Antitrust, Privacy & Big Data Seminar

Concurrences Law & Economics Seminar
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Privacy & Competition Trends

4 Trends

1. User data -- including personal data -- is becoming an increasingly important asset for many businesses
2. Major Internet companies increasingly compete in multiple product and service markets
3. Mobile computing gives firms new, location-based data streams
4. Large firms that collect data are seeking new ways to monetize data -- including ways that potentially reinforce their dominance
European Commission

- European Commission considered customer privacy in its review of TomTom/TeleAtlas case
- TomTom proposed acquisition of TeleAtlas, provider of digital maps with complete coverage of Europe and North America.
- Commission noted “confidentiality concerns can be considered as similar to product degradation”
DOJ Comcast/ NBC Universal Consent Decree

• 2011 Consent Decree Focused on Keeping Pathways open for Innovation
• Innovation occurred because of the Disruptive Potential of the Internet
• DOJ’s focus was on the Threat of Exclusionary Conduct by Incumbents.
• The New Form of Competition was in the Early Stages
• DOJ Alluded to Recognition of the Threat.
• United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001)
Former European Data Protection Supervisor, Peter Hustinx:

- EC applied “a purely economic approach to the case, [and] did not consider how the merger could have affected the users whose data would be further processed by merging the two companies’ datasets…that were not envisioned when the data were originally submitted.”

- EC therefore “neglected the longer term impact on the welfare of millions of Users in the event that the combined undertaking’s information generated by search (Google) and browsing (DoubleClick) were later processed for incompatible purposes.”
Theory #1: Competition in Privacy Protections

- Firms compete on price, and on non-price dimensions that are important to consumers and may influence their purchasing decisions.


Privacy & Competition – Theory #2

Theory #2: Competition in Privacy-Enhancing Technologies

• Privacy-related competition to strengthen user privacy.
  Examples:
  – DuckDuckGo - search engine promises no tracking
  – Sgroules - social networking site promises “no spying, no tracking, no stalking.”
  – Do Not Track – opt-in or opt-out?

• Firms entering market with a dominant single player
Privacy & Competition – Theory #2

• A dominant firm might not have same incentives to invest in adopting
  – privacy-enhancing business practices or
  – developing privacy-enhancing technologies

• If firm feels confident that the lack of competitive alternatives for consumers gives firm a higher “tolerance” for
  – weaker privacy practices and technologies.
EDPS Preliminary Opinion
March 2014

• Preliminary Opinion identifies an “underdeveloped market” for privacy enhancing services:
  – “Despite this heightened risk [for personal data] the market for privacy-enhancing services in the digital economy remains weak”.
Privacy & Competition – Theory #3

• Theory #3: Defining a Product Market for Data

• Firms continue to develop new products and services based on new ways of monetizing databases of user data and/or user profiles

• Competition regulators should consider defining a product market for user data, not just a product market for products or services fueled by the data.
Privacy & Competition – Theory #3

• A product market for data would also better account for the fact that firms are constantly finding new ways to use data, far beyond the initial purposes for which the data was initially collected.

  – e.g., Historical ticketing data — initially collected for the purpose of selling tickets to concertgoers

• is useful for concert promoters who need to decide which artists to book, when to schedule concerts, how to set prices, etc.
Privacy & Competition - Remedies

• When crafting remedies, competition regulators might consider
  – extent to which a dominant firm might be able to maintain or extend monopoly through its control over user data, and ensure that any remedies address this risk.

• Competition Law and Consumer Protection Law have complementary goals:
  – Competition Law strives to ensure that consumers have a range of choices;
  – Consumer Protection Law aims to ensure that consumers have truthful and accurate information when making choices.
TREND: CALL FOR MORE EMPIRICAL RESEARCH IN AREA OF BIG DATA, PRIVACY & COMPETITION

• Former EDPS Hustinx Report Suggestions for Further Study
  • Understanding the Value of Personal Data
    – How can the value of personal data be assessed as a currency and an asset in competition analysis?
    – To what extent is “big data” composed of personal data?
  • Reviewing Approaches to Market Analysis Where Personal Data are an Asset
    – How can we apply the parameters of competition (especially price, quality and choice) in explaining the impact on privacy and data protection?
  • Competition Law Enforcement: Wider Issues
    – Is there a case for wider study to inform regulators dealing with antitrust and merger cases in the digital economy
    – One recommendation: Carry out retrospective/ex post analysis of the impact of competition decisions
• Weak Markets for Privacy Enhancing Services
  – Data Portability: How Could it Work in Practice?