

Competition and Privacy

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Competition and data privacy laws can work in concert to rein in the potential abuses that the massive aggregation of personal information by a small number of technology firms like Facebook, Apple, Google and Amazon. These companies dominate the digital market globally, and that dominance increasingly is the target of both antitrust authorities¹ as well as data privacy regulators across the world.²

Increasing privacy often is a central argument justifying antitrust actions against digital platforms. The increased privacy risks posed by aggregating consumer data was the core of the German competition regulator's action against Facebook that prohibited processing consumer information obtained from third-party sources using Facebook integrations without obtaining their consent.³ Likewise, consumer-rights organization EPIC predicted in 2014 that Facebook's acquisition of the digital message service WhatsApp, which originally emerged as a privacy-protective alternative to leading messaging apps, would undermine those protections by forcing WhatsApp users to share data with Facebook and its partners—a prediction that appeared to come true in 2021.⁴ These examples illustrate the ways that data privacy concerns can help address the distinctive competition risks created by digital markets where access to data creates market power.

Data localisation and related data transfer requirements that are a feature of many privacy laws similarly play a dual role in both providing greater sovereign control of citizen information and in ensuring that local companies play a role in the storage and processing of that information.⁵ This is particularly important for African countries to foster local innovation and create space for domestic alternatives to emerge.

At the same time, however, the extensive compliance obligations posed by data privacy laws can conflict with competition law. Several preliminary studies have shown that Europe's

¹ N Rivero, 'A cheat sheet to all of the antitrust cases against Big Tech in 2021,' *Quartz* 29 September 2021 <https://qz.com/2066217/a-cheat-sheet-to-all-the-antitrust-cases-against-big-tech-in-2021/>.

² See S Evenett, J Fritz, 'How to achieve digital economy regulation through increased transparency,' (10 Dec 2021) <<https://www.weforum.org/agenda/2021/12/digital-economy-regulation-transparency/>>; J DeBeer, 'Digital markets, big data, data privacy, and competition: where crossroads meet,' *without prejudice* blog (October 2020) <<https://www.withoutprejudice.co.za/free/article/7096/view>>.

³ 'Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources Background Information on the Bundeskartellamt's Facebook Proceeding' BUNDESKARTELLAMT 1 2019 <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf?blob=publicationFile&v=5 [<https://perma.cc/5FRV-3AJR>]> (reporting on the FCO action).

⁴ EPIC.org, 'WhatsApp Policy Change Highlights Privacy Risks EPIC Warned of in Facebook Acquisition' 15 Jan 2021 <<https://epic.org/whatsapp-policy-change-highlights-privacy-risks-epic-warned-of-in-facebook-acquisition/>>.

⁵ A Sylla 'Recent Developments in African data protection law – Outlook for 2022' *JDSupra* 1 February 2022 <<https://www.jdsupra.com/legalnews/recent-developments-in-african-data-7141556/>> (summarizing recently enacted laws including several with data localisation/transfer requirements); E Harding 'Data Localization and Data Transfer Restrictions' *National Law Review* 28 February 2022 <<https://www.natlawreview.com/article/data-localization-and-data-transfer-restrictions>>.

General Data Protection Regulation (GDPR) raises some substantial competition concerns. The GDPR generally applies to firms equally, regardless of size. Early studies suggest that the compliance costs are similar for both large and small firms, putting smaller firms at a disadvantage against their larger competitors. This also creates higher entry costs, which risks entrenching existing, larger firms in a market.⁶

Data privacy laws also often require organizations to exert substantial control over third party access and use of private information. Exercising that kind of control often can have significant anti-competitive effects. This was the subject of an extended exchange between U.S. Rep. Kelly Armstrong and Google CEO Sundar Pichai in a 2018 antitrust hearing. Rep. Kelly repeatedly pressed Pichai regarding Google's decisions to restrict third-party access to user information citing GDPR compliance.⁷ Similarly, a recent U.S. federal appellate court decision forced LinkedIn to allow access to user data by a third-party competitor, disregarding LinkedIn's arguments that doing so would violate the data privacy of its users.⁸

Some have criticized the supposed tension between competition and privacy as a false dichotomy that ignores both the obvious ways that they work together to promote consumer welfare and the many alternative methods for protecting privacy while still forcing Big Tech to relinquish its stranglehold on digital markets.⁹ Others have pointed out that entrenched firms like Apple and Google frequently point to privacy protection measures as a pretext to exclude competitors and in the process stifle the potential development of even more privacy-protective alternatives.¹⁰

Regardless, we're well past the point where anyone can credibly assert that data privacy has no place in competition regulation. To the contrary, it's now clear that competition regulators must carefully consider the role that data privacy itself plays as an aspect of unfair competition as well as the interrelationships between competition and data privacy laws both domestic and internationally.

⁶ A Marthews, C Tucker 'Privacy Policy and Competition' *Economic Studies at Brookings* (2019) 7-8; M Gal, O Aviv, 'The Competitive Effects of the GDPR,' *J Competition L and Econ* (September 2020).

⁷ 'Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook, and Google' US House of Representatives, Cmtee on Jud., Subcmtee on Antitrust, Commercial and Administrative Law, 116th Cong. 2d Sess., Serial No 116-94, 29 July 2020 <<https://www.govinfo.gov/content/pkg/CHRG-116hhrg41317/html/CHRG-116hhrg41317.htm>>.

⁸ HiQ Labs, Inc. v. LinkedIn Corp., ___F.4th ___, 2022 WL 1132814 9th Cir. 8 Apr. 2022

⁹ See, e.g., Sunny Seon Kang, 'Don't Blame Privacy for Big Tech's Monopoly on Information' *Just Security* 18 Sept 2020 <<https://www.justsecurity.org/72439/dont-blame-privacy-for-big-techs-monopoly-on-information/>>.

¹⁰ See, n.6 above. Google and Apple's joint decision to limit digital contact-tracing apps to a single technical standard is an extreme example of this. See J Bambauer, B Ray, 'COVID-19 Apps Are Terrible—They Didn't Have to Be' *Lawfare Digital Social Contract* 21 Dec 2020 <https://www.lawfareblog.com/covid-19-apps-are-terrible-they-didnt-have-be>>.