



Antitrust, Privacy and Big Data

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Speaking points

Ladies and Gentlemen,

It's a great pleasure and privilege to open this seminar on competition, privacy and big data.

There was a roundtable discussion at the 4th International Concurrences Conference precisely two years ago. But today offers perhaps the first opportunity for an in-depth debate among competition specialists in Europe.

In March 2014 we published our preliminary Opinion in order to give regulators a gentle nudge into the unknown.

We wanted to inform better our own constituency of privacy and data protection experts on the rudiments of competition law and consumer law in the EU. But we were also addressing, on behalf of the data protection community, competition experts.

As a result of the exercise, we were surprised by the conceptual overlap between three separate fields of EU law - the third of course was consumer protection, which will be less in focus today:

fairness, transparency, free and informed choice are common concerns.

But we were surprised also at the lack of dialogue at a regulatory level in the EU. There have been a few joint investigations, but they are the exceptions not the rule.

As a result, the same or similar terminology is used by different regulators and policymakers in a series of echo chambers, with limited room for cross-fertilisation and coherent enforcement.

We found ourselves in agreement with an increasing number of experts on both sides of the Atlantic, who have argued that a new approach was urgently needed: Pamela Jones Harbour, who I'm delighted to see participating today, deserves special mention in this regard.

This urgency arises from the rapid evolution in digital markets, and what many feared to be a growing information gap between trader and consumer, between data controller and data subject.

The digital economy is the most exciting frontier for growth and innovation in the EU.

But we are beginning to realise the risks of complacency towards the increasing number of online services, simply on the grounds that they did not charge users money. With the proliferation in **free-to-consumer advertising-supported business models**, competitiveness and privacy and data protection are being challenged by the same market phenomena.

I would even add that there is an *ethical imperative* to meet this challenge.

Surveys of internet users repeatedly tell us that they are unhappy with ubiquitous tracking of their online behaviour.

Some say that that if these users really valued privacy then they would not use the online services.

I find that sort of response deeply flawed.

It's like saying, as pointed out by one law professor, 'that drivers do not care about potential for auto accidents because they continue to drive.'¹

My vision as the new European Data Protection Supervisor is for the EU to be a beacon of respect for data protection and privacy; for the EU to show leadership in developing global standards so individuals can enforce their digital rights.

But rights are worthless without effective enforcement and redress.

That means the EU should use all the means available, flexibly and in a concerted way.

In the field of competition law, enforcement is formidable but the ability of citizens to obtain redress for abuses is weak.

I have spoken previously about how data protection regulation, a relatively new discipline, has a lot to learn from the more established tradition of enforcing competition rules:

- On accountability:
 - the emphasis on companies' self-assessment regarding compliance with Article 101 prohibition on anti-competitive agreements;
 - the notion in antitrust that dominant firms have a 'special responsibility' to avoid any action which might impair effective competition;
 - in data protection, the Google Spain judgment, and other independent developments such as a risk-based approach, go in a similar direction in terms of accountability of businesses towards the people whose information they handle.

¹ Strandburg, K. J., 'Free Fall: The online Market's Consumer Preference Disconnect', [2013], University of Chicago Legal Forum, p. 166.

- On sanctions, there is a realisation that new data protection rules will be only effective if those responsible for data processing know that there will be serious penalties for failing to respect fundamental rights.

There have been some hopeful signals.

Commissioner Vestager is clearly thinking deeply about this issue.

In recent statements she has spoken of data as currency in digital markets, and recognised the need for a coherent approach. She knows that this is not merely a competition issue, but appears willing to show leadership.

What is vital, is that we, as responsible policymakers, prevent a very serious debate from becoming a proxy for corporate litigation.

It is too important for that.

For me, this is about the interests of the individual consumer. It's not about protecting the interest of one industry lobby against another.

I enter this debate with an open mind.

I accept that the actions of dominant undertakings in a given market may be *bad for competitors* and yet *benefit innovation and consumers*, at least in the short term.

I can see that expert opinion seems divided down the middle on the question of whether internet monopolies have more or fewer barriers to entry compared with offline monopolies. It is far from certain to what extent users of particular search engines or gaming apps are really *locked-in* to those services.

That, in part, is why I have called for Big Data Protection and a New Deal on Transparency, where individuals have up-to-date, meaningful, rights to access and to information about data processing.

Big data and the Internet of things require businesses, more than ever before, to learn and to practice accountability.

I invite you to consider the need for a new mechanism –a sort of **cross-cutting, inter-regulatory clearing house**- at EU and national level for determining the different angles to an issue.

Consumers and data subjects rely on competition authorities, like consumer and data protection authorities, to be trained and vigilant in spotting abuses and exploitation.

I have referred in the past to the recent 22bn USD merger of Facebook-WhatsApp as a test case for competition authorities.

On that occasion, the European Commission did not block the merger, finding that the ‘concentration of data within Facebook’s control’ did not raise competition concerns.

As far as mergers are concerned, we must await further opportunities for looking at how control of personal data affects market structures in the digital sector.

We all recognise that these data capabilities can create asymmetries of power between the citizen and those controlling information about them.

So we need to address silo mentalities and work across portfolios.

It may be that there are issues of common concern and that remedies could be devised accordingly.

Competition enforcement should be one tool for encouraging competitiveness of the EU economy. Used in tandem with effective data protection enforcement, the EU could encourage privacy-enhancing technologies and services.

Now is the time for clarity in enforcing these rules intelligently:

- as we realise that our concept of price needs to take into account actual costs to consumers, in terms of attention and personal information;
- as we realise the value of other parameters of competition such choice and quality.

This could amount to a 'paradigm shift' in enforcement which requires clarity, legal certainty, for citizens and business on how these factors will be analysed by the regulator.

As practitioners, regulators and academic authorities, you hold the key to realising this paradigm shift, to updating the toolbox of incentives, remedies and sanctions for the digital economy.

So in conclusion, ladies and gentleman, I have only had time to outline, with the broadest of brushstrokes, a handful of the themes which you will be exploring today. As much if not *more* than anyone else in this room, we are in a learning phase. I regret that as this event coincides with the plenary meeting of Europe's data protection authorities, I am unable to stay for the rest of the afternoon. All the same I am pleased that the EDPS will be represented on one of the panels.

Further opportunities to pursue these themes are planned for this year. This project will be further developed as part of the EDPS's strategic plan for 2015-2019, which I will present in a few weeks' time.

The EDPS is hosting with ERA (the European Academy of Law) an event in early autumn to explore these themes in more detail. If you would like to take part or lead a session please contact us.

My best wishes to you all for a fruitful discussion.
