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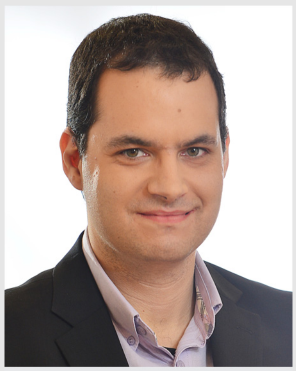

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In this article, Avi-Yonah and Frank explore how progressive corporate tax rates could address the abuse of power by monopolistic big tech companies.

I. Introduction

On June 2, 2019, *The Washington Post* (owned by Amazon founder and CEO Jeff Bezos) prominently declared that "Amazon could face heightened antitrust scrutiny under a new agreement between U.S. regulators." As explained by the *Post*:

> The move is the result of the FTC and the Department of Justice, the U.S. government's leading antitrust enforcement agencies, quietly divvying up competition oversight of two of the country's top tech companies, according to those people, who spoke on the condition of anonymity because the government's work is confidential. The Justice Department is set to have more jurisdiction over Google, The Washington Post reported on Friday, paving the way for a potential investigation of the search-and-advertising giant.[1]

This is just the latest episode in the long struggle to contain the monopoly power of big tech companies such as Facebook, Amazon, Apple, Netflix, and Google. These companies have become for early 21st-century America what Standard Oil, U.S. Steel, and the railroads were to early 20th-century America — the embodiment of corporate power that enjoys a near monopoly on an important segment of economic activity.[2]

Indeed, incumbent platforms (that is, big tech) can abuse their monopolistic power in a manner that hinders the competitive process, stifles innovation, and harms consumer welfare.[3] Most recent studies show that incumbent platforms tend to acquire competitors, or potential competitors, with the intention of preempting competition.[4] Simply put, after the consummation of the merger, the acquiring monopolistic

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[1] Tony Romm, "Amazon Could Face Heightened Antitrust Scrutiny Under a New Agreement Between U.S. Regulators," *The Washington Post*, June 1, 2019.

[2] *See, e.g.*, Naomi R. Lamoreaux, "The Problem of Bigness: From Standard Oil to Google," 33(3) *J. Econ. Persp*. 94-117 (2019).

[3] *See generally* Kenneth A. Bamberger and Orly Lobel, "Platform Market Power," 32 *Berkeley Tech. L.J.* 1051 (2017).

[4] Axel Gautier and Joe Lamesch, "Mergers in the Digital Economy," CESifo Working Paper No. 8056 (Feb. 3, 2020).

platform shuts down its competitor's acquired operations, because it is directly competing with its own products or research and development efforts. This type of acquisition is referred to as a killer acquisition.[5] By extinguishing competition that way, the incumbent platforms entrench their dominant position, which in turn gives them leeway for exploiting their customers.

Incumbent platforms can use their monopoly power to exploit their customers in different ways, as will be discussed below.

A plethora of online platforms offer goods and services free of charge.[6] But this doesn't mean that online platforms do not generate revenue. On the contrary — some, especially incumbent platforms like Facebook,[7] still manage to generate immense profits. Although consumers make free use of the platform's services, they pay for it with their personal data.[8] In this way, online platforms accumulate vast amounts of personal data, which grants them market power. In turn, platforms use the accumulated personal data as a commodity and sell it to third parties (like advertisers), who are willing to pay for it. Consumers suffer privacy loss, while the platform uses their personal data as its own and gains substantial profits by exploiting it. This exploitative monopolistic behavior can be deemed abusive, and can be subject to antitrust law enforcement.[9]

Not all platforms offer goods and services for free. Digital platforms, like Amazon, charge their customers directly for purchasing goods (tangible and intangible) and services online. In these cases, monopolistic platforms can use their dominant position in the market and extract from their customers excessive prices (that is, prices that wouldn't prevail in a more competitive market).

