CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
May 2015 (2)

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I. INTRODUCTION

What is true of "free" lunches is true also of "free" search: there has to be a catch. By now it has dawned on most of us, as private individuals, how it is we are paying: not in cash, but in information about ourselves. The new dawn for the antitrust community needs to be the articulation of the consequences for antitrust analysis of this tectonic shift in business models.

The generational change in the leadership of the European Commission's antitrust work has coincided with a sudden spurt of attention to this topic—although it is perhaps no coincidence. In her confirmation hearing before the European Commission, Margrethe Vestager described personal data as "the new currency of the internet."[2] In this and other remarks she took up the themes launched into public debate by the European Data Protection Supervisor ("EDPS") in a discussion paper of March 2014 entitled *Privacy and Competitiveness in the Age of Big Data: The interplay between data protection, competition law and consumer protection in the Digital Economy.*[3]

The echo at the time from DG Competition was muted, but a conference seeking to breathe new life into the EDPS' unheard plea for debate in the antitrust community was held in February this year.[4] The keynote address was by Giovanni Buttarelli,[5] a privacy regulator

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[2] Commissioner-Designate Vestager, Hearing before the Committee on Economic and Monetary Affairs of the European Parliament (Oct. 2, 2014). Since taking office, Commissioner Vestager has reiterated these remarks: *see* Lewis Crofts & Robert McLeod, *In conversation with Europe's new Competition Commissioner*, MLEX, 5 (Jan. 1, 2015) ("Very few people realize that, if you tick the box, your information can be exchanged… you are paying a price, an extra price for the product that you are purchasing. You give away something that was valuable. I think that point is underestimated as a factor as to how competition works"); *see* Aoife White & Peter Levring, *EU Deal Probes May Weigh Value of Personal Data: Vestager*, BLOOMBERG BUSINESS (Apr. 9, 2015) ("Some companies, while apparently not generating euros or cents, still make money because holding very large volumes of data generates value").

[3] Preliminary Opinion of the 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,* (Mar. 2014), *available* at: https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2014/14-03-26_competitition_law_big_data_EN.pdf.

[4] Concurrences and Cadwalader seminar, *Antitrust, Privacy & Big Data*, Brussels (Feb. 3, 2015). Synthesis *available at* http://www.concurrences.com/Photos/Antitrust-Privacy-Big-Data-1713/?lang=en.

[5] Mr. Buttarelli assumed office as the European Data Protection Supervisor in December 2014. The original paper was published in the term of his predecessor Peter Hustinx.

speaking to an audience drawn primarily from the antitrust circuit. My remarks on the day[6] sought to frame privacy and Big Data issues in the vernacular of antitrust. The growing interest in the topic is reflected in a number of conferences;[7] and for example, in a consultation on the "The commercial use of consumer data" launched by the U.K.'s Competition and Markets Authority in January 2015.[8]

The information collated by businesses about their customers evidently has an economic value justifying the cost of providing the service. The economics and business strategies around such datasets are not the focus of this contribution to CPI's colloquium. Instead the high-level conclusion, easily and quickly drawn, is that antitrust needs to evaluate the role and significance of datasets when they arise in the factual matrix of any assessment—be it dominance, restrictive practices, or merger review. Antitrust is not somehow set aside by the fact that a Big Dataset comprises information about individuals that may also be subject to privacy or data protection requirements.

Such an overlap in applicable rules is of course nothing remarkable in itself (consider LIBOR, where malpractice is the subject of both antitrust and financial services regulation[9]). But the question may fairly be posed as to the co-existence and interaction of these regimes.

II. "AS SUCH"

This issue has not been squarely presented in any decision of the EU Courts in Luxembourg, nor in the practice of the European Commission. The closest that the EU jurisprudence comes is a brief assertion in the *Asnef*[10] ruling of the Court of Justice. This was a case referred from the Spanish courts concerning a credit-worthiness register maintained among banks. The issue arising was one of information exchange among competitors—the information in question including personal data.

In framing the discussion the Court remarked that the "sensitivity of personal data" was not "as such" a matter for the antitrust laws. More fully it said: "…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."[11] The observation was

[6] Alec Burnside, *Setting the Scene* – Address at Concurrences and Cadwalader, Wickersham & Taft LLP seminar *Antitrust, Privacy & Big Data* (Feb. 3, 2015), *available at* http://www.concurrences.com/Photos/Antitrust-Privacy-Big-Data-1713/?lang=en.

