justice, the Federal Trade Commission, the House Judiciary Committee, and a bipartisan coalition of State Attorneys); Annie Palmer, *47 Attorneys General are Investigating Facebook for Antitrust Violations*, CNBC (Oct. 22, 2019), <https://www.cnbc.com/2019/10/22/47-attorneys-general-are-investigating-facebook-for-antitrust-violations.html> (noting that the State Attorneys are bipartisan).

B. Network Effects: The Winner Takes It All

In digital markets and particularly in data-driven industries, competition can suffer due to network effects.⁵³ Network effects exist when the value of a service increases with the number of users.⁵⁴ For example, Facebook as a social network is characterized by network effects because the social network's value grows with its user base.⁵⁵ Network effects can thus confer an advantage on incumbent companies because it would be difficult for a new company to compete when it has very few users.⁵⁶ As the D.C. Circuit remarked, "in markets characterized by network effects, one product or standard tends towards dominance."⁵⁷ In Big Tech, a preliminary stage of fierce competition eventually results in "winner-takes-all" outcomes once the company has reached enough users to benefit from low marginal costs and network effects.⁵⁸

The Supreme Court has recently applied network effects to antitrust analysis.⁵⁹ Network effects may be alleviated by other factors that may make the market competitive.⁶⁰ To offset competitive concerns, technology companies have also alleged that network effects provide economic efficiencies.⁶¹ However, courts eventually recognized that

53. *United States v. Bazaarvoice, Inc.*, No. 13-cv-00133-WHO, 2014 WL 203966, at *94 (N.D. Cal. Jan. 8, 2014) (accepting the Department of Justice theory that network effects can create "a significant and durable competitive advantage" in data-driven industries); *see also Facebook/WhatsApp Decision M.7217*, *supra* note 41, at 23–24; OECD, *BIG DATA: BRINGING COMPETITION POLICY TO THE DIGITAL ERA* 9–10 (2016) (available at [https://one.oecd.org/document/DAF/COMP\(2016\)14/en/pdf](https://one.oecd.org/document/DAF/COMP(2016)14/en/pdf)) [hereinafter *OECD Big Data Report*].

54. *United States v. Microsoft Corp.*, 253 F.3d 34, 49 (D.C. Cir. 2001).

55. *Id.*; *Facebook/WhatsApp Decision M.7217*, *supra* note 41, at 23–24.

56. *OECD Big Data Report*, *supra* note 53, at 9–11; *see also* STUCKE & GRUNES, *supra* note 44, at 201–02 (explaining that incumbents in Big Data markets not only benefit from the user network, but also from the larger pool data which becomes increasingly valuable as more users join the network).

57. *Microsoft Corp.*, 253 F.3d at 49.

58. *OECD Big Data Report*, *supra* note 53, at 11.

59. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2280–81 (2018). However, the Supreme Court analysis is not directly applicable to Facebook because it dealt with "transaction[al]" two-sided platforms like credit cards, which work differently than social networks. *Id.*

60. *Microsoft Corp.*, 253 F.3d at 49–50; *see also Facebook/WhatsApp Decision M.7217*, *supra* note 41, at 24 ("The existence of network effects as such does not *a priori* indicate a competition problem in the market affected by a merger. Such effects may however raise competition concerns in particular if they allow the merged entity to foreclose competitors and make more difficult for competing providers to expand their customer base. Network effects have to be assessed on a case-by-case basis.").

61. *See, e.g., SC Innovations, Inc. v. Uber Techs., Inc.*, 434 F. Supp. 3d 782, 796 (N.D. Cal. Jan. 21, 2020). In *SC Innovations*, Uber alleged that network effects allowed Uber to drive down costs as the company expanded. *Id.* Thus, even if it was proven that Uber charged below-cost prices, the explanation was based on economic efficiencies and not on exclusionary conduct. *Id.* at 791–96. Dismissing SC Innovations' complaint on other grounds with leave to amend, the court stated that

network effects are related to significant entry barriers, and thus network effects can be used as proof of market power.⁶² Network effects help with understanding market concentration in the digital sector and warn enforcers to be vigilant to potential abuses that can be committed within a company's "winner-take-all" strategy.⁶³ The following section provides a model of effective antitrust enforcement taking into account network effects in digital markets.

C. The Microsoft Case

The landmark case in the battle for antitrust enforcement in the new economy was *United States v. Microsoft Corp.*⁶⁴ In 1998, the Government filed an antitrust complaint against Microsoft Corporation, already a giant in the operating system ("OS") market with its product "Windows."⁶⁵ Microsoft raised concerns with the government when it released a new product, the Internet browser "Internet Explorer."⁶⁶

The Government denounced Internet Explorer's connection to Microsoft's dominance in the OS market in two ways.⁶⁷ First, Microsoft was attempting to monopolize the Internet browser market by leveraging its power from the OS market and tying Internet Explorer with Microsoft's Windows.⁶⁸ Second, Internet Explorer helped Microsoft to maintain a monopoly by excluding other rivals that could threaten its dominance in the OS market.⁶⁹ An insight into the court's findings helps to understand the connection.

Microsoft dominated the OS market by a staggering share of over 95%.⁷⁰ Even under a broader definition of the relevant market, including Mac OS systems, Microsoft held a greater than 80% share of the

"[Uber's] allegations do not in themselves establish that Uber was motivated primarily by realizing such efficiencies rather than by eliminating competition, or that consumers are on balance better off in a monopolized market benefiting from network effects than in a competitive market benefiting from competition." *Id.* at 796.

62. *Realcomp II, Ltd. v. Fed. Trade Comm'n.*, 635 F.3d 815, 829 (6th Cir. 2011); *Microsoft Corp.*, 253 F.3d at 83.

63. See STUCKE & GRUNES, *supra* note 44, at 204.

64. 253 F.3d 34 (D.C. Cir. 2001).

65. Compl. ¶¶ 1–2, *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 1998) (No. 98-1232) (available at <https://www.justice.gov/sites/default/files/atr/legacy/2012/08/09/1763.pdf>).

66. *Id.* ¶¶ 10–12.

67. *Id.* ¶¶ 139, 141.

68. *Id.* ¶ 141 (citing 15 U.S.C. § 2 (2018)).

69. *Id.* ¶ 139 (citing 15 U.S.C. § 2).

70. *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 36 (D.D.C. 2000), *aff'd in part, rev'd in part*, 253 F.3d 34 (D.C. Cir. 2001).

market.⁷¹ Moreover, competitors faced substantial barriers to entry because Microsoft enjoyed network effects.⁷² To begin with, Windows needed compatible applications and programs. Because Windows was the dominant OS system, most applications were designed exclusively for Windows.⁷³ As a consequence, most people kept buying Windows because it would guarantee compatibility with most applications.⁷⁴ This created a high barrier of entry for new OS systems to compete with Windows.⁷⁵ The court held that under these circumstances, Microsoft had monopoly power.⁷⁶

However, Microsoft was worried when the competing internet browser Netscape was developed with Java, a programming language that could work in any OS system.⁷⁷ As a consequence, Netscape had the potential to make applications work in any OS system: thus eliminating the entry barrier of network effects that benefitted Microsoft.⁷⁸ Microsoft used Internet Explorer to exclude Netscape and maintain the network effects that helped Windows dominate the OS market, which the court held was a violation of Section 2 of the Sherman Act as maintenance of monopoly power by anticompetitive means.⁷⁹

The Circuit Court of Appeals for the District of Columbia affirmed the maintenance of monopoly theory explained above, but it reversed other findings of the trial court concerning Microsoft's leverage of OS market power into the Internet browser market.⁸⁰ On remand, Microsoft and the Government reached an agreement on measures to ensure the competitiveness of the OS and Internet browser markets.⁸¹

Despite the complexity of the case, the Government succeeded in the final legal recognition that network effects were harmful to competition in high technology markets.⁸² Whereas, Microsoft tried to fight a bigger battle with its argument that the dynamic nature of digital industries insulated companies from antitrust scrutiny.⁸³ The

71. *Id.*

72. *Id.*; see also *supra* pt. II(B) (explaining network effects).

73. *Microsoft Corp.*, 87 F. Supp. 2d at 36.

74. *Id.*; Compl. ¶ 3, *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000) (No. 98-1232).

75. *Microsoft Corp.*, 87 F. Supp. 2d at 36.

76. *Id.* at 37.

77. A. DOUGLAS MELAMED & DANIEL L. RUBINFELD, *U.S. v. Microsoft: Lessons Learned and Issues Raised*, in *ANTITRUST STORIES* 287, 291–92 (Eleanor M. Fox & Daniel A. Crane eds., 2007).

78. *Id.* at 291.

79. *Microsoft Corp.*, 87 F. Supp. 2d at 44.

80. *United States v. Microsoft Corp.*, 253 F.3d 34, 46 (D.C. Cir. 2001).

81. *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144, 150 (D.C.C. 2002).

