HELSINGIN YLIOPISTO
HELSINGFORS UNIVERSITET
UNIVERSITY OF HELSINKI

Faculty Faculty of Social Sciences		**Degree Programme** European and Nordic Studies
Author Sandrine Charlotte Bartos		
Title The intersection of data privacy and competition law: a comparative analysis of the United States and European Union's responses to Facebook's data collection		
Subject/Study track Social Sciences		
Level Master's Thesis	**Month and year** April 2021	**Number of pages** 89

Abstract

Data privacy came to the forefront of public consciousness in March 2018, with the revelation that the data of upwards of 87 million accounts was misused due to a lack of privacy protections. Furthermore, the release of confidential court documents detailing years of anticompetitive conduct by Facebook, largely helped by the amount of data it has access to, through ways that many are beginning to characterise as immoral. The intersection of data privacy and competition law is a relatively new issue, but one that will have a significant impact in the coming years. Investigations into Facebook's conduct by the United States and the European Union will determine if the social media giant, and by extension, any other companies that collect large amounts of data, will adjust or maintain its data-gathering practices.

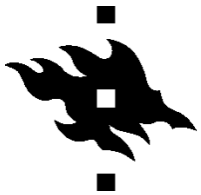
Keywords

Antitrust, Competition Law, United States, Data Privacy, Data Protection, European Union, Comparative Law

Where deposited

Helsinki University Library

Additional information



Helsingin Yliopisto
Helsingfors Universitet
University of Helsinki

The intersection of data privacy and competition law: a comparative analysis of the United States and the European Union's responses to Facebook's data collection

---

A Master's Thesis
Submitted for the partial fulfilment of the degree of
Master of Social Sciences

Sandrine Charlotte Bartos
European and Nordic Studies
Faculty of Social Sciences
May 2021

ACKNOWLEDGMENTS

Thank you to my advisor and lecturer, Lotta Lounasmeri, for her help during my time at the University of Helsinki. My gratitude extends to former computer science lecturer Jobel Vecino from the University of California, Berkeley, for his feedback, technical knowledge, and willingness to proofread many messy drafts. Thank you to my friends in Finland and in the United States for their support and keeping me grounded throughout the brainstorming and writing process. And finally, the biggest thank you goes to my mom and brother for their love and support, especially when I had to return home. I could not have finished this thesis without them.

TABLE OF CONTENTS

ABBREVIATIONS

BKA	Bundeskartellamt (German Federal Cartel Office)
CCPA	California Consumer Privacy Act
CPBR	Consumer Privacy Bill of Rights
CPRA	California Privacy Regulation Act
ECSC	European Coal and Steel Community
FTC	Federal Trade Commission
GAFA	Google, Apple, Facebook, Amazon
GDR	General Data Regulation
GDPR	General Data Protection Regulation
ICO	Information Commissioner's Office
NCA	National Competition Authorities

GLOSSARY

Antitrust/competition law: The sets of laws and regulations governing competing businesses. Antitrust is the American term, while competition is the European term.

Clayton Act: Enacted in 1914, it added prohibitions to the Sherman Act, such as making certain mergers illegal and prohibiting price discrimination.

Consumer Welfare: The standard to which antitrust law has been held since the 1980s in the United States. Consumer welfare promotes business efficiency generally by encouraging low prices, to the detriment of small businesses who cannot compete against bigger businesses who can afford to lower prices.

Cookie: A small text file that companies place on a user's browser that sends the companies information ranging from user location to the type and dimensions of device used. Cookies can serve to remember usernames and passwords, where one left off on a previously-watched video, or what one put in their digital shopping cart from a week prior. Cookies can also be used to track user behaviour across different websites, through the use of third-party cookies.

Consent: The act of agreeing to another act; in this thesis, consent is generally referred to as agreeing to have one's data shared or sold, or to allow cookies to be installed on one's browser. The United States has no federal definition of consent insofar as data protection is concerned, while the European Union's GDPR requires that consent be "freely given, specific, informed, and unambiguous".

Federal Trade Commission Act: Enacted in 1914, it created the Federal Trade Commission, the federal body that helps in the regulation of businesses.

Monopoly: In the United States, a monopoly is a company with significant and durable market power that unreasonably restrains trade. Whether a restraint is unreasonable or not depends on the facts of the restraint, and is decided by the Supreme Court or the Federal Trade Commission. Some acts of restraint such as bid rigging, price-fixing, and market division are always unreasonable, and thus illegal. Note that a monopoly need not have a majority control of the market.
In the European Union, a monopoly is a company that abuses its market power to the point that it affects trade within member states. Such abuses include price-fixing, limiting production, placing trading partners at a competitive disadvantage, and adding unnecessary clauses to contract that add nothing of significance. Note that a firm can have a dominant position in a market, but not be a monopoly.

Personal data: The definition varies from one jurisdiction to another, but generally compromises of personal identifying data, such as age, gender, location, biometric data, and medical data.

Sherman Act: Enacted in 1890, it prescribes the rules for engaging in free and fair competition within the United States.

1. INTRODUCTION

1.1. Relevance of the subject

In December 2020 and January 2021, the United States Federal Trade Commission (FTC) and 47 United States states and territories, respectively, filed lawsuits against the tech and social media giant, Facebook. They alleged that Facebook has abused its power, which it acquired through over a decade of collecting data. The data has been used to attract advertisers and eliminate rivals. In March 2021, the Düsseldorf Higher Regional Court referred a case for abuse of power originally filed by the Bundeskartellamt (the German Federal Cartel Office, or BKA) against Facebook to the European Court of Justice (ECJ). These lawsuits will be some of the biggest cases of the decade, if not the century, as data collection becomes a normal and increasingly unavoidable part of our lives, and as of May 2021, there is little regulation insofar as to how data collection enriches and empowers social media companies.

This topic is relevant because almost half of the world (3.3 billion people[1]) uses one of Facebook's core products: Facebook, Messenger (for which a Facebook account is needed), photo-sharing application Instagram, or messaging application WhatsApp (for which one only needs a phone number to use). But even though Instagram and WhatsApp's acquisitions in 2012 and 2014 gained worldwide attention, it was only until 17 March 2018 that the world truly realised the immensity of Facebook's power. On that day, the *Guardian* and the *New York Times* published exposés of how the data of up to 87 million Facebook users worldwide[2] was harvested by a British data analytics firm, Cambridge Analytica. The data was gathered via a personality quiz application developed by a Cambridge University psychology professor, Aleksandr Kogan, and gathered information from users and their friends, a practice that was allowed by Facebook at the time. What was shocking was not that data was collected, but how the data was collected and what the purpose of the collection was. Kogan told Facebook the data gathered would be used for academic purposes, but, against Facebook's rules, sold the information to Cambridge Analytica. A former Cambridge

[1] Facebook Inc., "Facebook Reports Fourth Quarter and Full Year 2020 Earnings", 27 January 2021, https://investor.fb.com/investor-news/press-release-details/2021/Facebook-Reports-Fourth-Quarter-and-Full-Year-2020-Results/default.aspx.

[2] Cecilia Kang, and Sheera Frenkel, "Facebook says Cambridge Analytica Harvested Data of Up to 87 Million Users", *New York Times*, 4 April 2018, https://www.nytimes.com/2018/04/04/technology/mark-zuckerberg-testify-congress.html.

Analytica employee turned whistle-blower alleged that the company then used the information to create "psychographic profiles"[3] of Facebook users and, based off the data, delivered pro-Trump material to those users[4] [5].

Even more striking than the data misuse was Facebook's response to the revelations. The social media giant was informed of the articles two weeks before publication, and requested that the *Guardian* not use the word "breach" in its story as it was inaccurate: data was misused, but not hacked[6]. This distinction painted Facebook as a victim and allowed it to absolve itself of responsibility, instead putting the blame on Cambridge Analytica and, to a lesser extent, its users. As Paul Grewal, Facebook's Vice President and Deputy General Counsel, wrote in a blog post on 17 March 2018: "everyone involved gave their consent. People knowingly provided their information, no systems [...] were stolen or hacked"[7]. Another Facebook executive, Andrew Bosworth, wrote in a now-deleted tweet that "[this] was unequivocally not a data breach. People chose to share their data with third party apps and if those third-party apps did not follow the data agreements with us/users it is a violation"[8]. However, this lack of accountability provoked frustration: American and British government officials called for hearings demanding accountability and answers for how this happened, and the hashtag #deletefacebook trended on Twitter[9].

Noticeably absent was Facebook's CEO Mark Zuckerberg, often seen as the face of the company, which prompted the hashtag #whereszuck to trend. He finally broke his silence in a 21 March Facebook post. In it, he seemed to realise, perhaps too late,

---

[3] Matthew Rosenberg, Nicholas Confessore, and Carole Cadwalladr, "How Trump Consultants Exploited the Facebook Data of Millions", *New York Times*, 17 March 2018, https://www.nytimes.com/2018/03/17/us/politics/cambridge-analytica-trump-campaign.html.

[4] *Ibid*.

[5] There were also allegations, now unfounded, that the data from the psychographic profiles were used to also deliver pro-Brexit material to British users. See letter from the Information Commissioner's Office to Julian Knight, 2 October 2020, 14, https://ico.org.uk/media/action-weve-taken/2618383/20201002_ico-o-ed-l-rtl-0181_to-julian-knight-mp.pdf.

[6] Nicholas Thompson and Fred Vogelstein, "A Hurricane Flattens Facebook", *Wired,* 20 March 2018, https://www.wired.com/story/facebook-cambridge-analytica-response/.

[7] Paul Grewal, "Suspending Cambridge Analytica and SCL Group From Facebook", Facebook, 16 March 2018, https://about.fb.com/news/2018/03/suspending-cambridge-analytica/.

[8] Andrew Bosworth (@boztank), "This was unequivocally not a data breach. People chose to share their data with third party apps [...]", Twitter, 18 March 2018, in Alex Sundby, "Facebook's fight against the phrase 'data breach'", CBS News, 19 March 2018, https://www.cbsnews.com/news/facebook-cambridge-analytica-was-it-a-data-breach/.

[9] Julia Carrie Wong, "Where's Zuck? Facebook CEO silent as data harvesting scandal unfolds", *Guardian* (US), 19 March 2018, https://www.theguardian.com/news/2018/mar/19/where-is-mark-zuckerberg-facebook-ceo-cambridge-analytica-scandal.

that "blaming users [...] will not suffice"[10]. He wrote that not only was there a breach of trust between Facebook and Cambridge Analytica, but also between "Facebook and the people who share their data with [it] and expect [Facebook] to protect it"[11]. Zuckerberg promised to let users know if they were affected, to investigate apps that have access to "large amounts of information"[12] (what large amounts of information precisely consists of was never revealed), as well as to limit the amount of information third-party developers can access.

Over three years later, Facebook is still facing backlash over its handling of the Cambridge Analytica scandal, and more generally over how it handles user privacy. While users were initially outraged about their data being used without their consent, their outrage grew to "encompass the ways that businesses [...] take more data from people than they need, and give away more than they should, often only asking permission in the fine print – if they even ask at all"[13]. But Facebook's system was working as intended: data was collected and exploited. Calls by lawmakers and the general public demanded to change this. Hearings at the American Congress and European Parliament were fruitless, leaving lawmakers unsatisfied with Zuckerberg's prepared answers to their questions[14], and he failed to show up at hearings scheduled by the Canadian and British Parliaments[15].

Facebook says that it has made strides as a company to protect its users' privacy, but is it too little, too late? Have users who remain on the platform, as well as its biggest

---

[10] Julia Carrie Wong, "Mark Zuckerberg apologises for Facebook's 'mistakes' over Cambridge Analytica", *Guardian* (US), 22 March 2018, https://www.theguardian.com/technology/2018/mar/21/mark-zuckerberg-response-facebook-cambridge-analytica.

[11] Mark Zuckerberg, 2018, "I want to share an update on the Cambridge Analytica situation -- including the steps we've already taken and our next steps to address this important issue.", Facebook, 21 March 2018, https://www.facebook.com/zuck/posts/10104712037900071.

[12] *Supra* note 10.

[13] Issie Lapowsky, "How Cambridge Analytica Sparked the Great Privacy Awakening", *Wired*, 19 March 2019, https://www.wired.com/story/cambridge-analytica-facebook-privacy-awakening/.

[14] Ryan Browne, "European lawmakers criticize Zuckerberg for his lack of answers", *CNBC News*, 22 May 2018, https://www.cnbc.com/2018/05/23/eu-politicians-dissatisfied-with-facebook-ceo-mark-zuckerbergs-parliament-meeting.html; Prachi Bhardwaj, "Here are all the questions Mark Zuckerberg couldn't answer during this week's congressional hearings", *Business Insider* (US), 12 April 2018, *https://www.businessinsider.com/mark-zuckerberg-facebook-cambridge-analytica-unanswered-questions-congressional-testimony-2018-4*.

[15] Catharine Tunney, "Facebook's Zuckerberg, Sandberg won't appear before committee, could be found in contempt of Parliament", *Canadian Broadcasting Corporation,* 27 May 2019, https://www.cbc.ca/news/politics/facebook-contempt-parliament-1.5145347; Alex Hern and Dan Sabbgagh, "Zuckerberg's refusal to testify before UK MPs 'absolutely astonishing'", *Guardian* (UK), 27 May 2019, https://www.theguardian.com/technology/2018/mar/27/facebook-mark-zuckerberg-declines-to-appear-before-uk-fake-news-inquiry-mps.

affiliates, WhatsApp and Instagram, simply accepted the fact that all their information is available for companies to use as they wish?

Both the United States and Germany (and to a lesser extent, the European Union) seek to limit how much data Facebook can collect from its users, and by extension reduce its power. The United States seeks to go even further by requesting that the Supreme Court annul Facebook's acquisitions of WhatsApp and Instagram.

However similar the end goals of the United States, the European Union, and some of its member states may be, their histories with data privacy law and competition law (antitrust in American parlance) are very different. This thesis aims to, in short, compare their histories and see how they have affected attitudes and legal cases against Facebook.

1.2. Relationship to antitrust law

Companies have long recognised the value of Big Data, and technological advancements have made its procurement much easier. A 2011 McKinsey report noted that "[using] big data will become a key basis of competition"[16], and Facebook has kept this in mind as it amasses over 4 petabytes of data[17] from its 3.3 billion users every day – in easier to digest numbers, that is 350 million photos and 100 million hours of video[18]. Any "competitor that fails to sufficiently develop its capabilities will be left behind"[19], or, conversely, bought out by a bigger company, as Facebook has done with 72 companies since its founding in 2004[20]. It is now one of the most powerful companies in the world. Power here is measured by the number of daily users (which shows its influence on the general population), its income, and having managed to retain this position even after facing a number of controversies. These have been primarily in the areas of free speech and whether it is responsible over the content its

[16] James Manyika, Michael Chui, Brad Brown, Jacques Bughin, Richard Dobbs, Charles Roxburgh, Angela Hung Byers, "Big data: The next frontier for innovation, competition, and productivity", McKinsey Global Institute, June 2011, https://www.mckinsey.com/~/media/McKinsey/Business%20Functions/McKinsey%20Digital/Our%20Insights/Big%20data%20The%20next%20frontier%20for%20innovation/MGI_big_data_full_report.pdf.

[17] Jeff Desjardins, "How much data is generated each day?", World Economic Forum, 17 April 2019, https://www.weforum.org/agenda/2019/04/how-much-data-is-generated-each-day-cf4bddf29f/.

[18] Ibid.

[19] *Supra* note 16, 6.

[20] Ramzeen A V, "72 Facebook Acquisitions – The Complete List!", TechWyse, 17 June 2019, https://www.techwyse.com/blog/infographics/facebook-acquisitions-the-complete-list-infographic/.

users post, but also over the vast amount of data it controls and generates, particularly after its acquisitions of WhatsApp and Instagram.

The European Union has generally been more aggressive than the United States when it comes to regulating businesses, particularly in matters related to privacy, but member states still have a certain amount of freedom. So when Germany's BKA opened an investigation in 2016 regarding Facebook's data gathering practices across its platforms and third-party websites, and assigning said data to individual users, Europe was watching, but with a critical eye. Margrethe Vestager, the EU's antitrust chief, said that just because Facebook violated data privacy rules "doesn't automatically mean that it has also broken the competition rules as well"[21]. The BKA ruled that Facebook needed to stop its data gathering practices unless it had explicit consent from its users, as the practices allowed Facebook to gain monopolistic market power[22]. While the Cambridge Analytica scandal has contributed to a reassessment of the European Union's separation of data privacy and competition law[23], but BKA case may end up being the event that solidifies the separation or dissolves it, as it has been referred to the European Court of Justice.

In comparison, the United States has generally been more lenient in its regulation of businesses and has been slower at responding to Facebook's violations. At a Senate hearing on 8 April 2018, Senator Lindsey Graham asked Zuckerberg if he considers Facebook to be a monopoly, to which he replied "it certainly doesn't feel like that to me"[24]. In March 2019, Senator and presidential candidate Elizabeth Warren released a plan to break up Big Tech, Facebook included, through the means of antitrust law. Since then, the idea of breaking up Big Tech and regulating it with antitrust law has gained an impressive amount of support, as most notably seen with

---

[21] Foo Yun Chee, "Facebook privacy issues may not be competition matters: EU antitrust chief", *Reuters*, 9 September 2016, https://www.reuters.com/article/us-eu-facebook-antitrust-idUSKCN11F1HR.

[22] Bundeskartellamt, "Bundeskartellamt prohibits Facebook from combining user data from different sources", 7 February 2019, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html.

[23] Natasha Lomas, "Europe is drawing fresh battle lines around the ethics of big data", *Tech Crunch,* 3 October 2018, https://techcrunch.com/2018/10/03/europe-is-drawing-fresh-battle-lines-around-the-ethics-of-big-data/.

[24] *Facebook: Social Media Privacy, and the Use and Abuse of Data Hearing before the Committee on Commerce, Science, and Transportation and the Committee on the Judiciary at the Senate*, 115th Cong. (2018), (statement of Mark Zuckerberg, Chief Executive Officer of Facebook).

the July 2020 hearing at Congress, and the state and Federal Trade Commission lawsuits in December 2020 and January 2021.

1.3. Thesis outline and research questions

This thesis aims to use a historical lens to see how historical approaches towards antitrust and data privacy law influence legal decisions by the United States, the European Union, and two of its member states, Germany and the United Kingdom[25]. Antitrust law was written before the advent of the Internet and computer age, and as more and more data are being generated and becoming central to businesses' success, regulators are wondering how to deal with this. Facebook is an excellent case study, as it is the only Big Tech company to be facing investigations combining antitrust and data privacy law on both sides of the Atlantic. Should legal decisions be made that force Facebook to change its structure or data practices, other companies may be required to reconsider their own structures and practices. Comparing the United States, the European Union, Germany, and the United Kingdom is also a strategic decision, as not only were those the entities affected most by the Cambridge Analytica scandal, but also because of their long-standing relationship and their positions as world powers.

To fully understand the entities' stances on the intersection of data privacy and antitrust law, the first two sections will briefly outline the history of their respective (data) privacy and antitrust laws, as understanding them is crucial to analysing the different stances they take towards Facebook. Following those, a third section will outline exactly how Facebook is anticompetitive by taking a look at its acquisitions. These sections set up the background for the fourth section, which will look at current investigations and legal battles taking place in the European Union, Germany, the United Kingdom, and the United States.

The main question of this thesis is "how has history shaped current antitrust and data privacy investigations into Facebook?". To answer that, another question

[25] For the purposes of this thesis, the United Kingdom is considered as a member of the European Union. Any activities (investigations, court decisions, laws) in relation to data privacy law, competition law, or Facebook Inc. and any of its subsidiaries taken after 31 December 2020, as well as any activities pertaining to the aforementioned legal fields or entities specifically within the context of a post-Brexit United Kingdom, are not considered.

must be asked: “how are data privacy and competition law linked?”. The former cannot be asked without establishing the background of what is, currently, a disputed issue.

1.4. Methodology and data

To answer the above questions, a combination of methods are used. First is qualitative research analysis, specifically through the usage of case studies – in this case, the United States, the European Union, the United Kingdom, and Germany. These case studies are examined through a historical lens, to show how history has shaped the present, and will shape the future. Second is the analytical legal research method, which seeks to look at the law and legal concepts, and understand their broader applications within specific contexts, in this case, the intersection of data protection and antitrust law.

1.5. Previous research

As the legal world has only recently become interested in Facebook and its bigness, and more specifically the intersection of data privacy and antitrust law, there is not a significant amount of research on the topic. As such, many of my non-historical sources are newspaper articles or legal sources, such as court decisions, lawsuits, or government hearings. It is noted that these sources may hold more bias than academic articles or books, though even those are not free from bias, particularly in the legal world. While the law aims to be impartial, bias is unavoidable.

Another matter of note is that legal scholarship within the United States is more prominent than within the European Union and its member states; or, at least, it is more accessible. While this did not greatly impact the research done for this thesis, it should still be considered.

There are four significant sources that helped shape the direction and topic of this thesis. First is Lina Khan’s “Amazon’s Antitrust Paradox”, an associate professor of antitrust law at Columbia University and a nominee for Commissioner at the Federal Trade Commission. In her paper, which propelled her to nation-wide fame, she wrote about how current American antitrust law, focusing largely on consumer welfare, is unequipped to deal with Amazon’s business practices of setting low prices and integration across business lines. Her paper not only disagreed with the current

foundations of antitrust law, but made a solid case against it, arguing for a return to a system which preserves a competitive marketplace, rather than focus on the harms to consumers (or lack thereof; low prices and being able to replenish necessary products, buy groceries, watch television shows, and listen to music all on the same website does not harm consumers, but it certainly harms competitors), such as by outlawing vertical integration by companies in a dominant position. Her position earned praise from supporters and ire from critiques, who dubbed her position "hipster antitrust", or, more formally, the Neo-Brandeis movement. The Neo-Brandeis movement will be discussed in detail in Sections 3.1.6. and 5.4.

Another adherent to the Neo-Brandeis movement is a professor of law at Columbia University, later one of Joe Biden's picks for special assistant in technology and competition policy at the National Economic Council, and author of *The Curse of Bigness: Antitrust in the New Gilded Age*, Tim Wu. In his book, Wu showcases the history the history of the (anti) monopoly movement in the United States, and advocates for neo-Brandeisian solutions to Big Tech's bigness. The formatting of Section 3 was influenced by Wu's work.

Dina Srinivasan's paper "The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy" outlines how Facebook has used its dominant position to eradicate user privacy. She makes the claim that accepting to use Facebook today is accepting to be subject to surveillance. The consent is dubious, however, as Facebook users do not get a say in whether or not they can be surveilled, and the fact that they have no say is due to Facebook's dominance on the social media market.

Fourth is Yale Law School professor James Q. Whitman's "The Two Western Cultures of Privacy: Dignity Versus Liberty". In it, he compares the European view of privacy as seen through France and Germany, which focuses on dignity, versus the United States' view, which emphasises liberty.

There are also papers and talks focusing on the differences between antitrust law and data privacy law within the United States and the European Union, but none have focused on their intersection, nor how their history has shaped policy today.