[7] *See* e.g. *Briefing on Big Data, Privacy, and Antitrust* at George Mason University on March 18, 2015 (http://www.masonlec.org/events/event/288-briefing-big-data-privacy-antitrust), and the *17th International Conference on Competition* in Berlin on March 25-27, 2015 (http://ikk2015.de/Seiten/konferenzprogramm_e.html).

[8] The consultation is now closed and the CMA is reviewing public responses. Materials and feedback *available at* https://www.gov.uk/government/consultations/commercial-use-of-consumer-data.

[9] *See* Joaquin Almunia, *Statement on the euro interest rate derivatives case* (May 20, 2014), *available at* http://europa.eu/rapid/press-release_STATEMENT-14-166_en.htm.

[10] *See* Case C-235/08 Asnef-Equifax v Asociación de Usuarios de Servicios Bancarios ("*Asnef*"), ECR I-11125 [2006].

[11] Case C-235/08 *Asnef* [2006], *Id.* at ¶ 63.

presented without greater discussion. Nor is the Advocate General's similar remark more expansive.[12] What then is the import and meaning of this statement?

It is hardly a blanket assertion that privacy is irrelevant to antitrust, or that antitrust must not address facts to which privacy laws may also be relevant. Rather, it indicates that antitrust rules should be applied in pursuit of antitrust goals. And indeed that is what the Court did in the case before it: apply the antitrust rules to a set of facts to which privacy disciplines had a parallel application.

The "as such" language, far from closing the door to the exercise of usual antitrust disciplines, in fact opens it. And the European Commission has passed through this open door, examining the economic relevance of control of large volumes of personal information.[13] It does so regardless of whether the individual-specific information in a dataset may also be governed by rules on privacy and the processing of personal data.

The relevance of antitrust goes beyond the obvious economic significance of Big Data (and of the sensitive personal information it comprises). It is not the goal of this contribution to multiply examples, but suffice it to note, for instance, that some service providers actively tout superior privacy characteristics as a quality differentiator.[14] Or note the commercial interests ranged against each other in the elaboration of a "Do Not Track" standard for internet searching.[15] It is a given that these matters must be debated in antitrust terms.

III. ANTITRUST (AND THE PURSUIT OF OTHER UNION OBJECTIVES)

It is, rather, the purpose of this contribution to fasten hard on the question whether (and how far) privacy considerations can be given weight within an antitrust assessment. That was not the topic before the Court in *Asnef*, where the comments were in any event (as English and U.S. lawyers might put it) *obiter*, i.e. an observation in passing which was not necessary for purposes of the immediate ruling.

Framing this very specific question invites echoes of older debates as to the application of competition policy to promote environmental or cultural objectives.[16] Citizens have an interest in clean air, but antitrust has never set itself up as a wholesale proxy for environmental policy. But it can give weight to environmental goals. So, for example, the Commission used its then power of exemption[17] to approve an otherwise restrictive agreement because it gave "direct practical effect to environmental objectives" defined in the directive on packaging waste.[18] Similarly it exempted

[12] *See* Opinion of Advocate General Geelhoed, Case C-235/08 *Asnef* [2006], ¶ 56:
"Any problems concerning the sensitivity of personal data can be resolved by other instruments, such as data protection legislation. It is clear that there must be some way of informing the borrowers concerned of what data are recorded and of granting them the right to check the data concerning them and to have them corrected where necessary. It appears that this point is settled, regard being had to the relevant Spanish legislation and also to clause 9 of the rules governing the register."

[13] *See* European Commission Decision 2014/C 417/02 (*Facebook/WhatsApp*), 2014 OJ C 417/4.

[14] For example, DuckDuckGo, *see* https://duckduckgo.com/—"the search engine that doesn't track you."

[15] *See* e.g. Fred B. Campbell Jr., *The Slow Death of 'Do NOT TRACK'*, N.Y. TIMES (Dec. 26, 2014).

[16] *See* JONATHAN FAULL & ALI NIKPAY, THE EU LAW OF COMPETITION 3.12 (6th ed. 2014).

[17] In the days before modernization under Reg 1/2003.

