

Privacy Now Looms Large In Antitrust Enforcement

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Until very recently, if you asked an antitrust lawyer what privacy has to do with their practice, there is a good chance you'd get back a blank stare or a "not much."

For decades, American antitrust law has been dominated by the Chicago School, which, as Robert Bork explains in his 1978 book "The Antitrust Paradox: A Policy at War with Itself," posits consumer welfare as the primary — if not exclusive — goal of antitrust.[1]

Under the consumer welfare standard, antitrust's guiding light has been achieving what Tim Wu in "The Curse of Bigness, Antitrust in the New Gilded Age," calls "the lowest price for consumers"[2] — even at the expense of competing policy goals, such as economic inequality, consolidation of political power and yes, privacy.

Take, for example, *National Society of Professional Engineers v. United States* in 1978, in which the U.S. Supreme Court determined that while the consumer welfare standard encompasses not merely a product's immediate price, but "all elements of a bargain — quality, service, safety and durability,"[3]

Facially, it has never been clear under the Chicago School that privacy drives much if any antitrust analysis.

That is now changing. As market shares consolidate in several key industries — technology perhaps chief among them — longstanding assumptions in antitrust are now being challenged, such as in the recent legislation package floated in the U.S. House aimed at reining in large technology companies and restoring competition in digital markets.[4]

Antitrust law, initially "slow to recognize privacy as a dimension of product quality,"[5] now confronts large digital platforms that "hold and use our data," writes Erika Douglas in "The New Antitrust/Data Privacy Law Interface." [6]

The companies that operate these platforms, colloquially referred to as Big Tech, have come under increased scrutiny in recent years, and lawmakers, regulators and consumers now face a new set of dilemmas as to how privacy and antitrust should interact. Preserving



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privacy and curbing unfair competition are both desirable policy goals, but they do not always peacefully cohabit.

On one hand, firms defending against allegations of anti-competitive conduct have used privacy to justify their practices. On the other, antitrust plaintiffs, including government agencies, have argued that concentration of consumer data in the hands of a few firms carries privacy and antitrust risks and responsibilities of its own.

Thus, in today's evolving antitrust world, privacy can function as a shield, a sword, or both, such that soon enough, few antitrust practitioners will be caught flat-footed by this article's opening question.

Privacy as Shield

Antitrust law does not proscribe all restraints of trade, but only those that are on balance unreasonable.[7] Thus, in cases outside the per se unlawful context, when a plaintiff demonstrates that a defendant's conduct yields anti-competitive effects, the defendant does not automatically lose.

Under the Rule of Reason, the defendant gets an opportunity to justify the practice by demonstrating that its beneficial or procompetitive effects outweigh any anti-competitive effects.[8]

In the technology context, large firms have increasingly relied on privacy concerns to justify allegedly anti-competitive conduct. Importantly, "[a]ntitrust analysis has not yet addressed whether user data privacy protection is cognizable as a business justification," Douglas writes.[9]

As more antitrust cases involve privacy and data security, however, courts seem increasingly likely to address the issue directly.

The first antitrust-adjacent case in which a court considered a prominent technology company's privacy defense was *HiQ v. LinkedIn* in 2019.[10] The U.S. Court of Appeals for the Ninth Circuit considered a challenge to LinkedIn's privacy policy, which allegedly disallowed competitor HiQ from "accessing publicly available LinkedIn member profiles" for the purpose of gathering data to sell to clients.[11]

HiQ argued that the policy violated California's Unfair Competition Law and asked the district court for a preliminary injunction, which the court issued.[12] On appeal, the Ninth Circuit upheld the preliminary injunction, finding that "LinkedIn's conduct may well not be within the realm of fair competition." [13]

In so doing, the court rejected LinkedIn's arguments that "protecting its members' data and the investment made in developing its platform" and "enforcing its User Agreements' prohibitions on automated scraping" were "private business interests" that justified the restriction.[14]

