

HANNES SNELLMAN



Data edistämään liiketoimintaa | Teknologiateollisuus 3.3.2020

Kilpailuoikeus ja data – mitä tulee ottaa huomioon?

Maria Wasastjerna, OTT, Partner Hannes Snellman



Competition, data and privacy in the digital economy

Testing conventional boundaries and expanding horizons - towards
a privacy dimension in competition policy?



HANNES SNELLMAN

The Next Battle in Antitrust Will Be About Whether One Company Knows Everything About You

by Bala Iyer, Mohan Subramaniam, and U. Srinivasa Rangan

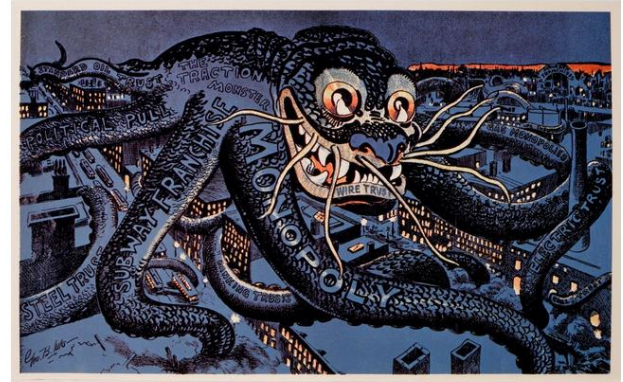
JULY 06, 2017



Is It Time to Break Up Google?

By Jonathan Taplin

April 22, 2017

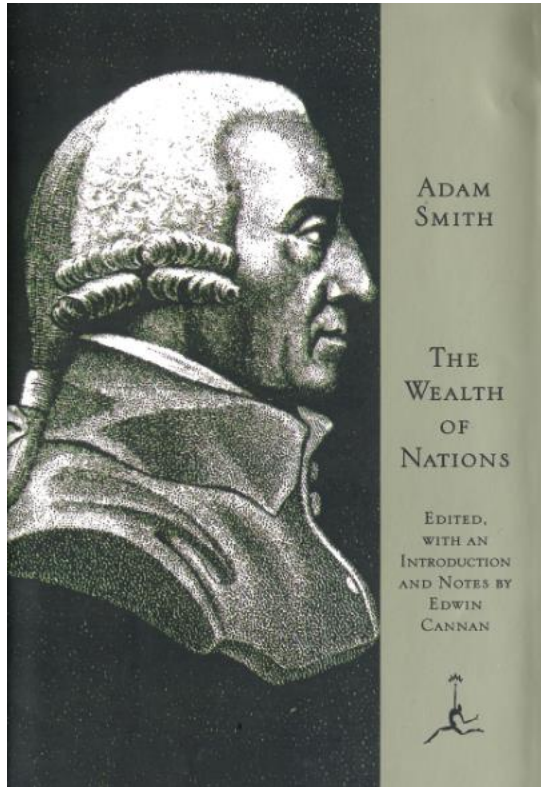


An antimonopoly cartoon from 1899, "The Menace of the Hour."
Universal History Archive/UTG, via Getty Images

Transition from price-driven to data-driven markets

HANNES SNELLMAN

Digital hand replacing the invisible hand?



HANNES SNELLMAN

Data protection concerns and the privacy paradox

We Want Privacy, but Can't Stop Sharing

By KATE MURPHY OCT. 4, 2014



IMAGINE a world suddenly devoid of doors. None in your home, on dressing rooms, on the entrance to the local pub or even on restroom stalls at concert halls. The controlling authorities say if you aren't doing anything wrong, then you shouldn't mind.

Well, that's essentially the state of affairs on the Internet. There is no privacy. If those creepy targeted ads on Google hadn't tipped you off, then surely [Edward J. Snowden's revelations](#), or, more recently, [Jennifer Lawrence's nude selfies](#), made your vulnerability to cybersnooping abundantly clear.



“I don't think there's been any meaningful impact that we've observed.”

Mark Zuckerberg commenting on the Cambridge Analytica scandal at a Congressional hearing

The right to decide what happens with our personal information is one of our most fundamental rights as individuals. And we can't just leave it to the market to protect those rights.

