



UNITED STATES OF AMERICA
Federal Trade Commission

Remarks of Commissioner Noah Joshua Phillips

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Introduction

Two months ago, in Brussels, leaders and regulators from across Europe gathered to discuss “Data Protection and Competitiveness in the Digital Age”.² One common refrain was that the convergence of privacy and competition law³ *was* and *should* be happening. Andreas Mundt, President of the Bundeskartellamt, discussed his case against Facebook. Martin Selmayr, then Secretary-General of the European Commission, called the convergence of the two concepts “the running theme of the next five years”, and noted the consideration of privacy in several recent merger reviews.⁴ While proponents’ precise definition of convergence is not

¹ A version of these remarks was presented on September 13, 2019 at the Forum for EU-US Legal-Economic Affairs funded by The Mentor Group Boston. The views expressed in these remarks are my own and do not necessarily reflect those of the Commission or of any other Commissioner.

² *Data Protection and Competition in the Digital Age*, European Data Protection Supervisor (July 9, 2019), https://edps.europa.eu/data-protection/our-work/publications/events/data-protection-and-competitiveness-digital-age_en.

³ NOTE that, in this speech, I use the word “antitrust” and the phrase “competition law” interchangeably.

⁴ Nicholas Vinocur, Simon Van Dorpe and Laurens Cerulus, *Europe looks beyond fining Big Tech – to changing its business model*, Politico (July 14, 2019), <https://www.politico.eu/article/europe-looks-beyond-fining-big-tech-to-changing-its-business-model/>; see also Microsoft/LinkedIn (Case M. 8124) 2016 at FN 330; Facebook/WhatsApp (Case M. 7217) 2014 OJ C417/02 (privacy considered a competition parameter to determine closeness of competition); Apple/Shazam (Case M. 8788) 2018 OJ C417/04 (determining privacy is an element to be considered when assessing ability to combine databases). In Facebook/WhatsApp, the Commission explained that “[a]ny privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the Transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules.” (M. 7217 at ¶ 164).

entirely clear, the desire to link competition and privacy is. In the States, Commissioners like Pamela Jones Harbour and my colleague, Rebecca Kelly Slaughter, have over the years urged a similar connection between competition and privacy law.⁵

Today, with you, and at the risk of being provocative, I want to register my dissent. I want in particular to counter two increasingly-prevalent notions. First, that competition agencies should pursue privacy ends as they apply law designed to address competition problems. Second, the assumption that, if we had more competition in certain markets, the result would be more or better privacy – the claim, in effect, that competition and privacy necessarily align. Privacy can be evaluated as a qualitative parameter of competition, like any number of non-price dimensions of output; but competition law is not designed to protect privacy. Put to the task, it will fail; and both competition and privacy will suffer.

The Federal Trade Commission, where I work, enforces both competition and privacy laws—not alone, of course, but we are the only agency that does both. Our experience, including in the relatively brief tenure thus far of us five sitting commissioners, lays bare the fact that competition and privacy law are different. They have different aims, and use different tools to achieve those aims. My concern

⁵ See, e.g., Remarks of Commissioner Rebecca Kelly Slaughter, FTC Hearing #12, *The FTC's Approach to Consumer Privacy*, at 3 (Apr. 10, 2019), https://www.ftc.gov/system/files/documents/public_statements/1513009/slaughter_remarks_at_ftc_approach_to_consumer_privacy_hearing_4-10-19.pdf; Dissenting Statement of Commissioner Pamela Jones Harbour, *Google/DoubleClick* (Dec. 20, 2007); https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf.

with adopting a broad “convergence” of privacy and competition law is that addressing both together will lead to incoherence and erosion of the rule of law.⁶

My remarks will address the agency’s history with these bodies of law, what each guards and guards against, and why policy-makers, law enforcers, and judges must take care not to conflate the two. The arguments for doing so are weak, and the potential for mischief great.

History of the FTC

The history of the FTC itself helps illustrate the dichotomy between competition and privacy. In a sense, the story begins in the person of Louis Brandeis, a Jewish attorney from Kentucky who became a senior economic advisor to President Woodrow Wilson and, later, a Supreme Court Justice.