Thus, in at least one instance a federal court has rejected a technology company's privacy justifications. However, HiQ is only of limited value in understanding privacy's efficacy as an antitrust shield because it concerns a state unfair competition law and, as a ruling on a preliminary injunction, considered only "whether hiQ ... raised serious questions on the merits of the factual and legal issues presented." [15]

A more thorough examination of the privacy antitrust defense arose in *Epic Games v. Apple*. [16] In that litigation, Epic Games, developer of the game Fortnite, argued that Apple illegally monopolized app distribution and in-app payments on the iOS App Store. [17]

Epic's complaint blasted as anti-competitive the tight control Apple exerts over which apps are listed on the App Store, as well as Apple's prohibition on competing app stores:

Apple's restrictions also prevent developers from experimenting with alternative app distribution models, such as providing apps directly to consumers, selling apps through curated app stores, selling app bundles, and more . . . , ensur[ing] that developers' apps will be distributed only on the App Store.[18]

In its answer, Apple responded that loosening its grip "would undermine [its] carefully constructed privacy and security safeguards, and seriously degrade the consumer experience and put Apple's reputation and business at risk." [19] Apple reiterated the privacy defense throughout the bench trial.[20]

In the U.S. District Court for the Northern District of California's Sept. 10 decision following trial, U.S. District Judge Yvonne Gonzalez Rogers wrestled with this tension extensively. The order acknowledged that Apple's app distribution restrictions "foreclos[e] competition" by disallowing competing app stores.[21]

These restrictions also "increase[] prices for developers" and "reduce innovation in 'core' game distribution services." [22] At the same time, the order reasoned that "privacy ... likely benefits from some app distribution restrictions," given the App Store's "heightened privacy requirements." [23]

Further, "security and privacy have remained a competitive differentiator for Apple," with privacy rating among "the top factors [for people who] choose Apple." [24]

At trial, the court found that witnesses were "unanimous that security and privacy [were] valid procompetitive justifications" for Apple's restrictions," and ultimately held that "Apple ha[d] a legitimate business justification in maintaining and improving the quality of its services, here, privacy and security." [25]

After weighing anti-competitive effects against Apple's proffered justifications, the court declined to hold that any proposed alternatives would be "virtually as effective" at protecting privacy and security as Apple's distribution model. [26] Thus, it held that Apple's app distribution restrictions did not violate the Sherman Act. [27]

Epic Games already has appealed Judge Gonzalez Rogers' decision, so this dispute remains ongoing. [28] Further, Apple's competitors have raised concerns about the intersection of privacy and competition in other contexts, raising the prospect of other litigation involving tension between the two. [29] In any event, this decision constitutes a significant early example of privacy's efficacy as an antitrust shield.

In Texas v. Google, another high-profile antitrust case against a tech giant, 15 state attorneys general have filed suit in the U.S. District Court for the Eastern District of Texas against Google, alleging, among other things, that Google's new privacy practices stifle competition in digital advertising. [30]

The amended complaint takes aim at Google Chrome's so-called privacy sandbox, which allegedly "stands in stark contrast to the open internet that Google claims to protect." [31]

According to the complaint, the privacy sandbox aims to "block publishers and advertisers from using the type of cookies they rely on to track users and target ads," effectively "wall[ing] off the entire portion of the internet that consumers access through Google's Chrome browser." [32]

To access consumer data, publishers and advertisers will instead have to use Google's "new and alternative tracking mechanisms." [33] The plaintiffs argue that this practice "raise[s] barriers to entry and exclude[s] competition in the exchange and ad buying tool markets," thereby "expand[ing] the already-dominant market power of Google's advertising businesses." [34]

In its answer, Google argued that the Privacy Sandbox responds to "evolving consumer privacy expectations." [35] The litigation is still in its early stages, but if the court determines that the Privacy Sandbox could produce anti-competitive effects, it likely would have to grapple with the tension between privacy and competition.