2. DATA PRIVACY HISTORY

Individuals have always been concerned with their privacy; however, someone writing in a journal does not have to worry about the journal's manufacturer leaking their information, while someone posting their thoughts on an online forum has to worry about the possibility of their login credentials being leaked, and potentially having more than just their online thoughts exposed. If one's thoughts are shared from a private, physical journal, the manufacturer cannot be held liable as the security vulnerabilities were due to the way the journal was stored: either the owner left it in an easily accessible place (though this does not mean that the owner is responsible for the leaking of any private information), or someone went through the owner's belongings, thus violating the owner's reasonable expectation of privacy. However, if a company system is hacked, or is in any way stolen by a third-party directly from a company, then the company can potentially be held liable for not securing their systems well enough and allowing unauthorised individuals access. In the case of Aleksandr Kogan, Facebook did not go through all the required steps to ensure that he and Cambridge Analytica deleted all Facebook user data from their systems[26].

This section will first explain the significance of data to Facebook, then provide an overview of privacy law in the case studies chosen, showing the differences between the entities, as well as within the EU itself. It is highly influenced by Whitman's article, "Two Western Cultures of Privacy", which compares French and Germany historical notions of privacy focusing on dignity, versus the United States, which emphasises liberty. Additional research has been done on the United Kingdom, and the European Union as a whole.

2.1. The significance of data to Facebook

To understand how Facebook makes money, one needs to understand what cookies are. Cookies are small text files that websites install on users' computers. On an individual level, cookies can improve the user experience such as by remembering login information or showing items in online shopping carts from a previous session. They can also give information to a website, like telling it which pages users visited,

[26] *Supra* note 3.

how long the page was visited for, and the user's location. Websites can use this information to provide advertisements to users, or suggest similar items, articles, or papers to look at. The use of cookies is not limited to Facebook; it is an industry standard.

In 2004, Facebook's privacy policy noted that it "does not and will not use cookies to collect private information from any user"[27]. It also promised users the ability to opt-out of having information shared with third parties, or prohibit Facebook from collecting information about users from third parties. Yet, in 2007, it broke that promise.

In November 2007, it launched a product called Beacon[28], which provided participants[29] with a piece of code to install on their websites. When a user did an action that launched the code, they would be greeted with a pop-up box that asked for their permission to share the action on their personal page. However, even if a user did not consent to having the activity shared, Facebook effectively still knew of what they did[30]. Furthermore, if a user clicked the "Remember Me" button on the Facebook website upon logging in, Facebook could link the user's Facebook identification number to what was supposed to be anonymised cookie data. This is the first instance of Facebook using cookies for tracking on third-party websites.

Facebook faced immediate backlash, including class-action lawsuits[31], petitions, and protests from advocacy groups[32]. As the social media marketplace was far more competitive then, with MySpace having twice as many unique visitors in the

[27] Thefacebook,"Privacy Policy", 13 June 2004, https://web.archive.org/web/20040613184140/http://www.thefacebook.com/policy.php.
[28] Juan Carlos Perez, "Beacon's user tracking extends beyond Facebook, CA says", *Computer World,* 3 December 2007, https://www.computerworld.com/article/2537951/beacon-s-user-tracking-extends-beyond-facebook--ca-says.html.
[29] When Beacon launched, it had 44 participants, including major American websites and brands such as the *New York Times*, wedding planning website *The Knot*, and the movie rental service Blockbuster. Facebook, Inc., "Leading Websites Offer Facebook Beacon for Social Distribution", 6 November 2007, https://about.fb.com/news/2007/11/leading-websites-offer-facebook-beacon-for-social-distribution/.
[30] Dina Srinivasan, "The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy", *Berkeley Business Law Journal*, 15, no. 1 (2019), 57, https://lawcat.berkeley.edu/record/1128876?ln=en.
[31] *Lane v. Facebook, Inc.*, 696 F.3d 911 (2012).
[32] MoveOn, "Facebook must respect privacy", Tech Liberation, 7 December 2007, https://techliberation.com/wp-content/uploads/2007/12/071120email.html.

United States[33], and rivals such as Orkut[34], Friendster[35], and Bebo[36] commanding strong presences, especially abroad[37], Facebook was compelled to make a move, and allowed users to opt-out of Beacon[38]. However, it still took almost two years, until September 2009, for Beacon to shut down[39].

Even though Beacon was shut down, Facebook continued to collect user information through other means. Some of these ways were through the "Like" button on third-party websites, or the ability to sign up for a website or application using one's Facebook credentials. Simply having those on a website was enough to send Facebook information about what its users were doing offline, even if users did not press the button or log in, or even if website users did not have a Facebook account[40].

98% of Facebook's revenue comes from advertising[41], and as a result, Facebook has a significant incentive to show its users relevant advertisements. To do so, Facebook sifts through the information users provide (willingly or unwillingly), and shows advertisements relevant to the information provided. Users also have the option to tell Facebook which advertisements or advertisers they do not want to see.

It is the data that has been collected unwillingly that has been at the centre of much of the contention surrounding Facebook's data hoarding practices. These data are collected through the cookies mentioned above. The fact that the company is able to track users offline means that it has access to information that users do not provide on the website, some of which may be sensitive[42].

---

[33] Michael Arlington, "Facebook No Longer the Second Largest Social Network", *TechCrunch,* 2 June 2008, https://techcrunch.com/2008/06/12/facebook-no-longer-the-second-largest-social-network/.
[34] Ricardo Geromel, "Facebook Surpasses Orkut, Owned by Google, in Number of Users in Brazil", *Forbes*, 14 September 2011, https://www.forbes.com/sites/ricardogeromel/2011/09/14/facebook-surpasses-orkut-owned-by-google-in-numbers-of-users-in-brazil/?sh=176152655e5e.
[35] Ling Woo Liu, "Friendster Moves to Asia", *Time*, 29 January 2008, http://content.time.com/time/business/article/0,8599,1707760,00.html.
[36] MarketingCharts, "Bebo Becomes Most-Visited Social Networking Site in UK", 16 August 2007, https://www.marketingcharts.com/demographics-and-audiences/youth-and-gen-x-1300.
[37] Supra notes 31, 32, and 33.
[38] Facebook, "Announcement: Facebook Users Can Now Opt-Out of Beacon Feature", 8 December 2007, https://about.fb.com/news/2007/12/announcement-facebook-users-can-now-opt-out-of-beacon-feature/.
[39] Juan Carlos Perez, "Facebook Will Shut Down Beacon to Settle Lawsuit," *New York Times,* 19 September 2009, https://archive.nytimes.com/www.nytimes.com/external/idg/2009/09/19/19idg-facebook-will-shut-down-beacon-to-settle-lawsuit-53916.html.
[40] Facebook, "What information does Facebook get when I visit a website with the Like button?", https://www.facebook.com/help/186325668085084.
[41] *Supra* note 1.
[42] *Supra* note 30.

Additionally, users have not always been aware of the extent to which Facebook collects and uses data, particularly for marketing purposes. This has also led to scrutiny by governments. The FTC was notable in going after Facebook in the years following its global rise. This will be discussed in Section 5.4.1.2.

2.2. Privacy as dignity: the European way

A concept vital for this subsection is dignity. However, there is no established legal definition of dignity, despite its importance in legal documents pertaining to human rights law, particularly after World War Two. Dignity is of upmost importance to the European Union: the first article of the Charter of Fundamental Rights of the European Union is "Human dignity is inviolable. It must be respected and protected". It also appears in the General Data Protection Directive (GDPR), in Article 88, "Processing in the context of employment": member states may provide more specific rules than outlined in the GDPR "to safeguard the data subject's human dignity". The Declaration of Human Rights, of which all current European Union member states are signatories, states in Article 1 that "All human beings are born free and equal in dignity and rights". An action that one state or individual may consider to be an affront to dignity may not be considered as such by another entity. But the lack of an established definition does not diminish the importance of the idea of dignity. Dignity can be seen as the idea that someone is worthy of respect and honour[43]. To lose one's dignity is to lose the respect of others, to no longer be seen as honourable in their eyes. While perhaps an archaic term today, honour was vital to the first instances of privacy law.

2.2.1. German honour and personality

In the second half of the 1800s, German jurists sought to endorse the theory of personality as the theory of true freedom. Personality, in short, is the individual right to self-creation. In other words, individuals have the right to present themselves in whatever way they see fit to the rest of the world. To translate this idea into law, German jurists "treated the protection of privacy simply as one aspect of the protection

[43] Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights", *European Journal of International Law*, 19, no. 4 (2008), 656 – 657, https://doi.org/10.1093/ejil/chn043.

of personality more broadly"[44], dipping into insult law, and artistic and intellectual property rights.

Unlike the French, whose honour laws were born from the lascivious art world[45], the Germans sought a more philosophical understanding of honour, which is related to insult in that insult injures honour. They looked at Ancient Roman insult law, *injuria*, which initially started out as only applying to "injuries to a person's possessions", but eventually expanded to "cover various kinds of disrespectful and insulting speech and treatment"[46] . However, the Romans did not explain how physical and verbal injuries were related, so the Germans took a Hegelian approach to *injuria*. Hegelians noted that the historical punishment approach to injury had moved to the material, such as "an eye for an eye, tooth for a tooth", to a more proportional, and thus immaterial, approach. German scholars applied this approach to their understanding of injury in relation to honour, and therefore personality.

In this move from the material (physical) to the immaterial (honour), they also focused on artistic rights as a part of personality. Infringing on artistic rights, whether by selling someone's art as one's own or distributing unauthorised prints, infringes on the right to self-creation, and consequently privacy, because permission was not given to sell the artwork.

Whitman wrote in "Two Western Cultures of Privacy" that Nazi Germany provided the basis for contemporary protections of personality and dignity. However, these protections were only for ethnic Germans. Nazi law emphasised that its citizens, so long as they were ethnic Germans, ought to have honour, and that others, ethnic Germans or not, should respect it. The lives, bodies, health, and freedom of ethnic Germans were protected by the Civil Code, and as such, "it can be said that the *Volk* comrade has a general right of personality"[47].

---

[44] James Whitman, "The Two Western Cultures of Privacy: Dignity Versus Liberty", *Yale Law Journal*, 113, no. 6 (2004): 1182, http://dx.doi.org/10.2139/ssrn.476041.

[45] Author Alexandre Dumas père enlisted a photographer to take intimate photos of himself and an American actress. Dumas did not discuss photo rights after the session ended, and so the photographer sold them, only to be sued by Dumas. As he did not hold the rights to the photos, the court tried to find another way to let him prevail, and essentially invented the right to privacy, insofar as photos were concerned. This is also known as the *droit à l'image,* or right to one's image, where one needs to give consent to have their photos published, and can revoke it if they choose, as consent can be revoked. Ibid, 1175 - 1176.

[46] Ibid, 1183.

[47] Ibid, 1187.

While Whitman is right that there was *de jure* protections for personality, *de facto* protections varied. If one respected and supported the Third Reich, then their personality protections were strong. But exercising one's personality rights by speaking out against the Nazi regime could endanger their lives, bodies, health, and/or freedom. As such, it cannot truly be said that the roots of contemporary personality rights were set during 1930s Germany.

Personality rights flourished in the Federal Republic of Germany (FRG) after World War Two, in an attempt to break free from the Nazi regime. It codified human dignity and the right to personal liberty for all, not just ethnic Germans. From these principles "comes the right to freely develop one's personality"[48], or the right to self-creation, i.e. privacy, which is what German jurists sought to endorse in the 1800s. In 1970, the state of Hessen adopted the world's first data privacy law, and in 1978, the FRG adopted a nation-wide data protection act, the Bundesdatenschutzgesetz *(*Federal Data Protection Act*)*. In 1983, the FRG wanted to conduct a general population census, collecting information such as education, professional occupations, and religious affiliations, for the general aim of statistics collection, as well as comparing the data against population registers. This sparked fears of surveillance and invasions of privacy, which eventually lead to the filing of a lawsuit to stop the census to the German Federal Constitutional Court. In December 1983, the Court issued a decision against the census. The fears against the aims were unfounded, but those against the collection methods were not; the government was ordered to explicitly explain how they would further safeguard and eventually delete identifying information. The census was delayed to 1987 and again was met with pushback from the general public; that time, the Constitutional Court allowed the census to happen[49], but it was the last time Germany, separated or unified, conducted a census[50].

While the FRG codified dignity and personal liberty, the Democratic Republic of Germany upheld state surveillance with the Stasi. They operated similarly to the Nazi-era Gestapo, relying heavily on informants. At its height, the Stasi had over

[48] Thomas Shaw, "Privacy Law and History: WWII – Forward", International Association of Privacy Professionals, 1 March 2013, https://iapp.org/news/a/2013-03-01-privacy-law-and-history-wwii-forward/.
[49] Gerrit Hornung and Christoph Schnabel, "Data protection in Germany I: The population census decision and the right to informational self-determination", *Computer Law and Security Report*, 25, no. 1, (2009), 85.
[50] Ibid, 85.

102 000 employees with an additional 173 081 informants, and no one could be absolutely certain that they were not being informed on[51].

When Germany reunited in 1990, all citizens had the rights and duties enshrined in the FRG's Basic Law, with Article 1 being "Human dignity is inviolable. To respect and protect it shall be the duty of all state authority".

2.2.2. The British right to privacy: a newfound concept

In comparison to German privacy law, British privacy law is not only young, but underdeveloped. In 1990, British actor Gordon Kaye was involved in a car crash, and some paparazzi journalists managed to get into his room and take photos of him. When the journalist filed an appeal against an injunction against the publication of the photographs and article, Kaye sued for libel, trespassing, and for being a nuisance. The Court of Appeals only acknowledged libel, with one judge saying that "It is well known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy"[52], and another that "the case highlights [...] the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens"[53].

This is not to say that there were no privacy protections in English law, but that privacy was not seen as a standalone right. It is only when a violation of privacy stands in conjunction with another allegation, such as libel or breach of contract, that British courts allowed the violation to stand.

British privacy law began to develop in 2000, when the Human Rights Act became law and incorporated the rights set forth in the European Convention on Human Rights (ECHR), which includes Article 8: Respect for your private and family life. Article 8, in short, legalises the right to privacy and freedom from interference from third parties, including the government and private parties. However, state interference is allowed, insofar as it is to protect national security interests.

---

[51] The Stasi had files on 5.6 million people, or approximately one third of the population of the German Democratic Republic. See Cathrin Schaer, "Stasi Files Reveal East Germany's 'Dirty Reality'", *Der Spiegel,* 10 July 2009, https://www.spiegel.de/international/germany/the-world-from-berlin-stasi-files-reveal-east-germany-s-dirty-reality-a-635486.html.

[52] Lord Justice Glidewill, Kaye v Robertson, Times 21 March 1990, (1991) FSR 62 Glidewell LJ, quoted in Sam Markkan, "PRIVACY, PARLIAMENT & the JUDICIARY (the privacy ping pong)", ActNow. https://www.actnow.org.uk/media/articles/Privacy_Parliament_and_the_Judiciary.pdf.

[53] *Ibid.*

2.2.3. European data protection and honour

In 1980, the Organisation for Economic Cooperation and Development (OECD) issued the non-binding Recommendations of the Council Concerning Guidelines Governing the Protection of Privacy and Trans-Border Flows of Personal Data, which outlined eight principles for data governance[54]. Following German reunification and the creation of the European Union, the European Commission proposed the Data Protection Directive (DPD) in 1995, which encompassed the OECD's principles. The DPD regulated the processing of all personal data within the European Union, even when the entity processing the data was located beyond the Union's borders. Personal data is defined in Article 2(a) of the DPD "any information relating to an identified or identifiable natural person", which includes "identification number[s] or [...] one or more factors specific to [one's] physical, physiological, mental, economic, cultural or social identity."

The DPD was proposed due to the lack of harmonisation between Member States' data privacy regulations, hampering the development of the internal market; if each state had different rules regarding data processing, then companies would perhaps be inclined to only be available in states with rules similar to ones within their home states, as to avoid extra red tape.

Technology has long since evolved the signing of the DPD. The General Data Protection Regulation was proposed in 2015 as an update, and adopted in 2017. The GDPR broadens and specifies the definition of personal data to include IP addresses, geo-location, and biometric data, in addition to the personal identity markers mentioned in the DPD. Companies use the given information to market to specific groups, such as males of Algerian ancestry between the ages of 30-45 in the Parisian metropolitan region, or female Swedish speakers between the ages of 18-25 in Österbotten. Under the GDPR, companies are not allowed to profile users via the

[54] Limitation on data collection; collected data should be relevant to the data controller collecting it; data must be used for reasons specified to users; data should be protected; data controllers should be open about how they use the data, and if there are any changes to data collection and processing; users should have the right to obtain data; data controllers should be held accountable. Organisation for Economic Development and Cooperation, "OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data", https://www.oecd.org/internet/ieconomy/oecdguidelinesontheprotectionofprivacyandtransborderflowsofpersonaldata.htm.

personal data markers mentioned above unless users explicitly consent to their data being used for marketing purposes.

Consent is another prominent aspect of the GDPR. Upon visiting a website, users are greeted with a pop-up box that asks for the user's consent to put cookies on their computer to gather data in the following areas:

- user performance (how long a user stays on the website, which pages they visited)
- user preferences (such as which language they browsed the website in)
- advertising/marketing (generally from third-party websites to present advertisements from the website users are browsing on other websites, as well as to track usage from third-party websites on the current websites, via share buttons or embedded videos)

Consent is defined in Article 4(11), and must be "freely given, specific, informed, and unambiguous". In order for consent to be freely given, specific, informed, and unambiguous, companies must present a description of what they intend to do with user data in a clear, specific, and concise manner. To consent to receiving cookies, users can click a button agreeing to receive them, or select which ones they want. Pre-ticked boxes or not clicking submit and continuing to browse the website (if browsing is permitted without having to consent) do not constitute consent. To place cookies and collect information on users who have not consented is a violation of the GDPR. In the case of Facebook, upon the implementation of the GDPR, users were presented with a full-screen notice about the changes. However, the notice was designed to encourage people to simply click through it and not make any changes. "Accept", "continue", and "save" buttons were in a bright blue, while the "manage data settings" buttons were inconspicuous: white with grey text, and a thin, grey border. The differences between the "accept" and "manage data settings" is not limited to Facebook; many websites design their consent forms in such a way as to encourage the user to not change their settings[55].

[55] Margaret Rhodes, "Is It Possible to Design an Ethical Cookie Consent Bar?", *XD Ideas*, 4 September 2020, https://xd.adobe.com/ideas/perspectives/social-impact/is-it-possible-to-design-an-ethical-cookie-consent-bar/.

2.3. Privacy as freedom from big government

2.3.1. "The Right to Privacy"

Insofar as the American Constitution is concerned, there is no explicit right to privacy. Some Amendments do make reference to certain freedoms from the state, such as the freedom to criticise the government (freedom of speech, First Amendment) or the freedom from unreasonable searches without a warrant (Fourth Amendment), both of which can be equated to the idea of personal sovereignty without fear of state interference (among other interpretations, but this is the one most relevant to the thesis). During the drafting of the Constitution, debate raged between the anti-Federalists, who feared a big central government and advocated for a Bill of Rights, and the Federalists, who thought that the government described in the Constitution was limited and that enumerating rights would limit individual liberties. The Ninth Amendment, written and added by Federalist James Madison, states that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people", thus appeasing both sides, and leaving the inclusion of additional rights open to interpretation.

The first reference to privacy in American law is found in an 1890 *Harvard Law Review* article by Louis Brandeis and Samuel Warren titled "The Right to Privacy". They wrote that

> Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops"[56].

By tying privacy to intellectual and property rights, Warren and Brandeis attempted to bring a "Roman"[57] (European) approach of privacy to the United States, though this did not succeed.

The European approach to privacy did not take hold in the United States because of the American emphasis on the free press and the free market[58]. In American court cases, free speech has triumphed over privacy matters, insofar as the speech was made in public or on a public forum; hence why a private citizen who publishes

[56] Louis Brandeis and Samuel Warren, "The Right to Privacy", *Harvard Law Review*, 4, no. 5 (1890): 195, https://doi.org/10.2307/1321160.
[57] *Ibid,* 198.
[58] *Supra* note 42, 1208.

compromising photos of another private individual may be sued, but celebrity gossip magazines are allowed to publish unflattering photos taken in places where there is no reasonable expectation of privacy. This in in contrast to the European Union, where individuals have the right to request that compromising photographs be taken down from public forums, even if they initially consented to their publication. Another example is how governments (federal and state) are limited in their abilities to censor publications from revealing publicly available yet sensitive information. In the case of Cox Broadcasting Corporation v. Cohn (1975), a Georgia newspaper obtained public court documents revealing the name of a 17-year-old who was raped and murdered, and published articles with her name. Her father sued, as under Georgia law, the names of rape victims are not allowed to be published in the media without consent. However, the Supreme Court ruled that because the court documents were public records, forbidding the newspaper from publishing the 17-year-old's name was a violation of free speech and "invite[s] timidity and self-censorship"[59].

Free speech triumphing over privacy also relates to the American emphasis on the free market. Take the example of celebrity gossip magazines: if celebrities sued each time a magazine published intimate details or unflattering photos, then gossip magazines would be out of business. The relationship between privacy and the free market can also be seen in a more personal way: a significant portion of advertising, particularly in the advent of the digital age, relies on consumer data. To go back to Facebook, the social media company has cookies on over 8.4 million websites[60]. Regulations regarding privacy in the technology sphere have traditionally been lax[61], and have contributed to how tech companies have amassed so much power. There are individuals who say that the market will self-correct; in this context, this means that if there is enough consumer demand, then companies will implement policies to protect user data and privacy. However, as has been seen in recent years, Facebook has not implemented any stronger privacy policies out of its own volition, but rather because of demands made by governments, which indicates that letting the free market run its course may not be the best way to handle such matters. As Dina Srinivasan wrote in "The Antitrust Case Against Facebook", the social media company has used its strong

[59] Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (White, majority opinion).
[60] Rebecca Stimson to Damian Collins, 14 May 2018, 2. https://www.parliament.uk/globalassets/documents/commons-committees/culture-media-and-sport/180514-Rebecca-Stimson-Facebook-to-Ctte-Chair-re-oral-ev-follow-up.pdf.
[61] Jacqueline Klosek, *Data Privacy in the Information Age,* (Westport: Quorum Books, 2000).

position to weaken user privacy: users are stuck with Facebook, and it is currently the eminent social network to keep in touch with friends, family, and individuals met at social events. Though a variety of other social media websites have popped up over the years, from right-wing Gab to professional social networking LinkedIn, none have amassed the global power that Facebook has, nor can they truly be compared to the giant, as they offer slightly different services that make it difficult to make a true comparison.

"The Right to Privacy" remains one of the most influential American law review articles published, directly influencing 15 state courts to recognise the common law right to privacy[62]. Brandeis's influence can also be seen in the dissent he wrote for Olmstead v. United States (1928), one of the most famous dissents on privacy.

Olmstead v. United States focused on the legalities of the government wiretapping private conversations. A previous decision, *ex parte* Jackson, had decided that tampering with letters is illegal because they are in the custody of the United States. Similarities between the cases were made during the trial, but the Supreme Court dismissed them, as telephone services are not provided by the government. Thus, the same reasoning did not apply. Brandeis disagreed, writing in his dissent that telecommunication companies are "public service[s] furnished by [the] authority"[63] of the government, and are thus protected under the Fourth Amendment, which prohibits illegal searches. As such, "every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment"[64]. Brandeis also wrote that wiretapping violated not only the rights of the person being wiretapped, but also the rights of others who used the phone and those who called the person, as they were unaware they were being wiretapped. In other words, their right to be left alone, "the right most valued by civilised men"[65] and an implicit constitutional right, was being violated.

Brandeis's affirmation that there is an implicit right to be left alone was largely influential, and can be seen through four Supreme Court cases. They are Griswold v. Connecticut (1965), Katz v. United States (1967), Roe v. Wade (1972), and Carpenter v. United States (2018).