In 1890, Brandeis and Samuel Warren published *The Right to Privacy*.⁷ They were concerned that new technologies like photography allowed for private actors to intrude into the affairs of their fellow citizens, and surveyed the common law for a doctrine to protect what they called “the right to be let alone”. Over time, Brandeis’ insight would both influence judicial interpretation of the U.S. Constitution’s Fourth Amendment and serve as the starting point for consumer privacy law in the United States.⁸

⁶ While I call this stance “provocative,” I am not alone in my concern. Maureen Ohlhausen, the former Acting Chairman of the FTC, articulated it. Maureen K. Ohlhausen & Alexander P. Okuliar, *Competition, Consumer Protection, and the Right [Approach] to Privacy*, 80 Antitrust Law Journal No. 1 (2015).

⁷ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 195 (1890).

⁸ Maureen K. Ohlhausen & Alexander P. Okuliar, *Competition, Consumer Protection, and the Right [Approach] to Privacy*, 80 Antitrust Law Journal No. 1 (2015) at 121.

A note: the Mentor Group exists to foster U.S.-European dialogue, a project that requires us to recognize when philosophical underpinnings differ. The right to privacy from the State is fundamental to all of us. In Europe, we see it expressed, for example, in Charter of Fundamental Rights.⁹ In the States, we have the Fourth Amendment. But when it comes to what I am calling “consumer privacy”—that is, the right to be let alone *other* than by the State—distinction lies between the Atlantic coasts. Here in Paris, that right is also fundamental. But that is not so in Washington, or Kentucky. Americans tend to think of privacy as consumer protection, with the specific rights defined by Congress over time.

The right to privacy was hardly Brandeis’ only project. The 1912 presidential election, dominated by questions of trusts and antitrust in the wake of the *Standard Oil* ruling, swept Progressive reformers, including Brandeis, into power.¹⁰ Two years later, at their behest, President Woodrow Wilson and Congress created the FTC, an independent, expert agency aimed, and soon armed with the Clayton Act, to “check monopoly in the embryo”.¹¹ Now the government could stop certain business combinations and conduct *before* they caused widespread anticompetitive harm. The remit was forward looking, and the jurisdiction broad: to prohibit “unfair methods of competition”.¹²

⁹ Charter of Fundamental Rights of the European Union, Art. 7, 8, 2012 OJ C 326/02 (Oct. 26, 2012).

¹⁰ Marc Winerman, *A Brief History of the Federal Trade Commission*, at 6 (Sept. 22-23, 2004), https://www.ftc.gov/sites/default/files/attachments/ftc-90-symposium/90thanniv_program.pdf.

¹¹ 51 Cong. Rec. 12,030 (1914) (Newlands); see also Brian Fung, *The FTC was built 100 years ago to fight monopolists. Now, it's Washington's most powerful technology cop*, Washington Post (Sept. 25, 2014), <https://www.washingtonpost.com/news/the-switch/wp/2014/09/25/the-ftc-was-built-100-years-ago-to-fight-monopolists-now-its-washingtons-most-powerful-technology-cop/>.

¹² 15 U.S.C. § 45.

The fledgling agency took it too far, however, asserting that antitrust properly encompassed consumer harms like deception. I hear echoes of this refrain today, as some attempt to cast every consumer harm as a competitive harm, putting “honest businesses” at competitive disadvantage. In 1931, in a case called *Raladam*, the Supreme Court rejected this logic.¹³ It held that the FTC’s jurisdiction over unfair methods of *competition* did not extend to cases based solely on *consumer protection* concerns. Congress responded in 1938, giving the FTC new authority to prohibit “unfair or deceptive acts or practices”. The FTC would enforce competition and consumer protection law—eventually including privacy—but they were not the same.¹⁴

Competition

I don’t need to explain to this audience that competition law in the U.S. and around the world exists to protect the competitive process, and with it consumers’ interests in low prices and increased product quality, service, variety, and innovation.¹⁵ Last week, for example, the FTC sued to block merger of title insurance underwriters, in part on the basis that it would eliminate a competitor offering to accept greater underwriting risks—incidentally, a non-price aspect of

¹³ 283 U.S. 643 (1931).