EU Competition Commissioner Margrethe Vestager, 'What competition can do – and what it can't' (25 October 2017)

Historically separate issues

- > Traditionally competition authorities did not consider privacy: “any privacy related concerns do not fall within the scope of EU competition rules but within the scope of the EU data protection rules”
 - Asnef-Equifax (2006)
 - TomTom/Tele Atlas (2007)
 - Google/Doubleclick (2008)
 - Microsoft/Yahoo! Search (2010)
 - Telefonica/Vodafone/Everything Everywhere (2012)
 - Publicis/Omnicom (2014)
 - Facebook/WhatsApp (2014)
 - Microsoft/LinkedIn (2016)
 - Apple/Shazam (2018)
 - Google/Fitbit (2020)



Bundeskartellamt **vs.** facebook®

Blurring the lines



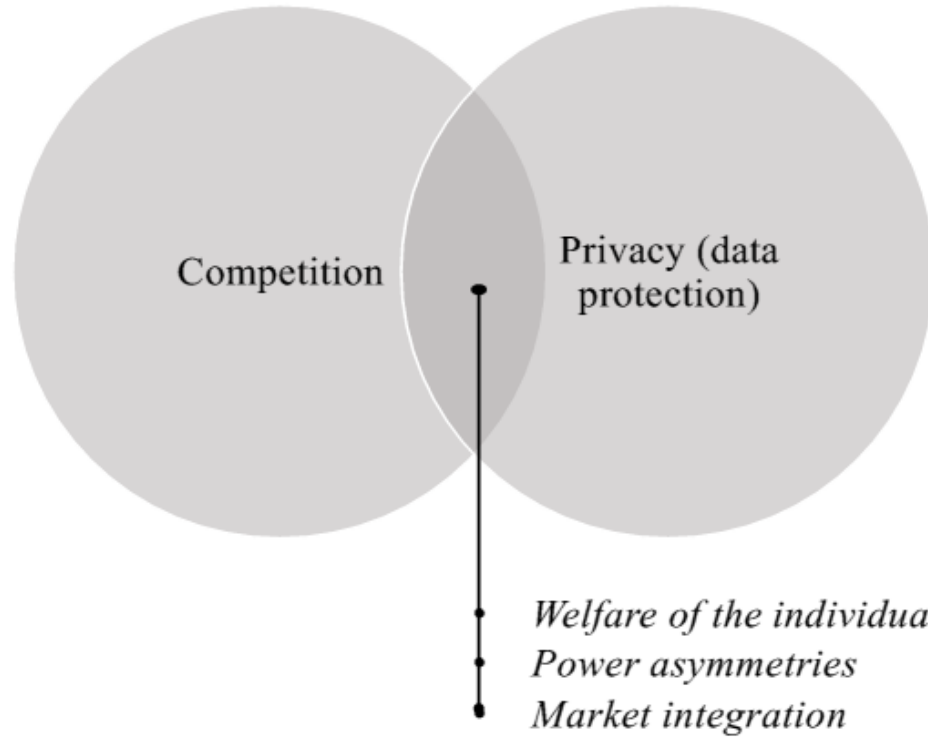
- > EU data protection as standard for examining exploitative abuse
- > Decision controversially seems like imposing post-clearance remedies in *Facebook/WhatsApp*
- > Implications beyond national borders
- > Transatlantic/international divergence or convergence – what next?

