

# ANTITRUST CONFRONTS BIG DATA: U.S. AND EUROPEAN PERSPECTIVES

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*“Republicans and Democrats agree that these companies have too much power, and that Congress must curb this dominance . . . . Mark my words, change is coming.”*

– U.S. Representative David Cicilline<sup>1</sup>

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## I. INTRODUCTION

What do Alphabet (Google), Apple, Amazon, and Facebook have in common? None of these big data technology firms existed in current form 40 years ago. Today, each of these dominant U.S.-based firms is among the world’s largest.<sup>2</sup> Each offers goods and services to users

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<sup>1</sup> Congressman Cicilline is the Chairman of the House Judiciary Committee’s Subcommittee on Antitrust, Commercial and Administrative Law. *Antitrust, Commercial, and Administrative Law (116th Congress)*, HOUSE COMM. ON THE JUDICIARY, <https://judiciary.house.gov/subcommittees/antitrust-commercial-and-administrative-law-116th-congress/> (last visited Apr. 14, 2021); David McLaughlin & Rebecca Kern, *Tech Gets Congress Antitrust Warning: ‘Change is Coming,’* BLOOMBERG (Feb. 25, 2021, 8:01 AM), <https://www.bloomberg.com/news/articles/2021-02-25/antitrust-reform-is-coming-for-tech-giants-lawmakers-say>.

<sup>2</sup> Press Release, Google, Google Launches World’s Largest Search Engine (June 26, 2000), <http://googlepress.blogspot.com/2000/06/google-launches-worlds-largest-search.html>; SUBCOMM. ON ANTITRUST, COMMERCIAL & ADMINISTRATIVE

and, in the process, collects and analyzes data from users.<sup>3</sup> That data is a valuable commodity which the firm uses to gain commercial advantage, often by exercising a gatekeeper's control over a data-related service.<sup>4</sup>

Although big data firms began operations inauspiciously and with little or no regulatory interference, each now faces uncertainty as the world turns toward ramped up antitrust enforcement.<sup>5</sup> This paper examines developments in the United States and Europe that include various enforcement initiatives along with proposals for new legislation. In these evolving developments, competition law issues stand alongside and intertwined with issues involving protection of consumer privacy.

Although the outcome of these processes is uncertain, a world in which big data firms could move unimpeded by antitrust and other regulatory intervention is at an end. Privacy regulation and antitrust enforcement are more robust in Europe than in the United States, but, on both sides of the Atlantic, enforcers and legislators are moving to constrain dominant data firms' perceived abusive behavior.

## II. OVERVIEW OF THE ISSUES

Collection of information from consumers' interactions with the internet began with little or no consumer awareness. Once consumers grasped that their internet actions were being recorded, analyzed and disseminated for profit-making or political purposes, opposition mounted. Perhaps because of the greater cultural sensitivity to privacy abuse, Europe was ahead of the United States in designing comprehensive privacy protection schemes.<sup>6</sup> With California leading

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LAW OF THE COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REP. AND RECOMMENDATIONS 9, 132, 247, 332 (2020), [https://judiciary.house.gov/uploadedfiles/competition\\_in\\_digital\\_markets.pdf?utm\\_campaign=4493-519](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519) [hereinafter INVESTIGATION OF COMPETITION IN DIGIT. MKTS.].

<sup>3</sup> INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 2, at 6, 10.

<sup>4</sup> *Id.* at 131.

<sup>5</sup> *See id.* at 377.

<sup>6</sup> 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 and Repealing Directive

the way,<sup>7</sup> state and federal privacy-protecting initiatives are now advancing in the United States.<sup>8</sup>

Today, despite widespread concern about privacy, many consumers have only the vaguest understanding of how the world of internet data collection works. There are substantial information gaps that affect a privacy choice made by a consumer. One survey of online platform users in ten major countries found that a majority did not understand how “free” online services, such as those offered by Google and Facebook, were funded.<sup>9</sup> An even larger percentage did not understand the process that was used to rank responses to search engine inquiries.<sup>10</sup> In what is known as the privacy paradox,<sup>11</sup> consumers may object to collection and dissemination of personal data, but still tolerate that use for apps that they value. The paradox can be traced to a variety of factors, including the complexity of the system, the lack of meaningful consumer choices, and the difficulty of enforcing privacy rules.<sup>12</sup> For example, Google collects data from a variety of uses, ranging from any use of a Google search engine, visits to YouTube, or signing on to Google apps such as YouTube music.<sup>13</sup> A user might be comfortable with allowing Google to share

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95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1 [hereinafter GDPR].

<sup>7</sup> California Consumer Privacy Act of 2018, CAL. CIV. CODE §§ 178.100-178.199.100 (West, Westlaw through Ch. 13 Reg. Sess.). The Act was amended by ballot Proposition 24, approved by the voters on November 3, 2020. A.B. 1490, 2020-2011 Leg., Reg. Sess. (Cal. 2021). For an overview of California law, see Allaire Monticollo et al., *California Privacy Landscape Changes Again with Approval of New Ball Initiative*, 35 ANTITRUST 32 (2020).