¹⁴ Address of Hon. R.E. Freer, Commissioner, FTC Before the Annual Convention of the Proprietary Association, Biltmore Hotel (May 17, 1938), https://www.ftc.gov/system/files/documents/public_statements/676351/19380517_freer_whe_wheeler-lea_act.pdf; Leslie Fair, *FTC Milestones: Shared beginnings in the Circle Cilk case* (Nov. 6, 2014), <https://www.ftc.gov/news-events/blogs/competition-matters/2014/11/ftc-milestones-shared-beginnings-circle-cilk-case>.

¹⁵ Noah Joshua Phillips, Commissioner, Federal Trade Commission, Prepared Remarks at the U.S. Chamber of Commerce: Post Hoc, Ergo Propter Hoc (Oct. 17, 2018), <https://www.ftc.gov/public-statements/2018/10/prepared-remarks-commissioner-phillips>.

competition.¹⁶ And the European Commission's *Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements* state that Article 101 provides the legal framework for the Commission to maintain effective competition¹⁷, and that competition laws are meant to promote innovation and enhance consumer welfare.”¹⁸

American courts have taken welfare maximization as their magnetic north, rejecting attempts to use competition law to achieve or protect ends beyond guarding the competitive process. In *National Society of Professional Engineers*, a trade group of engineers argued that ethics prohibited engineers from providing competitive bids for engineering services, because it might lead to inferior engineering work.¹⁹ Justice John Paul Stevens, who practiced antitrust law early in his career, wrote the opinion rejecting ethics as a defense to the Sherman Act.²⁰ When the FTC sued a trade group of dentists who withheld x-rays from insurers, the dentists argued that providing them would lead to a decline in quality of care.²¹ The Court rejected the argument because there was little reason to credit

¹⁶ *FTC Challenges Proposed \$1.2 Billion Merger of Title Insurance Providers Fidelity National Financial, Inc. and Stewart Information Services Corporation*, Federal Trade Comm'n (Sept. 6, 2019), <https://www.ftc.gov/news-events/press-releases/2019/09/ftc-challenges-proposed-12-billion-merger-title-insurance>.

¹⁷ Communication from the Commission - Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation, 2011 OJ C 11/1 (Jan. 14, 2011) at ¶ 4.

¹⁸ *Id.* at ¶ 296.

¹⁹ *Nat'l Soc'y of Prof'l Eng'rs v. U.S.*, 435 U.S. 679 (1978).

²⁰ 435 U.S. at 691.

²¹ *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986).

“noncompetitive quality of service justifications”.²² As the Court wrote in *Philadelphia National Bank*, it could not evaluate a merger based “on some ultimate reckoning of social or economic debits and credits” because a “value choice of such magnitude is beyond the ordinary limits of judicial competence”.²³ Or, put more simply by the Third Circuit, “the fact that the conduct may be otherwise undesirable is not a concern of the antitrust laws”.²⁴

In practice, with the possible exception of the Bundeskartellamt’s order in Facebook earlier this year, authorities in the U.S. and Europe have generally recognized that privacy is not an end for which antitrust can or should supply the means. In 2008, the FTC rejected calls to use privacy as a basis to block Google’s acquisition of DoubleClick.²⁵ In *Asnef-Equifax*, the European Court of Justice wrote that “any possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law” and “may be resolved on the basis of the relevant provisions governing data protection.”²⁶ Three years ago, even though DG Competition found that privacy was a “parameter of competition and driver of customer choice”—and I agree that it can be—the agency allowed Microsoft to

²² 476 U.S. at 463-64.

²³ U.S. v. Philadelphia Nat’l Bank, 374 U.S. 321, 373 (1963).

²⁴ *Schuylkill Energy Resources v. Pennsylvania Power & Light, Co.*, 113 F.3d 405, 414 FN 9 (3d Cir. 1997).

²⁵ Statement of the Federal Trade Commission Concerning Google/DoubleClick, FTC File No. 071-0170 (Dec. 20, 2007),

https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf.

²⁶ Case C-238/05, *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL and Administración del Estado v. Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, 2006 E.C.R. I-11125 at I-11164.

purchase LinkedIn subject to behavioral remedies that did not aim to prevent a violation of privacy rules, but sought to ensure that competitors were not marginalized and could continue competing, including on privacy.²⁷ To be clear, all of this is not to say that privacy is *irrelevant* to competition law; but the protection of privacy is not, and should not become, an independent goal of antitrust enforcement.