---

[62] Melville B. Nimmer, "The Right of Publicity", *Law and Contemporary Problems*, 19 (1954), 203.
[63] *Olmstead v. United States*, 277 U.S. 438, 475 (1928) (5-4 decision) (Brandeis, dissenting).
[64] *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, dissenting).
[65] *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, dissenting).

In Griswold v. Connecticut, the Court ruled that couples have the right to privacy within their marriages. Though the right to privacy is not explicitly stated in the Constitution, in delivering the opinion of the Court, Justice William Douglas wrote that there are implicit privacy protections within the Bill of Rights, and Justice Arthur Goldberg cited Brandeis's dissent in his concurrence as a precedent for privacy being a "fundamental personal right"[66].

Katz v. United States was another wiretap case in a public phone booth, though in this instance the court ruled in favour of the plaintiff. By ruling in favour of Katz, the Court overturned Olmstead, and thus expanded the reach of the Fourth Amendment to include oral statements.

Roe v. Wade is arguably one of the most well-known Supreme Court cases in modern American history. It not only legalised abortion (with some exceptions), but affirmed an implicit right to privacy in the Due Process Clause of the Fourteenth Amendment.

Finally, Carpenter v. United States explicitly cited Brandeis's dissent. The government had obtained cell phone data from cellular companies, without a warrant, to track and eventually charge robbery suspects. Chief Justice John Roberts cited Brandeis in the majority opinion, acknowledging that "the Court is obligated [...] to ensure that the 'progress of science' does not erode Fourth Amendment protections"[67]. In other words, the Court has a duty to ensure that technological advances do not lessen privacy protections.

With these cases in mind, it should be noted that the United States is a common law system, and that most case law relating to privacy involves protection from the state, rather than third parties. However, this is not to say that there are not important pieces of legislation pertaining to privacy protections from third parties unaffiliated with the government. Examples include the Health Insurance Portability and Accountability Act (1996)[68], the Federal Educational Rights and Privacy Act (1974)[69], two-party consent laws for recordings of conversation, and a variety of financial privacy laws. Yet, there is only one federal law pertaining to digital privacy: the Children's Online Privacy Protection Act (2000). As its name indicates, the act only

[66] *Griswold v. Connecticut*, 318 U.S. 479 (1965) (Goldberg, concurring).
[67] *Carpenter v. United States*, No. 16-402, 585 U.S. _____ (2018) (Roberts).
[68] HIPAA prevents unauthorised parties from accessing medical records.
[69] FERPA prevents all education institutions that receive government funds from disclosing certain information about students without prior consent.

protects children, and only those under the age of 13, by prohibiting "unfair or deceptive acts or practices in connection with the collection, use, and/or disclosure of personal information from and about children on the Internet"[70]. While definitions or examples of unfair or deceptive acts are not included in the text of the law, such acts can include the collection of children's data by third parties without the host website informing the third parties of the ages of the individuals whose data they were collecting or without informing the users of the data collection[71], and using cookies to track underage users without informing their guardians[72].

2.3.2. Federal privacy law

When online privacy laws began to be a subject of discussion in the 1990s, the United States was hesitant to write federal laws for online companies. The Information Infrastructure Task Force, led by then Vice President Al Gore, gathered a number of government agencies, including the Federal Trade Commission, and eventually "observed that Internet privacy issues could impede the rapid growth of Internet-based commerce"[73]. However, in its final report, released in July 1997, the Task Force noted that legislation was not the best way to protect online privacy. Instead, the Task Force called for industry self-regulation with regard to managing and protecting user data, as it would allow the Internet to continue being "a non-regulatory medium, one in which competition and consumer choice will shape the marketplace"[74]. Some politicians did however say that if companies did not comply, regulation would be necessary[75].

A number of federal laws have been proposed since the Task Force's report, most notably the Consumer Privacy Bill of Rights (CPBR), introduced during Barack Obama's tenure. The blueprint appeared in 2012, with a draft bill was proposed in 2015. The CPBR promoted consumer control over data, transparency about privacy practices and how companies use data, and the rights to access the data and to hold

[70] 16 CFR § 312.3.
[71] See 2015 Federal Trade Commission settlements with Lai Systems LLC and Retro Dreamer.
[72] See 2019 Federal Trade Commission settlement with YouTube and Google.
[73] *Supra* note 61, 130.
[74] *Supra* note 61, 131.
[75] Secretary of Commerce William Daley said at the 1998 Privacy Summit that if regulation were to be needed, he did not "want to hear griping and moaning from any of you [Internet-based companies]". *Supra* note 61, 132.

companies accountable for data misuse. However, it prompted backlash from both tech companies and privacy advocates. The Consumer Electronics Association, which includes Facebook, said that the bill "could hurt American innovation and choke off potentially useful services and products"[76] as consumers would be given the ability to limit how much, if any, data can be sent to and used by the companies. Consumer privacy groups were also unhappy with the bill, particularly with the idea that companies would be able to write their own rules that would be signed off by the FTC, leaving room for them to only comply with the bare minimum established within the bill, as opposed to allowing the FTC to write regulations that established stronger protections for consumers. In addition, if the CPBR had been passed, it would have overturned state law that offer more adequate protections.

The idea that free speech and the free market triumph over privacy rights is present in the CPBR. Section 106.a.3.A states that companies are under no obligation to fulfil correction or data deletion requests if "when doing so would be incompatible with [...] any applicable First Amendment interest of the covered entity [company] in that personal data". In plain language, this means that should there be an individual who had committed a crime that would be within the public's interest to know about (such as a sexual violence or a hate crime), said individual would be unable to make a request to a search engine to remove search results that feature articles detailing their crimes, as it would be a First Amendment interest of the company to keep the search result up.

It has been clear that Congress wants to pass laws protecting American consumers, but differences between Democrats and Republicans has made it so that Congress has been unable to pass any legislation[77], thus leaving it up to states to cover the gaps in consumer data protection (another important aspect to note is that data protection in the United States has so far fallen under consumer protection law, as opposed to privacy law). California has so far been the only state to pass any meaningful legislation, though other states have made steps in that direction.

---

[76] Gary Shapiro, "CEA: Government Must Not Stifle Innovation While Protecting Privacy", *Business Wire*, 27 February 2015, https://www.businesswire.com/news/home/20150227006119/en/CEA-Government-Must-Not-Stifle-Innovation-While-Protecting-Privacy.

[77] Lauren Feiner, "A federal privacy law is starting to crystallize, but Democrats and Republicans can't agree on how to do it", *CNBC News*, 4 December 2019, https://www.cnbc.com/2019/12/04/a-federal-privacy-law-is-starting-to-crystallize-senators-remain-divided-over-details.html.

2.3.3. State privacy law

2.3.3.1. California

The California Consumer Privacy Act (CCPA) was introduced in 2018, and came into effect in January 2020. The CCPA allows consumers to ask businesses to disclose what personal information they have on them, to delete personal data, to opt-out of the sale of their data, and to not be discriminated against should they exercise their rights under the CCPA. Businesses covered under the law had to satisfy one of three conditions: have an annual revenue of over $25 million, buy or sell the data of at least 50 000 households and/or individuals, or earn at least 50% of their revenue through selling their customers' personal information. Privacy advocates had concerns when the law was passed, however. Thanks to tech companies' lobbying[78], a number of changes were made in the final bill, including simplifying the definitions of "personal information" and "deidentified"[79], and increasing the figurative cost of asserting privacy rights[80]. While degrading privacy rights for the general population, low-income individuals are disproportionately affected by these changes.

In November 2020, California voters voted 56.2-43.8% to pass the California Privacy Rights Act (CPRA)[81]. The CPRA was proposed to strengthen the CCPA, such as by tripling the fines for companies who misuse children's data, creating a dedicated data protection agency to enforce the law, and closing a loophole that allowed businesses engaging in targeted advertising, such as Google and Facebook, to not be exempt from the law. It also limited its impact on small to medium-sized businesses

[78] Something interesting to note is that Facebook initially lobbied against the CCPA, donating $200 000 to the California Chamber of Commerce to defeat, if not rewrite, the law. But in April 2018, a month after the Cambridge Analytica scandal, Facebook announced it would no longer oppose the CCPA, yet Facebook officials still participated in anti-CCPA meetings. See Lee Fang, "Google and Facebook Are Quietly Fighting California's Privacy Rights Initiative, Emails Reveal", *The Intercept*, 26 June 2018, https://theintercept.com/2018/06/26/google-and-facebook-are-quietly-fighting-californias-privacy-rights-initiative-emails-reveal/.

[79] Cal. Civ. Code § 1798.140(h).

[80] Assembly Bill 1564 allows companies to only have one method of contacting them for information requests, either by phone or email, and require an email address to be given if contacting them online. This disproportionately affects low-income individuals and senior citizens, who are less likely than the rest of the population to own a smartphone or have Internet access. Electronic Frontier Foundation to Marc Berman, 17 April 2019, "AB 1564 -- as introduced OPPOSE", https://www.eff.org/document/ab-1564-opposition-letter-april-2019.

[81] Alex Padilla, *Statement of Vote, General Election November 3, 2020*, 16, https://elections.cdn.sos.ca.gov/sov/2020-general/sov/complete-sov.pdf.

by raising the threshold of customers they buy or sell data of to 100 000[82]. The CPRA is an imperfect piece of legislation, and many privacy-centred organisations, most notably the Electronic Frontier Foundation (EFF) and the Electronic Privacy Information Center (EPIC), either did not endorse it or remained neutral[83]. One of the reasons was that the CPRA expanded the "pay for privacy" aspect of the CCPA to cover store loyalty programs, allowing "companies to charge [Californians] more if [they] tell [companies] not to sell [their] personal information"[84]. This particularly targets low-income individuals, who tend to be elderly and/or non-white, as they benefit from the savings these programs provide. Those who do not want to give their personal information to companies will no longer benefit from the rewards offered by loyalty programs, such as additional sales or reward points. Another reason why EFF and EPIC did not endorse the CPRA was that individuals who want to sue a business for not respecting their rights would not be able to do so; rather, only the Attorney General would be able to sue a business for lack of compliance. EFF put their concerns about CPRA succinctly in a July 2020 publication: "It is a mixed bag of partial steps backwards and forwards"[85].

2.3.3.2. Other state laws

Maine and Nevada have also recently implemented consumer data protection laws, and are the only other states to have done so. They are, however, more limited in scope than the CPRA. In Maine, only customers of Internet Service Providers (ISPs) are covered, and only the data relating to the ISPs is protected. Consumers must specifically opt-in to allow the usage, disclosure, sale, or access of their data (subject to certain exemptions such as the data needed to provide the service or bill for it)[86], and the consent can be revoked at any time. ISPs are not allowed to charge consumers different prices whether they consent or not to the sharing of their data.

---

[82] Cal. Civ. Code § 1798.140(d)(1)(B).
[83] Lee Tien, Adam Schwartz, and Hayley Tsukayama, "Why EFF Doesn't Support California Proposition 24", Electronic Frontier Foundation, 29 July 2020, https://www.eff.org/sv/deeplinks/2020/07/why-eff-doesnt-support-cal-prop-24; Electronic Privacy Information Center, "California's Proposition 24", https://epic.org/state-policy/ca-prop24/.
[84] Jacob Snow, Chris Conley, "Californians Should Vote No on Prop 24", American Civil Liberties Union of Southern California, 16 October 2020, https://www.aclusocal.org/en/news/californians-should-vote-no-prop-24.
[85] *Supra* note 80.
[86] Sec. 1. 35-A MRSA c. 94 §9301(4).

In Nevada, all residents are covered under the Nevada Privacy Law, which covers businesses, services, and operators of online websites intended for commercial purposes. Unlike the California law, there is no minimum threshold for revenue or customers served; as such, small and medium-sized businesses are covered by the law. However, the sale of data is much more narrowly defined. While California law covers the rent and disclosure of data, Nevada law explicitly defines the sale of data as exchanging it for money. Consumers can opt out of having their data sold, but the process is not simple: websites can either have a designated email, phone number, or form for customers to contact or fill out to not have their data sold[87], rather than clicking a simple button, as is the case in California.

[87] Sec. 1 NRS c. 603A.325.

3. ANTITRUST HISTORY

Unlike privacy, antitrust developed more quickly on the Western side of the Atlantic. American antitrust law was born during the oil boon in the latter half of the 19th century, while European competition law, even at the state level, was born in the post-World War Two period. One noticeable difference between American and European competition law, at least in their inceptions, is that the former sought to regulate all industries, while the latter sought to mainly regulate the coal and steel industries, as those were two of the biggest products in demand during the war.

This section will seek to first look at the long and academically developed history of antitrust in the United States, from its roots in the 1860s to today, and roughly follows the outline in Wu's *The Curse of Bigness*. Following that, a primer will be given on European antitrust.

3.1. From Standard Oil to Big Tech

American antitrust was born at the height of the oil and railway industries. John Rockefeller's Standard Oil was the largest oil company in the United States; at its height, it controlled 91% of the refinery market[88], as well as all aspects of oil's life, from production to transportation in its refined form to gas stations.

Today, Big Tech is one of the domains people think of when they think of antitrust[89], notably Google, Amazon, Facebook, and Apple, or GAFA. As of June 2020, Google was expected to control 29.4% of the online ad market and 92% of global web searches[90]; Amazon controls 13% of global e-commerce, behind TaoBao at 15% and Tmall at 14%[91], but its share of the marketplace jumps up to 54% when looking only at

[88] Jeff Desjardins, "Chart: The Evolution of Standard Oil", *Visual Capitalist*, 24 November 2017, https://www.visualcapitalist.com/chart-evolution-standard-oil/.

[89] There are other areas where lack of competition is an issue, such as Internet Service Providers (ISPs), the National Collegiate Athletic Association (NCAA), and academic testing agencies, such as the College Board, the Law School Admissions Council, and the Graduate Management Admissions Council.

[90] Statista, "Worldwide desktop market share of leading search engines from January 2010 to February 2021", March 2021, https://www.statista.com/statistics/216573/worldwide-market-share-of-search-engines/.

[91] https://www-statista-com.ezproxy.sfpl.org/statistics/664814/global-e-commerce-market-share/ Activate Consulting, "Activate Tech & Media Outlook 2021", 2020, 102, https://activate.com/outlook/2021/.

the United States[92]; Facebook maintains 72.04% of the social media market (not including WhatsApp and Instagram)[93]; Apple controls 23.4% of the global phone market[94]. These companies also push their own products on their platforms: for example, Amazon brand products are available for purchase alongside generic or name-brand products, Facebook has Facebook News and Facebook Marketplace, Apple has its applications pre-installed on its devices, and Google offers email, shopping services, and navigation services, among many other additional services.

This section aims to show how antitrust has evolved through the years, from the days of Big Oil to today's fights with Big Tech.

3.1.1. The Gilded Age and the curse of bigness

Modern American antitrust dates back to the mid 1860s, namely due to the rise of industry in the American North during the Civil War, an abundance of natural resources and labour, and the expansion of railway lines. The railway industry was one of the biggest players in the early days of American antitrust and helped the steel and oil industries become some of the most profitable industries of the era.

New production techniques allowed for higher pars while keeping costs low and quality high, and no other person took advantage of this as much as Andrew Carnegie. Based in Pittsburgh, Pennsylvania, he initially invested in railroads, eventually becoming the superintendent of the Pittsburgh division of the Pennsylvania Railroad Company. During the Civil War, he helped the Union organise railroad facilities, and near the end of the War, began investing in businesses, eventually founding the Edgar Thompson Steel works (later the Carnegie Steel Company). To increase efficiency and profitability, he adopted the newest technological innovations. But most importantly

> he had made his company into a vertically integrated corporation that had its own sources of iron ore and coal, its own railroads and shipping, its own plants for making crude iron and steel, and its own fabricating machinery for turning iron and steel into a variety of finished products. By 1900 his plants were turning out about a quarter of all the steel produced in the United States[95].

---

92 Marketplace Pulse, "Amazon's Lost Web Traffic Market Share", 10 July 2020, https://www.marketplacepulse.com/articles/amazon-lost-web-traffic-market-share.
93 StatCounter, "Social Media Stats Worldwide", April 2021, https://gs.statcounter.com/social-media-stats.
94 International Data Corporation, "Smartphone Shipments Return to Positive Growth in the Fourth Quarter Driven by Record Performance by Apple, According to IDC", 27 January 2021, https://www.idc.com/getdoc.jsp?containerId=prUS47410621.
95 Fon W. Boardman, *America and the Gilded Age, 1877-1900*, (New York, 1972), 54.

Petroleum was to Pennsylvania and New York what gold was to California. Anyone with some money and the willingness to drill a well went to the oil fields to make their fortunes, but John Rockefeller was the man who succeeded above all. 1100 companies were involved in the production and refining process[96], but by 1900, 85% of companies were owned by Rockefeller's company, Standard Oil Company[97].

Standard Oil came to control the industry through a number of shrewd business practices. Three railroad companies on the East Coast were competing to get oil refineries' business, which resulted in them slashing their prices to a level that became unprofitable. The companies eventually struck a deal with the biggest oil refineries in Ohio, Pennsylvania, and New York, agreeing to offer them rebates while charging the other refineries higher prices. This secret alliance was dubbed the South Improvement Company (SIC). Standard Oil was the company chosen in Ohio, as it was the biggest one, with 4% of the United States' market[98]. However, before the SIC could begin operations, word leaked out of the contract terms, inciting outrage among smaller refineries and the general public. Rockefeller took advantage of the chaos and proceeded to buy out 22 of the 26 smaller companies in the Cleveland area (accounting for 25% of the U.S. market[99]) in a six-week span between February and March 1872[100], right before the SIC was abolished in April 1872[101].

Rockefeller did not let the dismantlement of the SIC stop Standard Oil from amassing power. After the SIC was dismantled, the railways instituted new rates applicable to all refineries. Within weeks, however, Standard not only established secret rebates with the railway companies, but merged with the original refinery partners of the SIC. Eventually, in 1882, Rockefeller created the Standard Oil Trust, which consolidated all aspects of production into single companies by state.

---

[96] *Ibid*, 55.
[97] *Ibid,* 55.
[98] Elizabeth Granitz and Benjamin Klein, "Monopolization by "Raising Rivals' Costs": The Standard Oil Case", *Journal of Law and Economics*, 39, no. 1 (1996), 1, https://doi.org/10.1086/467342.
[99] *Ibid*, 2.
[100] Tyler Conway, "History of Standard Oil: The Cleveland Massacre", Columbia Law School, 3 February 2013, http://moglen.law.columbia.edu/twiki/bin/view/AmLegalHist/TylerConwayProject.
[101] "The Cleveland Massacre", Public Broadcasting Service, https://www.pbs.org/wgbh/americanexperience/features/rockefellers-south/.

3.1.2. Reigning in trusts with the Sherman Act (1890)

Growing opposition to trusts across a number of industries eventually led to the proposal and passage of the Sherman Act in 1890. The Act is composed of seven sections and declares that "restraints of trade or commerce [...] [are] declared to be illegal" and are to be treated as felonies. However, the pro-business presidents that led the United States in the decade following its passage did little to enforce it. Only one case from that time period stands out: United States v. E.C. Knight Company. The case was decided in 1892 and set the tone for the rest of the decade.

In 1892, the American Sugar Company acquired several sugar manufacturing and refining companies, namely the E.C. Knight Company, leading to the American Sugar Company to "control [nearly] all the sugar refineries of the United States"[102]: in raw numbers, that amounted to 98% of refineries. President Grover Cleveland directed the government to sue E.C. Knight Company to prevent the acquisition under the provisions of the Sherman Act, with the main question being if "the existence of a monopoly in manufacture [...] can be directly suppressed under the act of congress [sic]"[103].

The Supreme Court ruled that the acquisitions were not in violation of the Sherman Act, as a monopoly in manufacturing did not constitute a hindrance to interstate commerce. The Sherman Act states that restraints of trade are illegal; as manufacturing falls outside of trade, a company having full control of manufacturing of a product across the country cannot be deemed to be a monopoly.

This ruling essentially dismantled the Sherman Act. Cases against companies purported to be trusts were unsuccessful. This is largely due to the ambiguity of the Act[104]: "Unlike most traditional criminal statutes, the Sherman Act 'does not, in clear and categorical terms, precisely identify the conduct [that] it proscribes.'"[105]. As such, the Supreme Court was given considerable leverage in its interpretation of the law. For example, while the Act criminalises "*every* [emphasis added] contract, combination, or conspiracy in restraint of trade", the Supreme Court decided in the 1911 Standard

[102] *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895).
[103] *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895).
[104] Gilbert Holland Montague, "The Defects of the Sherman Antitrust Act", *Yale Law Journal*, 19, no. 2 (1909): 100, https://doi.org/10.2307/784687.
[105] Maurice E. Stucke, "Does the Rule of Reasons Violate the Rule of Law?", *UC Davis Law Review*, 42, no. 5 (June 2009), https://lawreview.law.ucdavis.edu/issues/42/5/articles/42-5_Stucke.pdf.

Oil case that the Sherman Act "should be construed in the light of reason" and that only "contracts and combination [sic] which amount to an unreasonable or undue restraint of trade" are to be illegal"[106]. From that case came the rule of reason, or, in short, the determination on a case-by-case basis[107] by the Supreme Court of whether a firm became a monopoly through fair or unfair competition.

The period from 1893 to 1904 is also known as the Great Merger Wave. Between 1898 and 1903, there were 3 653 mergers, with over half of the new companies controlling over 40% of their respective markets[108]. Between 1895 and 1904, 157 holding companies consolidated over 1 800 companies[109]. Eventually, there were calls to strengthen the Sherman Act, especially after the United States elected a president who ramped up efforts to curb monopolies.

Theodore Roosevelt urged his government to go after the Northern Securities Company, a railway trust formed in 1901. Northern Securities was the first company Roosevelt went after, and he succeeded in dismantling it, earning him the title of trustbuster[110]. He also went after Standard Oil, though the case was not decided until 1911, after he left office. The government did win the case and dismantled Standard Oil into many of the world's biggest oil companies; it lives on today through Chevron, ExxonMobil, BP Petroleum, and Marathon Petroleum[111].

3.1.3. The Progressive Era to World War Two

The Clayton Act and the Federal Trade Commission Acts are two acts passed by Congress in 1914 to strengthen the Sherman Act, and antitrust law in general. The Clayton Act sought specifically to strengthen its predecessor by closing loopholes. It prohibited mergers, which were not illegal under the Sherman Act, whose effects "may

---

[106] *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).
[107] Prior to taking into account the rule of reason, the Supreme Court determines whether a firm became dominant under the *per se* rule. The *per se* rule determines five behaviours that are always anticompetitive: horizontal agreements to fix prices, horizontal market allocation agreements, or bid rigging. Federal Trade Commission, "The Antitrust Laws", 11 June 2013, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws.
[108] Bruce R. Scott, "Capitalism: Its Origins and Evolution as a System of Governance", (New York: Springer, 2011) 463.
[109] *Ibid*.
[110] "The Northern Securities Case", Theodore Roosevelt Center, https://www.theodorerooseveltcenter.org/Learn-About-TR/TR-Encyclopedia/Capitalism-and-Labor/The-Northern-Securities-Case.
[111] *Supra* note 88.

be substantially to lessen competition, or to tend to create a monopoly"[112], anticompetitive price discrimination, rebates, and going after labour organisations[113].

