

Regulating Privacy by Design

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Technology: Transforming the
Regulatory Endeavor

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Overview

- Privacy Technology Framework
 - PETs
 - Privacy by Design
- Economic Incentives
 - Consumer demand
 - Lack of data needed for cost-benefit analysis
 - Reputational sanction
- Regulatory Incentives
 - Under existing FTC authority
 - New privacy law would enable regulatory innovation

Understanding Privacy Technology

- PETs
 - “Substitute PETs”
 - “Complementary PETs”
 - Privacy-friendly
 - Privacy-preserving
- Privacy by Design (PbD)
 - Use of PETs
 - Use of design methodology
 - Front-end software development processes and practices
 - Back-end data management processes and practices
 - Critique of FTC’s new Proposed Framework
 - The Limits of PbD

Economic Incentives ⁽¹⁾

- Economics of Privacy Investments
 - Orthodox view: Rational firms should deploy privacy technologies in response to consumer demand for protection against the risks associated with data collection, unauthorized secondary use, processing errors, and improper access.
- First Problem: Weak consumer demand
 - Information asymmetries
 - Behavioral and cognitive biases

Economic Incentives ⁽²⁾

- **Second problem: Lack of data needed for cost-benefit analysis**
 - Cost-benefit approach requires data (cost of privacy breaches and probability of their occurrence) but little is available. Absent such data, firms
 - Are less likely to undertake a cost-benefit analysis
 - More likely to adjust relevant budget up or down or adopt a more passive strategy
- **Third problem: Opportunity costs of privacy investments**
 - Firms have overwhelming incentives to collect and analyze as much data as possible, which severely limits their adoption of technology that would restrict such activity.
- **Upshot:**
 - Firms shun substitute PETs and prefer privacy-friendly PETs over privacy-preserving PETs.

Regulatory Incentives ⁽¹⁾

- FTC's Section 5 powers
 - “Privacy on the Ground”
 - Workshops, reports, guidance
 - Informed by FTC enforcement authority
 - Derive best practices from unfairness cases
 - Prohibited
 - Required
 - Recommended

Regulatory Incentives ⁽²⁾

- New Law Might Allow “Regulatory Innovation”
 - Encourage industry to experiment (discrete agreements)
 - Negotiated rulemaking or other multi-stakeholder processes for defining what PbD means in specific sectors
 - Privacy safe harbors
 - Reward firms that use PbD (sticks and carrots)
 - Rewards must match up with which PETs firms adopt or how they approach PbD:
 - Substitute or possibly privacy-preserving PETs=>Avoid sticks, qualify for carrots
 - Privacy-friendly PETs=>Positive factor but not sufficient by itself
 - PbD may qualify for rewards if comprehensive and transparent
 - Require consultation in defining PbD
 - Retain oversight and enforcement powers