To the extent consumer privacy is a value society wishes to pursue using the instrumentalities of the state, of course, we have long understood that enforcing competition laws is not the only way for the government to “enhance consumer welfare”. To protect privacy, we have privacy law.

Privacy Law

At what does privacy law aim? As I alluded to earlier, in the U.S., the Fourth Amendment enshrines “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures”.²⁸ Justice Brandeis believed that conferred upon individuals a general right to privacy from the government.²⁹ And, in the 1960s, U.S. courts adopted his approach and incorporated into Fourth Amendment jurisprudence the “reasonable expectation of privacy”³⁰—a zone of personal privacy into which the government may not intrude without substantial justification. That jurisprudence, and additional privacy rights

²⁷ Microsoft/LinkedIn (Case M. 8124) 2016 at FN 330.

²⁸ U.S. Const. amend. IV.

²⁹ Olmstead v. United States, 277 U.S. 438 (1928) (Brandeis, J. dissenting), overruled by Katz v. United States, 389 U.S. 347 (1967), and Berger v. New York, 388 U.S. 41 (1967).

³⁰ Katz v. United States, 398 U.S. 347 (1967) (Harlan, J. concurring).

subsequently fashioned by Congress, protect the privacy of individuals in the U.S. from the government, from local law enforcement up to our national security apparatus.³¹ For example, Congress has restricted the government’s access to things like emails, financial information, and information gathered for foreign intelligence purposes.³²

As an aside, this legislative and judicial history is why Americans like me are often surprised when Europeans accuse us of having a privacy regime that is somehow not “adequate” in the context of national security. Requiring probable cause—and not permitting, for example, the detention of witnesses—our laws offer privacy protections from the State among the strongest—if not *the* strongest—in the world, including developed liberal democracies in Europe.³³ Data embargoes predicated on what are, at core, relatively minor differences in approaches to national security – among countries that all embrace civil liberties – may serve neither privacy nor national security, much less trans-Atlantic commerce.

Consumer privacy is different. While the Fourth Amendment and its statutory progeny focus on the relationship between individuals and a particular set of entities—*i.e.*, the government—U.S. consumer privacy laws protect individuals

³¹ See, e.g., Electronic Communications Privacy Act of 1986 (“ECPA”), Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended in scattered sections of 18 U.S.C.).

³² *Id.*; Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401 *et seq.*; Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801 *et seq.*; USA Freedom Act Pub. L. No. 113-23, 129 Stat. 268.

³³ See Cameron Kerry, *Missed Connections: Talking With Europe About Data, Privacy, and Surveillance*, Brookings Institution, at 2, 16 (May 2014), <https://www.brookings.edu/research/missed-connections-talking-with-europe-about-data-privacy-and-surveillance/>.

from specific harms, mostly by private actors.³⁴ The Fair Credit Reporting Act protects the accuracy of information about an individual's financial life, and limits its sharing.³⁵ The Children's Online Privacy Protection Act (COPPA) protects children from unwanted contact online. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) is intended to give individuals control over information about their health. And the FTC has used its so-called UDAP authority to target deception and unfairness related to privacy, for example the deceptions alleged in our recent settlement with Facebook. All of these harms are under discussion in our national debate over a comprehensive data privacy law.

But, unlike in the European Union, where the right to consumer privacy is enshrined in the GDPR, in the U.S, there is not yet societal agreement on which privacy harms necessitate rights to protect against them—against what, specifically, are we protecting consumers?³⁶ One study by the Department of Commerce indicates that, when Americans think about privacy, their primary concern relates to identity theft.³⁷ Addressing that is different from (and sometimes

³⁴ That said, the Constitution does have a voice when it comes to what can be done with data collected by a third-party. Where the government seeks access to such data, courts determine if the consumer voluntarily exposed the data (the "third-party doctrine") or whether there remains a reasonable expectation of privacy in the data, and, as such, whether the 4th Amendment applies. *Compare Carpenter v. United States*, 585 U.S. __ (2018) *with Smith v. Maryland*, 442 U.S. 735 (1979).

³⁵ 15 U.S.C. § 1681.