The Clayton Act was accompanied by the Federal Trade Commission Act. As the name suggests, it created the Federal Trade Commission, the main regulatory body for anticompetitive practices within the United States. The FTC is "directed to prevent persons, partnerships, or corporations [...] from using unfair methods of competition"[114]. While the FTC does not enforce the Sherman Act, it "can bring cases under the FTC Act against the same kind of activities that violate the Sherman Act"[115], as all acts that are illegal under the Sherman Act are also illegal under the FTC Act. It can also bring cases that do not fall neatly within the scope of the Sherman Act, but can still be considered as harming competition. In addition, the FTC works with companies accused of violating antitrust law[116].

The passing of the Clayton and FTC Acts were a result of the public discontent towards large industrial firms, but unfortunately they were rarely enforced. This was in part due to World War One. During the war, President Woodrow Wilson established the War Industries Board which "formed industrial trade committees to gather information, coordinate supplies, and stabilize prices"[117]. After the War ended, consulting firms emerged to meet the demands of big businesses who embraced the wartime cooperation. Technological advances and the benefits workers acquired by working for big companies made the government reluctant to pursue them, as it was afraid of public backlash.

Following the Great Depression and banking crises, Congress passed the National Industrial Recovery Act (NRA) in 1933, which had similarities to the War Industries Board. The NRA established industry prices and policies. However, a report in 1934 found that the NRA "was essentially creating small monopolies" and "was

---

[112] *Supra* note 103.
[113] The government's successful cases using the Sherman Act in its first decade were primarily against labour unions. See CJ Primm, "Labor Unions and the Anti-Trust Law: A Review of Decisions", *Journal of Political Economy,* 18, no. 2 (1910), https://www.jstor.org/stable/1829777.
[114] 15 U.S.C. § 45d.
[115] *Supra* note 103.
[116] The FTC establishes guidelines to prevent anticompetitive acts from happening again, investigates companies accused of anticompetitive practices, and reports to Congress as necessary.
[117] Mark Glick, "Antitrust and Economic History: The Historic Failure of the Chicago School of Antitrust", *The Antitrust Bulletin*, 64, no. 3 (2019), 24, http://dx.doi.org/10.2139/ssrn.3378809.

obviously made for the rich man – big business"[118]. The Supreme Court eventually found the NRA to be unconstitutional in 1935, thus putting an end to it.

In 1938, Thurman Arnold was sworn in as the Assistant Attorney General in the recently created (1933) Antitrust Division of the Justice Department. As Assistant Attorney General, he was a proponent of going through the courts to enforce antitrust law, rather than through the creation of new agencies. He was also opposed to the abuse of power, not big businesses as a whole. During his term, Arnold brought forth more antitrust cases than in the previous 50 years the antitrust laws had existed, and prevented many cases from going to court using the mere threat of indictment.

3.1.4. The Golden Era of Antitrust

During World War Two, the United States promoted what economist Maurice Stucke dubbed the "competition ideal"[119]; that is, the idea that privately-held companies with diverse ownership is better for democracy and the economy compared to government owned manufacturing companies or holding companies, which were prominent in much of the fascist-led countries at the time. For the competition ideal to flourish, a country needs to have strong antitrust enforcement. This was made possible through a liberal Supreme Court, new anti-merger legislation, and strong enforcement. The competition ideal is the main underlying principle of the Golden Era, which lasted until the early 1970s.

Despite the fact that the competition ideal originated in the 1940s, it is the Celler-Kefauver Act, passed in 1950, that marks the beginning of the Era. The Act is an amendment of the Clayton Act, and closed the loophole for acquisitions of assets. Prior to the Act being passed, only competitor stock purchases were banned, leading companies in powerful positions to acquire rival companies' assets and eventually own them. It was previously understood that the Clayton Act did not cover vertical mergers, only horizontal ones[120].

---

[118] *Ibid*, 33.
[119] Maurice, Stucke and Ariel Ezrachi, "The Rise, Fall, and Rebirth of the U.S. Antitrust Movement", *Harvard Business Review,* 15 December 2017, https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement.
[120] Richard C. Clark, "Conglomerate Mergers and Section 7 of the Clayton Act", *Notre Dame Law Review*, 36, no. 3 (1961), 256, https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=3339&context=ndlr.

The decision that prompted Congress to act was United States v. Columbia Steel Company (1948). Prior to Columbia, a number of cases were decided that made it such as that when a company reaches a certain level of market power, to the point where it is able to exclude competitors or fix prices, that market power is deemed to be illegal. There was talk of a "new" Sherman Act, but Columbia Steel eliminated that discussion. In a 5-4 decision, the Supreme Court allowed U.S. Steel, a company providing rolled steel, to purchase Consolidated Steel Corporation, a manufacturer of finished steel products. The government's case was that by buying Consolidated Steel Company, U.S. Steel would be the only company from which Consolidated would be able to buy from, thus unreasonably restraining trade under Sections 1 and 2 of the Sherman Act. However, the Supreme Court found that there would be no such violations, and allowed the merger to happen. "Vertical integration is not illegal *per se*"[121], so the Court used the rule of reason to determine if the acquisition was anticompetitive, looking at how the market would be affected by it, as well as the intent behind it. In light of the rule of reason, it was found that the acquisition did not limit other manufacturers of finished steel products from marketing their products, and there was no intent to illegally monopolise the market, as the purchase was deemed to "not demonstrate the existence of a specific intent to monopolize, but reflect[ed] rather a normal business purpose"[122].

After the passage of the Celler-Kefauver Act, the United States acted aggressively against mergers, both horizontal and vertical, even if their market shares were not majorities. One of the biggest cases demonstrating this aggression is United States v. Brown Shoe Company (1962). Brown Shoe Co., a manufacturing company, sought to acquire G.R. Kinney Company, a smaller manufacturer but owner of the largest family shoe store chain, at 1.2% of the market. Upon investigation, it was found that together, they would only control about 7.2% of the national shoe market, yet the Supreme Court decided that the merger had the possibility of lessening competition in cities (defined as 10 000 individuals or more) with both a Brown and Kinney store, as well as reducing the amount of manufacturers selling to Kinney. Chief Justice Earl Warren wrote in the opinion of the Court that promoting "competition through the protection of viable, small, locally-owned businesses" was the priority, even if it meant that "higher costs and prices might result from the maintenance of fragmented

[121] *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948).
[122] *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948).

industries and markets”[123]. Brown Shoe is a clear example of the competition ideal, as it promotes diverse private ownership over homogenous ownership.

3.1.5. The rise of the Chicago School

The Chicago School of thought holds the idea that government intervention should be minimal. Proponents argue that antitrust policy limits the lengths to which markets self-correct, and “exacerbate market inefficiencies rather than making them more competitive”[124]. Instead, antitrust law should maximise consumer welfare.

This idea of consumer welfare is central to the Chicago School of thought. Robert Bork, a University of Chicago-educated legal scholar, wrote about this idea in his 1978 book *The antitrust paradox*. His believed that antitrust law should maximise consumer welfare by keeping costs down, rather than protect the interests of small businesses which may sell products at higher prices, which is inefficient. His line of thinking is best illustrated with his thoughts on the Brown Shoe Co. case: “the Supreme Court went so far as to attribute to Congress a decision to prefer the interests of small, locally owned businesses to the preferences of consumers”[125]. If the merger had been permitted, Brown Shoe Co. would have lowered prices, which would have incentivised rival firms to lower their prices to attract consumers, thus putting the welfare of consumers above that of small businesses and maximising efficiency.

Academic thought alone is not sufficient to make an impact. Two years after the publication of *The antitrust paradox,* Ronald Reagan, one of the most prominent conservative politicians in the modern age, was elected president. Presidents have the power to name not only members of the presidential cabinet, but also federal judge seats and FTC Commissioners. Unsurprisingly, such individuals tend to fall in line with the president's politics. During Reagan's eight-year tenure, he nominated the head of the Justice Department, the head of the Department's Antitrust Division, and the Chairman of the Federal Trade Commission. The latter two were "self-acknowledged disciples of the ‘Chicago School’", holding the idea that “businessmen's

[123] *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962).
[124] Laura Philips Sawyer, “US Antitrust Law in Historical Perspective”, *Oxford Research Encyclopedia of American History,* 2019.
[125] Robert H. Bork, *The antitrust paradox: a policy at war with itself*, (New York: The Free Press, 1993), 65.

actions always reflect their pursuit of greater efficiency, [so] mergers seldom pose a public policy problem"[126]. During the Reagan administration,

> the Federal Trade Commission has brought no price discrimination or monopolization cases. Moreover, it has dismissed important monopoly and merger cases brought by prior Republican and Democratic administrations[127].

In regard to the Supreme Court, none of the four justices appointed by Reagan (a significant amount, as there are only nine justices) were educated at Chicago Law School, but they were all sympathetic to Big Business. Nominating Supreme Court justices is arguably one of the most effective means to ensure that a president's views will maintain their hold after their term ends, as the seats are for life. While judges are supposed to be apolitical, their political views become glaringly obvious in cases revolving around civil rights and economic regulation. Justice William Rehnquist (promoted to Chief Justice during Reagan's presidency) was "a solid conservative vote, siding invariably [...] with business in antitrust cases"[128]. In the three antitrust cases decided by the Rehnquist Court (1986 to 2005), two of them did not vote in favour of the plaintiff, and the third one involved a foreign company as the defendant. For that case, the Court upheld the idea that foreign companies could be held liable under the Sherman Act should they limit trade within the United States.

3.1.6. The neo-Brandeis movement

This movement is named after Louis Brandeis, the same jurist mentioned in Section 2.2.. In addition to promoting privacy, he also represented families and small businesses, earning him the title of "the people's lawyer"[129]. After several years of practice, he reached the conclusion that power centralised in one person or institution "would inevitably lead to a restriction of liberty and form of abuse". Additionally, Brandeis also believed that it is impossible for a "human being [...] to acquire the

---

[126] Willard F. Mueller, "Antitrust in the Reagan Administration", *Revue Française d'Études Américaines*, no. 21-22 (1984), 429, https://doi.org/10.3406/rfea.1984.1187.
[127] *Ibid*, 430.
[128] Scott Armstrong, and Bob Woodward, *The Brethren: Inside the Supreme Court*, (New York: Simon & Schuster, 1979).
[129] Brandeis University, "Our Namesake: Louis D. Brandeis", https://www.brandeis.edu/about/louis-brandeis.html.

knowledge to manage more than one enterprise at a time"[130]. From these two beliefs, he determined that limits on liberty were required to break up firms with power.

The neo-Brandeis movement (sometimes pejoratively known as hipster antitrust) came to prominence around 2017, with the publication of Lina Khan's paper "Amazon's Antitrust Paradox" (a play on Bork's *The antitrust paradox*), in which she argues that using consumer welfare as a pillar to determine whether a company is anticompetitive is inadequate in today's age, where firms' market power has grown to an exorbitant amount. She concludes that the consumer welfare model fails to truly capture the negative effects of predatory pricing and "integration across distinct business lines"[131]. Additionally, Amazon's growth over profits model[132] has put aside the welfare of its employees[133], which is contrary to the neo-Brandeis tenet of citizen welfare (discussed in further detail below). Other proponents of the neo-Brandeis movement include Senators Cory Booker and Elizabeth Warren, who advocated for the breakup of Facebook during their presidential runs in 2019 and 2020, and Wu.

The neo-Brandeis movement emphasises two tenets: citizen welfare and an open market. Citizens here encompass not only consumers, but entrepreneurs, workers, and the state. This is in contrast to consumer welfare, which, as the name implies, consumers' welfare is at the forefront. If Facebook emphasised citizen welfare, it would be transparent about data usage, provide easy to find and easy to understand options to allow users to opt-out of data sharing, and not lobby against regulations to reduce its power. Additional, bigger ways to emphasise citizen welfare at the government level, proposed by Wu in *The Curse of Bigness*, are reviving the practice of merger reviews, and making merger considerations public and allowing citizens to submit comments. Merger reviews today rely too much on whether consumers will be

---

[130] Florian Kaffert, "Should EU competition law move towards a Neo-Brandeis approach?", *European Competition Journal*, 16, no. 1 (2020), https://doi.org/10.1080/17441056.2019.1706396.
[131] Lina Khan, "Amazon's Antitrust Paradox", *Yale Law Journal, 116*, no. 3 (2017), 710 https://www.yalelawjournal.org/pdf/e.710.Khan.805_zuvfyyeh.pdf.
[132] *Ibid.*
[133] Jodi Kantor and David Streitfeld, "Inside Amazon: Wrestling Big Ideas in a Bruising Workplace", *New York Times*, 16 August 2015, https://www.nytimes.com/2015/08/16/technology/inside-amazon-wrestling-big-ideas-in-a-bruising-workplace.html; Benjamin Romano, "Amazon's turnover rate amid pandemic is at least double the average for retail and warehousing industries", *Seattle Times,* 10 October 2020, https://www.seattletimes.com/business/amazon/amazons-turnover-rate-amid-pandemic-is-at-least-double-the-average-for-retail-and-warehousing-industries/.

harmed by higher prices if companies merge, and harms to "Innovation and dynamic effects, being harder to measure, do not get due consideration"[134].

An open and competitive market would mean preventing companies from acquiring so much power that entering the market becomes next to impossible, as has become the case with the social media market. In *The Curse of Bigness*, Wu decries the "use of consent decrees as the main antitrust remedy"[135], and advocates for "breakups and structural remedies"[136], specifically calling for the breakup of Facebook[137]. He also suggests conducting "market investigations"[138], which evaluate the conditions for competition and if they are "well or can be improved [...] [Market investigations are] not seeking to establish general rules and obligations for firms"[139]. By conducting market reviews of a particular market, individual firms may not feel as targeted, and they give the government a better idea of the overall competitiveness of the market than if it looks at particular companies.

While some right-wing economists and lawyers are sceptical about the merits of the neo-Brandeis movement, and the movement has yet to secure legal victories, its reach cannot be downplayed. A Gallup poll conducted in January and February 2021 showed that 57% of Americans believe that the government should increase Big Tech regulation[140]. Whether Congress will unite to act upon the will of the people and pass laws regulating Big Tech is another story entirely. A Senate Committee of Commerce, Science and Transportation hearing at the end of April 2021 featuring the current FTC commissioners (evenly split between Republicans and Democrats, with Khan expected to join in summer 2021) revealed that they all believe that the FTC should act to protect digital rights if Congress is unable to[141].

---

[134] Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age*, (New York: Columbia Global Reports, 2018), 167.
[135] *Ibid,* 173.
[136] *Ibid*, 173.
[137] *Ibid,* 172.
[138] *Ibid*, 174.
[139] Competition Commission, "Guidelines for market investigations: Their role, procedures, assessment and remedies", April 2013, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284390/cc3_revised.pdf.
[140] Gallup, "Americans' Views of Technology Companies Worsen Amid Calls for More Government Regulation", 18 February 2021, https://news.gallup.com/poll/329666/views-big-tech-worsen-public-wants-regulation.aspx.
[141] Lauren Feiner, "FTC commissioners agree they should act to protect consumer privacy if Congress doesn't", *CNBC News,* 20 April 2021, https://www.cnbc.com/2021/04/20/ftc-commissioners-agree-they-should-protect-consumer-privacy.html.

3.2. European Coal and Steel Community to the European Union

Modern antitrust law was a way to unify Europe post World War Two, beginning with the creation of the European Coal and Steel Community (ECSC). It was the first organisation to step into the domain of pan-European competition law, and was seen as the grand project for European unity.

3.2.1. From the Treaty of Paris to the Treaty of Lisbon

European competition law is based in the idea of European unification through the common market. The roots were planted in the 1940s, before even the Second World War had ended. Jean Monnet was a French diplomat and the Minister of Armaments in Charles de Gaulle's exiled government who spent a significant portion of the war in Washington, D.C. and London courting Franklin Roosevelt and Winston Churchill. In 1943, Monnet made a speech to the French Committee of National Liberation, in which he said that

> There will be no peace in Europe if the States are reconstituted on the basis of national sovereignty, with all that that entails in terms of prestige politics and economic protectionism. The countries of Europe are too small to guarantee their peoples the prosperity that modern conditions make possible and consequently necessary. Prosperity for the States of Europe and the social developments that must go with it will only be possible if they form a federation or a "European entity" that makes them into a common economic unit.[142]

The idea of the common economic unit gained traction in the post-war days. Wanting to avoid further German domination of the Second World War's most important commodities, coal and steel, the future leaders of what would become the European Economic Union gathered to create an institution which would control the production and sale of the commodities: the European Coal and Steel Community.

Because of his years in D.C., Monnet was familiar with American antitrust law and wished to replicate it across the Atlantic, but he had little legal training. To aid his endeavours, he sought the help of two acquaintances: Robert Bowie, a Harvard Law professor who was in the American High Commission of Germany acting as legal counsel, and George Ball, an American lawyer and frequent advisor to Monnet.

---

[142] Jean Monnet, "Jean Monnet's thoughts on the future", (speech, Algiers, 5 August 1943), Fondation Jean Monnet pour l'Europe, https://www.cvce.eu/content/publication/1997/10/13/b61a8924-57bf-4890-9e4b-73bf4d882549/publishable_en.pdf.

Despite reaching out to Americans for their advice for the drafting and subsequent revisions of both the Schuman Plan and the Treaty of Paris, "any suggestion that the anticartel provisions of the Schuman Plan Treaty[143] were imposed by the Americans" had to be avoided[144]. France was wary about the increasing American presence in Europe, and afraid of being left behind as the United States focused more on the incoming Cold War with the Soviet Union. To avoid suspicions of American interference, Bowie's additions (which ended up being Articles 65 and 66 of the Treaty of Paris) were "rewritten in a European idiom"[145] by a member of the French *Conseil d'État* (the legal adviser of the state and the highest court for administrative law), who translated then unknown American terms and concepts into formal legal French[146]. The translations bore strong resemblances to Sections 1 and 2 of the Sherman Act, and emphasised "notions of antitrust that strongly condemned market power and anticompetitive practices"[147], and were reminiscent of the aforementioned American goal of promoting the competition ideal.

Article 65 prohibited agreements which would "prevent, restrict, or distort normal competition within the common market", particularly those which fixed prices, restricted or controlled production, technical development, or investment, or split the market. However, deals which restricted or distorted the common market in such ways could be allowed if the agreements improved production or distribution, if they were deemed necessary for a healthy market, or they did not give the concerned entities the ability to do any of the restricted actions or shield them from corruption. Article 66 focused on "concentrations between undertakings"; in other words, monopolies. It included a provision that allowed the High Authority to authorise a concentration if it found "that the proposed transaction will not give [...] the power [...] to determine prices, to control or restrict production or distribution or to hinder effective competition [...] or to evade the rules of competition".

With the signing of the Treaty of Rome in 1967, the ECSC merged with the European Atomic Energy Community and the European Economic Community to

---

[143] The Schuman Declaration led to the Treaty of Paris.
[144] George Ball, *The Past Has Another Pattern: Memoirs*, (New York: Norton, 1982), 105.
[145] *Ibid*, 105.
[146] David Gerber, *Law and Competition in Twentieth-Century Europe: Protecting Prometheus*, (New York: Oxford University Press, 1998), 338.
[147] Silvia Beltrametti, "Capturing the Transplant: U.S. Antitrust Law in the European Union", *Vanderbilt Journal of Transnational Law* 48, no. 3 (October 2015): 1166, https://www.law.uchicago.edu/files/capturing_the_transplant_-_vanderbilt_j._trans._l.pdf.

form the European Community. The institutions maintained their independent legal personalities, and were governed by the same institutions, including the newly created European Commission and European Court of Justice. Articles 65 and 66 of the Treaty of Paris became Article 81 and 82 of the Treaty of Rome. When the 2007 Treaty of Lisbon renamed the Treaty of Rome to the Treaty on the Functioning of the European Union, Articles 81 and 82 were transposed to Articles 101 and 102.

Article 101 is a condensed version of Article 65. It adds two additional actions that make a company abusive: different contract conditions for different parties with otherwise equivalent transactions, and adding stipulations that have no connection to the subject of the contracts. It eliminated the portions present in Article 65 which mention the High Authority (now the Commission), and the process by which it determines if actions are abusive.

Article 102 is similarly condensed. It merely describes the prohibited abuses by companies in dominant positions, while Article 66 lists exceptions to the abuses and the steps the High Authority could take to show how a company is or is not abusive. Article 105 describes some of the duties regulated to the Commission that were mentioned in Articles 65 and 66, but does not go as in depth in terms of describing the procedures.

3.2.2. Institutions governing competition law

The ECSC was governed by four institutions, two of which would play a vital role in the future: the High Authority (precursor to the European Commission) and the Court of Justice (eventually the European Court of Justice).

The High Authority was the executive branch of the ECSC, composed of representatives from the six member states: two from each of the three biggest (France, Germany, Italy), one from each of the smaller countries (Belgium, the Netherlands, Luxembourg), and a president chosen by the representatives (Monnet was the first). The High Authority had three legal instruments at its disposal: decisions (binding), recommendations (binding, but how member states chose to achieve the goals of the recommendations was up to them), and opinions (non-binding).

The High Authority reorganised when it became the Commission. Today, there is one Commissioner for each member state, and each Commissioner heads one or more of the 57 Directorates-General. The Competition Commissioner is Dutch

politician Margrethe Vestager, who has become known for being aggressive against Big Tech. As Competition Commissioner, Vestager holds one of the most important positions in the Commission, and, arguably, the world.

In 2001, Competition Commissioner Mario Monti declared that the proposed acquisition of Honeywell by General Electric, two big electronics companies in the United States, would violate European competition law. The acquisition would have made General Electric the biggest company in the world. But it is not the bigness itself that violated European competition law (as seen in Section 3.2.1., monopolies in and of themselves are not prohibited so long as certain conditions are respected); Monti said that "there were ways of eliminating these concerns [i.e., reduced competition in the aerospace industry, leading to higher prices] and allowing the merger to proceed", but "the companies were not able to agree on a solution that would have met the Commission's competition concerns"[148].

The opposition to the acquisition was the subject of controversy at the time. The United States' investigation had found that because the companies specialised in complementary goods (both companies were in the aerospace industry, but supplied different goods) they were not competitors. The decision would have not prevented General Electric from selling its products in the United States and other countries that approved of the merger, but the European Union's was one of General Electric's biggest markets. Having that market closed off would have been a significant blow to General Electric. Thus, the Commission's decision to not approve the acquisition essentially cancelled it.

During her tenure, Vestager has not prevented any big-name acquisitions or mergers, but she has levied historic, multi-million euro fines against Apple, Google, and Facebook, earning the ire of former American president Donald Trump, who accused the European Union of being hostile towards American companies[149].

While the Commission was the biggest competition regulator, by 2005, every member state had their own competition authority (National Competition Authority, or NCA), and thus competition responsibilities became decentralised. Between 2004

[148] European Commission, "The Commission prohibits GE's acquisition of Honeywell", 3 July 2001, https://ec.europa.eu/commission/presscorner/detail/en/IP_01_939.
[149] David M. Herszenhorn, and Maia de la Baume, "Trump slammed her as a U.S.-hating 'tax lady.' She just got a promotion.", *Politico,* 27 November 2019, https://www.politico.com/news/2019/11/27/margarethe-vestager-eu-tax-promotion-074181.

and 2014, 85% of cases were handled by NCAs[150]. NCAs naturally handle investigations within their own countries, though cases may be reallocated depending whether another member state or the Commission is better equipped to handle the case. The decentralisation of competition responsibilities also explains why multiple states have investigated or started cases against Facebook. In addition, NCAs do not have the authority to declare that a company has not broken competition law.

