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# **PRIVACY RIGHTS AT A CROSSROADS: PARALLEL ENFORCEMENT OF “CONSUMER CONTROL” BY PRIVACY REGULATORS AND ANTITRUST AUTHORITIES**

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# Presenters



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**SECTION 01**

# **FOUNDATION**

# What are privacy rights?

- Information rights
- If consent is used, it must be fully informed and freely given
- Rights to control how personal data is used: primary or secondary purposes
- Rights to access and request deletion or restriction of data usage
- Rights to export data to another provider
- Right to object to legitimate interest processing

# What is the purpose of antitrust?

- Protect healthy competition on the merits
- Prevent restrictive and abusive behaviours
- *Ex post* intervention



**SECTION 02**

# **GDPR AND PECR**

# GDPR REGIME

- Came into force 25 May 2018
- Enforcement action by DPAs:
  - Information notice: provision of information to DPA
  - Enforcement notice: requirement to take or refrain from certain action
  - Assessment notice: to allow audits, inspections, observations etc for an assessment
  - Monetary penalty: range of fines
- Range of regulatory fines so far:
  - Small (EUR 100) – large (EUR 200 m (under /EUR 50m (final)
  - Class/group action or individual claims
  - No need to have suffered financial loss

# FINE FACTORS

- **Gravity and nature** — The overall picture of the infringement. What happened, how it happened, why it happened, the number of people affected, the damage they suffered, and how long it took to resolve.
- **Intention** — Whether the infringement was intentional or the result of negligence.
- **Mitigation** — Whether the firm took any actions to mitigate the damage suffered by people affected by the infringement.
- **Precautionary measures** — The amount of technical and organizational preparation the firm had previously implemented to be in compliance with the GDPR.
- **History** — Any relevant previous infringements, including infringements under the Data Protection Directive (not just the GDPR), as well as compliance with past administrative corrective actions under the GDPR.
- **Cooperation** — Whether the firm cooperated with the supervisory authority to discover and remedy the infringement.
- **Data category** — What type of personal data the infringement affects.
- **Notification** — Whether the firm, or a designated third party, proactively reported the infringement to the supervisory authority.
- **Certification** — Whether the firm followed approved codes of conduct or was previously certified.
- **Aggravating/mitigating factors** — Any other issues arising from circumstances of the case, including financial benefits gained or losses avoided as a result of the infringement.

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# FINES TO DATE

MONTH	Sum of Fines (up to month)	Number of Fines (up to month)
Jul 2018	€ 400,000	1
Sep 2018	€ 400,300	2
Oct 2018	€ 400,688	3
Nov 2018	€ 420,688	4
Dec 2018	€ 436,388	9
Jan 2019	€ 50,437,276	12
Feb 2019	€ 50,502,384	24
Mar 2019	€ 50,964,684	32
Apr 2019	€ 51,273,819	40
May 2019	€ 51,833,345	48
Jun 2019	€ 52,917,895	57
Jul 2019	€ 368,275,670	65
Aug 2019	€ 371,528,505	74
Sep 2019	€ 372,435,028	83
Oct 2019	€ 406,947,402	112
Nov 2019	€ 408,062,202	132
Dec 2019	€ 429,819,732	155
Jan 2020	€ 457,930,442	169
Feb 2020	€ 458,816,532	198
Mar 2020	€ 466,677,568	230
Apr 2020	€ 467,471,268	233
May 2020	€ 467,476,268	234