This type of claim was brought by consumers in a class action suit against Apple, in *Pepper*.[10] The consumers argued that Apple has monopolized the retail market for the sale of apps and unlawfully used its monopolistic power to charge consumers higher-than-competitive prices. The Supreme Court clearly stated: "A claim that a monopolistic retailer (here, Apple) has used its monopoly to overcharge consumers is a classic antitrust claim."[11] Thus, the Court allowed the case to proceed in a lower court, which must now determine whether Apple's pricing scheme is indeed harmful to consumers.[12] Generally speaking, excessive pricing charged by monopolistic platforms harms consumer welfare by transferring entire consumer surplus, or a large portion of it, to the monopolistic platform, which in turn captures most of the gains deriving from the transaction.[13] The consumer, on the other-hand, pays a price which is higher than the price that she would normally pay in a competitive market. In light of that, scholars argue that antitrust law should also prohibit monopolistic excessive pricing, which exploits consumers directly.[14]

In response to these antitrust concerns, former Secretary of Labor Robert Reich has explicitly called for the breakup of big tech.[15] Sen. Elizabeth Warren, D-Mass., has proposed to treat the big tech companies as common carriers, forbidding them from selling their own goods and services on their platforms, and to force them to dispose of their recent anti-competitive acquisitions.[16] The Warren proposals are based on the pioneering work of antitrust experts such as Lina M. Khan,

[5] Colleen Cunningham, Florian Ederer, and Song Ma, "Killer Acquisitions" (2019); Marc Bourreau and Alexandre de Streel, "Big Tech Acquisitions" (2020).

[6] Michal S. Gal and Daniel L. Rubinfeld, "The Hidden Costs of Free Goods: Implications for Antitrust Enforcement," 80(401) *Antitrust L.J.* 521-562 (2016); *see also* John M. Newman, "Antitrust in Zero-Price Markets: Applications," 94(1) *Wash. U. L. Rev.* 49 (2016).

[7] *See, e.g.*, Friso Bostoen, "Online Platforms and Pricing: Adapting Abuse of Dominance Assessments to the Economic Reality of Free Products," 35(3) *Computer L. & Security Rev.* 263-280 (2019).

[8] For further discussion on this topic, see Tim Wu, "Blind Spot: The Attention Economy and the Law," 82 *Antitrust L.J.* (2017).

[9] *See, e.g.*, Marco Botta and Klaus Wiedemann, "Exploitative Conducts in Digital Markets: Time for a Discussion After the Facebook Decision," 10(8) *J. Eur. Competition L. & Prac.* 465-478 (2019).

[10] *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1522 (2019).

[11] *Id.* at 1.

[12] For elaboration on excessive pricing as an antitrust issue, see, *e.g.*, Harry First, "Excessive Drug Pricing as an Antitrust Violation," 82(2) *Antitrust L.J.* 701-705 (2019).

[13] David C. Hjelmfelt and Channing D. Strother Jr., "Antitrust Damages for Consumer Welfare Loss," 39 *Clev. St. L. Rev.* 505 (1991).

[14] *See, e.g.*, David Gilo, "A Coherent Approach to the Antitrust Prohibition of Excessive Pricing by Dominant Firms," in *Excessive Pricing and Competition Law Enforcement* 99-126 (2018).

[15] Robert Reich, "Break Up Facebook (and While We're at It, Google, Apple and Amazon)," *The Guardian*, Nov. 20, 2018.

[16] Warren, "Here's How We Can Break Up Big Tech," *Medium*, Mar. 8, 2019.

who created them while a student at Yale Law School.[17]

However, there may also be another way of reining in the power of big tech that could be a helpful complement to antitrust enforcement. It is derived from an early 20th-century innovation that was intended to curb the power of monopolies in 1909: the corporate tax.

The corporate tax can limit corporate power in three ways. First, even a low-rate corporate tax requires corporations to provide the government with detailed information about their activities that is hard to obtain in the absence of that tax (for example, it forces them to calculate profits per taxing jurisdiction, which they may not otherwise do). Second, the corporate tax, like any other tax, can involve the power to destroy if the rate is high enough. The recognition of that may limit the aggressiveness of corporate management. Third and most importantly, the corporate tax can be used as a regulatory device, with the effective rate being raised or lowered either for specific desirable or undesirable activities (for example, maintaining or compromising privacy) or in response to an overall corporate social responsibility score.

One of this article's authors has previously argued that regulatory uses are the only valid reason to have a corporate tax, because taxing shareholders is more easily accomplished by either taxing them directly (for closely held corporations) or taxing them on the changes in the value of their shares (for publicly traded corporations like big tech).[18] We believe that corporate taxation may be a useful complement to antitrust enforcement in curbing the power of big tech, especially because a corporate tax has the probability of making anti-competitive killer acquisitions less lucrative. It can also be used as a vehicle for regulating excessive monopolistic pricing, and might also reduce unwanted consumer data accumulation by large platforms.

