Insight

Why Technology Should Not Be Regulated Like Finance

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Executive Summary

- A number of critics of Big Tech have called for new regulations modeled on the regulatory regime in the financial services sector, specifically Glass-Steagall and the Consumer Financial Protection Bureau (CFPB).
- The analogy between the largest technology platforms and banking ultimately does not work, undermining calls for a Glass-Steagall for tech, and a specialized CFPB-like agency for digital platforms or data protection would likely lead to a dramatic increase in regulations on data without much in the way of consumer benefits.
- Instead of seeking to regulate technology like finance, policymakers should look at ways to implement in other industries the kinds of regulatory approaches found in the technology sector.

Introduction

In hearings and interviews, policymakers on both the left and the right have suggested that the regulatory approach to "Big Tech" companies and the technology sector more generally needs reconsideration. As the argument goes, continuing the hands-off approach to regulating technology as it becomes more influential in consumers' lives risks allowing Big Tech to exploit users or harm smaller competitors. While often praising the spirit of innovation that allowed the United States to be a leader in the technology sector, advocates for much stronger regulation also believe that tech giants such as Google, Apple, Facebook, and Amazon have too much power and are stifling future innovation and competition to the detriment of consumers and smaller players. To solve these problems, some policymakers have called for additional regulation of these companies, and in particular, they have called for new regulations modeled on those in the financial sector.

But shifting away from the more hands-off approach could cause more harm than good. The parallels that these advocates for changes to current tech policy regulation draw between finance and technology fail upon closer inspection in crucial ways, and the impact of these regulations on the financial sector indicate they likely would not solve the problems identified in the technology sector. The current regulatory standards balance well the twin concerns of encouraging innovation and mitigating possible risks, and rather than dramatic reforms and increased regulatory interventions, policymakers should consider ways to improve these existing tools. Instead of imposing finance-inspired regulations on the technology sector, policymakers should consider how such a hands-off approach might encourage more innovation, improve competition, and benefit consumers in industries beyond technology.

Glass-Steagall for Technology

House Judiciary Antitrust Subcommittee Chairman Rep. David Cicilline (D-RI) recently called for a Glass-Steagall-style regulation for online platforms. Glass-Steagall was a set of regulations passed in the wake of the stock market crash that led to the Great Depression. The law created separation between retail banking and investment banking and was intended to minimize risky behaviors at banks by preventing banks from speculating in the stock markets with client or depositor funds. In a recent podcast, Chairman Cicilline argued, not for the first time, that a similar legislative intervention is needed to prevent tech giants from both creating a marketplace and participating in it as a seller. This sort of division would likely prevent Amazon from selling AmazonBasics batteries or Apple from providing its own map app if they allow Duracell or Mapquest to offer the same products via their platforms. As Chairman Cicilline previously argued, he believes such a separation is needed because this behavior “creates sort of an inherent conflict,” when “you’re both a platform and a manufacturer of goods.” These platforms, the argument goes, have an unfair competitive advantage by having access to data on the success of products and as a result are crushing small businesses or potential competitive products when they create their own products. With a report stemming from the House Judiciary Committee Antitrust Subcommittee’s investigation into online platforms and market power expected soon, such statements signal that the chairman may be considering further action to change current competition policy and create such separation.

But such a shift would set up barriers in the current market and focus on the impact of these platforms’ behavior on competitors rather than consumers, and the easiest way to see this impact is by examining a closer analogy: brick-and-mortar retail. The result could actually harm consumers by raising prices and limiting service options for small business rather than improving competition and better protecting consumers.

Increasing marketplace competition was not the primary purpose of Glass-Steagall, but advocates for a "Glass-Steagall" for technology see it as a way to correct what they view as anti-competitive behaviors. Such a separation between platforms and sellers on that platform is less akin to not allowing a bank to be in both the retail and investment sector, but more akin to not allowing Walmart and CVS to decide to sell their own products or where to place such products on their shelves. But the practice of offering such house brands based off of popular products has occurred in brick and mortar retailers for quite some time, and in many cases these house brands make up a far larger portion of brick-and-mortar retailers' sales than the own-brand apps or products of the Big Tech companies, the Progressive Policy Institute's Alec Stapp notes. As the International Center for Law and Economics' Sam Bowman notes, "regardless of the propriety of Glass-Steagall in the banking sector, there's no real analogy with tech platforms here at all."

In fact, the burdensome and confusing regulation limited competition in the banking sector by raising the barriers to new entrants and limiting the markets in which they could compete. Glass-Steagall was repealed in 1999, as critics from both sides of the aisle argued that the extensive carveouts had illustrated the measure had outlived any usefulness and had rendered it "dead" long prior. Further, the law's protections to consumers is doubtful: While some have contended that such separation is a necessary consumer protection to prevent risky practices, the regulation would not have affected many questionable practices such as those criticized in the wake of the 2008 financial crisis.