Privacy as Sword

Just as antitrust defendants have become more comfortable asserting privacy defenses, plaintiffs have begun incorporating privacy concerns in their complaints. Further, regulators have begun to suggest that privacy reductions can be a form of diminished quality, evincing harm to competition. [36]

Thus, privacy may come to play a significant role in antitrust suits against Big Tech companies handling vast quantities of user data.

For example, an ongoing enforcement action against Google by the U.S. Department of Justice and state attorneys general has interwoven privacy concerns with more traditional allegations of anti-competitive effects. [37]

The amended complaint, filed by the U.S. and 14 states, accuses Google of "unlawfully maintaining monopolies in the markets for general search services, search advertising, and general search text advertising." [38]

The amended complaint alleges that Google, through exclusionary agreements with manufacturers, carriers, and developers, has "lock[ed] up distribution channels and "black[ed] rivals," making itself the "default" search engine for most of the search market and "deny[ing] rivals scale to compete effectively." [39]

Thus, search competitors like DuckDuckGo, which "differentiates itself from Google through its privacy-protective policies," lack effective paths to enter the search market and challenge Google's dominance. [40]

Interestingly, the complaint's "anti-competitive effects" section alleges that Google's imposed restrictions on competition "reduc[es] the quality of general search services — including dimensions such as privacy, data protection, and use of consumer data — lessening choice in general search services, and impeding innovation." [41]

While the plaintiffs in monopolization cases often focus on price in alleging anti-competitive effects, the government plaintiffs here emphasize that Google's alleged stranglehold on search prevents rivals like DuckDuckGo from competing on product quality by introducing search engines that better protect user privacy.

The case is in its early stages, and the court has not yet indicated how much weight it will give to the privacy argument. However, this type of argument is likely to become more common in contexts where

the antitrust defendant does not charge consumers directly for services, as may be the case in search and social media.

What's Next for Privacy in Antitrust Enforcement?

Privacy seems poised to play an increasingly important role in antitrust litigation, both as a justification used to defend against allegations of anti-competitive conduct, and as an element of product quality that can be restricted or diminished as a result of anti-competitive conduct.

While the examples above reflect a preexisting trend in this direction, popular sentiment has motivated some public officials to take additional steps. In recent months, for instance, President Joe Biden made three key appointments and issued an executive order which could have potentially important implications for the future of antitrust and privacy.

First, Biden appointed Lina Khan to serve as the chair of the Federal Trade Commission.[42] Khan is a central figure in the movement to expand the goals of antitrust law and has strongly criticized the Chicago School's emphasis on consumer welfare.[43]

Further, she wrote about the relationship between antitrust and privacy as recently as 2019, when she co-authored an article for the Harvard Law Review on "information fiduciaries." [44]

In that article, which discusses big tech firms that manage large amounts of user data, Khan and her co-author opined that "any broad regulatory framework ... that focuses on abusive data practices, without attending to issues of market structure ..., is likely to be at best highly incomplete and at worst an impediment to necessary reforms." [45]

They floated the idea of "[d]ata interoperability requirements," which would "allow users to move their data across platforms," as one possible solution to the problem of data abuses by tech monopolists.[46]

Required interoperability, the article argues, would "require[] incumbent services to continuously compete" while simultaneously providing that "a platform that perennially violated users' privacy would likely lose ground to more privacy-conscious rivals, instead of benefiting from high switching costs that keep users trapped." [47]

As chair, Lina Khan's fresh approach to the relationship between privacy and competition could manifest itself in more robust enforcement based on factors other than price, though price will remain an attractive metric due to the ease with which it can be tracked.

Second, Biden just announced his intent to nominate Alvaro Bedoya, a law professor at Georgetown University Law Center, to serve as an FTC commissioner.[48]

Bedoya, who founded Georgetown's Center on Privacy & Technology at Georgetown Law,[49] has written extensively on facial recognition technology[50] and other privacy-related topics.[51] He is generally regarded as a hawk on privacy issues and would likely bring that perspective to the commission, if confirmed.[52]

Third, Biden picked Wu, the "Curse of Bigness" author and Columbia Law professor, to serve as special assistant to the president for technology and competition policy.