[18] *See* European Commission Decision 2001/837/EC (*DSD*), 2001 OJ L.391/1.

an agreement among appliance manufacturers to cease production of energy-inefficient machines identified by a directive.[19] In adopting this approach the Commission was giving due weight to the Treaty objective specifying the integration of environmental protection requirements into EU policies and actions.[20]

Similarly the Treaty calls for cultural aspects to be taken "into account in its action under other provisions of the Treaties."[21] DG Competition guidance on exemption under Art 101(3) recognizes that "goals pursued by other treaty provisions can be taken into account…".[22]

The examples cited above all concerned exemption criteria under Art 101(3), but a further example of cross-pollination, under Art 101(1), is provided by the Court of Justice in its *Allianz Hungaria* [23] ruling. Here the Court identified a restriction by object, drawing strength from an infringement of sectoral insurance rules. Domestic law required car dealers acting as insurance brokers to be independent from insurance companies, and to act in the best interests of policyholders. Arrangements (relating to the rate of payment for repair work to be done by the dealers) were, however, in place by which dealers were given conflicting economic incentives. The Court put weight on the breach of the insurance regulation in identifying a restriction of competition by object.

IV. APPLYING ANTITRUST (WITH PRIVACY IN MIND)

How then can antitrust align with and facilitate privacy goals? The superior norm is provided by the Charter of Fundamental Rights, which recognizes the protection of personal data as a specific right.[24] This right protects not only against interference by the state, but against any processing that does not meet minimum safeguards, i.e. processing "for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law."[25] In pursuit of this superior hierarchy requirement, and aligning with specific directives adopted to give effect to it, there is obvious scope for an application of the antitrust rules in a duly sensitive manner.

The EDPS has suggested, for example, that repeated breach of privacy rules may be an indication of abuse of a dominant position.[26] In this he was perhaps following a lead given by

[19] *See* European Commission Decision 2000/475/EC (*CECED*), 2000 OJ L 187/47.

[20] *See* Treaty on the Functioning of the European Union (TFEU), 2008 OJ C 115/53, art. 11.

[21] *Id.* art. 167(4).

[22] European Commission Guidelines on the application of Article [101(3) TFEU], 2004 OJ C 101/97, ¶ 42.

[23] Case C-32/11 Allianz Hungária Biztosító Zrt. and Others v Gazdasági Versenyhivatal ("*Allianz Hungaria*"), not yet reported [2013], ¶¶ 39-47.

[24] Charter of Fundamental Rights of the European Union, 2000 OJ C 364/10, art. 8

[25] *See* Preliminary Opinion of the European Data Protection Supervisor, *Privacy and competitiveness in the age of big data*, *supra* note 3, ¶ 16 et sub.

[26] European Data Protection Supervisor Giovanni Buttarelli, *Privacy and Competition in the Digital Economy* – Address at the European Parliament's Privacy Platform (Jan. 21, 2015), *available at* https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Speeches/2015/15-01-21_speech_GB_EN.pdf.

Commissioner Almunia who, as long ago as 2012, recognized that a "single dominant company could of course think to infringe privacy laws to gain an advantage over its competitors."[27]

The ability to retain customers despite serial disregard of their privacy interests might well be taken, first, as a confirmation of dominance, i.e. the ability to act without the need to be concerned about the reaction of competitors. And, secondly, the conduct could be thought of as exploitative abuse. In an old-economy mindset one would instinctively think of exploitation as extracting an excessive price.[28] But where the payment for the services received is not in cash but in personal data, the exploitation might perfectly well be found in the excessive harvesting of such data.

Such harvesting might be deemed exploitative where there is breach of legal privacy standards: the parallel to *Allianz Hungaria*[29] is a simple one. Data protection rules require unambiguous consent to the processing of personal data, and this principle is implemented in data protection rules, themselves the subject of reform and debate as to their adequacy. It is though plainly the reality that our data is being collated into datasets and used in ways beyond our knowledge or expectation: how many of us have ever consciously consented to receive targeted online advertising? Antitrust enforcement (pursued with a sensitivity to individuals' privacy interests) need not be aligned only on the breach of specific data protection rules. It can also be inspired directly from the higher Charter principle of minimum safeguards.

It will be argued against this that antitrust should not extend so far into another policy area; and doubtless more effective privacy regulation would reduce the reason for antitrust disciplines to be brought to bear. But this would hardly be the first occasion when EU antitrust enforcement has come to the aid of related policy areas, particularly where legislative reform has failed to advance. For a current example, consider the use of state aid disciplines to unlock the gridlock around unfair tax competition by EU Member States.[30] Similarly an activist antitrust enforcement policy served to secure passage of delayed legislation for the liberalization of the EU

[27] Joaquín Almunia, *Competition and personal data protection* – Speech at Privacy Platform event on Competition and Privacy in Markets of Data (Nov. 26, 2012), *available at* http://europa.eu/rapid/press-release_SPEECH-12-860_en.htm.

