NOTE

DISTRUST & ANTITRUST:

USING FACEBOOK TO UNDERSTAND COMPETITION LAW'S ROLE IN REGULATING DATA AND DATA PRIVACY CONCERNS AROUND THE WORLD

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ABSTRACT

In the twenty-first century digital economy, more user data means more money, power, and dominance. Big tech companies like Facebook and Google have historically exploited user data to become the powerhouses they are today. Around the world, countries are trying to regulate these mega-companies using a common strategy: competition enforcement. Unfortunately, the United States is not as well equipped for this fight as the European Union and Germany. While the European Union and Germany have implemented laws that directly address data privacy and big tech competition, the United States is trying to address modern problems with a legal framework that dates back over a century. This Note argues that the proposed legislation in the United States House of Representatives and the Senate would successfully modernize United States antitrust law. The proposed bills borrow successful elements from European competition enforcement by directly addressing data privacy

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concerns and by changing the requirement that US antitrust enforcers must define a common relevant market to succeed in an antitrust action. The fight against big tech has just begun, and the United States needs the correct tools going forward.

I. INTRODUCTION: THE INTERSECTION OF PRIVACY & ANTITRUST

The digital economy[1] is a space often defined by conflict. Fights often erupt between internet users in comment sections,[2]

1. This Note defines "digital economy" as the infrastructure needed for the internet to exist and operate, digital transactions that take place using the internet, and content that digital economy users create and access. *See* Kevin Barefoot et al., *Defining and Measuring the Digital Economy,* BUREAU OF ECONOMIC ANALYSIS, 6-7 (Mar. 15, 2018), https://www.bea.gov/system/files/papers/WP2018-4.pdf [https://perma.cc/EG6C-2GG9].

2. *See generally* Tauriq Moosa, *Comment Sections Are Poison: Handle with Care or Remove Them*, GUARDIAN (Sept. 14, 2014, 7:04 AM), https://www.theguardian.com/science/brain-flapping/2014/sep/12/comment-sections-toxic-moderation [https://perma.cc/82SB-MAW8].

between consumers and companies in court rooms,[3] and between CEOs and US Senators on the Senate floor.[4] In 2021, the world watched as two tech giants—Apple's Tim Cook and Facebook's[5] Mark Zuckerberg—battled one another in real time over a software update that addressed privacy concerns.[6]

In April 2021, Apple unveiled a software update that can heavily restrict an app developer's ability to share user data with third parties, such as advertisers.[7] Once installed on a person's iPhone or iPad, the update will prompt a pop-up notification to appear when the user opens an app—for example, Facebook.[8] The notification asks if the user would like to allow the app developer to "track your activity across other companies' apps and websites."[9] Then, the user has the opportunity to opt out of data tracking, which apps like Facebook use to produce targeted ads.[10]

The ability to opt out of data tracking subverts the way that many "free" apps make money. While an account holder does not have to pay a fee to use an app like Facebook, its services come with a price. In reality, advertisers pay the bills in the digital economy,[11] and access to personal data allows them to stretch the value of

3. *See* Bob Egelko, *Class-action Suit Against Facebook for Selling Personal Information Allowed to Go Forward*, S.F. CHRON. (Mar. 22, 2021, 5:18 PM), https://www.sfchronicle.com/us-world/us/article/Class-action-suit-against-Facebook-for-selling-16045273.php [https://perma.cc/6HZB-ULAP].

4. *See* CNET Highlights, *Klobuchar Hits Zuckerberg HARD: Political Ads and Election Fake News*, YOUTUBE (Nov. 17, 2020), https://www.youtube.com/watch?v=XFLv9ozEZeM [https://perma.cc/DE35-DMDF].

5. Since this Note was written, Facebook's parent company has changed its name to Meta. This Note uses Facebook to refer to both the social media platform (i.e. the mobile app and the website) and the parent company.

6. *See* Scott Ikeda, *Why Is Facebook Suddenly Bullish on the Apple Privacy Update?*, CPO MAG. (Mar. 30, 2021), https://www.cpomagazine.com/data-privacy/why-is-facebook-suddenly-bullish-on-the-apple-privacy-update/ [https://perma.cc/3W3N-CJDW].

7. Brian X. Chen, *To Be Tracked or Not? Apple is Now Giving Us the Choice.*, N.Y. TIMES (Apr. 26, 2021), https://www.nytimes.com/2021/04/26/technology/personaltech/apple-app-tracking-transparency.html [https://perma.cc/KLC3-X8DP].

8. *Id*.

9. *Id*.

10. *Id*.

11. For example, in its 2017 financial report, Facebook said: "We generate substantially all of our revenue from selling advertising placements to marketers." Callum Borchers, *Would You Pay $18.75 for Ad-Free Facebook?*, WASH. POST (Apr. 14, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/04/14/would-you-pay-18-75-for-ad-free-facebook/ [https://perma.cc/43BJ-NVM8].

their dollars.[12] Over time, tech companies like Facebook and Google have become remarkably adept at presenting users with ads that they are likely to click on.[13] These platforms know exactly what a user wants to see because they track the user's every move on the web.[14] Apple's new privacy update allows iOS users to close the blinds on their ever-present digital stalker. As a result, Facebook executives predict that the company's sales revenue will decrease by about ten billion dollars in 2022.[15]

This big tech business model has turned personal data into a valuable commodity. While data points are not tangible products, the ways that data is sourced, sold, and bought implicate classic antitrust and consumer protection issues.[16] From a purely economic angle, there are outstanding questions about the effect that data collection has on competition. For example, whether access to data is a barrier to entry into a market and how regulation impacts innovation.[17] From a consumer protection point of view, there are questions about whether data collection is ethical,[18] or if

12. Personal data allows advertisers to tailor ads to specific users, often at a lower cost than traditional advertising. *See* Spandana Singh, *Special Delivery: How Internet Platforms Use Artificial Intelligence to Target and Deliver Ads,* NEW AMERICA (Feb. 18, 2020), https://www.newamerica.org/oti/reports/special-delivery/the-growth-of-todays-digital-advertising-ecosystem [https://perma.cc/AFX7-MJDA].

13. These companies have become so good at ad personalization that they create echo chambers, which are "feedback loops that reaffirm and narrow an individual's thoughts and beliefs." Joseph Jerome, *Big Data: Catalyst for a Privacy Conversation*, 48 IND. L. REV. 213, 220 (2014).

14. *See* Brian X. Chen & Daisuke Wakabayashi, *You're Still Being Tracked on the Internet, Just in a Different Way,* N.Y. TIMES (Apr. 6, 2022), https://www.nytimes.com/2022/04/06/technology/online-tracking-privacy.html [https://perma.cc/UWA4-EY45].

15. *See* Kif Leswing, *Facebook Says Apple iOS Privacy Change Will Result in $10 Billion Revenue Hit This Year*, CNBC (Feb. 2, 2022, 7:54 PM), https://www.cnbc.com/2022/02/02/facebook-says-apple-ios-privacy-change-will-cost-10-billion-this-year.html [https://perma.cc/YGF3-73AK].

16. *See* A.B.A., Antitrust Law Section, Report of the Task Force on the Future of Competition L. Standards 9, 12 (2020) [hereinafter *ABA Report*].

17. *See* Alexis J. Gilman & Andrew I. Gavil, *Antitrust – Antitrust Enforcement Poly for Big Data? Stay Tuned.*, CROWELL MORING (Feb. 27, 2019), https://www.crowell.com/NewsEvents/Publications/Articles/Antitrust-Antitrust-Enforcement-Policy-for-Big-Data-Stay-Tuned [https://perma.cc/B4ZP-FK89].

18. *See* Karin Clark et al., *Advancing the Ethical Use of Digital Data in Human Research: Challenges and Strategies to Promote Ethical Practice*, 21 ETHICS AND INFO. TECH. 59, 60 (2019).

consumers even care at all.[19] While this is not the first time that competition and consumer protection concerns have overlapped,[20] there is no clear answer about how the two should interact.

Questions concerning the relationship between competition and data privacy are particularly interesting because they are emerging simultaneously and globally.[21] iPhone users everywhere are downloading the same software update and seeing the same notification upon opening the Facebook app.[22] This Note analyzes how three different jurisdictions have handled competition in big data thus far and uses Facebook as a case study to predict the future of the field. Part II provides an overview of competition enforcement in three different jurisdictions: the United States, the European Union, and Germany.[23] In the United States, data

19. *Compare* Brooke Auxier et al., *Americans and Privacy: Concerned, Confused, and Feeling Lack of Control Over Their Personal Information*, PEW RSCH. CTR. (Nov. 15, 2019), https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information/ [https://perma.cc/7FHP-J6TV] (finding that a majority of Americans are concerned about how companies use their data and believe that the risks of data collection outweigh the benefits), *with* Daniel Castro & Michael McLaughlin, *Survey: Few Americans Willing to Pay for Privacy*, CTR. FOR DATA AND INNOVATION (Jan. 16, 2019), https://datainnovation.org/2019/01/survey-few-americans-willing-to-pay-for-privacy/ [https://perma.cc/Z2FX-FWU3] (finding that a majority of Americans who report that they would like big tech companies to collect less of their personal data would not be willing to pay a fee in exchange for less data collection).

