

# A New Era of Antitrust: A Means to Protecting Consumer Data Privacy?

## Abstract

*In an interesting twist in a landmark decision, German officials imposed far-reaching restrictions on Facebook's data-collection practices by relying on antitrust authority instead of privacy regulation. German officials told Facebook it can no longer combine its users' personal data with its other owned services, such as Instagram and WhatsApp, without user consent. Officials found the customer behavioral data to be "the essential factor for establishing the company's dominant position" in the marketplace (Bundeskartellamt, 2019). Not only are competitors disadvantaged, but consumers are harmed by being forced to give up their privacy or otherwise refrain from the social media network altogether. This view of tying competition and market power to exploitative abuses of privacy is increasingly being held by regulators outside the United States (Chao, 2019).*

*To what extent could antitrust law be used to similarly protect consumer data privacy interests in the U.S.? This paper examines U.S. antitrust law and its potential application to consumer data privacy concerns.*

*Antitrust law is guided, in part, by the consumer welfare standard, an economic model that assesses consumer benefits by focusing primarily on prices. This makes it difficult, however, for regulators to bring an antitrust case against Google, Facebook and others, because there is no direct evidence of monopoly power from price hikes when the service is essentially free to consumers (Livni & Kozlowska, 2019).*

*Still, some experts say the consumer welfare model includes non-price effects such as quality and innovation (Chao, 2019). Thus in digital markets where consumers do not pay a price, antitrust enforcement could rely on an assessment of service quality as an indicator of a company's market power (Livni & Kozlowska, 2019). One such measure of service quality could be the promise of privacy protection to consumers.*

*More recently, the "New Brandeis movement" has sparked interest in an antitrust standard that prioritizes competition instead (Patel, 2018). Competing firms increasingly value private consumer data which translates into market power (Lohr, 2019). By promoting competition as the primary objective, firms would not possess an unfair advantage in the control over personal data collection, and consumers could more easily assert their individual privacy preferences when choosing services.*

*Several factors may stand in the way of an antitrust approach to privacy regulation, however. In the first place, U.S. regulators tend to view competition and consumer protection as distinct issues (Chao, 2019). Courts may also be reluctant to extend the consumer welfare standard to privacy harms that are more difficult to show and quantify than price effects. Finally, the opposite may occur where the act of accumulating consumer data in a vertically integrated merger is actually seen as a necessary competitive strategy against other digital companies.*

*This paper concludes that even if antitrust law were to take into account consumer privacy interests, the law may only protect those customers of a specific company or merger. Relief may also be delayed due to litigation. While potentially a safeguard, more than antitrust law oversight will likely be needed to fully protect consumer privacy interests.*

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