



# **The Antitrust-Privacy Collision**

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# Antitrust

## Federal Antitrust Law

- **Designed to ensure fair competition and prevent predatory business practices within a specific market**
- **Generally speaking, there are two categories of civil antitrust violations:**
  - Sherman Act, Section 1: A contract, combination, or conspiracy among two or more parties that unreasonably restrains trade or commerce in a market
  - Sherman Act, Section 2: Unilateral conduct that monopolizes, or attempts to monopolize, a market through anticompetitive or exclusionary conduct (Section 2 of the Sherman Act)

# Data Privacy Laws

## Federal Data Privacy Laws

- **No federal counterpart akin to the comprehensive data privacy laws enacted by the states**
- **Various overlapping federal laws in the area of data privacy:**
  - Children's Online Privacy Protection Rule
  - Fair Credit Reporting Act
  - Family Educational Rights and Privacy Act
  - Gramm-Leach-Bliley Act
  - Health Insurance Portability and Accountability Act

## State Data Privacy Laws



- **Provide a framework governing the collection and processing of consumers' personal information**

# State by State



**California Privacy Rights Act**



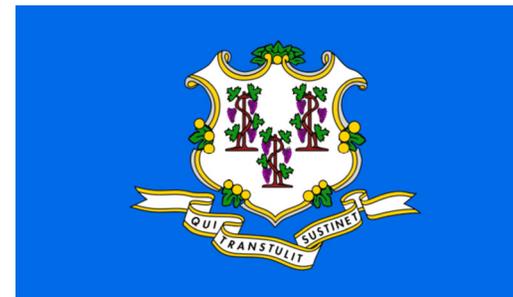
**Virginia Consumer Data Protection Act**



**Colorado Privacy Act**



**Utah Consumer Privacy Act**



**Connecticut Data Privacy Act**

# Example: The California Privacy Rights Act in a Nutshell

## Five Privacy Rights:

1. Right to Notice of Collection, Disclosure, or Sale of Personal Information
2. Right to Request Deletion of Personal Information
3. Right to Access the Personal Information Collected
4. Right to Opt-Out of the Sale of Personal Information
5. Right to Non-Discrimination for the Exercise of a Consumer's Privacy Rights

## Private Right of Action in Event of Data Breach

# Europe's General Data Protection Regulation

- Like U.S. state laws, the GDPR regulates the processing of personal data
- Provides Nine Privacy Rights:
  - Right to Be Informed
  - Right to Access
  - Right to Have Details Corrected or Amended
  - Right to Port Data
  - Right to Be Forgotten
  - Right to Restrict Data Processing
  - Right to Withdraw Consent
  - Right to Object
  - Rights Related to Automated Processing

# **FTC and the Convergence of Antitrust and Data Privacy Enforcement**

# Federal Trade Commission



- **Competition Bureau:**
  - Enforces civil antitrust laws
- **Consumer Protection Bureau:**
  - Stops unfair, deceptive, and fraudulent business practices

## **New FTC Chair Priorities**



**Lina Khan Brings Scrutiny to Big Tech Data Dominance as FTC Chair**

**Bloomberg  
Law**

**FTC Chair Lina Khan calls for a paradigm shift on data privacy**

**THE WALL STREET JOURNAL.**

## FTC Preparing to Issue New Rule

**August 11, 2022:** FTC issued advanced notice of proposed rulemaking regarding commercial surveillance and data security

Requests public comments on the prevalence of “commercial surveillance and data security practices that harm consumers”

Asks: “Would any given new trade rule on data security or commercial surveillance impede or enhance competition?”

Asks: “To what extent, if at all, do firms that now, by default, enable consumers to block other firms’ use of cookies and other persistent identifiers impede competition?”

**September 8, 2022:** FTC held a public forum on the proposed rulemaking

**October 21, 2022:** Deadline to submit public comments

# Recent Enforcement Actions

## FTC v. Facebook



- **FTC action against Facebook filed in D.C. District Court**
- **FTC alleges Facebook unlawfully maintains a monopoly in the PSN services market by:**
  - 1. Acquiring competitors (Instagram and WhatsApp)
  - 2. Preventing interoperability between Facebook and other apps

# United States v. Google



- Action to restrain Google from maintaining monopolies in markets relating to general search services
- Alleges “Google’s conduct has harmed consumers by reducing the quality of general search services (including dimensions such as privacy, data protection, and user of consumer data), lessening choice in general search services, and impeding innovation”

## FTC v. Meta



- FTC action against Meta filed in Northern District of California
- FTC seeks to enjoin Meta's merger with Within
- FTC alleges the merger would cause anticompetitive effects by eliminating potential competition in the market for VR dedicated fitness apps

# Where Europe Is Headed

## **Antitrust and Data Privacy Converge**



- **Europe's antitrust bodies are bringing actions against big tech companies in the area of data privacy**
- **Recent legislation imposes new requirements on tech companies in this area**

## Germany Action Against Facebook

- Bundeskartellamt, Germany's competition authority, prohibited Facebook from processing personal data after it found Facebook's failure to comply with the GDPR constituted an abuse of Facebook's dominant position
- Facebook appealed to the European Court of Justice, arguing that national competition authorities cannot enforce the GDPR
- On September 20, 2022, a non-binding opinion by the advocate general, an influential adviser to the EU's top court, said that while the competition authorities do not have direct jurisdiction regarding the GDPR, they may consider them

## Digital Markets Act

- **Intends to ensure a higher degree of competition in the European Digital Markets by:**
  - Preventing large companies from abusing their market power
  - Allowing new players to enter the market
- **Targets online platforms (called “Gatekeepers”) such as Google, Facebook, YouTube, WhatsApp, and Instagram**

## Digital Markets Action – Requirements

Among other things, Gatekeepers are subject to new requirements in the following areas:

1. Interoperability
2. Self-Preferencing
3. Advertising Transparency
4. Use of Data

## Digital Markets Act – Key Dates



Effective Date  
**November 1**  
**2022**

Enforcement Date  
**May 2**  
**2023**

# **Privacy-Centric Policies Act as a Defense to Allegations of Anticompetitive Conduct**

## Epic Games, Inc. v. Apple Inc.



- Epic Games argues Apple engages in anticompetitive activities in its App Store
- The Court, however, found that Apple's restrictions benefitted user security and privacy
- The Court also found that by limiting competition in its App Store, Apple fostered competition between brands that value security v. those that do not

# In re Google Digital Advertising Antitrust Litigation



- Filed by Attorneys General from over a dozen states
- Alleges that Google restricts user identification data from publishers while sharing the same user ID data on Google's own advertising tools
- The Court found that the "States have not explained why [the restriction] was not an innovation that consumers rightly or wrongly preferred" and that antitrust laws do not require a monopolist to share information with competitors

## hiQ Labs, Inc. v. LinkedIn Corp.



- LinkedIn sought to prevent hiQ Labs from scraping information from LinkedIn users' public profiles, and then using that information to sell data analytics to third parties
- LinkedIn argued hiQ's data collection harmed user privacy
- The Ninth Circuit upheld an injunction preventing LinkedIn from denying hiQ access to the public data
- The Court of Appeal noted that LinkedIn's litigation position conflicted with its business position, and that users' privacy expectation over public information was tentative