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All Happy Families Are Alike: The EDPS' Bridges between Competition and Privacy*

*Simonetta Vezzoso***

ABSTRACT: Long before techlash became popular, the European Data Protection Supervisor (EDPS) was holding up a mirror to the EU competition authority. Not only the effectiveness of competition rules' enforcement in the age of big data was questioned, but the suggestion was made to substantially improve the interaction, i.e. strengthen the family ties between competition, data protection and consumer protection. The importance of this suggestion was recently acknowledged by the EU Commissioner and Executive Vice-President of the European Commission Margrethe Vestager at a lecture delivered in memorial of the former EDPS Giovanni Buttarelli: "[i]n this time of fast and radical change, all of us have a lot to learn from each other. And if we work together in the spirit that Giovanni Buttarelli showed us, we can achieve his cherished aim – a digital future that works for human beings".

The article's main purpose is to take stock of the current state of the interplay between data protection and competition law against the background of the roadmap presciently put forth by the EDPS since 2014. Moreover, in the spirit that Giovanni Buttarelli showed us, it is suggested that new forms of collaborative enforcement should be explored, the workings of the Digital Clearinghouse progressively institutionalised, also at national level, and, most importantly, that a pro-competitive data governance framework should be developed in a cooperative manner.

KEYWORDS: big data, data market, data protection, abuse of dominance, merger control.

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** Economics and Management Department, Trento University (Professore Aggregato for Competition Policy and Intellectual Property), simonetta.vezzoso@unitn.it.

I. Introduction

In early 2014, Peter Hustinx, then European Data Protection Supervisor (EDPS), published a Preliminary Opinion suggesting numerous ways in which data protection law could be incorporated in the enforcement of competition law.[1] The 2014 Preliminary Opinion presented the first findings of the EDPS on the interplay between data protection and competition law. This early exploratory exercise was followed in 2016 by an Opinion by Giovanni Buttarelli, Peter Hustinx's successor, on the coherent enforcement of fundamental rights in the age of big data [2], as well as by seminal speeches and articles.[3] Six years on, it is fair to recognise that the work of this EU institution, relentlessly advocating in favour of stronger and better "family ties"[4] between these two areas of law, has been especially influential in shaping overall data governance in the digital age. Data, and personal data in particular, is both key to understanding new strategies and practices underpinning business activity in the digital environment and to provide suitable concepts and tools to adequately respond to policy challenges. In July 2019, Martin Selmayr, then Secretary-General of the European Commission, called the convergence of competition and data protection "the running theme of the next five years".[5]

[1] "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", *European Data Protection*, 2014, https://edps.europa.eu/sites/edp/files/publication/14-03-26_competitition_law_big_data_en.pdf.

[2] "Opinion 8/2016, EDPS Opinion on coherent enforcement of fundamental rights in the age of big data", *European Data Protection Supervisor*, 2016, https://edps.europa.eu/sites/edp/files/publication/16-09-23_bigdata_opinion_en.pdf.

[3] Among the numerous contributions that Giovanni Buttarelli devoted to this specific topic see in particular Giovanni Buttarelli, "Les données et la concurrence dans l'économie numérique, Opening statement at the roundtable on data and competition hosted by l'Autorité de la Concurrence, Paris", *EDPS*, 2016, https://edps.europa.eu/sites/edp/files/publication/16-03-08_paris_speech_gb_en.pdf; Giovanni Buttarelli, "Competition Rebooted: Enforcement and personal data in digital markets", *EDPS*, 2015, https://edps.europa.eu/sites/edp/files/publication/15-09-24_era_gb_en.pdf; Giovanni Buttarelli, "Big step towards coherent enforcement in the digital economy", *EDPS Blog*, 2019, https://edps.europa.eu/press-publications/press-news/blog/big-step-towards-coherent-enforcement-digital-economy_en; Giovanni Buttarelli, "This is not an article on data protection and competition law", *CPI Antitrust Chronicle*, February (2019), https://www.competitionpolicyinternational.com/category/antitrust-chronicle/antitrust-chronicle-2019/.

[4] Cfr. Francisco Costa-Cabral and Orla Lynskey, "Family Ties: The Intersection between data protection and competition in EU law", *Common Market Law Review* 54, no. 1 (2017): 11.

[5] Nicholas Vinocur, Simon Van Dorpe and Laurens Cerulus, "Europe looks beyond fining Big Tech – to changing its business model", *Politico*, July 14, 2019, https://www.politico.eu/article/europe-

The important role already played in this regard by the EDPS was also acknowledged by the EU Commissioner and Executive Vice-President of the European Commission Margrethe Vestager at a recent lecture delivered in memorial[6] of Giovanni Buttarelli: "[i]n this time of fast and radical change, all of us have a lot to learn from each other. And if we work together in the spirit that Giovanni Buttarelli showed us, we can achieve his cherished aim – a digital future that works for human beings".[7]