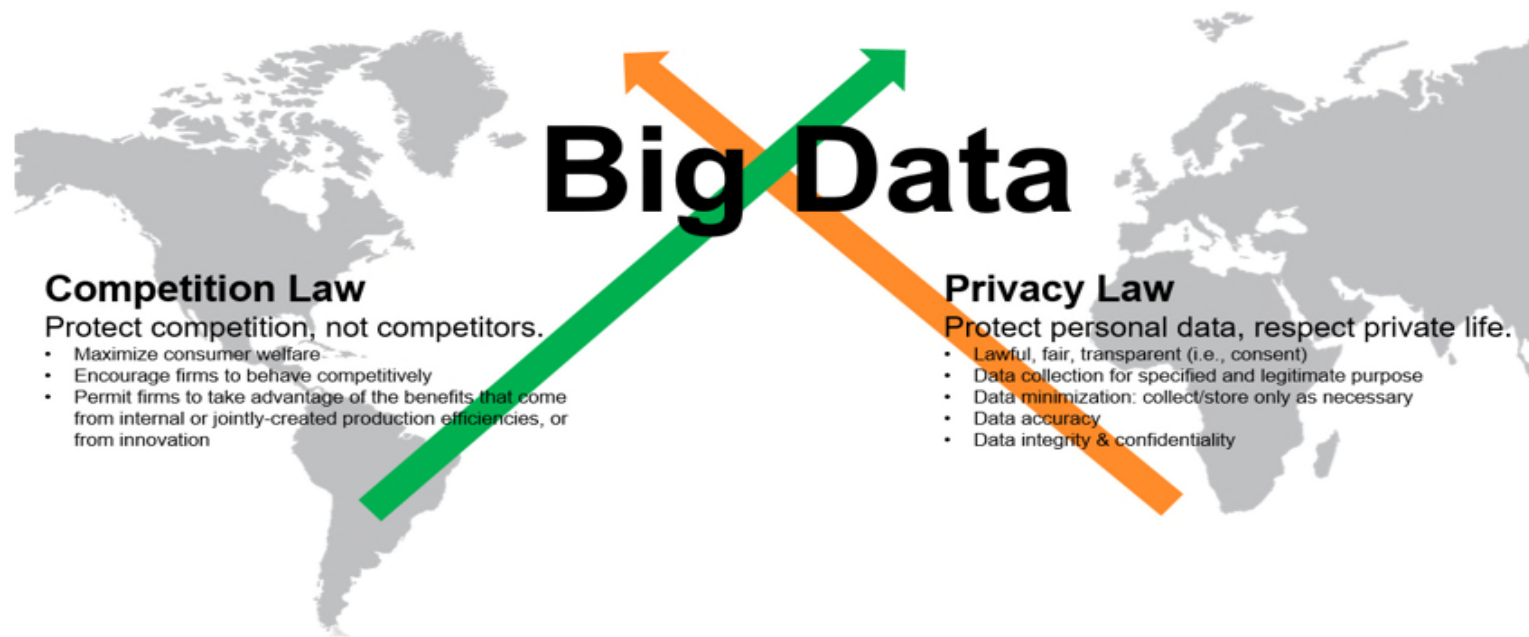
# BIG DATA

- Focus of regulators on collection of data
- Is collection properly informed?
- Do consumers really have effective control rights over personal data
- Monetisation of big data is now entrenched in service providers business models
- Is it a “price to pay” for free services e.g. social media platforms, file sharing apps
- Cookies: the next stage for personal data?
- PECR: now and next?

**SECTION 03**

# **AT A CROSSROADS: ENTERS ANTITRUST**

# The crossroads



# The very basis of it all



*“Data is the new currency.”*

Margrethe Vestager,  
EU Commissioner for Competition

## Antitrust issues in data aggregation and handling

- The starting point: Determining the value of data: freshness, granularity, uniqueness, velocity?
- The concern: Creating or consolidating an insurmountable data advantage
  - Mass aggregation of personal data provides unique “competitive edge”
  - Use of data across business purposes leverages this unique competitive advantage
- The problem: Isn't this what competition is about?

# The big question



When does this harm competition on the merits?

## Blurring the borders between antitrust and consumer/privacy protection

- Initial scope of EU investigations: recourse to traditional theories of harm in network industries: “platform power”
- The bridge to privacy rules: “unfair trading practices”
- Germany’s FCO’s controversial approach: violation of data protection *consent rules* as benchmark for abuse of a dominant position – BUT: challenged under appeal
- Recent EU investigations cover privacy law territory with the antitrust rule set: *How* is data gathered, pooled, processed, used and monetized: “data power”

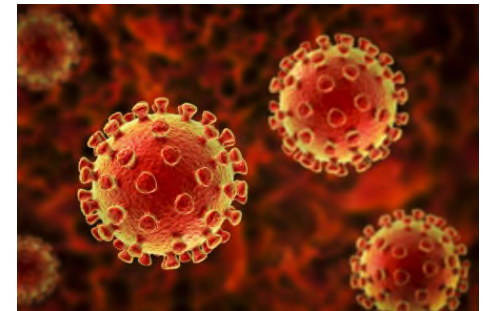


**SECTION 04**

# **PRIVACY AND ANTITRUST DURING THE COVID-19 PANDEMIC**

# Antitrust and privacy during the COVID 19 pandemic

- Testing and tracing: an increased *public* need for collection of private data; and employer obligation to protect staff
- Tracing apps: the treasure trove of data
- Is it intrusive collection or serving the public cause
- A test for striking the right balance
- EDPB/DPA guidance on contact tracing apps: emphasize need for anonymity, proper control, proportionality and deletion obligations



## Enforcement action by antitrust regulators

- Limiting (mandatory) data collection on grounds of antitrust or privacy
- Imposing portability of data for customers
- Imposing fair access to data (against remuneration)
- Imposing interoperability between different platforms and data
- *Ex ante* regulation?