20. Consumer protection law and competition law are both tools used to fight distortion in the marketplace. *See* Julie Brill, *The Intersection of Consumer Protection and Competition in the New World of Privacy*, 7 COMPETITION PRIV. INT'L 7, 8-9 (2011). Generally, consumer protection offenses distort the demand side of a transaction by eroding trust in the marketplace, while antitrust offenses artificially distort supply. *Id.* at 9. However, this supply and demand distinction is not always clear. *Id.* Some conduct can negatively impact both individual consumers and an industry as a whole. *Id.* While data privacy lends itself to the intersection of consumer protection and competition, they can also converge in the context of more traditional widgets. *See id.* at 14.

21. *See* Cecilia Kang, *Lawmakers, Taking Aim at Big Tech, Push Sweeping Overhaul of Antitrust*, N.Y. TIMES (June 11, 2021), https://www.nytimes.com/2021/06/11/technology/big-tech-antitrust-bills.html [https://perma.cc/YZ9K-F7DH].

22. *See* Chen, *supra* note 7.

23. Although Germany is an EU member state, it is still considered a separate jurisdiction with its own set of national laws. All EU member states, include Germany, lack jurisdiction to legislate where the Treaty on the Functioning of the European Union grants the European Union "exclusive competence," but they may legislate where the European Union and national governments share competence, or where the European Union only has supporting or special competence. *See* Consolidated Version of the Treaty on the Functioning of the European Union arts. 3-6, May 9, 2008 O.J. (C 115) 47 [hereinafter TFEU].

concerns are beginning to appear in antitrust enforcement actions,[24] but it is unclear if the country's century-old antitrust laws are equipped to handle them. However, Congress is aware of these growing concerns and has taken steps to draft new antitrust legislation for the twenty-first century.[25]

In the European Union, enforcers must balance competition regulation with data protection. Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") provide European competition regulators with the necessary tools to tackle big tech,[26] but any action must also comply with the General Data Protection Regulation ("GDPR"), the European Union's comprehensive data protection regime.[27] While the goals of competition enforcement and privacy regulation can be complementary, they can also be at odds. Finally, Germany has recently passed one of the world's most comprehensive laws regulating the digital economy.[28] However, as an EU Member State, German national laws may be subject to EU approval.[29]

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24. For example, the FTC issued a record-breaking $5 billion fine and unprecedented operation restrictions against Facebook for violating users' privacy in 2019. *See* Press Release, Fed. Trade Comm'n, FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook (July 24, 2019), https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions [https://perma.cc/9PVG-33CA].

25. *See* Kang, *supra* note 21; Makena Kelly, *Senators Roll Out Bipartisan Data Privacy Bill*, VERGE (May 20, 2021), https://www.theverge.com/2021/5/20/22444515/amy-klobuchar-data-privacy-protection-facebook-state-laws [https://perma.cc/7TWW-NWFD].

26. *See* TFEU, *supra* note 23, at 101-02.

27. *See* Regulation 2016/679, of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation) O.J. (L 127) [hereinafter GDPR].

28. *See* Jenny Gesley, *Germany: New Digital Competition Act Expands Abilities of Competition Authorities to Regulate Abuse of Dominant Market Positions*, LIBR. OF CONG. (Feb. 23, 2021), https://www.loc.gov/item/global-legal-monitor/2021-02-23/germany-new-digital-competition-act-expands-abilities-of-competition-authorities-to-regulate-abuse-of-dominant-market-positions/ [https://perma.cc/3ZFK-8QGX].

29. Germany is bound by the European law that it has formally adopted, such as the General Data Privacy Regulation. *See* Hunton Andrews Kurth, *German Federal Parliament Passes New German Data Protection Act*, HUNTON PRIVACY BLOG (Apr. 28, 2017), https://www.huntonprivacyblog.com/2017/04/28/german-federal-parliament-passes-new-german-data-protection-act/ [https://perma.cc/MFZ9-KJVB]. It also lacks jurisdiction to legislate where the TFEU has granted the EU "exclusive competence." *See* TFEU, *supra* note 23, arts. 3-6. However, the scope of the supremacy of European law is tenuous. *See* Sharifullah Dorani, *The Supremacy of EU Law Over German Law: EU Law vs National Law*, 7 POL. REFLECTION 44, 52 (2021). In fact, a German court rejected a decision

Part III explores how each jurisdiction's competition enforcement works in practice, using Facebook as a case study. The United States, European Union, and Germany have all independently launched probes into Facebook that implicate both competition and its data practices. Additionally, the United States and Germany have taken legal action against the company.[30] In the United States, a lawsuit filed against Facebook by the Federal Trade Commission ("FTC") introduces some of Facebook's data practices as proof that Facebook has engaged in anticompetitive conduct.[31] In recent years, the EC has launched two investigations into whether the company's data practices have harmed competitors, including competitors in secondary markets.[32] Finally, Germany issued its own sanctions against Facebook,[33] independent of the EC, after its Federal Cartel Office ("FCO") found that Facebook's data practices harmed users directly by collecting users' data and assigning non-Facebook data to users' Facebook accounts.[34]

Part IV considers the future of big tech competition regulation by analyzing US legislation that would update its antitrust regime

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from the European Court of Justice in 2021, further bringing into question the supremacy of EU law. *See Germany Rebuffs EU Legal Move Against Germany Over ECB Ruling*, REUTERS (Aug. 10, 2021, 9:24 AM), https://www.reuters.com/article/us-eu-germany-ecb/germany-rebuffseu-legal-move-against-germany-over-ecb-ruling-idUSKBN2FB1AH [https://perma.cc/CE6E-HZGS].

30. *See* Complaint, Fed. Trade Comm'n v. Facebook, Inc. (D.C. Cir. 2020) [hereinafter *FTC Complaint*]; Schechner et al., *EU Deepens Antitrust Inquiry into Facebook's Data Practices*, WALL ST. J. (Feb. 6, 2020, 8:00 AM); Press Release, European Commission, Antitrust: Commission Opens Investigation into Possible Anticompetitive Conduct of Facebook (June 4, 2021), https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2848 [https://perma.cc/34NL-G4ZA]; Press Release, Bundeskartellamt, Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources (July 2, 2019), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html [https://perma.cc/CRD9-2EYN] [hereinafter German Facebook Enforcement].

31. *See FTC Complaint, supra* note 30 at 8, 12-14. While the complaint implicates privacy concerns, the FTC's theory of the case focused on anticompetitive acquisitions and conditional dealing policies.

32. *See* Schechner et al., *supra* note 30; European Commission, *supra* note 30.

33. Facebook appealing these sanctions, claiming that it complies with the GDPR. *See* Matthias Inverardi, *German Court Turns to Top European Judges for Help on Facebook Data Case*, REUTERS (Mar. 24, 2021, 11:39 AM), https://www.reuters.com/business/legal/german-court-turns-top-european-judges-help-facebook-data-case-2021-03-24/ [https://perma.cc/JSR9-7KC6].

34. *See* German Facebook Enforcement, *supra* note 30.

to better regulate the modern digital economy. The legislation proposed in Congress tackles two areas where the European Union is better equipped than the United States to tackle big tech antitrust concerns: addressing harm that a monopolist inflicts in a secondary market and codifying data privacy as a consumer welfare concern. While no competition enforcement scheme is perfect, if passed, the proposed legislation would bring the United States into the twenty-first century.

II. COMPETITION ENFORCEMENT AROUND THE WORLD

A. United States: Old Laws Face New Problems

1. Antitrust Legal Framework

The US antitrust regime existed long before personal data became the commodity and concern that it is today. The United States passed its first federal antitrust law in 1890 with the Sherman Act.[35] The statute was passed to curb the concentration of wealth in large, unregulated industries, such as steel and railroads.[36] Section 1 of the Sherman Act proscribes "[e]very contract, combination . . . or conspiracy, in restraint of trade"[37] and Section 2 makes monopolization and attempted monopolization a felony.[38] In 1914, the United States passed two more antitrust statutes, the Federal Trade Commission Act and the Clayton Act, to fill perceived gaps in antitrust regulation and enforcement.[39] The Federal Trade Commission ("FTC") Act created the FTC to enforce a ban on "unfair methods of competition" and "unfair or deceptive acts or practices,"[40] while the Clayton Act, in relevant part, regulates mergers.[41]

Although the text of the Sherman Act proscribes "every" contract, combination, or conspiracy in restraint of trade, and provides that "every" person who monopolizes or attempts to

35. ALDEN F. ABBOTT, US ANTITRUST LAWS: A PRIMER 1 (Mercatus Ctr. George Mason Univ. ed., 2021).
36. *Id.* at 1-2.
37. Sherman Act of 1890, 15 U.S.C. § 1.
38. Sherman Act of 1890, 15 U.S.C. § 2.
39. ABBOTT, *supra* note 35, at 3.
40. Federal Trade Commission Act of 1914, 15 U.S.C. § 45.
41. Clayton Act of 1914, 15 U.S.C. § 18.

monopolize is guilty of a felony,[42] over time the Supreme Court of the United States has stepped in to outline the contours of the word "every."[43] In *Standard Oil Company of New Jersey v. United States*, the Court held that "every" restraint of trade only includes *unreasonable* restraints of trade.[44] While some arrangements are so outrageous as to be *per se* illegal, most Section 1 claims are analyzed on a case-by-case basis using the "rule of reason" test.[45] Under a rule of reason analysis, the court balances the harm resulting from the alleged anticompetitive conduct with procompetitive justifications for the action offered by the defendant.[46] The action is considered unreasonable only if the harm outweighs the business justifications.[47] Similarly, merely possessing a monopoly in a particular market is not enough to be guilty of a Sherman Act Section 2 violation.[48] Rather, the company must engage in exclusionary conduct so as to preclude potential competitors from legitimately challenging the monopolist's position.[49] In short, in the United States, exclusionary conduct or monopolization of a market is generally not illegal on its face. Conduct most likely will not be deemed illegal by the courts without concrete proof of harm.