<sup>8</sup> At the federal level, the FTC, through its Bureau of Consumer Protection, has focused enforcement resources on misleading or deceptive online advertising and protection of data security and privacy. Richard Cunningham et al., *The Other Tech-Focused Initiative: The FTC’s Expanding Consumer Protection Efforts Targeting E-Commerce*, 34 ANTITRUST 51 (2020).

<sup>9</sup> Pinar Akman, *A Web of Paradoxes: Empirical Evidence on Online Platform Users and Implications for Competition and Regulation of Digital Markets*, SSRN, at 7 (Mar. 29, 2021), <https://ssrn.com/abstract=3835280> (data collected from users in ten countries, including the U.S., China, India, the U.K., and Germany).

<sup>10</sup> *Id.*

<sup>11</sup> Susanne Barth & Menno D.T. de Jong, *The Privacy Paradox—Investigating Discrepancies Between Expressed Privacy Concerns and Actual Online Behavior—A Systematic Literature Review*, 34 TELEMATICS & INFORMATICS 1038 (2017).

<sup>12</sup> *See id.* at 1040, 1049, 1051.

<sup>13</sup> *See* INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 2, at 174.

information from some of these apps, but not with others. Some collected data helps sellers provide valued consumer choices.<sup>14</sup> Knowing what music a consumer prefers to hear, or what video entertainment a consumer prefers to watch, can result in attractive offerings for the consumer. On the other hand, consumers may not be comfortable with the collection and release of data related to matters of location, race, ethnicity, health, gender preference, and a variety of other issues.<sup>15</sup>

Another concern is the bundled nature of many choices that big data firms offer consumers. Both Google and Facebook, for example, gather and analyze data received from the variety of operations and apps that they own, and sometimes gain access to data collected by firms they do not own.<sup>16</sup> If a big data firm offers a consumer an all-or-nothing choice to share all data or be blocked from participation, many consumers may opt to give blanket consent, notwithstanding a preference for more refined choices.

As Google gradually expanded its reach and acquired other firms that could also be a source of online data, there was a lack of clarity about what role, if any, antitrust should play in protecting privacy. Contemporary antitrust analysis has focused on price and output, and courts may find it awkward to assess privacy protection under this narrow framework. At the same time, an increasing number of experts agree that the Sherman Act protects the competitive process, including not only a consumer's interest in a competitive price, but also in a variety of other values associated with competition, including consumer choice, quality, and innovation.<sup>17</sup> There is an open door to consider consumer privacy interests as a component of choice and quality. For example, if given a choice, many users of a search engine might choose one that better protects user privacy, valuing this option as a higher quality of service.

When dominance prevails, consumer choices tend to be sparse. Network efficiencies add to the barriers of entry already facing a firm

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<sup>14</sup> See *Final Report of the Directorate-General for Competition (EC) on the Competition Policy for the Digital Era*, at 44 (May 20, 2019), <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

<sup>15</sup> See INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 2, at 45–46.

<sup>16</sup> *Id.* at 148–49.

<sup>17</sup> Warren Grimes, *Breaking Out of Consumer Welfare Jail: Addressing the Supreme Court's Failure to Protect the Competitive Process*, 15 RUTGERS BUS. L. REV. 49, 53–63 (2020) (surveying views of scholars on reach of antitrust laws).

that wishes to gather personal data and compete against big data firms. Dominant firms already possess a rich trove of personal data. The reach of a large data set is likely to provide for more accurate targeting of potential buyers, an advantage that advertisers will value and pay to obtain. A new entrant with a less comprehensive data set may have difficulty in attracting advertisers, even if it offers its advertisements at a lower price.<sup>18</sup>

Efforts to protect the privacy of internet users may have an unintended but perverse impact on competition. The European Union's (EU) General Data Protection Regulation (GDPR)<sup>19</sup> was designed to protect individual privacy. In doing so, however, it may make it more difficult to enter and compete against large firms such as Google and Facebook. Consumers may agree to allow the use of data by large established firms because they desire the comprehensive services provided in return. When a small or new competitor makes the same request to use data, the consumer, not seeing any comprehensive benefit, may decline to allow access.<sup>20</sup> The end result is that the nascent competitor cannot get access to the data that the dominant firms have.

One possible way to make it easier for competing firms to survive might be to allow small rivals to pool their data, thereby achieving a minimum scope that makes their targeted advertisements attractive alternatives. This solution could raise privacy and antitrust issues of its own but deserves consideration.

Another issue is the two-sided nature of most of these firms' data collection operations. Two-sided markets are not new to antitrust. A 1953 Supreme Court case involved a newspaper that profited from two revenue-generating sides of the newspaper business: selling subscriptions to readers and selling advertising to outsiders.<sup>21</sup> A firm

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<sup>18</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] June 23, 2020, *Entscheidungen des Bundesgerichtshofes in Zivilsachen*, [BGHZ], 69/19 (Ger.), <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2020-6&Seite=4&nr=109506&pos=121&anz=279>. For a summary of the case in English, see [https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2020/23\\_06\\_2020\\_BGH\\_Facebook.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2020/23_06_2020_BGH_Facebook.pdf?__blob=publicationFile&v=2).

