



“Data Protection Law in the Context of Competition Law Investigations”

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“Data Protection and Competition: interfaces and interaction”

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INTRODUCTION

- This seminar is about an interface of data protection and competition, and more specifically about data protection law in the context of competition investigations. It is therefore also taking up a new more general topic, which has started to trigger great interest in recent months: the interplay between privacy and data protection law on the one side and competition law on the other side.
- The increasing relevance of data in general, and the role of personal data more specifically, in the current political and economic debates is evident: data has been called the "new oil"; big data seems to be the way forward for a huge number of economic activities; access to large datasets of personal data is fundamental for an increasing number of services.
- All this simply cannot be ignored as a relevant element to take into account by authorities charged with the enforcement of competition law, and the same applies obviously to authorities charged with the enforcement of data protection law, like my own.

CAVEAT

- Let me be clear and make an important disclaimer at the outset. I am here today representing an EU institution, the European Data Protection Supervisor (EDPS). We act

as a supervisor of and advisor to all the European Institutions, and work together with national data protection authorities to improve the consistency of data protection law and practice in the EU.

- In relation to competition law, our *supervisory* competence is therefore related to the activities of the Directorate General for Competition (DG COMP) of the European Commission. In our *consultative* role, we may also issue opinions on any piece of legislation proposed by the Commission or any other relevant subject with a data protection angle.
- Let me therefore state upfront that I am *not* in a position to provide any legal advice to private companies or any legal counsel.
- Our interest in the topic has triggered an intense internal reflection which will be developed in an opinion which we envisage to publish in the coming months, in any case before the end of this year.

BROAD OVERVIEW OF INTERFACES

- At first sight, there are some obvious differences between competition and DP law and policy:
 - Competition law and policy address the behaviour of companies (e.g. prohibited agreements, abuses of dominance, merger control) which could lead to a distortion of competitive dynamics among them and, ultimately, harm consumers. They basically ensure that consumers have a fair choice.
 - DP law and policy in the EU aim at making sure that individuals' fundamental rights, notably their right to privacy and protection of personal data, are respected and put in practice through the appropriate safeguards and processes.
 - But there is a common aspect to both areas: the violation of these rules harms the consumer/individual/data subject, and they also address the wider public interest of a free and open society based on the rule of law and not only on survival of the most powerful.
- It has to be highlighted that DP rules and competition rules in the EU are two separate sets of obligations with different legal bases, and that compliance with these rules is under the supervision of separate authorities in the EU.
- The independence of Data Protection Authorities is a fundamental principle enshrined in Article 8 of the EU Charter of Fundamental Rights. It has been upheld clearly by the European Courts in two cases against Germany and Austria. The roles of the European

Commission in competition law and in DP law are therefore quite different, as regards policy making and enforcement.

- Compliance with one set of rules does not necessarily mean compliance with the other set of rules, as well as non compliance with one set of rules does not mean necessarily infringement of other rules. However, at the interfaces of these rules, there may be much more scope for interaction than is now widely understood or practiced.

INTERFACES AND INTERACTION

- When thinking about the main branches of competition law, we can envisage an interaction with data protection law from various points of view.
- In the **antitrust sector**, the European Commission can carry out investigations of suspected prohibited agreements or practices pursuant to Article 101 of the TFEU or abuses of dominance pursuant to Article 102 TFEU. DG COMP also regularly carries out sector enquiries in order to verify compliance with the Treaty rules involving whole sectors of the economy.
- In this context, it can carry out inspections, it can send requests for information, attend and host meetings; it keeps records of all its activities; it then issues decisions which can be challenged before the EU Courts.
- When looking at the substantive part of these activities, the analysis carried out by the Commission will always start from the market definition exercise. Data in general and personal data specifically, have nowadays an evident economic value and certain services will need this input to be available at acceptable conditions. It follows quite clearly that in certain areas the competition authorities' market definition analysis will have to take into account the growing role of personal data. This will also have an impact on the establishment of the existence of a possible dominant position and will then determine which types of abuses may be identified.
- A similar relevance of data as an important input can be identified also in the competition authorities' activities in **merger reviews**. In this scenario, the "forward looking" analysis carried out by the authority may need to take into account the increasingly important role of personal data as an input. It will also need to verify whether the merger itself would trigger dynamics through which concentration of control over data (either or not personal data) could cause a "significant impediment to effective competition", to use the words of the Merger Regulation.

