



*Les données et la concurrence dans l'économie numérique*

*Opening statement at the roundtable on data and competition hosted by l'Autorité de la Concurrence, Paris*

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*Giovanni Buttarelli*

Ladies and gentlemen,

In April 2014 we launched the debate on the interaction between privacy and competition in the digital environment<sup>1</sup>.

Since then there has been much debate. European Commissioner Vestager and her staff at DG Competition have been very open and honest with us. I fully appreciate the complexity and sensitivity of high profile competition cases. The Commission is quite right to be prudent, and maintain its reputation for analytical rigour.

Perhaps the most dramatic develop was the announcement last week by the Bundeskartellamt of its investigation into Facebook's data policies.

We are keen to see progress on such a practical level, and we have called on the EU to find policy responses. Others, such as BEUC, have been calling for more joined up enforcement. But as Ms Vestager has rightly said – you can't substitute justice with speed.

In our Opinion, we cited former Vice President of the European Commission, Joaquin Almunia, who said that there hadn't yet been a full market analysis of free digital services.

We identified a need to recognise personal data as intangible asset and called for authorities to collaborate and identify scenarios and standards for measurement of market power.

We criticised the treatment of the Google DoubleClick merger case in 2007/8. We said that there had been a purely economic approach with no assessment of consumer welfare or the users of search engines.

At present the accumulation of data by a handful of players has in our view two big results:

- it distorts the market, and

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<sup>1</sup> EDPS Preliminary Opinion on Privacy and Competitiveness in the Age of Big Data, 26 March 2014.

- it disempowers individuals, reduces the control they have over data about them.

Our question is therefore this: with today's internet based on surveillance, how can the EU enable alternative, non-privacy invasive business models to penetrate the market? How can the EU stop lagging behind in a sector where none of the top ten companies is European?

Let's spend a moment considering what is happening in digital markets. Here are five big trends:

1. There is an extraordinary explosion of data, more created in the last two years than has ever existed. In the coming years, there will be 20-30 billion connected devices - the Internet of Things.
2. Internet services have often created the myth that privacy controls means you see or don't see certain ads. But it is almost impossible to be anonymous on the internet. Internet companies typically require transparency of the user but not of themselves – the so-called 'black box' phenomenon.
3. Data protection was conceived when data was ancillary to main business (that is, to keep a record of customers etc). But now personal data is hugely important to all businesses -including finance, energy and manufacturing- and governments. This has an impact on the individual and on social welfare. The richest companies in the world owe much of their success to personal data.
4. There is an ongoing concentration in the market for internet services – we all know about the tech giants. It is a dynamic environment, but concentration of market power is always a concern for public policy.
5. There is a lack of trust (see Eurobarometer EU and US Pew Research) in online services – that is a basis for the Commission's digital market strategy. Silicon Valley is also realising that data security is not an optional extra; investors and company boards are taking data breaches seriously.

In June this year, I will publish an update on our 2014 Opinion, calling for a more coherent approach to enforcement in digital markets, and exploring ways of enhancing individual control, including personal data vaults and data portability.

Let me address the criticisms of our 2014 paper. I would like to address eight specific arguments which have been deployed.

Firstly, 'Big data is not personal data'.

Now of course data about the weather, or about mechanical processes, are clearly not personal information. But the most valuable data is information that helps us understand, predict and influence behaviour. That, almost always, is personal data. Even where data is anonymised and aggregated, technology now allows individuals to be singled out by combining different anonymised data sets.

Secondly, the misconception that 'Personal data processing equals an infringement of privacy'.

Processing personal information is not a bad thing per se. European case law affirmed that it is an interference with the right to privacy, but it is not automatically, an infringement of privacy. Privacy and data protection are separate rights.

The free flow of personal data is one of the freedoms of the EU internal market. The EU rules aim to encourage it.

But personal data processing has always carried risks for the individual.

Especially when there is an imbalance between the individual and the controller.

Therefore the rules require that the individual has a meaningful, informed choice before giving their consent.

Alternatively, businesses can argue that their legitimate interests are sufficient justification for data processing, keeping in mind the interests of the individual.

The 2014 *Costeja/ Google Spain* judgment from the CJEU (the 'right to be forgotten' case) was about balancing Google's legitimate interest to profit from providing a search engine with an individual's right for information about him to be relevant. The Court found in favour of the individual.

Thirdly, it is said that people don't care about privacy, that convenience more important.

But of course we all care about privacy. That is why we are wearing clothes, why we have curtains and shutters for our windows, why we have locks on our doors. Privacy is why Mark Zuckerberg has spent millions of dollars buying land around his new homes.