<sup>19</sup> GDPR, *supra* note 6.

<sup>20</sup> Florian C. Haus, *Recent Developments in Data Privacy and Antitrust in Europe*, 35 ANTITRUST 63, 64 (2020) (explaining why the GDPR has made it more difficult for small rivals of big data firms).

<sup>21</sup> *Times Picayune Pub. Co. v. United States*, 345 U.S. 594 (1953).

such as Google offers its search engine for use by consumers, but the search engine is a vehicle for collecting user data as a commercial venture in order to sell targeted advertising. In this example, the search engine is operated at no direct charge to consumers (other than their loss of privacy or their exposure to targeted advertisements). Google profits handsomely, however, from the sale of ads that the data collection enables.

In antitrust parlance, these markets are known as two-sided platforms. The issue of how to treat two-sided markets has generated substantial discussion in the academic literature.<sup>22</sup> A straight forward antitrust approach to two-sided markets is simply to ask, in the first instance, whether a firm's market power-based conduct results in substantial distortions undermining the competitive process on either side of its platform. If so, the burden of proof should shift to the defendant to justify these restraints.

In *Ohio v. American Express Co.*<sup>23</sup>, Amex made money from its credit cards by charging merchants a fee each time the credit card was used and by charging card holders annual fees, late payment fees, or interest on unpaid balances.<sup>24</sup> Amex refused to allow merchants to steer their customers to rival cards charging lower merchant fees. The Court majority rejected arguments of the plaintiff States and the U.S. Justice Department's amicus brief that found these anti-steering actions to be a substantial distortion in competition, concluding that a firm that operates in two-sided markets violates the Sherman Act only if, looking at both sides of the market, a plaintiff can demonstrate a net consumer injury.<sup>25</sup> The decision is controversial.<sup>26</sup> Instead of accepting evidence of a clear and substantial distortion on one side of the market, the Court concluded that the government plaintiffs had failed to establish a violation because of Amex's speculative and impossible-to-prove arguments that anti-steering conduct benefitted consumers through credit card rebates or other enhanced services that Amex

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<sup>22</sup> See, e.g., John B. Kirkwood, *Antitrust and Two-Sided Platforms: The Failure of American Express*, 41 CARDOZO L. REV. 1805 (2020); Herbert Hovenkamp, *Platforms and the Rule of Reason: The American Express Case*, 2019 COLUM. BUS. L. REV. 35 (2019).

<sup>23</sup> 138 S. Ct. 2274 (2018).

<sup>24</sup> *Id.* at 2282.

<sup>25</sup> *Id.* at 2287.

<sup>26</sup> For criticism of the *American Express Co.* decision, see Kirkwood, *supra* note 22; Hovenkamp, *supra* note 22; Grimes, *supra* note 17, at 74–77.

provided card holders.<sup>27</sup> Amex card users had no opportunity to decide whether the rebates and other enhanced services were worth the extra charge that Amex imposed on merchants and, indirectly, on anyone buying from those merchants.<sup>28</sup>

### III. DEVELOPMENTS IN THE UNITED STATES

Each of the big data firms got its start in the United States. These firms grew to dominance in a world of benign neglect. In the United States, internal growth and growth by merger were largely ignored until recently. According to the American Antitrust Institute, the federal antitrust agencies (the Antitrust Division of the Justice Department and the Federal Trade Commission) challenged only one merger involving digital technology over the two decades ending in 2020.<sup>29</sup> On the political front, these firms were either ignored or supported by both Democrat and Republican regulators and legislators. All of this has changed in the last few years. In the waning months of the Trump administration, government enforcers initiated investigations and brought major enforcement actions against Amazon, Google, and Facebook.<sup>30</sup>

In August 2020, news outlets reported that the Federal Trade Commission, joined by state attorneys general in California and New York, was investigating Amazon's online marketplace.<sup>31</sup> A focus of the investigation was secret use of data from third-party sellers.<sup>32</sup>

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<sup>27</sup> See *American Express Co.*, 138 S. Ct. at 2287–91.

<sup>28</sup> See *id.*

<sup>29</sup> *AAI Applauds States' and FTC's Major Antitrust Cases Against Facebook*, AM. ANTITRUST INST. (Dec. 10, 2020) <https://www.antitrustinstitute.org/aai-applauds-states-and-ftcs-major-antitrust-cases-against-facebook/> (the only reportable merger transaction resulting in a challenge by a federal agency was Google-ITA).

