



ANTITRUST, PRIVACY & BIG DATA

3 February 2015 | Cadwalader, Wickersham & Taft LLP, Brussels

Concurrences
Competition Laws Journal

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On 3 February 2015, Concurrences and Cadwalader, Wickersham & Taft LLP welcomed 145 delegates for a half-day seminar in the offices of Cadwalader in Brussels.

In March 2014, the European Data Protection Supervisor published a preliminary opinion entitled *“Privacy and Competitiveness in the Age of Big Data: The interplay between data protection, competition law and consumer protection in the Digital Economy”*.

On 2 June, the EDPS followed up with a workshop in Brussels. Regulators and experts at that event were mostly from the privacy circuit. Hence, the Cadwalader and Concurrences seminar *Antitrust, Privacy & Big Data* was designed to begin to focus competition regulators and antitrust practitioners as well as technology and economics experts on some of the challenges Big Data presents in an antitrust context.

The programme was organised as three panels with high-level speakers. After a keynote address by the European Data Protection Supervisor, Giovanni Buttarelli, the first session began by focusing on the issue of Competition

& Privacy. Speakers Alec Burnside (Cadwalader), Maurits Dolmans (Cleary Gottlieb Steen & Hamilton LLP), Pamela Jones Harbour (Herbalife International) and Cecilio Madero (DG Competition) discussed the potential interplay between the areas of competition and privacy protection.

Sophie in’t Veld (Member of the European Parliament) then addressed delegates, followed by the second panel, which comprised speakers Susan Athey (Stanford Graduate School of Business), Cristina Caffarra (CRA) and Paul Hofer (AMC Economics). This panel looked at the role of Big Data from an antitrust perspective, and was chaired by Jonathan Kanter (Cadwalader).

The final panel revolved around issues such as two-sided markets, the phenomenon of so-called “free” services and the question of how to apply antitrust tools in markets where there is no question of price effects. The speakers included Antonio Bavasso (Allen & Overy), Christian D’Cunha (European Data Protection Supervisor) and Maurice Stucke (Data Competition Institute), and was chaired by Anne MacGregor (Cadwalader).

Giovanni Buttarelli,
European Data Protection
Supervisor.



KEYNOTE ADDRESS GIOVANNI BUTTARELLI

Mr Buttarelli began his speech by stressing that since a roundtable discussion at the fourth International Concurrences Conference two years ago, this seminar was the first opportunity for an in-depth debate among competition specialists in Europe on the conceptual intersection between data protection, competition and consumer law. Mr Buttarelli observed that although fairness, transparency, free and informed choice are common concerns, same or similar terminology is used by different regulators and policymakers with limited room for cross-fertilisation and coherent enforcement. The rapid evolution in digital markets, and a growing information gap between trader and consumer, between data controller and data subject, is the most exciting frontier for growth and innovation in the EU, but also unites data protection and competition policy concerns in the single market. A new approach in the field is urgently required, and Mr Buttarelli sees it as an ethical imperative to meet this challenge.

Mr Buttarelli acknowledged the challenge of consumer complacency towards the increasing number of “free”

online services. The proliferation in free-to-consumer, advertising-supported business models is equally challenging for competitiveness, privacy and data protection. As the new European Data Protection Supervisor, it is Mr Buttarelli’s vision that the EU should show leadership in developing global standards so that individuals can enforce their digital rights. However, this requires effective enforcement and redress. Enforcement tools for competition law breaches, on the other hand, are already formidable.

Data protection regulation can look to the more established tradition of competition enforcement. Competition law enforcement presents an example of accountability with its emphasis on self-assessment by companies in ensuring compliance with Article 101 and the notion of a dominant undertaking having “special responsibility” not to impair effective competition. It can also be an example for sanctions, as new data protection rules will be only effective if those responsible for data processing know that there will be serious penalties for failing to respect fundamental rights.