- Also, in relation to mergers, one could consider a possible conflict between DP rules and possible remedies imposed by the authority which can consist of access to certain datasets, for instance. If the dataset includes personal data, a complex legal scenario emerges whereby a merging company can be required to grant access to its data to a third party and could as a result find itself in a position of conflicting requirements between competition law and DP law.
- When thinking about the areas of activity involving the investigation of **cartels**, it is mostly procedural issues that come to my mind. It is in this area that the Commission carries out the highest number of inspections. It also requests large amounts of information in order to be able to properly investigate the potential cartel. All these activities involve processing of personal data and DG COMP is bound to respect Regulation 45/2001 like all other EU institutions, under the supervision of the EDPS. As these investigations typically involve companies at national level, this also leads to an interesting interaction with national DP law.
- Also in relation to **State Aid** proceedings, the relevant aspect in my view is mostly procedural: the procedure involves a dialogue between Member States and the Commission, and may also include processing of personal data of possible beneficiaries of the aid who are natural persons. In this context, similar interactions of competition law and DP law (both EU and national) are to be expected.

RELEVANT CONTEXT

- As already touched upon, developments in technology in recent years led to a dramatic increase of the relevance of data – including personal data – in all economic sectors: for instance, "big data" is a phenomenon with great impact across sectors, from technology to medical, to financial, to retail, transport etc.
- It is a fact that consumer data are an asset that companies value enormously. Consumer data are highly relevant in existing client relations, obviously also for continuing and widening such relations ("exploiting consumer potential") and for acquisition and further development of new relationships, either or not via cross selling or other exchanges of experience.
- At the same time, in the EU, all companies involved must comply with national DP legislation which implemented Directive 95/46/EC. As you certainly know, the Directive

is under review and the European Parliament and the Council are currently working on the text of the General Data Protection Regulation proposed by the Commission in January 2012.

- Some interesting trends can be observed:
 - Companies across all economic sectors are collecting large amounts of consumer data; they are competing among each other in order to have access to data; in particular, the advertising industry nowadays seems to value personal data tremendously, because the creation of online user profiles allows very sophisticated targeting possibilities which were unimaginable in the off-line world; companies need to be able to manage large datasets to be competitive and anticipate trends;
 - Consumers are also getting more and more "tech savvy"; electronic commerce is expanding; consumers search for products and services online to gather information before they purchase offline; consumers now also demand free online services, but at the same time they are not sufficiently aware of how companies active online can profit from using the personal data they disclose while surfing online.
- From a more strictly legal point of view, in the EU the protection of personal data is a fundamental right enshrined in the Charter of Fundamental Rights and in the TFEU: its position in the hierarchy of principles of law is highest – this is an important difference with other systems (like in the US) where it is a matter of consumer protection: it is certainly a challenge to reconcile these fundamental differences in transatlantic relationships.
- However, our focus is now on making the right to data protection much more effective in practice in a more and more dynamic and globalising digital environment. See the DP review mentioned before.

COMPETITION POLICY AND DP: SUBSTANTIAL ASPECTS

- I would now like to briefly touch upon a few substantial aspects on which we - as an institution - are currently reflecting:
- Online privacy is one of the dimensions on which **consumers** compare offers between service providers – one could conceive the idea of competition “on privacy”. A more privacy friendly service can be considered to be of a better quality by the consumer than a service which has an unclear or opaque privacy policy. However, consumers are used to

get free online services (e.g. search, webmail, word processing, data storage) and may be willing to provide personal data in exchange for free, quick and easy service. This means that better privacy policies do not *automatically* mean that the service or product is *perceived* as necessarily of better quality by the consumer.

- In this context, we also see a serious problem of **asymmetry in knowledge** of what happens to the personal data provided by the consumer once he or she has handed them over to the provider. A supplier can find secretly new ways of exploiting personal data provided by customers in order to offer new types of services (see e.g. examples of Facebook Beacon). This type of development has a highly intrusive impact on individuals and risks placing a company at the border of DP law compliance. This is because the principle of "purpose limitation" requires that personal data can only be used for purposes that are compatible with the one for which they were originally collected.
- Establishing the border between compatible and incompatible use is often a complex and delicate exercise in DP law. From a competition perspective, consumer choice among suppliers could be seriously hampered by the lack of transparency of privacy policies. Therefore the analysis of competition dynamics, namely the extent to which one company does compete with another should take into account also this specific aspect. In this respect the new rules on transparency enshrined in the proposed GDPR may help enhancing the comparability of different competitors' offers.
- The analysis of the competitive dynamics in these markets also has to take into account the existence of **free service providers** that need to collect huge amounts of data to be able to monetize (mainly through advertising), and at the same time compete with other pay service providers. In other words, consumers in one case pay with money, in the other case pay with their personal data. A relevant market analysis should take into account these different business models and consider whether in the eyes of the consumers there is *substitutability* between them. This is most certainly not easy to evaluate, in view of the fact that the relevant market share of a free online service provider cannot be based on sales or volume data.