Placing regulatory barriers between different elements of tech companies as Glass-Steagall did in the banking industry could end up costing consumers rather than protecting them. Consumers benefit from lower-cost generic offerings, and small businesses benefit from more opportunities to offer their services via online platforms. In both cases, tech giants face a diverse range of growing competition for both products and services, not only from brick-and-mortar retail but from more targeted platforms such as Etsy and Shopify as well. Not only is the success of Glass-Steagall in the financial sector questionable, but to apply a similar separation onto the technology sector would likely reduce consumer benefit and not provide further protection.

A CFPB for Data?

Not only have there been calls to mirror regulations from the financial sector in order to change competition policy, a recent paper has proposed creating a new specialized regulatory agency to protect consumers and regulate data. As with calls for a Glass-Steagall for tech, this proposal also finds its inspiration in the financial sector, and specifically in the Consumer Financial Protection Bureau (CFPB) created in the wake of the 2008 financial crisis. This paper by former Federal Communications Commission Chairman Tom Wheeler,

Phil Verveer, and Gene Kimmelman suggests the creation of a Digital Platform Agency to regulate a number of aspects of current technology platforms to promote consumer protection. The authors recognize that antitrust is a limited tool that should not be used to address policy concerns beyond its intended competition purposes. The lessons of the CFPB show, however, that creating a new agency to focus on a perceived crisis or focus on a sole industry may create new problems and result in over-regulation that deters beneficial uses of data.

The authors argue that while consumers have benefited from technologies, the current behaviors of Big Tech do not benefit consumers and "there are inadequate public policy tools available to protect consumers and promote competition." Other advocates for creating such an agency have also pointed to data privacy incidents such as the 2018 Cambridge Analytica scandal as a reason to establish such an agency and take a more interventionalist approach.

Creating a new agency is an approach to data regulation taken by European regulators. This approach has tended to create regulatory burdens that are greater for smaller players and also to raise the cost of doing business more generally. More specific regulation on these issues also presumes that consumers' prefer the tradeoffs of heightened privacy and limited data usage and does not allow consumers to select products that fit their preferences. For example, as the Center for Data Innovation's Eline Chivot and Daniel Castro point out, this more regulatory approach and the differences in interpretations among European data protection authorities could increase costs and deter certain applications of algorithms and artificial intelligence. The more aggressive regulatory posture that could come from a new agency may dissuade innovators from considering new data practices by signaling the need to seek regulatory approval and increasing the compliance costs associated with pursuing new ideas.

To be sure, American consumers are not without protection when harm does occur. The Federal Trade Commission (FTC) has been an engaged enforcer when needed for consumer harms caused by digital platforms such as data breaches or unfair and deceptive practices. While there are reforms that could provide greater certainty for consumers, innovators, and regulators (as previously discussed), the current FTC approach of mostly responsive actions balances the tradeoffs involved in many data issues while still protecting consumers when harm occurs. A new agency would likely shift this approach.

There are broader reasons to be concerned about a new data protection agency and the impact it could have. First, such an agency may not actually be as narrowly focused as advocates believe and could have influence over any number of industries well beyond Big Tech. The use of data continues to expand in almost every industry, from agriculture to

retail. Thus, an agency focused on data protection could reach into nearly every sector of the American economy.

Even if the agency were able to retain a truly narrow focus on online digital platforms, this too could yield problems not seen in the current responsive approach. As former FTC chief technologist Neil Chilson has written, a single focused agency is more likely to be subject to "industry capture," resulting in regulations that favor incumbents and make it more difficult for new entrants into the field. Creating a new regulatory body might only further entrench existing big players rather than allow new innovators to emerge in existing flexibility.

Rather than expanding the regulatory state with a new agency, policymakers should look at ways to improve existing consumer-protection enforcement from the FTC. This could include narrowly tailored expansions of rulemaking authority that could provide greater certainty for consumers and innovators in conjunction with an overall federal data privacy framework. In any event, any proposal modeled on the structure of the CFPB would be an especially questionable choice given that the Supreme Court recently deemed its governance structure unconstitutional.

Applying Lessons from Technology Regulation for Heavily Regulated Sectors

There are important lessons to learn from financial regulation for the current policy conversation around Big Tech—just not the lessons that advocates of finance-style regulations might want. The lessons policymakers should learn from past financial regulation is that even well-intentioned regulation can have consequences and tradeoffs as well as fail to solve the underlying concerns.

Rather than seeing the financial sector as a model for how to regulate the tech industry, the tech industry is a model for how a more flexible regulatory approach might help close current gaps or create incentives for innovation. One way this approach is apparent in the financial sector is in "sandboxes," which have created ways to test new potential regulatory solutions and facilitated conversations between regulators and innovators about the burdens that may make certain innovations difficult to launch. This experimental approach allows policymakers to see if the less interventionist approach found in the technology sector might be applicable in certain other areas as well, and it could even lead to outright deregulation if it shows that certain regulations are more harmful than beneficial.

Instead of moving toward a regulatory approach similar to the financial sector, policymakers should seek smaller and more focused changes to technology's regulatory regime. Continuing to focus on clearly defined harms and creating targeted reforms to address problems is the approach that is most likely to balance the benefits of innovation with

protecting and redressing potential harm.