The Court of Justice consisted of seven judges who were deemed to be able to work impartially, and, notably, did not have to be citizens of member states. It made sure that the Treaty of Paris was being applied correctly, and that companies and the High Authority did not overstep their constitutional boundaries. The Court was the only one with jurisdiction over disputes relating to the coal and steel communities. When the Court became the ECJ, it expanded its scope to include security, justice, and freedom, among other areas. The number of judges also increased (one for each member state). The ECJ deals with cases by member states against the Commission and vice-versa, and can declare legal acts made by the Union to be illegal.

[150] "Empowering National Competition Authorities", European Commission, https://ec.europa.eu/competition/antitrust/nca.html.

4. How Bigness Lessens Privacy

Facebook has been accused of stifling competition as early as 2010[151]. As of April 2021, Facebook has acquired 72 companies, the most notable ones being WhatsApp, Instagram, and Virtual Private Network (VPN) Onavo. Between Facebook, Messenger, WhatsApp, and Instagram, there are over 3.3 billion users, or approximately one third of the world's population. Having direct access to such a significant portion of the world puts tremendous power in Facebook's hands.

This section will examine how Facebook's bigness has contributed to a weakening of user privacy in three manners: stifling of competition, consumer suffering, and data tracking.

4.1. Stifling of competition

Facebook's encroachment on companies has been well-documented and vilified. FourSquare is a search and discover app, where users can check in at locations such as restaurants or parks, and receive recommendations of other places to check out in the surrounding area, based off data from other users in the same demographics. FourSquare founder Naveen Selvadurai told tech magazine *Wired* "that it was common knowledge [...] that Facebook would approach a company and say something to the effect of 'join us or we will copy you'"[152]. Indeed, the company has done just that with a number of applications. In the same article, Selvadurai commented that in 2010, Facebook added a feature that allows users to check-in at locations, FourSquare's main feature. But perhaps the most well-known copy is of Snapchat's Stories.

This section will look at how Facebook threatened and eliminated competition through legally and morally dubious means.

---

[151] Erin Griffith, "Will Facebook Kill All Future Facebooks?", *Wired*, 25 October 2017, https://www.wired.com/story/facebooks-aggressive-moves-on-startups-threaten-innovation/.
[152] *Ibid.*

4.1.1. Switcharoo Plan

In 2019, investigative journalist Duncan Campbell received nearly 7000 pages of legal documents detailing anticompetitive efforts made by Facebook under the guise of protecting user privacy, which he released to NBC News and the *Guardian*. These documents have proven to be instrumental in showing how Facebook has decreased competition. They stem from a 2015 case between Facebook and a now-defunct application, Six4Three, which found and compiled users' friends bikini photos. The questionability of the plaintiff's application aside, the documents reveal insightful information into Facebook's practices. They show that beginning in 2012, Facebook began cutting off user data to third parties it saw as potential rivals to limit their growth, while presenting the move as protecting user privacy. This was known internally as the Switcharoo Plan[153].

Companies that requested user data from Facebook were divided into three categories: competitors, potential competitors, and "developers that [Facebook had] alignment with on business models"[154]. Thousands of developers lost access to an exclusive data mine because they were viewed as competitors: without Facebook's data, they were unable to market their applications as effectively. However, companies in the third category could access it for a price. For example, internal documents show that because Amazon invested in Facebook advertisements and was not a direct competitor, it was allowed to continue accessing user data, while many messaging applications, such as MessageMe and WeChat lost access due to the potential for becoming competitors.

As Facebook has grown over the years, it lessened privacy protections for its users, relying on its size and lack of competitors to do so. It has acquired WhatsApp and Instagram using information gathered through morally dubious means. It also

---

[153] *Six4Three, LLC. V. Facebook, Inc. (2015),* Exhibit 124 of the Declaration of David S. Godkin [Six4Three's legal counsel] in Opposition to Defendants' Special Motions to Strike (Anti-SLAPP), email from Ilya Sukhar to Eddie (Edward) O'Neil and Francis Larkin, subject line: f8, 2014, 1456, https://dataviz.nbcnews.com/projects/20191104-facebook-leaked-documents/assets/facebook-sealed-exhibits.pdf.

[154] *Six4Three, LLC. V. Facebook, Inc. (2015),* Exhibit 113 of the Declaration of David S. Godkin, instant message from Douglas Purdy to Edward O'Neil, Ilya Sukhar, and Vladimir Fedorov, 15 October 2013, 1396, https://dataviz.nbcnews.com/projects/20191104-facebook-leaked-documents/assets/facebook-sealed-exhibits.pdf.

sought to acquire Snap Inc., but the company refused, leading Facebook to copy Snap's biggest feature, Stories.

4.1.2. Onavo

In October 2013, Facebook acquired Onavo, an Israeli mobile analytics company, whose products included a VPN which collected data on third-party app usage, including names of apps, time spent on them, devices used, and country information. Onavo, and eventually Facebook, marketed the VPN as one that would help its users manage mobile data usage, in addition to the usual privacy protections guaranteed by VPNs. While Facebook did state that data collected by Onvao would be used to improve Facebook's products[155], the main purpose of it was anonymised Internet browsing. It was only until 2018, after the Cambridge Analytica scandal and hearings at the American Congress in April where Zuckerberg was questioned about Onavo, that media outlets really began to report on the data gathering. In August 2018, Apple requested that Facebook remove Onavo from the App Store as the app's data-gathering practices violated Apple's recently-enacted policies aimed at limiting data collection by app developers, as well as "apps from using data in ways that go beyond what is directly relevant to the app or to provide advertising"[156].

The acquisition of Onavo greatly helped Facebook expand its dominance. Using Onavo data, they found that users, particularly in Europe and Asia, were sending twice as many messages on messaging application WhatsApp than Facebook Messenger[157]. In February 2014, less than 5 months after the Onavo acquisition, Facebook announced plans to buy WhatsApp, and the purchase was cleared by both the United States and the European Union.

Onavo also helped Facebook glean another competitor: Snapchat, known for its messages that disappear within 24 hours, and the ability to share short snippets of videos (also known as Stories) overlaid with text or virtual stickers. Onavo data showed

---

[155] A Google search for the terms "Facebook Onavo acquisition" with a date limit of 2014 shows only three articles from American media companies: *Business Insider, Tech Crunch* and *PC Mag,* and none mention the anti-privacy or anticompetitive implications of the acquisition.

[156] Deepa Seetharaman, "Facebook Removes Data-Security App From Apple Store", *Wall Street Journal*, 22 August 2018, https://www.wsj.com/articles/facebook-to-remove-data-security-app-from-apple-store-1534975340.

[157] *Six4Three, LLC. V. Facebook, Inc. (2015*), Exhibit 69 of the Declaration of David Godkin, "Mobile messages per day per service", 1014, https://dataviz.nbcnews.com/projects/20191104-facebook-leaked-documents/assets/facebook-sealed-exhibits.pdf.

that Snapchat has a reach of 13.2% among U.S. Onavo users with iPhones, just below Facebook's Messenger 13.7%[158]. In mid-November 2013, Snap CEO Evan Spiegel revealed that he had rejected a $3 billion offer from Facebook[159], the second in a series of offers Facebook made to acquire the company[160].

The sections below will go look further into Facebook's anti-privacy and anticompetitive efforts insofar as WhatsApp and Snapchat are concerned.

4.1.2.1. WhatsApp

The FTC investigation regarding the Facebook/WhatsApp acquisition was private, but then director of the FTC's Bureau of Consumer Protection, Jessica Rich, sent a letter to both companies shortly after the acquisition was cleared, an unusual step. For context, WhatsApp had, at least since 2012, made its stance on data collection and privacy clear: "data isn't even the picture. WhatsApp is not interested in any of it"[161]. Facebook, already having had gaffes with the FTC in regard to user privacy, said that nothing would change in regards to how WhatsApp handled user data. This did not stop Rich from strongly recommending them to not change the way they handled user data, and that any action taken that would nullify WhatsApp's privacy policy or "privacy promises [made] by either Facebook or WhatsApp, could constitute a deceptive practice under Section 5 of the FTC Act"[162], as well as the 2012 FTC consent order against Facebook.

In 2014 in Brussels, the Commission opened and closed an investigation into the proposed acquisition. It found that Facebook and WhatsApp were not close competitors. Facebook's messaging application, Messenger, operates through

---

[158] *Six4Three, LLC. V. Facebook, Inc. (2015),* Exhibit 69 of the Declaration of David Godkin, "US iPhone App Reach, Aug 2012 – Mar 2013", 1011, https://dataviz.nbcnews.com/projects/20191104-facebook-leaked-documents/assets/facebook-sealed-exhibits.pdf.

[159] Evelyn M. Rusli and Douglas MacMillan, "Snapchat Spurned $3 Billion Acquisition Offer from Facebook", *Wall Street Journal*, 13 November 2013, https://www.wsj.com/articles/BL-DGB-30794.

[160] Spiegel was unofficially offered $60 million in 2012 during a meeting with Zuckerberg. Upon refusing, Zuckerberg told Spiegel about the launching of a new app, Poke, which turned out to be an exact replica of Snapchat. See Billy Gallagher, *How to turn down a billion dollars: The Snapchat story*, (New York: St. Martin's Press, 2018), 82.

[161] WhatsApp LLC, "Why we don't sell ads", 18 June 2012, https://blog.whatsapp.com/why-we-don-t-sell-ads.

[162] Jessica Rich to Erin Egan and Anne Hoge, 10 April 2014, 3, https://www.ftc.gov/system/files/documents/public_statements/297701/140410facebookwhatappltr.pdf.

Facebook, requires an account, and can only be used to communicate with others who have Facebook pages, who generally tend to be friends and family. On the other hand, WhatsApp was determined to be used not only with those groups, but also with colleagues and acquaintances, as it only requires a phone number for sign-up. The Commission also noted that there were other messaging applications on the market, such as Viber and TextMe, thus increasing competition. Furthermore, the obstacles to creating a competing application were deemed to be low, requiring little time or money. The net gain of new users was also determined to be insignificant, as Facebook and WhatsApp's user bases overlapped. The Commission ended their report on the following note:

> any privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the transaction do not fall within the scope of European Union competition law[163].

Matters took a decidedly negative turn for users in 2016 when WhatsApp announced that it would disclose user information to Facebook. Users had 30 days from the day of the announcement to opt-out of the sharing of information. Despite several privacy rights groups writing to the FTC about how this violated not only the promises the companies made in 2014, but also the terms of Rich's letter, the FTC did nothing to remedy the situation.

It could be surmised that the timing of the announcement in conjunction with the state of politics in the United States at the time (election season was in full swing, and Donald Trump was elected a few months later) led to the FTC's inaction. The new head of the FTC, Ajit Pai, who graduated from the University of Chicago, was nominated by Donald Trump in January 2017. As Pai has not made any statements regarding WhatsApp sharing data with Facebook, it can be surmised that WhatsApp's decision to do so was not followed through by the FTC because it wasn't seen as harming consumers, which is one of the main tenets of the Chicago School. The sharing of data has actually been touted as positive by Facebook: WhatsApp users on both platforms would benefit from more precise targeted advertising, a plus for consumers who were tired of seeing inapplicable advertisements on their feeds.

The European Union, on the other hand, had a much stronger reaction. Facebook told the Commission during the latter's initial investigation that it was

[163] European Commission, "Mergers: Commission approves acquisition of WhatsApp by Facebook", 3 October 2014, https://ec.europa.eu/commission/presscorner/detail/en/IP_14_1088.

unable to link WhatsApp information to Facebook information. Following a six month long investigation upon the announcement that Facebook would do just that, the Commission found that not only was Facebook technologically capable of matching user identities in 2014, but also that Facebook staff was aware of it. For misleading the European Union, and by extension the general public, the Commission leveraged a €110 million fine against the company. In response to media inquiries, Facebook said that the "errors [it] made in [its] filings were not intentional" and that it had "acted in good faith since [its] very first interactions with the Commission"[164].

4.1.2.2. Snapchat

Before the 2013 offer, Zuckerberg made an unofficial offering to Spiegel in November 2012 for $60 million. Spiegel refused, and Zuckerberg told him about Facebook's newest product, Poke, an application with disappearing messages and photos, just like Snapchat. The presentation of the app came with an unsaid but clear message: "join us or we will crush you".[165] Upon Poke's release just before Christmas, Zuckerberg sent Spiegel a one line email: "I hope you enjoy Poke"[166].

Despite Poke being "an exact replica of Snapchat"[167], it was a failure. While reaching the number one spot on Apple's App Store upon its release, it was down to number 34 one week later. Reasons for its failure include the fact that teenagers (the majority of Snapchat's user base) used Snapchat because it was not Facebook, and older users did not see the appeal of disappearing messages. In fact, Poke actually helped Snapchat rise in popularity[168].

In mid-2016, Facebook once again approached Snapchat, and Spiegel once again refused. In August 2016, Facebook added a Stories feature to Instagram, and the popularity was almost immediate. By March 2017 (the same month Facebook Stories

[164] British Broadcasting Service, "EU fines Facebook over 'misleading' WhatsApp claim", 18 May 2017, https://www.bbc.com/news/business-39958630.
[165] Gallagher, *Snapchat,* 82.
[166] Gallagher, *Snapchat*, 84.
[167] Gallagher, *Snapchat*, 84.
[168] Christina DesMarais, "Facebook app spurs spike in Snapchat popularity", *PC World*, 29 December 2012, https://www.pcworld.com/article/2023506/facebook-app-spurs-spike-in-snapchat-popularity.html.

launched), 166 million users used Instagram Stories[169], the same number of users that Snapchat had. In April 2019, during a company earnings call, Facebook's Chief Operating Officer Cheryl Sandberg reported that Stories on both applications surpassed 500 million users each, or 80% more than Snapchat's user base during the same period[170].

Snap has documented Facebook's copycat and competitive efforts for years in a dossier titled Project Voldemort[171], named after the main antagonist in the children's fantasy series *Harry Potter*. Efforts include discouraging influencers from having accounts on both Snapchat and Facebook, and suppressing content originating from Snapchat from trending on Facebook. However, the copying of the Stories feature is the most blatant attempt to turn users away from Snapchat.

This leads to the question, why hasn't Facebook been sued for copying Snapchat, both with Poke and with the Stories feature? While intellectual property and patent law are out of the scope of this thesis, the matter can be briefly summarised as such: in October 2014, Snap filed a patent for "an ephemeral gallery of ephemeral messages"[172], and the application was accepted in January 2017, months after Instagram introduced its own Stories feature. Snap merely patented its own execution of Stories, not the idea itself. What matters is the expression of the idea: the execution of the Stories feature is different on Snapchat versus Instagram and Facebook. In addition, legal scholars have pointed out that so long as the source code is not copied, then Facebook's Stories are legally permissible, even if on the surface, they are identical to Snap's. In essence, this means that should another application that Facebook deems a threat appear on the market, there is essentially nothing to prevent the tech giant to copy the application's best features onto its own platform. While this does not guarantee success of the new feature (as seen with Poke), or the failure of the competing application (Snapchat is in no danger of shutting down), it is still important

[169] Kurt Wagner, "The 'Stories' Product that Facebook Copied from Snapchat is now Facebook's Future", *Vox,* 30 October 2018, https://www.vox.com/2018/10/30/18044962/facebook-stories-business-user-growth-q3-earnings-zuckerberg.
[170] Isobel Asher Hamilton, "A feature Facebook stole directly from Snapchat now has twice as many users as Snapchat", *Business Insider*, 25 April 2019, https://www.businessinsider.com/facebook-stories-now-has-more-than-twice-as-many-users-as-snapchat-2019-4.
[171] Georgia Wells and Deepa Seetharaman, "Snap Detailed Facebook's Aggressive Tactics in 'Project Voldemort' Dossier", *Wall Street Journal,* 24 September 2019, https://www.wsj.com/articles/snap-detailed-facebooks-aggressive-tactics-in-project-voldemort-dossier-11569236404.
[172] Nicholas Allen et al. 2017, Ephemeral gallery of ephemeral messages, US 9,537,811 B2, Filed October 2, 2014 and issued January 3, 2017.

to keep in mind. One can argue that releasing a similar, if not nearly-identical, application is competitive, especially as it does not fall into less doubtable anti-competitive behaviours such as buying out the competitor to consolidate the market; however, as seen with Stories, it was a blatant attempt to convert users.

4.1.3. Instagram

Another company Facebook has had issues with is Instagram. The FTC and the United Kingdom Office of Fair Trading (OFT) cleared the acquisition of Instagram by Facebook (the Commission did not investigate the acquisition) in 2012. The OFT believed that there were enough competitors in the photo sharing industry at the time, such as Camera Awesome, Flickr, and Camera+, therefore the acquisition wouldn't be a problem. In addition, Instagram was not a household name at the time, did not pose a threat to online advertising (users spent little time on of the application beyond uploading and taking photos), and the acquisition would not lead to market foreclosure[173].

The FTC's investigation of the acquisition was private, so there is no insight into why the organisation approved the merger, though is can be speculated that they made the same reasoning as their colleagues across the Atlantic. In addition, as the merger would not come at any monetary cost to consumers, there was no consumer harm involved, as far as could be determined. Instagram's acquisition, as such, could be summed up as providing little benefit to Facebook; in fact, the FTC even speculated that some would stay away from Instagram because it was owned by Facebook.

However, in recent years, lawmakers have started to criticise the acquisition, and this criticism was starkly laid out at the July 2020 Congressional hearing where Congress members interrogated the GAFA CEOs. The Instagram acquisition was a focal point in Zuckerberg's questioning. Prior to buying the small company out in 2012, Zuckerberg noted the threat Instagram caused to Facebook's popularity. In a series of emails released by the FTC in July 2020 and which were shown at the hearing, Zuckerberg noted that his desire to go after Instagram was rooted in "neutralizing a

[173] Office of Fair Trading, "Anticipated acquisition by Facebook Inc of Instagram Inc", 22 August 2012, https://assets.publishing.service.gov.uk/media/555de2e5ed915d7ae200003b/facebook.pdf.

competitor and improving Facebook"[174]. He wrote that by buying Instagram, "what [Facebook is] really buying is time. […] Buying Instagram […] now will give [Facebook] a year or more to integrate their dynamics before anyone can get close to their scale again"[175]. Seeming to realise that he revealed too much information, Zuckerberg followed up with another email saying that he "didn't mean to imply that [Facebook would] be buying them to prevent them from competing with [it] in any way."[176]

4.2. Consumer Suffering

Consumer welfare is generally the standard to which companies are held to in competition law, though this mainly translates to not pushing higher (visible) prices on them. If a service is free, then it can be difficult to determine how consumers suffer as they don't invest any money into the service. However, Facebook has been opening the doors for new standards of consumer suffering.

While the average individual is aware that Facebook collects general information such as names, birthdays, and locations, there is a dearth of information beneath the surface, such as biometric facial data, political leanings, and consumption habits. This data is either collected from the website itself, or through cookies that millions of websites have installed, which can reveal information such as current location, how long one was on a certain website, and when they visited it. As stated in Section 2.1., the collection of data through cookies is an industry standard. What makes Facebook different is how vast its reach is. Due to its reach, other companies, including other Big Tech firms, are attracted to Facebook's data mine, and pay the company tens of millions of dollars in advertising revenue every year, thus continuing the cycle of data gathering.

---

[174] Casey Newton and Nilay Patel, "'Instagram can hurt us': Mark Zuckerberg emails outline plan to neutralize competitors", *The Verge*, 29 July 2020. https://www.theverge.com/2020/7/29/21345723/facebook-instagram-documents-emails-mark-zuckerberg-kevin-systrom-hearing

[175] Mark Zuckerberg to David Ebersman, "null", email, 28 February 2012, https://cdn.vox-cdn.com/uploads/chorus_asset/file/20711757/VRG_4119_003.jpg.

[176] Mark Zuckerberg to David Ebersman, email. 28 February 2012, https://cdn.vox-cdn.com/uploads/chorus_asset/file/20711825/VRG_4119_004.jpg.

In addition, many, if not most, users do not read privacy policies before joining websites[177], finding them to be too long or complicated to read[178]. Facebook's privacy policy was found to take approximately 18 minutes to read, and requires being able to read at a college level[179]. The readability of Facebook's privacy policy falls along the industry average, but as evidenced by the statistics, either an easier-to-read or condensed version is necessary. While Facebook may have defended itself in the past for what many have seen as privacy violations by stating that the behaviours were detailed in its privacy policy, it is a disingenuous defence. It is well-known that most people do not read privacy policies all the way through[180], and Facebook has and continues to rely on and take advantage of the ignorance of its user base.

The Cambridge Analytica scandal is the perfect example of the world realising just how much access to data Facebook has, with over 87 million people affected[181]. Cambridge Analytica truly revealed Facebook's power, and governments have been coming to terms with it.

In 2019, the United States Department of Justice suggested that the idea of altering the way in which it investigates antitrust violations, by including "less free speech" and "lower privacy protections" in addition to the traditional ways of determining anticompetitive conduct as determined in the Sherman Act[182]. These ideas came to light in July 2020, during the Congressional hearing on Big Tech. During that hearing, the idea that Facebook dismissed privacy matters as it grew truly solidified.

---

[177] A Pew Research Center survey in 2019 found that 74% of US adults never or only sometimes read a company's privacy policy, and of those who do read them (including those who said sometimes), only 22% read it all the way through, making for 13% of the U.S. adult population who always reads through privacy policies. Pew Research Center, "Americans and Privacy: Concerned, Confused, and Feeling Lack of Control Over Their Personal Information", 15 November 2019, https://www.pewresearch.org/internet/2019/11/15/americans-attitudes-and-experiences-with-privacy-policies-and-laws/.

[178] A 2015 BCG Big Data survey of French, German, Italian, Spanish, British, and American Internet users who do not read privacy policies found that 66% them think they are too long and complicated (this was before the GDPR mandated that privacy policies be easy to read), 52% think there is too much legal jargon, and 26% find them hard to understand. BCG Big Data, "Big Data, les consommateurs désabusés", *Journal du Net,* 2015, https://www.journaldunet.com/ebusiness/telecoms-fai/1187803-big-data-des-regles-de-confidentialite-trop-floues-pour-les-consommateurs-statista/.

[179] Kevin Litman-Navarro, "We Read 150 Privacy Policies. They Were an Incomprehensible Disaster", *New York Times*, 12 June 2019, https://www.nytimes.com/interactive/2019/06/12/opinion/facebook-google-privacy-policies.html.

[180] *Supra* notes 173 and 174.

[181] *Supra* note 2.

[182] Steven Overly, "'It will be fascinating': Silicon Valley faces an antitrust reckoning", Politico, 26 July 2019, https://www.politico.com/story/2019/07/26/silicon-valley-anti-trust-1619256.

Facebook's most significant opponent in the European Union is not the European Commission, but Germany's national competition office, the Bundeskartellamt. In February 2019, the organisation issued a decision that prohibited Facebook from making the use of its service and its other companies "conditional on the collection of user and device-related data and combining that data [...] without the users' consent"[183]. It also stated that consent is not meaningful "if [users'] consent is a prerequisite for using facebook.com in the first place"[184].

4.3. Data tracking

The most significant way in which Facebook hoards data is by tracking across websites through the use of cookies. As explained in Section 2.3., cookies are little bits of code that websites install on browsers to track behaviour, from saving online shopping carts to determining users' locations.