82. MELAMED & RUBINFELD, *supra* note 77, at 303.

83. *Id.*

Government's view prevailed because Microsoft's expansion into Internet browsers served a broader mission to its OS market dominance, with anticompetitive ends.⁸⁴

The *Microsoft* case has notable analogies with Libra. Facebook has market power in social media.⁸⁵ Libra and Novi are connected to Facebook's enormous user base because they would both benefit from network effects and reinforce Facebook's dominance.⁸⁶ The network effects become stronger with Facebook's wide array of products and create anticompetitive concerns for Facebook's ultimate target: online advertising.⁸⁷

III. FACEBOOK'S UNPRECEDENTED DOMINION IN SOCIAL MEDIA

The foundation of Facebook's power lies in the firm's dominance of the social media market. Facebook's business model is called a "two-sided market."⁸⁸ One side is the social media market, where the company captures attention from users; and the other side is online advertising, where the company sells the attention to advertisers.⁸⁹ The Supreme Court has recently supported that, in platforms like Facebook, each side of the market should be analyzed independently for antitrust purposes.⁹⁰ The social media market can be broadly defined as platforms that "allow users to post a profile and exchange or broadcast messages and information with their friends and contacts."⁹¹

Measuring Facebook's power in social media has proved troublesome. In antitrust, market share is usually measured by sales, which presents an initial difficulty in this case.⁹² The sales measure becomes obsolete for Facebook because users do not pay a monetary

84. *Id.*

85. *Infra* pt. III.

86. *Infra* pt. V.

87. *Infra* pts. IV-V.

88. Filistrucchi, *supra* note 40, at 297.

89. *See id.*

90. *See* *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2286 (2018) ("Newspapers that sell advertisements, for example, arguably operate a two sided-platform. . . . [However,] the market for newspaper advertising behaves much like a one-sided market and should be analyzed as such."). The reasoning behind this approach is that the anticompetitive concerns in each side of the market can be different. *See id.*; Filistrucchi, *supra* note 40, at 302. However, the Supreme Court did not solve many antitrust concerns related to Facebook because the Court dealt with "transactional" two-sided platforms like credit cards, which are greatly distinguishable from social media platforms. *Am. Express Co.*, 138 S. Ct. at 2286-87.

91. Catherine Tucker & Alexander Marthews, *Social Networks, Advertising, and Antitrust*, 19 GEO. MASON L. REV. 1211, 1214 (2012).

92. AREEDA & HOVENKAMP, *supra* note 27, at 188.

price.⁹³ Despite the fact that users do not pay money for Facebook, its services are not “free”—users pay with their data and attention.⁹⁴ However, it would be even more complicated to quantify the value of the paid data to determine market power.⁹⁵

Thus, several measures have tried to capture Facebook’s market share. The Organisation for Economic Co-operation and Development (OECD) suggests the “shares of control over data” as the metric for market power in platforms such as Facebook.⁹⁶ Other scholars analyzing Facebook emphasize the “attention” rather than the data that users pay and accordingly fix the metric on the time spent on the social media site.⁹⁷ In 2019, the German Competition Authority found that Facebook dominated the German social media market, using “daily active users” as a reference.⁹⁸ Regardless of the measure used, all tests give Facebook an astonishing market share, with rates of 70%, 85%, and even 95%.⁹⁹

Facebook reported \$70.7 billion of revenue in 2019.¹⁰⁰ That represents an increase of almost \$15 billion compared to the previous year.¹⁰¹ The profitability of the industry should attract the entry of

93. STUCKE & GRUNES, *supra* note 44, at 116–17.

94. Tim Wu, *Blind Spot: The Attention Economy and the Law*, 82 ANTITRUST L.J. 771, 771 (2019).

95. *OECD Big Data report*, *supra* note 53, at 6–7. The subjectivity in the value of each piece of data is not the only difficulty. Even if we could determine how much would a user pay to give away a part of his privacy, the value of a specific set of data given by one user depends also on its combination with other data. *Id.* Consequently, the larger the data pool, the more valuable the overall data becomes. *Id.* Besides, the value can even change over time because machines engage in “deep learning” which allow them to draw more and more accurate conclusions about the consumer and his or her preferences. *Id.* Thus, the value of data is subjective if looked in isolation, dependent on the receiver’s data pool, and dynamic over time. *See id.*

96. *Id.* at 16–17. This is the closest attempt to equate money paid with data paid. *Id.*

97. Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist’s Journey Towards Pervasive Surveillance in Spite of Consumer’s Preference for Privacy*, 16 BERKELEY BUS. L.J. 39, 88 (2019) (around 83% of the market share using as metric the time spent on each network); *see also* Wu, *supra* note 94, at 794 (suggesting time spent on the platform as the basis for market definition).

98. *Facebook, Exploitative Business Terms Pursuant to Section 19(1) GWB for Inadequate Data Processing*, No. B6-22/16, English case summary, at 6 (Bundeskartellamt 2019) (market share of 95% using as metric daily active users) [hereinafter *Bundeskartellamt Facebook Case No. B6-22/16*]. The *Bundeskartellamt* is Germany’s antitrust agency. *About us*, BUNDESKARTELLAMT, https://www.bundeskartellamt.de/EN/AboutUs/Bundeskartellamt/bundeskartellamt_node.html (last visited Aug. 12, 2020). The *Bundeskartellamt* 2019 sanction against Facebook is a landmark case that recognized the intersection between data and competitive markets.

99. *America’s Concentration Power: Social Networking Sites*, OPEN MARKETS INSTITUTE, <https://concentrationcrisis.openmarketsinstitute.org/industry/social-networking-sites> (last visited Aug. 12, 2020) (70% of the market share without specified metric); Srinivasan, *supra* note 97, at 88 (approximately 83% of the market share using as metric the time spent on each network); *Bundeskartellamt Facebook Case No. B6-22/16*, *supra* note 98 (Facebook market share above 95% using daily active users). It is remarkable that the highest share, 95%, is the result reached precisely by the antitrust agency.

100. FACEBOOK, *SEC FILINGS: ANNUAL REPORT* (2020) (available at <https://investor.fb.com/financials/default.aspx>).

101. *Id.*

potential competitors and bring profits.¹⁰² However, competitors like Twitter or Snapchat make either very little or no profit yet.¹⁰³ As the United Kingdom Competition and Markets Authority explained, “[t]his indicates that Facebook may be benefitting from the efficiencies which it enjoys due to its scale and its incumbent position in social media. . . . If competition was more effective, we would expect to see Facebook’s [profitability] to be eroded by competitors.”¹⁰⁴ Research from economists and antitrust lawyers at the University of Chicago also alerts that platforms like Facebook use their dominant position to buy out every competitor or foreclose and control all potential innovation in the market.¹⁰⁵

Concerns over market competitiveness increase through an analysis of how Facebook achieved this dominant position. Admittedly, Facebook has brought significant innovation. Nevertheless, it is far from the paradigmatic example of fair competition. In achieving its dominant position, Facebook has lied to users, content creators such as newspapers, and even antitrust authorities.

First, Facebook initially promised users better quality through enhanced privacy policies, but it has repeatedly broken those promises.¹⁰⁶ A threshold question is whether privacy policies are important for consumers. Empirical studies show that 93% of Americans believed that personal control of their information was “important.”¹⁰⁷ In Europe, the union’s legislative body that represents

102. *Id.* (reporting more than 18 billion dollars in net profits for Facebook); *Online Platforms and Digital Advertising*, COMPETITION & MKTS. AUTH. app. D, at 25 (July 3, 2019), <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study> [hereinafter *U.K. Competition Authority 2019 Digital Advertising Report*]. The Competition and Markets Authority is United Kingdom’s antitrust agency. *About us*, COMPETITION & MKTS. AUTH., <https://www.gov.uk/government/organisations/competition-and-markets-authority/about> (last visited Aug. 23, 2020).

103. *U.K. Competition Authority 2019 Digital Advertising Report*, *supra* note 102, app. D, at 24. The closest competitors to Facebook in terms number of users were WhatsApp and Instagram, now owned by Facebook. *Id.* at 95.

104. *Id.* at 25. In other words, Facebook is benefitting from network effects.

105. U. CHI. STIGLER CTR., *FINAL REPORT OF THE STIGLER COMMITTEE ON DIGITAL PLATFORMS* 75 (Sept. 16, 2019) (available at <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf?>) (“Despite very high and stable profit margins, markets like social media and search have faced little entry. . . . With deep pockets, [dominant platforms] can purchase possible future disruptors. . . . This story is widely believed to be the reason that Facebook purchased Instagram and WhatsApp.”) [hereinafter *University of Chicago Stigler Report*].

106. *Infra* notes 113–14 and accompanying text.

