



Privacy and Competition in the Digital Economy

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Speaking points at the European Parliament's Privacy Platform

Ladies and Gentlemen,

I'm delighted that MEP Sophie in 't Veld has decided to relaunch this important discussion. The previous Privacy Platform on this theme in November 2012 was a great inspiration for what became EDPS's preliminary Opinion on 'Privacy and competitiveness in the age of big data' last year.

Our intention with the Opinion -and the subsequent workshop which we hosted in June- was to encourage a *holistic approach* to upholding the interests of the individual in the digital economy.

That is why we have been reaching out to esteemed competition experts such as Mrs. Moonen in the European Commission, but also legal academics, NGOs and international organisations like the OECD.

I recognise the value of the digital economy being able to harness computational power in order to innovate and improve our quality of life.

But we must also recognise that these capabilities, as noted by the US White House Big Data Report last year, can create asymmetries of power between the citizen and those controlling information about them.¹

We must recognise, like another report in 2013 from the European Parliament on the digital single market, that *'consumers are negatively affected by the lack of measures allowing consumers to report discriminatory practices taking place.'*²

We need to respond to this. And I believe data protection and competition laws used intelligently and in tandem have an important role.

We in the data protection community could indeed take several leaves out of the competition enforcement manual.

For instance, antitrust rules treat companies like responsible adults.

Since 2003³ companies no longer have to notify horizontal cooperation agreements to the Commission. Instead, they are expected to assess their own compliance with rules under Article 101 of the Treaty (*'self assessment'*).

Like with criminal law, ignorance of competition rules is no defence where a company is found in breach of competition rules.

This echoes the accountability principle being developed in the General Data protection Regulation (GDPR) still under negotiation: the move away from notification of data processing operations and towards accountable internal processes, like the use of data protection impact assessments. A development boosted by the 2014 Google Spain judgment⁴ and the Court's emphasis on the

¹ Big Data: Seizing Opportunities, Preserving Values, May 2014.

² Study on Discrimination of Consumers in the Digital Single Market, 2013.

³ Regulation 1/2003 on the application of the EU competition rules on anti competitive agreements which abolished the notification system and introduced self assessment.

⁴ Judgment of CJEU of 13 May 2014 in Case C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos and Mario Costeja Gonzalez*.

responsibilities of controllers towards the people whose information they collect and use.

Meanwhile, the potential sanctions for breaches of competition rules are formidable.

Only last year – a €953m fine was imposed on a cartel in the market for car and truck bearings.

The maximum fine is 10% of total group turnover.

It puts into perspective the current haggling over the maximum penalty in the GDPR for breach of the fundamental right to data protection, the €150 000 imposed by the CNIL, the French regulator, on Google for violating rules on tracking and storing user information and even the €1.4m fine applied by the Italian Data Protection Authority for violations concerning StreetView.

One innovation of the GDPR is the right to data portability.

This has the potential to enhance competitiveness, as it would free consumers from ties to a particular competing service and empower them to take their personal data to another provider.

There are obviously lots of question marks over how this would work in practice. The services would need a degree of interoperability.

Crucially, it would depend on companies respecting the right to information, so users would be fully informed about what data is held on them.

So in this debate I share the view of the European Commission President Juncker that Europe needs to overcome silo mentalities and work across portfolios.

Modern and future oriented rules on data protection are essential:

➤ in order to enable individuals to seek to enforce their rights in the digital economy.

➤ for companies investing in technological innovation and relying on cross-border data flows.

I am encouraged that the new Commission is prioritising the Digital Single Market. And I know that Commission Vestager is mindful of the need for competition authorities to monitor and to respond to digital markets.

I am not saying, as some do, that competition law and competition authorities should factor into their analysis privacy and other 'alien' public policy considerations.

But I *am* saying that the dynamics of digital markets, which are fuelled by personal data on a massive scale, should be carefully studied, in order to address imbalances which could damage competitiveness as well as individual rights.

Furthermore, a *competition authority is rarely responsible only for competitiveness in the market.*

DG Competition is of course a beautiful star in the Commission firmament, but the Commission is more than a competition authority.

Some member states like Italy, UK, Poland and Netherlands combine in one authority competition and consumer protection supervision.

The US FTC has multiple functions, combining antitrust with consumer privacy.

So it's not unreasonable to expect holistic decisions on competition and consumer cases, balancing all interests.

The tools of competition enforcement are quite flexible and able to respond to dynamic markets.

Nevertheless in the Google/DoubleClick merger in 2008, the Commission did not consider the impact on customers of the two companies being able to combine all that data and potentially use them for incompatible purpose at a future.

Most recently -and I speak tentatively given that I sit next to the expert who oversaw this case- the same concern was raised with the acquisition of WhatsApp by Facebook.

The millions of users of WhatsApp signed up for a service which scans entire address books but does not sell their personal data to advertisers.

This is a completely different business model to Facebook.

Many were disappointed that the Commission as a whole -not DG COMP- did not consider requiring any guarantee that the new owners would respect the privacy agreement signed up to by WhatsApp customers.

There is rapid change and consolidation in the digital economy – Google are reported to have acquired a company *every week* since 2010.

So similar cases are bound to arise again soon.

Why should we not envisage competition authorities addressing, for example, an abusive use by dominant firm of non-negotiable ‘privacy policies’?

Unfortunately, we know that unfair and deceptive practices do occur in digital services as revealed by the enforcement ‘sweep’ in 2012 by the European consumer protection authorities.⁵

We must not neglect digital services which are marketed as ‘free’, or zero priced, but which actually require payment by personal information or attention- literally ‘paying attention’.

Consumer welfare can still be harmed, and we must not allow a kind of *de facto* antitrust immunity for zero-price market participants

I have a very practical suggestion.

⁵In a joint enforcement action by 26 MS consumer protection authorities in 2012 checked 330 websites selling digital content (games, books, videos, music), It found that half of these websites contained unfair contract terms or unclear information on right of withdrawal or insufficient information on the trader’s identity and how to contact him/her.

If a competition regulator is considering an investigation into possible anti-competitive conduct in the digital sector, why don't they pick up the phone and inform the national DPA and consumer authority?

If a DPA is looking into a possible breach of data subject rights by a tech firm, why don't they inform the consumer and competition regulator?

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

The key message at this stage is to continue dialogue. Big Data and digital services require us to develop innovative perspectives on how to apply existing instruments.

There is a lot to be learned on both sides.

We will soon publish our strategy for the new EDPS mandate 2015-2019, where we will consider further ways of stimulating and informing this dialogue.

Thank you for your attention.