³⁶ See Chairman Joseph Simons, Federal Trade Commission, Opening Remarks at the FTC Hearing #12: The FTC's Approach to Consumer Privacy, at 10 (Apr. 9, 2019), https://www.ftc.gov/system/files/documents/public_events/1418273/ftc_hearings_session_12_transcript_day_1_4-9-19.pdf.

³⁷ Rafi Goldberg, *Most Americans Continue to have Privacy and Security Concerns, NTIA Survey Finds*, National Telecommunications and Information Administration (Aug. 20, 2018), <https://www.ntia.doc.gov/blog/2018/most-americans-continue-have-privacy-and-security-concerns-ntia-survey-finds>.

in conflict with), say, control over data, or embarrassment, or other dignitary harms, all frequently discussed in today's privacy debate.

Some of that lack of consensus relates, I think, to fundamentally divergent views about privacy. By that I mean that different people, in different contexts, place different value on the harms and the tradeoffs associated with privacy—and some tastes fundamentally oppose each other. While one user may value a social media company recommending a connection with another person based on some common interest (say, religion, or politics), another user may find such recommendations (or the data collection on which they are based) distasteful or invasive. Is getting an advertisement for coffee as I pass the coffee shop convenient or creepy? Studies, and experience, show that different individuals value privacy differently, and that context matters.³⁸ Alessandro Acquisti finds that “privacy concerns can vary dramatically for the same individual, and for societies, over time.”³⁹

Competition v. Privacy

But let us assume for purposes of this discussion that the U.S. will, as Europe has, come to some societal resolution about the consumer privacy harms we wish to stop, and the rights we should have to stop them. Competition and privacy still are different, and more than that, they often are in tension. Restrictions on the

³⁸ See Alessandro Acquisti et al., *The Economics of Privacy*, 54(2) J. of Econ. Literature 442, 476 (2016) (surveying literature and noting that “small changes in contexts and scenarios can lead to widely differing conclusions regarding consumers’ willingness to pay to protect their data.”)

³⁹ Alessandro Acquisti et al., *Privacy and Human Behavior in the Age of Information*, 347 Science 509, 513 (2015).

collection, sharing, or use of data, the ‘tools’ at the core of much proposed and enacted privacy legislation, may work contrary to competition—by limiting product offerings, raising barriers to entry, increasing costs, and entrenching larger incumbents. Data portability offers promise, to be sure, but it may not be easy for small firms; and I’m mindful of Autorité President Isabel da Silva’s comments in Washington earlier this year that she was hearing complaints from startups in France that the data portability provisions in the GDPR might enable big companies to lure away customers.⁴⁰

Consider circumstances surrounding two recent privacy enforcement actions at the FTC. One involved a company called Unroll.me, which offered Gmail users a tool to organize their email inboxes and made money by searching the emails for purchasing receipts, which its affiliate used for an anonymized market research product. (Unroll.me allegedly failed to level with its consumers, for which it was held liable.) Google recently decided to cut off the access of third parties like Unroll.me to Gmail data, ostensibly a pro-privacy move, but also one that prevents third-parties from creating useful applications on top of Gmail and leaves Google with a monopoly on that data.⁴¹ Good for privacy? Maybe. But good for competition? Probably not.

This summer, the FTC settled a privacy enforcement action against Facebook, including a \$5 billion fine and substantial new privacy compliance

⁴⁰ Luuk de Klein & Lisha Zhou, *French, Australian agency chiefs share ideas on privacy, competition interplay*, in PARR, ABA ANTITRUST SPRING MEETING 18 (2019), https://www.acuris.com/assets/PaRRABReport2019_1.pdf.

⁴¹ Separate Statement of Commissioner Noah Joshua Phillips, *Federal Trade Commission v. Unrollme.Inc.*, Matter No. 1723139 (Aug. 8, 2019).

changes at the company. One observer, Alex Stamos, Facebook's former chief security officer, criticized the settlement, stating: "we are actually going [in] two different directions that are not compatible. If you want these companies to have competition, then you need to require them to allow other people to utilize the data they sit on."⁴² I think there's something to that. Facebook had allowed app developers access to its trove of data, and that data sharing may very well have been good for competition. But it may not have been good for privacy.