<sup>30</sup> See McLaughlin & Kern, *supra* note 1; see also Shannon Boyd et al., *How are Apple, Amazon, Facebook, Google Monopolies? House Report Counts the Ways*, NPR (Oct. 6, 2020, 5:16 PM), <https://www.npr.org/2020/10/06/920882893/how-are-apple-amazon-facebook-google-monopolies-house-report-counts-the-ways>.

<sup>31</sup> Spencer Soper, *Amazon's Market Power to be Investigated by New York AG*, BLOOMBERG (Aug. 3, 2020, 11:10 AM), <https://www.bloomberg.com/news/articles/2020-08-03/amazon-s-market-power-is-said-to-be-investigated-by-new-york-ag>.

<sup>32</sup> Tyler Sonnemaker, *Amazon is Reportedly Facing a New Antitrust Investigation into Its Online Marketplace Led by the FTC and Attorneys General in New York and California*, BUS. INSIDER (Aug. 3, 2020, 12:53 PM),

Amazon reportedly used marketplace-procured data from rival sellers to launch competing products.<sup>33</sup> EU competition authorities began a similar investigation in July 2019.<sup>34</sup>

Moving beyond investigation, in May 2021, the Attorney General for the District of Columbia filed an antitrust suit against Amazon.<sup>35</sup> This suit was based on the District of Columbia's antitrust law (similar to federal antitrust law) and seems likely to be litigated in the district courts (not in federal court). The complaint alleges that Amazon effectively requires all third-party sellers to offer the lowest price on the Amazon platform—no lower price may be offered by the third-party's own web site or on any other online platform.<sup>36</sup> Amazon does not explicitly prohibit lower prices offered elsewhere, but Amazon can remove or sanction any seller that offers the same product on more favorable terms on another online platform.<sup>37</sup>

The effect of Amazon's conduct is to maintain or extend its online monopoly power by raising prices and depriving consumers of choice.<sup>38</sup> Amazon charges third-party sellers substantial fees for using its online marketplace.<sup>39</sup> Although these fees could be avoided or lessened if the seller used a lower cost online marketplace, the complaint alleges that the third-party seller is precluded from offering lower prices if it wants to continue to sell on the dominant Amazon platform.<sup>40</sup>

Well before the Amazon suit, in October 2020, the Antitrust Division of the Justice Department, joined by eleven state attorneys general, sued Google for alleged violations of Section 2 of the Sherman

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<https://www.businessinsider.com/amazon-antitrust-probe-ftc-new-york-california-online-marketplace-2020-8>.

<sup>33</sup> *Id.*

<sup>34</sup> See discussion *infra* Part IV.

<sup>35</sup> Complaint, District of Columbia v. Amazon.com, Inc., No. 2021-CA-001775 (D.C. Super. Ct. filed June 1, 2021) (BL, Ct. Docket Entry BL-5) [hereinafter Complaint Against Amazon]; Press Release, Dist. of Columbia Att'y Gen., AG Racine Files Antitrust Lawsuit Against Amazon to End Its Illegal Control of Prices Across Online Retail Market (May 25, 2021), <https://oag.dc.gov/release/ag-racine-files-antitrust-lawsuit-against-amazon>.

<sup>36</sup> Complaint Against Amazon, *supra* note 35, at 16.

<sup>37</sup> *Id.* at 3.

<sup>38</sup> *Id.* at 23.

<sup>39</sup> *Id.* at 3–4; see also AMAZON, <https://sell.amazon.com/pricing.html> (last visited June 7, 2021).

<sup>40</sup> Complaint Against Amazon, *supra* note 35, at 20–21.

Act.<sup>41</sup> Government suits alleging Section 2 monopoly abuse are a relative rarity. That alone made this event newsworthy. A central thrust of the complaints was that Google entered into contractual arrangements with manufacturers of Android devices such as cell phones, tablets, smart television sets, and smart speakers that required that Google be the default or exclusive operating system.<sup>42</sup> The complaint alleged that these restrictions made it difficult for rivals to gain a foothold and created a self-reinforcing cycle of monopoly in search engines and search advertising.<sup>43</sup>

In December 2020, thirty-eight states brought an additional Section 2 Sherman Act complaint against Google.<sup>44</sup> The suit alleged that Google manipulated results on its search engine to favor its own products and services over rivals.<sup>45</sup> According to the complaint, Google rivals, faced with unfavorable search results, were forced to pay Google for advertising that runs alongside the search results.<sup>46</sup> The suit claimed that Google's favoritism prevented internet users from seeing the best options for dining, travel, and other products and services.<sup>47</sup> The government plaintiffs planned to seek consolidation of all Google antitrust claims for trial.<sup>48</sup>

The claims against Google echo many of the concerns already raised by competition law enforcers in Europe.<sup>49</sup> The same can be said for the Federal Trade Commission's December 2020 suit against

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<sup>41</sup> Press Release, Dep't. of Just., Justice Department Sues Monopolist Google for Violating Antitrust Laws (Oct. 20, 2020), <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws>.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Complaint, *Colorado v. Google*, No. 20-cv-03715 (D.D.C. filed Dec. 17, 2020), EFN No. 3 [hereinafter *Complaint Against Google*]; see also Tony Romm, *Nearly 40 States Sue Google Alleging Search Manipulation, Marking the Third Antitrust Salvo Against the Tech Giant*, WASH. POST (Dec. 17, 2020, 11:50 AM), <https://www.washingtonpost.com/technology/2020/12/17/google-search-antitrust-lawsuit/>.

