Integrating privacy into EU merger control

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Overview

1. Integration of data protection into the merger analysis

2. Three-layer approach towards the integration of data protection interests into merger review

3. Levels of cooperation between regulators
Integration of data protection into merger analysis

• As parameter of competition: Facebook/WhatsApp

• As legal limit preventing competition concerns from arising:
  – Microsoft/LinkedIn (2016):
    ability of the GDPR to ‘further limit Microsoft’s ability to have access and to process its users’ personal data in the future’ by strengthening the rights of data subjects such as through data portability

  – Google/Fitbit (2020):
    Commission made clear that ‘the assessment of the effects of the Transaction under the Merger Regulation in the present proceedings is predicated on the assumption that the Parties could lawfully combine their datasets’ and that ‘the Parties remain accountable for any breach of GDPR or the e-Privacy Directive […] should such assumption prove to be incorrect’
Possible conflicts between data protection and competition concerns

• *Microsoft/Yahoo* (2010): data-driven efficiencies as defence to justify potential anticompetitive effects

• Possibly incompatible with data protection law if personal data is involved: additional data protection measures needed

• Available remedies:
  – Data silo can create synergies between data protection and competition concerns: *Google/Fitbit* (2020)
Three-layer approach towards the integration of data protection interests in merger review

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<th>Comparison with other non-efficiency concerns</th>
<th>Character of the obligation incumbent on the European Commission as a competition authority</th>
<th>Effect on the application of competition law</th>
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<td>Data protection treated as any other non-efficiency concern</td>
<td>Protection of economic efficiency also furthers data protection interests</td>
<td>In accordance with the inherent limitations of competition law</td>
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<td>Special status of data protection as a fundamental right in the EU Charter of Fundamental Rights</td>
<td>Negative duty to respect the right to data protection: - procedural limits in competition investigations; and - limits on the substance of competition law measures</td>
<td>Right to data protection imposes limits on how competition law can be applied</td>
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<td>Special status of data protection as a fundamental right in the EU Charter of Fundamental Rights</td>
<td>Positive duty to promote the application of the right to data protection: <strong>Scenario 1</strong>: no economic efficiency concern found - legally impossible and undesirable to promote data protection on the basis of competition law <strong>Scenario 2</strong>: economic efficiency concern found - promote data protection when taking competition law measures</td>
<td>Take proactive measures on the basis of competition law to guarantee the effectiveness of the right to data protection</td>
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Scenario 1: the merger does not significantly impede effective competition

• Merger compatible with EU Merger Regulation
• Data protection authorities are free to initiate own / parallel investigation
  – Opportunity to improve coordination by relying on Article 21(4) of the EU Merger Regulation (analogy with media pluralism)
  – Use of GDPR’s data protection impact assessment
Scenario 2: the merger significantly impedes effective competition

- Merger incompatible with the EU Merger Regulation
- Leeway to adopt conditions not only addressing economic efficiency concerns but also stimulating data protection compliance:
  - Data silo in *Google/Fitbit* can prevent competition concerns but also ensures compliance with GDPR purpose limitation
Levels of cooperation between regulators

• Level 1: consultation – EDPB ready to advise in Google/Fitbit
• Level 2: joint work – info exchange, joint design and/or monitoring of remedies
• Level 3: joint policymaking – May 2021 joint statement by UK CMA and ICO on competition and data protection law

• Forum for cooperation: UK Digital Regulation Cooperation Forum (DRCF) and NL Digital Regulation Cooperation Platform (SDT)
Questions for discussion

• How do you perceive the current interactions (overlaps, complementarity, conflicts) between the protection of privacy and merger control?
• Do you think that privacy concerns are sufficiently well integrated in merger review in the EU?
• If not, how do you think privacy concerns could be better integrated in antitrust theories of harm?
• Do you think the cooperation between the antitrust authorities in charge of merger control and the data protection authorities should be improved? If so, how: with more exchange of information, more joint work on specific merger, more joint policy making, for instance by issues common guidelines on data, privacy and merger control?
• Do you think the establishment of a forum composed of multiple authorities (in particular those in, charge of competition and data protection law) should be established at the national level?
• Should such a network also be established at the EU level?