

Editorial

The Interface between Competition Policy and Data Protection

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Digital data is considered the basic currency of the information economy, while at the same time concern is growing that new technologies and business practices might represent serious and largely unprecedented threats to privacy. Earlier this year, there have been significant data protection initiatives on both sides of the Atlantic. The US Administration finalized a 'White Paper' on consumer privacy, and called for Congress to enact legislation to implement a Consumer Privacy Bill of Rights. The US Federal Trade Commission released a privacy report setting forth best practices for companies that collect and use consumer data, and supporting the development of general privacy legislation to ensure basic privacy protection across all industry sectors. The European Commission adopted a comprehensive reform package of its 1995 Directive, including a proposal for a Regulation containing the general rules on data protection and a proposal for a Directive on data protection in the law enforcement sector.

As the economic and political significance of privacy issues will certainly grow in the near future, the relationship between competition policy and data protection regulation will very likely become an increasingly sensitive issue. As a preliminary move, however, it should be debated whether competition policy is capable of effectively promoting the goal of protecting privacy, therefore making specific personal data regulation useless at best. The assumption here would be that, for instance, social networking sites compete over the protection of personal information. Current incentives, however, seem to stimulate the almost opposite market behaviour: social networking sites do not compete in terms of the protection of personal information, but in its sweeping acquisition and monetisation. Moreover, consumers, more or less deliberately, trade some of their privacy for 'free' content and services. In this respect, strong obligations of 'privacy by design' and 'privacy by default', as contained in the recent EU reform package on data protection

regulation, would seem to offer much needed remedies to an ongoing market failure. On the other side, however, pro-competitive data protection regulation should allow for ample flexibility in order to adapt to ongoing changes in the technological landscape.

As a consequence of the increasing relevance of data protection regulation especially in the information and communication technologies sector, tension with competition policy is most likely to arise. Confronted with an allegation that it has violated competition/antitrust legislation, an undertaking might, for instance, try to invoke a privacy-tailored regulated conduct defence. Thus, a dominant market player in the information technology sector could refer to its legal obligation to protect consumers' privacy and use it as a defence to a claim by competition authorities that it is leveraging its sole control over a vast amount of user data to hamper or eliminate competition in the market. In any event, the finding of an abuse of dominant position in the EU would not seem to be precluded if, despite data protection regulation that encourages, authorises, or even imposes strict privacy measures, there is still room for autonomous conduct by the dominant undertaking.

Finally, it should be recalled that data protection in the Post-Lisbon Treaty era has the undisputable legal status of a fundamental right. The constitutional nature of the commitment to undistorted competition is also beyond dispute, despite the fact that it has now moved to Protocol No 27 annexed to the Treaties. It remains to be seen whether the clear recognition of fundamental rights such as the right to data protection enshrined in the Lisbon Treaty, in conjunction with the at least partial downgrading of the requirement of undistorted competition, will stimulate a more holistic approach in the interpretation of competition law by European courts.

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