The paper's main purpose is to take stock of the current state of the interplay between data protection and competition law against the background of the roadmap presciently put forth by the EDPS since 2014. It is by now universally acknowledged that data is at the heart of the digital economy (II). In the last six years, it has also become clear that privacy can be a competition/antitrust issue (III). Increasingly, competition authorities have also come to realise that data accumulation is a source of power that should not escape antitrust scrutiny (IV). In addition to describing the current interplay between these two fields of law, the article, in Giovanni Buttarelli's spirit, charts some directions in which the family ties between data protection and competition law could evolve and improve. It is suggested that new forms of collaborative enforcement should be explored, the workings of the Digital Clearinghouse progressively institutionalised, also at national level, and, most importantly, that a pro-competitive data governance framework should be developed in a cooperative manner (V). [8]

II. Data is at the heart of the (digital) economy

Peter Hustinx, Giovanni Buttarelli's predecessor to the role of European Data Protection Supervisor, remarked in a 2013 speech that personal data was increasingly relevant and that this "simply cannot be ignored as a relevant element to take into account by authorities charged with the enforcement of competition law, and the same applies obviously to authorities

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looksbeyond-fining-big-tech-to-changing-its-business-model/ (the recording of the conference mentioned in the press article is available at https://www.youtube.com/watch?v=3JI33s5e53M).

[6] Christian D'Cunha, "In memory of Giovanni Buttarelli", *International Data Privacy Law* 9, no. 3 (2019): 129.

[7] Margrethe Vestager, "Privacy and competition in an age of data", IAPP Europe Data Protection Congress, Brussels, 21 November 2019.

[8] This is the paper's not-so-hidden aspiration to say 'qualcosa di fico,' as Giovanni Buttarelli himself would put it, see "Privacy 2030", Giovanni Buttarelli's 'manifesto', Presentation by Christian D'Cunha at the IAPP Data Protection Congress, Brussels, 21 November 2019 ("to shake things up, say something new - qualcosa di fico").

charged with the enforcement of data protection law, like my own".[9] He went on offering a broad overview of the possible interfaces between these two legal fields from the point of view of a data protection enforcer. These early thoughts were further detailed in the 2014 "Preliminary Opinion on the interplay between data protection, competition law and consumer protection in the Digital Economy" (2014 Preliminary Opinion)[10] and in the 2016 "Opinion on coherent enforcement of fundamental rights in the age of big data" (2016 Opinion).[11]

According to the EDPS, data, data protection law and competition law in the age of big data are inexorably linked. Value-creating economic activities conducted by undertakings in this field, namely data harvesting, storage, structuring, analysis and, finally, usage,[12] touch upon these two areas of the law in a cross-cutting fashion. Well before becoming a fashionable topic inside competition policy circles, it did not escape the small and attentive EU institution that "big data [seemed] to be the way forward for a huge number of economic activities" and that this required thorough analysis from the economic and also societal perspectives".[13] To some extent, the Preliminary Opinion was "gingerly wading into uncharted waters" at a time when "the honeymoon with Big Tech had not quite yet run its course".[14]

The Preliminary Opinion pointed out that "[i]n the digital economy personal information represents a significant intangible asset in value creation and a currency in the exchange of online services".[15] As to the business model designed to capture the value of big data, the EDPS analysed in particular two-sided or multisided platform "cross-financing distinct

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[9] See Peter Hustinx, "Data protection and competition: interfaces and interaction", *EDPS*, 2013, https://edps.europa.eu/data-protection/our-work/publications/speeches-articles/data-protection-and-competition-interfaces_en.

[10] "Preliminary Opinion of the European Data Protection Supervisor".

[11] "Opinion 8/2016".

[12] "Exploring the economics of personal data", Organisation for Economic Cooperation and Development (OECD), 2013.

[13] Hustinx, "Data protection", 1.

[14] See Christian D'Cunha, "Best of frenemies? Reflections on privacy and competition four years after the EDPS Preliminary Opinion", *International Data Privacy Law* 8, no. 3 (2018): 253.

[15] "Preliminary Opinion of the European Data Protection Supervisor", 37. In 2008, the OECD had already defined personal data as the basic currency of the information economy, see Angel Gurría, "Closing remarks by Angel Gurría, OECD Ministerial Meeting on the Future of the Internet Economy", *OECD*, 2008, https://www.oecd.org/korea/closingremarksbyangelgurriaoecdministerialmeetingonthefutureoftheinterneteconomy.htm.

services provided to two or more distinct user groups, that is, users of 'free' services on the one hand, and other businesses and especially advertisers, on the other".[16] Anticipating by five years one of the central themes of Shoshana Zuboff's seminal work "Surveillance Capitalism", published in early 2019,[17] the EDPS remarked that "businesses (...) are increasingly using massive volumes of personal information to understand, predict and *shape* human behaviour".[18]

As confirmed by numerous recent reports and studies, personal data plays several functions in the current phase of the digital economy. First, data has become an instrument used to enable economic transactions ("data as medium of exchange"). As explained by the Australian Competition and Consumer Commission (ACCC) in a recent Report, "[u]sers effectively pay for (…) services [provided by Google and Facebook] by allowing [them] to collect and use their data and by viewing advertisements".[19] Second, data is quickly becoming one of the most important competitive assets for firms ("data as input"), and this is going to become even more important in the upcoming digital age, as AI-fuelled products and services need access to data to be able to compete. AI models trained on data are able to provide a better product or service to the individual who generated some of data, for instance improved maintenance services to a connected device they use, or it can be employed for entirely unrelated purposes. Third, data is increasingly the backbone of economic activity in the current industrial era. In this respect, an unhindered flow of data is increasingly considered necessary for the good functioning of data-driven markets and for a healthy economy overall ("data as infrastructure").