Again, privacy is not necessarily *irrelevant* to antitrust law. If, in fact, firms are competing on privacy, then that is an aspect of competition at which we should look. If, for instance, Google were to acquire Duck Duck Go, the search engine that competes for users by not collecting or storing personal data, it would be perfectly reasonable to consider that. Duck Duck Go has made a determination that there is sufficient demand for greater privacy protections to make it a strategic variable of competition. The loss of that product could conceivably harm competition. But the FTC was correct not to consider privacy when Facebook purchased WhatsApp. Our critics said we should have blocked that acquisition because Facebook gained additional data on users, which they view negatively. But any acquisition in the technology age can lead to a consolidation of data, at least incidentally. And while that might be bad for privacy, it is not on that basis bad for competition.

But we have to look at "privacy-as-quality" carefully. Given that consumers have different privacy tastes, where the value of an aspect of competition lends

⁴² Jesse Pound, *Ex-Facebook security chief calls regulatory efforts 'confused,' says FTC settlement won't address main privacy concerns*, CNBC (Jul. 24, 2019), <https://www.cnbc.com/2019/07/24/ex-facebook-exec-says-ftc-deal-wont-address-main-privacy-concerns.html>.

itself to polar disagreement—your privacy cost is my privacy benefit—identifying a lessening of competition for privacy may be difficult. James Cooper describes the challenge in considering privacy as an aspect of quality in competition law analysis. Profit does not necessarily follow from a lessening in privacy.⁴³ He argues that distinguishing a differentiated product from an exercise of market power may be hard.⁴⁴ Cooper, for his part, likens considering privacy as a quality aspect of competition to asking whether a restaurant’s decision to replace corn on the menu with green beans is a decline in quality.⁴⁵ What are we to make of the fact that Google’s share of search advertising is slightly higher in Europe, which has stronger privacy standards, than its share in the U.S.?⁴⁶ These analytical questions, stemming from differing and even opposing tastes, open the door to subjectivity. Agency enforcers (and courts) should not be substituting our privacy tastes for those of consumers, especially when the product is free.

The problem is not just about measurement. The tension between competition and privacy means that, rather than strengthening either, pushing antitrust and privacy law to converge threatens to confuse (and thus weaken) the enforcement of each. He who serves two masters serves none, they say. Where the

⁴³ James Cooper, *Privacy and Antitrust: Underpants Gnomes, the First Amendment, and Subjectivity*, 20 Geo. Mason L. Rev. 1129, 1136 (2013).

⁴⁴ *Id.* at 1137.

⁴⁵ *Id.* at 1138.

⁴⁶ As of August 2019, Google had a 93% share of search advertising in Europe, and 88% share in the U.S.. Search Engine Market Share Europe, Statcounter (Aug. 2019), <https://gs.statcounter.com/search-engine-market-share/all/europe> and Search Engine Market Share United States of America, Statcounter (Aug. 2019) <https://gs.statcounter.com/search-engine-market-share/all/united-states-of-america>.

interests of both align, perhaps we are less concerned. But competition and privacy are often at odds. Are law enforcers forced, like Buridan's Ass, to make a choice that cannot be made? And how could courts review such decisions? These questions are difficult enough. In the exercise of prosecutorial discretion (or adjudication), how do you quantify the harm from a behaviorally targeted ad? Some people consider them helpful. Or from the sharing of an embarrassing photo? That is unlike, say, price.

We all want lower prices. What is the cost of privacy?

Even assuming the ends were reconcilable, what about the means? Are the tools of antitrust law effective at accomplishing privacy, and vice versa? There are cases in which preventing one firm's access to another's data may protect competition,⁴⁷ and others where requiring access to data is necessary.⁴⁸ The question, of course, depends on the market dynamics in a given case. Compelling data sharing may be good for competition, or it may be bad, such as when it deters investment. But privacy would counsel against the sharing of data, at least where it involves people. Again, consider the competition critique of the Facebook settlement. In that case, any number of people asked the FTC to break up Facebook. But how compelled divestiture—a remedy under antitrust law—would serve the ends of privacy law is not immediately apparent. I'm not aware of evidence suggesting that breakup would change the appetite some companies have for

⁴⁷ Statement of Chairman Joseph J. Simons, Commissioner Noah Joshua Phillips, and Commissioner Christine S. Wilson Concerning the Proposed Acquisition of Essendant, Inc. by Staples, Inc. FTC File No. 181-0180 (imposing a firewall between two parts of the newly merged company to avoid anticompetitive conduct from occurring).

