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UNFAIR COMPETITION: BIG DATA AND THE FIGHT OVER DATA PRIVACY

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TABLE OF CONTENTS

I. INTRODUCTION 225

II. BACKGROUND 227

A. What are "Unfair Methods of Competition" in Other Systems? *227*
B. Violations of Competition Law in Data Privacy in the EU *229*
i. Bundeskartellamt v. Facebook *229*
ii. Autorita Garante della Concrrenza e del Mercato (AGCM) v. WhatsApp *231*
C. Violations of Competition Law in Data Privacy in the Asia-Pacific *232*
D. Why is this Relevant? *233*

III. ANALYSIS 235

A. *What is the Overall Trend Amongst Various Jurisdictions?* 235
i. What are unfair practices against trade? *235*
B. *How Should this Inform U.S. Legislation and/or FTC Guidelines?* 236
i. First, is it appropriate for the FTC to create stricter guidelines for what behavior is fair or unfair? *236*
ii. Challenges raised by critics and concerns regarding state sovereignty within the U.S. federal system *237*

IV. CONCLUSION 238

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ABSTRACT

Section 5 of the Federal Trade Commission Act prohibits "unfair methods of competition in or affecting commerce." While Congress intended Section 5 to play a vital role in the development of competition policy, courts have struggled in applying this vague and ambiguous language, resulting in case-law that lacks certainty and is inconsistently enforced. These difficulties are further highlighted in the context of unfair competition and data privacy.

Data, the currency that our digital world trades in, is largely collected by a small group of companies, Google, Meta, and Amazon. Concerns over how this data is collected and used have existed for decades and the intersection of competition law and data privacy law continue to grow. Businesses, large and small, benefit from the data these big data giants collect but at what cost? The United States lacks federal law that elaborates on what unfair competition is in the context of data privacy. Should big data companies, in the interest of data privacy, be prohibited from sharing the data they collect at the expense of competition? By first examining approaches taken by other legal systems and then by looking at cases from other jurisdictions, this article proposes that the United States should take a more proactive role in finding the balance between these two slightly opposing areas.

I. INTRODUCTION

Section 5 of the Federal Trade Commission Act prohibits "unfair methods of competition in or affecting commerce."[1] Acts or practices are considered unfair if they cause or are "likely to cause substantial injury to consumers and is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[2] While Congress intended Section 5 to play a crucial role in developing competition policy, "the historical record reveals a remarkable and unfortunate gap between the theoretical promise of Section 5 as articulated by Congress . . . and its application in practice by the Commission."[3] There have been many calls to create guidelines for Section 5 to cure the vague and ambiguous nature of the Commission's Section 5 authority in hopes of aiding the agency in its work and providing businesses with a minimal level of certainty in competition law.[4] The current common law case-by-case approach has provided some flexibility and certainty, but academics and practitioners believe it is a "recipe for unprincipled and inconsistent enforcement" as well as an invitation for courts or Congress to define Section 5 however they see fit.[5]

This problem is further highlighted by a policy statement released by the Federal Trade Commission ("FTC") on November 10, 2022.[6] The policy statement, "[r]elying on the text, structure, legislative history of Section 5, precedent, and the FTC's experience applying the law," defined various principles including "unfairness."[7] Unfair methods of competition must go

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[1] 15 U.S.C. § 45.
[2] *Id*.
[3] Joshua D. Wright, Commisioner, Fed. Trade Comm'n, Remarks at the Symposium on Section 5 of the Federal Trade Commission Act, at 2 (Feb. 26, 2015), (https://www.ftc.gov/system/files/documents/public_statements/626811/150226bh_section_5_symposium.pdf.
[4] *Id*. at 6-7. *See generally* Maureen K. Ohlhausen, *Section 5 of the FTC Act: Principles of Navigation*, 2 J. ANTITRUST ENF'T (2013), https://www.ftc.gov/system/files/documents/public_statements/section-5-ftc-act-principles-navigation/131018section5.pdf (Ohlhausen identifies "six criteria that the FTC should satisfy in pursuing any standalone Section 5 enforcement").
[5] Wright*, supra* note 3, at 9.
[6] Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022) [hereinafter *Policy Statement*], https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf. (reiterating that Section 5 reaches beyond the Sherman Act and the Clayton Act "to encompass various types of unfair conduct that tend to negatively affect competitive conditions." *Id.* at 1. The statement was published in an effort to help the public, businesses, and antitrust lawyers by laying out principles that apply to determine whether business practices are unfair methods of competition under Section 5).
[7] *Id*. at 8.