107. Mary Madden & Lee Rainie, *Americans’ Views About Data Collection and Security*, PEW RESEARCH CTR. (May 20, 2015), <https://www.pewresearch.org/internet/2015/05/20/americans-views-about-data-collection-and-security/>.

twenty-seven countries just passed the most advanced, intensive regulation on privacy that has ever existed.¹⁰⁸

Still, it seems that when a platform imposes harsher privacy policies, the market does not reflect these shifts.¹⁰⁹ A plausible explanation for this is a combination of network effects and several phenomena analyzed in behavioral economics.¹¹⁰ One example is “dysfunctional equilibrium”: consumer pessimism about their ability to control their privacy or that new companies will fulfill their privacy promises.¹¹¹ Another problem is information asymmetries: where users do not understand how their data is used or how much their data is worth.¹¹²

In social media, the fact that Facebook was able to displace Myspace by offering better privacy policies, and that Facebook still lies about their privacy policies, reflects that Facebook itself does believe privacy is still important to users as a quality parameter, relevant to competition.¹¹³ Users switched to Facebook for an unkept promise for better privacy policies, and they stay on the platform through repeatedly broken promises of excellent privacy protection.¹¹⁴

Second, Facebook lied to content creators and copied app competitors.¹¹⁵ Users come to Facebook for its content. Thus, Facebook depends not only on its own users to create the content that makes Facebook interesting, but also on third-party content creators, like newspapers. To animate interaction between Facebook and these

108. OJ L 119, 4.5.2016, p. 1. Regulation (EU) 2016/679 of the European Parliament and of the Council (General Data Protection Regulation), Apr. 26, 2016, Official Journal of the European Union [hereinafter *GDPR*]. The GDPR belongs to the highest category of EU law, directly binding and superior to the national law of every EU member. The GDPR even has extraterritorial applicability to the US.

109. Joseph Farrell, *Can Privacy Be Just Another Good?*, 10 J TELECOMM. & HIGH TECH. L. 251, 259 (2012).

110. STUCKE & GRUNES, *supra* note 44, at 58–61.

111. Farrell, *supra* note 109, at 257–59. Dysfunctional equilibrium is better understood through an example. Imagine that Company X offers privacy policy A, which consists of very aggressive data collection and right to sell data to third parties. Company Y then decides to offer privacy policy B to compete, which is very respectful with the user’s privacy. Consumers should understand that Company Y offers a better-quality product (at least in terms of privacy). However, due to consumer pessimism, consumers think that privacy policy B is false and contains hidden terms that allows aggressive data collection and the right to sell to third parties. Or even worse, consumers do not even read the policy because they no longer have any privacy expectations. Thus, the pessimist consumer chooses between Company X and Y assuming that both of them offer an equally bad privacy policy, and thus the better quality in privacy does not reflect a shift in the market. *Id.*

112. STUCKE & GRUNES, *supra* note 44, at 58–61.

113. Srinivasan, *supra* note 97, at 48–54.

114. *Id.*

115. Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1003–05 (2019).

content creators, Facebook launched features such as the Like Button.¹¹⁶ The Like Button promised higher exposure to content creators, whose content would be shared on Facebook, while also increasing Facebook's content offer.¹¹⁷ But it did more than that. The Like Button surreptitiously tracked the user's activity at the content creator's website, even when the user did not hit the Like Button and even when the user was not logged into Facebook.¹¹⁸ In other words, implementing this button allowed Facebook to access all data collected by the content creator without permission from the creator.¹¹⁹

Another type of content creators were apps. Facebook viewed certain apps as direct competitors and, therefore, a threat to the company. In response, Facebook tracked these apps with the eventual intent to purchase or outright copy them.¹²⁰ Facebook used its extensive user base to track what other apps users were spending time on, so Facebook had unrivaled insights on apps that were surging and could eventually pose a threat.¹²¹ Then it offered those apps a choice: be acquired by Facebook or be copied by Facebook.¹²² Some apps, like WhatsApp and Instagram, were bought out.¹²³ Others suffered from being copied; as a result, and due to Facebook's extensive network, rival competitors exited the market.¹²⁴

116. *Like Button for the Web*, FACEBOOK FOR DEVELOPERS, https://developers.facebook.com/docs/plugins/like-button/?locale=en_US#language (last visited Aug. 23, 2020).

117. *Id.*

118. Khan, *supra* note 115, at 1004. Moreover, “[d]espite facing public backlash for its apparent deception and its pervasive surveillance, Facebook did not change course—perhaps because it no longer faced serious competition in the social network market. In 2014, it officially codified its policy of using Facebook code embedded across third-party websites [i.e., the Like Button] to track users.” *Id.* (internal citations omitted).

119. *Id.* The lack of consent here transcends contract law and raises antitrust concerns when it violates “competition on the merits.” See 15 U.S.C. § 2.

120. Khan, *supra* note 115, at 1002–1003.

121. Betsy Morris & Deepa Seetharaman, *The New Copycats: How Facebook Squashes Competition From Startups*, WALL ST. J. (Aug. 9, 2017, 1:47 PM ET), <https://www.wsj.com/articles/the-new-copycats-how-facebook-squashes-competition-from-startups-1502293444> (describing the tracking method and reporting that according to former executives and employees, “Mr. Zuckerberg is sensitive to anything that might disrupt Facebook, even the teeniest startup”).

122. Khan, *supra* note 115, at 1003 (“Facebook has established a systemic informational advantage (gleaned from competitors) that it can reap to thwart rivals and strengthen its own position, either through introducing replica products or buying out nascent competitors.”).

123. *University of Chicago Stigler Report*, *supra* note 105, at 75.

124. Khan, *supra* note 115, at 1002; see also Josh Obear, Note, *Move Last and Take Things: Facebook and Predatory Copying*, 3 COLUM. BUS. L. REV. 994, 1044 (2018) (“With the ability to track consumer preferences, Facebook no longer has any incentive to outsource app development; it can allow new competitors to experiment, and then swoop in with its own version of the app. . . . Facebook’s copycatting of new companies may cause significant anticompetitive harms, leading to decreased investment in startups and decreased innovation.”). In Facebook offices, the copycatting strategy developed into an informal internal slogan: “Don’t be too proud to copy.” Morris & Seetharaman, *supra* note 121.

Finally, the most shocking example of Facebook's misrepresentation is the WhatsApp acquisition.¹²⁵ When applying for approval of the merger, Facebook repeatedly told E.U. antitrust authorities that it was technically impossible to link Facebook users' accounts with WhatsApp users' accounts.¹²⁶ However, once the merger was approved, WhatsApp's terms of service changed, revealing that it would be possible to link WhatsApp numbers with Facebook accounts.¹²⁷ Facebook knew this was possible before the merger and thus lied to E.U. antitrust authorities throughout the merger process.¹²⁸ It also combined the data of WhatsApp and Facebook despite promising not to.¹²⁹ For this blunt legal violation, the European Commission fined Facebook \$110 million, which still was less than 0.5% of Facebook's turnover that year.¹³⁰ All of these abuses have come short of stopping Facebook's dominance in social media. Instead, Facebook is going after a new industry—online advertising.

IV. FACEBOOK'S NEXT TARGET: THE RACE FOR ONLINE ADVERTISING

This Part starts by framing the market definition for Facebook's advertising services as the first step in the application of antitrust laws. Once display advertising is understood as the most appropriate market definition, this Part analyzes how Facebook is in the lead for a potential "winner-take-all" race in that market.

A. Selling Our Attention: The Display Online Advertising Market

Once a company like Facebook has captured our attention, the company can sell it through the online advertising market.¹³¹ Thus, a company has strong incentives to capture as much attention as possible by designing addictive platforms.¹³² Every minute of attention is

125. See generally *Facebook/WhatsApp Decision M.7217*, *supra* note 41.

126. *Commission Fines Facebook €110 Million for Providing Misleading Information About WhatsApp Takeover*, EUROPEAN COMM'N (May 18, 2017), https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1369.

127. *Id.*

128. *Id.*

129. *Id.*

130. Robert Jan-Bartunek, *EU Fines Facebook 110 Million Euros Over Whatsapp Deal*, REUTERS (May 18, 2017, 2:57 AM), <https://www.reuters.com/article/us-eu-facebook-antitrust/eu-fines-facebook-110-million-euros-over-whatsapp-deal-idUSKCN18EOLA>.

131. Wu, *supra* note 94, at 772.

132. *Id.*; *University of Chicago Stigler Report*, *supra* note 105, at 62, 64–66. Current platforms have excelled at being profitable in online advertising because our phones accompany us every time

enhanced through “targeted” advertising, which learns from user data to increase the effectiveness of the ads.¹³³ This combination has created a very profitable online advertising industry with prospects of growth.¹³⁴

“Online advertising” may be too broad of a market for antitrust analysis. Under current antitrust doctrine, it is necessary to have a specific and accurate market definition to analyze competitiveness in that defined area.¹³⁵ All online advertising does not seem to be a single market. The Federal Trade Commission distinguishes between “search” and “display” online advertisements and considers them distinct markets in antitrust.¹³⁶ “Search” online advertisement is Google’s business: the user’s word search prompts ads, which are particularly valuable because the user’s search reveals he or she is looking for that type of content in that instant moment.¹³⁷ “Display” online advertisement is Facebook’s business: the ads appear in the platform even if the user had no intention to look for that specific content.¹³⁸

of the day, having the potential to capture our attention at every time of the day. Wu, *supra* note 94, at 793. Professor Tim Wu argues that advertising providers grow by conquering attention “greenfields,” the time not occupied by commercial providers, like being with friends or contemplating nature. *Id.* Exploitive tactics to design addictive platforms can be harmful to consumers. *University of Chicago Stigler Report*, *supra* note 105, at 62. For example, “Facebook users who were paid to leave the site for four weeks wound up with higher subjective well-being . . . and had a ‘large and persistent reduction in Facebook use after the experiment[.]’” *Id.*

133. Targeted advertising can be more effective because it offers more relevant content to the user, but the algorithm behind targeted advertising can also induce users to purchase when the person is at a weaker mental state. Chris J. Hoofnagle et al., *Behavioral Advertising: The Offer You Cannot Refuse*, 6 HARV. L. & POL’Y REV. 273, 275 (2012) (defining targeted advertising as content tailored to the user); *University of Chicago Stigler Report*, *supra* note 105, at 59 (“A platform can analyze a user’s data in real time to determine when she is in an emotional “hot state” and offer a good that the user would not purchase when her self-control was higher. . . . In addition, . . . big data may help differentiate well-informed and sophisticated consumers or workers from poorly informed or more naïve consumers.”).