II. A Progressive Corporate Tax

Imagine a corporate tax, like the original corporate tax of 1909, that (1) does not include a dividends received deduction, (2) does not include tax-free mergers, and (3) does not permit consolidated returns. All these provisions were added to the original corporate tax from 1919 to 1929, which significantly weakened the original corporate tax as an antitrust device.

Such a tax would significantly limit the monopoly power of big tech firms by preventing them from acquiring competitors or potential competitors (for example, WhatsApp and Instagram for Facebook, Waze for Google) on a tax-free basis and limiting their ability to use the profits of those corporations to fund R&D at the parent level. Hence, a corporate tax makes anti-competitive killer acquisitions less lucrative.

However, these changes in the corporate tax may be too limited, too late, and would unnecessarily harm corporations with no monopolization potential (the same argument that was made against enacting a corporate tax to address the monopolization issue in 1909).

But there may be another way of using the corporate tax to address the problems of monopolistic abuse of power and consumer exploitation. The current corporate tax is flat: "The amount of the tax imposed by subsection (a) shall be 21 percent of taxable income."[19] Before 2017, there was some progressivity in the corporate tax, but it applied only to small corporations, most of whom were not subject to it. A flat rate of 35 percent applied to taxable income of corporations exceeding $10 million, and a

[17] Khan, "Amazon's Antitrust Paradox," 126 *Yale L.J.* 710 (2017); Khan, "The Separation of Platforms and Commerce," 119 *Colum. L. Rev.* 973 (2019). *See also* Menesh S. Patel, "Merger Breakups," *Wisconsin L. Rev.*, forthcoming (Feb. 11, 2020).

[18] *See generally* Reuven S. Avi-Yonah, "Corporations, Society and the State: A Defense of the Corporate Tax," 90(5) *Va. L. Rev.* 1193 (2004).

[19] Section 11(b).

surtax eliminated the progressive rate structure for taxable income exceeding $15 million.[20]

The rationale for the flat corporate tax was that corporations do not bear the burden of the tax, people do, and so it was an inappropriate vehicle for redistribution because the incidence of the tax was not clear (it could fall on shareholders, on all capital providers, on employees, or on consumers, depending on the economic model used).[21]

But if the corporate tax is primarily conceived of as an antitrust device, then a sharply progressive corporate tax makes sense. The purpose of monopolization is to increase corporate profits. The more monopolistic a corporation is, the higher its profits are likely to be, and the purpose of anti-competitive mergers is to eliminate competitors that would decrease profits. So a highly progressive corporate tax (for example, with top rates of 70 or 80 percent above a high threshold of, for example, $10 billion in annual profit) would tend to apply at the top only to monopolies. The more competition there is in an industry, the lower the likelihood of very high profits because competition drives down profits. In 2018 all of big tech had profits exceeding $10 billion.[22]

A highly progressive corporate tax structure would also address excess profits that derive from external crises like the coronavirus pandemic. Amazon, for example, has high profits in a normal year, but is likely to have even higher profits in 2020 because of the pandemic. In general, Amazon, Apple, Facebook, Google, and Netflix all have high profit margins, especially if we disallow expensing R&D, which tends to reduce their taxable income and should not be expensed because it generates future profits, and if we tax them on worldwide profits so they cannot avoid tax by shifting profits offshore.[23]

Importantly, none of the big tech companies can easily escape a progressive U.S. corporate tax by inverting (that is, expatriating to another, more friendly jurisdiction) because under existing law, inversions are subject to an exit tax that would be prohibitively expensive for the controlling founders. As long as Mark Zuckerberg, Jeff Bezos, Sergey Brin, and Larry Page control the big tech companies, and as long as they don't want to pay 23.8 percent of their unrealized gains (that is, tens of billions in tax) to the IRS, the big tech companies are trapped. And if they are willing to pay the 23.8 percent, section 7874 should be revised to treat an inverted corporation as a U.S. corporation if it is managed and controlled from the United States or if it merges with a smaller foreign corporation, as the Obama administration had proposed.

[20] Former section 11(b), as in effect before December 31, 2017:

(A) 15 percent of so much of the taxable income as does not exceed $50,000,

(B) 25 percent of so much of the taxable income as exceeds $50,000 but does not exceed $75,000,

(C) 34 percent of so much of the taxable income as exceeds $75,000 but does not exceed $10,000,000, and

(D) 35 percent of so much of the taxable income as exceeds $10,000,000.

