In which ways should privacy concerns serve as an element of the competition assessment

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1. The growing reliance on smart objects and the advent of the digital economy will fuel the creation of even more "big data"[1]. Many of these technologies will eventually operate in the background of consumers' lives and be almost invisible to them[2]. Due to the very important amount of information that the Internet of Things "IoT" and wearable technologies can gather, privacy and security-related concerns will grow as these devices and services expand[3].

2. Thus, as the IoT and the digital economy expand steadily, so will concerns about consumer privacy. Therefore, the need for legal protection for the privacy of individual persons will increase dramatically[4]. In particular, the IoT will render the provision of free services in return for personal data even more common. These services will be "paid for" by the users with their personal information[5], which will, in turn, raise the issue of "consent" to disclosure of personal data. However, today's tech markets seem stable but could flip suddenly if the potential network effects that created them were to go into reverse. There could be a sudden surge of customers towards a new social-media firm that promised to guarantee user's privacy or pay them for their data[6].

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[1] Gil Allouche, Big Data and the Internet of Things: A Powerful Combination, SMARTDATA COLLECTIVE, June 4, 2014, https://www.smartdatacollective.com/big-data-and-internet-things-powerful-combination/

[2] Shawn G. DuBravac, A Hundred Billion Nodes, in FIVE TECHNOLOGYTRENDS TO WATCH (2014), p. 8, archived at https://perma.cc/3ABK-YSGH

[3] See Patrick Thibodeau, The Internet of Things Could Encroach on Personal Privacy, COMPUTERWORLD (May 3, 2014), https://www.computerworld.com/article/2488949/emerging-technology/the-internet-of-things-could-encroach-on-personal-privacy.html and Wolfang Kerber, 'Digital Markets, Data, and Privacy: Competition Law, Consumer Law, and Data Protection' (2016) Journal of Intellectual Property Law & Practice, p. 14. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2770479

[4] Ibid.

[5] See, on this new model of services, Commissioner Vestager, Competition in a big data world, speech held in Munich on the 17 January 2016, https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-big-data-world_en. See also, Thomas von Danwitz, Les défis du « Big data », L'observateur de Bruxelles, n°113, July 2018, p.20.

[6] *The Economist*, Trustbusting in the 21st century, Special report Competition, November 17th 2018, p.7.

3. The protection of privacy as a fundamental right can be derived from the basic values of autonomy and human dignity[7]. Privacy is enshrined in Article 8 of the ECHR. Further guarantees are brought by the Charter of Fundamental Rights of the European Union, which gives a concrete meaning to the right to privacy. The Charter outlines, in particular, in Article 8, paragraph 2, that "data must be processed fairly for specified purposes and on the basis of the consent of the person concerned […]".

4. These provisions are not without effect from an economic perspective, as the lowering of data protection standards by dominant companies enables the collection of more data, fueling network effects and the related economies of scale ultimately consolidating ever-growing market dominance[8]. Therefore, also from an economic perspective, it can be shown that the protection of privacy and personal data should be strengthened for solving serious market failure problems in regard to privacy[9].

I. Privacy concerns do not traditionally serve as an element of the competition assessment

5. Admittedly, competition laws as construed and applied in the EU and data protection rules pursue different objectives. While competition rules are aimed at safeguarding a level playing field and, to a certain extent, a fair competitive process, data protection rules are aimed, primarily, at protecting consumers.

6. Differences between these two fields of law have been regularly acknowledged by the European Commission. In the *Facebook/Whatsapp* merger, the European Commission expressly stated that "any privacy-related concerns flowing from the increased concentration of data (…) do not fall within the scope of the EU

[7] Wolfang Kerber, 'Digital Markets, Data, and Privacy: Competition Law, Consumer Law, and Data Protection' (2016) Journal of Intellectual Property Law & Practice, p. 17. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2770479

[8] Giulia Schneider; Testing Art. 102 TFEU in the Digital Marketplace: Insights from the *Bundeskartellamt*'s investigation against Facebook, *Journal of European Competition Law & Practice*, Volume 9, Issue 4, 1 April 2018, Pages 218, https://doi.org/10.1093/jeclap/lpy016

[9] Kerber, ibid note 7.

competition law rules but within the scope of the EU data protection rules".[10.] This stance was confirmed in early 2016 by Commissioner Vestager who declared in a speech that "privacy and competition concerns should be considered separately"[11]. Moreover, when it approved the *Microsoft/Linkedin* merger, the Commission considered that the transaction did not raise competition concerns resulting from the possible post-merger combination of the "data" (essentially consisting of personal information), as any such data combination could only be implemented by the merged entity to the extent it is allowed by applicable data protection rules[12].