134. A. Guttman, *Digital advertising spending worldwide from 2017 to 2023*, STATISTA (Dec. 3, 2019), <https://www.statista.com/statistics/456679/digital-advertising-revenue-format-digital-market-outlook-worldwide/> (noting that worldwide online advertising industry generated over \$311 billion of revenue in 2019 and is expected to go over \$500 billion by 2023).

135. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018). The dissent challenged the prevailing view and argued that proof of anticompetitive effects should be enough to prove an antitrust violation, without inquiries into complex market definition. *Id.* at 2296–97 (Breyer, J., with Ginsburg, Sotomayor and Kagan, JJ., dissenting). Eventually, the dissent argued that in many situations if a company can behave anticompetitively, it is because such firm has market power. *Id.* at 2297.

136. Statement of the Federal Trade Commission Concerning Google/DoubleClick, FTC File No. 071-0170 3–4 (F.T.C. Dec. 20, 2007) (available at https://www.ftc.gov/system/files/documents/public_statements/418081/071220googleadc-commstmt.pdf (identifying distinct markets for purposes of merger review) [hereinafter FTC Google/DoubleClick Letter]. The Federal Trade Commission used the terms “search” and “non-search”, but recent literature has adopted “display” advertising as a more accurate synonym for the “non-search” advertising market. *Id.*; e.g., *U.K. Competition Authority 2019 Digital Advertising Report*, *supra* note 102, at 48.

137. FTC Google/DoubleClick Letter, *supra* note 136, at 3.

138. *Id.*

Whether these are two separate markets depends on whether search ads and display ads are close economic substitutes.¹³⁹ In other words, if Google increased the price of search ads, would Facebook's display ads serve as substitutes? If both types of ads are not substitutes for each other, then two different markets exist; competition concerns arise from this market separation because Google could raise the price of their unique ads without facing competition from Facebook ads.¹⁴⁰

Whether search online advertisement and display online advertisement are separate markets is controversial and would require a specific, fact-based investigation.¹⁴¹

During the Facebook/WhatsApp merger review, the European Commission surveyed the online advertising market and found evidence that search and display ads were separate markets because they served different marketing purposes.¹⁴² More recent research from the United Kingdom's antitrust authority reached the same conclusion after surveying advertisers and media agencies.¹⁴³ While the European Commission has not yet given a definitive answer on whether display and search are different markets,¹⁴⁴ the United Kingdom and the United

139. *Ohio*, 138 S. Ct. at 2285; James D. Ratliff & Daniel L. Rubinfeld, *Online Advertising: Defining Relevant Markets*, 6 J. COMPETITION L. & ECON. 653, 678 (2010).

140. See Ratliff & Rubinfeld, *supra* note 139, at 677–78.

141. *Id.* at 685–86 (concluding that “[f]urther analysis and empirical study are needed before” determining whether search and display advertising are separate markets for antitrust purposes); JASON FURMAN ET AL., UNLOCKING DIGITAL COMPETITION: REPORT OF THE DIGITAL COMPETITION EXPERT PANEL 28 (2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf (“It is not clear to what extent the search, social display and ‘other display’ categories [of online advertisement] . . . are separate markets, but it is clear that Google and Facebook have significant market shares and the market is concentrated towards them.”).

142. *Facebook/WhatsApp Decision M.7217*, *supra* note 41, at 13.

143. *U.K. Competition Authority 2019 Digital Advertising Report*, *supra* note 102, at 157–58 (“All media agencies and most advertisers told us that search and display advertising are not substitutable, mainly because they perform different roles within the customer purchase journey. Search is intent-based advertising designed to provide immediate answers to those consumers that have already shown interest in buying the product and are at end of the purchase funnel . . . , whereas display is suitable for brand awareness and reaching new audiences that might not yet have shown interest . . . Most advertisers set budgets for search and display advertising independently and do not allocate them interchangeably.”)

144. *Facebook/WhatsApp Decision M.7217*, *supra* note 41, at 14. Admittedly, “properly defining a market is often a complex business.” *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2295 (2018) (Breyer, J., with Ginsburg, Sotomayor and Kagan, JJ., dissenting). Maybe for this reason, the European Commission has delayed the question of whether search and display are separate markets until there is a case where the distinction would be outcome decisive. See *Apple/Shazam* (Case M.8788) Commission Decision 2018/C 417/04 [2018] O.J. C417/04 28, para. 133, https://ec.europa.eu/competition/elojade/iseef/case_details.cfm?proc_code=2_M_8788.

States' antitrust authorities have supported that both markets are separate.¹⁴⁵

Accordingly, this analysis will focus on display online advertisement as Facebook's market.¹⁴⁶ Knowing the importance of online advertising and having limited the scope to the appropriate antitrust market, this analysis turns to the competitiveness of display advertising and how Facebook's strategy affects the market.

B. Races and Winners

Facebook already benefited from network effects in the social media market, which lead to dominion and abuses.¹⁴⁷ Now, display advertising runs the risk of lacking competitiveness due to the same network effects. Display online advertising is characterized by network effects, where one company tends to dominate.¹⁴⁸ The display advertising market is tied to the social media market, and thus Facebook could translate its advantages from one market to the other.¹⁴⁹ Because display advertising consists of selling the user's attention, the companies that are dominant at capturing the user's attention translate their advantage into display advertising.¹⁵⁰

Facebook considered making a big push for the advertising market once the company had conquered the social media market.¹⁵¹ Originally, Facebook had considered other revenue models like selling the data acquired from users to third parties.¹⁵² However, in 2008, Mark

145. FTC Google/DoubleClick Letter, *supra* note 136, at 3; U.K. Competition Authority 2019 *Digital Advertising Report*, *supra* note 102, at 157.

146. *E.g.*, *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 791 (N.D. Cal. 2011) ("Facebook earns revenue primarily through the sale of targeted advertising that appears on members' Facebook pages.").

147. *See supra* pt. III.

148. *See United States v. Microsoft Corp.*, 253 F.3d 34, 49 (D.C. Cir. 2001) (explaining how network effects create a tendency for one product or standard to dominate); Tucker & Marthews, *supra* note 91, at 1218 (citing Mark Armstrong, *Competition in Two-Sided Markets*, 37 RAND J. ECON. 668, 681-84 (2006) and Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND J. ECON. 645, 659 (2006)) (finding that online advertising is characterized by network effects).

149. Tucker & Marthews, *supra* note 91, at 1224-25.

150. Wu, *supra* note 92, at 777 (explaining how the capturing and selling of attention works in the specific instance of Facebook).

151. Kirkpatrick, *supra* note 1.

152. *Six4Three Files*, U.K. PARLIAMENT 6-7 (Dec. 5, 2018), <https://www.parliament.uk/documents/commons-committees/culture-media-and-sport/Note-by-Chair-and-selected-documents-ordered-from-Six4Three.pdf>. The Six4Three files are controversial documents pertaining Facebook's business practices, which the United Kingdom's Parliament collected and made public despite their confidential status. *See generally* Dig., Culture, Media & Sport Comm., *Disinformation and "Fake News": Final Report*, (HC 2017-19, 1791-I) 26-40, <https://publications.parliament.uk/pa/cm201719/cmselect/cmcomeds/1791/1791.pdf>

Zuckerberg changed the company's course by personally recruiting a former master advertising strategist for Google, Sheryl Sandberg.¹⁵³ During an executives' meeting, Sandberg wrote a question in big letters on the whiteboard: "What business are we in?"¹⁵⁴ The answer changed the company forever: Facebook was, at its core, an advertising company.¹⁵⁵

A year after that meeting, Facebook was already making 764 million dollars of revenue from advertising.¹⁵⁶ In the span of a decade, the company's revenue from advertising was ninety-one times higher, amounting to over \$69 billion in 2019.¹⁵⁷ If we limit revenue to the United States market alone in 2019, Facebook's reported \$24 billion of revenue was over 30% of the United States' display advertising market.¹⁵⁸ The second-largest competitor, Google, had approximately 8% of the market share for display advertising that year.¹⁵⁹

Unlike the market shares in social media, the market shares in display advertising do not provide an immediate source of concern. However, display advertising is subject to network effects and "tipping," and Facebook is leading the race in this market. If the market tilts, it will likely do so in Facebook's favor.¹⁶⁰ Display advertising provides an interesting opportunity for antitrust because it would allow regulators to act *before* the market has lost a chance to be competitive. At a minimum, agencies should consider the current situation and how events unfolding now, like Libra, affect the present and future competitiveness of the market.

