

Origins of Analysis of Intersection of Privacy & Competition Law

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Exploring the Intersection of Data Protection
& Competition Law
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Overview

- Swire background
- Role of privacy in competition law: **non-price & quality**
 - 2007 FTC testimony
 - Today
- **Do Not Track** blocked on antitrust grounds
- **Data portability** as only partly about competition law, even though part of GDPR
 - 2013 law review article
 - New article in preparation

Swire Background

- Holder Chair of Law & Ethics, Georgia Tech Scheller College of Business
 - Senior Fellow, FPF, since 2011
 - Senior Counsel, Alston & Bird LLC
- 1998 book: “**None of Your Business**: World Data Flows, Electronic Commerce, and the European Privacy Directive”
- Clinton Administration **Chief Counselor for Privacy**, in OMB, 1999-2001
 - First person to have US government-wide privacy responsibility
 - HIPAA, GLBA, Safe Harbor, etc.

Swire background

- During 2000's, taught courses including **privacy, cybersecurity, and antitrust law**
- 2009-2010, Special Assistant to Pres. Obama for **Economic Policy** (Larry Summers)
- Co-chair W3C standards process for **Do Not Track**, 2012-13
- Georgia Tech in 2013
 - NSA Review Group after Snowden
 - **IAPP textbook** to be certified as US Privacy Professional – Private Sector
 - Current projects, including **data portability** and as Research Director of the Cross-Border Data Forum

Swire 2007 FTC Testimony on Privacy & Antitrust: <https://tinyurl.com/w6s2k7n>

- Proposed merger of Google (search ads) and DoubleClick (display ads) - FTC approved merger, saying different “markets”
- Previous writings by others: use **privacy-based arguments** to affect a merger or other antitrust analysis
- Testimony: important role for considering **privacy within existing antitrust law framework**
- “Privacy harms can reduce **consumer welfare**, which is a principal goal of modern antitrust analysis”
- “Privacy harms can lead to a reduction in the **quality** of a good or service, which is a standard category of harm that results from market power.”
- Focus on **non-price** aspects of competition

Makan Delrahim, Assistant AG for Antitrust, US Department of Justice

- Speeches June, November 2019
- It is well-settled, however, that competition has price and **non-price dimensions.**”
- “Although **privacy** fits **primarily** within the realm of **consumer protection law**, it would be a grave mistake to believe that privacy concerns can never play a role in antitrust analysis.”
- “Without competition, a dominant firm can more easily **reduce quality** — **such as by decreasing privacy protections** — without losing a significant number of users.”
- Previously had some **FTC** recognition of this possibility
 - Commissioner Harbour, 2007, Google/DoubleClick opinion

Do Not Track, Standards & Antitrust Law

- Do Not Track proposed standard in World Wide Web Consortium
- We had tentative agreement for May 2012 meeting
 - Privacy groups, browsers, advertising groups
 - Basic idea – **browsers would implement DNT standard**, allowing advertising for 1st and 3d parties who agreed to the standard
 - It seemed like a **privacy win** – user choice, in browser
- FTC expressed **antitrust concerns** that standard would reduce privacy competition in browsers
 - They would state that publicly if we announced the deal
 - **We argued**, privately, that we were implementing precisely the privacy protection the FTC had supported, **user welfare**
 - **Lesson – antitrust risk in standards process**

2013 Article on Data Portability, Data Protection, and Competition

- Swire & Lagos, 72 Maryland Law Review 335 (2013)
- EU competition law
 - Article 18 GDPR Right to Data Portability (RDP) explained as a **competition measure**, e.g., to reduce Facebook market power
 - **But**, it also applies to a **small software company**, with small market share
 - Need a different rationale for that: **autonomy/user control**
 - **Per se rule**, not rule of reason – **benefits/efficiencies excluded**
- EU data protection law
 - Fundamental right to **security of personal data**– but unauthorized hacker can transfer all data “without hindrance”
 - **Lack principled test** for when to allow portability vs. protect data security

Data Portability – Paper for March 2020

- “A Framework for Assessing the **Privacy, Security, Autonomy, and Competition Issues** in Data Portability and Inter-Operability”
 - To date, remarkable lack of guidance about:
 - When to **open data**:
 - **Portability**: ”without hindrance”
 - **Autonomy** – control by the data subject, even if data holder has no market power
 - When to **close data**
 - **Privacy**: Cambridge Analytica, and risk of re-identification of de-identified data
 - **Security**: unauthorized user; authorized user sends to insecure recipient

Conclusion: Lessons from Earlier Rounds on Privacy & Competition

- Privacy as a non-price, quality aspect of competition
 - Possible **antitrust enforcement based on privacy**
- Privacy standards can be subject to antitrust concerns
 - Possible **antitrust objection to privacy protections**
 - **Beyond standards**, actions taken for privacy & security may raise competition concerns (DoH)
- Privacy & cybersecurity can be contrary to data portability
 - **Need framework to assess privacy, security, and antitrust for inter-operability of data**
- These issues are pressing today when **data is a key competitive advantage, and also a key privacy risk**