



October 16, 2019

## CATCHY BUZZWORDS CAN'T JUSTIFY INCREASED ANTITRUST SCRUTINY OF DATA-CENTRIC ENTERPRISES

by Glenn G. Lammi

Federal and state antitrust regulators and politicians are fixated on this country's most successful online businesses. When discussing why the U.S. should follow other countries' lead and bring these American-made innovators to heel (including at tomorrow's [House Judiciary Committee hearing](#)), we may hear phrases like "data is the new oil," "essential facility," "network effects," and "barrier to entry." The use of such catchy buzzwords should not distract anyone, however, from the reality that collection and use of consumer data does not justify demands for elevated antitrust scrutiny.

**Data is the new oil** is a clever phrase, evoking a substance which, though essential to the economy, is highly regulated and increasingly demonized. But it is a misleading, inapt metaphor. Numerous other commentators, including International Center for Law and Economics' [Alec Stapp](#) (who'll be speaking at an October 30 [WLF briefing](#)) and Georgetown University's [Mark McCarthy](#), have thoroughly debunked the comparison, so we'll focus here on three other buzzwords.

The idea that online data is an **essential facility** to which government must impose open access has won some supporters, mostly [overseas](#). Data, to these advocates, is akin to a railroad bridge over a river owned by one railroad company. That company's denial of bridge access to all other rail carriers shuts off competition, a predicament that only government intervention can resolve.

The essential-facility argument falters because the type of information that competitors of the online market leaders desire is "non-rivalrous." Unlike oil, data can be used more than once. Consumers are free to share that desired information, either through entering it on a website or through their online activity, with any market participant they wish.

MIT Professor Catherine Tucker explains in an April 2019 *CPI Antitrust Chronicle* piece why data is unlikely to be an essential facility for online advertisers. Online browsing data is not very valuable, Professor Tucker explains, in part because over 90% of ad campaigns accomplish nothing. The presence of "multiple digital footprints" complicates one or several firms' ability to maintain control over data relevant to advertisers.

A third justification for antitrust intervention gaining traction is that the large amounts of data enable online businesses to entrench themselves through **network effects**. The telephone network is a classic example of an industry that expands thanks to network effects—businesses' value increases with each new telephone user. The more data a business collects, the "data network

---

**Glenn G. Lammi** is Chief Counsel of Washington Legal Foundation's Legal Studies Division.

effects” argument goes, the better services it can provide, making it harder for new entrants to compete.

But as two general partners at venture-capital firm Andreessen Horowitz explain in an [analysis](#), businesses cannot count on network effects to build a “data moat” that secures a firm’s survival. Collection of data, they argue, is more of an economies-of-scale effect than a network effect. But more data doesn’t provide more value at less “cost.” As more data becomes available and more businesses are collecting it, data’s value decreases. Also, the authors explain, data’s short lifecycle of relevance and its repetitive nature reduce its value as more is collected.

A fourth [argument for antitrust intervention](#) is that large online firms’ data possession constitutes a market **barrier to entry**. Two major factors dictate against data, in and of itself, being a market entry barrier. First, as we discussed above, the type of data that new competitors require to enter the online market is abundant, reusable, and relatively inexpensive to obtain.

Second, consumer information has little or no value on its own. Only through innovation—the creation of products and services that efficiently and effectively harness data—does that information become valuable. Consider that when ride-sharing companies burst onto the scene, they didn’t have the relevant data—their taxi and limousine rivals had it. But what those firms did offer was a new approach and a product consumers liked to use, and the data followed.

American Action Forum’s Will Rinehart [notes](#) that a firm’s successfully “processed data,” not raw data, is what gives it a competitive advantage. A data-centric business’s success, he explains, can depend on how it adjusts to an avalanche of data and a rapid increase in users. Facebook succeeded in making these adjustments while its main rival, MySpace, “hit a wall with its technology and slogged through upgrades” that led to its ultimate demise.

Talent and creativity, not data, is more often than not the true barrier to entry, a circumstance that our antitrust laws should support, not deter or punish. As former FTC Acting Chairman Maureen Ohlhausen (also participating in our [October 30 program](#)) testified last July, “Antitrust is about protecting the process, not guaranteeing a particular result at a particular time.”

Government action motivated by market restructuring, and the resulting chill on innovation, can be a far more burdensome barrier to entry than any business’ collection or use of data. We’ve written [previously](#) about the antitrust missteps of the past. In the 1940s, the Justice Department and Congress acted against grocer A&P in part because its rivals complained about A&P’s revolutionary use of data to reduce prices and improve customer offerings. A&P crumbled under the weight of subsequent criminal and civil charges and the grocery industry, and its consumers, ended up suffering as a result.

Members of Congress, state attorneys general, and federal agencies, all of whom are competing over who can be tougher on Big Tech, must bear in mind the mistakes made by their predecessors, or risk negative market outcomes in the future.