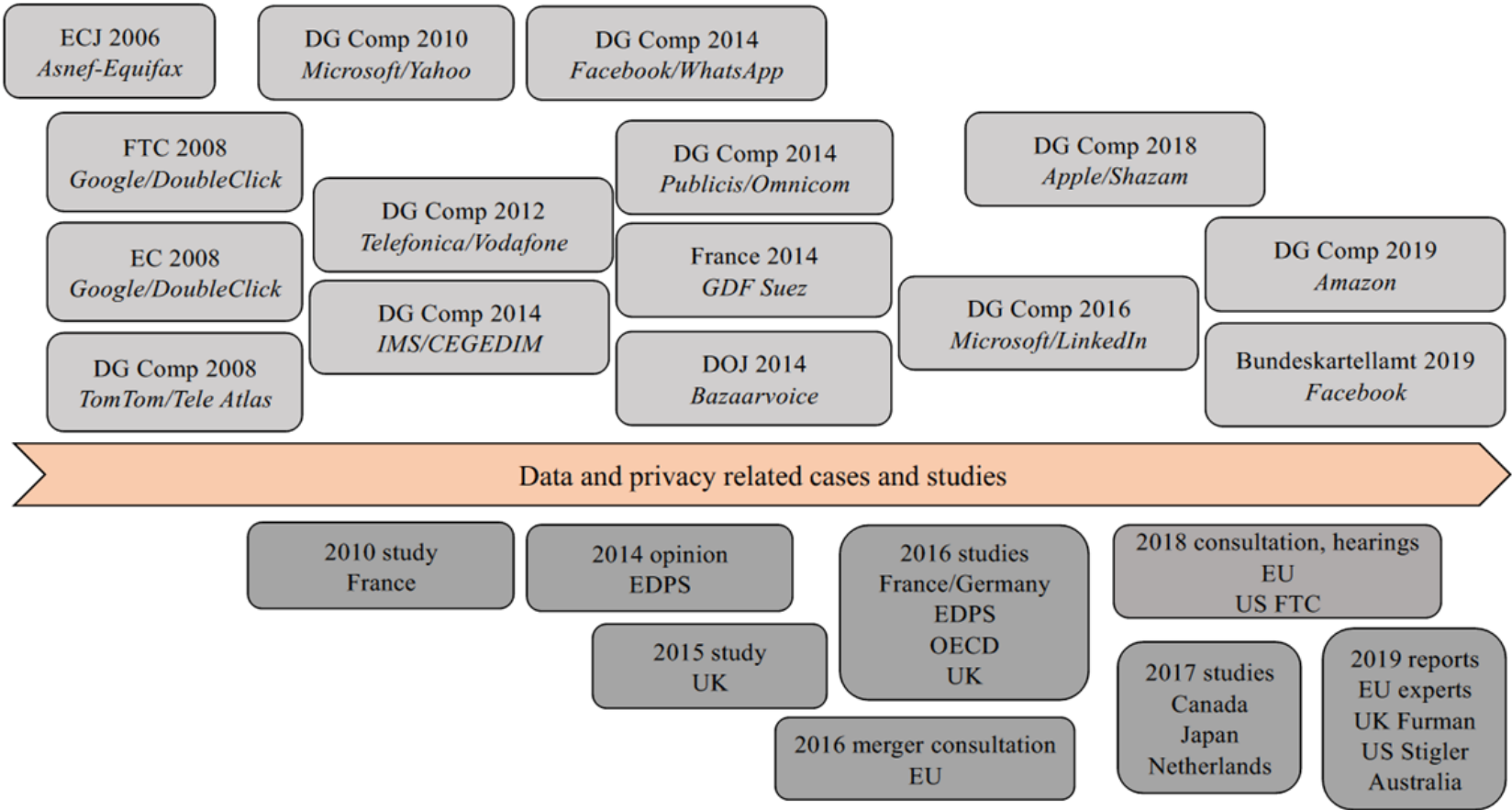


Increasing interplay
and testing of
conventional boundaries

Testing of conventional boundaries

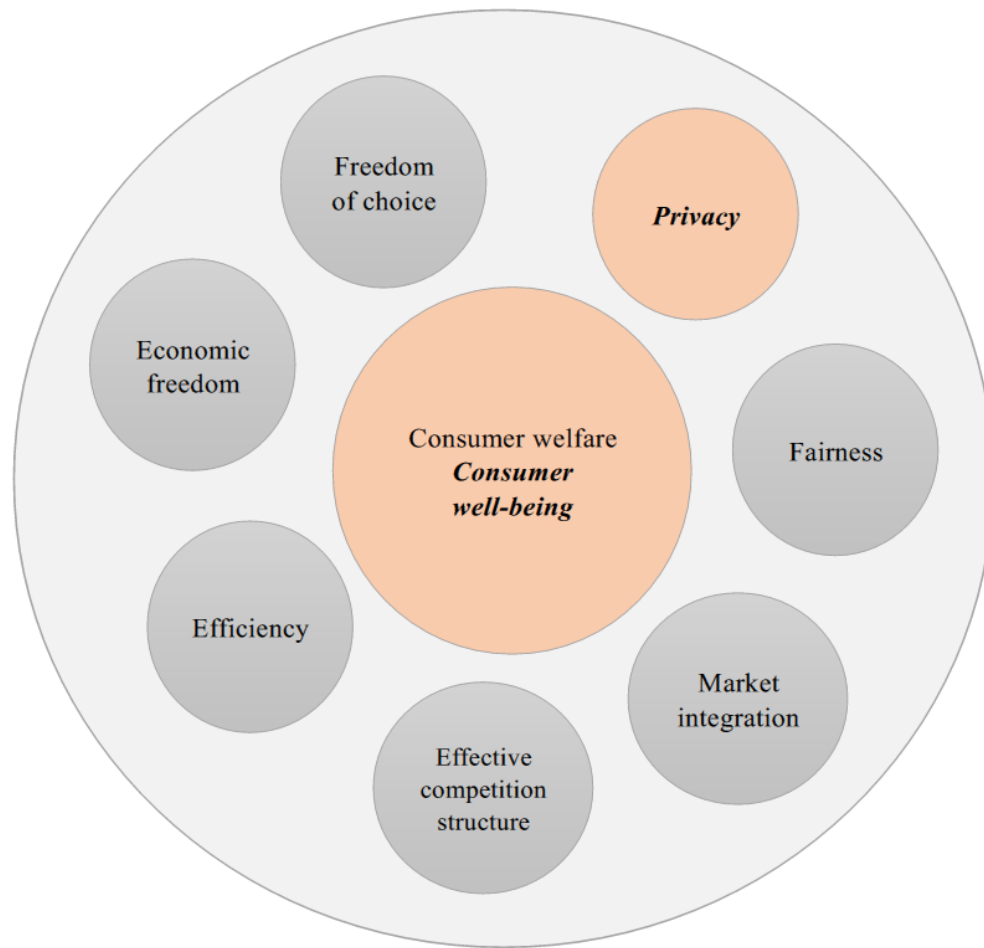
- > Historical hard line softening – focus on commonalities, shared concerns
- > Privacy as a parameter of competition or quality component
- > Goals of competition law? Distinct transatlantic approaches
- > Different EU/US policy objectives
 - Multidimensional v single goal
 - Freedom of choice v price
 - Ordoliberalism v Chicago
- > Different EU/US approach to data/privacy protection
 - Dignity (fundamental right) v liberty
 - GDPR v sectoral approach





