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Big Tech's head-scratching terms of service agreements need simple, specific government regulation

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- Big Tech's terms of service agreements are complicated and hard to understand.
- Market-based transactions require consent, but that consent is difficult to obtain when buried in legalese.
- Government's role should be limited to requiring that Big Tech make users fully aware of what they're signing.
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- This is an opinion column. The thoughts expressed are those of the author.
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If you're among the billions of people globally who rely on Big Tech for information and social interaction, then you know that Facebook, Twitter, Google, et al. often include inconspicuous, verbose, and Byzantine provisions in their terms-of-service agreements. Some of the more extensive stipulations include: customer indemnification of the website for costs arising out of third-party lawsuits; customer waiver of litigation and acceptance of binding arbitration; website access to the customer's browsing history and personal data; the website's right to alter the terms without advance warning; and restrictions on cancellation by the customer.

Those agreements are called contracts of adhesion: boilerplate fashioned to favor one party, with no opportunity for the other party to negotiate a better bargain – essentially, a take-it-or-leave-it deal. They're not illegal, but when the terms are too oppressive, courts will sometimes bar enforcement under a doctrine called "unconscionability."

In determining if a contract is unconscionable, a judge will usually consider the knowledge and relative bargaining power of the two parties — whether the buyer has a choice, and whether the seller has deliberately misrepresented one or more terms.

The criterion of fairness is not whether there's haggling over every transaction, but whether the seller incorporated reasonable terms in his standard-form contract. Would the buyer have assented if they realized that a particular term was, or was not, part of the agreement? The

buyer's awareness, in turn, can hinge on such factors as the size of the print, the length of the agreement, and the complexity of the terminology.

Consumers wrongly perceive that abusive terms will not be enforced by the courts. As a result, the typical user glosses over or disregards caveats that demand more than fleeting attention.

Yet legal doctrines such as "unconscionability" vary by jurisdiction and can change as technology evolves. Moreover, one-sided conditions are now more prevalent and widely publicized, and consequently, users are presumed to be better informed and less able to claim incomprehension or surprise.

There's a powerful economic justification for standard-form contracting: It reduces transaction costs, thus promoting economic efficiency by precluding the need for buyers and sellers to negotiate the many details of a sale each time a product is sold. So, how should law and public policy harmonize these two competing concerns – maximizing aggregate welfare of buyers and sellers versus balancing the distribution of benefits between the two groups?

Market-based transactions require consent

Customarily, we let the market decide such questions. Facebook's audience doesn't have a right to use its website except on Facebook's terms. The choice to consent, or not, is up to the user.

The counterargument, however, is that true consent isn't realistic when the terms of the bargain are too costly to unravel. Yes, customers retain the option to go elsewhere and to seek alternative channels of communication, and if Facebook were to lose enough customers in that manner, the company would likely respond by modifying its terms. When the company persists in offering take-it-or-leave-it deals, perhaps we should conclude that users are content with the bargain. After all, Facebook may enjoy a certain amount of market power, but unlike the government, it cannot force compliance.

Still, even hardcore free-marketers concede that tactics such as tiny print, thousands of words, and impenetrable legalese can more than offset the advantages of standard forms. The result: prohibitive transaction costs – a market imperfection that, although short of outright fraud, can nevertheless negate the element of consent. Accordingly, government may have a legitimate role to play.

How the government might act

If the government acts, the worst outcome from a free-market perspective would allow federal or state authorities to dictate selected terms of service – for example, no indemnity, no waivers, and no website use of personal data. More sensible, and more consistent with our time-honored belief in private ordering and freedom to contract, would be for the government to focus on reducing transaction costs, thus ensuring that users can knowledgeably accept or reject the bargain.

Such measures might be as simple as specifying a minimum type font, maximum word length, or an objective grade-level rating. Other requirements might include advance publication of material changes, and an opportunity for users to comment prior to implementation. Government might even propose one or more templates, which the website could alter, subject to appropriate notice and clarity.

Government intervention of that type may offend market purists. But simple, specific regulations directed at facilitating the bargaining process are far less intrusive than government intervention mandating inflexible, one-size-fits-all terms of service.

Ideally, Big Tech might react by offering variable terms with tradeoffs — perhaps fewer ads in return for access to browser history — as a market segmentation strategy. The ingenuity of the private sector is boundless when transaction costs are low and the government does no more than lubricate the wheels of commerce.

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