Judicial activism has also played a role in US antitrust enforcement since its inception.[50] While the laws have largely stayed the same throughout the last century, the goals of antitrust legislation have shifted, as have the ways that judges approach antitrust claims.[51] The initial concern of economic competition—protecting small businesses from large trusts—has evolved into

42. *See* Sherman Act of 1890, 15 U.S.C. §§ 1-2.

43. *See* Standard Oil Company of New Jersey v. United States, 221 U.S. 1 (1911).

44. *See id*. at 64.

45. *See* ABBOTT, *supra* note 35, at 2.

46. *See id.*

47. *See* Michael A. Carrier, *The Four-Step Rule of Reason,* 33 ANTITRUST 50, 51 (2019).

48. *See Competition and Monopoly: Single Firm Conduct Under Section 2 of the Sherman Act*, DEP'T OF JUST. ARCHIVES (last updated Mar. 18, 2022), https://www.justice.gov/archives/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1 [https://perma.cc/C68M-DPJM].

49. *Id.*

50. *See* Standard Oil Company of New Jersey v. United States, 221 U.S. 1, 87 (1911). While the Supreme Court found Standard Oil guilty of an antitrust violation, the Court made a policy decision that was not included in the text of the Sherman Act by reading "every" restraint of trade to only mean "unreasonable" restraints of trade.

51. *See* Christine S. Wilson, Comm'r, U.S. Fed. Trade Comm'n, Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get (Feb. 15, 2019).

concern about economic efficiency, which means offering consumers the best products for the lowest prices.[52] Since the 1970s, the United States has approached antitrust enforcement through the lens of the Consumer Welfare Standard.[53] While the exact definition of the Consumer Welfare Standard is somewhat amorphous,[54] the primary takeaway is that concentration of wealth is not *per se* negative.[55] Some firms gain dominance through efficient business practices that should not necessarily be condemned.[56] Thus, the Consumer Welfare Standard traditionally suggests that courts should consider social and political factors, along with economic factors, when considering the market impact of allegedly anticompetitive conduct.[57]

There is an ongoing conversation about how the Consumer Welfare Standard and antitrust enforcement should handle data and data privacy concerns.[58] From a consumer welfare perspective, it is debatable whether users actually care about data privacy, as highlighted by the "privacy paradox."[59] Internet users claim they disapprove of companies tracking their data; however, these views do not reflect how Internet users behave. In a 2019 Pew survey, seventy-nine percent of Americans said they are concerned about how companies are using their data and eighty-one percent of Americans said they believe the risks of data collection outweigh the benefits.[60] Another survey by the Center on Data Innovation found that about eighty percent of Americans would like companies like Facebook and Google to collect less of their data, but that support wanes when they consider the trade-offs.[61] Most dramatically, support for less data collection dropped by fifty-three percentage points when participants considered

52. *See id.* at 3.
53. *Id.* at 4.
54. *See ABA Report, supra* note 16, at 12.
55. *See* Wilson, *supra* note 51, at 3.
56. *See id.*
57. *See id.*
58. *See ABA Report*, *supra* note 16.
59. *See* John Naughton, *The Privacy Paradox: Why Do People Keep Using Tech Firms that Abuse Their Data?*, GUARDIAN (May 5, 2019, 2:00 AM), https://www.theguardian.com/commentisfree/2019/may/05/privacy-paradox-why-do-people-keep-using-tech-firms-data-facebook-scandal [https://perma.cc/NL2R-VBUW].
60. *See* Auxier et al., *supra* note 19.
61. *See* Castro & McLaughlin, *supra* note 19.

paying a monthly subscription fee in exchange for more data privacy.[62]

The market supports the position that users do not care about data privacy.[63] In the wake of the Facebook/Cambridge Analytica scandal, in which a whistleblower revealed that the analytics company exploited data from Facebook users to influence the 2016 presidential election,[64] Facebook saw an increase in users across its platforms and in overall revenue.[65] Applying this information to the US antitrust framework, data privacy concerns could, in theory, be a quality factor that courts consider when applying the Consumer Welfare Standard.[66] However, it is not clear that it has enough of an effect on the market to gain a seat at the antitrust table. As put by Tad Lipsky, a law professor and former Department of Justice ("DOJ") antitrust lawyer, privacy should stay out of "the antitrust lane."[67]

2. Antitrust Policy in Action

The privacy paradox notwithstanding, recent activity from the DOJ Antitrust Division, the FTC's Bureau of Competition, and Congress indicate that data does, or at least should, play some role in antitrust enforcement. Makan Delrahim, the former Assistant Attorney General who headed the DOJ Antitrust Division under the Trump administration, said that it is a "grave mistake to believe that privacy concerns can never play a role in antitrust analysis," and compared personal data to the "oil" of the digital economy.[68]

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62. *Id.*

63. *See* Naughton, *supra* note 59.

64. *See* Terry Gross, *Whistleblower Explains How Cambridge Analytica Helped Fuel U.S. 'Insurge*ncy', NPR (Oct. 8, 2019, 2:45 PM), https://www.npr.org/2019/10/08/768216311/whistleblower-explains-how-cambridge-analytica-helped-fuel-u-s-insurgency?t=1647368672606 [https://perma.cc/N4R9-N6Q7]; *see also* Alvin Chang, *The Facebook and Cambridge Analytica Scandal, Explained With a Simple Diagram*, VOX (May 2, 2018, 3:25 PM), https://www.vox.com/policy-and-politics/2018/3/23/17151916/facebook-cambridge-analytica-trump-diagram [https://perma.cc/WD64-AJEX].

65. *See* Naughton, *supra* note 59.

66. *See ABA Report*, *supra* note 16, at 55.

67. *See id.* at 82.

68. Tony Romm, *DOJ Issues New Warning to Big Tech: Data and Privacy Could Be Competition Concerns*, WASH. POST (Nov. 8. 2019, 3:22 PM), https://www.washingtonpost.com/technology/2019/11/08/doj-issues-latest-warning-big-tech-data-privacy-could-be-competition-concerns/ [https://perma.cc/VHS5-DF77].

The DOJ has been reviewing Google's acquisition of Fitbit, which closed in 2021 after approval from EU regulators.[69] The merger provides Google with access to Fitbit users' personal data, including health information.[70] This is worrisome because Google could use the newly acquired data to further solidify its dominant position in the search advertising market.[71] Although the merger has finalized, the DOJ has yet to conclude its probe into the matter and could still bring an enforcement action to attempt to disentangle the two companies.[72]

Generally, courts will block a merger only if the two companies are competitors within the same market.[73] Here, Google and Fitbit are not competitors—Google occupies the search and search advertising markets[74] while Fitbit occupies the wearable tech or fitness tracker market.[75] Even though Google makes a smartwatch with fitness tracking functionality,[76] it does not possess market power in the wearable tech market and it did not gain dominance through its acquisition of Fitbit.[77] Therefore, the

69. *See* Dave Sebastian, *Google Proceeds with Fitbit Deal, but Government Reviews Continue*, WALL ST. J. (Jan. 14, 2021, 12:49 PM), https://www.wsj.com/articles/google-closes-fitbit-deal-surviving-regulatory-scrutiny-11610636698 [https://perma.cc/5Q2D-JYTG].

70. *See id.*

71. The DOJ sued Google in 2020, alleging that it had unlawfully maintained a monopoly in the search and search advertising markets. *See* Press Release, Dep't of Just., Justice Department Sues Monopolist Google for Violating Antitrust Law (Oct. 20, 2020), https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws [https://perma.cc/PN68-WUX8].

72. *See* Alyse F. Stach et al., *The Thin Line Between Privacy and Antitrust*, IAPP (June 23, 2020), https://iapp.org/news/a/the-thin-line-between-privacy-and-antitrust/ [https://perma.cc/3AMZ-T7MZ].

73. *See, e.g.,* United States v. Sabre Corp., 452 F. Supp. 3d 97, 136 (D. Del. 2020) (declining to enjoin Sabre's acquisition of Farelogix because the DOJ failed to determine the relevant market).