Wu, another important critic of the Chicago School,[53] has also previously addressed the relationship between privacy and competition. In a 2019 interview with the American Enterprise Institute, Wu said that tech firms that do "not fac[e] direct competition" are "able to get away with a lot more in terms of privacy protection" because there is no "competitor to keep them honest." [54]

By framing privacy reduction as an anti-equals-competitive effect, Wu lent credence to the privacy-as-sword theory discussed above.

Fourth, this summer Biden signed the executive order on promoting competition in the American economy.[55] This wide-ranging order includes provisions aimed at expanding the FTC's enforcement role.

One such provision encourages the FTC chair to "exercise the FTC's statutory rulemaking authority, as appropriate and consistent with applicable law, in areas such as ... unfair data collection and surveillance practices that may damage competition, consumer autonomy, and consumer privacy." [56]

By explicitly grouping competition and privacy, the Order arguably sets the stage for the FTC to include and emphasize privacy concerns in its enforcement actions.

Conclusion

All indicators suggest privacy will have an increasingly important role to play in antitrust enforcement in the coming years.

Precisely where and how privacy will factor most will be revealed through the crucible of antitrust litigation. While big tech firms may continue to rely on privacy as a defense to rebut allegations of anti-equals-competitive conduct, antitrust regulators, particularly in the Biden administration, seem increasingly likely to wield privacy concerns offensively.

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[1] Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 81 (1978).

[2] Tim Wu, *The Curse of Bigness* 87–88 (2018).

[3] *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978). Thus, if a merger or practice reduced non-price privacy-based competition, it might be construed as a reduction in "quality," thereby raising antitrust concerns. Erika M. Douglas, *The New Antitrust/Data Privacy Law Interface*, 130 *Yale L.J. Forum* 647, 654 (2021).

[4] <https://www.law360.com/articles/1393416> and "Lawmakers, Taking Aim at Big Tech, Push Sweeping Overhaul," N.Y. Times (Jun. 12, 2021), available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKewi7qrmW9bfyAhWjL30KHasnAhUQFnoECDUQAQ&url=https%3A%2F%2Fwww.nytimes.com%2F2021%2F06%2F11%2Ftechnology%2Fbig-tech-antitrust-bills.html&usg=AOvVaw0JR3k35Mitzt1-U9Uybqeu>.

[5] Frank Pasquale, Privacy, Antitrust, and Power, 20 Geo. Mason. L. Rev. 1009, 1010 (2013).

[6] Douglas, *supra* note 5, at 647.

[7] Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911).

[8] John M. Newman, Procompetitive Justifications in Antitrust Law, 94 Ind. L.J. 501, 502 (2019).

[9] Douglas, *supra* note 5, at 667.

[10] HiQ v. LinkedIn, 938 F.3d 985 (9th Cir. 2019).

[11] *Id.* at 989–991.

[12] *Id.* at 992.

[13] *Id.* at 998.

[14] *Ibid.*

[15] *Id.* at 989.

[16] Adi Robertson, Tim Cook's Fortnite Trial Testimony was Unexpectedly Revealing, Verge (May 22, 2021), available at <https://www.theverge.com/2021/5/22/22448139/tim-cook-epic-fortnite-trial-testimony-privacy-iap-antitrust>.

[17] Epic Games v. Apple, 4:20-cv-05640-YGR, Dkt. No. 1, ¶ 6 (N.D. Cal. 2020).

[18] *Id.* at ¶ 96.

[19] 4:20-cv-05640-YGR, Dkt. No. 1, ¶ 6 (N.D. Cal. 2020).

[20] See generally Mike Peterson, Apple Says Epic Games Demands Threaten iOS App Security, Privacy, Quality, AppleInsider (May 3, 2021).

[21] Epic Games, Inc. v. Apple Inc., No. 4:20-cv-05640-YGR, 2021 U.S. Dist. LEXIS 172303, at *163 (N.D. Cal. Sep. 10, 2021).

[22] *Id.* at *169, 176.

