Developments in recent months have made clear that major technology platforms—such as Facebook, Google, and Amazon—are under increasing scrutiny by antitrust regulators in Europe and elsewhere. United States regulators have suggested that they are unlikely to follow that path. In December 2017, Assistant Attorney General Barry Nigro signaled that the United States Department of Justice (“DOJ”) has no plans to pursue or support Sherman Act enforcement actions against data-powered digital market leaders. In a speech before a New York conference on Tech, Media & Telecom Competition, he expressed “skeptic[ism]” of using U.S. antitrust laws to force such companies to share their data with competitors.¹ The speech makes clear that U.S. antitrust enforcement policy will not consider data to be inherently different from other assets, or consider digital markets inherently more susceptible to anticompetitive harms.

Nigro distinguished between two uses of data. First, companies may use data in a traditional way: to “become more efficient” and obtain “important feedback and insights” to “solve problems and improve its products and offerings.” Second, recent technological developments have allowed the “aggregation and commercial use of large quantities of data,” which can “give a firm a competitive advantage over its rivals.” Such advantages may be compounded by network effects “as the data becomes more comprehensive or the platform gains more users.” It is this second use, he observed, that has caused “some enforcers” to express concerns that “amassing data, and not sharing it with rivals” may in itself be anticompetitive, or that, if “certain critical data” is a source of market power, refusing access to it means that potential competitors in downstream markets might not be able to overcome barriers to entry.

In response to such concerns, Nigro pointed out that the DOJ’s Antitrust Division already looks at data, among other assets, in determining whether a merger or acquisition would result in reduced competition under Section 7 of the Clayton Act. DOJ asks, for example, whether “the transaction combines substitutable datasets” or “transfers control of critical data on which the acquiring firm’s competitors depend and

for which there are inadequate alternatives.” He explained that such concerns prompted the Antitrust Division to require Thomson Corporation to divest several financial datasets before approving its 2008 merger with Reuters Group.

But apart from the DOJ’s routine Clayton Act review, Nigro observed, U.S. “antitrust law generally does not impose a unilateral duty to share one’s assets with competitors.” He added that such claims have only been recognized in very limited, almost unique circumstances, such as the 1985 case Aspen Skiing v. Aspen Highlands Skiing. In that case, the Supreme Court upheld a treble-damages verdict against a ski resort operator, holding that its refusal to participate with a smaller competitor in a joint, all-access ticket program on terms that had been favorable to the competitor was an adequate basis to impose liability for monopolization under Section 2 of the Sherman Act. Nigro noted that, since Aspen Skiing, “courts have moved away from Section 2 liability for unilateral refusals to deal” and toward “the general principle that a monopolist is ordinarily free to refuse to deal with its rivals,” making such claims “very rare, and for good reason.” Against this backdrop, he explained, “[t]here are many reasons to be skeptical of using the antitrust laws to force the sharing of data.”

First, “forced sharing of critical access reduces the incentive to invest in innovation” because “[d]ata collection, storage, and analysis is not free and not always easily accomplished.” While acknowledging the potential for forced sharing to promote competition within a market, Nigro suggested that such benefits were outweighed by the prospect of “undermining future incentives to invest in innovation” to create new markets, and would incentivize free riding by competitors. In his view, “stretch[ing] antitrust law to create competition within the market” by “[m]andating access to data is just as (or perhaps more) likely to result in less . . . innovation as it is to enable new competition within existing markets.”

Second, forced sharing “is an inherently regulatory approach” and, in his view, outside the proper purview of antitrust enforcement. Nigro discussed Justice Scalia’s warning in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP—which affirmed dismissal of a failure-to-deal claim against Verizon for refusing to share its telephone network—that forced sharing “requires antitrust courts to act as central planners,” a role for which they are fundamentally unsuited. Nigro noted that after Trinko, there remain some narrow circumstances under which forced sharing may be appropriate, such as the Federal Trade Commission’s requirement that branded prescription drug manufacturers make drug samples available to potential developers of generic versions. He explained that this requirement does not discourage competition or innovation—rather, it was imposed to “facilitate compliance” with an explicitly prescribed statutory process.

Nigro concluded by addressing the argument, advanced by advocates of more aggressive enforcement, that “network effects,” the “winner-take-all nature of digital markets[,] and the existence of tipping points” require “new tools” to assess market power, or make data inherently different from other assets. Economic theory, Nigro observed, indicates that, while network effects may diminish competition within existing markets, they do not stifle competition for markets, i.e., “compet[ing] intensely to become the solution most people choose” by developing “innovative products and services.” For this reason, he concluded that the traditional antitrust framework—which already accounts for network effects, as in the Antitrust Division’s case against Microsoft in the late 1990s and recent Clayton Act merger reviews—remains adequate to the task of evaluating and policing competition in data-driven digital markets.

The major takeaway from Nigro’s speech is that—at least for purposes of assessing and responding to market power—the Antitrust Division will not consider data meaningfully different from more traditional, tangible assets. Although it will not, for now, prompt
heightened enforcement scrutiny by U.S. federal enforcement authorities, the issue of data dominance raises unique antitrust considerations on a practical, case-by-case level.

Antitrust analysis will need to be sensitive to the different ways data can be used in the marketplace: as a standalone product delivered to end users for their ingestion and use; as an input to data-powered products and services, or as a collateral tool to assist vendors in selling their other products (e.g., data on the spending habits of consumers). The ability to leverage data, particularly proprietary data, will vary widely depending on these disparate types of use. Furthermore, the distribution of data often differs from sales of commodities in that data is typically licensed, not sold outright, and often embodies intellectual property different from that associated with tangible goods. For this reason, applying the rules developed to govern the sale and resale of tangible goods to the market for data can prompt conceptually challenging questions in the antitrust area.