Facebook cookies are installed on over 8 million websites in a variety of ways, from Share and Like buttons to the less innocuous ones that gather information such as device dimensions, type, brand, and model, IP addresses, and time spent on the website. Facebook collects this information even from non-users, for a period of 10 days. This number, however, quickly becomes meaningless. If an individual visits a website every day, or every few days for a period of under 10 days[185], Facebook will always have the most recent cookies from the person's visit. So if someone visits their local news website on a Monday and a Friday, the cookies from the Monday visit will be deleted the following Thursday, but Facebook will still have the cookies from the Friday visit. Simply put, even if one does not use Facebook products on a daily basis, or does not even have accounts, Facebook will almost never not have data on Internet users, so long as they connect to websites with Facebook cookies or plug-ins.

Facebook uses this data to create shadow profiles[186]. Shadow profiles consist of all the data that companies collect on users, and in the case of Facebook, non-users.

---

[183] Bundeskartellamt, "Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing", B6-22/16, 1, 6 February 2019.
[184] *Ibid.*
[185] Kurt Wagner, "This is how Facebook collects data on you even if you don't have an account", *Vox,* 20 April 2018, https://www.vox.com/2018/4/20/17254312/facebook-shadow-profiles-data-collection-non-users-mark-zuckerberg.
[186] Facebook does not use this term, but this is how privacy advocates refer to the trove of data the company collects on users and non-users alike.

This is done via the cookies placed on third-party websites, which include news organisations, fashion retailers, and other social networking websites such as LinkedIn, as well as when users upload contact information, which may include individuals who do not have Facebook accounts, and information that users have not uploaded themselves, such as phone numbers or email addresses. The company has denounced accusations that it has shadow profiles, but it has not denied that it collects data on non-users, as well as contact information that users do not connect to their account[187]. This can lead to personal security risks: if, for example, two married people had an affair resulting in a child, and only one of parents had a Facebook account, it can be that when the child is old enough for Facebook, their biological parent can be suggested as a friend (or the child is suggested to the parent) if both the parent and the child uploaded their contact information to Facebook and they both had the other parent as a contact. Another example is that personal and work lives can overlap if someone's co-worker uploads their contacts, and that co-worker only has work contact information. But consider that the first person's friend has both their work and personal email addresses in their contacts, and has uploaded that information to Facebook. That can lead to Facebook suggesting the co-worker under the "People You May Know" feature, thus violating the space between one's work and personal lives[188].

In addition to the possibility of personal privacy violations that shadow profiles bring on Facebook itself, there is no way for a user wishing to remove contact information they did not upload to Facebook themselves, unless they can find every user, not all of which may be in their friends list, who has uploaded their contact information to Facebook and ask them to delete it, as the uploaded data does not belong to the user wishing to delete information, but rather to those who uploaded it in the first place. For users not on Facebook, it is currently impossible to ask Facebook to remove information it has on them without creating an account.

Facebook announced in 2019 that it would merge data from Instagram, WhatsApp, and Facebook, essentially giving Facebook (the website), the data of over 3.3 billion users, even if they do not have Facebook profiles. Google is the only other company to have the data of such a significant amount of people. No governments or

[187] Kashmir Hill, "How Facebook Figures Out Everyone You've Ever Met", *Gizmodo,* 7 November 2017, https://gizmodo.com/how-facebook-figures-out-everyone-youve-ever-met-1819822691.
[188] *Ibid*.

other companies have this much data; having that amount of data, and thus power, is unprecedented.

The sheer amount of data collected by Facebook is what allows it to maintain its dominance. Advertisers, especially small businesses, rely on Facebook's reach and algorithms to connect to a larger audience than they would be through self-advertising and word of mouth. Any new social media platform in the future wishing to emulate Facebook, even one that promotes user privacy, faces a significant barrier to market entry due to this. Not only would it have a hard time attracting advertisers, but it would also have a hard time attracting users. Social networking site Gab, a right-wing Facebook alternative which "champion[s] free speech"[189], has 4 million users, the majority of whom joined after the 6 January insurrection at the United States Capitol[190], yet only about 150 000 users are active on a regular basis[191]. Given that a main complaint about Facebook by Republicans is how it censors right-wing users and free speech[192], it is surprising that Gab does not have a larger user base. Another barrier to market entry is the fact that people are comfortable on Facebook, and do not want to learn how to use another social media network, or cannot convince enough of their network to migrate to a new one: in other words, Republicans staying on Facebook despite Gab being an alternative is an example of network effects in action, or the phenomenon by which the value derived from using a service rises as more people use that service.

---

[189] Gab AI Inc., "About Gab.com", https://gab.com/about.
[190] Micah Lee, "Inside Gab, the Online Safe Space for Far-Right Extremists", *The Intercept*, 15 March 2021, https://theintercept.com/2021/03/15/gab-hack-donald-trump-parler-extremists/.
[191] *Ibid.*
[192] The Heritage Foundation, "Heritage President Kay C. James Signs Pledge Rejecting Big Tech Money", 4 May 2021, https://www.heritage.org/press/heritage-president-kay-c-james-signs-pledge-rejecting-big-tech-money; Bill Hagerty, "Sen. Bill Hagerty: Facebook vs. Trump -- Big Tech's censorship regime out of control. Here's how we fix it", *Fox News*, 5 May 2021, https://www.foxnews.com/opinion/facebook-trump-big-tech-censorship-fix-sen-bill-hagerty; Jim Jordan, Doug Collins, Ken Buck, Matt Gaetz, and Gregory Steube, "Reigning in Big Tech's Censorship of Conservatives", 6 October 2020, https://steube.house.gov/sites/steube.house.gov/files/GOP%20Big%20Tech%20Report.pdf.

5. Legal Concerns and Their Connections to History

Each subsection within this section will present a general overview of how countries are investigating Facebook, including how the issues outlined in the previous section, if applicable to the country being examined, are being treated, followed by an analysis of the investigations and the roles of data privacy and competition history in the investigations.

5.1. European Union

The European Union's antitrust chief, Margrethe Vestager, has increased scrutiny of Big Tech during her tenure, though she has so far not taken any action against Facebook in regard to the intersection of data privacy and antitrust law. When asked about the German case, she replied that it would be watched "with great interest", but also, she does not "think it could serve as a template" for legal action on the part of the European Union, since the case sits "in the zone between competition law and privacy", and was partly based in German law[193].

In December 2019, the European Commission sent a request to Facebook looking for documents related to data gathering and monetisation, in light of the release of Six4Three documents, and the revelation that Facebook used data from Onavo to track iPhone users' habits. While the coronavirus has slowed down this process, in July 2020, Facebook sued the European Union, claiming that the documents it sought would reveal employees' personal information, and requested that the Union narrow down the list of documents needed, thus further slowing down the investigation. As of May 2021, there have not been any public reports about the progress of the lawsuit.

In March 2021, the BKA case was referred to the ECJ. It may take a couple of years for the ECJ to make a decision, but whatever the verdict is, it will have a significant impact on both German and European competition law. This case will be discussed in further detail in Section 5.2.

---

[193] Lenka Ponikelska and Aoife White, "Germany's Facebook Order Will Be Studied by EU, Vestager Says", *Bloomberg*, 8 February 2019, https://www.bloomberg.com/news/articles/2019-02-08/germany-s-facebook-order-will-be-studied-by-eu-vestager-says.

5.1.1. Analysis

The European Union's lack of action can be attributed to two factors: interpretation of its law, and a lack of information.

The first factor can be broken down into two parts. The first is how Article 101 law defines monopolies. As seen in Section 2, a company is considered to be a monopoly if it is of a certain size *and* hinders market entry to other companies. None of Facebook's acquisitions have been rejected: in its press release describing the approval of the WhatsApp acquisition, the Commission wrote that

> Facebook Messenger and WhatsApp are not close competitors and that consumers would continue to have a wide choice of alternative consumer communications apps after the transaction. Although consumer communications apps are characterised by network effects, the investigation showed that the merged entity would continue to face sufficient competition after the merger[194].

This quote leaves it safe to say that, at least for the WhatsApp acquisition, and possibly for the other Facebook acquisitions, the European Union did not consider Facebook's acquisitions to give it the status of monopoly, nor to hinder the entry of other companies that may be competitors to Facebook. This falls in line with the exceptions listed in Article 101. However, in light of the Six4Three documents, the Union launched an investigation into Facebook's "alleged efforts to identify and squash potential rivals"[195].

The second part is that the European Union held, and continues to hold, the idea that data privacy and competition law are two strictly separate branches of law. Vestager has stated that the Commission would be closely watching the BKA's investigation of Facebook, but also that it should not be expected that it follow in Germany's footsteps, as the BKA was relying partly on German law for its investigation. However, as data becomes more central to our lives, and by extension to companies, it can be expected that there will be a blurring of the lines.

While WhatsApp/Facebook were fined $110 million for merging data (they failed to disclose that they were capable of doing so during the preliminary merger investigation), there has been no significant discussion of changing the law or

[194] *Supra* note 158.
[195] Sam Schechner, Emily Glazer, and Valentina Pop, "EU Deepens Antitrust Inquiry Into Facebook's Data Practices", *Wall Street Journal*, 6 February 2020, https://www.wsj.com/articles/eu-deepens-antitrust-inquiry-into-facebooks-data-practices-11580994001.

punishing Facebook further for violating its users' privacy. Vestager, and by extension, the European Union, does not believe that breaking up Facebook will solve issues.

The lack of information is closely related to the first point. Had the Six4Three documents not been leaked, then the European Union would not be investigating Facebook. It remains to be seen whether more information will be revealed about Facebook's practices, and what, if any, sanctions will be placed on the company. It would not be a surprise if the Union let go of the idea that data privacy and competition law are wholly separate branches of law, particularly with the pending ECJ and United States lawsuits.

5.2. Germany

In 2016, the Bundeskartellamt initiated proceedings against Facebook, based off the collection and processing of user data by the social media giant, not the data it generates. It based its investigations off the Terms of Service, and whether users were properly informed about how their data would be processed.

In 2017, the BKA released a preliminary assessment, declaring that "Facebook's collection and use of third-party sources is abusive"[196], and as such, Facebook is dominant on the market. Users are unable to control exactly what data are collected by Facebook via third-party applications, particularly on non-Facebook owned products.

The case was decided in 2019, with the BKA officially declaring that within Germany, Facebook's data collection was an abuse of its power. §18(2a) of the German Competition Act declares that "The assumption of a market shall not be invalidated by the fact that a good or service is provided free of charge", so Facebook being free is not an issue. The BKA also does not consider competition with other social media applications or websites, as they do not believe they are comparable to Facebook, despite Facebook's assertions to the contrary.

To come to the conclusion of abusive power, the BKA relied on the GDPR, despite the EU's official position that privacy concerns do not fall within the scope of competition law. To do so, it looked at German case law. Two previous rulings by the

[196] Bundeskartellamt, "Preliminary assessment in Facebook proceeding: Facebook's collection and use of data from third-party sources is abusive", 19 December 2017, https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2017/19_12_2017_Facebook.pdf?__blob=publicationFile&v=3.

Federal Court of Justice, VBL-Gegenwert and Pechstein, found that in the event of an abuse of dominant undertaking as described in §19 of the Act against Restraints of Competition, which also violates Section 307 of the German Civil Code, in that "Provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user", then all interests of the parties, including constitutional rights, must be considered. In light of these rulings, the BKA "holds that as far as the appropriateness of conditions agreed in an unbalanced negotiation is concerned, these decisions of the highest court apply to all other areas of the law"[197], including data protection law.

As a result of the findings, Facebook was ordered to stop combining Facebook data with that obtained from WhatsApp and Instagram. Facebook disagreed with the BKA, and appealed the decision to the Düsseldorf Higher Regional Court. While the Court did not overturn the decision, it did rule that while the appeal was being considered, the BKA did not have the power to tell Facebook to stop combining user data. This decision was appealed by the BKA, which appealed to the Federal Court of Justice and in June 2020, it sided with the BKA. In March 2021, the Düsseldorf Higher Regional Court submitted the case to the ECJ.

5.2.1. Analysis

Germany's history of state surveillance plays into how it deals with Facebook. Facebook tracks nearly every German resident connected to the Internet, even if they do not hold an account on the social media website. This level of data-gathering, even if it is not used for purposes as nefarious as the secret police, is alarming, and it is clear that the German judiciary wants to take the steps necessary to limit Facebook's tracking, and uphold the right to privacy.

The BKA acknowledges the right to privacy is a motivational factor in its decision, writing in its case summary that

> [in] order to protect the fundamental right to informational self-determination[198], data protection law provides the individual with the right to

[197] Bundeskartellamt, "Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing", B6-22/16, 6 February 2019, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4.

[198] In other words, the right to personality, as described in Section 2.1.1.

> decide freely and without coercion on the processing of his or her personal data"[199]

In its case against Facebook, the BKA looked to the GDPR, despite the European Union's stance that data privacy is not an antitrust issue. In doing so, it has perhaps paved a path that other member countries can follow in the future; it has already collaborated with the French NCA in a paper on data's implications in competition law, and Belgium and Italy have both opened cases against the tech giant. While this is only a minority of countries taking action against Facebook, they are member states with relatively important status within the European Union, and the organisation at large may take inspiration from these cases.

It is also interesting to note that Berlin is now the most surveilled city in the Union[200], and among the most surveilled cities in the world[201]. Most of the surveillance is centred around bustling public areas deemed "crime hotspots and critical security facilities"[202], such as public transport stations and airports, and the systems are set up for prevention against crimes such as terrorist attacks, rather than smaller, more insignificant ones, and automatically delete the data of those whose photos are not in a national database[203]. A trial run of facial recognition software at Berlin's Südkreuz train station ended with a false positive recognition rate of one in 1 000[204]. While low, the unlucky individuals, who tend to be darker-skinned, as facial recognition software has more trouble differentiating darker-skinned people[205], may end up facing severe consequences. As such, the question is not so much why is Berlin so extensively surveilled, but whether false positives, however low, and knowing that one is in a surveilled area, offset the benefits brought forth by surveillance? The answer lies

---

[199] *Supra*, note 199.
[200] Previously, it was London. See Paul Bischoff, "Surveillance camera statistics: which cities have the most CCTV cameras?", *Comparitech,* 22 July 2020, https://www.comparitech.com/vpn-privacy/the-worlds-most-surveilled-cities/.
[201] *Ibid*.
[202] Thorsten Frei, "Facial recognition can make us safer", *about:intel,* 10 November 2020, https://aboutintel.eu/facial-recognition-germany/.
[203] *Ibid*.
[204] Johnathan Day, "Facial Recognition Surveillance a threat to Law-Abiding Citizens", *Liberties*, 21 September 2018, https://www.liberties.eu/en/stories/facial-recognition-clue-article/15661.
[205] For more on this topic, see Alex Najibi, "Racial Discrimination in Face Recognition Technology Today", Harvard University, 24 October 2020, https://sitn.hms.harvard.edu/flash/2020/racial-discrimination-in-face-recognition-technology/; Patrick Gother, Mei Ngan, and Kayee Hanaoka, "Face Recognition Vendor Test (FRVT) Part 3: Demographic Effects", National Institute of Standards and Technology, December 2019, https://doi.org/10.6028/NIST.IR.8280.

beyond the scope of this paper, and is ultimately based on one's opinion of facial recognition software, but the question is still an important one to consider.

Berlin's status as the most surveilled city in the European Union begs the question of whether Germany is serious about cracking down on privacy violations. The main issue between the BKA and the Düsseldorf Higher Court is whether data privacy can be considered within the scope of competition law, but given the prevalence of surveillance in Berlin, it is important to consider how seriously privacy is taken at a grander scale.

5.3. The United Kingdom

As Cambridge Analytica's home country, one would expect that the United Kingdom would have cracked down on the company, particularly as there were (now unfounded) allegations that the company was trying to influence the Brexit vote. However, there have been few repercussions.

Following the revelations, the Information Commissioner's Office (ICO), the UK's data protection organisation, announced a £500 000 fine (approximately $644 000 or €578 000), the highest possible fine. James Dipple-Johnstone, the ICO's deputy commissioner, said that the organisation's "main concern was that UK citizen data was exposed to a serious risk of harm"[206]. Facebook appealed the fine on the basis that the ICO's reasoning for fining them was broader than the questions raised in the Cambridge Analytica case. In October 2019, over a year after the initial declaration of the fine, Facebook eventually acquiesced.

The UK Parliament's Digital Culture, Media and Sport Committee issued a report in February 2019 titled "Disinformation and fake news" which, despite the title, goes into great detail about Facebook's failings, including the issues revealed with the Six4Three case and data sharing. The report also notes that the Six4Three documents, while critiqued by Facebook for putting the company in a bad light, could be useful to regulatory bodies, notably the ICO and the FTC, as they "highlight Facebook's aggressive action against apps". Upon releasing the report, Parliament called for the ICO to investigate Facebook's usage of user data. As of February 2021, the ICO has

[206] British Broadcasting Service, "Facebook agrees to pay Cambridge Analytica fine to UK", 30 October 2019, https://www.bbc.com/news/technology-50234141.

either not yet commenced an investigation, or is still in the process of doing an investigation, and has not made that information publicly available.

5.3.1. Analysis

The United Kingdom has done the least out of the societies examined within the scope of this paper. There are three reasons for this. The first is Brexit: the process of leaving the European Union has taken up a considerable amount of resources in the last several years. Second is the coronavirus, which is common to all the entities studied in this paper; while competition law itself may not be affected by the coronavirus, governments have been allocating their time and resources towards fighting the virus.

The third reason is the most nefarious, and admittedly speculative. There are no doubts that the United Kingdom is a surveillance society. In 2013, former National Security Agency (NSA, United States) contractor Edward Snowden leaked thousands of documents revealing extensive surveillance practices by not only the United States, but also the United Kingdom. Among revealed programs was the General Communications Headquarters' (GCHQ, United Kingdom) Tempora and the NSA's PRISM. Tempora is a program set up by the GCHQ to intercept data from fibre optic cables at the United Kingdom's borders. Data interceptors were placed on the cables on British land; in 2013, at the time of the programme's discovery, the GCHQ had access to over 21 terabytes of data every day. This data was also shared with the NSA "in order to bypass domestic restrictions on data gathering"[207]. Intercepted data includes phone call recordings, Facebook posts, and internet history.

While Facebook has made moves to encrypt its messaging services (encryption being the process of encoding messages in a way that only the intended recipients can read them; not even employees from the platform the messaging takes place on can read or intercept messages), the United Kingdom, alongside the United States and Australia, is fighting encryption. In an 2019 letter, politicians from those countries wrote a letter to Zuckerberg requesting that he not encrypt Messenger for security purposes. If messages are encrypted, law enforcement would have a harder time gaining access and evidence of illegal content. As stated in Section 2.1.2, signatories to

[207] Kadhim Subber, "A simple guide to GCHQ's Internet surveillance programme Tempora", *Wired*, 24 June 2013, https://www.wired.co.uk/article/gchq-tempora-101.

the ECHR can surveil their citizens in the name of national security, and encryption would severely limit governments' access to data.

The United Kingdom's history of surveillance and its efforts to limit Facebook's moves to encrypt messaging services indicate that the country may perhaps be light in any future dealings when it comes to Facebook and privacy. After all, punishing Facebook for data hoarding to maintain its power could come across as hypocritical by privacy rights-focused organisations.

5.4. United States

5.4.1. Federal level

For clarity, this section will be divided between the actions of Congress, the elected body of the United States, and the regulatory agencies, notably the Federal Trade Commission. To recap from Section 3, Congress can pass laws dictating what the agencies can and cannot do, but it has no official bearing on the agencies' decisions. That is to say, even if a majority of Congress supports, for instance, breaking up Facebook, the Federal Trade Commission can issue a decision which does not recommend breaking up the company.

5.4.1.1. Congress

In July 2020, Congress hosted a day-long meeting on the subject of tech and antitrust, and questioned the GAFA CEOs. Zuckerberg was asked the most questions (62), closely followed by Sundar Pichai of Google (61)[208]; this is unsurprising, as both Facebook and Google have been the focus of a number of investigations throughout the years.

The hearing revealed a lot of information, and gave concrete proof for many suspicions, notably in regard to Instagram and Facebook's relationship. As discussed in Section 4, the hearing confirmed that Facebook has grown so powerful that its main competitors are its own products.

[208] *New York Times,* "Here's which tech C.E.O. was asked the most questions by lawmakers", 29 July 2020, https://www.nytimes.com/live/2020/07/29/technology/tech-ceos-hearing-testimony/heres-which-tech-ceo-was-asked-the-most-questions-by-lawmakers.

In November 2020, a panel consisting of outside legal counsel, members of Congress, and their aides, released a much-anticipated report. It not only went over the findings of the hearings, but also outlined suggestions as to what Congress should do to reign in the power of Big Tech. These included establishing non-discrimination rules to enforce fair competition and promote innovation. If this law were implemented several years ago, then perhaps there would have not been the controversy revealed in the Six4three lawsuit. The report also suggests passing interoperability laws, which would for example, allow users to message their friends on different platforms. Facebook recently set this up between Facebook and Instagram; Instagram users who are not on Facebook are now able to message users on Facebook who are not on Instagram, and none of them have to download additional applications. Beyond Facebook companies, this could potentially mean that someone can email a business with a Facebook page, but no publicly available email address, without having to create a Facebook account. Related to interoperability is the idea of data portability, which is one of the most significant barriers users face when switching to a new website. Creating tools that would easily allow a user to move to another platform would address this issue.

Something quite notable is that this was a bipartisan report: both Republicans and Democrats believe that Big Tech needs to come under more scrutiny, though the parties differ on why this is the case: Republicans believe that the social network is censoring conservative voices, while Democrats believer that Facebook harms its users through its data collection. Some Republicans released their own report, but the fact that the initial (and most important) report was bipartisan is significant, and signals to Facebook and the rest of the world that there will be consequences for its behaviour.

While no member of Congress has officially gone on record saying that Facebook is essentially a state, as several media outlets from across the world have done since 2010[209], there have been comparisons, most notably with Republican representative Lindsey Graham, who said that "companies have the power of

[209] See Dominique Boulier, "Facebook un quasi Etat contre les Etats", *MediaPart*, 20 March 2018, https://blogs.mediapart.fr/dominique-g-boullier/blog/200318/facebook-un-quasi-etat-contre-les-etats; *The Economist,* "The Future is Another Country", July 22 2010; Henry Farrel, Margaret Levi, and Tim O'Reilly, "Mark Zuckerberg runs a nation-state, and he's the king", *Vox*, 10 April 2018. https://www.vox.com/the-big-idea/2018/4/9/17214752/zuckerberg-facebook-power-regulation-data-privacy-control-political-theory-data-breach-king; Emmanuel Karlsten, "Facebook börjar bli som ett egen land", *Göteborgs-Posten*, 27 January 2018. https://www.gp.se/kultur/kultur/facebook-b%C3%B6rjar-bli-som-ett-eget-land-1.5095556.

government"[210] when discussing Facebook censorship. This ties back to the idea in Section 2 that the American people expect protection from the state. While perhaps a bold claim to make, it is evident that certain segments of the population believe that censorship on privately-owned social media websites and applications are a violation of the First Amendment (freedom of speech). As stated in Section 2.3.1., the Bill of Rights guarantees protection of speech by the state, and not private individuals or companies, no matter how publicly known they may be.

5.4.1.2. Federal Trade Commission and the Department of Justice

Insofar as the Federal Trade Commission is concerned, there are two actions that deserve to be highlighted. The first is a historic $5 billion fine for deceiving users over privacy practices, and the second is the lawsuit.

The fine is the largest privacy-related fine in the world, almost 20 times greater than the second largest fine, and is among the largest fines ever imposed by the United States government[211]. Its roots lie in a complaint filed to the FTC in December 2009 against Facebook by several organisations, including EPIC. The complaint highlighted changes to Facebook's privacy policy, namely that users were not notified or properly informed of how their data was being shared. Some examples are that information available to users' friends became available to third-party applications their friends used, or that Facebook said that user information would not be shared with advertisers, when it was, in fact, shared.

