



UNITED STATES OF AMERICA  
**Federal Trade Commission**

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**“Should We Block This Merger? Some Thoughts on Converging Antitrust  
and Privacy”<sup>1</sup>**

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Earlier this month, Google announced its plan to phase out support for third-party cookies in its Chrome browser.<sup>2</sup> The move, part of the company’s Privacy Sandbox initiative, attempts to address user demand for greater privacy, including transparency, choice, and control over how user data is used. Without doubt, cookies are today an important tool for firms to gather data, often in a manner not apparent to users. They provide important value to many firms—in particular, advertisers. Google’s decision may very well be the right one for privacy. But analysts and representatives of publishers and Google’s digital advertising competitors expressed concern for competition. This comes as some regulators, in Europe and here, are mulling the convergence—the merger, if you will—of competition and privacy.

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<sup>1</sup> A version of these remarks was presented on September 13, 2019 at The Mentor Group Paris Forum. The views I express today are my own and do not necessarily represent those of the Commission or any Commissioner.

<sup>2</sup> Justin Schuh, *Building a More Private Web: A Path Towards Making Third Party Cookies Obsolete*, Chromium Blog (Jan. 14, 2020), <https://blog.chromium.org/2020/01/building-more-private-web-path-towards.html>.

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At a conference last summer to discuss “Data Protection and Competitiveness in the Digital Age”,<sup>3</sup> 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.<sup>4</sup> In the non-merger setting, the German Bundeskartellamt, or Federal Cartel Office, sued Facebook last year, alleging an abuse of dominance where Facebook’s data policy permits the company to collect user data from non-Facebook websites and assign the outside data to Facebook user accounts to enhance ad targeting.<sup>5</sup> In the States, Federal Trade Commissioners like Pamela Jones Harbour have over the years urged a connection between competition and privacy law.<sup>6</sup> While proponents’ precise definition of converging antitrust and privacy is not entirely clear, the desire to link the two concepts is.

I think we should be very skeptical of this merger proposal. With you, today, I want in particular to counter two increasingly prevalent notions upon which it is

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<sup>3</sup> *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](https://edps.europa.eu/data-protection/our-work/publications/events/data-protection-and-competitiveness-digital-age_en).

<sup>4</sup> Nicholas Vinocur, Simon Van Dorpe & 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/>.

<sup>5</sup> Decision, In the Administrative Proceedings Facebook Inc., B6-22/16, Bundeskartellamt (Feb. 6, 2019), <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.html>. The Düsseldorf Higher Regional Court has suspended the Bundeskartellamt decision against Facebook, noting a lack of competitive harm and declaring that GDPR violations do not implicate freedom of competition or the openness of markets. Decision, In the Antitrust Case of Facebook Inc., VI-Kart 1/19 (V), Düsseldorf Higher Regional Court (Aug. 26, 2019), [https://www.olg-duesseldorf.nrw.de/behoerde/presse/Presse\\_aktuell/20190826\\_PM\\_Facebook/20190826-Beschluss-VI-Kart-1-19-V\\_.pdf](https://www.olg-duesseldorf.nrw.de/behoerde/presse/Presse_aktuell/20190826_PM_Facebook/20190826-Beschluss-VI-Kart-1-19-V_.pdf). The matter continues to be on appeal.

<sup>6</sup> See, e.g., 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](https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf).

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based. 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 FTC, where I work, enforces both competition and privacy laws—not alone, of course, but we are the only agency that does both. Our experience lays bare the fact that competition and privacy are different. They have different aims, and use different tools to achieve those aims. My concern with adopting a broad merger of privacy and competition law is that addressing both together will lead to incoherence, and even contribute to the erosion of the rule of law.<sup>7</sup>

Today I want to 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

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<sup>7</sup> 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 L.J. 121 (2015).

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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*.<sup>8</sup> 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”.<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> Two years later, in part 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”.<sup>12</sup> Now the government could stop certain business combinations and conduct *before* they caused widespread

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<sup>8</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

<sup>9</sup> *Id.* at 193, 195, 205.

<sup>10</sup> Ohlhausen & Okuliar, *supra* note 7, at 121.

<sup>11</sup> 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](https://www.ftc.gov/sites/default/files/attachments/ftc-90-symposium/90thanniv_program.pdf).