For a corporation which has taxable income in excess of $100,000 for any taxable year, the amount of tax determined under the preceding sentence for that taxable year shall be increased by the lesser of (i) 5 percent of that excess, or (ii) $11,750. For a corporation which has taxable income in excess of $15,000,000, the amount of the tax determined under the foregoing provisions of this paragraph shall be increased by an additional amount equal to the lesser of (i) 3 percent of that excess, or (ii) $100,000.

[21] For a recent discussion of the incidence issue and an argument that the corporate tax falls mostly on economic rents and is therefore born by capital, see Edward G. Fox, "Does Capital Bear the U.S. Corporate Tax After All? New Evidence From Corporate Tax Returns," 17(1) *J. Empirical Legal Stud*. 71-115 (2020); *see also* Laura Power and Austin Frerick, "Have Excess Returns to Corporations Been Increasing Over Time?" 69(4) *Nat'l Tax J.* 831-846 (2016). Given today's environment (expensing for equipment, some interest deductibility), this is probably even more the case under current law.

[22] Apple's profit for 2019 was $59.5 billion, Amazon's $10.1 billion, Alphabet's $30.7 billion, Microsoft's $16.6 billion, and Facebook's $22.1 billion. Visual Capitalist, "How the Tech Giants Make Their Billions" (Mar. 29, 2019). The other corporations that had profits exceeding $10 billion in 2019 include other big tech companies (Intel, Micron), big banks (Chase, Bank of America, Wells Fargo, Citi, Goldman Sachs, Visa), big pharma (Pfizer), big oil (Exxon, Chevron), big telecom (AT&T, Verizon, Broadcom), United Health, Boeing, and some major consumer brands (Johnson & Johnson, Home Depot, Disney, Pepsi). All these enjoy some degree of quasi-monopolistic status. *See* Fortune.com, "Fortune 500."

[23] On why we should not allow expensing for either physical or human capital, see Calvin H. Johnson, "The Effective Tax Ratio and the Undertaxation of Intangibles," *Tax Notes*, Dec. 15, 2008, p. 1289. On eliminating the exemption or lower rate for foreign profits, see Avi-Yonah, "Hanging Together: A Multilateral Approach to Taxing Multinationals," 5(2) *Mich. Bus. & Entrepreneurial L. Rev.* 137 (2016). Note also that 70 percent of U.S. equities are held by tax-exempt institutions or individuals (*e.g.*, through retirement accounts), so that dividends are not taxed and increasing the corporate tax rate is the only way to effectively tax capital income (unless we abolish all these tax preferences). Leonard E. Burman, Kimberly A. Clausing, and Lydia Austin, "Is U.S. Corporate Income Double-Taxed?" 70(3) *Nat'l Tax J.* 675-706 (Sept. 2017).

It can be also be claimed that higher corporate tax rates solve the problem of the transfer of the entire consumer surplus (or large portions of it) to the monopolistic platform itself. When tax rates are higher, a larger portion of the surplus is transferred to the state and not entirely to the platform. In that case, the state can spend more on infrastructure, which in turn benefits the public. Hence, the monopolistic platform is not the only party that benefits from the profits of the transaction — the public at large does as well.

Last but not least, a higher tax rate can also deter large platforms from accumulating vast amounts of consumer personal data and exploiting it for their own profits.[24] Most notably, a higher corporate tax rate on the resale of data can render it less profitable and lucrative. The tax can thus minimize unwanted consumer data accumulation by large companies and reduce the probability of privacy loss. Hence, it can also reduce monopolistic behavior that exploits consumers directly.

III. Two Caveats

First and foremost, the solution suggested in this article is not meant to prevent companies from becoming monopolies. It is only meant to prevent monopolistic exploitative behavior that harms consumer welfare. In that sense, our suggestion is less drastic than breaking-up monopolies, which can deter companies from becoming monopolies. It must be remembered, that companies can become monopolies because consumer prefer their products, and thus, neither antitrust law, nor any other law, should prevent companies, including online platforms, from achieving dominant position. Legal intervention is only warranted where companies abuse their monopolistic power.

Secondly, the solution suggested in this article is not exclusive, and it stands as another regulatory tool that should be used with others, in order to curb abuses of big tech monopolistic power.

IV. Conclusion

The corporate tax was enacted in 1909 to rein in the market power of big corporations. If we make the corporate tax sharply progressive, it can be used to regulate the big tech companies and punish anti-competitive behavior. In this way, we can recapture its original intent. ■

[24] *See also* Francis Bloch and Gabrielle Demange, "Taxation and Privacy Protection on Internet Platforms," 20(1) J. *Pub. Econ. Theory* 52-66 (2018).