Mr Buttarelli noted that he was encouraged that Commissioner Vestager is also engaged on these matters, having

referred to data as currency, and having said that this area calls for a coherent approach. The divide between experts on whether internet monopolies have more or fewer barriers to entry than offline monopolies is partially why Mr Buttarelli has called for Big Data Protection and a New Deal on Transparency, within which individuals would have up-to-date, meaningful rights to access information about data processing. He also expressed the need for more “test cases” such as *Google/DoubleClick* and *Facebook/Whatsapp* to see how data can affect market structures.

Mr Buttarelli concluded that EU enforcers need to start realising that the concept of price needs to take into account actual costs to consumers, in terms of attention and personal information and that there is a value in other parameters of competition such as choice and quality. This realisation should lead to a ‘paradigm shift’ in enforcement, which requires clarity and legal certainty for citizens and business as to how these factors will be analysed by regulators. Practitioners, regulators and academics hold the key to updating the toolbox of incentives, remedies and sanctions for the digital economy. ■



PANEL

1

Panelists included Alec Burnside (Cadwalader, Maurits Dolmans (Cleary Gottlieb Steen & Hamilton LLP), Pamela Jones Harbour (Herbalife International) and Cecilio Madero (DG Competition).

COMPETITION AND PRIVACY

The first panel's main focus was the relevance of antitrust law to privacy, and the relationship between antitrust and privacy regulation. Examples were given as to the importance of privacy in different aspects of competition law. In merger control, acquiring valuable assets (i.e. data) can be relevant for the analysis of a transaction and indeed in its *TomTom/Tele Atlas* decision the European Commission looked at whether the merger might enable a dominant player to degrade the level of protection of confidential data without fear of losing business. Similarly, defining privacy characteristics in an industry standard is subject to Article 101 disciplines on the objectivity of standard-making. Article 101 is also relevant to exclusivity clauses preventing the transfer of datasets. Significant holdings of data, used as a platform to provide services, are also potentially a barrier to entry for others who might like to provide a competing service and as such might fall within the scope of Article 102.

Moreover, it was stressed that it is not unusual to have areas of economic activity which fall under multiple legal regimes. The cases around Libor and

Forex, for example, have come under scrutiny by both antitrust regulators and financial service regulators.

The panel discussed whether the consumer welfare objectives pursued by privacy laws overlap with the consumer interests which antitrust laws try to protect, and whether the European Commission's DG Competition should give weight to privacy protection in balancing an antitrust equation. Cases such as *Facebook/WhatsApp* and the judgment in *Asnef-Equifax* contain statements to the effect that privacy concerns, are not, "as such", a matter for competition law, but the court in *Asnef* did not reason its statement, which arose in the context of a set of facts not highlighting the issues under discussion in the EDPS consultation or at the present conference. The extent of the "as such" limitation, and indeed its correctness, remained to be explored.

Taking Big Data as distinct from privacy, the Commission has in any event been explicit that it has analysed data concentration issues when assessing potential harm to competition. One of the speakers expressed the view that Big Data falls outside the scope of privacy regulation, because individual

profiling by search engines seems to proceed uninhibited by privacy laws. Although some diagnostics on big datasets do not relate to individuals, much of the information gathered in this way is profiled and analysed in a way specific to individuals, who then become targets for specific, relevant advertising. Evaluating the two-sided markets in which advertisers buy access to people searching on the Internet presents a novel challenges for antitrust. Traditional antitrust rules address the advertising side of the market but there is still uncertainty as to the protection of the user side. It was observed that when personal data is acquired and then traded as a commodity by data brokers there must be a market in that data which could be addressed in terms of relevant antitrust parameters. As some of this data is used to provide advertising opportunities to businesses on the other side of the two-sided market, it may alternatively or additionally be an input with economic significance to that service rather than a commodity sold in its own right. To evaluate the economic significance of such matters there is a need for discussion as to the type and quantity of data that a given player holds, and whether others hold

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▶▶ comparable datasets that allow them to offer the same service. Another important question is whether the ability to combine data from many different sources to create the most sophisticated profile can be a significant factual circumstance suggesting market power or a barrier to entry.