[23] *Id.* at *185-6.

[24] Id. at *188.

[25] Id. at *189, 259 n.608.

[26] Id. at *264-65.

[27] Id. at *265.

[28] 'Fortnite' Creator Epic Games to Appeal Ruling in Apple Case, Reuters (Sept. 13, 2021), available at <https://www.reuters.com/technology/epic-games-says-it-is-appealing-ruling-apple-case-2021-09-12/>.

[29] For instance, Tile, which makes a Bluetooth tracker that helps users find lost products, has argued to Congress that recent iOS updates, ostensibly designed to strengthen privacy protections, wrongfully disadvantage Tile in favor of Find My, a competing Apple service. Tile Says Apple's Behavior is Anticompetitive and as 'Gotten Worse, Not Better', Reuters (Apr. 1, 2020), available at <https://www.reuters.com/article/us-tech-antitrust-apple-tile/tile-says-apples-behavior-is-anticompetitive-and-has-gotten-worse-not-better-idUSKBN21J72V>.

[30] Texas v. Google, 4:20-cv-00957-SDJ, Dkt. No. 77 (E.D. Tex. 2021).

[31] Id. at ¶ 260.

[32] Id. at ¶ 266.

[33] Id.

[34] Id.

[35] Texas v. Google, 4:20-cv-00957-SDJ, Dkt. No. 96, ¶ 226 (E.D. Tex. 2021).

[36] Makan Delrahim, Assistant Attorney Gen., Dep't of Justice, Remarks for the Antitrust New Frontiers Conference: ". . . And Justice for All": Antitrust Enforcement and Digital Gatekeepers (June 11, 2019), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-antitrust-new-frontiers> ("[D]iminished quality is also a type of harm to competition. As an example, privacy can be an important dimension of quality.").

[37] United States v. Google, 1:20-cv-03010-APM, Dkt. No. 94 (D.D.C. 2021).

[38] Id. at 2.

[39] Id. at ¶¶ 4–8.

[40] Id. at ¶¶ 8–9.

[41] Id. at ¶ 167.

[42] Joe Biden Appoints Lina Khan to Head The Federal Trade Commission, Economist (Jun, 19, 2021), available at <https://www.economist.com/united-states/2021/06/19/joe-biden-appoints-lina-khan-to-head-the-federal-trade-commission>.

[43] Id.

[44] David E. Pozen & Lina M. Khan, A Skeptical View of Information Fiduciaries, 133 Harv. L. Rev. 497 (2019).

[45] Id. at 528.

[46] Id. at 539.

[47] Id.

[48] Leah Nylen and Alexandra S. Levine, Biden Taps Privacy Advocate Alvaro Bedoya for FTC, Politico (Sept. 13, 2021), available at <https://www.politico.com/news/2021/09/13/biden-picks-privacy-advocate-for-ftc-511649>.

[49] Id.

[50] See, e.g., Clare Garvie, Alvaro Bedoya & Jonathan Frankle, The Perpetual Line-Up: Unregulated Face Recognition in America (2016).

[51] See, e.g., Alvaro M. Bedoya, Privacy as a Civil Right, 50 N.M. L. Rev. 301 (2020).

[52] Margaret Harding McGill, Scoop: Biden to Tap Privacy Hawk for FTC Post, Axios (Sept. 13, 2021), available at <https://www.axios.com/biden-to-tap-privacy-hawk-for-ftc-post-928e807e-14f0-49ba-9585-50c9df171a04.html>.

[53] See generally Tim Wu, After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice, Comp. Pol'y Int'l Antitrust Chron (2018).

[54] James Pethokoukis, 5 Questions for Tim Wu on Big Tech, Antitrust, and The Consumer Welfare Standard, AEI (Feb. 19, 2019), available at <https://www.aei.org/economics/5-questions-for-tim-wu-on-big-tech-antitrust-and-the-consumer-welfare-standard/>.

[55] President Biden, Executive Order on Promoting Competition in the American Economy (July 9th, 2021), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.