74. *See* Joseph Johnson, *Global Market Share of Search Engines 2010-2022*, STATISTA (Mar. 1, 2022), https://www.statista.com/statistics/216573/worldwide-market-share-of-search-engines/ [https://perma.cc/EF85-RXZ9].

75. *See* John Koetsier, *Global Smartwatch Market: Apple 34%, Huawei 8%, Samsung 8%, Fitbit 4.2%*, FORBES (May 27, 2021, 1:28 PM), https://www.forbes.com/sites/johnkoetsier/2021/05/27/global-smartwatch-market-apple-34-huawei-8-samsung-8-fitbit-42/?sh=270aae2166c7 (finding that, although Apple has a dominate market share in the global smartwatch market with thirty-four percent, Fitbit is still a contender in the market).

76. *See* WEAR OS BY GOOGLE, https://wearos.google.com/#hands-free-help [https://perma.cc/2ZDU-BW47] (last visited May 4, 2021).

77. *See* Stach et al., *supra* note 72.

merger was likely not anticompetitive. The DOJ, however, might still decide to challenge the merger using a competition theory, arguing that the merger strengthened Google's monopoly in the search advertising market.[78]

While the DOJ has been at the forefront of the United States' battle with Google, the FTC has generally played a larger role in the big tech antitrust field. In 2018, the FTC held a series of hearings on competition and consumer protection in the twenty-first century,[79] with focus on privacy, big data, and competition.[80] Additionally, in 2019, the FTC launched the Technology Task Force, later renamed the Technology Enforcement Division, within the Bureau of Competition.[81] The Technology Enforcement Division specifically focuses on "technology-related sectors of the economy, including markets in which online platforms compete."[82] Following a Technology Enforcement Division investigation, the FTC sued Facebook at the end of 2020, alleging that it maintained its monopoly through illegal conduct.[83] In its complaint, the FTC implicated data privacy when alleging the ways in which Facebook illegally maintained its dominant position.[84] For example, the FTC

78. The European Union signed off on the Google/Fitbit merger with the condition that Google cannot use the Fitbit data for advertising purposes. *See* Sam Schechner, *Google Must Silo Fitbit Data, EU Says, Clearing $2.1 Billion Deal*, WALL ST. J. (Dec. 17, 2020, 10:33 AM), https://www.wsj.com/articles/google-must-silo-fitbit-data-eu-says-clearing-2-1-billion-deal-11608219201 [https://perma.cc/C9RH-P765]. This condition is in place so that Google cannot use the merger to gain dominance in the search advertising market. *Id.* The DOJ could use the European approach as a guide to its own action.

79. *See* Press Release, Fed. Trade Comm'n, FTC Announces Hearings on Competition and Consumer Protection in the 21st Century (June 20, 2018), https://www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st [https://perma.cc/9R7H-8TJM].

80. *See* Press Release, Fed. Trade Comm'n, FTC Announces Agenda for Sixth Session of Its Hearing on Competition and Consumer Protection in the 21st Century (Oct. 29, 2018), https://www.ftc.gov/news-events/press-releases/2018/10/ftc-announces-agenda-sixth-session-its-hearings-competition [https://perma.cc/FV7L-9PRC].

81. *See* Patricia Galvan & Krisha Cerilli, *What's in a Name? Ask the Technology Enforcement Division*, FED. TRADE COMM'N (Oct. 16, 2019, 1:59 PM), https://www.ftc.gov/news-events/blogs/competition-matters/2019/10/whats-name-ask-technology-enforcement-division [https://perma.cc/VAE8-NJ9P].

82. Press Release, Fed. Trade Comm'n, FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets (Feb. 26, 2019), https://www.ftc.gov/news-events/news/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology-markets [https://perma.cc/P495-EY97].

83. *See FTC Complaint, supra* note 30.

84. *See id.; see also infra* Section IV.A.

claimed that Facebook's acquisition of WhatsApp deprived users who value data privacy of meaningful choice in the market.[85]

Complementing the investigations and enforcement actions taken by the executive branch, Congress is considering ways to bring US antitrust laws into the twenty-first century. In 2020, the Antitrust Subcommittee of the House of Representatives' Judiciary Committee released a majority staff report entitled "Investigation of Competition in Digital Markets."[86] The report highlighted two ways that privacy and data protection affect platform market power. On one hand, erosion of consumer privacy is equivalent to a monopolist decreasing quality of a product or increasing price.[87] On the other hand, dominant firms could weaponize privacy in a way that hurts potential competitors.[88]

The report then goes on to suggest how Congress can amend legislation to address modern antitrust concerns.[89] Several of the recommendations involve regulating the ways that firms can use data. Two of the suggestions are structural separations and line of business restrictions to reduce conflicts of interest.[90] Structural separations would prevent dominant firms from using their intermediary role to gatekeep the data they collect—for example, the data Facebook collects from users that it shares with third parties. Line of business restrictions would prevent dominant firms from exploiting data from third parties to enter a new market.[91] Such proposals have historical precedent. For example, Congress in the 1890s imposed line of business restrictions on railroads by preventing them from "transporting any goods that they had produced or in which they held an interest."[92] At the time, Congress was concerned about common carrier railroads expanding into the coal market.[93] A congressional investigation found that railroads were undermining independent coal miners

85. *See id.* at ¶ 127.

86. *See* SUBCOMM. ON ANTITRUST, COM. AND ADMIN. L. OF THE COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS (2020) [hereinafter *House Report*].

87. *See id.* at 51-52.

88. *See id.* at 53.

89. *See id.* at 376-405.

90. *See id*. at 378.

91. *See id.* at 379.

92. *Id.* at 380.

93. *Id.*

by deprioritizing the transport of coal mined by smaller companies to give themselves an advantage.[94] In response, Congress passed a law that prohibited "railroads from transporting any goods that they had produced or in which they held an interest," thereby restricting the lines of business in which the railroads could participate.[95] This is analogous to the line of business restrictions proposed in the report. Just as Congress prevented railroads from entering and manipulating the coal industry, the proposal would prevent collectors of data from entering and manipulating new markets by misappropriating data it collects from third parties that rely on their platforms.

An additional suggestion in the report is a piece of legislation that would require data portability, which would allow social media users to move their personal data between social networks.[96] Such legislation would address the high switching costs that arise when data cannot easily be moved from one platform to the next. This suggestion also has historical precedent. It is similar to an existing FCC rule allowing telephone users to keep their phone numbers when switching carriers.[97]

Since Congress released the report, members of both the House and the Senate have introduced legislation focused on big tech regulation. Senator Amy Klobuchar, the lead Democrat on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, introduced the Competition and Antitrust Law Enforcement Reform Act in 2021.[98] The bill aims to strengthen prohibitions against anticompetitive mergers and prevent harmful

94. *Id*.

95. *Id*.

96. *See id.* at 386.

97. *See Porting: Keeping Your Phone Numbers When You Change Providers*, FED. COMM. COMM'N (Mar. 9, 2020), https://www.fcc.gov/consumers/guides/porting-keeping-your-phone-number-when-you-change-providers [https://perma.cc/Z3Z4-2JJY]. The FCC mandates local number portability, which allows a telephone user to keep their phone number even if they change carriers. *Id.* Data portability, as suggested by the House Report, would allow easy data transfer between websites, which would benefit both companies and individual internet users.

98. *See* Press Release, Amy Klobuchar, Senator, Senator Klobuchar Introduces Sweeping Bill to Promote Competition and Improve Antitrust Enforcement (Feb. 4, 2021), https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement [https://perma.cc/3ZXQ-PCAU]; Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. (2021).

dominant firm conduct, two areas in which tech companies have exploited data to engage in potentially illegal activities.[99] Senator Klobuchar also introduced the Social Media Privacy Protection and Consumer Rights Act of 2021.[100] The bipartisan bill, which includes provisions that mandate user control over data collection and user notification after data breaches,[101] has the potential to be the American GDPR.[102] Additionally, a violation of the bill's privacy requirements would be considered an unfair or deceptive act or practice under the FTC Act, which would give the FTC jurisdiction to sanction a social media company for inappropriately using consumers' data.[103] Although it does not affect US antitrust law, the Social Media Privacy and Consumer Rights Act would solidify the idea that data privacy is a consumer welfare concern that courts should be considering when engaging in an antitrust analysis.

Lawmakers have also introduced a series of bills that take aim at Facebook, Apple, Google, and Amazon[104]. The proposals, which do not name those four companies but purportedly only apply to those four companies,[105] tackle antitrust issues directly.[106] They include measures that would "make it easier to break up businesses that used their dominance in one area to get a stronghold in another, create new hurdles for acquisitions of

99. *See id.*

100. Social Media Privacy Protection and Consumer Rights Act of 2021, S. 1167, 117th Cong. (2021).

101. *See* Press Release, John Kennedy, Senator, Kennedy, Klobuchar Introduce Bill to Protect Privacy of Consumers' Online Data (May 20, 2021), https://www.kennedy.senate.gov/public/2021/5/kennedy-klobuchar-introduce-bill-to-protect-privacy-of-consumers-online-data [https://perma.cc/KVH3-4HJX].