The EDPS' Preliminary Opinion also pointed out that big data markets are often characterised by economies of scale. The initial up-front investment and fixed costs to capture, assemble and process data are high, as it is required for instance to set up a complex digital infrastructure such as a social network or a search engine. Once the digital platform has 'ignited', however, the marginal cost of adding an extra user is extremely low. A

[16] "Preliminary Opinion", 10.

[17] Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (United States of America: Public Affairs/Hachette Book Group, 2019), 8 ("[surveillance capitalists intervene] in the state of play in order to nudge, coax, tune, and herd behaviour toward profitable outcomes").

[18] "Preliminary Opinion of the European Data Protection Supervisor", 6 (emphasis added).

[19] "Digital Platforms Inquiry: Final Report, June 2019", *Australian Competition and Consumer Commission (ACCC)*, 9.

recent Report written by Special Advisers to Competition Commissioner Vestager states in this regard that, while economies of scale characterise a range of industries, "the digital world pushes it to the extreme and this can result in a significant competitive advantage for incumbents".[20] Beyond economies of scale, particularly significant are what have been called "advantages of scope", such as those enjoyed by Facebook in providing differentiated but closely related services. The ACCC considers that a digital platform such as Facebook could enjoy significant advantages of scope using its wide range of services in order to accumulate user data and then tracking users on "websites that utilize Facebook business tools or are part of Facebook Audience Network".[21]

Moreover, the EDPS is already well aware of the important role of network effects in the age of big data.[22] This has become increasingly obvious in the last six years. As a recent Report written for the UK government explains, "[n]etwork effects mean that platforms become more valuable to their users as they grow, which in turn makes them a more attractive proposition to further prospective users".[23] Thus, the value of Facebook to individual users depends on the participation of other users (same-side or direct network effects). Similarly, for both the general search market and the social media market, the benefits to advertisers of using these platforms increase with the number of consumers using them (cross-side or indirect network effects). In the mainstream economic literature on multi-sided markets, these cross-side network effects are also essential in explaining why platforms have an incentive to subsidise groups of users by charging a zero (or extremely low) monetary price for the services (and products) they offer. As to network effects that are strictly dependent on the amount of user data that digital platforms collect, these can again be same-sided or cross-sided. Same-side network effects that arise from data accumulation are for instance those that, according to the ACCC, Google's search platform enjoys, namely due to the relationship between the quantity of

[20] Jacques Crémer, Yves-Alexandre de Montjoye, and Heike Schweitzer, "Competition policy for the digital era - Report", *European Commission*, 2019, 2, https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

[21] "Digital platforms inquiry", *ACCC*, 9.

[22] "Preliminary Opinion of the European Data Protection Supervisor", 23.

[23] Jason Furman, Diane Coyle, Amelia Fletcher, Derek McAules, and Philip Marsden, "Unlocking digital competition: Report of the Digital Competition Expert Panel", *UK Government*, under "Competition", 35, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

data and the quality of the search service. Google's ongoing accumulation of a considerable quantity of data on the users of its search platform (and how users interact with the platform) improves the relevance algorithm in the search engine, thereby increasing the quality of the search service. In particular, as the ACCC found, "large quantities of these types of data improves the ability for the algorithm to generate reliable relevance rankings for queries that are uncommon".[24] This is also called a user feedback loop: improving the quality of the search algorithm, Google is able to draw in more users, creating a virtuous circle. As put by the already mentioned UK Report, "[a] data-rich incumbent is able to cement its position by improving its service and making it more targeted for users, as well as making more money by better targeting its advertising".[25] As to the cross-sided and data-related network effects, these pertain to the circumstance that if an advertising-dependent platform like Google Search has more users and therefore access to more data, it can improve the relevance of ads presented to users. As the ACCC puts it, "[a]ll else being equal, an advertiser may prefer a larger platform, because its ads will tend to be more targeted".[26]

Beyond the early acknowledgement of the risks and challenges of big data, the EDPS was also quick to stress the technology's potential to "deliver significant benefits and efficiencies for society and individuals not only in health, scientific research, the environment and other specific areas".[27] Again, anticipating actual reflections in competition policy circles on how to empower consumers in the age of big data,[28] in 2015 the EU institution made clear the importance of transparency, access to data, data portability and the roll out of "personal data spaces" in order to promote the benefits of big data in a way that is consistent with fundamental rights and values.[29]

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[24] "Digital platforms inquiry", *ACCC*, 66.

[25] Furman *et al.*, "Unlocking digital competition", under "Competition", 33.

[26] "Digital Platforms Inquiry", *ACCC*, 64.