<sup>12</sup> 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*, Wash. 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/>.

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anticompetitive harm. The remit was forward looking, and the jurisdiction broad: to prohibit “unfair methods of competition”.<sup>13</sup>

The fledgling agency took it too far, however, asserting that antitrust properly encompassed consumer harms like deception, without good evidence of their effect on competition itself. In 1931, in a case called *Raladam*, the Supreme Court rejected this logic.<sup>14</sup> It held that the FTC’s jurisdiction over unfair methods of *competition* did not extend to cases based solely on *consumer protection* concerns.<sup>15</sup> Congress responded in 1938, giving the FTC new authority to prohibit “unfair or deceptive acts or practices”. The FTC would enforce antitrust *and* consumer protection law—eventually including privacy—but they were not the same.<sup>16</sup>

### Competition

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.<sup>17</sup> In the past few months, for example, the FTC has sued to block mergers presenting quality and innovation harms, including a merger of title insurance underwriters, in part on the basis that

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<sup>13</sup> 15 U.S.C. § 45(a).

<sup>14</sup> 283 U.S. 643 (1931).

<sup>15</sup> *Id.* at 649.

<sup>16</sup> Address of Hon. R.E. Freer, Commissioner, Federal Trade Commission, 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](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>.

<sup>17</sup> 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>.

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it would eliminate a competitor offering to accept greater underwriting risks<sup>18</sup>, and a merger of two gene sequencing companies, the acquirer a monopolist and the target an innovative and nascent competitor.<sup>19</sup>

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.<sup>20</sup> In *National Society of Professional Engineers*, a trade group of engineers argued that ethics prohibited them from providing competitive bids for engineering services, because it might lead to inferior engineering work.<sup>21</sup> Justice John Paul Stevens, who practiced antitrust law early in his career, wrote the opinion rejecting ethics as a defense to the Sherman Act.<sup>22</sup> 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.<sup>23</sup> The Court rejected the argument because there was little reason to credit

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<sup>18</sup> *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>.

<sup>19</sup> *FTC Challenges Illumina's Proposed Acquisition of PacBio*, Federal Trade Comm'n (Dec. 17, 2019), <https://www.ftc.gov/news-events/press-releases/2019/12/ftc-challenges-illumina-proposed-acquisition-pacbio>.

<sup>20</sup> The same is true under EU competition law. The European Commission's *Guidelines on the Application of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements* state that Article 101 provides the legal framework for the Commission to maintain effective competition, and that competition laws are meant to promote innovation and enhance consumer welfare. *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 ¶¶ 4, 269 (Jan. 14, 2011).

<sup>21</sup> *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978).

<sup>22</sup> *Id.* at 691.

<sup>23</sup> *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986).

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“noncompetitive quality of service justifications”.<sup>24</sup> 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”.<sup>25</sup> 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”.<sup>26</sup>

In practice, authorities in the U.S. and Europe have 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.<sup>27</sup> 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”.<sup>28</sup> 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 purchase LinkedIn subject to 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

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<sup>24</sup> *Id.* at 463-64.

<sup>25</sup> *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 373 (1963).

<sup>26</sup> *Schuylkill Energy Res. v. Pa. Power & Light Co.*, 113 F.3d 405, 414 n.9 (3d Cir. 1997).

<sup>27</sup> 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/418081/071220googledec-commstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledec-commstmt.pdf).

<sup>28</sup> *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL and Administración del Estado v. Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, Case C-238/05, 2006 E.C.R. I-11125 at I-11164 (Nov. 23, 2006).

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privacy.<sup>29</sup> And in the German Bundeskartellamt case against Facebook that I mentioned earlier, an appellate court held that Facebook’s off-website data collection practices failed to implicate competitive harm.<sup>30</sup> 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 antitrust 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? 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”.<sup>31</sup> Justice Brandeis believed that conferred upon individuals a general right to privacy from the government.<sup>32</sup> And, in the 1960s, U.S. courts adopted his approach and incorporated into Fourth Amendment jurisprudence the “reasonable expectation of privacy”<sup>33</sup>—a zone of personal privacy into which the government may not intrude without substantial justification. That jurisprudence, and additional privacy rights subsequently

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<sup>29</sup> Microsoft/LinkedIn (Case M. 8124) 2016 at n.330 (Dec.6, 2016).