102. *See, e.g.,* GDPR, *supra* note 27, art. 33 (requiring notification in case of data breach); GDPR, *supra* note 27, art. 6 (stating that consent is needed to process personal data).

103. Social Media Privacy Protection and Consumer Rights Act of 2021, S. 1167, 117th Cong. (2021).

104. *See* Kang, *supra* note 21; *see also* American Innovation and Choice Online Act, H.R. 3816, 117th Cong. (2021); Platform Competition and Opportunity Act of 2021, H.R. 3826, 117th Cong. (2021); Ending Platform Monopolies Act, H.R. 3825, 117th Cong. (2021); Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act, H.R. 3849, 117th Cong. (2021); Merger Filing Fee Modernization Act of 2021, H.R. 3843, 117th Cong. (2021). For more information about each bill, *see* JAY B. SYKES, CONG. RSCH. SERV., R46875, B 11 (Aug. 13, 2021).

105. *See* SYKES, *supra* note 104, at 3.

106. *See* Kang, *supra* note 21.

nascent rivals, and empower regulators with more funds to police companies."[107]

In sum, Congress passed US antitrust laws long before data and data privacy concerns were relevant market factors. While the DOJ and the FTC are beginning to consider data and data privacy in their antitrust investigations and enforcement actions, it is unclear if these arguments hold weight under the current laws. This is particularly true in enforcement actions to stop mergers. The House report states: "It is unclear whether the antitrust agencies are presently equipped to block anticompetitive mergers in digital markets."[108] Congress, however, is beginning to consider how it can update antitrust laws to better manage the concerns that arise in the digital economy, including data and data privacy.[109] Although it is unclear if legislation will be passed,[110] the proposals provide the United States with the opportunity to implement necessary change at a time when there is bipartisan support to update its antiquated laws.

B. Competition in the European Union: The Tale of Two Frameworks

While antitrust enforcement in the United States falls to every vertical and horizonal branch of its federalist government—Congress, two administrative agencies, federal courts, and state Attorneys General—the European Union's administrative law system consolidates their antitrust enforcement.[111] The EU's competition laws are found in Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU").[112] Though comparable, the Treaty differs from the Sherman Act in that it is

107. *Id.*

108. *House Report*, *supra* note 86, at 387.

109. *See* SYKES, *supra* note 104.

110. *See* Lauren Feiner, *2022 Will be the 'Do or Die' Moment for Congress to Take Action Against Big Tech*, CNBC (Dec. 31, 2021), https://www.cnbc.com/2021/12/31/2022-will-be-the-do-or-die-moment-for-congress-to-take-action-against-big-tech.html [https://perma.cc/K5EF-ZFVU].

111. James Keyte, *Why the Atlantic Divide on Monopoly/Dominance Law and Enforcement is So Difficult to Bridge*, ANTITRUST INST. (2018), https://www.antitrustinstitute.org/wp-content/uploads/2018/12/fall18-keyte.pdf [https://perma.cc/WXU3-VLRM].

112. *See* EUROPEAN COMMISSION, https://ec.europa.eu/competition/antitrust/overview_en.html [https://perma.cc/W76B-J98B] (last visited May 3, 2021).

more specific in some areas and broader in others.[113] Article 101 parallels Section 1 of the Sherman Act, prohibiting agreements that restrict trade.[114] Article 102 is akin to Section 2 of the Sherman Act, but outlaws holding a "dominant position" instead of proscribing "monopolization."[115] However, Articles 101 and 102 proscribe specific conduct,[116] while the Sherman Act uses the unspecific word "every."[117] Further, the "dominant position" prohibited in Article 102 encompasses more than the American understanding of a monopoly.[118] The European Commission ("EC"), the executive body of the European Union, is the "investigator, prosecutor, and decision maker" of competition enforcement,[119] which includes enforcement under Articles 101 and 102 and review of mergers and acquisitions.[120] Unlike the US FTC and DOJ, the EC does not need to go to court to impose penalties or other remedies[121] and is also given broad discretion to make policy decisions.[122]

The EC differs from the United States in its approach to handling competition within the digital economy. Up until now, the United States has tried to handle modern problems with decades-old laws and enforcement mechanisms. The European Union, by contrast, is less reticent about tackling the issues explicitly and head-on. The EC has a competition agency that is headed by Margrethe Vestager, the "Executive Vice-President for A Europe Fit for the Digital Age and Competition."[123] Vestager's responsibilities include "[s]trengthening the enforcement of, and reviewing, EU competition rules."[124] She does more than approve mergers and

113. *See* Keyte, *supra* note 111.
114. TFEU, s*upra* note, 23, art. 101.
115. TFEU, *supra* note 23, art. 102.
116. *See* TFEU, *supra* note 23, arts. 101-102.
117. 15 U.S.C. § 1
118. *Id.*
119. Keyte, *supra* note 111.
120. *See* Robert Snelders & Michele Piergiovanni, *European Union*, CLEARY GOTTLIEB (July 30, 2004), https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/publication-pdfs/european-union-merger-control.pdf [https://perma.cc/4R7N-XWSB].
121. Keyte, *supra* note 111.
122. *See id.*
123. *See Margrethe Vestager*, EUR. COMM'N, https://ec.europa.eu/commission/commissioners/2019-2024/vestager_en [https://perma.cc/48W6-5F7T] (last visited May 4, 2021). In 2019, Vestager's job title was changed from "Commissioner of Competition" to explicitly include digital considerations.
124. *Id.*

break up monopolies—which are two tasks that a competition enforcer often undertakes. Her job also encompasses "[c]oordinating work on a European strategy on data" and working on the new Digital Services Act.[125]

Data concerns are beginning to influence Europe's antitrust enforcement. In a March 2021 speech entitled "Competition in a Digital Economy," Vestager said that "the privacy of millions of people is at stake" if states do not regulate technology monopolies.[126] This commitment to privacy played an important role in the European Union approving the Google/Fitbit merger. One of the conditions of the merger was that Google promised "not to use Fitbit data for advertising purposes in Europe, and to store such data separate from any other Google data used in ads."[127] The EC has also launched several investigations into Facebook's use of data to engage in anticompetitive conduct,[128] and has not shied away from brining formal charges in the big tech space.[129] Europe, however, is learning that there are still many unanswered questions about the relationship between competition and data privacy.

In fact, the European Union arguably has a more complicated road ahead than the United States. While the United States is working within an old framework, Europe must balance its competition regulation and enforcement with the GDPR.[130] Passed in 2018, the GDPR has been dubbed the "Magna Carta of data protection."[131] The regulation does not touch on competition directly, but competition law and the GDPR are clearly

125. *Id.*

126. Margrethe Vestager, Exec. Vice President, A Eur. Fit for the Digital Age, Competition in a Digital Age, Address at European Internet Forum (Mar. 17, 2021), https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-digital-age_en [https://perma.cc/P3S4-G5C7].

127. Schechner, *supra* note 78.

128. Schechner et al., *supra* note 30; *see also*, *infra* Section IV.B.

129. For example, the EC has formally charged Amazon for allegedly exploiting data for improper benefits. *See* Alina Selyukh, *Amazon Faces Antitrust Charges from European Regulators*, NPR (Nov. 10, 2020, 8:56 AM), https://www.npr.org/2020/11/10/879643610/amazon-faces-antitrust-charges-from-european-regulators [https://perma.cc/SC4Y-3JWH].

130. *See* GDPR, *supra* note 27.

131. Michal S. Gal & Oshrit Aviv, *The Competitive Effects of the GDPR*, 16 J. COMPETITION L. & ECON. 349, 349 (2020).

complementary. For example, the GDPR includes the right to data portability.[132] Data portability, which was a factor in the US House report,[133] is considered a procompetitive measure because it theoretically empowers consumers to choose among competing providers by lowering switching costs.[134] In 2019, the EC published a report called "Competition Policy for the Digital Era" ("EU Report").[135] The report includes a chapter on data, which tries to grapple with the relationship between the two distinct, but interconnected, legal fields. The report clarifies when data privacy concerns trigger competition laws.[136] For example, data sharing triggers Article 101 when it amounts to exclusionary conduct.[137] While data sharing can often result in efficiencies in the market,[138] it can become anticompetitive when, for example, companies share "commercially sensitive information such as costs or prices," because such information sharing can lead to collusion.[139] Data sharing can also be anticompetitive if it dissuades competitors from improving their own data collection practices.[140] Additionally, the EU Report provides a framework for when a dominant firm has an affirmative duty to grant access to data under Article 102.[141]

However, the EU Report also acknowledges the tension between competition laws and the GDPR. It points out that while access to data may be required under Article 102, it is subject to limits found in the privacy law.[142] It also acknowledges that the GDPR is new and yet to be tested in the courts; therefore, there are still open questions about how it interplays with competition

132. *See* W. Gregory Voss, *European Union Data Privacy Law Reform: General Data Protection Regulation, Privacy Shield, and the Right to Delisting*, 72 BUS. LAW. 221, 226 (2017).

133. *See House Report, supra* note 86, at 384.