COMPETITION POLICY IN PRACTICE

- When looking more closely at the day-to-day activities of the competition authorities, I would like to sketch out a few reflections.
- Personal data have become de facto an important **input** for many economic activities, such as mainly advertising, consulting services, and statistical services. Competition

analysis in the EU has never approached **market definition issues** from this perspective, but the fact is that personal data are traded (e.g. existence of “data brokers”) as a valuable input and companies may need them to set up or continue their businesses.

- Strictly speaking DP policy does not look at bulk of datasets, but is concerned by the possible impact of processing on each single individual – however the economic value of PD may not reside in the single individual’s data as such, but rather in how data are collected and organized in a way that can translate into profitable processes (e.g. data - name, emails, addresses, IP addresses, surfing history - of all subscribers of a given category of online services is valuable for advertisers who want to target that special category).
- Profiles are valuable in that they allow businesses to focus their offer to users in ways that were never available before the explosion of the web. Not every player has the technical means to re-create these datasets/profiles: this translates - from a competition perspective - into possible **barriers to entry**. However, digital markets are very dynamic and have been characterized by "creative destruction" cycles (e.g. Facebook replaced and basically eliminated the previously most important Social network MySpace). The antitrust analysis requires a delicate balance of all these aspects.
- Another dimension of the interplay between DP and competition policies is related to cases of **dominance in a given market and its abuse** (Art. 102 TFEU). The exact terms on the basis of which the interaction between DP and competition policy enforcement against abuses of dominant position should take place, has not been completely explored yet. It should be highlighted that, from a DP perspective, if certain behaviour constitutes an infringement of DP rules, legally it is the same (all the other conditions being equal) whether the infringing company is dominant or not. To the contrary, abuses under Article 102 TFEU can only be punished once the dominant position of the company is demonstrated.
- First, it has to be clarified which is the **relevant market** on which the existence of a **dominant** position is to be assessed. In this respect, the interface with DP rules exists so long as personal data are involved. If no personal data are processed as part of the business activity of the company, the link is non existent. Furthermore, markets in which processing of personal data is involved can include free services: in this case, demonstrating dominance on the basis of the traditional criteria of ability to raise prices above competitive level cannot apply. Competition authorities will need to develop an innovative and forward looking approach.

- Second, the larger the company (e.g. online service provider such as Google, Yahoo, Facebook, eBay), or perhaps more relevant, the more comprehensive its scope, the more difficult it will be to find the borders of relevant markets: providers usually cross-finance services from one service to another (concept of two-sided platform business model: e.g. Google offers free search service and finances it with online advertising services offered against payment to advertisers and publishers); they may discriminate between users and/or offer scalable services (e.g. free plain vanilla service to attract basic users, increasing price for more sophisticated/business users). But also: when does a simple cloud storage service stop competing with free services and start competing with large enterprise offers? What is the role of open source? Etc. Etc.

SOME CONSEQUENCES

- I see two consequences: for competition policy, it is very difficult to establish exactly which service competes with which other service.
- For DP policy, the problem posed by these "multi service" companies is multi-faceted: when is processing of personal data involved? Which company is the data controller? Which is the geographic scope of DP law? For which purpose were the personal data intended and is there a risk of function creep/incompatible use?
- These two sets of issues are different but run in parallel, and a finding in one field should be coherent with the evaluation in the other field: e.g. if the competition analysis identifies one category of online services which are to be considered substitutable with each other, also the assessment of compatible use should take into account the substitutability aspect (see WP29 opinion on compatible use).
- In other words, it would be problematic if, from a DP perspective, the use of personal data to deliver a service, different from the one for which the data were originally collected, was considered incompatible, while the competition analysis would consider these two services as substitutable, therefore belonging to the same relevant market. However, it cannot be excluded that DP requirements are stricter than market forces. In fact, this is a dimension that plays an important role in the DP review and why strong and effective sanctions ("competition size" fines) are really needed.
- One could also consider that the behaviour of a company which can afford to constantly infringe privacy rules to the detriment of data subjects, without suffering competitive constraints from other competitors, could be considered as an element in the evaluation of dominance. In other words, disrespect for data protection rules could be conceived as a

"symptom" of dominance. In that scenario, competition law would serve to confirm and "back up" DP rules and principles in critical markets.

