

# ANTITRUST

## ANTITRUST ENFORCEMENT POLICY FOR BIG DATA? STAY TUNED.



What, exactly, is Big Data? Rather than referring to a particular industry or amount of information, it's about how firms that interact with consumers and other businesses use technology to aggregate data and extract value from it to create or enhance products and services.

The importance of Big Data to both businesses and consumers is surging. It has attracted particular attention in the antitrust world, where enforcement authorities are wrestling with growing concerns about how collecting and controlling Big Data may affect competition. As they review mergers and acquisitions—and assess the conduct of high-tech firms with troves of data—regulators are increasingly focusing on whether Big Data could be a barrier to entry, inhibit innovation, or enable large firms to stymie competition.

European competition authorities have taken an aggressive approach to antitrust issues that revolve around data, opening several investigations and industry inquiries. But their U.S. counterparts, the Department of Justice and the Federal Trade Commission, are acting more cautiously. All around the globe, antitrust authorities are confronting two fundamental issues:

1. Are existing laws sufficient to address concerns with Big Data, or do regulators need new tools (i.e., laws, regulations, economic models, and technical expertise)?
2. How should they pursue Big Data enforcement when their policies aren't yet clearly defined?

As in previous periods of rapid, disruptive innovation, a debate has broken out about the adequacy of antitrust principles to tackle new competition issues. Some say enforcement authorities are playing catch-up instead of setting the pace.

This year could be the year in which this changes. Or not. “The U.S. antitrust agencies haven't brought a case alleging

that a firm's mere acquisition or use of data constitutes an antitrust violation,” says [Alexis Gilman](#), a partner in Crowell & Moring's [Antitrust Group](#), who formerly served as assistant director of the Mergers IV Division in the FTC's Bureau of Competition. “That said, we know that Big Data issues are very much on the minds of officials at the DOJ, the FTC, and other antitrust authorities—their public comments make that clear. But we don't know when this attention to Big Data issues might turn into enforcement action.”

### IT'S ALL ABOUT DATA COLLECTION, USAGE, AND CONTROL

While the head of the DOJ's Antitrust Division has expressed confidence that existing antitrust laws can address any competition issues raised by Big Data, the FTC is taking a more open-minded stance and working methodically to fashion its own view (see sidebar). The centerpiece of this assessment is a series of public hearings collectively titled “Hearings on Competition and Consumer Protection in the 21st Century.”

There have been nine hearings since last September, with more scheduled for 2019. More than half of them have addressed data, technology, and related issues in the context of competition or consumer privacy.

One of the hearings featured a presentation by a deputy director in the FTC's Bureau of Competition that summed up some key questions about data in competition analysis:

- Is the data unique? What other sources are available at similar cost? Is it difficult or costly to replicate, or are there other barriers to replication?
- Data is often combined with analytics to make information useful in a business setting. How does this affect competition?
- Do incumbents have a data advantage?
- Current antitrust analysis accounts for how companies



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compete using data as a product or input, or as a tool for making decisions. This may present additional complexity if data is proprietary or subject to intellectual property protection.

- Data sets can be highly differentiated; non-price factors of competition such as quality and innovation are important.

Ultimately, notes [Andrew Gavil](#), a senior counsel in Crowell & Moring’s [Antitrust Group](#) and former director of the Office of Policy Planning at the FTC, data enforcement boils down to three things. “Antitrust thinking should concentrate on how data is collected, used, and controlled,” he says.

“Some critics,” Gavil adds, “are challenging the historical approach to enforcement, which focuses on competition in narrowly defined markets for products and services, arguing that it may be missing the mark in some of today’s evolving markets. We’ll be watching to see if—and, if so, how—antitrust enforcers respond to these challenges.”

## A FOGGY FORECAST

The vigorous discourse on the ability of antitrust agencies to address Big Data competition issues is likely to intensify. Combined with factors such as potentially different approaches by the DOJ and the FTC and by European and U.S. antitrust authorities, continuous technological and business-model innovation, and political considerations, this suggests that tackling Big Data competition issues could take unanticipated

twists and turns in 2019. Against this backdrop, Gilman and Gavil see a number of potential developments:

- The FTC might use its hearings to help it generate new policy papers, guidance documents, and enforcement priorities that indicate how its thinking is changing.
- Even if the DOJ and the FTC take little or no action to step up enforcement directed at Big Data, state attorneys general—who have the authority to enforce state and (in some cases) federal antitrust laws—may undertake their own investigations and enforcement actions. They’ve already begun to do so.
- With Democrats taking control of the House of Representatives, the new chair of the House Judiciary subcommittee covering antitrust has signaled plans to conduct further hearings targeting large technology companies, which will keep the pressure on the antitrust agencies to address any perceived enforcement gaps. But with control of Congress divided, prospects for the passage of new legislation are murky.
- European regulators will likely press ahead in their efforts to rein in the data-driven practices of the tech giants and, in the process, push the boundaries of antitrust enforcement.

“Regardless of what happens,” Gilman says, “companies considering transactions with a significant data component should be prepared for increased scrutiny—even while the agencies’ enforcement policy in this area evolves—and be prepared to address agency concerns.”

## DOJ AND FTC: TWO AGENCIES, TWO VIEWS?

There’s lively debate in the antitrust community about whether current antitrust laws and enforcement policies sufficiently address Big Data-related competition concerns. Adding to the uncertainty are the different tacks taken by the DOJ and the FTC. The agencies’ dissimilar institutional structures amplify this uncertainty.

The DOJ speaks with one voice—that of Makan Delrahim, head of the Antitrust Division. Delrahim has aggressively advocated the view that existing antitrust laws are flexible enough to handle the issues of the digital age.

The FTC’s view is still developing, primarily because the agency has five recently appointed commissioners who don’t necessarily agree with each other (or with the DOJ) but generally try to operate by bipartisan consensus. In

addition, FTC Chair Joseph Simons is using the agency’s “Hearings on Competition and Consumer Protection in the 21st Century” to gather evidence and consider all arguments before taking any hard-and-fast positions that might include pursuing a new enforcement approach.

“Visibility into the government’s antitrust thinking will remain low until the agencies reveal their preferences through concrete policy statements and enforcement decisions—especially new cases and case settlements—and, possibly, closing statements that explain their reasoning,” notes Crowell & Moring’s Andrew Gavil. “For now, although there’s uncertainty, it seems unlikely that the agencies will pursue any radically different policies, despite continued debate and political pressure.”