<sup>30</sup> Decision, In the Antitrust Case of Facebook Inc., VI-Kart 1/19 (V), Düsseldorf Higher Regional Court (Aug. 26, 2019).

<sup>31</sup> U.S. Const. amend. IV.

<sup>32</sup> *Olmstead v. United States*, 277 U.S. 438, 478-79 (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).

<sup>33</sup> *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J. concurring).

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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.<sup>34</sup> For example, Congress has restricted the government’s access to things like emails, financial information, and information gathered for foreign intelligence purposes.<sup>35</sup>

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 from specific harms, mostly by private actors.<sup>36</sup> The Fair Credit Reporting Act protects the accuracy of information about an individual’s financial life, and limits its sharing.<sup>37</sup> 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 settlement with Facebook last year. All of these harms are under discussion in our national debate over a comprehensive data privacy law.

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<sup>34</sup> 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.).

<sup>35</sup> *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.

<sup>36</sup> 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 4<sup>th</sup> Amendment applies. Compare *Carpenter v. United States*, 585 U.S. \_\_\_ (2018) with *Smith v. Maryland*, 442 U.S. 735 (1979).

<sup>37</sup> 15 U.S.C. § 1681.

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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, should we protect consumers?<sup>38</sup> One study by the Department of Commerce indicates that, when Americans think about privacy, their primary concern relates to identity theft.<sup>39</sup> Addressing that is different from (and sometimes 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

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<sup>38</sup> 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](https://www.ftc.gov/system/files/documents/public_events/1418273/ftc_hearings_session_12_transcript_day_1_4-9-19.pdf).

<sup>39</sup> 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>.

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differently, and that context matters.<sup>40</sup> Alessandro Acquisti finds that “privacy concerns can vary dramatically for the same individual, and for societies, over time”.<sup>41</sup>

### **Competition v. Privacy**

But let us assume for purposes of this argument 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 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, at least in theory. But scholars at New York University’s Engelberg Center on Innovation Law and Policy expressed skepticism about it as a tool for spurring competition after surveying tech firms in New York City.<sup>42</sup> And I’m mindful of Isabel da Silva’s comments in Washington last year that she was hearing complaints from startups in France that the data

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<sup>40</sup> See Alessandro Acquisti et al., *The Economics of Privacy*, 54 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”).

<sup>41</sup> Alessandro Acquisti et al., *Privacy and Human Behavior in the Age of Information*, 347 Science 509, 513 (2015).

<sup>42</sup> Gabriel Nicholas & Michael Weinberg, *Data Portability and Platform Competition, Is User Data Exported From Facebook Actually Useful to Competitors?*, Nov. 2019, <https://www.law.nyu.edu/centers/engelberg/pubs/2019-11-06-Data-Portability-And-Platform-Competition>.

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portability provisions in the GDPR might enable big companies to lure away customers.<sup>43</sup>

I mentioned earlier the reaction to Google's announcement about third-party cookies in Chrome. Consider also the circumstances surrounding two recent privacy enforcement actions by 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 exclusive access to that data.<sup>44</sup> Good for privacy? Probably. But good for competition? Probably not.

Last summer, the FTC settled a privacy enforcement action against Facebook, including a \$5 billion fine and substantial new privacy compliance changes at the company. 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

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<sup>43</sup> 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/PaRRABAreport2019\\_1.pdf](https://www.acuris.com/assets/PaRRABAreport2019_1.pdf).

<sup>44</sup> Separate Statement of Commissioner Noah Joshua Phillips, *FTC v. Unrollme, Inc.*, Matter No. 1723139 (Aug. 8, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1539865/phillips\\_-\\_unrollme\\_statement\\_8-8-19.pdf](https://www.ftc.gov/system/files/documents/public_statements/1539865/phillips_-_unrollme_statement_8-8-19.pdf).

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need to require them to allow other people to utilize the data they sit on.”<sup>45</sup> 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. Note, however, that Alex Marthews and Catherine Tucker have expressed skepticism that privacy competition actually is driving Duck Duck Go usage.<sup>46</sup> Similarly, Microsoft’s unsuccessful attempt to drive volume to its email and search products through its “Scroogled” campaign, which trumpeted Google’s privacy failings, suggests consumers may not value privacy as much as some would have them do.<sup>47</sup>

The FTC was correct not to take action on Facebook’s acquisition of WhatsApp *on the basis of privacy concerns*. Our critics said we should have blocked

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<sup>45</sup> Jesse Pound, *Ex-Facebook security chief calls regulatory efforts ‘confused,’ says FTC settlement won’t address main privacy concerns*, CNBC (July 24, 2019), <https://www.cnn.com/2019/07/24/ex-facebook-exec-says-ftc-deal-wont-address-main-privacy-concerns.html>.