134. *See Data Portability, Interoperability and Competition*, OECD, https://www.oecd.org/daf/competition/data-portability-interoperability-and-competition.htm [https://perma.cc/SPR7-SSJK].

135. JACQUES CRÉMER ET AL., COMPETITION POLICY FOR THE DIGITAL ERA (European Union, 2019).

136. *See id.* at 91.

137. *See id.* at 94.

138. *See id.* at 94-96.

139. *Id.* at 96.

140. *Id.* at 97.

141. *See id.* at 98.

142. *See id.* at 108.

law.[143] For example, the GDPR requires users to affirmatively consent to a company collecting their data,[144] but there is currently an outstanding question about whether existence of a dominant position is relevant for assessing the validity of consent.[145]

Over the last several years, the European Union has been particularly proactive in its approach to regulations in the digital age. Through the GDPR, it has codified its commitment to digital privacy.[146] It has also acknowledged that, while data concerns and competition are often complements, there are areas where data privacy and competition regulation are incompatible. The EC has also proposed two pieces of legislation, the Digital Markets Act and the Digital Services Act, which would function jointly with competition and privacy law to effectively regulate large tech companies.[147] In summary, Europe seems to be creating a comprehensive regulatory scheme fit for the digital economy, but there will likely be bumps in the road ahead.

C. Competition in Germany: Little Yet Fierce

Germany is a member of the European Union and is therefore subject to EU competition and privacy schemes. However, it is also forging on its own path when it comes to regulating competition in the digital age. The German Federal Cartel Office ("FCO"), *Bundeskartellamt*, recently amended the German Competition Act[148] by passing the Digital Competition Act.[149] The reform aims

143. *See id.* at 77.

144. *See id.* at 79.

145. *See* Christopher Ritzer & Tim Schaper, *Germany's Federal Supreme Court Provisionally Confirms Facebook's Use of Personal Data Is Alleged Abuse of Dominant Market Position*, DATA PROTECTION REPORT (July 16. 2020), https://www.dataprotectionreport.com/2020/07/germanys-federal-supreme-court-provisionally-confirms-facebooks-use-of-personal-data-is-alleged-abuse-of-dominant-market-position/ [https://perma.cc/Y8V3-QVWD].

146. *See* GDPR, *supra* note 27.

147. *See* Bart Van den Brande, *The Future Digital Services Act and Digital Markets Act in a Nutshell*, LEXOLOGY (Jan. 4, 2021), https://www.lexology.com/library/detail.aspx?g=5d279269-9218-48dd-b33b-42f01676369e [https://perma.cc/LB6R-2FJH].

148. Gesetz gegen Wettbewerbsbeschränkungen [GWB] [Act Against Restrains of Competition], June 26, 2013, BUNDESGESETZBLATT [BGBL I] (Ger.).

149. Gesetz gegen Wettbewerbsbeschränkungen [GWB] [Act to Amend the Competition Act to Achieve a Focused, Proactive, and Digital Competition Law 4.0 and Other Provisions], Jan. 19, 2021, BUNDESGESETZBLATT [BGBL I] (Ger.).

to end abuse of dominant market power by improving regulation of digital platforms.[150] The original Competition Act defined "dominant market power" as having at least forty percent of market share.[151] The Digital Competition Act adds a new Section 19(a) to the Competition Act, which would allow the FCO to designate a company that holds a dominant market position as having "paramount significance for competition across markets."[152] If the FCO decides that a company has "paramount significance for competition across markets," it has the power to impose certain restrictions.[153] For example, FCO may prohibit a company that has paramount significance from favoring its own products, interfering with data portability, or product interoperability among competitors.[154] Data plays a role in how the FCO decides if a company has paramount significance and it is relevant in some of the restrictions that the Office could impose. In terms of determining paramount significance, the FCO can consider the dominant company's access to data relevant to competition.[155] As to restrictions, the FCO could prohibit the dominant company from leveraging data to create barriers to entry into a market or restricting the portability of data.[156]

The Digital Competition Act also addresses access to data directly. Like in the United States, obtaining a dominant position in Germany is not unlawful unless the company abuses that position.[157] Under the Essential Facilities Doctrine,[158] it may be an abuse to refuse access to a network or other infrastructure that is

150. *See* Jenny Gesley, *Germany: New Digital Competition Act Expands Abilities of Competition Authorities to Regulate Abuse of Dominant Market Positions*, LIBR. OF CONG. (Feb. 23, 2021), https://www.loc.gov/law/foreign-news/article/germany-new-digital-competition-act-expands-abilities-of-competition-authorities-to-regulate-abuse-of-dominant-market-positions/ [https://perma.cc/CN8D-D6GE].

151. *Id.*

152. *Id.*

153. *Id.*

154. For a full list of restrictions, see *id.*

155. *Id.*

156. *Id.*

157. *See* Jones Day, *Germany Adopts New Competition Rules for Tech Platforms*, JONES DAY (Jan. 2021), https://www.jonesday.com/en/insights/2021/01/germany-adopts-new-competition-rules [https://perma.cc/G627-43T4].

158. First developed in the United States in 1912, and later codified in European law in the EC Treaty, the Essential Facilities Doctrine "imposes on owners of essential facilities a duty to deal with competitors." *See* Sébastien J. Evrard, *Essential Facilities in the European Union: Bronner and Beyond*, 10 COLUM. J. EUR. L. 491 (2004).

necessary to compete.[159] The Digital Competition Act characterizes data as an essential facility, making it an unlawful abuse of a dominant position to refuse to share data.[160] The amended Act also includes a right to access data from companies with "relative market power," which means that a company without dominant market power may be obligated to share data with another company that is dependent on its data.[161] Andreas Mundt, the President of the FCO, has said that explicitly adding data to the Essential Facilities Doctrine is important, but "not revolutionary," since the European Essential Facilities Doctrine presumably does not exclude data.[162] However, the EU Report suggests that access to data cases should be analyzed outside of the established framework of the Essential Facilities Doctrine.[163] While the EC agrees that access to data is important in regulating competition, the two jurisdictions will likely split in their analysis of when data access is required.

Data concerns have also been relevant in Germany's recent enforcement actions. In 2019, the FCO launched an investigation against Facebook, finding that the company was abusing its dominant position based on how it collects, merges, and uses data from Facebook-owned services and third-party websites.[164] More recently, a group of German media and advertising companies filed a complaint with the FCO against Apple, again highlighting the tension between competition and privacy.[165] The complaint alleges that Apple's new privacy update[166] is anticompetitive because it

159. *See* Day, *supra* note 157.

160. *See* Oliver Fleischmann et al., *New Antitrust Rules for the Digital Economy: German "Digitalization Act" Nears the Finish Line*, JD SUPRA (Dec. 14, 2020), https://www.jdsupra.com/legalnews/new-antitrust-rules-for-the-digital-53319/ [https://perma.cc/PK8C-WH7P].

161. *See id.*

162. *See ABA Report*, *supra* note 16, at 102.

163. *See* CRÉMER ET AL., *supra* note 135, at 98.

164. *See Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources*, BUNDESKARTELLAMT (July 2, 2019) https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html [https://perma.cc/RZ89-WWK3]; *see also infra* Section IV.C.

165. *See* Jack Denton, *Apple Slapped with Antitrust Complaint in Germany over New iPhone Privacy Settings*, MARKETWATCH (Apr. 26, 2021, 1:00 PM), https://www.marketwatch.com/story/apple-slapped-with-antitrust-complaint-in-germany-over-new-iphone-privacy-settings-11619456399 [https://perma.cc/7BBK-MQYY].

166. *See supra* Part I.

prevents competitors from processing commercially relevant data.[167] Rejecting this claim, Apple invoked the GDPR, which holds that data privacy is a human right.[168] The FCO has since initiated a formal proceeding against Apple to determine whether the company is of paramount significance.[169] If the FCO finds that Apple is of paramount significance, it will have authority to impose restrictions on the company.[170]

III. FACEBOOK: A CASE STUDY

A. FTC Lawsuit

Facebook provides insight into the future of data-driven competition enforcement in the United States, the European Union, and Germany. All three jurisdictions have independently initiated antitrust actions against the company that implicate its data practices. Given the varying laws in the jurisdictions, the results of these actions are likely to differ.

In the United States, the complaint by the FTC highlighted three main ways in which Facebook's allegedly anticompetitive conduct implicates data and data privacy concerns: using data to make decisions about acquisitions; acquiring competitors, thereby depriving social media users of the possibility of finding an alternative social network that meets their data privacy needs; and withholding user data from third parties as a condition to a non-compete.[171]

First, the complaint discusses Facebook's 2013 acquisition of Onavo, a user surveillance company that tracked users' online activity.[172] Facebook used the data from Onavo to track the growth

167. *See German Business Groups File Complaint Over Apple Privacy Settings*, REUTERS (Apr. 26, 2021, 5:22 PM), https://www.reuters.com/technology/german-business-groups-file-complaint-over-apple-privacy-settings-2021-04-26/.