[27] "Opinion 7/2015, Meeting the challenges of big data: A call for transparency, user control, data protection by design and accountability", EDPS, 2015, https://edps.europa.eu/sites/edp/files/publication/15-11-19_big_data_en.pdf. See also D'Cunha, "In memory", 130 ("Buttarelli (…) recognized from early on that the ability to do new things with enormous datasets could be a positive development if it was genuinely to improve the lives of most people").

[28] See, "Online platforms and digital advertising: Market study interim report", *Competition and Markets Authority (CMA)*, 2019.

[29] "Opinion 7/2015".

III. Privacy is a competition/antitrust issue

At the end of the first decade of this millennium, it was still commonly held that privacy was not an antitrust issue.[30] On the contrary, a popular belief was that a high level of data protection could likely result in less competition and consumer welfare.[31] This tension surfaced at the time of the *Google/DoubleClick* merger. On both sides of the Atlantic, competition authorities agreed that the merger review had to consider the combination of the parties' databases solely from the perspective of negative effects on competition.[32] The US Federal Trade Commission (FTC) expressly stated that "[n]ot only does the Commission lack legal authority to require conditions to this merger that do not relate to antitrust, [but] regulating the privacy requirements of just one company could itself pose a serious detriment to competition in this vast and rapidly evolving industry".[33] In the EU, the Commission's argument in *Google/DoubleClick* seemed to find support in an almost contemporary pronouncement by the Court of Justice of the European Union. The Court stated in *Asnef-Equifax* that "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".[34] Seven years later, in the 2014 *Facebook/WhatsApp* merger decision, the Commission still expressed a very similar view when it held that "[a]ny privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the Transaction do not fall within the scope of

[30] Simonetta Vezzoso, "Pro-competitive regulation of personal data protection in the EU", in *State-Initiated Restraints of Competition*, ed. Josef Drexl and Vicente Bagnoli (Cheltenham: Edward Elgar, 2015), 201 ("The competition authorities' stance in Google/DoubleClick is not surprising. In fact, most competition scholars and practitioners would likely agree that privacy as such is not a competition issue").

[31] Ibid.

[32] European Commission Decision of 11 March 2008, *Google/ DoubleClick*, Case COMP/M.4731, OJ C 187, p. 10; Federal Trade Commission, "Statement of the Federal Trade Commission Concerning Google/ DoubleClick", FTC File No. 071-0170 (20 December 2007).

[33] Ibid.

[34] Judgment of 23 November 2006, *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL and Administración del Estado v. Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, C-238/05, EU:C:2006:734. For the interesting background from which this ruling originated see Federico Ferretti, "The legal framework of consumer credit bureaus and credit scoring in the European Union: Pitfalls and challenge – overindebtedness, responsible lending, market integration, and fundamental rights", *Suffolk University Law Review* 46 (2013): 791.

the EU competition law rules but within the scope of the EU data protection rules".[35] Currently, this argument is increasingly qualified also from a sound economic perspective. As put for instance by the former Chief Economy at DG Competition Tommaso Valletti, "[l]imited data protection can…lead to both exploitative and exclusionary conduct by dominant platforms"[36] Data protection authorities, and the EDPS in particular, have been influential in making this happen.

A bird's view of the interplay between data protection and competition law, as developed specifically from the point of view of a data protection authority, identifies at least four potentially relevant levels[37]: first, data protection forms part of the legal, (market) institutional background for competitive assessments; second, the data protection perspective can be relevant at the substantive level, in the application of the competition policy legal framework; third, data protection concerns can act as external constraints to the application of competition law, such as devising a data access remedy to a competition law infringement; finally, data protection matters at the more procedural level, namely when the competition enforcer processes personal data in the course of its enforcement activities. The first level, which points to a minimalist interplay between competition law and data protection law, is largely uncontroversial. Data protection law forms part of the legal institutions determining the unfolding of competitive processes, and this needs to be accounted for when enforcing competition law. Put differently, data protection needs to be considered for the purposes of "establishing the relevant counterfactual, to the same extent as any other regulatory requirement would be considered by the Commission in its assessment".[38]

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[35] European Commission Decision of 3 October 2014, *Facebook/Whatsapp*, case COMP/M.7217, paragraph 164.

[36] See Tommaso Valletti, "The role of data and privacy in competition", Testimony Before the House Judiciary Committee Subcommittee on Antitrust, Commercial, and Administrative law, 18 October 2019; see also Cristina Caffarra and Tommaso Valletti, "Google/Fitbit review: Privacy IS a competition issue", *Vox CEPR Policy Portal*, 2020, https://voxeu.org/content/googlefitbit-review-privacy-competition-issue#.Xl-025mfgNo.twitter.

[37] Already in Hustinx "Data protection". Since at least 2014, many have been the important doctrinal contributions on this interaction. For a recent overview comprising also consumer law see Marco Botta and Klaus Wiedemann, "The interaction of EU Competition, consumer, and data protection law in the digital economy: The Regulatory dilemma in the Facebook odyssey", *The Antitrust Bulletin* 64, no. 3 (2019): 428.