7. The *Equifax* case[13] where the Court held that "any possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection" may have had an impact on the rather conservative approach taken by the Commission, in its decisional practice. However, the expression "as such" is important in this statement. Indeed, it is far from certain that the Court of Justice would exclude any competition concerns stemming from the limitless acquisition of personal data to the detriment of digital platform users. Even if, on a more theoretical level, it is the subject of much debate whether personal data should be considered as a source of competitive advantage, due to the ubiquitous and non-rival nature of personally-inflected data[14].

II. The Facebook case may pave the way to a new approach

8. In this respect, the *Facebook* investigation of the Bundskartelamt ("BKT") marks a shift toward taking into consideration personal data in competition enforcement. The

[10] European Commission, *Facebook/Whatsapp*, 3 October 2014, Case N. Comp./M. 7217, http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf, para. 164.

[11] European Commission, *Competition in a big data world*, https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-big-data-world_en.

[12] European Commission, *Microsoft/LinkedIn*, Case COMP/M.8124, http://ec.europa.eu/competition/mergers/cases/decisions/m8124_1349_5.pdf, para 176-177

[13] Judgment of 23 November 2006, ASNEF-EQUIFAX and Administración del Estado, C-238/05, EU:C:2006:734, para. 63.

[14] Giulia Schneider; ibid note 8, p. 217.

investigation launched on 20th March 2016[15] by the BKT is based on Facebook's misleading terms and conditions for user data. According to the German competition authority, Facebook holds a dominant position in the German market for social networks because it collects a vast amount of data from various sources and it uses this data for the creation of personal profiles enabling its advertisement customers to better target their advertisement activities[16]. The BKT is concerned that such market dominance enables Facebook to impose unclear and misleading terms and conditions on its users and infringes German competition law provision of para 19(1) GWB[17]. In particular, the BKT's theory of harm is that Facebook is abusing its dominant position by conditioning the access to its social networking service on users' consent to a limitless collection of their personal data[18]. Due to such networks effects, the BKT considers users to be locked in Facebook's social networking service with no possibility to (readily) switch to one of Facebook's competitors[19]. Interestingly, the BKT's investigation directly links competition violations with data protection law infringements.

9. This position tending to take into account, in competition law, the artificial collection of data through misleading terms and conditions is not specific to Germany. A joint position paper issued in May 2016 by the French and German antitrust authorities pleads for the assessment of privacy policies under competition law "whenever these

[15] Bundeskartellamt, Bundeskartellamt initiates proceeding against Facebook on suspicion of having abused its market power by infringing data protection rules, http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html?nn=3599398 .

[16] Ibid.

[17] Bundeskartellamt, Background Information on the Facebook proceeding, 19 December 2017, http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2017/Hintergrundpapier_Facebook.pdf?__blob=publicationFile&v=4, 5.

[18] Bundeskartellamt, 'Preliminary Assessment in Facebook Proceeding: Facebook's collection and use of data from third-party sources is abusive, http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2017/19_12_2017_Facebook.pdf?blob=publicationFile&v=3 . Facebook is said to collect its users' data not only from services that the company directly owns, such as Whatsapp or Instagram, but also from secondary websites and applications of other operators with embedded Facebook APIs.

[19] Bundeskartellamt, background information, para 5.

policies are liable to affect competition, notably when they are implemented by a dominant undertaking for which data serves as a main input of its products or services"[20]. Against this background, the President of the French competition authority declared that EU privacy rules were "key to competition analyses"[21]. One may fairly deduce from these statements that inclusion of data privacy concerns in competition analysis, particularly, in terms of market power, is getting greater attention among NCAs, even if this position seems at odds with the approach of competition authorities on the other side of the Atlantic, where antitrust enforcers consider that competition agencies shouldn't intervene in consumer privacy markets, except when those markets are characterized by barriers to entry[22].

III. Article 102 TFUE may be construed as including privacy concerns

10. Accordingly, the question arises of whether this trend illustrated by the *Facebook* case in Germany can and should be expanded. Indeed, it seems that the *Facebook* case is based on German law and jurisprudence[23]. Therefore, the possibility to "transpose" this case into EU law invites reflection on the legal tools at the disposal of competition authorities to include breaches of privacy in their competition analysis.

11. According to article 102 (a) TFUE, an abuse of dominance may, in particular, consist in "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions", while Article 102 (d) TFUE provides that "making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts" may be anticompetitive. Therefore, on this legal basis, competition authorities may pursue infringements consisting in unfairly and illegally lowering data protection standards so as to gain more data and therefore more market power. This is all the more true in two-sided markets where

[20] See Autorité de la concurrence & Bundeskartellamt, Competition law & Data, 10th May 2016, p. 29

[21] Mlex, EU privacy rules key to competition analyses, head of France's antitrust watchdog says, 4 May 2018.

[22] Mlex, DOJ's Delrahim says antitrust enforcers shouldn't intervene in consumer privacy markets absent barriers to entry, 19 April 2018.

