

Ramsi Woodcock  
Assistant Professor of Law  
Secondary Appointment  
Assistant Professor of Management  
Gatton College of Business and Economics  
ramsi.woodcock@uky.edu  
(859) 257-1253

Office of the Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue NW  
Washington, DC 20580

October 14, 2018

**Re: The First of the FTC’s Hearings on Competition and Consumer Protection in the 21<sup>st</sup> Century, and Specifically, the Irrelevance of Concentration Levels to the Question Whether the FTC Should More Aggressively Enforce the Antitrust Laws**

Dear Commissioners,

I commend the FTC for holding hearings to discuss the considerable challenges facing competition policy in the 21<sup>st</sup> century. A focus of debate at the hearings thus far has been whether increasing markups across the economy are due to increasing concentration of markets, and whether the increase in concentration has in turn been driven by new information technologies. If the answer to both questions is yes, it has been suggested, then the firms that have grown large because of those new technologies ought to be subjected to more careful antitrust scrutiny, perhaps under a new standard that takes the interests of workers into account, as well as those of consumers.

But what if new information technologies were to pose a threat to consumer welfare regardless whether they change the level of concentration in markets, and that threat could be addressed through a campaign of deconcentration of American industry?

That would render moot the debate over whether the economy has become more concentrated in recent years, and create a basis for increased antitrust enforcement rooted squarely in the existing consumer welfare standard (but still benefitting workers and other groups that flourish in deconcentrated markets).

Advances in information technology do in fact pose a direct threat to consumer welfare that applies regardless of the prevailing level of concentration in any given market. That threat comes from what I call “extractive technologies,” new technologies that facilitate the related practices of price discrimination – charging different markups on different units of the same good – and dynamic pricing – adjusting prices based on new

seeblue.

information about demand faster than supply can adjust to the new demand. Big data and algorithms have enabled the spread of dynamic pricing across the economy over the past fifteen years, from Amazon to Disney World, and are poised to unleash near-perfect price discrimination in the years to come.

The hallmark of price discrimination and dynamic pricing is the power they give a firm to extract more surplus from consumers for each purchase consumers make, regardless the level of market power enjoyed by the firm. Since the days of Edward Chamberlin, economists have recognized that every firm, regardless how competitive the market in which the firm operates, faces a downward-sloping residual demand curve. Big data and algorithms have given firms the information and data processing capacity necessary to use personalized pricing and continuous adjustment of prices to hollow out the consumer surpluses under firms' residual demand curves. Those consumer surpluses were once denied to firms by their own ignorance regarding the identity of individual buyers at the point of sale and firms' technological inability to raise prices at the same speed at which surges in demand appear. But no more. The uncanny coincidence of the adoption of extractive technologies and the rise in markups in recent years suggests that the two phenomena could be related.

Price discrimination and dynamic pricing harm consumers by driving up prices, and antitrust law has not traditionally viewed higher prices – which are the stuff of price discrimination and dynamic pricing – as relevant to antitrust policy absent a nexus with anticompetitive conduct. The situation is different with extractive technologies, however, for two reasons.

First, in embracing the consumer welfare standard in the 1980s, antitrust enforcers accepted the mission of using competition to protect consumers' share of the economic surpluses generated by markets. If new technologies allow firms to redistribute some of that share to themselves, that effectively undermines the efforts of antitrust enforcers to use competition to protect consumers. Indeed, extractive technologies represent a collateral attack on the consumer bargaining power that antitrust enforcers have sought to preserve for consumers through competition.

Second, while the channel through which extractive technologies harm consumers is price, rather than anticompetitive conduct, the antidote is the promotion of more competition, which is the traditional *modus operandi* of the antitrust laws. Thus it is wholly appropriate for antitrust enforcers, such as the FTC, to treat extractive technologies as a threat to their consumer protection mandates and to employ antitrust remedies to neutralize that threat.

Competition is an antidote to extractive technologies because, while these technologies harm consumers regardless the level of competition in the market, the greater the level of competition, the less the harm. In competitive markets, consumers have more opportunities to escape the discriminatory price, or the price surge, by purchasing a competing product.