(explaining how Mark Zuckerberg's denial to collaborate with the U.K.'s investigation despite the finding of Facebook's abuses contributed to the decision of publishing the files).

153. Kirkpatrick, *supra* note 1.

154. *Id.*

155. *Id.* (Sandberg stated: "There has been this myth that everyone's waiting for [Facebook's] revenue model. . . . But we have a revenue model. The revenue model is advertising. This is the business we're in, and it's working."); *see, e.g.*, Bass v. Facebook, Inc., 394 F. Supp. 3d 1024, 1028 (N.D. Cal. 2019) (noting that today 96% of Facebook's revenue comes from targeted advertising).

156. *Facebook's Advertising Revenue Worldwide from 2009 to 2019*, STATISTA (Jan. 2020), <https://www.statista.com/statistics/271258/facebook-ads-revenue-worldwide/>.

157. *Id.*

158. *Digital Advert. in the U.S.*, STATISTA 20 (Dec. 2019), <https://www.statista.com/outlook/216/109/digital-advertising/united-states#market-revenue> (total revenues in United States market for display advertising were 78,791 million dollars) (last visited August 10, 2020). The total online advertising spending in the United States was 115,149 million dollars. *Id.* at 14. Search advertising represents 37,440 million dollars, and thus all "non-search" spending represents display advertising, a total of 77,709 million dollars. *See id.*; FTC Google/DoubleClick Letter, *supra* note 136, at 3.

159. STATISTA, *supra* note 158, at 20.

160. *See supra* notes 156–59 and accompanying text (stating that Facebook substantially leads the markets, thus placing the company in the best position for the market to tip in its favor).

For example, the United Kingdom's antitrust authority conducted an in-depth investigation into online advertising.¹⁶¹ The antitrust authority concluded that Facebook was the largest company in display advertising, with a share between 40% and 50%—way ahead of the second main competitor, YouTube, which had a share of 5% to 10%.¹⁶² The prices for Facebook's display ads had been increasing for the last three years and were significantly more expensive than the ads of any other platform.¹⁶³ For the antitrust agency, this fact suggested that Facebook already had power in the display advertising market.¹⁶⁴

In addition to market shares, there may be other signs of Facebook's power in the United States advertising market.¹⁶⁵ The most controversial example is that Facebook has not allowed external auditing and verifying of their advertisement campaigns.¹⁶⁶ Facebook runs many campaigns by impression, in which Facebook gets paid each time a user sees an ad even if the user never clicks on it.¹⁶⁷ Since the user does not interact with the third-party website, Facebook is the only company with the data to determine whether the impression actually occurs.¹⁶⁸ A marketing executive complained, "What frustrates us when we run a campaign [on Facebook] is that there's almost no acknowledgment that the campaign even existed in the first place."¹⁶⁹ Or, as P&G's chief brand officer put it, letting Facebook self-control the existence and reach of its own campaigns is like "letting a 'fox guard the hen house.'"¹⁷⁰ Facebook is now facing a class-action lawsuit in federal court because the company reported a number of users reached through advertising that is higher than the existent population in the Census.¹⁷¹

Regardless of whether Facebook already has market power in display advertising, there are two main concerns in this market. First,

161. *U.K. Competition Authority 2019 Digital Advertising Report*, *supra* note 102, at 6.

162. *Id.* at 179. YouTube is considered independently in the United Kingdom report, but the statistical study for the United States does not make that specific distinction and considers YouTube within Google services. STATISTA, *supra* note 156, at 20.

163. *U.K. Competition Authority 2019 Digital Advertising Report*, *supra* note 102, at 181.

164. *Id.* at 179.

165. Srinivasan, *supra* note 97, at 95.

166. *Id.* Facebook's policy in this respect is uniform worldwide and has drawn criticism from antitrust agencies in other countries. *See, e.g., U.K. Competition Authority 2019 Digital Advertising Report*, *supra* note 102, at 184. ("[T]here was a perception on the part of advertisers and agencies that Google and Facebook were able, in effect, to 'mark their own homework' in respect of the effectiveness of their own advertising. . . .")

167. Srinivasan, *supra* note 97, at 95.

168. *Id.*

169. *Id.* (internal quotations omitted).

170. *Id.* at 97 (internal quotations omitted).

171. *Id.* at 95 (citing Complaint, *Singer v. Facebook, Inc.*, 2018 WL 3954428 (N.D. Cal. Aug. 15, 2018) (No. 4:18-cv-04978-KAW)).

display online advertising is characterized by network effects and thus can be conceived as a race with a sole winner.¹⁷² Second, Facebook is already in the lead for that race.¹⁷³ Without intervention, online advertising can suffer the same fate as social media: the dominant company may become too big for other companies to compete with, thanks to the present network effects.¹⁷⁴

Is Facebook fomenting those network effects and leveraging them into the online advertising market? Is there any way that regulators can stop social media network effects from being transferred to display advertising? The newly announced Libra project and the Novi payment system are two ways in which Facebook can augment these network effects and further tip the display advertising market in its favor—toward domination.

V. FRIENDS, ADS, AND MONEY: HOW LIBRA PLAYS WITH NETWORK EFFECTS

Parts III and IV examined Facebook’s position in social media and online display advertising. This Part begins by explaining how Libra can fit into a broader strategy for Facebook and raise competition concerns in both social media and online display advertising, applying notions delineated in Part II. Further, this Part examines how the loss of market competitiveness, due to Libra’s introduction, will harm consumers.

A. Libra, the Newest Advantage in an Uneven Race

In June of 2019, Facebook announced its newest project: Libra.¹⁷⁵ Libra is a cryptocurrency that combines the digital nature of Bitcoin with the stability of a fiat currency, like the dollar.¹⁷⁶ Along with Libra, Facebook announced that it will introduce Novi (formerly known as Calibra), a digital wallet for Libra.¹⁷⁷ Novi will manage transactions made

172. See *United States v. Microsoft Corp.*, 253 F.3d 34, 49 (D.C. Cir. 2001) (“In markets characterized by network effects, one product or standard tends towards dominance. . .”).

173. See *supra* notes 156–59 and accompanying text.

174. Alex Heath, *Facebook and Google Completely Dominate the Digital Ad Industry*, BUSINESS INSIDER (April 26, 2017), <https://www.businessinsider.com/facebook-and-google-dominate-ad-industry-with-a-combined-99-of-growth-2017-4?IR=T> (Facebook and Google alone account for over 90% of the annual growth in this sector, while “the average growth rate for every other company in the sector was close to 0[.]” (internal quotation marks omitted) (last visited August 24, 2020)).

175. *Libra White Paper*, *supra* note 3, at 4.

176. *Id.* at 7.

177. *Examining Facebook’s Proposed Digital Currency and Data Privacy Considerations: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, *supra* note 12, at 5.

with Libra, and it will be integrated in WhatsApp, Facebook Messenger, and a standalone app.¹⁷⁸ With this new proposed line of business, “Facebook” will be a company dedicated to social media (Facebook and Instagram); texting (WhatsApp and Messenger); retail (Checkout with Instagram and Facebook Marketplace); virtual reality (Oculus VR); video advertisement technology (Live Rail); drone-making (Ascenta); fitness and health monitoring (ProtoGeo Oy); and now finance (Libra and Novi).¹⁷⁹

Libra and Novi fit into Facebook’s business model in several ways, with a significant impact on competition. First, Libra helps Facebook further tip the display advertising market in favor of Facebook. Facebook’s services are based on “behavioral” advertising.¹⁸⁰ Behavioral advertising targets the consumer’s individual preferences, emotional state, and level of sophistication.¹⁸¹ Facebook must first collect data on the user to engage this type of advertising.¹⁸²

Data dimensions are usually conceived as three “V’s”: volume of data, variety of data, and velocity of data.¹⁸³ These dimensions, in turn, account for a fourth “V”: value.¹⁸⁴ Makan Delrahim, Assistant Attorney General for the DOJ Antitrust Division, has remarked that the scale of data, type of data, and combination of both user and usage data creates heightened competitive concerns in the digital market.¹⁸⁵ All of these dimensions reinforce each other due to machine learning: the better data you have, the better the collecting and processing system becomes, which results in a “feedback loop.”¹⁸⁶ As Delrahim points out, “A feedback loop that protects market power in one or more markets and leverages usage data in particular, however, may make it more difficult for entrants to compete against incumbents.”¹⁸⁷

178. *Id.*

179. Nathan Reiff, *5 Companies Owned By Facebook*, INVESTOPEDIA (last updated Apr. 1, 2020), <https://www.investopedia.com/articles/personal-finance/051815/top-11-companies-owned-facebook.asp>.