While advocating the benefits of Big Data in the form of innovation and job creation, one expert raised questions as to the existence of network effects in online search. The panelist called for a cautious approach in “instrumentalising” competition law to tackle Big Data entry barriers before an infringement has actually been found. The speaker underlined that privacy and competition law serve different goals. The former protects individuals from government and enterprise control, while antitrust focuses on consumer welfare, efficient allocation of resources and internal market integration. This panelist went so far as to propose that privacy regulation can serve as an entry barrier. Further, the speaker suggested, firms actually compete on offering privacy options. For example, Google offers a Dashboard to control/delete personal data and Ad Settings to opt out of/influence/block targeted ads.

Moreover, this panelist was of the view that the current law can deal with relevant Big Data issues. The Commission's *Facebook/WhatsApp* merger control decision was cited, in which the Commission stated that even if Facebook were to use WhatsApp as a new source of user data, sufficient alternative providers of online advertising services would remain with access to user data for advertising purposes. The Commission noted that it could indeed intervene if a transaction or practice reduced competition in offering rival privacy solutions, or monopolized key sources of Big Data or tools.

There was then a discussion among panelists as to whether online search is a natural monopoly. One of the speakers insisted that there are no direct or indirect ad-based network effects for online search. Moreover, if there are too many ads, negative network effects will be generated.

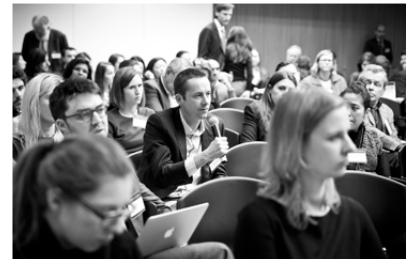
As to the suggestion that lack of data may serve as a barrier to entry, one opinion was that the proposition is false because data is ubiquitous, widely available and of fleeting value. Scale is not the decisive factor for success, it was said, but rather only a necessity for start-ups and such start-ups should focus on specialized data. In an attempt to disprove the idea that control over Big Data guarantees success, examples were given of many Google-owned companies that did not succeed. Furthermore, the position was advanced that Google faces thriving competition, in rebuttal to allegations that its monopoly over Big Data has excluded rivals. Among others, Amazon, TripAdvisor, Yelp and eBay were mentioned as efficient rivals to Google. Big Data, it was argued, is not the basis for Google's success – it is its constant innovation and engineering of algorithms, in addition to its localised service.

One expert stressed that user data – including personal data – is becoming the “new currency of the internet”. Major internet companies increasingly compete in multiple product and service markets and seek new ways to monetize data, including for the purposes of reinforcing a dominant position. The importance of data as an asset has increased even further with the explosive growth in mobile computing, which provides firms with new location-based data streams. Once again, it was noted that the European Commission had flirted with these issues and considered consumer privacy in its merger control

review of the *TomTom/TeleAtlas* case. Regrets were expressed that privacy concerns were not included in the competitive assessment in *Google/DoubleClick*. Also highlighted was the need to give effect to Article 8 of the Charter of Fundamental Rights of the European Union which recognizes the protection of personal data as a fundamental right.

One speaker suggested three theories as to how privacy issues may fit into a competition assessment. Firstly, firms compete on price but also on non-price dimensions that may equally affect purchasing decisions. Secondly, competition in privacy-enhancing technologies may be weakened because a dominant firm may not have the incentive to invest in privacy-enhancing technology. Thirdly, a product market for data can be defined. For example, firms develop products based on finding new ways to monetize data and firms constantly find ways to use data beyond the reason for which it was collected, which can present a competitive advantage. When defining these product markets, it was said, one must first understand all the different available methods for collecting data.