[38] Massimiliano Kadar and Mateusz Bogdan, "'Big data' and EU merger control – A case review", *Journal of European Competition Law & Practice* 8, no. 8 (2017). See also "Competition law and

As to the second, namely the substantive level, the Preliminary Opinion first notes that a full market analysis for any of the "free" digital services at the time of the writing was still missing and suggests that the focus of the competition authorities be directed towards "assess[ing] the value of personal information as an intangible asset"[39], while considering that "[c]ompany expansion and broadening of their range of [data-related] services can blur the borders between markets".[40] The EDPS warns in this regard that neglecting "to acknowledge the increasing importance of personal information as an intangible asset risk ring-fencing more and more services reliant on mass personal data processing (…) outside the scope of enforcement (…) of competition rules".[41] The *Google/DoubleClick* decision is criticised in particular for not considering how the merger could have affected the users whose data would be further processed by merging the two companies' datasets and 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".[42] Finally, besides complex aspects related to the identification of the relevant markets for the competition policy assessment, the EDPS considers that market power in the age of big data is "partly driven by the degree to which a given undertaking can actually, potentially or hypothetically collect and diffuse personal information."[43]

From a purist's perspective,[44] the EDPS's substantive and, possibly, adversarial incursion into competition policy's well-guarded terrain was not

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data", *Autorité de la concurrence and Bundeskartellamt*, 2016, 23, https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.html?nn=3591568 ("The fact that some specific legal instruments serve to resolve sensitive issues on personal data does not entail that competition law is irrelevant to personal data. Generally speaking, statutory requirements stemming from other bodies of law may be taken into account, if only as an element of context, when conducting a legal assessment under competition law").

[39] "Preliminary Opinion of the European Data Protection Supervisor", 27.

[40] Ibid., 28.

[41] Ibid.

[42] Ibid., 30

[43] Ibid., 28.

[44] See Reuben Binns and Elettra Bietti, "Dissolving privacy, one merger at a time: Competition, data and third party tracking", *Computer Law & Security Review*, in press (2019): 6 ("We define the purist conception of antitrust as the understanding that antitrust is a pure discipline with rigid boundaries, focused on the promotion of market efficiencies and the limited correction of market failures. The claim that underlies a purist view of antitrust law is that markets are mostly capable

particularly welcome. "Ostensibly neutral economic analysis and established enforcement practices"[45] felt annoyingly threatened. According to this view, perceived "public interest" considerations expressed by the data protection regime have no place in competition proceedings, and, besides, factoring in privacy concerns would intolerably distort and complicate competition analysis and proceedings.[46] Moving on from these more extremist positions, it appeared increasingly clear, however, that in so-called zero-price markets the identification of the true parameters on which firms compete is necessarily more complex than in traditional competition analysis, as the possible harm cannot be assessed in terms of a traditional price increase. Thus, in case of merger control, degraded data protection post-transaction can be *the* harm that competition authorities are required to assess and prevent, such as, for instance, requiring more personal information from the merged party's users or supplying such data to third parties.[47] Whereas a privacy degradation, was eventually conceded, could affect the quality as a competition dimension and thus, ultimately, consumer welfare, this is considered unlikely to happen in actual, real case scenarios. Several reasons for this are commonly alleged, such as the existence of a "privacy paradox" (namely the that consumers care about preserving privacy, but few actually take steps to protecting it) from which to infer that different consumers value privacy in different ways and therefore "the relationship between privacy and quality is purely subjective".[48] Moreover, there would be an ambiguous relationship between privacy and other elements of product quality, as access to more user data could have an overall positive effect on product quality.[49] At any rate, privacy

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of correcting themselves and thus that any regulatory interference in markets must be kept to an absolute minimum").

[45] Costa-Cabral, Linksey, "Family ties".

[46] D. Daniel Sokol and Roisin Comerford, "Does antitrust have a role to play in regulating big data?", in *The Cambridge Handbook of Antitrust, Intellectual Property, and High Tech*, ed. Roger D. Blair and D. Daniel Sokol (Cambridge: Cambridge University Press, 2017); Geoffrey Manne and Ben Sperry, "Debunking the myth of a data barrier to entry for online services", *Truth on the Market Blog*, 26 March 2015, under "antitrust", https://truthonthemarket.com/2015/03/26/debunking-the-myth-of-a-data-barrier-to-entry-for-online-services/.

[47] Cfr. Maria Wasastjerna, "The role of big data and digital privacy in merger review", *European Competition Journal* 14 (2018), 417, 423.

[48] See James C. Cooper, "Privacy and antitrust: Underpants gnomes, the first amendment, and subjectivity", *George Mason Law Review* 20, no. 4 (2013): 1129, 1135-1138.

[49] Cfr. Geoffrey Manne and Ben Sperry, "The problems and perils of bootstrapping privacy and data into an antitrust framework", *CPI Antitrust Chronicle* 5, no. 2 (2015).

could be taken into account only when objective evidence is provided that in the specific circumstances of the case it is an important competition parameter, and balanced against the transaction's (likely) substantial efficiencies in zero-price markets. Within these limits, however, few would deny that competition policy and data protection law could *still* converge on the need to protect "privacy competition" whenever this was likely to emerge.