180. *Facebook/WhatsApp Decision M.7217*, *supra* note 41, at 11. (“Facebook collects data regarding the users of its social networking platform and analyses them in order to serve advertisements on behalf of advertisers, which are as much as possible ‘targeted’ at each particular user of its social networking platform.”).

181. *University of Chicago Stigler Report*, *supra* note 105, at 59.

182. STUCKE & GRUNES, *supra* note 44, at 194.

183. *Id.* at 16. Velocity of data refers to how fast data can be processed. *Id.*

184. *Id.* at 22; *OECD Big Data Report*, *supra* note 53, at 6. Value of data increases as volume, variety, and velocity of data increase. *Id.*

185. Delrahim, “*Blind[ing] Me With Science*”, *supra* note 50, at 4.

186. *Id.* at 5.

187. *Id.*

Thus, through Libra, Facebook can increase the amount of data that it receives, and most importantly, the type of data. Financial data mixed with Facebook's already large data pool can become an insurmountable advantage over competitors. The former chief economist of the European antitrust agency expressed his concern: "With Libra, [Facebook] can do two things: match data of its ecosystem with Libra data on individual daily income, individual purchases, etc. Not even credit cards have that info. Hyper-targeted ads go to a new level."¹⁸⁸ Christine Lagarde, the President of the European Central Bank and former President of the International Monetary Fund, concurred in this analysis.¹⁸⁹

The great scale and diversity of Facebook's data, along with a 2.7 billion audience, is already considered a significant advantage that imposes a high entry barrier for other companies to compete in advertising.¹⁹⁰ If Libra's data is added to this data pool, the entry barrier may become insurmountable. Unlike in social media, where Facebook is an incumbent, online advertising is still competitive. Facebook does not dominate display online advertising yet. An initiative like Libra with powerful financial data could change this situation. Antitrust law could work *ex ante* to deter, rather than later intend to cure, market concentration in display advertising.

A second layer of concern is that Libra can help Facebook to maintain a social media monopoly.¹⁹¹ Even if Libra's data is not shared with Facebook, Libra aims at increasing Facebook's use.¹⁹² The recent antitrust study from the U.K. agency found that the main strength of Facebook was its very wide portfolio of services as compared to its competitors.¹⁹³ For example, Snapchat private chats and short-lived posts compete with Instagram Stories and Messenger, Reddit

188. Tommaso Valletti (@TomValletti), Twitter (July 12, 2019, 10:05 AM), <https://twitter.com/tomvalletti/status/1149681184521236480?s=21>.

189. Letter from Christine Lagarde, President, European Central Bank, to Members, European Parliament, *Libra*, 2 (Dec. 19, 2019), https://www.ecb.europa.eu/pub/pdf/other/ecb.mepletter191220_Tang_et_al~b3de9b0436.en.pdf ("Stablecoin arrangements [like Libra] could lead to significant market concentration. . . . [T]he potential combination of social media data with financial data could give stablecoin operators a strong competitive advantage and undermine market contestability.").

190. FACEBOOK, *SEC Filings: QUARTERLY REPORT 27* (July 31, 2020), <https://investor.fb.com/financials/sec-filings-details/default.aspx?FilingId=14302237> (stating the number of monthly active users on Facebook as of June 30, 2020); *U.K. Competition Authority 2019 Digital Advertising Report*, *supra* note 102, at 189.

191. See generally *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) (inferring a company's monopoly power based on domination of a market that is protected by entry barriers).

192. *Examining Facebook's Proposed Digital Currency and Data Privacy Considerations: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, *supra* note 12, at 5.

193. *U.K. Competition Authority 2019 Digital Advertising Report*, *supra* note 103, at 95.

communities compete with Facebook Groups, and TikTok videos compete with Facebook Watch.¹⁹⁴ Other companies can compete with Facebook for subsets of their services; however, Facebook not only wins each submarket, but it also has the strongest overall ecosystem—with the explained consequences of more and more valuable data.¹⁹⁵ Moreover, Facebook is a “must-have,” which users of other companies like Snapchat or TikTok keep coming to, while far fewer Facebook users visit those other platforms.¹⁹⁶

With Libra, Facebook can conquer yet another submarket, ensuring that users do not go outside of Facebook’s ecosystem. Because this reinforces the advertising side of the market, it eventually reinforces the social media side too. If firms cannot compete on the advertising side, it becomes very difficult for new companies to offer a profitable alternative in social media.¹⁹⁷ Recent estimates indicate that it would cost as much as five to ten billion dollars to develop a profitable social network; but without funding from advertising, it is difficult to offer such an alternative.¹⁹⁸ Twitter, one of Facebook’s closest competitors, has displayed a concerning financial status precisely due to the inability to compete equally in online advertising.¹⁹⁹

B. Undermining Competition

Proving harm to “consumer welfare” is required to bring an antitrust cause of action.²⁰⁰ The entry barriers and lack of competition described eventually harm consumers. The following analysis focuses on

194. *Id.* at 95–96.

195. *Id.* at 96.

196. *Id.*

197. Michal S. Gal & Daniel L. Rubinfeld, *The Hidden Cost of Free Goods: Implications for Antitrust Enforcement*, 80 ANTITRUST L.J. 521, 535 (2016) (using Facebook as an example of how two-sided markets suffer this barrier to entry).

198. *Id.*; U.K. Competition Authority 2019 Digital Advertising Report, *supra* note 103, at 22.

199. U.K. Competition Authority 2019 Digital Advertising Report, *supra* note 103, at 24–25. For further ways in which Libra can pose monopolization risks, see Thibault Schrepel, *Libra: A Concentrate of “Blockchain Antitrust,”* 118 MICH. L. REV. ONLINE 160, 165–67 (2020).

200. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting BORK, *supra* note 29, at 66). While “consumer welfare” is not in the language of the Sherman Act, keeping this standard seems particularly important to maintain wide support of antitrust enforcement action. Some scholars have argued that antitrust should focus on structures and processes, rather than on consumer welfare alone. See, e.g., Vaheesan, *supra* note 33, at 980–81; WU, *supra* note 37, at 17. However, even progressive sectors are split on whether to abandon the consumer welfare model. Compare Joe Kennedy, *Why the Consumer Welfare Standard Should Remain the Bedrock of Antitrust Policy*, INFO. TECH. & INNOVATION FOUND. (Oct. 4, 2018), <http://www2.itif.org/2018-consumer-welfare-standard.pdf>, with Elizabeth Warren, *Here’s How We Can Break Up Big Tech*, MEDIUM (Mar. 8, 2019), <https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c>.

two of these potential consumer harms: quality reduction and price increase.²⁰¹

1. *The Rear Window: Loss of Privacy as Reduction of Quality*

When there is no monetary price for services, as with Facebook's social media, other parameters like quality should be taken into account.²⁰² The DOJ Antitrust Division currently recognizes that in digital markets, consumer welfare is specially measured through the parameter of quality.²⁰³ Since users value privacy within a platform, a reduction of privacy amounts to a reduction in quality.²⁰⁴

Considering privacy as a quality parameter in antitrust requires drawing a line between privacy laws and antitrust. In a recent cartoon from *The New Yorker*, one person shows his friend his phone screen and explains: "It's this new app—you put in your Social Security number, and it makes you look like a cat."²⁰⁵ Privacy laws would be concerned about whether the app is entitled to have your social security number at all; how that data is collected, processed, and stored; and the users' right to control that data. Alternatively, antitrust is concerned with whether the app can ask you for more data or more sensitive data because the market is not competitive.

In Facebook's case, privacy reduction occurs more subtly. Instead of asking for a specific set of data in exchange for a cat picture, Facebook offers their product while the user agrees on an extensive contract that has increasingly allowed Facebook to track its users more over time. For example, Facebook has tracked what users write but then delete without publishing and even the users' activity when they are not on

201. Besides the two harms analyzed in this Comment, consumers may suffer from market concentration in other ways such as loss of innovation or loss of quality and amount of third-party content like newspapers due to lack of funding. *U.K. Competition Authority 2019 Digital Advertising Report*, *supra* note 103, at 56–57.

202. See *Horizontal Merger Guidelines*, *supra* note 49, at 2, 4, 7, 24, 29 (describing quality as a legally protected parameter of competition).

203. Delrahim, "*Blind[ing] Me With Science*", *supra* note 50, at 9; Delrahim, "*I'm Free*", *supra* note 48, at 10.

204. See *e.g.*, Mary Madden & Lee Rainie, *Americans' Attitudes About Privacy, Security and Surveillance*, PEW RESEARCH CTR. (May 20, 2015), <https://www.pewresearch.org/internet/2015/05/20/americans-attitudes-about-privacy-security-and-surveillance/> (93% of Americans believe control over their personal information is "important").