After the complaint was filed, the FTC launched an investigation into Facebook's practices, and in 2012, the FTC and Facebook signed a consent order. Rather than going to court and both parties spending possibly millions of dollars, they came to an agreement with terms that put user privacy at the centre. The consent decree ordered Facebook to not misrepresent its privacy practices, obtain user consent to share information, remove user data within 30 days of a user closing an account,

[210] Nandita Boze, and Diane Bartz, "'More power than traditional media': Facebook, Twitter policies attacked", *Reuters,* 17 November 2020, https://www.reuters.com/article/usa-tech-senate/more-power-than-traditional-media-facebook-twitter-policies-attacked-idUSKBN27X186.
[211] Federal Trade Commission, "FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook", 24 July 2019, https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions.

and be subject to independent audits every two years. The consent decree was solely applicable to Facebook, and enforceable only by the FTC.

Despite the consent order, Facebook still misrepresented its privacy practices. Auditing firm PricewaterhouseCoopers (PwC) reviewed Facebook's privacy policies in 2017, two years after Facebook was made aware of how Aleksandr Kogan provided Cambridge Analytica with data harvested from user profiles, and gave the tech giant a clean bill of health. It found that

> Facebook's privacy controls were operating with sufficient effectiveness to provide reasonable assurance to protect the privacy of covered information and that the controls have so operated throughout the Reporting Period, in all material respects for the two years ended [sic] February 11, 2017[212].

When the Cambridge Analytica scandal was revealed, privacy experts and government officials wondered how PwC did not report the inadequacy of Facebook's data privacy practices[213]. Some speculated that the report was not thorough enough, or they did not ask the right questions to Facebook officials to get them to tell the firm about the misuse. When asked why Facebook did not disclose the Cambridge Analytica issue to PwC, a spokesperson pointed to the 11 April 2018 House of Representatives hearing, wherein Zuckerberg told Representative Bob Latte that Facebook does not believe that the issue was a violation of the consent decree, as it was Kogan who told Facebook he was going to use the data a certain way, but did not, rather than Facebook having inadequate privacy protections. Kogan's misrepresentation of the data usage was not Facebook's fault, therefore it was not responsible for what happened to the data, even though it eventually came to light that the company had not adequately verified that Kogan and Cambridge Analytica had deleted all the data, and did not inform its users about what happened[214].

A report submitted in June 2019, covering the period from 2017 to February 2019, the same time the FTC announced a historic $5 billion fine against Facebook for violating the consent decree, found that Facebook had failed to implement a

---

[212] PricewaterhouseCoopers, "Independent Assessor's Report on Facebook's Privacy Program", 12 April 2017, https://epic.org/foia/ftc/facebook/EPIC-18-03-20-FTC-FOIA-20180418-FB-Assessment-2017.pdf.

[213] Nitasha Tiku, " Facebook's 2017 Privacy Audit Didn't Catch Cambridge Analytica", *Wired*, 19 April 2018, https://www.wired.com/story/facebooks-2017-privacy-audit-didnt-catch-cambridge-analytica/.

[214] Chloe Watson, "The key moments from Mark Zuckerberg's testimony to Congress", *Guardian* (US), 11 April 2018, https://www.theguardian.com/technology/2018/apr/11/mark-zuckerbergs-testimony-to-congress-the-key-moments.

"reasonable privacy program that safeguarded the privacy, confidentiality, and integrity of user information"[215].

The fine was decided after a year-long investigation following the Cambridge Analytica scandal. Specifically, it was imposed for "deceiving users about their ability to control the privacy of their personal information"[216]. In addition to the fine, Facebook was ordered to restructure its approach to privacy, which included encrypting passwords, greater oversight for third-party application, and obtaining user consent before using facial recognition technology.

Following the fine, in July 2019, the Department of Justice filed a complaint against Facebook for failure to uphold the consent order. An investigation was officially declared in September 2019, and in December 2020, rumours arose that the Department would file a lawsuit against Facebook.

While a lawsuit from the Department of Justice still has not been confirmed, the FTC filed one against the tech giant in December 2020, for "maintaining its personal social networking monopoly through a years-long course of anticompetitive conduct"[217]. While the link between anticompetitive conduct and the erosion of user privacy is not explicitly mentioned in the complaint, as shown in Section 4, Facebook viewed WhatsApp as a rival to acquire in part due to data gathered through Onavo.

5.4.2. State level

In September 2019, the Attorneys General of 47 states plus the District of Columbia and the territory of Guam revealed that they had begun an investigation of Facebook, to see whether the company "put consumer data at risk, reduced the quality of consumers' choices, and increased the price of advertising"[218]. The probe reached its end in December 2020.

What was noteworthy when the investigation was revealed was that California, home to Facebook, was not participating. A barrage of negative reporting concluded with the *New York Times* wondering what the state was doing, as its status as the

---

[215] *United States v. Facebook, Inc.* (2019)
[216] Federal Trade Commission, "FTC Imposes $5 Billion Penalty".
[217] Federal Trade Commission, "FTC Sues Facebook for Illegal Monopolization", 9 December 2020, https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization.
[218] Letitia James, "Attorney General James Gives Update On Facebook Antitrust Investigation", 22 October 2019, https://ag.ny.gov/press-release/2019/attorney-general-james-gives-update-facebook-antitrust-investigation.

richest state in the country makes it so that it has more money and resources than other states, making it a powerful ally. A week after the release of the article, then California Attorney General Xavier Becerra revealed that his office had been investigating Facebook for over a year, since summer 2018. Publicly available documents filed by Becerra's office reveal that Facebook had failed "to comply with lawfully issued subpoenas and interrogatories"[219]. The lack of cooperation pushed Becerra to make the investigation public.

In December 2020, California joined the 47 other state attorneys general in suing Facebook. In contrast to the FTC lawsuit, the state lawsuit explicitly mentions the privacy harms committed by Facebook, and how "Facebook's illegal conduct [...] [contributes] to reductions in the quality and variety of privacy options and content available to [users]"[220].

5.4.3. Analysis

The Chicago School is still the dominant theory of antitrust in the United States; Facebook is free, thus users are getting a good deal. However, the dominance of the Chicago School of thought has been slowly eroding over the last few years, as noted in Section 3.1.6 with the rise of the Neo-Brandeis movement. For this, it would be worthwhile to look at the Republicans' and Democrats' views of the Facebook debate.

Republican concerns with Big Tech mainly appear to be concerned with matters of free speech. By limiting free speech, Facebook is limiting consumer choice in regards to media outlets. Representative Ken Buck stated that the October 6 House report was "a thinly veiled call to break up Big Tech firms", indicating that Republicans are against it.

Both parties are open to the idea of stronger privacy rights, but they disagree on how the bill should be written. There are two main points of contention: the private right to action, and pre-emption.

The private right to action allows a civilian to bring a case against a company. This differs from class action lawsuits in the sense that when the plaintiffs in a class action suit file, certain issues may be pushed aside if they are not applicable to all of them. Without the private right to action, individuals have to rely on state agencies,

[219] *People of the State of California Ex Rel. Xavier Becerra, Attorney General v. Facebook Inc.* (2019).
[220] *New York v. Facebook Inc. (2020).*

such as the FTC or attorneys general, to sue a company. Republicans, some moderate Democrats, and many CEOs from the country's biggest companies (Zuckerberg has not made a public statement about this issue) oppose the private right to action.

Giving individual civilians the right to sue companies directly allows them to defend their rights in a way that the government may be unable or unwilling to, such as in the case of gender or racial discrimination. There is also power in numbers: if one civilian files a suit against Facebook, then Facebook will most likely pay the person off quietly. But if even 0.00001% of Facebook's base (3 000 users) sued Facebook for violating their privacy, Facebook would be unable to hide that. Take the example of the Telephone Consumer Privacy Act (TCPA) from 1991. To put it simply, the TCPA allowed consumers to sue telemarketing companies who did not obtain their consent before calling them, and to be compensated between $500 and $1500 per unsolicited call. Since 2004, the FTC has fined companies a total of $1.5 billion[221]. If the aforementioned 3 000 users sued Facebook and could receive a similar amount per privacy violation, Facebook would have to pay the plaintiffs between $1.5 million and $4.5 million. If Facebook faced a successful class action lawsuit on behalf of all those whose data was harvested by Cambridge Analytica (87 million users), or whose phone numbers were leaked in April 2021 (533 million users), it could expect to pay $43.5 billion to $799.5 billion[222]. If the fine were reduced to a more modest $50 per violation, the Cambridge Analytica class action suit alone could still come to cost Facebook $4.35 billion (assuming every affected user claimed their compensation). These numbers are not insignificant, and could make Facebook take the necessary steps to truly protect its users privacy. Additionally, if one can sue a company for physical injury, then one should be able to do so for privacy injury. Simply because the injury is not physical does not mean that the injury does not hurt: personal identifying information in the wrong hands could lead to, at best, an increase in spam, and at worst, stolen identities, fraud, or blackmail.

The CCPA grants consumers a private right to action, but only if certain conditions are met, and if certain information has been stolen. If the information (social security number, state-issued identification card numbers, banking

[221] Sarah Krouse, "The FCC Has Fined Robocallers $208 Million. It's Collected $6,790.", *Wall Street Journal,* 28 March 2019, https://www.wsj.com/articles/the-fcc-has-fined-robocallers-208-million-its-collected-6-790-11553770803.

[222] These numbers are if each affected Facebook user claimed the money owed to them, using the $500 and $1500 fines given in the TCPA.

information along with credentials that would allow access to the person's account, medical information, or health insurance information) was unencrypted or nonredacted and subject to unauthorised access "As a result of the business's violation of the duty to implement and maintain reasonable security procedures and practices appropriate to the nature of the information to protect the personal information"[223], then one could sue a company for violating the CCPA. Under these conditions, an individual would be unable to sue Facebook for the Cambridge Analytica scandal, or the phone number debacle.

Opponents to the private right of action oppose it for a number of reasons. First, they fear that allowing anyone to sue a company for privacy breaches will open the door "to a flood of nuisance lawsuits"[224], particularly against small businesses who would be unable to afford the time or money required of a lawsuit. Second, lawsuits would also require companies to direct resources away from compliance, thus further damaging the relationship between consumers and the companies.

Another area where Republicans and Democrats clash on is in regard to pre-emption, or for federal law to override state law. Republicans support pre-emption, while Democrats do not. Allowing it would essentially annul any state law that goes beyond federal law's data protections. For example, if a state says that cookies must be deleted after 10 days, while federal law says 28 days, federal law will reign. Republicans, as well as many CEOs, say that without pre-emption, there would be too many laws for companies to follow, which would prevent consumers from fully understanding all their rights, especially if they travel a lot between states. It could also "threaten companies' abilities to remain competitive, as many resources would go towards compliance"[225]. The EFF has also stated that companies are against pre-emption because it would mean having to follow state laws that are tougher than federal law.

Republican objections to the private right of action, and support of pre-emption fall in line with the Chicago School tenet of efficiency. Frivolous lawsuits, taking away

[223] Cal. Civ. Code § 1798.150(a) (as amended by Assembly Bill 1355 (effective Oct. 11, 2019)).
[224] Ben Brody, and Daniel Stoller, "Democrats Seek Expansion of Corporate Liability in Privacy Bill", *Bloomberg*, 22 May 2019, https://www.bloomberg.com/news/articles/2019-05-22/democrats-seek-expansion-of-corporate-liability-in-privacy-bill.
[225] Allie Gottlieb, "Persuading for Privacy", *The Regulatory Review,* 19 March 2020, https://www.theregreview.org/2020/03/19/gottlieb-persuading-privacy/.

resources from companies in a way that would interfere with their efficiency, or adding extra work to ensure compliance, all go against the tenet of efficiency.

Meanwhile, the Democrats' support of citizen lawsuits and keeping strong state law fall in line with citizen welfare as established by the neo-Brandeis movement. Ensuring that citizens are able to sue the companies for violation of their rights is putting citizen welfare at the forefront of matters, as opposed to hoping that the government will take matters into their own hands. Members of traditionally marginalised groups in particular can benefit from the private right to action. And while a federal law comes with the risk that states will only comply with the bare minimum, it also promotes citizen welfare by protecting citizens. The argument that companies will be less competitive as they will have to devote more resources towards compliance rather than marketing or merchandise is nearly rendered moot when one considers the idea that companies, not wanting to limit business, particularly in areas with a lot of customers, will put in the necessary work to ensure compliance in all jurisdictions if it means the net profit is positive.

Aspects of the neo-Brandeis movement are also present in the state lawsuit. The Attorneys General mention not only how users are harmed by Facebook's practices, but also how advertisers, particularly small businesses, are doubly harmed by the lack of competition; because the market is smaller, when Facebook does something deemed negative by the general public, users may leave, thus reducing the amount of people who would see the advertisements, or businesses would feel pressured to remove them, which would significantly impact their reach.

Both lawsuits also support the tenet of an open and competitive marketplace by explicitly advocating for the breakup of Facebook. In their lawsuit, the states requested that the Supreme Court "restore competitive conditions and lost competition"[226], in part by declaring the acquisitions of Instagram and WhatsApp to be violations of Section 7 of the Clayton Act, which prohibits mergers and acquisitions that may lessen competition or create monopolies. The FTC lawsuit requests the Court to order a "divesture of assets, divestiture or reconstruction of businesses (including, but not limited to, Instagram and/or WhatsApp), and such other relief sufficient to restore the competition that would exist absent the conduct alleged in the Complaint"[227].

[226] *New York v. Facebook, Inc.* (2020).
[227] *Federal Trade Commission v. Facebook, Inc.* (2021).

It is possible that when deciding on the lawsuit, the Supreme Court will take into account Carpenter v. United States. To recap from Section 2.3.1., Chief Justice Roberts wrote in the majority opinion that "the Court is obligated [...] to ensure that the 'progress of science' does not erode Fourth Amendment protections"[228], i.e. privacy. While in Carpenter, the government was culpable, it is entirely possible that the Court will find Facebook just as culpable for eroding privacy, even if it is not a government entity (since the protections listed in the Bill of Rights protect citizens from the government, and not private companies). It is, admittedly, more likely that Facebook will be found guilty for anticompetitive behaviour, as that behaviour has actually violated laws, and that the privacy erosions are a result of the anticompetitive behaviour. But given that Chief Justice Roberts wrote that the Court has an obligation to protect privacy from the progress of science, it is possible that the Court will, at the very least, lambast Facebook for its privacy violations.

[228] *Carpenter v. United States*, No. 16-402, 585 U.S. _____ (2018) (gi).

6. CONCLUSION

The aim of this thesis was to show and analyse responses and investigations by the United States, the European Union, Germany, and the United Kingdom into Facebook's conduct in regard to how its data privacy practices and data hoarding contribute to a lack of competition in the social media market. The United States was chosen as it is home to Facebook's headquarters, the European Union for its historically tough stance against big companies, Germany for its pending lawsuit against Facebook, and the United Kingdom for being home to Cambridge Analytica, whose data misuse scandal with Facebook made data privacy a more public issue. The countries and entities' responses and investigations were looked at through a historical lens to see how past attitudes towards data privacy and competition law have affected present-day actions. This history was described in Sections 2 and 3.

Facebook was chosen as opposed to Google, the only other company to have access to as much data as Facebook, because unlike Google, it is facing legal action for its conduct regarding "the zone between competition law and privacy[229]". Section 4 examined how Facebook has used its power to gather data and eliminate competitors based off that data. WhatsApp is the most notable example: Facebook used data gathered through an application marketing itself as a VPN to stake out the messaging application as a competitor, particularly in Europe and Asia, and subsequently bought it out for $19 million.

Several limitations presented themselves throughout this thesis. First was the disruption the coronavirus caused to investigations. Governments have been focusing their energy on limiting the negative impact of the virus. Additionally, anticompetitive conduct has risen since March 2020, leading competition authorities to focus more resources on those cases. Second was my lack of legal education; all of the legal knowledge presented in this thesis was self-taught. As such, I did not go as deep into certain topics or legal analyses as would have been optimal, as I did not have the resources to do so, hence why there was a more historical focus rather than legal. A couple of issues that would have been interesting to further develop is the role of privacy violations within the United States' lawsuits, given the dearth of legislation, and a legal analysis of the BKA's inclusion of the GDPR in its initial lawsuit against

[229] *Supra* note 189.

Facebook. Third, and this is less of a limit and more so an acknowledgment, but what one perceives as truth may be perceived by another as bias or misrepresentation of reality. This thesis perceives as truth the idea data privacy and competition law cannot be separated when looking at Facebook's conduct, and based that stance off of court cases and statistics that show discontentment with the current reality. While it appears that the cases presented in this thesis are moving towards a blurring, if not outright removal, of the boundary between data privacy and competition, there are individuals within those governments who believe them to be wholly separate issues. Vestager's stance on the separation of the two fields of law may, however indirectly, end up influencing the ECJ's eventual decision, and the Supreme Court may reject the claims made by almost all the states and the Federal Trade Commission to break up Facebook. Those are potential realities that should be prepared for.

If the ECJ and the Supreme Court rule in favour of Facebook, what could happen? A ruling in favour does not mean that Facebook is not in the wrong, but that it made the more compelling argument to the majority of the judges. Rulings can be overturned, and they do not prevent legislative bodies from making new laws, nor prevent companies from implementing different standards. Apple recently released a new iOS update that shows users when apps want to use users' unique identification number to track them for advertising purposes. Facebook rallied against the update prior to its release, saying that it would harm the small businesses who rely on Facebook to advertise. On the pop-ups that show up after an iPhone user downloads iOS 14.5 and opens Facebook or Instagram, it is written that "[Facebook] use[s] information about your activity received from other apps and websites to [...] Help keep Facebook [and Instagram] free of charge". This sentence serves three purposes: first, it implicitly reminds users that Facebook monetises their data, and, two, serves as a scare tactic towards users who may not deeply understand how exactly Facebook uses their data. By implying that their data helps keep Facebook free of charge (a claim that Facebook upheld and posted on the Facebook log-in page until 2019), Facebook creates a fear in users that it may start charging them.

This is not to say that other companies' policies are the best way to regulate Facebook's data hoarding and educate the public about data tracking and monetisation, but it appears that Apple has made such a policy because it recognises the importance of data privacy, and the fact that governments have been slow in producing legislation concerning privacy matters. If the courts rule in favour of

Facebook, it is possible that there may be may be more policy changes coming from other companies, ones who do not rely so heavily on advertising. Given this caveat, it appears unlikely that Google, who also generates a significant amount of income from advertising, will require applications in the Google Play Store to explicitly ask its users for consent to track them. However, companies may only want to advertise with companies who ask their user base for consent, or other social media companies could team up to make their messaging services interoperable.

The future has yet to be written, however, and it may be that we will live in a world where Facebook is required to be broken up by the Supreme Court, and the ECJ considers Facebook's policies abusive. If even one of those decisions happen, the consequences will be ground-breaking.

REFERENCES

Activate Consulting. "Activate Tech & Media Outlook 2021". 2020. https://activate.com/outlook/2021/.

Arlington, Michael. "Facebook No Longer the Second Largest Social Network". *TechCrunch,* 2 June 2008, https://techcrunch.com/2008/06/12/facebook-no-longer-the-second-largest-social-network/.

Armstrong, Scott, and Bob Woodward. *The Brethren: Inside the Supreme Court*. New York: Simon & Schuster, 1979.

Ball, George. *The Past Has Another Pattern: Memoirs*. New York: Norton, 1982.

BCG Big Data. "Big Data, les consommateurs désabusés". *Journal du Net,* 2015. https://www.journaldunet.com/ebusiness/telecoms-fai/1187803-big-data-des-regles-de-confidentialite-trop-floues-pour-les-consommateurs-statista/.

Beltrametti, Silvia. "Capturing the Transplant: U.S. Antitrust Law in the European Union". *Vanderbilt Journal of Transnational Law* 48, no. 3 (October 2015): 1147 – 1190.

Bhardwaj, Prachi. "Here are all the questions Mark Zuckerberg couldn't answer during this week's congressional hearings". *Business Insider* (US), 12 April 2018. *https://www.businessinsider.com/mark-zuckerberg-facebook-cambridge-analytica-unanswered-questions-congressional-testimony-2018-4*.

Bischoff, Paul. "Surveillance camera statistics: which cities have the most CCTV cameras?". *Comparitech,* 22 July 2020. https://www.comparitech.com/vpn-privacy/the-worlds-most-surveilled-cities/.

Boardman, Fon. *America and the Gilded Age, 1877-1900*. New York, 1972.

Bork, Robert. *The antitrust paradox: a policy at war with itself*. New York: The Free Press, 1993.

Boulier, Dominique. "Facebook un quasi Etat contre les Etats". *MediaPart*, 20 March 2018. https://blogs.mediapart.fr/dominique-g-boullier/blog/200318/facebook-un-quasi-etat-contre-les-etats.

Boze, Nandita, and Diane Bartz. "'More power than traditional media': Facebook, Twitter policies attacked". *Reuters,* 17 November 2020. https://www.reuters.com/article/usa-tech-senate/more-power-than-traditional-media-facebook-twitter-policies-attacked-idUSKBN27X186.

Brandeis University. "Our Namesake: Louis D. Brandeis". https://www.brandeis.edu/about/louis-brandeis.html

Brandeis, Louis, and Samuel Warren. "The Right to Privacy". *Harvard Law Review*, 4, no. 5 (1890): 193 – 220.

British Broadcasting Service. “EU fines Facebook over ‘misleading’ WhatsApp claim”. 18 May 2017. https://www.bbc.com/news/business-39958630.

British Broadcasting Service. “Facebook agrees to pay Cambridge Analytica fine to UK”. 30 October 2019. https://www.bbc.com/news/technology-50234141.

Brody, Ben, and Daniel Stoller. “Democrats Seek Expansion of Corporate Liability in Privacy Bill”. *Bloomberg*, 22 May 2019. https://www.bloomberg.com/news/articles/2019-05-22/democrats-seek-expansion-of-corporate-liability-in-privacy-bill.

Browne, Ryan. “European lawmakers criticize Zuckerberg for his lack of answers”. *CNBC News*, 22 May 2018. https://www.cnbc.com/2018/05/23/eu-politicians-dissatisfied-with-facebook-ceo-mark-zuckerbergs-parliament-meeting.html.

Chee, Foo Yun. “Facebook privacy issues may not be competition matters: EU antitrust chief”. *Reuters*, 9 September 2016. https://www.reuters.com/article/us-eu-facebook-antitrust-idUSKCN11F1HR.

Clark, Richard. “Conglomerate Mergers and Section 7 of the Clayton Act”. *Notre Dame Law Review*, 36, no. 3 (1961), 252 – 275.

Conway, Tyler. “History of Standard Oil: The Cleveland Massacre”. Columbia Law School. 3 February 2013. http://moglen.law.columbia.edu/twiki/bin/view/AmLegalHist/TylerConwayProject.

Day, Johnathan. “Facial Recognition Surveillance a threat to Law-Abiding Citizens”. *Liberties*, 21 September 2018. https://www.liberties.eu/en/stories/facial-recognition-clue-article/15661

Desjardins, Jeff. “Chart: The Evolution of Standard Oil”. *Visual Capitalist*, 24 November 2017. https://www.visualcapitalist.com/chart-evolution-standard-oil/.