"beyond competition on the merits" and two criteria points must be considered.[8] First, Section 5 requires the conduct be "coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature." Second, "the conduct must tend to negatively affect competitive conditions."[9] The policy adopts a near per se illegal view of unfairness, "effectively abandon[ing] a rule of reason of analysis, . . . giving the FTC broad discretion to determine that conduct is 'unfair' without . . . evidence of anticompetitive effects, and without regard to procompetitive justifications or potential efficiencies."[10]

Even though the statement was intended to provide clearer guidance, it contains few specifics about what conduct the Commission would deem unfair, suggesting that the FTC has "broad discretion to challenge nearly any conduct with which it disagrees."[11] This leaves the public, businesses, and practitioners in no better shape than before but does reflect "the current Commission's aggressive antitrust enforcement posture."[12]

Along with the unpredictability of defining what methods of competition under Section 5 are unfair, concerns over the relationship between antitrust and data privacy regulation have been rising.[13] Recently, the FTC brought a complaint against Kochava Inc., alleging, among other violations, that it was in violation of Section 5 for selling its customers' data.[14]

Competition law and data protection law are distinct in the goals they aim to accomplish. Competition law seeks to promote a competitive market,[15] while data protection laws seek to protect individuals' privacy, "ensuring [the] free flow of information to promote innovation and growth."[16] The complementarity between the two laws is debated by scholars[17] but the "two

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[8] *Id*. at 8.
[9] *Id.* at 8-9.
[10] Maureen K. Ohlhausen et al., *FTC's New "Unfair Methods of Competition" Policy Statement Delcares Protection for Competitors, Not Just Competition*, BAKER BOTTS (Nov. 11, 2022), FTC's New "Unfair Methods of Competition" Policy Statement Declares Protection for Competitors, Not Just Competition | Thought Leadership | Baker Botts.
[11] *Id*.
[12] *Id*.
[13] Complaint, Federal Trade Comm'n v. Kochava Inc., No. 2:22-CV-00377-BLW (D. Idaho Aug. 29, 2022).
[14] *Id.*
[15] *Guide to Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws (last visited Nov. 20, 2022).
[16] An Act Protecting Individual Personal Information in Information and Communications Systems in the Government and the Private Sector, Creating for this Purposes a National Privacy Commission, and for Other Purposes**,** Rep. Act No. 10173 § 2 (July 25, 2011) (Phil.), https://privacy.gov.ph/data-privacy-act/.
[17] Erika M. Douglas, *The New Antitrust/Data Privacy Law Interface*, 130 YALE L.J. F. 647, 653-654 (Jan. 18, 2021) ("The first theory on this legal interface casts data privacy as beyond the purview of antitrust law." Antitrust law, by some, has been viewed as an

areas of law are increasingly interacting" in the digital economy and must be examined together.[18] Part of the concern regarding personal data collection of consumers is the high level of data aggregation in large companies like Meta and Amazon. These firms, partly due to their early emergence on the Internet and partly due to their effective use of their jump start, have amassed a wide breadth of information on its users, allowing targeted content and advertisement, further benefiting from its network effects at the cost of infringing upon users' control over theirdata privacy. The collection of data and its uses raises several questions including whether this data should be shared with smaller companies in order to further competition or should principles and concerns regarding data protection prevent others from benefiting, and ultimately profiting, from the jump start these large firms got? This note will focus on how other countries define "unfair methods of competition" to determine whether this is a universal, well-accepted concept and how they have approached the relationship between data privacy and competition law. This note will conclude with how, if possible, these distinct areas of law can be informed by each other and what the US can learn from the way other countries have approached this topic.

II. BACKGROUND

A. WHAT ARE "UNFAIR METHODS OF COMPETITION" IN OTHER SYSTEMS?

Competition laws throughout the world come in varying degrees of certainty. South Korea's Monopoly Regulation and Fair-Trade Act classifies general unfair trade practices into nine categories and particular unfair trade practices into two categories.[19] General unfair trade practices include "[r]efusal to deal; Discriminatory treatment; Exclusion of a competitor; Unfair solicitation of customers; Coercion of transaction; Abuse of superior bargaining position; Imposing binding conditional trade; Obstruction of business activities; and Unfair support."[20] Particular unfair trade practices are determined by public notifications.[21] The South Korean Fair Trade

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inappropriate approach to address privacy concerns, noting the "historical and doctrinal separation between the FTC's competition mandate and its consumer protection mandate." The second theory argues that antitrust analysis should consider data privacy when it is "an element of quality-based competition."); *see also* James C. Cooper & John M. Yun, *Antitrust & Privacy: It's Complicated*, 2022 U. ILL. J.L. TECH. & POL'Y 343, 343 (2022) (arguing that antitrust is a poor tool to address privacy problems).