In a March 2016 speech, the EU Competition Commissioner signalled the intention to increasingly consider the role of data in merger control.[50] A first tangible turning point[51] with regard to the interplay between data protection and competition law was marked, eight months after the speech, by the *Microsoft/LinkedIn* merger decision.[52] Arguing against the backdrop of what was stated by the CJEU exactly ten years earlier in *Asnef-Equifax*,[53] the argument was made from within the EU Commission that, whereas the enforcement of data protection rules *as such* falls outside the competition authority's remit, "privacy consideration may have a role to play in merger control".[54] In the *Microsoft/LinkedIn* merger decision, the Commission has embraced the argument that proposed mergers could in some cases raise privacy issues that cannot be assessed separately from competition policy issues[55] and not shied away from engaging in a thorough analysis of at least some of the privacy implications of a specific transaction. First, the Commission acknowledged, based on the results

[50] Margrethe Vestager, "Refining the EU merger control system", *European Commission*, 2016, under "Speeches and articles about Mergers", https://wayback.archive-it.org/12090/20191129204644/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/refining-eu-merger-control-system_en ("in this digital age, we find that mergers often affect competition for a service that's offered free of charge. Often what attracts users to a service isn't its price or any inherent quality, but how many other people use it. And sometimes data can be the most valuable asset a company owns. Fortunately, our rules allow us to take all of these issues into account when we review a merger. Our test is nimble enough to be applied in a meaningful way to the 'new economy', which is after all not so new anymore").

[51] See Agustín Reyna, "The psychology of privacy – what can behavioural economics contribute to competition in digital markets?", *International Data Privacy Law* 8, no. 3 (2018): 240; Ben Holles de Peyer, "EU Merger control and big data", *Journal of Competition Law & Economics* 13, no. 4 (2018): 767, 784.

[52] European Commission Decision of 6 December 2016, *Microsoft/LinkedIn*, Case COMP/M.8124, C(2016) 8404.

[53] See footnote 34 above.

[54] Eleonora Ocello and Cristina Sjödin, "Microsoft/LinkedIn. Big data and conglomerate effects in tech markets", *Competition Merger Brief*, Issue 1/2017 (2017): 5.

[55] See also "Competition law and data", at 23.

of its market investigation, that privacy in the case at hand was indeed an important parameter of competition.[56] Second, the Commission stated that the potential foreclosure of competing providers of professional social networking services could give rise to consumer harm, *inter alia*, because it could lead to the "marginalisation of an existing competitor which offers a greater degree of privacy protection to users than LinkedIn (or make the entry of any such competitor more difficult)",[57] thereby restricting consumer choice as to the level of data protection offered by a professional social network. Thus, the Commission's merger analysis anticipated privacy degradation post-transaction as a consequence to a change in the market conditions brought about by the proposed merger. In the end, the EU Commission allowed Microsoft to acquire LinkedIn subject to behavioural remedies. When commenting on the merger decision, the EU Competition Commissioner held that "by getting commitments from Microsoft that will keep the market open, we've helped to allow companies to compete to protect privacy more effectively".[58] In this respect, the Commission did not assess any possible effects on privacy deriving from the mere concentration of personal data in the merged entity. It was reaffirmed, instead, that "[a]ny privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules".[59]

[56] European Commission Decision of 6 December 2016, *Microsoft/LinkedIn*, Case COMP/M.8124, C(2016) 8404, footnote 330 ('The results of the market investigation have indeed revealed that privacy is an important parameter of competition and driver of customer choice in the market for PSN services"). Instead, in the *Facebook/WhatsApp* merger decision, the Commission came to the conclusion that the majority of consumer communications apps (e.g. Facebook Messenger, Skype, WeChat, Line, etc.) did not (mainly) compete on privacy features, despite the fact that an increasing number of users valued privacy and security, and would have therefore be dissatisfied if, after the merger, end-to-end encryption were abandoned, see European Commission Decision of 3 October 2014, *Facebook/WhatsApp,Case*, COMP/M.7217, C(2014) 7239.

[57] European Commission Decision of 6 December 2016, *Microsoft/LinkedIn*, Case COMP/M.8124, C(2016) 8404, paragraph 350.

[58] Margrethe Vestager, "What competition can do – and what it can't" (communication, Chilling *Competition Conference*, October 25, 2017).

[59] European Commission Decision of 6 December 2016, *Microsoft/LinkedIn*, Case COMP/M.8124, C(2016) 8404, paragraph 164.

IV. Data accumulation/gathering is appearing on the radar of competition authorities

Long before *techlash* became popular, even among world economic elites,[60] and critical voices from inside and outside the antitrust community were taken seriously also by competition enforcers (and their respective governments), the EDPS was already holding up a mirror to the EU competition authority. Not only the effectiveness of competition rules' enforcement in the age of big data was questioned, but the suggestion was made that a possible solution could be to substantially improve the interaction, i.e. strengthen the family ties between competition, data protection and consumer protection. From the EDPS' perspective, the *Microsoft/LinkedIn* decision was, possibly, a (small) step in the right direction, but much more needed to be done. Highly favourable was instead the EDPS' response to the 2019 *Facebook* decision by the German competition authority (Federal Cartel Office, Bundeskartellamt) scrutinizing Facebook's terms of service under German competition law.[61] The Bundeskartellamt found that these terms of service, which allowed Facebook to collect extensive amounts of user data from third-party sources, were in breach of EU data protection law and amounted to an abuse of a dominant position. On 7 February 2019, the day following the date of the Bundeskartellamt's public announcement, Giovanni Buttarelli wholeheartedly welcomed the decision.[62] The EDPS noted how "[p]owerful tech companies pose multiple challenges to lawmakers in Europe and elsewhere on many levels and vigorous enforcement of competition rules in the EU is one important element in addressing them". He also pointed out that his institution had "consistently supported competition authorities taking action to combat abuse of dominance in a market by means of exploitation of consumers (in accordance with Article 102 of the Treaty)" and therefore they were feeling "encouraged by this decision".