205. Jason Adam Katzenstein, Cartoon, *Daily Cartoon: Friday, July 26th*, NEW YORKER (July 26, 2019), <https://www.newyorker.com/cartoons/daily-cartoon/friday-july-26th-social-security-app>.

Facebook.²⁰⁶ This extensive, aggressive data collection is thus a reduction of privacy, which translates into a reduction of quality.²⁰⁷

If Facebook can reduce quality without losing users, it is a sign that the market is not competitive.²⁰⁸ The European Commission, despite refusing to consider every privacy concern within the scope of E.U. antitrust law, has found that privacy “is an important parameter of competition” in digital markets and particularly for Facebook.²⁰⁹

However, a significant difficulty with this approach is quantifying that reduction of quality. Neoclassical models might have provided more certainty to antitrust by using a definable standard of consumer welfare—prices.²¹⁰ However, quantifying a reduction in privacy policies proves harder than a reduction in price. For example, how to measure the value of not being tracked in your phone usage. Likely not every user will give equal value to tracking. Instead of trying to assign a uniform value to privacy, a possible method to measure quality competition is to focus on whether companies can successfully lower privacy without experiencing user loss.²¹¹

Another way to look at the same problem is to consider privacy reductions as a “higher price” paid in data. As remarked, Facebook is paid for with the user’s data and attention.²¹² Consequently, more extensive data collection can be considered an increase in price.²¹³ According to Carugati, “by collecting data on third party websites and applications, the user’s privacy is degraded and the user pays more with their data to use the service.”²¹⁴ Overall, there seems to be a transatlantic consensus between E.U. and U.S. authorities that reductions in privacy are an antitrust harm that affects consumer welfare.²¹⁵

206. Sauvik Das & Adam Kramer, *Self-Censorship on Facebook*, ASS’N FOR THE ADVANCEMENT OF ARTIFICIAL INTELLIGENCE (July 2, 2013), <https://research.fb.com/publications/self-censorship-on-facebook/>; Khan, *supra* note 115, at 1004.

207. STUCKE & GRUNES, *supra* note 44, at 116–22. Besides a reduction in privacy, there are other ways in which Facebook can degrade its quality. For example, imposing a heavier ad-load; a strategy that Facebook has followed after eliminating its main competitors. Wu, *supra* note 94, at 791, 799.

208. See STUCKE & GRUNES, *supra* note 44, at 116–22.

209. European Comm’n Decision M.8124 Microsoft/LinkedIn, 2016 O.J. (C 8404) at 77 (June 12, 2016); *Facebook/WhatsApp Decision M.7217*, *supra* note 41, at 15, 18; see also *Bundeskartellamt Facebook Case No. B6-22/16*, *supra* note 98 (relying on reduction of privacy to find that Facebook conduct was anticompetitive).

210. AMATO, *supra* note 32, at 22.

211. STUCKE & GRUNES, *supra* note 44, at 266–68.

212. PATTERSON, *supra* note 39, at 163; *OECD Big Data Report*, *supra* note 53, at 18.

213. Christophe Carugati, *The 2017 Facebook Saga: A Competition, Consumer and Data Protection Story*, 2 EUR. COMPETITION & REG. L. REV. 4, 7 (2018).

214. *Id.*

215. See *id.*; Delrahim, “Blind[ing] Me With Science”, *supra* note 50, at 7–8 (“Just as antitrust enforcers care about companies charging higher prices or degrading quality as a sign of allocative

In a novel antitrust case, the German Competition Authority followed this theory and declared that Facebook's data sharing with Whatsapp was not only a defiance to the E.U. merger review process but also an "abuse of dominance" violation because the reduced privacy was similar to a higher price paid by consumers.²¹⁶ The president of the German competition authority summarized this line of thought: "[W]hen data is called the new currency of the digital age, then the relationship to competition law is obvious."²¹⁷ If data has an economic value, its collection and processing have economic consequences relevant to antitrust: either as a reduction of quality of Facebook's services or as a higher price paid in data.²¹⁸

2. *Expensive Ads and Expensive Products*

Since data is the fuel of the advertising industry, Facebook's "data-opoly" can give the company pricing power to charge higher prices for advertisements.²¹⁹ The European antitrust agency, while reviewing the Facebook/WhatsApp merger, was wary that Facebook collecting and using data from another platform (then, Whatsapp) would "raise competition concerns . . . if the concentration of data within Facebook's control were to allow it to strengthen its position in advertising."²²⁰

If the cost of advertising is higher due to market concentration, that increase in advertising costs can later translate to a price increase for consumers.²²¹ Jason Furman, professor at Harvard and former chair of the Council of Economic Advisers to the President of the United States, recently shared this view.²²² After analyzing Facebook and Google's

inefficiency, it may be important to examine circumstances where companies acquire or extract more data from consumers in exchange for less").

216. *Bundeskartellamt Facebook Case No. B6-22/16*, *supra* note 98; Maximilian N. Volmar & Katharina O. Helmdach, *Protecting consumers and their data through competition law? Rethinking abuse of dominance in light of the Federal Cartel Office's Facebook investigation*, 14 EUR. COMPETITION J. 195, 198-200, 205 (2018).

217. *Facebook's New Nemesis is a Besuited German Antitrust Watchdog*, BUSINESS TIMES (Dec. 20, 2017, 4:42 PM), <https://www.businesstimes.com.sg/technology/facebooks-new-nemesis-is-a-besuited-german-antitrust-watchdog>.

218. *See, e.g., Bundeskartellamt Facebook Case No. B6-22/16*, *supra* note 98. Besides more extensive data collection as a quality reduction, market concentration of these digital platforms can lead to other types of quality degradation. For example, the platform is incentivized to present content that creates outrage instead of thoughtful content because intense emotional reactions increase the engagement of the user with the platform (i.e., increasing the time spent and thus the amount of data and attention given). *University of Chicago Stigler Report*, *supra* note 105, at 63.

219. Maurice E. Stucke, *Should We Be Concerned About Data-opolies?*, 2 GEO. L. TECH. REV. 275, 299 (2018); *see supra* pt. IV(B).

220. *Facebook/WhatsApp Decision M.7217*, *supra* note 41, at 33.

221. *U.K. Competition Authority 2019 Digital Advertising Report*, *supra* note 103, at 57.

222. Furman et al., *supra* note 141, at 50.

position in the digital market, Furman concluded that the consequences of market concentration in the advertising industry “will ultimately feed through to consumers in the prices they pay.”²²³ Products that rely heavily on online advertising like hotels, flights, insurance, and consumer electronics are the most prone to a price increase.²²⁴

VI. RECONCILING LIBRA AND MARKET COMPETITIVENESS

Acknowledging Libra’s innovation and potential benefits, this Part makes some proposals to reconcile Libra’s existence with market competitiveness. The digital market is far from easy solutions, but this should not discourage antitrust enforcers.²²⁵ Separating the data pools from Facebook and Libra and ensuring the interoperability of other payment systems are a starting point to defeat entry barriers and revive competition.

These proposals could be implemented in several ways. Facebook is currently facing several antitrust investigations, and the proposals could be included in court-imposed measures in an eventual case.²²⁶ Moreover, the Federal Trade Commission has rulemaking authority which could be used to ensure that any measure applies across the board to every company and achieves deterrence, rather than working *post facto*.²²⁷ However, this power is largely unused, and the agency seems reluctant to revive its rulemaking authority.²²⁸ The most feasible

223. *Id.*

224. U.K. Competition Authority 2019 Digital Advertising Report, *supra* note 103, at 57. Other possible consequences of a higher advertising cost are the reduction in the quality of the products consumers buy and the loss of innovation with the implied diminished range of new products and services that consumers may choose amongst. Furman et al., *supra* note 141, at 50.

225. “I do not say it is impossible, but I look upon it as difficult.” MIGUEL DE CERVANTES SAAVEDRA, DON QUIXOTE (J.W. Clark ed., John Ormsby trans., 1880) (available at <http://www.gutenberg.org/files/996/996-h/996-h.htm>). “Libra is an excellent catalyst for exposing the anticompetitive issues that may appear in permissioned blockchain. On the other hand, regulatory intervention at the stage of product design carries significant risks of creating . . . errors. Plus, Libra’s objective to disrupt the existing financial system cannot be ignored. Finding the right balance is extremely difficult.” Schrepel, *supra* note 199, at 162.

226. David McLaughlin, *Attorney General Barr Seeks DOJ Facebook Antitrust Probe*, BLOOMBERG (Sept. 25, 2019), <https://www.bloomberg.com/news/articles/2019-09-25/attorney-general-barr-sought-doj-facebook-antitrust-probe> (reporting that Facebook has four antitrust investigations undergoing, from the Department of Justice, the Federal Trade Commission, the House Judiciary Committee, and a bipartisan coalition of State Attorneys).

227. Nat’l Petroleum Refiners Ass’n v. Fed. Trade Comm’n, 482 F.2d 672, 674–78 (D.C. Cir. 1973); see also Sandeep Vaheesan, *Resurrecting a Comprehensive Charter of Economic Liberty: The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645, 680–82 (2017) (advocating for the FTC to use its rulemaking power against dominant firm conduct).