The point was also made that the link between Big Data and personal data is not necessarily strong. Privacy issues may be relevant for market definition, especially for data portability, and this is why the new Data Protection Regulation, once adopted, will bolster the right to data portability. However, it was noted that sanctions for infringements of data protection rules are still extremely weak and that a more effective network of national DP agencies is necessary for successful enforcement. ■



ANTITRUST AND BIG DATA

PANEL

2

Panel 2 was chaired by Jonathan Kanter (Cadwalader) and speakers included Susan Athey (Stanford Graduate School of Business), Cristina Caffarra (CRA) and Paul Hofer (AMC Economics).

The second panel focused in on the competition issues raised by Big Data and on whether competition law was equipped to address them.

One panelist tried to frame the importance of data for ad-driven platforms, explaining that the algorithms that predict how many clicks an ad will get grow more complex and sophisticated as data accumulates, allowing for more triangulated and personalised ad targeting. Commercially, this is far from controversial and a well-understood fact in the digital community. However, questions were raised as to the precise scope of the economies of scale connected with Big Data and the alleged barriers to entry in online services. For example, do firms need to acquire the same amount and same type of data as their dominant rivals for the data disadvantage to qualify as a barrier to entry, and might there be other means of collecting the relevant data?

One speaker explained that as the amount of data a company is able to collect increases, the marginal value of additional information may very well decrease. Furthermore, Big Data is not unique to the on-line world. For example, supermarkets are able to collect, store and use all the information they receive via customers' use of fidelity cards.

As a follow-up to the previous panel, one of the speakers restated that being in possession of Big Data does not guarantee success, giving as an example Yahoo's failure to monetize its data (it was noted that after Yahoo's default search engine deal with Mozilla Firefox there was an initial increase in

Yahoo's search users but that has since leveled off or dropped back). The view was advanced that it is technology and innovation that is driving competition in the sector. A counter-argument from the panel recalled that Google's increase in market share in Search had not been organic, but rather fueled through a series of M&A deals, many of which had provided the company with a larger data base. Different views emerged as to whether Google's disproportionately strong market position in Search in Europe as compared to Search in the United States was due to superior technology, namely early localisation of European search results, or due to the 20 to 1 data volume advantage the company enjoys in Europe over its closest competitor.

On speaker argued that it is incorrect to say that Big Data allows a firm to exclude rivals. For example, Amazon is perceived as a viable competitor to Google. Studies were cited, showing that a third of users start searching for a product directly on Amazon.

On network effects, there was a consensus that direct network effects are not so crucial for Search. However, there was substantial disagreement amongst panelists as to the presence of indirect network effects in online search services. Some of the speakers were of the view that there are negative indirect effects, because advertisers do not like to compete with each other and users do not like being flooded with ads. Other speakers, however, believed that indirect network effects were a concern and that, while users may not care much about data, advertisers and app developers are depending on it as a commercial input.

One of the most debated issues during this session was whether a viable theory of harm in relation to Big Data can be identified. Some speakers maintained that there is still no clarity as to the foreclosure effect of Big Data and whether it is a credible threat to competition that requires sanctions. Furthermore, there is a rationale behind using alternative competition or, even better, regulatory tools rather than a classic price-effects analysis to address Big Data and privacy.

In a response to a question on theories of harm, one of the panelists said that building a vertical search engine does not require big data volumes because specialised information is widely available (e.g., flight information). However, the problem lies in dominant players in online search reacting to new engines by changing traffic and re-directing search results. The speaker clarified further that there is a difference between online and offline experiments and that the former is crucial for digital innovation and growth. Consequently, the more users an engine has, the more it can experiment and develop its products, which could be seen as a competitive advantage. Another speaker responded that there is, however, no need to be a Google-sized company to conduct efficient online experiments. To show that Bing for instance had been able to improve its search technology, the speaker quoted a US study showing that 70% of users were ignorant as to their choice between Google and Bing, while 15% preferred Google and 15% the competitor Bing. ■



ANTITRUST TOOLS, DATA AND THE PHENOMENON OF “FREE”

PANEL

3

Panel 3 was chaired by Anne MacGregor (Cadwalader) and panelists included Antonio Bavasso (Allen & Overy), Christian D’Cunha (European Data Protection Supervisor) and Maurice Stucke (Data Competition Institute).