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[60] See "Year in a word: Techlash", *Financial Times*, 16 December 2018, https://www.ft.com/content/76578fba-fca1-11e8-ac00-57a2a826423e ("This year will be remembered as the moment big tech faltered. At January's World Economic Forum in Davos, investor George Soros questioned the economic and political power of tech companies and their ability to manipulate public opinion in ways that challenge what John Stuart Mill would have called "the freedom of mind").

[61] Bundeskartellamt Decision of 6 February 2019, Facebook B6-22/16.

[62] Giovanni Buttarelli, "Big step towards coherent enforcement in the digital economy", *EDPS Blog*, 7 February 2019, https://edps.europa.eu/press-publications/press-news/blog/big-step-towards-coherent-enforcement-digital-economy_en.

Indeed, the 2014 Preliminary Opinion already noted that "[a]busive exploitation which most obviously could harm the consumer, such as the application of excessive prices or unfair discrimination, has (…) rarely been confronted by competition authorities and in most cases of exploitation the 'victims' have been companies, not end consumers"[63] and suggested that this type of abuse might require much more attention by competition authorities in the age of big data. The EDPS proposed the example of a dominant firm in the market for email services that launches a new photo-sharing platform, nudges users of the email service into downloading and using the photo-sharing platform (to which users become increasingly dependent), and then exploits them by weakening data protection controls through the imposition of a revised privacy policy. This, according to the Preliminary Opinion, besides possible questions of exclusionary conduct through tying, could raise issues of exploitation under Article 102 TFEU.[64] Following up on these early reflections, the 2016 Opinion suggested "using data protection and consumer protection standards to determine 'theories of harm' relevant to merger control cases and to cases of exploitative abuse as understood by competition law under Article 102 TFEU, with a view to developing guidance similar to what already exists for abusive exclusionary conduct".[65]

Understandably, the *Facebook* case by the Bundeskartellamt attracted significant attention from within the competition policy community. While this is not the place to reproduce the extremely stimulating legal and economic debate that ensued both before and after the decision,[66] it is worth noting that, to some extent, the German authority conducted a natural experiment.[67] To put it differently, the Bundeskartellamt embarked

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[63] "Preliminary Opinion of the European Data Protection Supervisor", 21.

[64] Ibid., 29.

[65] "Opinion 8/2016", 15.

[66] See Marco Botta and Klaus Wiedemann, "Exploitative conducts in digital markets: Time for a discussion after the Facebook decision", *Journal of European Ccompetition Llaw & Practice* 10, no. 8 (2019); Viktoria Robertson, "Excessive Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data", *Common Market Law Review* 57, no. 1 (2020): 161-190.

[67] See Luca Rancati, "The intersection between Antitrust and data protection. Lessons from the Facebook/ Whatsapp merger and the Bundeskartellamt's decision on Facebook's terms and conditions", *Faculté des sciences économiques, sociales, politiques et de communication, Université catholique de Louvain, 2019*, 49, https://dial.uclouvain.be/memoire/ucl/fr/object/thesis%3A21242. The economist Cristina Caffarra also recently remarked that the German *Facebook* decision resembled a natural experiment, cfr. "CRA Conference, Antitrust in Times of Upheaval – a Global

on a discovery tour to a still largely unexplored region,[68] albeit relying on German legal precedents developed far from the digital sphere. Judging from the clear words of the Düsseldorf Higher Regional Court (OLG Düsseldorf) deciding on the appeal to the first instance in interim proceedings, the experiment has so far produced at least "mixed" results,[69] unless the German Federal Court of Justice, where the case is actually pending, or even the CJEU,[70] decide otherwise. Facebook's application for suspensive effect of the Bundeskartellamt's decision was unhesitantly granted by the OLG, which also left little doubt as to the fate of the main proceedings before the same Court.[71]

With regard specifically to the interplay between data protection and competition law, it should first be noted that the Düsseldorf Court does not rule specifically on the alleged infringement of data protection law, which occupied roughly one third of the Bundeskartellamt's Decision, as this will be part of the upcoming full assessment. What the Court is however unequivocally rejecting is that there could be an automatic finding of an abuse of dominance under Section 19(1) of German Competition law (Gesetz gegen Wettbewerbsbeschränkungen, GWB) on the grounds of Facebook's alleged infringement of data protection law. Facebook's data processing, according to the Düsseldorf OLG, does not constitute an abuse of a dominant position in the form of exploitation of users.[72] According to the Bundeskartellamt, Section 19(1) GWB, "which relies heavily on decisions about values based on both fundamental rights and ordinary law in order to determine abusive conduct, has so far found no equivalent in European case law or application practice".[73] The Authority considers that,

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Conversation, Brussels 10 December 2019", https://events.streamovations.be/sessions/reference/antitrust-in-times-of-upheaval-a-global-conversation [at 2:13:19].