Time to look beyond price in competition analysis?

- > Existing competition policy too price-centered?
- > Competition law is about consumer choice, and price is only one type of choice
 - Ultimate purpose of competition law? To protect and help ensure that the free market will offer consumers what they want from competition, starting with competitive prices, but also variety, innovation, quality, and other forms of non-price competition
 - Privacy protection is one form of non-price competition
- > New Brandeis school and hipster antitrust
- > Holistic conjoined approach, e.g. Digital Clearing House



Consumer welfare includes choice and privacy

“Competition gives consumers the power to demand a fair deal. It means companies know that if they don't offer a good price, and a proper service – well, then their customers will simply go somewhere else.”

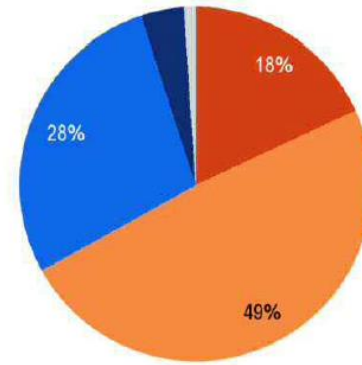


The role of trust for functioning markets

Most people don't think about politics all the time. But they do have to buy things in the market every day. And if they get treated unfairly in the market, it affects how they relate to the whole world around them. If consumers don't have the chance to make their own choices, to walk away from businesses that don't serve them well, that undermines the trust that makes our society work.

Margrethe Vestager, 'Competition in changing times' (February 2018)

QB5. How concerned are you about not having complete control over the information you provide online? Would you say you are...?



- Very concerned
- Fairly concerned
- Not very concerned
- Not at all concerned
- Don't know





History repeating itself?



1899

“The Menace of the Hour”



2018

“Tech Octopus”

Political, moral and value-based dimensions

The fight over antitrust's soul: The reality is that 'competition law' has never been, nor will it ever be, pure from normative political, social and economic values. Ultimately, it comes down to the values we want to promote and our belief in how competition works.

Ariel Ezrachi and Maurice Stucke, Journal of European Competition Law & Practice (2017)

Translating theory into practice?

“We believe that even where consumer harm cannot be precisely measured, strategies employed by dominant platforms aimed at reducing the competitive pressure they face should be forbidden in the absence of clearly documented consumer welfare gains”

Competition policy for the digital era 2019 (EU Commission expert report)

Future competition policy focus areas: “the twin transitions”

“Europe today needs to find the right way forward. We’re in the middle of not one, but two great transitions – to an economy that’s both *digital* and *green*. And that’s changing the world we know in fundamental ways.”

EU Competition Commissioner Margrethe Vestager, ‘Keeping the EU competitive in a green and digital world’ (2 March 2020)

Future competition policy focus areas

“Many of the biggest tech companies in the world – Google, Facebook, or Alibaba - didn’t even exist, 25 years ago. Now they have hundreds of millions, even billions of users. In a digital world, where size is often the key to success, growing companies can quickly reach the point where the market simply tips in their favour – and competition is lost forever.

Europe’s businesses need to be able to pool data, so they can compete to develop advanced artificial intelligence. And that sort of cooperation is good news for Europe – just as long as it doesn’t become a cover for cartels.”

EU Competition Commissioner Margrethe Vestager, ‘Keeping the EU competitive in a green and digital world’ (2 March 2020)

Thank you!

Maria Wasastjerna

Partner, OTT

Tel. +358 9 2288 4209

maria.wasastjerna@hannessnellman.com



Helsinki

Hannes Snellman Attorneys Ltd
Eteläesplanadi 20 | P.O. Box 333
00130 | 00131 Helsinki, Finland
Tel: +358 9 228 841
Fax: +358 9 177 393

riikka.rannikko@hannessnellman.com

Stockholm

Hannes Snellman Attorneys Ltd
Kungsträdgårdsgatan 20 | P.O. Box 7801
111 47 | 103 96 Stockholm, Sweden
Tel: +46 760 000 000
Fax: +46 8 679 85 11

fredrik.olsson@hannessnellman.com

www.hannessnellman.com