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Editorial

When two worlds collide: the interface between competition law and data protection

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In his seminal article ‘The Limits of Antitrust’, Easterbrook argued that ‘when everything is relevant, nothing is dispositive’; therefore, when applying competition law, judges should resort to clear presumptions rather than balancing the pro- and anti-competitive effects of particular conduct.¹ In the intervening 20 years, much ink has been spilled on the issue of whether competition law should take into consideration wider policy objectives.² This discussion has been given renewed impetus in recent months following the publication of a ‘preliminary opinion on the intersection of data protection, consumer protection and competition law’ in March of this year by the European Data Protection Supervisor (EDPS).³ The publication of this report was followed by a workshop held under Chatham House rules in Brussels in June, a summary of which was published by the EDPS in July.⁴

The report reflects lively discussions on several issues familiar to data protection experts, such as the role of personal data in the digital economy and how to foster privacy as a competitive advantage. However, it also serves to launch a debate regarding matters which have been overlooked or unsubstantiated thus far. Most significantly, the report queries whether the traditional tools of competition law, which focus on parameters such as price, quality, and choice can explain the impact of certain business practices on data protection and privacy. It also questions ‘wider issues’ in competition law enforcement, for instance whether the Commission’s current case-by-case approach is correct in the digital environment or whether specific guidelines or a study

should be introduced to inform authorities dealing with antitrust and merger cases involving personal data.

These are queries which need to be addressed and the EDPS is to be applauded for kick-starting this discussion, whatever its outcome. Many of web 2.0’s data-centric services are two-sided platforms which are characterised by network effects: the more users they have, the more users they acquire. This leads to winner-takes-all markets which makes the application of key data protection concepts, such as consent, more difficult. Quite simply, individual control over personal data (or ‘informational self-determination’) becomes illusory when individuals are dealing with monopolies. For this reason, competition law is frequently depicted as the silver bullet which will render data protection rules more effective by injecting competition into monopolised markets and facilitating individual choice. However, that competition law can or even should play this role is contested by experts in that field. A discussion on the potential—and limits—of competition law was therefore conspicuously lacking until the EDPS initiative in March.

Nevertheless, it is not yet apparent whether, and if so how, the two fields actually intersect. In recent years, the enforcement activity of DG Competition has been guided by a consumer welfare standard, according to which competition law should seek to deliver benefits to consumers in the form of ‘lower prices, better quality and a wider choice of new or improved goods and services.’⁵ This approach assumes that consumer welfare is negatively affected only when a particular practice has the effect of foreclosing an equally efficient competitor

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1 Frank H Easterbrook, ‘The Limits of Antitrust’ (1984) 63 *Texas Law Review* 1, at 12.

2 See, for instance, Giorgio Monti, ‘Article 81 EC and public policy’ (2002) 39 *Common Market Law Review* 1057 in support of such inclusion and Okeoghene Odudu, ‘The Wider Concerns of Competition Law’ (2010) 30 *Oxford Journal of Legal Studies* 599 against such inclusion.

3 Preliminary Opinion of the EDPS, ‘Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy’, March 2014.

4 Report of workshop on Privacy, Consumers, Competition and Big Data, 2 June 2014. <https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Big%20data/14-07-11_EDPS_Report_Workshop_Big_data_EN.pdf> accessed 18 August 2014.

5 Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7, para 5.

from the market. The question is then whether this consumer welfare standard can encompass data protection considerations. On the one hand, the standard seeks to promote competitive parameters such as quality and choice and the Commission has seemingly placed more emphasis on these non-price parameters in recent years. For instance, in its Microsoft decision, DG Competition suggested that the lack of interoperability of Microsoft's operating system diminished consumer choice by locking consumers into a homogenous product.⁶ Competition law could therefore theoretically be used to intervene in a market where a particular practice or agreement reduces consumer choice as to privacy policy or the quality of a product deteriorates as a result of changes to a privacy policy.

On the other hand, however, the limits of competition law should also be noted. Price and non-price parameters are not commensurable: online services are often provided for 'free' in exchange for a user's personal data. How can a competition authority balance a price decrease against a lower quality privacy policy? Moreover, the Commission cannot intervene solely on the basis that the market structure is too concentrated or privacy policies, although compliant with data protection legislation, could be more protective. An abusive practice or a restrictive agreement is a prerequisite for intervention. It is traditionally the role of regulation and not competition law to tackle systemic market failures and to shape markets. In previous instances, *Asnef-Equifax*⁷ and *Google/DoubleClick*,⁸ the Court of Justice and the Commission have refused to intervene to protect personal data on the grounds that any possible issues would be dealt with by the EU Data Protection Directive.

It therefore appears difficult to fit data protection considerations into the Commission's 'consumer welfare' mould. Critically, however, the Court of Justice has refused to endorse this consumer welfare standard.⁹ Rather, it has emphasised that competition rules also promote competition itself and promote market integration. This more pluralistic approach to the objectives of competition law may be able to incorporate data protection concerns. Indeed, the continued viability of the

Commission's exclusion of data protection concerns from competition law could be questioned following the entry into force of the Lisbon Treaty. This Treaty introduced a provision on data protection which sits amongst the 'provisions having general application' (alongside other policies such as environmental and consumer protection) and places a positive obligation on the EU Institutions to ensure consistency between policies.¹⁰ The EU Institutions are also under an obligation to respect the rights set out in the EU Charter of Fundamental Rights (including the rights to data protection and privacy) and to promote their application.

In light of these factors, it might be argued that competition law should be applied alongside data protection law in certain instances in order to enhance the effectiveness of data protection law. For instance, could DG Competition intervene if a firm with significant market power deceptively amended its privacy policy even if this amendment was also incompatible with data protection rules? Unlike in the United States, European competition law has been applied to regulated industries in certain circumstances.¹¹ Moreover, the 'special responsibility' of dominant firms is well documented. Equally, should DG Competition take into consideration the aggregation of personal data which a merger may entail, even if this merger does not 'significantly impede effective competition'? Scale is a significant factor when assessing the harms caused by personal data processing as personal data are worth more than the sum of its parts. This is something which the Court of Justice alluded to in the *Google Spain* judgment but which competition law finds difficult to gauge.

Such intervention is likely to be rejected by competition law experts who fear the 'instrumentalisation' of competition law and the Commission is likely to proceed with caution in this area. However, the EDPS has questioned the wisdom of this cautious case-by-case approach and queried whether wider guidelines might be preferable. The genie is now well and truly out of the bottle.

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6 COMP/37792 *Microsoft* [2007] OJ L32/23, para 782.

7 C-238/05 *Asnef-Equifax v Ausbanc* [2006] ECR I-11125, para 63.

8 COMP/M.4731 *Google/DoubleClick* [2008] OJ C104/10, para 368.

9 C-501/06 *GlaxoSmithKline* [2009] ECR I-9291, para 31.

10 Article 7 read in conjunction with Article 16 TFEU.

11 C-280/08 *Deutsche Telekom AG v Commission* [2010] ECR I-9555.