<sup>45</sup> *Complaint Against Google*, *supra* note 44, at 9.

<sup>46</sup> *Id.* at 69.

<sup>47</sup> *Id.*

<sup>48</sup> The government plaintiffs successfully consolidated claims in January 2021. Order Granting in Part and Denying in Part Plaintiff's Motion to Consolidate, *Colorado v. Google*, No. 20-cv-03715 (D.D.C. filed Jan. 7, 2021), EFN No. 67.

<sup>49</sup> See *infra* Part IV.

Facebook, alleging a violation of Section 5 of the FTC Act.<sup>50</sup> A coordinated, separate suit was brought by forty-eight state attorneys general, alleging violations of Section 2 of the Sherman Act and Section 7 of the Clayton Act.<sup>51</sup> The district court dismissed both actions in June of 2021, holding in part that the FTC had failed to plead facts establishing Facebook's monopoly power in a relevant market.<sup>52</sup> Only the FTC was granted leave to amend (the state attorneys general may appeal). The Commission wasted no time in amending its complaint, alleging more details to establish Facebook's monopoly power and abuse of that power through a "buy or bury" scheme to crush emerging competition for social networking in the cell phone market.<sup>53</sup>

The government plaintiffs seek comprehensive relief, including divestiture of Instagram and WhatsApp, two Facebook acquisitions that had previously been unchallenged by government enforcers. Perhaps more directly than the suits against Google, the claims against Facebook will require the plaintiffs to establish harm through loss of privacy protection choices. To the extent that consumers do not pay to use the social networking or other apps' services, they do so indirectly by allowing Facebook to collect and analyze consumer data, which is then used to sell targeted advertisements.

As described in Part II, the claims against both Google and Facebook involve challenges linked to the two-sided platform, one side of which is to provide free services to users. These obstacles have not prevented successful enforcement initiatives in Europe, but will be litigated in U.S. courts, as defendants will likely invoke the *Amex* decision.<sup>54</sup>

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<sup>50</sup> Complaint for Injunctive and Other Equitable Relief, Fed. Trade Comm'n v. Facebook, Inc., No. 20-cv-03590 (D.D.C. filed Dec. 9, 2020), EFN No. 3 [hereinafter Complaint Against Facebook].

<sup>51</sup> *New York v. Facebook, Inc.*, No. 20-cv-03589 (D.D.C. filed Dec. 9, 2020), EFN No. 4; *Privacy, Not Price, Takes Focus in Facebook Antitrust Suits*, LAW360 (Dec. 11, 2020, 4:29 PM), <https://www.law360.com/articles/1336691/privacy-not-price-takes-focus-in-facebook-antitrust-suits>; see AM. ANTITRUST INST, *supra* note 29.

<sup>52</sup> Fed. Trade Comm'n v. Facebook, Inc., No. 20-3590, 2021 BL 240437 (D.D.C. June 28, 2021).

<sup>53</sup> First Amended Complaint for Injunctive and Other Equitable Relief, Fed. Trade Comm'n v. Facebook, Inc., No. 20-cv-03590 (D.C.C. filed Aug. 19, 2021), EFN No. 75-1.

<sup>54</sup> See *supra* notes 23–26 and accompanying text.

Although Apple has so far escaped a major government enforcement action in the United States, it has been sued for monopolization in private suits. A prominent example is a Sherman Act Section 2 suit brought by Epic Games.<sup>55</sup> Epic's popular game was available through Apple's App Store, but required Epic to pay Apple's commission, which can be as high as thirty percent for some apps.<sup>56</sup> Many large and small firms offering apps have argued that Apple's high commission fees are an abuse of the firm's monopoly position.<sup>57</sup> This suit was tried in May 2021 and is awaiting the Judge's decision.<sup>58</sup> Although there is doubt whether the trial judge will go this far, truly meaningful antitrust relief would allow competition in the selling of apps for the Apple system.<sup>59</sup>

On the legislative front, Senator Amy Klobuchar (D. Minn.) has introduced legislation designed to strengthen the antitrust laws in ways that could directly affect the data technology industry.<sup>60</sup> The proposed bill would increase resources for federal enforcers, create a stronger presumption against anticompetitive mergers, and amend the Clayton Act to "prohibit 'exclusionary conduct' (conduct that materially disadvantages competitors or limits their opportunity to compete) that presents an 'appreciable risk of harming competition.'"<sup>61</sup> The burden of proof in proving that a merger will not violate the law is shifted to merging firms in any case in which the merger (1) would significantly increase market concentration; (2) would involve a dominant firm's (defined as a firm with a fifty percent market share or in possession of significant market power) acquisition of competitors or nascent competitors; and (3) would constitute a mega-merger valued at more

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<sup>55</sup> *Epic Games, Inc. v. Apple, Inc.*, 493 F. Supp. 3d 817, 817, 834 (N.D. Cal. 2020); see also Jack Nicas, *Apple's Fortnite Trial Ends with Pointed Questions and a Toast to Popeyes*, N.Y. TIMES (May 24, 2021), <http://nytimes.com/2021/05/24/technology/apple-epic-antitrust-trial.html>.