The FTC can use competition to protect consumers from extractive technologies by more vigorously enforcing the antitrust laws across the board, to the end of reducing market power economy wide, and thereby of offsetting the losses inflicted on consumers by the general adoption of extractive technologies taking place today.

Because of this restorative motivation, a policy of curing extractive pricing with deconcentration has the added virtue of rendering irrelevant the perennial debate over the effects of deconcentration on innovation. So long as a consensus exists that the level of profits available to firms fifteen or twenty years ago, before the rise of extractive technologies, was sufficient to fuel American innovation – a conclusion that is easy to draw given that the economy birthed the information age during that period – then a ramping up of antitrust enforcement today to counteract extractive-technology-driven increases in profits, and to return profits to their pre-information-age levels, can hardly raise innovation concerns.

One way in which the FTC could ramp up enforcement would be by reverting to the enforcement thresholds that prevailed before the 1980s, thresholds that are universally regarded as having hindered concentration, for better or worse. Challenge all intrabrand vertical restraints, exclusive dealing, and tying of unique products. Challenge all mergers, horizontal or vertical. Challenge all refusals to deal that meet the essential facilities test. Challenge all pricing below average total cost.

In sum, the advent of extractive technologies has made the need for vigorous antitrust enforcement aimed at bringing about across-the-board deconcentration of industry essential to the realization of antitrust’s consumer protection mission. It has also made the connection between 21<sup>st</sup> century technologies and consumer harm direct, and not dependent on the question whether concentration has increased in recent years.

I develop these points in greater detail in [“Big Data, Price Discrimination, and Antitrust”](#) (2017), [“The Efficient Queue and the Case against Dynamic Pricing”](#) (2018), and [“The Bargaining Robot”](#) (2017).<sup>1</sup>

Although the FTC need only enforce existing antitrust laws with greater vigor in order to address the rise of extractive technologies, the FTC could also choose to attack the use of extractive technologies directly. [“Price Discrimination as Monopolization”](#) (2018) outlines how data-driven price discrimination can be understood to violate Section 2 of the Sherman Act, [“The Antitrust Duty to Charge Low Prices”](#) (2018) shows how the FTC might find in current law a mandate to treat high pricing of all forms as an antitrust offense, and [“Antitrust as Corporate Governance”](#) (2018) shows how recognition of a high-pricing offense could revolutionize corporate law.<sup>2</sup>

---

<sup>1</sup> Ramsi A. Woodcock, *Big Data, Price Discrimination, and Antitrust*, 68 HASTINGS L.J. 1371 (2017), available at <https://ssrn.com/abstract=2817523>; Ramsi A. Woodcock, *The Efficient Queue and the Case against Dynamic Pricing* (2018), available at <https://ssrn.com/abstract=3230425>; Ramsi A. Woodcock, *The Bargaining Robot*, CPI ANTITRUST CHRON., May 2017, at 40, available at <https://ssrn.com/abstract=2972228>.

<sup>2</sup> Ramsi A. Woodcock, *Price Discrimination as Monopolization*, 51 CONN. L. REV. (2018), available at <https://ssrn.com/abstract=2972369>; Ramsi A. Woodcock, *The Antitrust Duty to Charge Low Prices*, 39

In “[The Obsolescence of Advertising in the Information Age](#)” (2018), I explore another striking consequence of the information age, that advertising is now purely anticompetitive in character, a consequence that should expand the toolkit available to the FTC to ramp up enforcement, by making possible the treatment of advertising as exclusionary conduct under Section 2.<sup>3</sup> I am

Very sincerely yours,

A handwritten signature in black ink that reads "Ramsi Woodcock". The signature is written in a cursive, flowing style.

Ramsi Woodcock.

---

CARDOZO L. REV. 1741 (2018), available at <https://ssrn.com/abstract=2896453>; Ramsi A. Woodcock, *Antitrust as Corporate Governance* (2018), available at <https://ssrn.com/abstract=3123985>.

<sup>3</sup> Ramsi A. Woodcock, *The Obsolescence of Advertising in the Information Age*, 127 YALE L.J. 2270 (2018), available at <https://ssrn.com/abstract=3027662>.