[18] Douglas, *supra* note 17, at 659.

[19] KOREA FAIR TRADE COMM'N, *Unfair Trade Practices* (Sept. 11, 2022, 11:17 PM), https://www.ftc.go.kr/eng/contents.do?key=3076.

[20] *Id*.

[21] *Id*.

Commission's (KFTC) website outlines what type of behavior falls within each category and provides examples.[22] The website additionally provides information about a safety zone in which the KFTC will not conduct a review.[23]

Japan's Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (AMA), enacted in April 1947, was directly influenced by the United States.[24] Unfair trade practices, addressed in Chapter V of the AMA[25] and described in the Japan Fair Trade Commission (JFTC) Designation of Unfair Trade Practices,[26] include refusal to trade, discrimination, and deceptive customer inducement.[27]

Germany's Act Against Unfair Competition (UWG), like Section 5, does not provide a definition of the term "unfair"; however, it does explicitly define various actions that are deemed to be unfair.[28] Based on these provided examples, the statute leaves it up to courts and legal writers to determine the "precise scope and meaning of the term."[29]

Congress intended for the FTC to use Section 5 to challenge conduct that is out of reach of the Sherman Act and the Clayton Act.[30] Enforcement of

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[22] *Id*.

[23] *Id*. (stating that the threshold for review depends on the size or market share of a business. "If the size or market share of a business is meager, it is deemed to have a minor impact on competition in the market and, in principle, the KFTC [Korean Fair Trade Commission] will not commence a review.").

[24] Hiroshi Iyori, *A Comparison of U.S.-Japan Antitrust Law: Looking at the International Harmonization of Competition Law*, 1 PAC. RIM L. & POL'Y J. 59, 65 (1995).

[25] Dokusen Kinshihō [Japan Act on Prohibition of Private Monopolization and Maintenance of Fair Trade], Law No. 54 of 1947, arts. 19-20 (Japan).

[26] Designation of Unfair Trade Practices, Fair Trade Commission Public Notice No. 15 of 1982 https://www.jftc.go.jp/en/legislation_gls/unfairtradepractices.html (Japan); *see also* Shinya Tago et al., *Restraints of Trade and Dominance in Japan: Overview*, THOMSON REUTERS PRAC. L. (Dec. 1, 2021), https://uk.practicallaw.thomsonreuters.com/6-571-2765?transitionType=Default&contextData=(sc.Default)&firstPage=true (unfair trade practices include but are not limited to "[p]redatory pricing[,] [t]ying[,] [r]efusal to deal[,] [d]iscriminatory treatment[,] [r]esale price maintenance[,] [d]ealing on exclusive or restrictive terms[,] [a]buse of superior bargaining position.").

[27] *See* Designation of Unfair Trade Practices, *supra* note 26.

[28] Gesetz gegen den unlauteren Wettbewerb [UWG] [Act against Unfair Competition], Mar. 3, 2010, BGBl I at 254, last amended by Gesetz [G], Aug. 10, 2021, BGBl I at 3433, §§3a-7a (Ger.) (determining categories of unfair practices) (Annex to §3(3) additionally provides illegal commercial practices that fall within the meaning of §3(3)).

[29] Jan Peter Heidenreich, *The New German Act Against Unfair Competition*, GER. L. ARCHIVE (2005), https://www.iuscomp.org/gla/literature/heidenreich.htm.

[30] *Hearing on Section 5 And Unfair Methods Of Competition: Protecting Competition Or Increasing Uncertainty Before the S. Comm. on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Protection*, 114th Cong. 3 (2016) [hereinafter *Hearing on Section 5*] (statement by Joshua D. Wright, Professor, Antonin Scalia School of Law at George Mason University).