⁴⁸ Analysis of Agreement Containing Consent Order to Aid Public Comment, In the Matter of Nielsen Holdings N.V. and Arbitron Inc. File No. 131 0058 (requiring Nielsen to divest assets from Arbitron's cross-platform audience measurement business and a perpetual, royalty-free license to data).

consumer data, or the inherent willingness of consumers to give it to them. To be sure, it *might*; but then again it might not, and we could easily end up with 3, 5, 10 different entities, each as eager to consume user data as the next.

These days, we often synonomize privacy and “data protection”; and there is substantial overlap. But privacy and data are not the same. As this discussion of remedies illustrates, antitrust law deals routinely and continues to grapple with, data in our data-driven economy—data as assets: inputs, outputs, barriers to entry and so forth. Today, my focus is not on data per se; but privacy—and how its pursuit ought to bear on competition law.

We can expect the market to meet consumer demand. But demand must reveal itself; and we should be skeptical of idealized claims of what competition will yield. At the very least, the claim must be backed by facts and evidence showing that the offending conduct has negative consequences on consumer welfare. But even then, where preferences are heterogeneous and even the meaning of privacy ambiguous, our confidence about how competition will affect the market for personal data should be muted. Consider competition in online social networks that we see today. The biggest, most successful social media companies outside of Silicon Valley come from China – WeChat and TikTok to name two. They are available for free and may have the scale to compete with companies like Google and Facebook. Of course, they gather data just as enthusiastically, and much of it is processed for purposes and in locations that are, at a minimum, hard to determine. That’s

competition, but probably not the kind that advocates of merging privacy and competition law had in mind.

Conclusion

To recap, competition and privacy laws are different. They serve different ends, and employ different tools. Often, they are in direct tension. And privacy lends itself to different and even diametrically-opposing tastes and interpretations. So why are we talking about converging antitrust and privacy law?

In June, Martin Selmayr argued that both competition and privacy “were about human dignity, and about choice, and about freedom”.⁴⁹ That may be, but it is far from clear how that distinguishes privacy as a subject for competition law from any other number of issues that also involve dignity, or choice, or freedom.

Commissioner Slaughter argues that we lack privacy because we lack competition, and that a merger may upset consumer expectations about privacy. Both of those may be, but – again – it is not clear why privacy stands apart from other values one might try to pour into the vessel of antitrust: labor, the environment, the well-being of small producers, etc. If ExxonMobil and Royal Dutch / Shell were to announce a merger, should we pay special attention to the privacy implications?

At least for some, the answer why “antitrust and *privacy*” should converge is, I fear, something else. The large technology firms that occupy a ubiquitous place in markets and the popular imagination also profit by monetizing consumer data—that is, their operations implicate privacy. To me, that is an argument for

⁴⁹ European Data Protection Supervisor, “Data Protection and Competitiveness in the Digital Age”, YouTube (July 12, 2019), <https://youtu.be/3JI33s5e53M?t=3217> (53:37).

scrutinizing these firms through the lenses of antitrust and privacy law—as regulators in the U.S. and Europe both are doing—but it is *not* an argument for merging the doctrines in the first place.

Certainly, it is not an argument for creating new legal doctrine. To the extent the point of “convergence” is to discover new bases of liability with the targets already in mind, my concern is that the Rule of Law itself erodes. The criminal is identified before the crime is defined. In June, then-Director General of Competition Johannes Laitenberger, speaking about the relationship between regulation and competition law, and contemplating privacy in particular, said: “I think competition law should not try to go beyond its scope. This is a question of expertise, it’s a question of the rule of law, it’s ultimately a question of democracy.”⁵⁰ Precisely.

⁵⁰ Johannes Laitenberger, Director-General of the Directorate-General for Competition (DG-COMP), European Commission, *Session 3 – Regulatory Challenges for Competition Policy*, OECD Conference on Competition and the Digital Economy, Paris, France (June 3, 2019), <https://oecd.streamakaci.com/ccde2019/> (32:22).