<sup>46</sup> Alex Marthews & Catherine Tucker, *Privacy Policy and Competition*, The Brookings Economic Studies (Dec. 2019) at 5, <https://www.brookings.edu/wp-content/uploads/2019/12/ES-12.04.19-Marthews-Tucker.pdf>.

<sup>47</sup> Adam Thierer, *A Framework for Benefit-Cost Analysis in Digital Privacy Debates*, 20 George Mason L. Rev. 1055, 1077-78 (2013).

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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.

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 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.<sup>48</sup> He argues that distinguishing a differentiated product from an exercise of market power may be hard.<sup>49</sup> 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.<sup>50</sup> 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.?<sup>51</sup> These analytical questions, stemming from differing and even opposing tastes, open the door to subjectivity.

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<sup>48</sup> James Cooper, *Privacy and Antitrust: Underpants Gnomes, the First Amendment, and Subjectivity*, 20 Geo. Mason L. Rev. 1129, 1136 (2013).

<sup>49</sup> *Id.* at 1137.

<sup>50</sup> *Id.* at 1138.

<sup>51</sup> As of December 2019, Google had a 93.91% share of search advertising in Europe, and 88.65% share in the U.S. Search Engine Market Share Europe, Statcounter, <https://gs.statcounter.com/search-engine-market-share/all/europe> (last visited Jan. 21, 2020); Search Engine Market Share United States of America, Statcounter, <https://gs.statcounter.com/search-engine-market-share/all/united-states-of-america> (last visited Jan. 21, 2020).

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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 competition 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 interests of both align, perhaps we are less concerned. But competition and privacy are often at odds. Are law enforcers forced 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. That is unlike, say, price. We all want lower prices.

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,<sup>52</sup> and others where requiring access to data is necessary.<sup>53</sup> 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

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<sup>52</sup> 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 (Jan. 28, 2019) (imposing a firewall between two parts of the newly merged company to avoid anticompetitive conduct from occurring).

<sup>53</sup> 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 (Sept. 20, 2013), <https://www.ftc.gov/sites/default/files/documents/cases/2013/09/130920nielsenarbitronanalysis.pdf> (requiring Nielsen to divest assets from Arbitron's cross-platform audience measurement business and a perpetual, royalty-free license to data).

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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 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 2, 3, or more different entities, each as eager to exploit user data as the next.

These days, we often synonymize 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. Alex Marthews and Catherine Tucker, whom I mentioned earlier, find “little evidence that competition itself appears to enhance privacy”.<sup>54</sup> At the very least, a claim of what competition will produce must be backed by facts and evidence showing that the offending conduct has negative consequences on consumer welfare.

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<sup>54</sup> Marthews & Tucker, *supra* note 46, at 8.

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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 people talking about merging antitrust and privacy law?

In June, Martin Selmayr argued that both competition and privacy “were about human dignity, and about choice, and about freedom”.<sup>55</sup> That may be, but it is far from clear how that distinguishes privacy as a subject for antitrust from any other number of issues that also involve dignity, or choice, or freedom. My colleague, Commissioner Rebecca Kelly Slaughter, argues that we lack privacy because we lack competition, and that a merger may upset consumer expectations about

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<sup>55</sup> European Data Protection Supervisor, “*Data Protection and Competitiveness in the Digital Age*”, YouTube (July 12, 2019), <https://youtu.be/3JI33s5e53M?t=3217> (53:37).

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privacy.<sup>56</sup> 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 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. Last June, then-EU Director General for 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

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<sup>56</sup> 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](https://www.ftc.gov/system/files/documents/public_statements/1513009/slaughter_remarks_at_ftc_approach_to_consumer_privacy_hearing_4-10-19.pdf).

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expertise, it's a question of the rule of law, it's ultimately a question of democracy."<sup>57</sup> Precisely.

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<sup>57</sup> 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).