Section 5 by the FTC has been directed at internet companies, "including the digital platforms that collect and use our data to compete."[31] However, this has resulted in certain problems with Section 5, one being that the FTC has failed to define what constitutes as an unfair method of competition.[32]

B. VIOLATIONS OF COMPETITION LAW IN DATA PRIVACY IN THE EU

The European Union General Data Protection Regulation (GDPR) imposes obligations on organizations that "target or collect data related to people in the EU," regardless of the actual location of the organizations.[33] While the intersection of competition law and data protection law is emerging in U.S. courts, there have been several cases internationally which have ruled on these two areas of law.

i. Bundeskartellamt v. Facebook

Germany's *Bundeskartellamt v. Facebook* case was the first significant case where a government agency assessed the legitimacy of a company's data processing policy under competition law.[34] At issue was the consent consumers were required to give in order to be able to use Facebook's services.[35] The Bundeskartellamt found that the consent Facebook (now Meta) received was ineffective because consent was a prerequisite for using Facebook and its services.[36] This method of attaining consent was considered

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[31] Douglas, *supra* note 17, at 660.
[32] *Hearing on Section 5*, *supra* note 30, at 4.
[33] Ben Wolford, *What is GDPR, the EU's new data protection law?*, GDPR.EU, https://gdpr.eu/what-is-gdpr/#:~:text=The%20General%20Data%20Protection%20Regulation,to%20people%20in%20the%20EU (last visited Oct. 27, 2023).
[34] Vincenzo Iaia, *The Strengthening Liaison between Data Protection, Antitrust and Consumer Law in the German and Italian Big Data-Driven Economies*, 26 BIALYSTOK LEGAL STUD. (SPECIAL ISSUE) 63, 68 (2021); *see also* Bundesgerichtshof [BGH] [Federal Court of Justice] June 23, 2020, Case KVR 69/19, ECLI:DE:BGH:2020:230620BKVR69.19.0 (Meta (formerly Facebook) challenged the Germany Federal Cartel Office's finding that Meta had abused its dominance on the national German market for social networks, arguing instead that the Cartel Office overstepped its authority by using its antitrust power to address data protection concerns).
[35] *Id.* (outlining how Facebook's terms stated it would process personal data through data and cookie policies as well as process device-related data without the users' consent).
[36] Facebook, *Exploitative Business Terms Pursuant to Section 19(1) GWB for Inadequate Data Processing*, BUNDESKARTELLAMT (Feb. 15, 2019), https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=#:~:text=Using%20and%20actually%20implementing%20Facebook's,form%20of%20exploitative%20business%20terms.

inadequate and invalid by the court as it hinged the use of *all* of Facebook's services on consent.[37] In essence, it was a take it or leave it option. The Bundeskartellamt found that Facebook's dominant position in the market and the control it had over data was integral to its growing dominance in the market.[38] Central to the Bundeskartellamt's determination of market dominance was "the strong direct network effects of Facebook's business model and the difficulties associated with switching to another social network."[39] Meta owns four of the largest social media platforms.[40] Its large market share along with the high barrier of entry in the social media industry exacerbates the difficulty users face in migrating to alternative platforms.[41]

Meta's use and actual implementation of its data policy was an abuse of its dominant position within the social network market, using its market position to push exploitative business terms on its users.[42] In the Pechstein case,[43] the German Federal Court of Justice found it necessary to "balance all interests including constitutional rights."[44] In order to protect constitutional rights, the Bundeskartellamt decided to apply Section 19 to cases where one contractual party is "so powerful that it is practically able to dictate the terms of the contract and the contractual autonomy of the other party is *abolished*."[45]

Integral to the Bundeskartellamt's decision making was considering EU data protection regulations under the GDPR, which are based on constitutional rights, while assessing whether data protection could be assessed under competition law.[46] The Bundeskartellamt can, along with the data protection board established by the GDPR, assess whether data processing terms infringe the GDPR.[47] The Bundeskartellamt ultimately concluded that processing data to the extent determined by Facebook was "neither required for offering the social network as such nor for monetizing the network through personalized

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[37] *Id.*
[38] *Id.* at 6 (stating that Facebook has a market share exceeding 95% of daily users, 80% of monthly users, and 50% among registered users).
[39] *Id*. (explaining that users want to connect with select people on social networking platforms, making it difficult to motivate them to transition to another service).
[40] Stacy Jo Dixon, *Global Social Networks Ranked by Number of Users 2023*, STATISTA (Oct. 27, 2023).
[41] Caitlin Chin-Rothmann, *Meta's Threads: Effects on Competition in Social Media Markets*, CTR. FOR STRATEGIC INT'L STUDIES (July 19, 2023).
[42] Facebook, *supra* note 36 at 7.
[43] Bundesgerichtshof [BGH] [Federal Court of Justice] June 7, 2016, KZR 6/15, *translated in Claudia Pechstein Case*, INT'L SKATING UNION (Oct. 10, 2016), https://www.isu.org/claudia-pechstein-case/2082-german-supreme-court-decision/file.
[44] Facebook, *supra* note 36 at 8.
[45] *Id*. (emphasis added).
[46] *Id*.
[47] *Id*. at 8-9.