[23] Bundeskartellamt, Background Information, para 9.

data obtained downstream on the consumer side is sold upstream on the advertising side.

12. On this basis, an excessively vast amount of data required by a digital platform to access its services may be considered to be an "unfair purchase or selling prices or [an] unfair trading condition" as it is now widely acknowledge that, in the digital economy, data can be equated to a "price"[24]. Likewise, making the subscription to a dominant platform conditional to the communication of an excessive range of personal information may amount to "making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature […], have no connection with the subject of such contracts". However, it will be for the competition authority to prove that the unfair collection of personal information has an anticompetitive effect on the market.

13. The existence of an infringement as regards data required to access a digital service may depend on how the Commission approaches the notion of "fairness" laid down in Article 102 TFUE. It can be deduced from the preliminary assessment of the BKT in the Facebook case, that may be "unfair", within the meaning of Article 102 TFUE, terms that infringe data protection regulations. That is, data provided by the Internet user without actual "consent", within the meaning of the General Data Protection Regulation ("GDPR")[25] Therefore, transposed into EU law, the "unfair" "price", "trading conditions", or "supplementary obligations" mentioned in Article 102 TFUE, would consist in the violation of data protection rules and, in particular, the GDPR, that is, another branch of law.

14. This would not be particularly new in competition law. In this respect, in *Allianz Hungária*[26], the CJEU seemed to consider, in essence, that the impairment of objectives pursued by another set of national rules could be taken into account to assess whether there was a restriction of competition. Furthermore, relevant precedents are also provided by case law regarding collecting societies' imposition of

[24] See, note 5 supra.

[25] Regulation n° 2016/679 of 27 April 2016, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

[26] Judgment of 14 March 2013, Allianz Hungária Biztosító and Others, C-32/11, EU:C:2013:160, para. 46-47.

unfair trading conditions on original copyright-holders. In the 1974 *Belgische Radio en Televisie vs. SABAM* case[27], in assessing the "unfairness" of the conditions imposed within the meaning of Article 102 TFEU, the Court of Justice took into account the "necessity" of the clause "for the attainment of its objects". The Court of Justice, in *AstraZeneca*[28], upholding the General Court judgment, also gave guidance on how to assess whether a commercial conduct is misleading[29]. An analogy may be made with misleading commercial terms.

15. Against this backdrop, it cannot be excluded that privacy terms of a dominant undertaking that would be considered as (i) unnecessary or disproportionate and/or (ii) misleading, in light of the GDPR, fall within the scope of Article 102 TFEU. In terms of competition policy, this could be justified, one the one hand, by the importance of quality as a competitive criterion[30], and, on the other hand, by a theory of ham based on the exclusionary effect of illegal acquisition of data in sectors where the possession of data is a key factor in competition.

IV. This would imply a change to the competition paradigm

16. This poses, in turn, another question of competition law. Can and should competition authorities continue to put the focus on traditional price parameters that form the classic source of antitrust harm. Specifically, some prominent authors have questioned whether conduct, such as the imposition of unlawful contractual terms, which does not affect services' prices or quantity, could nonetheless be deemed anti-

[27] Judgement of 21 March 1974, BRT et Société belge des auteurs, compositeurs et éditeurs, 127/73, EU:C:1974:25, para 11, 12 and 15.

[28] Judgement of 6 December 2012, AstraZeneca v Commission, C-457/10 P, EU:C:2012:770.

[29] Ibid, para 62, 63, 65-93.

[30] See, judgement of 5 October 1988, Alsatel, 247/86, EU:C:1988:469, para 10, Decision 2007/53/EC of 24 March 2004 (Case COMP/C-3/37.792 – Microsoft) (OJ 2007 L 32, p. 23), para 782 http://ec.europa.eu/competition/antitrust/cases/dec_docs/37792/37792_4177_1.pdf , Commission Decision of 16 July 2003 (Case COMP/38.233 − Wanadoo Interactive, para 359), http://ec.europa.eu/competition/antitrust/cases/dec_docs/38233/38233_87_1.pdf, see also the judgement of 2 April 2009, France Télécom v Commission, C-202/07 P, EU:C:2009:214, para 112.

competitive according to other parameters different from price[31]. If consumer welfare may be determined by prices in the short run, it can be argued that it is given by quality, variety and innovation in the medium and long run[32].As mentioned above, in several judgements, the Court of Justice has reminded the importance of quality as a competitive criterion[33].

17. The legitimacy of such transposition also poses more far-reaching question of competition policy, that is, the opportunity to adopt a "holistic approach" between competition law and data privacy rules[34]. According to the European data protection supervisor, the growing economic significance of personal data requires the adoption of a new concept of consumer harm triggering an evolutionary interpretation of competition law's doctrines and especially the one of abuse of market dominance[35].