But people talk about a privacy paradox – they say they care about privacy but then use social media to announce their relationship or medical problems.

There are plenty of surveys in Europe and US in the last couple of years which have confirmed that most people do not like at all how the internet functions.

A Brunswick survey last year asked people whether free services or privacy was more important. The responses were divided 50-50.

Also last year, a Dutch survey of young people found that only a small minority were aware of the fact that app providers make money from their personal information.

So privacy matters. And the EU has an obligation to safeguard privacy – and even if some people seem not to care about it, it is still a fundamental right.

Fourth, 'people don't pay with their data'.

It is very difficult to be anonymous and expect to use social media or eCommerce sites. The question is transparency – how is the data being used?

Currency may not be the perfect analogy. But the question is: what is the transaction between the consumer and provider of online services?

This is not like TV or newspaper and magazine advertising in the past, where you watch and read in the privacy of your living room.

Your activity online is always monitored, what you watch and what you search for. If you opt out you lose the experience.

So , in approach specific cases, let's ask these companies - if they could not access the personal data, how much would it cost to provide this 'free service'?

Fifth, data protection and competition law are separate areas.

Yes of course, they are separate areas, as confirmed by the CJEU in the Asnef Equifax case and more recently by the Commission with the Facebook/WhatsApp merger.

But in fighting privacy-related actions initiated by European DPAs, big companies have typically tried to use a jurisdiction-based argument to its advantage, for example claiming individual member states do not have jurisdiction over its regional business.

Lawyers choose where they want to pick their fights.

The Bundeskartellamt recently launched its proceeding to investigate whether n the volume of personal data a company holds is a significant factor in possible abuse of a dominant position.

And it has done so in close contact with data protection officers, consumer protection associations as well as the European Commission and the competition authorities of other EU member states.

So these are different areas of law, but not silos.

Sixth – competition authorities only deal with specific cases, they don't address social issues in the abstract.

We had the pleasure of meeting the former Commissioner Almunia. He was sympathetic but said that competition authorities deal with cases, and that so far they had not encountered a case with a theory of harm including negative effects on the competitive process, with those effects caused by the action of a dominant firm or a merger.

Nevertheless, if you listen to Ms Vestager, it is clear that the Commission is working hard to understand the bigger picture. Competition policy has always been a topic for vigorous public debate.

Seventh, competition authorities are not able to do data analysis.

The notion that competition authorities only deal in specific cases seems to me to contradict another criticism – that competition authorities lack expertise to understand the role of personal data in digital markets.

But if they do not understand the role of personal data in these markets, how can they identify a case.

So what is the solution? Well, they should talk to experts, in consumer and data protection authorities. And vice versa.

Legal compliance with data protection is one thing – that is clearly the job of data protection authorities. Compliance is the 'baseline of protection', as a recently reported by the Brussels thinktank, the Centre on Regulation in Europe.

But beyond compliance, we need to promote competitiveness, and avoid externalities damaging the public good of privacy and freedom.

We need the help of market forces in big data when individual is too weak to exercise control over his or her participation in the market.

So with the new right to data portability in the GDPR, for example, we need competition authorities to help enforce that right.

One comment on a blog last week appeared to doubt that consumers could be exploited unless there was an indirect competitive foreclosure or harm to the competitive process that could, in turn, lead to an increase in prices.

This points to another paradox, that successful companies naturally aim for dominant power, and then try to convince everyone that they are not in fact very powerful.

With the new German case, there is an opportunity to test the established notion in competition law of the exploitative abuse of consumers. This is an area which has no guidance and little case law in the EU.

Eighth, and lastly, it is argued that we must not regulate big data because online behavioural advertising and targeted ads are good for competition.

This exposes another contradiction in the argument of those who resist calls for greater cohesion in enforcement.

On the one hand, they argue that users don't pay for the services with personal data, and that the really driver for value is not the data but the quality of the algorithm, the intellectual property.

On the other hand, they say that you should not punish 'harvesting of data', because that will interfere with successful business models.

In fact, this is a tacit acknowledgement of the deeper issue: the core business model of the internet is surveillance, monitoring individual behaviour.

This is not a biased view of a data protection regulator. It is message coming from many expert observers of the hyperconnected society, including Tim Berners-Lee, the inventor of the World Wide Web.

So, in conclusion, our call is to let the authorities talk to each other and learn about how these firms are operating and whether the benefits are bigger or smaller than the costs to society.

Competition law was conceived at the end of the 19th century to prevent abusive behaviour by cartels and monopolies, because of the negative impact on society.

Data protection and consumer law in late 20th century have had very similar goals.

That is why I firmly believe that competition policy should be part of the solution.

Thank you.