<sup>56</sup> *Epic Games, Inc.*, 493 F. Supp. 3d at 838.

<sup>57</sup> Nicas, *supra* note 55.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Senator Klobuchar Introduces Sweeping Bill to Promote Competition and Improve Antitrust Enforcement*, U.S. SEN. AMY KLOBUCHAR (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>.

<sup>61</sup> Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225 (117th Cong., 1st Sess.).

than \$5 billion.<sup>62</sup> These provisions could have made it much easier for the government to challenge many big data firms' acquisitions over the past two decades.

The legislation has five Senate sponsors, all of them Democrats,<sup>63</sup> but big data firms have also drawn intense criticism from Republicans<sup>64</sup> and Republican state attorneys general have joined in actions against Google and Facebook. While the outcome of the legislative process is uncertain, the prospect of bipartisan support is reason to take this proposal seriously.

#### IV. DEVELOPMENTS IN EUROPE

Well before the enforcement initiatives by U.S. government enforcers, the EU and national state enforcers in Europe had taken action against big data firms. Many of these actions involved challenges to conduct that is being attacked in the major U.S. antitrust complaints against Google and Facebook.

In three separate enforcement actions against Google, EU competition authorities have levied €8.25 billion in fines against the firm. In June 2017, a fine of €2.42 billion was levied for Google's abuse of dominance in favoring its own comparison-shopping service.<sup>65</sup> In July 2018, a fine of €4.34 billion was levied for Google's use of contractual restrictions with manufacturers of Android mobile devices that strengthen Google's dominance.<sup>66</sup> In March 2019, the fine was €1.49 billion for abusive practices in online advertising that had exclusionary effects on Google's rivals.<sup>67</sup> In June of 2021, the European Commission announced an additional investigation of

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Cecilia Kang, *Democratic Congress Prepares to Take on Big Tech*, N.Y. TIMES (Jan. 26, 2021), <https://www.nytimes.com/2021/01/26/technology/congress-antitrust-tech.html> (describing Senator Klobuchar's initiative and Republican frustration with tech platforms that censor conservative voices).

<sup>65</sup> European Commission Press Release IP/17/1784, Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service (June 27, 2017).

<sup>66</sup> European Commission Press Release IP/18/4581, Antitrust: Commission Fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine (July 18, 2018).

<sup>67</sup> European Commission Press Release IP/19/1770, Antitrust: Commission Fines Google €1.49 Billion for Abusive Practices in Online Advertising (Mar. 20, 2019).

whether practices in the online advertising market favor Google over rival sellers of online ads.<sup>68</sup>

In July 2019, EU competition authorities announced an investigation of Amazon's online marketplace.<sup>69</sup> The Commission is challenging Amazon's use, to benefit Amazon's own retail business, of non-public data from independent sellers that sell through the marketplace.<sup>70</sup> This investigation was announced roughly a year before the FTC and Attorneys General from California and New York were revealed as conducting a similar investigation.<sup>71</sup>

The EU Commission also has a pending investigation of Apple's activities involving potential "App" store favoritism that has exclusionary effects on rival producers of apps.<sup>72</sup> Finally, the EU Commission investigated Facebook's acquisition of WhatsApp.<sup>73</sup> While the Commission cleared this transaction subject to future monitoring, a €110 million fine was levied against Facebook for providing misleading information about the takeover.<sup>74</sup> In the December 2020 suit brought by the FTC and various state attorneys general, the plaintiffs are seeking the divestiture of WhatsApp.<sup>75</sup>

One of the most salient enforcement initiatives was brought not by the EU but by the German Federal Cartel Office (FCO) in March 2016.<sup>76</sup> The FCO announced its decision in this administrative

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<sup>68</sup> European Commission Press Release IP/21/3134, Antitrust: Commission Opens Investigation into Possible Anticompetitive Conduct by Google in the Online Advertising Sector, (June 22, 2021).

<sup>69</sup> European Commission Press Release IP/19/4291, Antitrust: Commission Opens Investigation into Possible Anti-Competitive Conduct of Amazon (July 17, 2019).

<sup>70</sup> European Commission Press Release IP/20/2077, Antitrust: Commission Sends Statement of Objections to Amazon for the Use of Non-Public Independent Seller Data & Opens Second Investigation into Its E-Commerce Business Practices (Nov. 10, 2020).

<sup>71</sup> See Sonnemaker, *supra* note 32.

