

**From:** Kingsland, Gail M.H.  
**Sent:** Tuesday, May 29, 2018 2:29 PM  
**To:** Phillips, Noah  
**Subject:** RE: Daily Clips 05.29.18

Hello,

My apology Commissioner Phillips, here is the article and I will fix the link on the Clips intranet page.

Have a good afternoon,

Gail

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### **FTC official: user expectations are not antitrust issue**

By Pallavi Guniganti

A senior official at the US Federal Trade Commission has said that concern about an online platform user's reasonable data expectations is a consumer protection issue that should not be tackled through competition enforcement. *Pallavi Guniganti at GCR Live*

Thomas Dahdouh, director of the FTC's western regional office in San Francisco, argued last Thursday that many of these concerns about data "are really consumer protection concerns". He spoke in his personal capacity at GCR Live IP & Antitrust in California.

He acknowledged that it is legitimate to be concerned about consumers' expectations and companies' disclosures or changes in policies without obtaining a user's opt-in. But he said: "Those are all consumer protection, bedrock theories based on this notion of what do consumers expect is going to happen to their data. I'm not sure it works in competition."

Forcing big data into antitrust analysis – which has achieved a "remarkable consensus" in most respects – is like "trying to drive a round peg into a square hole", Dahdouh said. This risks errors such as unjustified requirements for divestitures and conduct remedies, he added.

"Fundamentally I have a concern with this idea that [consumer data] is an appropriate place for competition analysis, apart from unique data situations," he said.

This raises problems such as a competition analysis that deems consumers' financial data to be an essential facility, which would require data to be handed out to other companies to which the consumer never consented. "That's stunningly concerning to me," he said.

Dahdouh noted that FTC bureau of competition director Bruce Hoffman has said that it is too early to say how valuable or predictive big data is.

"I don't think there's a strict relationship between having more data and being closer to the truth" about consumers, he added.

Dahdouh, who has been at the FTC for nearly three decades and was a staff attorney on monopoly investigations into Intel and Google, drew on those experiences to support his view that enforcers should be cautious about condemning conduct as anticompetitive.

While in some sectors – particularly those with regulatory pipelines such as pharmaceuticals – it is clear which company will have the next new product, one of the lessons of high tech is that "it's often surprising who the innovator is, the one who leapfrogs" competitors, he said.

Dahdouh said he disagrees with claims that US consumers do not care about violations of privacy policies. To the extent consumers care, the FTC will enforce against violations under its deceptive or unfair practices consumer protection authority, he said.

“I won’t say that the FTC’s notions of [consumers’ expectations] exactly jive with what the Europeans are coming out with,” he said.

Dahdouh did not directly address the case brought by Germany’s Federal Cartel Office against Facebook, which alleges that the company is abusing its dominant position in the social network market by requiring users to allow it to collect their data from third-party websites and merge it with data from Facebook accounts.

The German competition authority said last December that users are often unaware that Facebook is collecting their data from other sites, and have not given effective consent to that behaviour.

Dahdouh was joined on the panel by University of California at Berkeley law professor Justin McCrary, Google chief economist Hal Varian and White & Case partner Noah Brumfield. Hogan Lovells partner Logan Breed moderated the discussion.

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