[28] *See* Faull & Nikpay, *supra* note 16, at 4.16 et sub.

[29] Case C-32/11 *Allianz Hungaria* [2013], *supra* note 10.

[30] *See* e.g. Commission Press Release *State Aid: Commission extends information enquiry on tax rulings practice to all Member States*, IP/14/2747 (Dec. 17, 2014). The European Commission has opened investigations against tax rulings in Ireland (SA.38373 relating to Apple), Luxembourg (SA.38375 relating to Fiat Finance and Trade and SA.38944 relating to Amazon), the Netherlands (SA.38374 relating to Starbucks) and Belgium (SA.37667 relating to its excess profit tax system). DG Comp's commitment to the issue is also reflected in the introduction of the Task Force on Tax Planning Practices. This enforcement activity is to be seen against the background of legislative gridlock in the reform of corporate taxation. For that broader context see the Communication from the Commission to the European Parliament and the Council on *Tax transparency to fight tax evasion and avoidance*, COM(2015) 136 final (Mar. 18, 2015), *available at*: http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transparency/com_2015_136_en.pdf.

energy market.[31] The pattern is an old one: as long ago as 1988 the competition rules were used to launch the process of telecoms liberalization.[32]

Alternatively, simply mining the text of Art 102 for possible application to "free" services, the Article refers to the imposition of "unfair trading conditions."[33] Users have *de facto* no choice but to sign up to the terms and conditions of online services, in order to be able to progress to the next screen. And then they may have no practical choice but to accept changes to terms and conditions, if they want to continue using a service in which they have invested their data. Network effects may also play, to keep a user within the ecosystem populated by other users. Degradation to original privacy terms will not provoke users to switch to another provider if there is no effective alternative.

Default settings (rarely altered in practice, no doubt) might desirably specify a high level of privacy protection, but a dominant company—or one that achieves dominance and then degrades its privacy policies—might more readily set defaults to the other extreme. The fairness of "trading conditions"—here the provision of the online service in return for extensive (and often unwitting) waiver of privacy rights—is explicitly a criterion within Art 102.

Companies compete to get consumers to give up their data. All companies in this line of business must have privacy terms, regardless of whether they choose to promote their policy as a quality differentiator. But dominant firms can afford to be more casual about users' privacy than others. There is no reason for antitrust regulators to treat this as beyond their reach.

V. (INTERIM) CONCLUSIONS

Privacy and Big Data present new permutations, but familiar antitrust disciplines can be applied to an economy where personal data rather than cash is the currency of payment. There is innovative scholarship in the area, focusing on the phenomenon of "free"[34] and the dimension of quality[35] as opposed to price. Antitrust lawyers, economists and regulators should avoid fixation on price as their key yardstick. It is not apt to measure what needs measuring in relation to "free" business models.

Cash is not king in these markets. Of course finance-driven markets are never far away: the personal information with which we pay for "free" services is monetized to attract advertising

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[31] Faull & Nikpay, *supra* note 16, at 12.09 ("The adoption of the Third [Liberalization] Package provides a good example of the interplay between liberalization and competition policy").

[32] *See* European Commission Directive 88/301/EEC on competition in the markets in telecommunications terminal equipment, 1988 OJ L.131/73; *see* Faull & Nikpay, *supra* note 16, at 13.05 ("Many of the competition law cases brought by the Commission have related to market situations where abusive behaviour crosses over regulatory obligations, and EU competition law enforcement has played a prominent role in further pursuing the liberalization agenda").

[33] *See* TFEU, *supra* note 20, art. 102(a).

[34] *See* e.g. Michael S. Gal & Daniel L. Rubinfeld, *The Hidden Costs of Free Goods: Implications for Antitrust Enforcement*, UC Berkeley Public Law Research Paper No. 259425 (Jan 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2529425.

[35] *See* e.g. Ariel Ezrachi & Maurice E. Stucke, *The Curious Case of Competition and Quality*, University of Tennessee Legal Studies Research Paper No. 256; Oxford Legal Studies Research paper No. 64/2014 (Oct. 1, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2494656.

revenues. That takes us into two-sided markets, beyond the reach of this contribution. But antitrust techniques can be applied to both sides of the equation.

Conclusions at this stage are interim only in the sense that we lack a body of decided cases. But antitrust has much to contribute. Dominant players may outpace the privacy legislator, but antitrust enforcement may be fleeter of foot. The race of course is not between the enforcers, but rather a joint pursuit of the consumer interest.