advertising."[48] Without voluntary consent, the data processing Facebook conducted was unjustified. Facebook was able to violate data protection requirements due to its dominant market power.[49]

ii. Autorita Garante della Concrrenza e del Mercato (AGCM) v. WhatsApp

In 2016, the Italian Competition Authority (ICA) investigated WhatsApp for alleged violations of the Italian Consumer Code.[50] In 2017, The Autorità Garante della Concorrenza e del Mercato (AGCM) fined WhatsApp for 3 million euros for unfair and aggressive commercial practices.[51] WhatsApp, a messaging platform owned by Meta, was accused of unfair and aggressive commercial practices and for exercising undue influence by forcing its users to accept its terms of use in full, providing no option for users to opt out of sharing parts or all of their data with Facebook.[52] If users refused to share their data with WhatsApp, their only option was to not use the messaging platform.[53]

The Italian case, unlike the German case but like the FTC, applied the Consumer Code instead of competition law when formulating its conclusion, likely because no prior decisions allowing the application of competition law to prohibit certain data handling actions existed.[54]

On September 14, 2022, the European Union's General Court upheld a prior decision against Alphabet, Google's parent company, for antitrust violations through Google's Android Operating System.[55] Google required original equipment manufacturers (OEMs) to pre-install certain apps to obtain a license to use Google's App Store (Play Store).[56] It also restricted OEMs from selling devices running versions of Android that were not approved by Google and restricted access to advertising revenue if manufacturers pre-

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[48] *Id*. at 10 (the Bundeskartellamt assessed the interests of Facebook, third parties, and users in reaching its conclusion).
[49] *Id*. at 11.
[50] Press Release, Autorita garante della concorrenza e del mercato, *WhatsApp fined for 3 million euro for haing forced its users to share their personal data with Facebook* (May 12, 2017), https://en.agcm.it/en/media/detail?id=a6c51399-33ee-45c2-9019-8f4a3ae09aa1.
[51] *Id*.
[52] *Id*.
[53] *Id*. (explaining that users who were using WhatsApp prior to August 25, 2016 were able to partially accept the changes WhatsApp made to its terms of use and therefore did not have to give their consent to have their data shared with Facebook to continue using the messaging app).
[54] Iaia, *supra* note 34, at 70.
[55] Case T-604/18, Google v. Eur. Comm'n, (Sept. 14, 2002), https://curia.europa.eu/juris/document/document_print.jsf?mode=lst&pageIndex=0&docid=265421&part=1&doclang=EN&text=&dir=&occ=first&cid=1432559.
[56] *Id*. ¶ 15.

installed a competing general search service.[57] The Commission found that Google "imposed unlawful restrictions on manufacturers of Android mobile devices . . . in order to consolidate the dominant position of its search engine."[58]

C. VIOLATIONS OF COMPETITION LAW IN DATA PRIVACY IN THE ASIA-PACIFIC

As with other parts of the world, data privacy in the Asia-Pacific region is diverse and complex. Many Asian jurisdictions have updated their data privacy laws to "reflect more closely the European data protection regime,"[59] by modeling them after the EU's General Data Protection Regulation (GDPR). To date, no regulatory agency from any of the Asia-Pacific jurisdictions have brought companies to court for violating competition law and data privacy law, like the case of Facebook and the Bundeskartellamt. However, these jurisdictions have recognized the interconnectedness of these two distinct areas of law by amending existing legislation.

In 2021, the Korean National Assembly amended the Unfair Competition Prevention and Trade Secret Protection Act (UCPA), expanding the scope of data protection and the definition of unfair competition.[60] Part of the amendment prohibits the unfair use of data,[61] specifically prohibiting four types of actions.[62] The amendment prohibits (1) the acquisition of data "by theft, deceit unlawful access, or any other improper means, or using or disclosing such data without access authority;"[63] (2) the use, disclosure, or provision to a third party of "data for the purpose of gaining unjust profit or inflicting damage on a data holder by a person who has access to the data in