168. *See id.*

169. *Proceeding Against Apple Based on New Rules for Large Digital Companies (Section 19a(1) GWB) – Bundeskartellamt Examines Apple's Significance for Competition Across Markets,* BUNDESKARTELLAMT (June 21, 2021), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/21_06_2021_Apple.html;jsessionid=7B9230A197564073881C648DC3569D59.1_cid378 [https://perma.cc/2DLA-5DLM]

170. *See* Gesley, *supra* note 150.

171. *See FTC Complaint, supra* note 30.

172. *See id.* ¶ 74.

and popularity of other apps, thereby helping Facebook "'make strategic acquisitions'" of potential competitors.[173] Facebook shut down Onavo in 2019, but still uses data "to track and evaluate potential competitive threats."[174] Next, the complaint discusses Facebook's 2012 acquisition of Instagram,[175] a nascent competitor,[176] and its 2014 acquisition of WhatsApp,[177] a company that was particularly successful at the time in Asia and Europe and had begun to gain traction in the United States.[178] The complaint alleges that Facebook's acquisition of these competitors "deprives users of the benefits of competition,"[179] including choice in privacy protection options.[180] WhatsApp in particular had a "strong focus on the protection of user privacy [that] would offer a distinctively valuable option for many users" had it not been acquired by Facebook.[181] Finally, the complaint discusses the conditions that Facebook imposed on third-party app developers in order to gain access to valuable application programming interfaces ("APIs").[182] APIs provide the third parties with critical user data, such as the user's friend list.[183] Access to this data could be integral to an app's success, but Facebook has limited access to only those app developers that agree to neither compete with Facebook nor promote competitors of Facebook.[184]

In June 2021, the United States District Court for the District of Columbia granted Facebook's motion to dismiss but invited the FTC to amend its complaint.[185] In its written opinion, the court stated that it "does not agree with all of Facebook's contentions," but agreed that the FTC did not adequately establish in its complaint that Facebook actually had monopoly power in the

173. *Id.* ¶ 75.
174. *Id.*
175. *See id.* ¶ 95
176. *See id.* ¶ 91.
177. *See id.* ¶ 121.
178. *See id.* ¶ 114.
179. *Id.* ¶ 105.
180. *See id.* ¶ 42.
181. *Id.* ¶ 127.
182. *See id.* ¶ 22.
183. *See id.* ¶ 130.
184. *See id.* ¶ 136.
185. *See FTC v. Facebook, Inc.*, No. 20-3590 JEB, 2021 WL 26433627, at *1 (D.C. Cir. June 28, 2021).

relevant market.[186] The FTC had properly defined the market—Personal Social Networking Services[187]—but failed to establish Facebook's market share.[188] In its analysis, the court underscored the challenges of defining market share in a data-driven industry.[189]

Traditionally, one way of calculating market share is by considering a company's total annual revenue.[190] However, total revenue does not accurately represent market share when the revenue is earned in a different market than the market in which the anticompetitive conduct is alleged. Here, Facebook earns its money through data-driven digital advertising. Since the company is not *directly* profiting from the users of its Personal Social Networking Services—meaning that the users are not paying for access to the service—its annual revenue is not the correct metric to determine its share of the Personal Social Networking Services market.[191] Hence, Facebook's revenue in the digital advertising market does not represent its share of the Personal Social Networking Services market.

The FTC did not directly address this revenue issue in its amended complaint, but it did consider Facebook's data practices. The FTC contended that Facebook's use and misuse of personal data demonstrates its market power.[192] The complaint points to two previous Consent Orders that Facebook had agreed to after the FTC charged the company with engaging in user privacy abuses, including the Cambridge Analytica scandal.[193] According to the FTC, these incidents prove that Facebook has market power given its "ability to harm users by decreasing product quality, without losing significant user engagement."[194] The court has not yet accepted the FTC's theory that data privacy is an appropriate consumer welfare concern to consider in an antitrust analysis, but the outcome will be significant to the ongoing debate.

186. *Id.* at *1.
187. *See id.* at *12.
188. *See id.*
189. *See id.* at *13.
190. *See id.*
191. *See id.*
192. *See* Complaint, Fed. Trade Comm'n v. Facebook, Inc. (D.C. Cir. 2020) at ¶ 206.
193. *Id.* ¶ 205-06.
194. *Id.* ¶ 206.

B. European Commission Facebook Investigations

Facebook is also the subject of antitrust investigations in the European Union. In 2019, the EC launched a probe into Facebook seeking documents related to the company's alleged leveraging of user data to stifle competition.[195] This preliminary investigation, which implicated the Onavo acquisition referenced in the FTC complaint, has not currently led to any official action against the company.[196] More recently, in 2021 the EC opened another antitrust investigation against Facebook involving its use of data collected from advertisers.[197] The EC is considering whether Facebook has an unfair competitive advantage in the online classified ads sector—a place where Facebook competes with companies from which it collects data.[198] The 2021 investigation is based on a theory that starkly differs from US antitrust laws: whether Facebook's actions are harming companies in the online classified ads sector.[199] There is no indication, however, that Facebook has a monopoly in this sector. In the United States, to make a successful claim under Section 2 of the Sherman Act, the defendant company must have monopoly power in the industry that is allegedly being harmed.[200] Therefore, even if the EC finds that Facebook committed actionable harm, a similar investigation likely would not lead to an antitrust action in the United States, unless the government can establish that Facebook has monopoly power in the online classified ads market.

C. German Facebook Action

One of the first actions that Germany has taken under its new Digital Competition Act is an investigation into the relationship between Oculus, Facebook's virtual reality products, and its social

195. Schechner et al., *supra* note 30.

196. *Id.*

197. Press Release, Eur. Comm'n, Antitrust: Commission Opens Investigation into Possible Anticompetitive Conduct of Facebook (June 4, 2021), https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2848 [https://perma.cc/8PCD-VHP8].

198. *Id.*

199. *Id.*

200. *See Competition and Monopoly, supra* note 48.

networking sites.[201] While this investigation does not necessary implicate data privacy concerns on its face, Facebook privacy practices have been condemned by the FCO under the general German Competition Act.[202] The FCO action against Facebook, which found that Facebook is using its data practices to abuse its dominant position, is still ongoing.[203] In 2019, the FCO imposed restrictions on how Facebook may process data, allowing the company to continue to collect it, but mandating that Facebook not assign the data to an individual user's account unless it receives the user's consent.[204] Andrea Mundt, President of the FCO, said that the decision is the first step toward a future where "Facebook will no longer be allowed to force its users to agree to the practically unrestricted collection and assigning of non-Facebook data to their Facebook user accounts."[205]

While German competition laws are similar to US antitrust laws in certain respects, the FCO action looks very different from the FTC lawsuit against Facebook. In both Germany and the United States, a company must have a dominant share of the relevant market to be held liable for anticompetitive conduct, but the measurement system is different. In determining that Facebook has a dominant position in the social networking market, the FCO looked at the number of Facebook's daily and monthly users, and found that Facebook has a market share of more than ninety-five percent of daily active users and more than eighty percent of monthly active users.[206] In the FTC lawsuit against Facebook, the United States District Court decided that "[p]ercent of 'daily users [or] monthly users' of PSN services" was an inaccurate measurement of market share.[207] Therefore, if the United States

201. Matthias Inverardi, *German Cartel Office Extends Probe of Ties Between Facebook and Oculus*, REUTERS, (Jan. 28, 2021), https://www.reuters.com/technology/german-cartel-office-extends-probe-ties-between-facebook-oculus-2021-01-28/ [https://perma.cc/GWR2-K3AK].

202. *See* German Facebook Enforcement, *supra* note 30.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *FTC v. Facebook,* 2021 WL 26433627 at *13. The court stated that the percent of users of PSN services was an inaccurate measure of market share because that number could misstate "any one firm's market share depending on the various proportions of users who have accounts of multiple services, not to mention how often users visit each service and for how long."

judicial system does eventually determine that Facebook has market power, it will likely do so using a different measurement than the one used in Germany.

The FCO action also differs from the FTC lawsuit in how the leading agencies defined the harm. In Germany, the FCO determined that Facebook's data practice "constitutes an abuse of a dominant position."[208] According to the FCO, the actionable harm was that users suffered due to Facebook's collection of their data.[209] On the other hand, the FTC focuses on harm to competitors.[210] In the eyes of the FTC, Facebook's primary transgressions were predatory business practices that ultimately deprived users of meaningful choice in the market.[211] While data practices were mentioned in the FTC complaint, their relevance was merely tangential. Both German and U.S. regulatory agencies have accused Facebook of anticompetitive conduct,[212] but the company will like use two very different strategies in the two jurisdictions considering the unique nature of both complaints.

After the FCO ruling, Facebook filed a timely appeal questioning the legality of the data restrictions.[213] While that lawsuit progresses, the restrictions remain in effect.[214] Germany's Higher Regional Court expressed concern with Facebook's data collection practice but announced that it will receive advice from the European Court of Justice ("ECJ") before issuing a decision on the restriction's legality.[215] Specifically, the German court has posed seven questions to the ECJ about the application and content

208. German Facebook Enforcement, *supra* note 30.

209. *See id.*

210. *FTC Complaint*, *supra* note 30, at ¶¶ 77-79.