228. John Hendel & Cristiano Lima, *FTC Chairman Tells Congress: Please Don’t Give Me Too Much Power*, POLITICO (May 8, 2019, 5:53 PM EDT), <https://www.politico.com/story/2019/05/08/ftc-chairman-congress-rulemaking-authority-1418237>.

solution to impose these remedies is to reach a settlement with Facebook, as done in other landmark antitrust cases like *Microsoft* or *AT&T*.²²⁹ While the applicability of such settlement would be limited to Facebook, it would allow the company to negotiate with enforcers and reach a consensual solution.

A. From Breaking Up Facebook to Separating the Database

Many progressive proposals today suggest that a “break up” is the antitrust solution for Big Tech.²³⁰ Even a Facebook co-founder has advocated for breaking up Facebook.²³¹ A “break up” refers to a structural separation among the different lines of business of the company.²³² Structural separations have been imposed in the past and changed the infrastructure of America’s economy, although such measures had a relevant political component.²³³ Some paradigmatic examples are the separation of Rockefeller’s empire and the separation of AT&T.²³⁴

However, today’s antitrust doctrine is unlikely to support a structural separation.²³⁵ In trying to find a middle ground, for purposes of Libra and Novi what is most concerning is the volume and variety that a joint data pool would generate.²³⁶ The database would reinforce significant entry barriers and dominance in the market.²³⁷ Accordingly, separating the data from both lines of business could be effective. This

229. *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 36 (D.D.C. 2000); *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982). Reaching a consensual solution on Libra can alleviate the harshness of the adversarial approach of some antitrust agencies. See Schrepel, *supra* note 199, at 168–69.

230. See, e.g., Khan, *supra* note 115, at 1065; Nicole Sganga, *Buttigieg Calls Facebook’s Ad Policy a “Mistake” and Backs the Breakup of Big Tech*, CBS NEWS (Oct. 24, 2019 7:35 PM), <https://www.cbsnews.com/news/buttigieg-calls-facebooks-ad-policy-a-mistake-today-2019-10-24/>; Warren, *supra* note 200.

231. Hughes, *supra* note 25.

232. Khan, *supra* note 115, at 980 (“[S]eparations place clear limits on the lines of business in which a firm can engage. Rather than prohibit particular business practices, separations proscribe certain organizational structures.”).

233. *Id.*

234. *Standard Oil Co. v. United States*, 221 U.S. 1, 46 (1910); *American Tel. & Tel. Co.*, 552 F. Supp. at 160. Back in 1984, the year of AT&T’s breakup, the press expressed “great concern” for the uncertainty that a structural separation might cause, but also reasoned that “[t]he telephone system is, in effect, the highway system of the Information Age, and its health affects the competitiveness of all American industry. If the telephone breakup spurs innovation, it could help all industries.” Andrew Pollack, *Bell System Breakup Opens Era of Great Expectations and Great Concerns*, N.Y. TIMES, Jan. 1, 1984, at L12 (available at <https://timesmachine.nytimes.com/timesmachine/1984/01/01/147599.html?pageNumber=12>).

235. Khan, *supra* note 115, at 1033–34.

236. See STUCKE & GRUNES, *supra* note 44, at 22.

237. See *supra* pt. V(A).

would prevent Facebook from having an automatic joint data pool with both social media and financial data.

The separation of both data pools should not depend on whether privacy laws exist to prevent the mixing of data because the problem here is the competitiveness of the market, not the user's rights. Privacy laws may regulate financial information and allow users to prevent its mixture with other personal information.²³⁸ However, privacy laws are not concerned with competition; their focus is neither on markets nor users as consumers, but rather on the individual as a citizen within their sphere of political rights.²³⁹ Under privacy laws, the user's consent is a key to identifying what actions are legal.²⁴⁰ In contrast, from an antitrust perspective, anticompetitive behavior can exist even if users consent. A consumer can agree to pay a predatory price, which would still be an antitrust violation.²⁴¹ Similarly, a consumer can consent to its Novi financial data being shared and mixed with its Facebook social data, and it will generate an antitrust problem as discussed above.

In other words, the user's consent should not be the determinative factor on whether a barrier between Novi's financial data and Facebook's social data exists.²⁴² Similarly, Facebook's internal policy cannot be the sole protection to competition. David Marcus, Head of Novi for Facebook, testified before the United States Senate regarding user's consent.²⁴³ Mr. Marcus made a blank statement that Novi data would not be shared with Facebook only to later reveal: "[Novi] will not share customers' account information or financial information data with Facebook *unless people agree to permit such sharing.*"²⁴⁴ As stated above,

238. For example, European law establishes such rights. *GDPR*, *supra* note 108. In the United States, California is on the lead, having targeted specifically financial information as sensitive. Consumer Privacy Act, CA. CIV. CODE § 1798.100 (West 2020); Financial Information Privacy Act, CA. FIN. CODE § 4052.5 (West 2004).

239. Giovanni Buttarelli, *Strange Bedfellows: Data Protection, Privacy, and Competition*, 13 COMPETITION L. INT'L 21, 23 (2017).

240. *See, e.g., GDPR*, *supra* note 108, ¶ 42 (identifying the user's consent as the necessary condition for data processing).

241. *See generally* Phillip Areeda & Donald T. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

242. Facebook promises are nothing more than a business policy, depending on business ethics, and without binding force. As much as Facebook has set the goal of not mixing Novi data with Facebook's data, they can later change their policy. *See Libra White Paper*, *supra* note 3. Indeed, Facebook's history does not indicate much loyalty to its promises. *See supra* pt. III.

243. *Examining Facebook's Proposed Digital Currency and Data Privacy Considerations: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, *supra* note 12, at 5.

244. *Id.* at 6 (emphasis added). Moreover, Novi will be embedded in other Facebook products such as Messenger and WhatsApp. *Id.* at 5. If the payment system is integrated within other Facebook products, there does not even need to be a "sharing" of data to Facebook because the transaction and data will be generated within Facebook's ecosystem, for example when a user clicks "pay" in WhatsApp or Messenger. However, this data would refer only to particular transactions

because this is not a privacy concern, but an antitrust issue, a user's consent does not remedy the problem. Overall, the separation of Novi's and Facebook's data concerns antitrust law because it could prevent harm to competition in the market.

B. Interoperability and No Discrimination to Facilitate Consumer Choice

Network effects in Facebook reinforce switching costs. "[U]sers concerned over Facebook's privacy policies may want to switch to another social network. But unless they can get their friends, family, and acquaintances to switch, they will likely stick with Facebook."²⁴⁵ This lock-in effect is almost natural and does not mean an automatic antitrust violation.²⁴⁶

However, the company can also design its product and perform actions to reinforce the lock-in and prevent users from choosing a competitor. For example, the European antitrust agency found that Microsoft violated antitrust laws for promoting "lack of interoperability" with other operating system products to benefit their package of operating systems.²⁴⁷ The agency demanded that Microsoft facilitate interoperability of other products within Microsoft's platform.²⁴⁸

In this same line, Facebook promises to have Novi integrated in WhatsApp and Facebook Messenger apart from the standalone app.²⁴⁹ This combination will allow Facebook to benefit from its billions of users. Interoperability could be achieved by giving Facebook users an option to choose their preferred payment method. If there were interoperability, users could choose what digital wallet and payment method to use within WhatsApp and Facebook Messenger.²⁵⁰ This solution would allow other digital wallets to compete in the digital arena and would alleviate network effects because users can decide more

and would be less detailed than Novi's overall data, which will hold wider information, such as previous transaction history and available currency at the time of payment.

245. STUCKE & GRUNES, *supra* note 44, at 292.

246. *Id.*

247. Case T-102/04 Microsoft Corp. v. Comm'n of the European Communities [2007], II-3819.

248. *Id.* at II-3647.

249. *Examining Facebook's Proposed Digital Currency and Data Privacy Considerations: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs, supra* note 12, at 5.

250. Even with interoperability, having Novi as the default option would already give Facebook an advantage because users suffer from "status quo bias" that benefits the default option. *Facebook/WhatsApp Decision M.7217, supra* note 41, at 24–25; *University of Chicago Stigler Report, supra* note 105, at 59–60.

easily whether they choose an app from Facebook's ecosystem or choose an alternative.

VII. CONCLUSION

Libra and Novi offer unique challenges and opportunities for antitrust. First, they reveal how in data-driven economies, the broader picture must be considered, analyzing the impact of these proposals in different markets like social media and online advertising. Second, antitrust already has the right statutes, caselaw, and tools in place for effective enforcement in digital markets. The main change required is the agencies' willingness to overcome the complexity of these cases and to collaborate with technology companies, given their significant innovations. The analysis and proposals exposed provide an insight into future possible outcomes of antitrust litigation against Facebook. Finally, the Libra project brings the opportunity to deter anticompetitive conduct. The time to act is now, in a preventive way, and not after the entry barriers become extremely high and competition is foreclosed. Instead of a complete ban on the project, appropriate regulation can balance innovative enterprise and competitiveness in digital markets.