<sup>72</sup> European Commission Press Release IP/20/1073, Antitrust: Commission Opens Investigations into Apple's App Store Rules (June 16, 2020).

<sup>73</sup> European Commission Press Release IP/17/1369, Mergers: Commission Fines Facebook €110 Million for Providing Misleading Information about WhatsApp Takeover (May 18, 2017).

<sup>74</sup> *Id.*

<sup>75</sup> See AM. ANTITRUST INST., *supra* note 29.

<sup>76</sup> *Case Summary: Facebook, Exploitative Business Terms Pursuant to Section 19(1) GWB for Inadequate Data Processing*, Ref.: B6-22/16, BUNDESKARTELLAMT 1 (Feb. 15, 2019) [hereinafter BUNDESKARTELLAMT CASE SUMMARY],

proceeding in February 2019.<sup>77</sup> The FCO ordered Facebook to cease requiring German Facebook consumers to agree to use of off-Facebook data as a condition for using Facebook's online social networking.<sup>78</sup> Off-Facebook data included both data received from apps now owned by Facebook (WhatsApp, Oculus, Masquerade, and Instagram) and from non-Facebook controlled sources (websites visited and third-party mobile apps).<sup>79</sup> The FCO regarded Facebook's conduct as an "abuse of dominant position" prohibited by both European and German competition law provisions.<sup>80</sup>

After an intermediate court, at Facebook's request, suspended the injunctive relief pending appeal, the German Federal Supreme Court of Justice (Bundesgerichtshof) issued an opinion upholding the injunctive relief.<sup>81</sup> Although an interim holding, the opinion offers insightful and important competitive analysis of two-sided platforms in online businesses.<sup>82</sup> The Court saw the consumer's lack of choice in controlling use of data as central, a point borne out by the remedy.<sup>83</sup> Facebook would be free to offer the consumer a personalized experience built upon use of both on-Facebook and off-Facebook data.<sup>84</sup> In doing so, however, Facebook must offer users a choice between the full data collection option and participation in the social network with no collection or use of off-Facebook data.<sup>85</sup> The court viewed consumer choice as an important metric in a competitive market.<sup>86</sup>

The court wrote that a forced bundling of all Facebook apps conditioned upon consumer consent to a full collection of all data would not in itself be a violation of European or German competition

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[https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?\\_\\_blob=publicationFile&v=3](https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=3).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] June 23, 2020, Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ], 69/19 (Ger.). For a description and analysis in English, see Haus, *supra* note 20.

<sup>82</sup> See BGHZ 69/19 (2020) (Ger.).

<sup>83</sup> *Id.* para. 29.

<sup>84</sup> *Id.* para. 121.

<sup>85</sup> *Id.* para. 45.

<sup>86</sup> *Id.* para. 123.

law.<sup>87</sup> It became an abuse of dominant position when it exploited consumers or had an exclusionary effect upon rivals.<sup>88</sup> A firm not in a dominant position would presumably be allowed similar bundling without triggering provisions of European or German competition law.

These EU and German enforcement actions occurred against a backdrop of new EU legislative proposals governing both competition and privacy law: the Digital Services Act and the Digital Markets Act.<sup>89</sup> Both proposals address dominant internet platforms that function as gatekeepers.<sup>90</sup> From a European perspective, the dominance of U.S.-based big data firms is troubling, particularly if those firms' exclusionary conduct prevents smaller or start-up European firms from competing. Beyond this, the legislative proposals are designed to protect privacy and fairness to European businesses and consumers.<sup>91</sup> They are intended to update and supplement currently existing regulations, creating uniform standards throughout the European Union.<sup>92</sup>

The proposed Digital Services Act has a variety of provisions addressing online marketplaces and other online intermediaries.<sup>93</sup> Among these provisions are rules for removal of illegal goods, services or content, safeguards for those whose content has been erroneously removed, transparency measures governing online advertising and the algorithms used to recommend content, and new powers to scrutinize how platforms work, including facilitating access by researchers.<sup>94</sup>

Compared to existing competition law provisions, the proposed Digital Markets Act more directly addresses competition-based issues such as the bottleneck monopoly that some gatekeeper platforms possess.<sup>95</sup> One example is the potential unfair use of data from businesses operating on these platforms.<sup>96</sup> Another is blocking users from uninstalling any pre-installed software or apps.<sup>97</sup> The rules in this

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<sup>87</sup> *Id.* para. 64.