Discussions during the day’s third and final panel concentrated around assessing the extent to which the tools in the hands of antitrust regulators were sufficient to address issues thrown up by data. It was noted that consumer protection rules, competition law and privacy legislation are all necessary, but that they do not always interact with one another and that indeed, one may be better suited to address data privacy issues than the others.

The panel noted that data is becoming a growing concern for competition regulators: every year brings more data-driven companies, data-driven mergers and data-driven conduct. Picking up on of the previous panels, a panelist noted that data was indeed being used as a currency in exchange for seemingly free services and that indeed quality degradation was a concern, but that the discussion of the sufficiency of antitrust tools needed to go beyond these general points.

First, the panel expressed views on the extent to which the application of current antitrust tools to data privacy issues was appropriate. One panelist argued that this would only be the case if a market failure with regards to data privacy was identified, i.e. that correctly regulated market forces could be expected to result in higher privacy standards. At the same time, the panel expressed doubt that such protection would be achieved by the pending General Data Protection Regulation (“GDPR”). More generally, while interest in data issues on the competition circuit is certainly increasing, there have been recent signals for instance from the

Commission and the EU courts expressing concern about making Art 102 an even more unpredictable tool.

As to addressing the rapidly-growing “free” phenomenon, the panel discussed whether competition tools were up to the task. From an economics perspective, one panelist noted, the notion of “free” does not create difficulties. Indeed, economic models employing “free” elements have existed for decades. Rather, the issue lies with correctly identifying quality degradation. While competition tools are focused around price variations, both to identify markets and abusive conduct, an OECD report has found that quality competition is a more important factor today than price competition. However, there is no standard equivalent to a “SSNIP” test for quality. Similarly, measuring market power in relation to privacy is far from evident. In *Microsoft/Skype*, the issue of degradation was easily identifiable: Microsoft would not have been able to degrade the quality of Skype without suffering entry of new competitors. For data, the issue is not as clear, since complex legislation and opaque privacy policies throw doubt as to what extent privacy degradation would be possible, and the extent to which consumers may or may not notice. Privacy is not valued uniformly. Furthermore, it is not clear what would amount to a small but significant non-transitory degradation in quality (“SSNDQ”).

The panel went on to rehearse the risks of out-dated competition tools, namely that enforcers could miss entire competition issues and abuses during merger

reviews and investigations, or eventually face the “right” case to address data protection issues without having a clear idea of how to tackle it.

Discussion then turned to what the next steps should be to assess and perhaps improve the use of antitrust tools to data-related competition issues. First of all, the panel agreed, regulators had to understand data markets better. For that to happen, authorities will need to identify the frontier between privacy and competition issues as well as market-based solutions – requiring increased contact with privacy professionals and tech economists. Regulators should also conduct merger retrospectives to see how the assessment at the time of the review played out on the real market.

More specifically, it is crucial for regulators to identify in what instances possessing data will provide a competitive advantage. Picking up on an earlier assertion that data was non-rivalrous and non-excludable, one panelist noted that this was only true for some data but not for all data. Thus, data does not always provide a commercial advantage, but it does sometimes – it has both pro- and anti-competitive potential. Thus, competition regulation can maximize value of the emerging commercial uses of Big Data while minimizing risk of abuse.

For practitioners, it is important to identify simple presumptions, i.e. guidance markers that will enable lawyers to provide clients with useful advice in fast-moving and complex industries.



Against this background, a voice emerged from the panel that before worrying about what to do, the community ought to first consider what it aims to achieve: avoiding abuses of market power, or countering privacy degradations.