**SECTION 05**

# **REMINDERS AND BEST PRACTICES**



# Recommendations

- Check consent, accessibility and transparency requirements
- Documentation of procedures
- Fairness check: Is there a proper balancing of interests ?
- Antitrust sanity check: If the conduct involved some other input (besides data), would antitrust law care about it?

## Morgan Lewis Coronavirus/COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

To help keep you on top of developments as they unfold, we also have launched a resource page on our website at

[www.morganlewis.com/topics/coronavirus-covid-19](http://www.morganlewis.com/topics/coronavirus-covid-19)

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to [subscribe](#) using the purple “Stay Up to Date” button.

## Biography



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Pulina Whitaker's practice encompasses both labor and employment matters as well as data privacy and cybersecurity. She manages employment and data privacy issues in sales and acquisitions, commercial outsourcings, and restructurings. Pulina provides day-to-day advisory support for multinationals on all employment issues, including the UK's Modern Slavery Act and gender pay reporting requirements. She also advises on the full spectrum of data privacy issues, including compliance with the General Data Protection Regulation.



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Christina Renner concentrates her practice on European Union and German merger control, competition, and antitrust law, with experience in cartels and general behavioral matters, abuse of dominance, and EU state aid laws. Christina regularly advises clients concerning mergers reviewed by the European Commission and the German Federal Cartel Office, as well as the French, Austrian, and Belgian competition authorities. She has experience handling multi-jurisdictional filings for a variety of clients and regularly advises on complex competition compliance matters.



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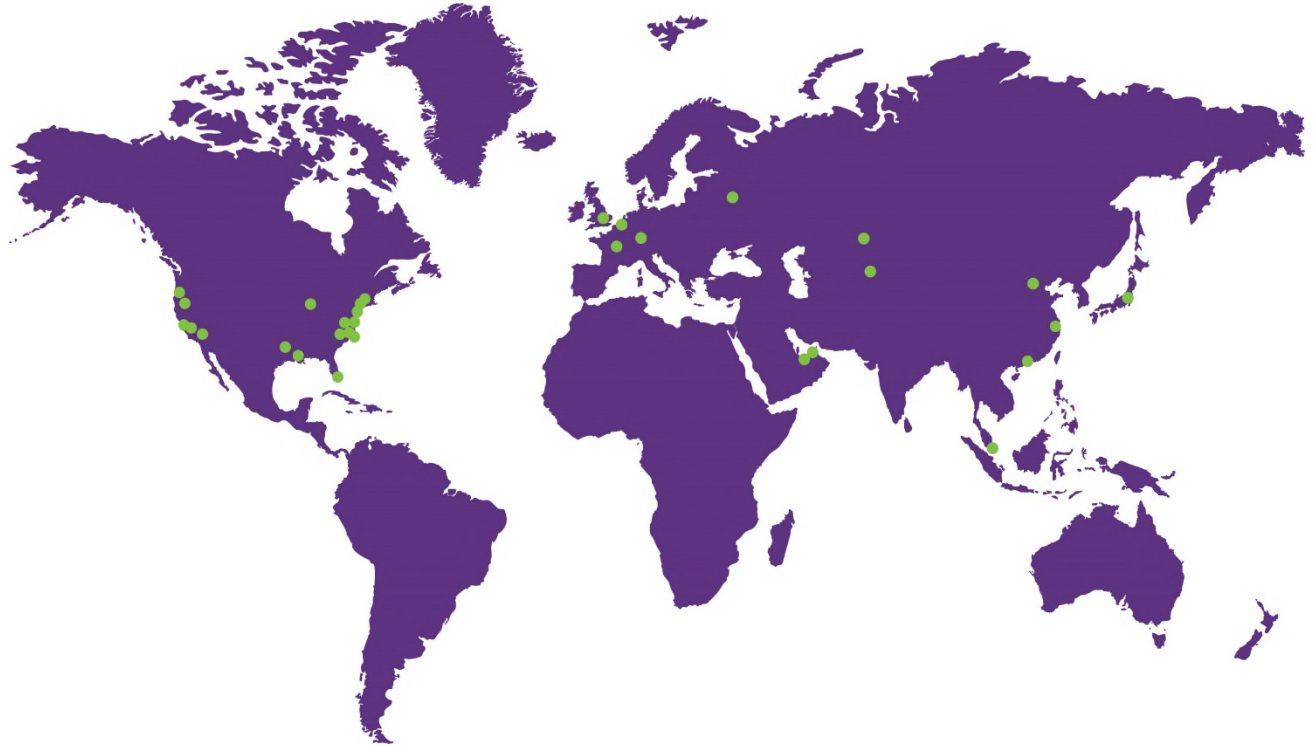
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