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[57] *Id*.
[58] Foo Yun Chee & Bart Meijers, *EU Court Backs EU Antitrust Decision Against Google, Trims Fines*, REUTERS (Sept. 14, 2022), https://www.reuters.com/technology/eu-court-backs-eu-antitrust-decision-against-google-trims-fine-2022-09-14/.
[59] Jonathan Crompton et al., *Upcoming Changes to Data Protection Legislation in Asia*, RPC (April 2021), https://www.rpc.co.uk/-/media/rpc/files/20491_a5pb_data_privacy_d9.pdf.
[60] Un Ho Kim et al., *Amendments to Korea's Unfair Competition Prevention and Trade Secret Protection Act Provide More Protection for Data and Famous* People, THE LEGAL 500, (Dec. 9, 2021), https://www.legal500.com/developments/thought-leadership/amendments-to-koreas-unfair-competition-prevention-and-trade-secret-protection-act-provide-more-protection-for-data-and-famous-people/.
[61] Hyung Ji Kim et al., *New Amendment to Specify Unfair Uses of Data and Publicity Rights Under the UCPA*, LEXOLOGY, (Dec. 21, 2021), https://www.lexology.com/library/detail.aspx?g=8de118ae-f348-435a-b7a8-4cc2c4c1206b (noting that amendment went into effect on April 20, 2022, inserted as Article 2(1)(k) in the UCPA).
[62] *Id.*
[63] *Id.*

accordance with a contractual relationship with the data holder;"[64] (3) the acquisition of data or use or disclosure of such data with knowledge of the involvement of (1) and (2); and the circumvention of "technical protective measures for data."[65] Additionally, the amendment provides people with civil remedies, allowing them to seek injunctive relief and damages, and criminal punishment for those who "[circumvent] technical protective measures for data."[66]

In June 2020, the Japanese Parliament also amended the Japan Act on the Protection of Personal Information (APPI) so that it could better align with the GDPR and strengthen data protection.[67] The Japan Fair Trade Commission, in publishing their report on the Study Group on Competition Policy for Data Markets, noted that data is an increasing source of competitiveness and that various challenges arise when drafting effective competition policy in data markets.[68]

D. WHY IS THIS RELEVANT?

As mentioned at the beginning of this note, there are opposing theories regarding the relationship between competition law and data privacy law. Adopting the separatist view, some argue that antitrust and data protection are neither connected nor informative towards each other and should therefore be separate.[69] Others argue that, under an integrationist view, especially considering the continuing growth of the digital economy, both areas of law are inevitably interconnected.[70] While both viewpoints have strong supporters and even stronger critics, it is inevitable that the two will intersect and must be considered in tandem due to the ever-growing digital economy.

Regardless of what position one subscribes to, it is undisputed that competition law and data protection law are in tension with each other. In the world of antitrust, data is a commodity. Personal data is the hidden cost that consumers pay in order to use various services on the internet, like Facebook and Amazon.[71] By effectively collecting and monetizing this data, companies

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[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] Sébastien Evrard et al., *The Intersection of Competition Law and Data Privacy in APAC*, GLOB. COMPETITION REV. ASIA PAC. ANTITRUST REV. at 34-35 (2022).
[68] *Id.* at 20, 34 (2022).
[69] Douglas, *supra* note 17, at 653-655.
[70] *Id.* at 654.
[71] *Id.* at 659. ("[l]eading digital platforms rely on collection and analysis of masses of data about consumers to drive their services, like search and social media—and to drive their profits.").

can "win the race to compete, attracting users, and benefit from the network effects that characterize many of these online services."[72]

On the other hand, this consumer data contains "personally identifiable [information] and [is] limited in its collection, use, and sale by the FTC's . . . common law of data privacy."[73] As mentioned at the beginning of this note, the FTC's section 5 enforcement has been targeted towards internet companies and their collection and use of consumer data. Privacy law restricts the collection and use of consumer data while competition law would further its use or at least provide a property right in it. This dynamic "creates potential tradeoffs with the benefits of data-driven competition."[74] "Early research on the . . . (GDPR) . . . suggests that improved consumer control . . . may . . . reduce competition in consumer data intensive markets, because it limits data sharing."[75]

Because of the continued tension between a desire to promote competition and the need to protect consumer welfare, this subject is relevant in ensuring both goals. Without considering both areas of law in the discussion, there exists the danger of consumer exploitation at the cost of pro-competitive behavior. Likewise, by only considering consumer welfare, competition can be stunted, violating U.S. antitrust principles. The concept of an information fiduciary may be applied to reconcile these interests, balancing the duties big data companies owe to not harm the interests of the people they gather information from while continuing to pursue their profit goals.[76] Regardless, privacy is a factor to be considered in non-price competition.[77]

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[72] *Id.*

[73] *Id*. at 660.