211. *Id.*

212. *See supra* Section III.A, Section III.C.

213. *See* Inverardi, *surpa* note 33.

214. *See* Christopher Ritzer & Tim Schaper, *Germany's Federal Supreme Court Provisionally Confirms Facebook's Use of Personal Data Is Alleged Abuse of Dominant Market Position*, DATA PROTECTION REPORT (July 16, 2020), https://www.dataprotectionreport.com/2020/07/germanys-federal-supreme-court-provisionally-confirms-facebooks-use-of-personal-data-is-alleged-abuse-of-dominant-market-position/ [https://perma.cc/8UMT-Z8C3].

215. *See id.*

of the GDPR,[216] which Germany has adopted.[217] The FCO action has the potential to be groundbreaking, but its fate is beyond the German government's control.

IV. THE FUTURE OF BIG TECH COMPETITION REGULATION

As the world navigates competition regulation in the digital economy, there is no one path forward. However, Europe is somewhat more equipped than the United States to take on big tech's monopolistic practices. One reason why is because the European Union can better address actions that have harmed or are likely to harm a secondary market. In the United States, for most antitrust actions to be successful, the plaintiff must establish a common relevant market shared between the parties.[218] This requirement prevents US antitrust enforcers from challenging a lot of potentially harmful conduct in the digital economy. For example, for a US agency to be successful in an antitrust action against Facebook, it must prove, in part, that Facebook's actions harmed other Personal Social Networking Services. A court will not care how Facebook's actions harmed companies in a secondary market, like the digital advertising sector, unless the government can prove that Facebook also has a monopoly in that market.

The limitations of the US approach to antitrust actions are demonstrated by both the Google/Fitbit merger[219] and the EC's investigation into Facebook's data practices in the classified ads sector.[220] On its face, the Google/Fitbit merger is harmless because the two companies do not occupy the same market. However, the merger has the potential to be anticompetitive because it provides Google with millions of additional datapoints that it can use to

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216. *See* Reemt Matthiesen & Björn Herbers, *ECJ to Issue Preliminary Ruling on German FCO-Facebook Case*, LEXOLOGY (Apr. 18, 2021), https://www.lexology.com/library/detail.aspx?g=e4e57715-55e6-4559-ae92-3ec63669a6a0 [https://perma.cc/5DWS-NP3J]

217. *See* Kurth, *supra* note 29.

218. *See* Jonathan Gleklen, *Comments of the American Bar Association Antitrust Law Section and International Law Section on the European Commission's Consultation on the Draft Revised Regulation on Vertical Agreements and Vertical Guidelines,* A.B.A. ANTITRUST L. SECTION (Sept. 16, 2021), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/september-2021/comments-eu-91621.pdf [https://perma.cc/BEU7-NAA7].

219. *See infra* Section II.A.2.

220. *See infra* Section III.B.

solidify its monopoly in the search advertising market. The EC addressed this issue by conditioning the merger, forbidding Google from accessing the Fitbit data for advertising purposes. If the United States does eventually decide to act against the merger, the judicial system will be unable to step in unless the DOJ can establish a relevant market between the two companies. Since the two companies do not share market power within a common market, this is unlikely.[221] The same could be said about the EC's probe into Facebook's data practices in the classified ads sector. If the probe does eventually result in sanctions, the United States is unlikely to follow Europe's lead unless it can define a relevant market or prove direct harm to the online classified ads sector.

Europe also has an advantage over the United States because it is decisive about data. European competition enforcers can confidently use data privacy as a sword against big tech companies. In the United States, it is still up for debate whether data privacy concerns matter, and if so, in what capacity.[222] While individual states have passed data privacy laws,[223] and private companies like Apple have implemented data privacy policies,[224] they have no bearing on the outcome of federal antitrust actions.

Ultimately, EU regulations of competition in the digital economy are not perfect. For example, there is tension among competition laws, the GDPR, and the laws of individual Member States, such as Germany. However, the United States can learn from Europe as it attempts to regulate the tech industry. First, like Europe, the United States needs a mechanism to address the harm that a monopolist inflicts onto a secondary market. Second, the United States needs a federal response to data privacy concerns. The DOJ and the FTC are unlikely to stop acting against companies like Facebook and Google, but those actions cannot go far within the current US antitrust framework.

The pieces of legislation that were brought in the House of Representatives and the Senate in 2021 could address these

221. *See infra* Section II.A.2.

222. *See* Sydney Wolofsky, *What's Your Privacy Worth on the Global Tech Market? Weighing the Cost of Protecting Consumer Data Against the Risk that New Legislation May Stifle Competition and Innovation During this Global, Technological Revolution,* 44 FORDHAM INT'L L. J. 1149 (2021).

223. *See, e.g.,* California Consumer Privacy Act, 2018 Cal. Legis. Serv. Ch. 55 (A.B. 375) (WEST).

224. *See infra* Part I.

concerns.[225] First, the Competition and Antitrust Law Enforcement Reform Act would allow enforcers to better protect secondary markets by removing the current requirement that plaintiffs must define a relevant market to establish liability.[226] Such a change would differently impact ongoing antitrust actions, like the probe into the Google/Fitbit merger. As law, this provision would allow enforcers to stop the Google/Fitbit merger using a similar theory implemented by the European competition enforcers.[227] Under this new regime, the DOJ could step in to stop Google from exploiting Fitbit user data for advertising purposes without defining a common relevant market.

The second Senate bill, the Social Media Privacy and Consumer Rights Act, would provide a federal response to the data privacy consumer welfare debate.[228] Although it does not address antitrust concerns directly, if passed, it would codify the contention that data privacy is a consumer welfare concern that should be considered when analyzing harm to consumers in an antitrust action. Such a measure would bring United States antitrust enforcement more in line with antitrust enforcement in the European Union.

The proposed legislation would do more than just open the door to antitrust actions in different markets and codify data privacy as a consumer welfare concern. For example, the proposed bills would better regulate mergers undertaken by big tech firms, require data portability, impose structural separation, and prevent dominant firms from engaging in exclusionary conduct.[229] The legislation addresses many of the concerns found in the report published by the House of Representatives' Judiciary Committee and would affect both ongoing and future antitrust actions. Right now, America is ill-equipped to take on big tech, but if Congress can act, its antitrust regime can take important steps in the right direction.

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225. *See infra* Part II.A.2.

226. *See* Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. (2021).

227. *See* Schechner et al., *supra* note 30.

228. *See* Social Media Privacy Protection and Consumer Rights Act of 2021, S. Res. 1667, 117th Cong. § 1667 (2021).

229. *See* SYKES, *supra* note 104.

V. CONCLUSION

It is indisputable that data and data privacy will play a large role in competition enforcement in the coming years. While government officials and legal scholars have been exploring the relationship between the two fields in a mostly theoretical sense up to now, enforcement agencies, courts, and legislative bodies around the world are beginning to test the bounds in practice. US enforcement agencies have implicated data and data privacy concerns in its antitrust actions, but due to the country's century-old antitrust laws, it is unclear whether data-driven arguments will hold up in court. In response to these concerns, Congress has dedicated a significant amount of time in the new decade trying to gain a better understanding of the digital economy with the goal of passing legislation that formally addresses the challenges posed by big tech. Legislation was introduced in the Senate, but so far, there has been no further movement.

The European Union, on the other hand, does not have to worry that its laws are too old to stand up to the current moment. If the Digital Markets Act and the Digital Services Act pass, Europe will be equipped with brand new laws specifically designed to regulate competition within the tech sector. However, the bloc must strike a delicate balance between its competition laws and its privacy laws. The GDPR solidifies data privacy as a human right, but as the EC is learning, prioritizing privacy can sometimes interfere with competitive markets. Germany, a member of the EU, is taking on big tech within its own borders with its own newly amended competition laws and its own enforcement actions, but it is still ultimately reliant on the EC.

The United States, European Union, and Germany are all currently testing out their big data antitrust strategies against a common opponent: Facebook. While all three jurisdictions have expressed concern over Facebook's data practices, their approaches to addressing the perceived problems vary. In their actions against Facebook, the European Union and United States have both focused their attention on the harm that Facebook's data practices are causing to competitors. Germany, on the other hand, sanctioned Facebook based on harms to consumers directly. However, it is still uncertain whether Germany's action against Facebook is consistent with the GDPR. Additionally, the actions in the European Union and Germany concern Facebook's data

practices directly, while in the US FTC complaint, data issues are merely tangential.

Finally, going forward, neither the United States nor the European Union has a perfect antitrust framework. However, if the United States wants to succeed in its current and future battles against big tech, it can learn a couple things from Europe. First, the United States needs to adjust its antitrust laws so that it can sanction a monopolist for harms that affect a secondary market. Second, the United States needs a federal policy to regulate data privacy. Pending legislation in the United States House of Representatives and the Senate would directly address these issues and more. Whether it is against Facebook, Google, or a company that currently only exists in someone's imagination, the United States is bound to have legal fights ahead of it. It is important that it equips itself with the proper tools.