18. However, these positions contrasts with those taken by U.S. competition authorities which tend to consider, in line with the Chicago School line of thinking, that absent immediate consumer harm, notably, in terms of price, no abuse of dominance can be found under Section 2 of the Sherman act. A DOJ official recently declared, to this respect, that data acquisition does not equate to price hike[36]. Admittedly, it is debatable whether these zero price services cause actual consumer harm. Young

[31] Ioannis Lianos, Some Reflections on the Question of the Goals of EU Competition Law, CLESWorking Paper Series 3/2013 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2235875 11; C. Ahlborn and A.J. Padilla (n°52), 62. Ariel Ezrachi and Maurce Stucke, Ariel Ezrachi and Maurce Stucke, 'The Curious Case of Competition and Quality' The curious case of competition and quality' Oxford Legal Studies Research Paper 64/2014 ,https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2494656, page 8

[32] Schneider, ibid note 8, p.219.

[33] See paragraph 15 supra.

[34] European Data Protection Supervisor, Privacy and competitiveness in the age of big data, The interplay between data protection, competition law and consumer protection in the digital economy, Press release of 26 March 2014, https://edps.europa.eu/sites/edp/files/publication/14-0326_competitition_law_big_data_en.pdf. See also, on this question, Wolfang Kerber, 'Digital Markets, Data, and Privacy: Competition Law, Consumer Law, and Data Protection' (2016) Journal of Intellectual Property Law & Practice, . https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2770479

[35] European Data Protection Supervisor, Privacy and competitiveness in the age of big data, The interplay between data protection, competition law and consumer protection in the digital economy, 26 March 2014, p.32 https://edps.europa.eu/sites/edp/files/publication/14-03-26_competitition_law_big_data_en.pdf.

[36] Data acquisition doesn't equate to price hikes, FTC's Hoffman says, MLlex, 12 April 2018.

generations are not as concerned about their data as their parents. Moreover, should it not be acknowledged that the communication of personal data is a new form of pricing which, overall, bears more efficiencies than negative externalities, given consumer high sensitivity to the gratuity of services offered? Last, tech markets may also be threatened by a "Schumpeterian wave". At one point, companies may enter the market using the protection of data privacy as a competitive asset *vis a vis* their competitors[37].

19. In any case, however, due to these structural differences in approaching abuses of dominance a dialogue should be initiated on both sides of the Atlantic on the real impact of these practices on consumer welfare (consumer welfare being at the heart of U.S. antitrust enforcement) to adopt a convergent approach as regards digital platforms that operate worldwide. Interestingly, questions are currently being raised among U.S. scholars on the aptitude of section 2 of the Sherman Act to capture practices that may be implemented by digital platforms and, notably Amazon[38]. These discussions, that have triggered a public debate[39], together with the political wish of M. Trump to investigate Gafa practices under antitrust law[40], may suggest a shift in the US approach and, why not, a return to a more "Harvard School" approach, that is, a more interventionist and formal attitude towards competition infringements.

20. Clear guidance on how competition authorities should approach competition concerns in privacy may be given by the CJUE within the context of the preliminary ruling procedure. However, surprisingly, as this was pointed out recently by a judge of the Court of Justice, it is only in November 2017 that the Court was seized for the first time by a question related to the validity and the actual coverage of the "consent" to communicate information to an Internet service provider. However, this was in a case concerning a very specific situation[41]. Very few questions have been posed to the

[37] See, para 2 supra.

[38] Lina Khan, Amazon's Antitrust Paradox, vol. 126, n°3, January 2017, https://www.yalelawjournal.org/note/amazons-antitrust-paradox

[39] See The Antitrust Case Against Facebook, Google and Amazon, Wall Street Journal, January 16 2018.

[40] Bloomberg, Trump Says Google, Facebook, Amazon May Be 'Antitrust Situation, 30 August 2018.

[41] Pending case C-673/17, Planet49 Gmbh

Court, as regards the conditions surrounding the provisions of Internet services by the main digital platforms. However, it should not be deduced from that, that their business practices do not raise any difficulties in terms of justification[42]. The CJEU may well be seized, in the future, to clarify these questions.

21. To conclude, nothing in Article 102 (a) TFUE and, to a lesser extent 102 (d) TFUE seems to exclude privacy concerns from the range of practices captured by this article. However, this would involve adapting the current competition paradigm and the standard of consumer welfare protection. In effect, in EU competition law, consumer welfare is achieved indirectly by protecting the competitive process and rivals foreclosed. Including privacy among competition concerns falling within the meaning of Article 102 TFUE would imply protecting consumer welfare more directly, which may not be in EU competition law "DNA" due to the original influence of ordoliberal theories. In this respect, one source of optimism may be Germany which made several tweaks to the law to modernize it for the digital age[43].

[42] See Thomas von Danwitz, ibid note 5, p.21.

[43] *The Economist*, Ibid note 6.