- Once the fundamental issue of establishing the dominance in a given market is sorted out (which is clearly not a given), the competition authorities' approach is to demonstrate a practice that would constitute an **abuse**. In this area, the list of possible abusive behaviours is very long and ever evolving: for instance, acquiring personal data through anti competitive means; seeking to prevent other competitors from acquiring certain data (exclusivity agreements); impeding data portability.
- We are reflecting about a possible scenario whereby an infringement of data protection rules by a dominant firm could substantiate an abuse pursuant to the competition law criteria, but at this stage we do not have an answer to this complex issue yet.
- At the same time, a finding of dominance from a competition point of view could support an investigation on the legality of consent to the processing given by a certain individual: to what extent can consent be valid if the consumer has little or no alternative choice of provider? The issue of "significant imbalance" between parties and its impact on consent now also plays a role in the discussion on the proposed DP Regulation.

DATA PORTABILITY

- At this point, I would like to mention that the right to **data portability** introduced in Article 18 of the COM Proposal for a DP Regulation has a positive impact, both on DP (control of individual on his own personal data) and on competition (no lock-in effect; more transparency in how undertakings treat PD; stimulating competition among online service providers; easier to identify abuses if portability is hampered). A good example: portability of eBay profile including reputation score is a great tool to stimulate growth of alternative market platforms.

COMPETITION POLICY AND DP: PROCEDURAL ASPECTS

- Finally, from another perspective, I would like to briefly touch on the EDPS' supervisory role as to all personal data processing activities of the Commission, and in particular of DG COMP. This is in relation to how DG COMP processes personal data in its day-to-day investigative activities (both at its own premises and during off-premises inspections in the MS) into alleged infringements of Articles 101 and 102 TFEU, into mergers which are

notified to it, sector investigations and in the procedures related to the assessment of the legality of State Aid.

- Regulation No. 45/2001 determines the criteria on the basis of which all EU institutions can process personal data. DG COMP is obliged to notify to the COM Data Protection Officer all processing operations intended to serve a single or several related purposes. If such operations present specific risks for data subjects by virtue of their nature, they should be notified to the EDPS for a prior check. Data subjects can also submit complaints to the EDPS for DP violations or to the EO for inappropriate actions. So far, we have received only few complaints and rarely found other reasons for an inquiry.
- However, it is true that it took DG COMP some time to discover that its investigations against companies could lead to processing of personal data relating to various individuals involved (e.g. sources, witnesses or representatives of companies under investigation). Such discoveries were also made in the context of large-scale inquiries in the electricity sector of a member state. As a result, DG COMP included DP aspects in its internal manuals (see EDPS, Annual Report 2006, p. 33-34).
- A different aspect is related to the possible conflict between compliance with requests sent to companies from DG COMP on the basis of Regulations No. 1/2003 (antitrust and cartel investigations) and No. 139/2004 (mergers), and compliance with national DP laws. This aspect will be examined by other presenters. However, I have already hinted at the possible interaction with national DP law, and similar issues could be relevant for internal investigations, where companies are bound by national DP laws.

CONCLUSION

- To sum up, the topic of today's seminar is quite complex and challenging, but also very relevant and forward looking. I have sketched a number of points on which we at EDPS are reflecting and which will find their way into an opinion which we are planning to issue in the course of this year.
- We have been talking also to authorities and representatives of the private sector in the US and we have found a deep interest in the topic. The US Federal Trade Commission has a dual role, as a competition agency and a consumer agency, with a growing interest in privacy issues. It is well known that, as regards competition enforcement, despite the legal differences, the EU and US system are more similar than in relation to the data protection regimes. However, we have also seen similarities in how to approach the analysis of the possible interplay between competition and data protection.

- The aim of our forthcoming opinion is to provide input to the discussion as data protection experts, hoping to trigger a fruitful interaction with the Commission and other competition enforcement authorities. And also, over all, more consistency among the respective laws and practices, and more added value for the public interests at stake.