<sup>88</sup> *Id.*

<sup>89</sup> European Commission Press Release IP/20/2347, Europe Fit for the Digital Age: Commission Proposes New Rules for Digital Platforms (Dec. 15, 2020).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

Act would apply only to major providers most prone to unfair practices.<sup>98</sup> Antitrust investigations of Amazon on both sides of the Atlantic have focused on this issue. The rules would extend not just to online marketplaces, but also to search engines or social networks.<sup>99</sup>

The European Parliament and the member states will be discussing the Commission's proposals in the run up to possible adoption.<sup>100</sup>

## V. ANALYSIS AND CONCLUSIONS

Europe seems well ahead of the United States in addressing both privacy and traditional competition issues linked to dominant data technology firms based in the United States. In part, this may be a reflection of European social attitudes toward privacy. There is, however, another possible reason: the "national champion" reluctance to curtail abusive behavior by firms headquartered in the jurisdiction of a government antitrust enforcer. Antitrust enforcers stress that they are guided by the rule of law, not by the nationality of a particular firm that might be engaging in anticompetitive conduct. Despite these denials, there are reasons to suspect that, particularly in close cases involving subjective analysis, enforcers or courts may bend their views to favor a firm headquartered in their home jurisdiction.

Months after the U.S. Justice Department won a signature antitrust decision in the Court of Appeals affirming most parts of a 2001 lower court decision against Microsoft,<sup>101</sup> the Department settled the case on terms that many critics found too lenient.<sup>102</sup> In its 2004 decision challenging Microsoft's abuse of dominance, the European Commission imposed different and arguably stronger sanctions on

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* For an overview of the proposed act and some of the issues that it raises, see Heike Schweitzer, *The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair: A Discussion of the Digital Markets Act Proposal*, 2021 ZEITSCHRIFT FÜR WETTBEWERBSRECHT (forthcoming 2021), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3837341](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3837341).

<sup>101</sup> *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

<sup>102</sup> Amy Harmon, *U.S. v. Microsoft: The Overview; Judge Backs Terms of U.S. Settlement in Microsoft Case*, N.Y. TIMES (Nov. 2, 2002), <https://www.nytimes.com/2002/11/02/business/us-vs-microsoft-overview-judge-backs-terms-us-settlement-microsoft-case.html> (describing the largely unsuccessful efforts of states to obtain more substantial relief from Microsoft).

Microsoft.<sup>103</sup> The U.S. Justice Department issued a press release critical of the Commission's decision.<sup>104</sup>

This and other examples of different views between U.S. and EU competition authorities<sup>105</sup> are consistent with the greater reluctance of an antitrust authority to vigorously prosecute one of its own firms. To be sure, some of the differences reflect the greater influence in the United States of Chicago School thinking that favored a monopolist's freedom of action. In some cases, however, the varying views reflect not differences about what constitutes a violation, but rather differences in how quickly an antitrust case is brought, how vigorously it is prosecuted, or how stringent the remedies should be. In the case of big data prosecutions, the conduct that is being challenged is largely the same on both sides of the Atlantic. The EU, however, has been quicker to challenge this conduct and design remedies suitable for EU businesses and consumers.

That antitrust challenges against dominant multinational firms can occur in multiple jurisdictions is a positive development. Dominant firms often enjoy a strong home-country lobbying presence that can ward off needed antitrust enforcement. In the case of big data, the European interventions came earlier and may have emboldened U.S. prosecutors in their subsequent initiatives. In the long term, harmonization of worldwide competition law standards is an important goal. With or without harmonization, however, prosecutions are, and should be, open to any country in which a multinational firm operates.

The home country's actions still are critical. European enforcers, for example, are less able to impose structural remedies on non-European-based firms. EU authorities may be reluctant to require divestiture of component parts of a dominant U.S. firm. In contrast, the FTC's amended complaint against Facebook seeks the divestiture of two firms earlier acquired by Facebook (Facebook and each of the acquired firms are based in the United States).

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<sup>103</sup> Case C-3/37.792, *Microsoft Corp. v. Comm'n*, 2004 E.C.R. 299-301.

<sup>104</sup> See Press Release, U.S. Dep't of Just., Assistant Att'y Gen. for Antitrust, R. Hewitt Pate, Issues Statement on the EC's Decision in Its Microsoft Investigation (Mar. 24, 2004), [https://www.justice.gov/archive/atr/public/press\\_releases/2004/202976.pdf](https://www.justice.gov/archive/atr/public/press_releases/2004/202976.pdf).

<sup>105</sup> LAWRENCE A. SULLIVAN ET AL., *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 887-97 (3d ed. 2016) (describing other cases in which U.S. and EU views differed).

As far as proposed legislation, European initiatives contain much more regulatory detail in confronting big data technology firms. The proposed Klobuchar bill, while containing meaningful antitrust reform, still leaves much detail of what constitutes an antitrust violation to the enforcers and the courts. This difference may reflect in part the potential for U.S. Senate gridlock that may fall heavily on proposals with regulatory detail.

There is a literacy gap for online platform users, with a majority still uninformed about how online services are funded or how targeted advertising works. Addressing this gap is critical to finding privacy regulation and antitrust solutions. Informed consumers will improve the functioning of the market and make regulatory solutions simpler and less burdensome.

In Europe and in the United States, the pending enforcement and legislative initiatives will be consequential, both in terms of mapping out limits for the future conduct of big data firms and in shaping future antitrust law for industries across the board. These developments are international in scope. What happens in one jurisdiction will have an impact on antitrust and regulatory initiatives elsewhere.