It was noted that regulators in Europe are already moving in the right direction. Commissioner Vestager hinted in her recent interview with MLex that she may launch a sector-wide inquiry into data. A similar inquiry has recently been launched by the Competition and Markets Authority (“CMA”) in the United Kingdom. Inquiries of this nature will help regulators obtain some transparency into data flows. Indeed, a floor comment during the panel’s Q&A noted the urgent need for regulators to understand how much data is being collected, by whom and for what uses.

Responding to a question regarding the potential for the EC to regulate “essential platforms” in the context of its pursuit of a Digital Single Market, one panelist warned that imposing privacy regulation may well raise barriers to entry. As for essential platforms, he was of the view

that the EC already possesses the necessary tools through the precedent in Oscar Bronner, and any new regulation should thus be met with scepticism.

Another issue the final panel identified was whether data regulation ought to be extra-territorial. On the one hand, with the “cloud” not having one true physical location, non-extra-territorial regulation would be ineffective in capturing cross-border data flows. On the other hand, legitimizing extra-territorial regulation in this field would open European citizens up to the risk of foreign regulators (e.g., China) imposing their views on privacy.

A clear view emerged from the panel that privacy protection could benefit from antitrust tools: Dawn raids, for example, have the deterrent effect of (mostly) keeping competitors honest. Similar tools do not yet exist for privacy protection. Hence, if data provides a competitive advantage, as the increase in data-driven corporate models could indicate, then competition tools are more suited to deal with privacy issues than current privacy protection tools. However, this would raise the issue of multiple regulators

addressing concerns on the same issues. While increased cooperation between privacy and competition regulators would be feasible during sector inquiries, experience suggested that it would not work in practice during a live case.

Closing the floor discussion was a question whether, given that the EC issues decisions as an overall executive body rather than as a separate competition regulator, it would be conceivable for the EC to attempt to force privacy protection through in a competition case, perhaps at the risk of losing if later challenged in the EU Courts in Luxembourg. The response recalled that both merger control and antitrust tools had already been used by the EC to bring about sectoral legislation in telecoms, energy or more recently in the field of national tax rulings. The view was expressed that a pro-active approach to antitrust enforcement, in relation to issues of privacy and Big Data, held great potential, including where appropriate the use of Article 7 remedies, as well as the potential for Article 9 Commitments. ■



CONCLUDING REMARKS, ALEC BURNSIDE

Alec Burnside closed the conference, thanking participants for their lively contributions, and noting that this was a debate in its early stages. As Winston Churchill once famously said: “This is not the end, this is not the beginning of the end, but this is the end of the beginning”. ■



Concurrences
Competition Laws Journal

CONCURRENCES JOURNAL

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THE INSTITUTE OF COMPETITION LAW: A LEADING ANTITRUST THINK TANK

The Institute of Competition Law is a think tank, founded in 2004 by Nicolas Charbit, PhD, with offices in Paris and New York. The Institute cultivates scholarship and discussion on antitrust issues through conferences and its publications, Concurrences Journal and the e-Competitions Bulletin. The Institute attracts government, business and academic attention to a broad range of subjects relating to competition law, regulations and industrial economics. This focus on the antitrust field allows the Institute to combine legal expertise with political acumen. The Institute of Competition Law has become one of the few think tanks in Europe to have significant influence on antitrust policies.

Events

Since 2004, the Institute has held more than 200 events – conferences, lunch meetings, in-house seminars or private dinners – in Brussels, London, Paris, New York and Washington DC. Each event is supervised by an ad hoc steering committee in order to ensure independence, objectivity and academic excellence. Some of these events have helped to shape antitrust policies. Papers of most of these events have been published in Concurrences Journal.

Intervenants

Joaquin Almunia, Scott Hemphill, Bill Kovacic, Kai-Uwe Kuhn, Frederic Jenny, Cecilio Madero, John Fingleton, Bruno Laserre, John Fingleton, etc. ■

SINCE 2004

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