[74] *Id*. *See also* Catherine Tucker, *Online Advertising and Antitrust: Network Effects, Switching Costs, and Data as an Essential Facility*, CPI ANTITRUST CHRONS., Apr. 2019, at 6.

[75] Douglas*, supra* note 17, at 660.

[76] Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1185, 1186 (2016).

[77] Salil K. Mehra, *Data Privacy and Antitrust in Comparative Perspective*, 53 CORNELL INT'L L.J. 133, 135 (2020) (explaining that the antitrust action was "hampered" because platforms argued that due to their free services, they could not harm consumers. This might have been a valid argument in the *Microsoft* case but does not stand when examining the business models of companies like Amazon, Meta, and Google).

III. ANALYSIS

A. WHAT IS THE OVERALL TREND AMONGST VARIOUS JURISDICTIONS?

European and Asia-Pacific jurisdictions increasingly adopt legislation that intermingles privacy and competition laws.[78] The EU's GDPR leads the discussion and serves as a model for other jurisdictions.[79] The GDPR, as mentioned, is the most severe form of legislation regarding data protection.[80] While other jurisdictions vary in the level of severity of their legislation, all have drawn from the EU's principles and considerations in shaping their own domestic laws.[81]

Insights from other jurisdictions adopting legislation could aid the U.S.'s endeavor to create regulation that caters to both proponents of strict and lax regulatory frameworks.[82] The ongoing legislative changes in these jurisdictions underscore the intersection of data privacy and competition law, contradicting critics who argue otherwise.[83]

i. What are unfair practices against trade?

As it stands, the EU provides the most information on interpreting unfair practices in data protection. In cases like *Bundeskartellamt v. Facebook* and *AGCM v. WhatsApp*, the inquiry often begins by determining if there was actual consent. As seen in those cases, consent was given only under specific circumstances, such as an opt-in versus an opt-out agreement. In *AGCM v. WhatsApp*, consent was not willingly given since the use of WhatsApp and the other services was directly linked to a broad, sweeping consent agreement which denied users the ability to choose the extent of information they wished to share. On the other hand, practices such as those employed by Google in *Google v. Comm'n* were deemed unfair even when the restraint was not on actual end users but on manufacturers.

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[78] Evrard et al., *supra* note 66.
[79] *Id*.
[80] *Id*.
[81] *Id*.
[82] Allison Grande, *Pelosi Raises Flag on Data Privacy Bill's State Law Override*, LAW360 (Sept. 1, 2022, 9:02 PM EDT), https://www.law360.com/consumerprotection/articles/1526889/pelosi-raises-flag-on-data-privacy-bill-s-state-law-override?nl_pk=fe5864d8-b41d-4cbb-b14d-e7750a7a8e6a&utm_source=newsletter&utm_medium=email&utm_campaign=consumerprotection&utm_content=2022-09-02.
[83] *Id.*

Within various jurisdictions, big tech companies have been the target of scrutiny regarding their data practices.[84] "Regulators in Europe, the US, and other regions are realizing that large tech companies have become very powerful, . . . collect[ing] huge amounts of data, while rules on their behavior lag behind."[85]

B. HOW SHOULD THIS INFORM U.S. LEGISLATION AND/OR FTC GUIDELINES?

i. First, is it appropriate for the FTC to create stricter guidelines for what behavior is fair or unfair?

The FTC's mission is to protect the public "from deceptive or unfair business practices and from unfair methods of competition."[86] It has three strategic goals: "protect the public from unfair or deceptive acts or practices in the marketplace, protect the public form unfair methods of competition in the marketplace and promote fair competition, [and] advance the FTC's effectiveness and performance."[87]

There is criticism about whether the FTC is the appropriate body to address these issues. Three Republican senators have told the FTC to "back off its ambitious efforts to craft sweeping data privacy and security rules, arguing that Congress is the 'only appropriate venue.'"[88] Their reasoning stems from the argument that "the country would be better served by Congress" making legislation than by "'bureaucratic rulemaking' that would place 'undue burdens' on companies."[89]

The FTC holds the authority to define and determine what behavior is condoned. As mentioned earlier in this note, the FTC recently published a policy statement to address what the Commission deems as "unfair methods of competition."[90] Although the policy statement does not fully clarify what actions are impermissible, it does indicate that the Commission is able to provide guidance, however useful its guidance may be. Furthermore, several