Desjardins, Jeff. “How much data is generated each day?”. World Economic Forum, 17 April 2019. https://www.weforum.org/agenda/2019/04/how-much-data-is-generated-each-day-cf4bddf29f/

DesMarais, Christina. “Facebook app spurs spike in Snapchat popularity”. *PC World*, 29 December 2012. https://www.pcworld.com/article/2023506/facebook-app-spurs-spike-in-snapchat-popularity.html.

Electronic Frontier Foundation. Electronic Frontier Foundation to Marc Berman, 17 April 2019. “AB 1564 -- as introduced OPPOSE”. https://www.eff.org/document/ab-1564-opposition-letter-april-2019.

Electronic Privacy Information Center. “California’s Proposition 24”. https://epic.org/state-policy/ca-prop24/.

European Commission. “Empowering National Competition Authorities”. https://ec.europa.eu/competition/antitrust/nca.html.

European Commission. “Mergers: Commission approves acquisition of WhatsApp by Facebook”. 3 October 2014. https://ec.europa.eu/commission/presscorner/detail/es/IP_14_1088.

European Commission. “The Commission prohibits GE's acquisition of Honeywell”. 3 July 2001. https://ec.europa.eu/commission/presscorner/detail/en/IP_01_939.

Facebook, Inc. “Facebook Reports Fourth Quarter and Full Year 2020 Earnings”. 27 January 2021. https://investor.fb.com/investor-news/press-release-details/2021/Facebook-Reports-Fourth-Quarter-and-Full-Year-2020-Results/default.aspx

Facebook, Inc. “Leading Websites Offer Facebook Beacon for Social Distribution”. 6 November 2007. https://about.fb.com/news/2007/11/leading-websites-offer-facebook-beacon-for-social-distribution/.

Facebook, Inc. “What information does Facebook get when I visit a website with the Like button?”. https://www.facebook.com/help/186325668085084.

Fang, Lee. “Google and Facebook Are Quietly Fighting California’s Privacy Rights Initiative, Emails Reveal”. *The Intercept*, 26 June 2018. https://theintercept.com/2018/06/26/google-and-facebook-are-quietly-fighting-californias-privacy-rights-initiative-emails-reveal/.

Farrel, Henry, Margaret Levi, and Tim O’Reilly. “Mark Zuckerberg runs a nation-state, and he’s the king”. *Vox*, 10 April 2018. https://www.vox.com/the-big-idea/2018/4/9/17214752/zuckerberg-facebook-power-regulation-data-privacy-control-political-theory-data-breach-king.

Federal Trade Commission. “FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook”. 24 July 2019. https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions.

Federal Trade Commission. “FTC Sues Facebook for Illegal Monopolization”. 9 December 2020. https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization.

Federal Trade Commission. “The Antitrust Laws”. 11 June 2013. https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws.

Feiner, Lauren. “A federal privacy law is starting to crystallize, but Democrats and Republicans can’t agree on how to do it”. *CNBC News*, 4 December 2019. https://www.cnbc.com/2019/12/04/a-federal-privacy-law-is-starting-to-crystallize-senators-remain-divided-over-details.html.

Feiner, Lauren. “FTC commissioners agree they should act to protect consumer privacy if Congress doesn’t”. *CNBC News,* 20 April 2021. https://www.cnbc.com/2021/04/20/ftc-commissioners-agree-they-should-protect-consumer-privacy.html.

Frei, Thorsten. “Facial recognition can make us safer”. *about:intel,* 10 November 2020. https://aboutintel.eu/facial-recognition-germany/.

Gab AI Inc.. “About Gab.com”. https://gab.com/about.

Gallagher, Billy. *How to turn down a billion dollars: The Snapchat story*. New York: St. Martin’s Press, 2018.

Gallup. “Americans’ Views of Technology Companies Worsen Amid Calls for More Government Regulation”. 18 February 2021. https://news.gallup.com/poll/329666/views-big-tech-worsen-public-wants-regulation.aspx.

Gerber, David. *Law and Competition in Twentieth-Century Europe: Protecting Prometheus*. New York: Oxford University Press, 1998.

Geromel, Ricardo. “Facebook Surpasses Orkut, Owned by Google, in Number of Users in Brazil”. *Forbes*, 14 September 2011. https://www.forbes.com/sites/ricardogeromel/2011/09/14/facebook-surpasses-orkut-owned-by-google-in-numbers-of-users-in-brazil/?sh=176152655e5e.

Glick, Mark. “Antitrust and Economic History: The Historic Failure of the Chicago School of Antitrust”. *The Antitrust Bulletin*, 64, no. 3 (2019).

Gother, Patrick, Mei Ngan, and Kayee Hanaoka. “Face Recognition Vendor Test (FRVT) Part 3: Demographic Effects”. National Institute of Standards and Technology, December 2019. https://doi.org/10.6028/NIST.IR.8280.

Gottlieb, Allie. “Persuading for Privacy”. *The Regulatory Review,* 19 March 2020. https://www.theregreview.org/2020/03/19/gottlieb-persuading-privacy/.

Granitz, Elizabeth, and Benjamin Klein. “Monopolization by “Raising Rivals' Costs": The Standard Oil Case”. *Journal of Law and Economics*, 39, no. 1 (1996): 1 – 47.

Grewal, Paul. “Suspending Cambridge Analytica and SCL Group From Facebook”. Facebook, 16 March 2018. https://about.fb.com/news/2018/03/suspending-cambridge-analytica/.

Griffith, Erin. “Will Facebook Kill All Future Facebooks?”. *Wired*, 25 October 2017. https://www.wired.com/story/facebooks-aggressive-moves-on-startups-threaten-innovation/.

Hagerty, Bill. “Sen. Bill Hagerty: Facebook vs. Trump -- Big Tech's censorship regime out of control. Here's how we fix it”. *Fox News*, 5 May 2021. https://www.foxnews.com/opinion/facebook-trump-big-tech-censorship-fix-sen-bill-hagerty

Hamilton, Isobel Asher. “A feature Facebook stole directly from Snapchat now has twice as many users as Snapchat”. *Business Insider*, 25 April 2019. https://www.businessinsider.com/facebook-stories-now-has-more-than-twice-as-many-users-as-snapchat-2019-4.

Hern, Alex, and Dan Sabbgagh. "Zuckerberg's refusal to testify before UK MPs 'absolutely astonishing'". *Guardian* (UK), 27 May 2019. https://www.theguardian.com/technology/2018/mar/27/facebook-mark-zuckerberg-declines-to-appear-before-uk-fake-news-inquiry-mps.

Herszenhorn, David M., and Maia de la Baume. "Trump slammed her as a U.S.-hating 'tax lady.' She just got a promotion.". *Politico,* 27 November 2019. https://www.politico.com/news/2019/11/27/margarethe-vestager-eu-tax-promotion-074181.

Hornung, Gerrit, and Christoph Schnabel. "Data protection in Germany I: The population census decision and the right to informational self-determination". *Computer Law and Security Report*, 25, no. 1, (2009), 84 – 88.

Hovenkamp, Herbert. "On the Meaning of Antitrust's Consumer Welfare Principle". *Revue Concurrentaliste,* 17 January 2020. https://leconcurrentialiste.com/herbert-hovenkamp-meaning-consumer-welfare/.

International Data Corporation. "Smartphone Shipments Return to Positive Growth in the Fourth Quarter Driven by Record Performance by Apple, According to IDC". 27 January 2021. https://www.idc.com/getdoc.jsp?containerId=prUS47410621.

James, Letitia. "Attorney General James Gives Update On Facebook Antitrust Investigation", 22 October 2019. https://ag.ny.gov/press-release/2019/attorney-general-james-gives-update-facebook-antitrust-investigation.

Jordan, Jim, Doug Collins, Ken Buck, Matt Gaetz, and Gregory Steube. "Reigning in Big Tech's Censorship of Conservatives". 6 October 2020. https://steube.house.gov/sites/steube.house.gov/files/GOP%20Big%20Tech%20Report.pdf.

Kaffert, Florian. "Should EU competition law move towards a Neo-Brandeis approach?". *European Competition Journal*, 16, no. 1 (2020): 55 – 96.

Kang, Cecilia, and Sheera Frenkel. "Facebook says Cambridge Analytica Harvested Data of Up to 87 Million Users". *New York Times*, 4 April 2018. https://www.nytimes.com/2018/04/04/technology/mark-zuckerberg-testify-congress.html.

Kantor, Jodi, and David Streitfeld. "Inside Amazon: Wrestling Big Ideas in a Bruising Workplace". *New York Times*, 16 August 2015. https://www.nytimes.com/2015/08/16/technology/inside-amazon-wrestling-big-ideas-in-a-bruising-workplace.html.

Karlsten, Emmanuel. "Facebook börjar bli som ett egen land". *Göteborgs-Posten*, 27 January 2018. https://www.gp.se/kultur/kultur/facebook-b%C3%B6rjar-bli-som-ett-eget-land-1.5095556.

Khan, Lina. "Amazon's Antitrust Paradox". *Yale Law Journal, 116*, no. 3 (2017).

Klosek, Jacqueline. *Data Privacy in the Information Age*. Westport: Quorum Books, 2000.

Krouse, Sarah. "The FCC Has Fined Robocallers $208 Million. It's Collected $6,790.". *Wall Street Journal,* 28 March 2019. https://www.wsj.com/articles/the-fcc-has-fined-robocallers-208-million-its-collected-6-790-11553770803.

Lapowsky, Issie. "How Cambridge Analytica Sparked the Great Privacy Awakening". *Wired*, 19 March 2019. https://www.wired.com/story/cambridge-analytica-facebook-privacy-awakening/.

Lee, Micah. "Inside Gab, the Online Safe Space for Far-Right Extremists". *The Intercept*, 15 March 2021. https://theintercept.com/2021/03/15/gab-hack-donald-trump-parler-extremists/.

Litman-Navarro, Kevin. "We Read 150 Privacy Policies. They Were an Incomprehensible Disaster". *New York Times*, 12 June 2019. https://www.nytimes.com/interactive/2019/06/12/opinion/facebook-google-privacy-policies.html.

Liu, Ling Woo. "Friendster Moves to Asia". *Time*, 29 January 2008. http://content.time.com/time/business/article/0,8599,1707760,00.html.

Lomas, Natasha. "Europe is drawing fresh battle lines around the ethics of big data". *Tech Crunch,* 3 October 2018. https://techcrunch.com/2018/10/03/europe-is-drawing-fresh-battle-lines-around-the-ethics-of-big-data/.

Manyika, James, Michael Chui, Brad Brown, Jacques Bughin, Richard Dobbs, Charles Roxburgh, and Angela Hung Byers, "Big data: The next frontier for innovation, competition, and productivity", McKinsey Global Institute, June 2011, https://www.mckinsey.com/~/media/McKinsey/Business%20Functions/McKinsey%20Digital/Our%20Insights/Big%20data%20The%20next%20frontier%20for%20innovation/MGI_big_data_full_report.pdf.

MarketingCharts. "Bebo Becomes Most-Visited Social Networking Site in UK". 16 August 2007. https://www.marketingcharts.com/demographics-and-audiences/youth-and-gen-x-1300.

Marketplace Pulse. "Amazon's Lost Web Traffic Market Share". 10 July 2020, https://www.marketplacepulse.com/articles/amazon-lost-web-traffic-market-share.

Markkan, Sam. "PRIVACY, PARLIAMENT & the JUDICIARY (the privacy ping pong)". ActNow. https://www.actnow.org.uk/media/articles/Privacy_Parliament_and_the_Judiciary.pdf.

Monnet, Jean. "Jean Monnet's thoughts on the future". Speech, Algiers, 5 August 1943. Fondation Jean Monnet pour l'Europe. https://www.cvce.eu/content/publication/1997/10/13/b61a8924-57bf-4890-9e4b-73bf4d882549/publishable_en.pdf.

Montague, Gilbert Holland. "The Defects of the Sherman Antitrust Act". *Yale Law Journal*, 19, no. 2 (1909): 88 – 109.

MoveOn. "Facebook must respect privacy". *Tech Liberation*, 7 December 2007. https://techliberation.com/wp-content/uploads/2007/12/071120email.html.

Mueller, Willard. "Antitrust in the Reagan Administration". *Revue Française d'Études Américaines*, no. 21-22 (1984), 427 – 434.

New York Times. "Here's which tech C.E.O. was asked the most questions by lawmakers", 29 July 2020. https://www.nytimes.com/live/2020/07/29/technology/tech-ceos-hearing-testimony/heres-which-tech-ceo-was-asked-the-most-questions-by-lawmakers.

Najibi, Alex. "Racial Discrimination in Face Recognition Technology Today". Harvard University, 24 October 2020. https://sitn.hms.harvard.edu/flash/2020/racial-discrimination-in-face-recognition-technology/.

Newton, Casey, and Nilay Patel. "'Instagram can hurt us': Mark Zuckerberg emails outline plan to neutralize competitors". *The Verge*, 29 July 2020. https://www.theverge.com/2020/7/29/21345723/facebook-instagram-documents-emails-mark-zuckerberg-kevin-systrom-hearing.

Nimmer, Melville. "The Right of Publicity". *Law and Contemporary Problems*, 19 (1954).

Office of Fair Trading. "Anticipated acquisition by Facebook Inc of Instagram Inc". 22 August 2012. https://assets.publishing.service.gov.uk/media/555de2e5ed915d7ae200003b/facebook.pdf.

Organisation for Economic Development and Cooperation. "OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data". https://www.oecd.org/internet/ieconomy/oecdguidelinesontheprotectionofprivacyandtransborderflowsofpersonaldata.htm

Overly, Steven. "'It will be fascinating': Silicon Valley faces an antitrust reckoning". *Politico*, 26 July 2019. https://www.politico.com/story/2019/07/26/silicon-valley-anti-trust-1619256.

Padilla, Alex. *Statement of Vote, General Election November 3, 2020*. https://elections.cdn.sos.ca.gov/sov/2020-general/sov/complete-sov.pdf.

Perez, Juan Carlos. "Beacon's user tracking extends beyond Facebook, CA says". *Computer World,* 3 December 2007. https://www.computerworld.com/article/2537951/beacon-s-user-tracking-extends-beyond-facebook--ca-says.html.

Perez, Juan Carlos. "Facebook Will Shut Down Beacon to Settle Lawsuit". *New York Times,* 19 September 2009. https://archive.nytimes.com/www.nytimes.com/external/idg/2009/09/19/19idg-facebook-will-shut-down-beacon-to-settle-lawsuit-53916.html.

Pew Research Center. “Americans and Privacy: Concerned, Confused, and Feeling Lack of Control Over Their Personal Information”. 15 November 2019. https://www.pewresearch.org/internet/2019/11/15/americans-attitudes-and-experiences-with-privacy-policies-and-laws/.

Ponikelska, Lenka, and Aoife White. “Germany's Facebook Order Will Be Studied by EU, Vestager Says”. *Bloomberg*, 8 February 2019. https://www.bloomberg.com/news/articles/2019-02-08/germany-s-facebook-order-will-be-studied-by-eu-vestager-says.

PricewaterhouseCoopers. “Independent Assessor’s Report on Facebook’s Privacy Program”. Electronic Privacy Information Center, 12 April 2017. https://epic.org/foia/ftc/facebook/EPIC-18-03-20-FTC-FOIA-20180418-FB-Assessment-2017.pdf.

Primm, CJ. “Labor Unions and the Anti-Trust Law: A Review of Decisions”. *Journal of Political Economy,* 18, no. 2 (1910): 129 – 138.

Public Broadcasting Service. “The Cleveland Massacre”. https://www.pbs.org/wgbh/americanexperience/features/rockefellers-south/.

Ramzeen A V. “72 Facebook Acquisitions – The Complete List!”. TechWyse, 17 June 2019. https://www.techwyse.com/blog/infographics/facebook-acquisitions-the-complete-list-infographic/.

Rhodes, Margaret. “Is It Possible to Design an Ethical Cookie Consent Bar?”. *XD Ideas*, 4 September 2020. https://xd.adobe.com/ideas/perspectives/social-impact/is-it-possible-to-design-an-ethical-cookie-consent-bar/.

Rich, Jessica. Jessica Rich to Erin Egan and Anne Hoge, 10 April 2014. https://www.ftc.gov/system/files/documents/public_statements/297701/140410facebookwhatappltr.pdf.

Romano, Benjamin. “Amazon’s turnover rate amid pandemic is at least double the average for retail and warehousing industries”. *Seattle Times,* 10 October 2020. https://www.seattletimes.com/business/amazon/amazons-turnover-rate-amid-pandemic-is-at-least-double-the-average-for-retail-and-warehousing-industries/.

Rosenberg, Matthew, Nicholas Confessore, and Carole Cadwalladr. “How Trump Consultants Exploited the Facebook Data of Millions”. *New York Times*, 17 March 2018. https://www.nytimes.com/2018/03/17/us/politics/cambridge-analytica-trump-campaign.html.

Rusli, Evelyn M., and Douglas MacMillan. “Snapchat Spurned $3 Billion Acquisition Offer from Facebook”. *Wall Street Journal*, 13 November 2013. https://www.wsj.com/articles/BL-DGB-30794.

Sawyer, Laura Philips. “US Antitrust Law in Historical Perspective”. *Oxford Research Encyclopedia of American History,* 2019.

Schechner, Sam, Emily Glazer, and Valentina Pop. "EU Deepens Antitrust Inquiry Into Facebook's Data Practices". *Wall Street Journal*, 6 February 2020. https://www.wsj.com/articles/eu-deepens-antitrust-inquiry-into-facebooks-data-practices-11580994001.

Scott, Bruce. "Capitalism: Its Origins and Evolution as a System of Governance". New York: Springer, 2011.

Seetharaman, Deepa. "Facebook Removes Data-Security App From Apple Store", *Wall Street Journal*, 22 August 2018, https://www.wsj.com/articles/facebook-to-remove-data-security-app-from-apple-store-1534975340.

Shapiro, Gary. "CEA: Government Must Not Stifle Innovation While Protecting Privacy". *Business Wire*, 27 February 2015. https://www.businesswire.com/news/home/20150227006119/en/CEA-Government-Must-Not-Stifle-Innovation-While-Protecting-Privacy.

Shaw, Thomas. "Privacy Law and History: WWII – Forward". International Association of Privacy Professionals, 1 March 2013. https://iapp.org/news/a/2013-03-01-privacy-law-and-history-wwii-forward/.

Snow, Jacob, and Chris Conley. "Californians Should Vote No on Prop 24". American Civil Liberties Union of Southern California, 16 October 2020. https://www.aclusocal.org/en/news/californians-should-vote-no-prop-24.

Srinivasan, Dina. "The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy". *Berkeley Business Law Journal*, 15, no. 1 (2019): 39 – 101.

StatCounter, "Social Media Stats Worldwide". April 2021. https://gs.statcounter.com/social-media-stats.

Statista. "Worldwide desktop market share of leading search engines from January 2010 to February 2021". March 2021. https://www.statista.com/statistics/216573/worldwide-market-share-of-search-engines/.

Stimson, Rebecca. Rebecca Stimson to Damian Collins, 14 May 2018. https://www.parliament.uk/globalassets/documents/commons-committees/culture-media-and-sport/180514-Rebecca-Stimson-Facebook-to-Ctte-Chair-re-oral-ev-follow-up.pdf.

Stucke, Maurice, and Ariel Ezrachi. "The Rise, Fall, and Rebirth of the U.S. Antitrust Movement". *Harvard Business Review,* 15 December 2017. https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement.

Stucke, Maurice. "Does the Rule of Reasons Violate the Rule of Law?". *UC Davis Law Review*, 42, no. 5 (June 2009).

Subber, Kadhim. "A simple guide to GCHQ's Internet surveillance programme Tempora". *Wired*, 24 June 2013. https://www.wired.co.uk/article/gchq-tempora-101.

Sundby, Alex. “Facebook's fight against the phrase ‘data breach’”. CBS News, 19 March 2018. https://www.cbsnews.com/news/facebook-cambridge-analytica-was-it-a-data-breach/.

The Economist. “The Future is Another Country”. July 22 2010.

The Heritage Foundation. “Heritage President Kay C. James Signs Pledge Rejecting Big Tech Money”. 4 May 2021. https://www.heritage.org/press/heritage-president-kay-c-james-signs-pledge-rejecting-big-tech-money

Thefacebook. “Privacy Policy”. 13 June 2004. https://web.archive.org/web/20040613184140/http://www.thefacebook.com/policy.php.

Theodore Roosevelt Center. “The Northern Securities Case”. https://www.theodorerooseveltcenter.org/Learn-About-TR/TR-Encyclopedia/Capitalism-and-Labor/The-Northern-Securities-Case.

Thompson, Nicholas, and Fred Vogelstein. “A Hurricane Flattens Facebook”. *Wired,* 20 March 2018. https://www.wired.com/story/facebook-cambridge-analytica-response/.

Tien, Lee, Adam Schwartz, and Hayley Tsukayama. “Why EFF Doesn’t Support California Proposition 24”. Electronic Frontier Foundation, 29 July 2020. https://www.eff.org/sv/deeplinks/2020/07/why-eff-doesnt-support-cal-prop-24.

Tiku, Nitasha. “ Facebook’s 2017 Privacy Audit Didn’t Catch Cambridge Analytica”. *Wired*, 19 April 2018. https://www.wired.com/story/facebooks-2017-privacy-audit-didnt-catch-cambridge-analytica/.

Tunney, Catharine. “Facebook's Zuckerberg, Sandberg won't appear before committee, could be found in contempt of Parliament”. *Canadian Broadcasting Corporation,* 27 May 2019. https://www.cbc.ca/news/politics/facebook-contempt-parliament-1.5145347.

Wagner, Kurt. “The ‘Stories’ Product that Facebook Copied from Snapchat is now Facebook’s Future”. *Vox,* 30 October 2018. https://www.vox.com/2018/10/30/18044962/facebook-stories-business-user-growth-q3-earnings-zuckerberg.

Wagner, Kurt. “This is how Facebook collects data on you even if you don’t have an account”. *Vox,* 20 April 2018. https://www.vox.com/2018/4/20/17254312/facebook-shadow-profiles-data-collection-non-users-mark-zuckerberg.

Watson, Chloe. “The key moments from Mark Zuckerberg’s testimony to Congress”. *Guardian* (US), 11 April 2018. https://www.theguardian.com/technology/2018/apr/11/mark-zuckerbergs-testimony-to-congress-the-key-moments.

Wells, Georgia, and Deepa Seetharaman. “Snap Detailed Facebook’s Aggressive Tactics in ‘Project Voldemort’ Dossier”. *Wall Street Journal,* 24 September 2019. https://www.wsj.com/articles/snap-detailed-facebooks-aggressive-tactics-in-project-voldemort-dossier-11569236404.

WhatsApp LLC. “Why we don’t sell ads”. 18 June 2012. https://blog.whatsapp.com/why-we-don-t-sell-ads.

Whitman, James. “The Two Western Cultures of Privacy: Dignity Versus Liberty”. *Yale Law Journal*, 113, no. 6 (2004): 1151 – 1221.

Wong, Julia Carrie. “Mark Zuckerberg apologises for Facebook's 'mistakes' over Cambridge Analytica”. *Guardian* (US), 22 March 2018. https://www.theguardian.com/technology/2018/mar/21/mark-zuckerberg-response-facebook-cambridge-analytica.

Wong, Julia Carrie. “Where's Zuck? Facebook CEO silent as data harvesting scandal unfolds”. *Guardian* (US), 19 March 2018. https://www.theguardian.com/news/2018/mar/19/where-is-mark-zuckerberg-facebook-ceo-cambridge-analytica-scandal.