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[84] Catherine Stupp, *European Privacy and Antitrust Regulators Join Forces on Corporate Data*, WALL ST. J. (Dec. 27, 2021, 5:30 AM), https://www.wsj.com/articles/european-privacy-and-antitrust-regulators-join-forces-on-corporate-data-11640601006.
[85] *Id*.
[86] *Mission*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/mission (last visited Oct. 27, 2023).
[87] *About the FTC*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc (last visited Oct. 27, 2023).
[88] Allison Grande, *Privacy Rules Should be Up to Congress, GOP Sens. Tell FTC*, LAW360 (Nov. 4, 2022, 10:10 PM EDT), Privacy Rules Should Be Up To Congress, GOP Sens. Tell FTC - Law360.
[89] *Id*.
[90] *Policy Statement*, *supra* note 6.

state attorney generals have supported the FTC's efforts to establish data privacy and security rules.[91]

ii. Challenges raised by critics and concerns regarding state sovereignty within the U.S. federal system

Determining the FTC's authority to regulate this area of law and concluding that competition law and data privacy intersect is just the beginning of this inquiry. Planning any course of action in the United States encounters difficulties.

First, the FTC "faces challenges including budget constraints, personnel changes and potential legal pushback."[92] Supporters of the FTC adopting a more proactive approach to data privacy have urged it to use its Magnuson-Moss authority "to write more general rules for data usage" to ban certain activities and potentially levy fines against companies.[93] Taking this route would require the FTC to define the unfair or deceptive practices.[94] This poses a unique challenge due to the lack of precedent regarding privacy in this area, and could be challenged in court.[95]

Secondly, federalism presents another issue. If the FTC does not implement regulation, Congress still has the power to enact legislation addressing the pertinent issues. Currently, a bill meant to enact federal privacy legislation was sent to the House.[96] Then-House Speaker Nancy Pelosi stated that, due to preemption issues, "more work needs to be done" before this bill can become law.[97]

The issue of preemption stems from California's existing state law on data protection. The California Consumer Privacy Act of 2018 currently provides "more stringent privacy protections" than the proposed federal legislation.[98] Within the federal bill exists a preemption clause, "which would mandate that the federal statute override comprehensive state protections."[99] Senator Pelosi and California constituents currently oppose the proposed federal legislation as it will override state legislation, diminishing the protection Californians

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[91] Allison Grande, *AGs Call On FTC To Boost Consumer Data Privacy*, LAW360 (Nov. 18, 2022, 9:30 PM EST), AGs Call On FTC To Boost Consumer Data Privacy Protections - Law360.
[92] David Uberti, *FTC's Effort to Strengthen Online Privacy Protections Faces Hurdles*, WALL ST. J. (Nov. 2, 2021, 5:30 AM ET), https://www.wsj.com/articles/ftcs-effort-to-strengthen-online-privacy-protections-faces-hurdles-11635845401?mod=article_inline.
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] Grande, *supra* note 81.
[97] *Id.*
[98] *Id.*
[99] *Id.*

currently have. The proposed federal legislation is not as strict, and the preemption issue looms over it successfully passing through the Senate.[100]

IV. CONCLUSION

The intersectionality between data privacy law and competition law is inevitable. Data is currency and the value it holds continues to grow.[101] Businesses will continue to rely on data in order to grow and having access to it is an integral part of being competitive in many markets. Companies like Facebook and Google have an advantage that many newer businesses do not in that the breadth of data they have far outnumbers what a newer business can hope to attain. Many businesses rely on the data that Facebook and Google has in order to, among other actions, provide targeted advertising.

It is important to understand that sharing consumer data is an integral part of maintaining a competitive market. On the other hand, it is equally important to protect the consumers whose data is being used and sold. As the EU states, "the sources of competitiveness for the next decades in the data economy are determined now."[102] Whether it be Congress enacting legislation or the FTC specifying what "unfair practices are," competition law must be adapted to the digital age. Legislation and policies from abroad can be informative of how the US should view data privacy and competition.

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[100] *Id.*

[101] Pedro Palandrani, *The Value of Data in a Digital World*, NASDAQ (May 13, 2022, 9:00 AM EDT), https://www.nasdaq.com/articles/the-value-of-data-in-a-digital-world.

[102] European Commission, *A European Strategy for Data*, Eur-Lex (Feb. 19, 2020), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0066.