[68] See Rupprecht Podszun, "After Facebook: What to Expect from Germany", *Journal of European Competition Law & Practice* 10, no. 2 (2019): 69 ("I prefer to see it as a 'pioneering' case, where a competition agency exhausts the full potential of competition law rules (here: exploitation of consumers as an abuse) in a subject matter that had not yet been explored before (personal data). That seems necessary to me in times when we are wondering how to shape competition policy in the era of digitisation. Such cases may even help to fight off more interventionist regulation").

[69] OLG Düsseldorf VI-Kart 1/19 of 26 August 2019, Facebook.

[70] Decision of 26 November 2015, *SIA "Maxima Latvija" v. Konkurences padome*, Case C-345/14, EU:C:2015:784.

[71] Christina Möllnitz, "Datenschutz ist kein Wettbewerbsrecht", *Computer und Recht* 35, no. 10 (2019): 640, 641 (" verbal slap in the face").

[72] Nor in the form of exclusion of competitors.

[73] Bundeskartellamt Decision of 6 February 2019, Facebook B6-22/16, paragraph 914.

first, according to German law, the provisions of the EU data protection law are mandatory principles for assessing whether Facebook's privacy notices are reasonable, and in this way principles of EU data protection law are incorporated into Section 19(1) GWB. The Bundeskartellamt then assesses Facebook's abuse by applying those principles, i.e. a normative criterion based on values. An interesting question in this respect is whether, at least conceptually, the Düsseldorf OLG's ruling represents any, even minor, constraint on any following attempt of using data protection to determine "theories of harm" relevant to cases of exploitative abuse under Article 102 TFEU, as was indeed suggested by the EDPS.[74] At any rate, the Court seems to consider Section 19(1) GWB much less "exceptional" than according to the legal interpretation of the Bundeskartellamt.[75] As noted by Rupprecht Podszum in the immediate aftermath of the Düsseldorf OLG's ruling, "[p]erhaps, the [Bundeskartellamt] would have done itself a favour if it had gone much further and if it had brought up the courage to say: Yes, we are trying a novel theory of harm here! This is antitrust law for the digital age! And we are now seriously trying to take exploitative abuses to the spotlight after decades of ignorance!".[76]

Regardless of the ultimate outcome of what could easily escalate into yet another (legal) antitrust saga, the undisputed merit of the German *Facebook* case, ongoing already since 2016, is that it has at long[77] focused competition enforcers' and other stakeholders' minds on the otherwise obscure mechanisms of data gathering in online advertising markets. Since the opening of the German Facebook investigation, these mechanisms have been thoroughly investigated by the ACCC first[78] and more recently by the UK competition authority.[79] Another positive effect could be to inspire data protection authorities to adopt a interpretative (risk-based) approaches increasingly reliant on concepts of dominance akin to

[74] "Opinion 8/2016", 15. See also D'Cunha, "In memory", 130 ("As the first legal skirmish in the first battle in what promises to be a prolonged confrontation, it also inadvertently demonstrates the need for authorities to pool their expertise").

[75] Möllnitz, "Datenschutz", 641 s.

[76] Rupprecht Podszun, "Facebook vs. Bundeskartellamt", *D'Kart Antitrust Blog*, 2019, https://www.d-kart.de/en/blog/2019/08/30/en-facebook-vs-bundeskartellamt/.

[77] See Binns and Bietti, "Dissolving".

[78] See footnote 19 above.

[79] "Online platforms and digital advertising".

competition law.[80] Conversely, however, a pro-competitive assessment of data protection law[81] could fuel some legitimate doubts as to the efficacy of protecting data subjects and consumers by heavily relying on consent ("terms and conditions"). It should not be overlooked, however, that the General Data Protection Regulation,[82] less than two-year old at the time of the writing, is a very complex piece of legislation whose scope and bearings still need to be adequately tested. Finally, it is abundantly clear that it should not be the role of competition agencies to proactively enforce data protection law simply because the competent data protection authorities might be unable to do that due to lacking powers, resources[83] and/or due to other institutional hurdles.

V. Concluding suggestions: family happiness in this time of fast and radical change

In the coming years, the relationship between data protection law and competition law is going to become increasingly crucial in the EU and elsewhere, especially against the background of the Internet of Things and likely algorithmic advances. In the spirit of Giovanni Buttarelli,[84] this part discusses a few ways in which the family tree could be nurtured in the interest of consumers and data subjects going forward.

Exploring new forms of coordinated enforcement between authorities

Whereas considering privacy as a dimension of quality competition is by now well established in EU competition law, further implications of the interplay between these two areas of law against the background of the speed of evolution in technology markets are less well apprehended, as

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[80] See, for instance, the, "Preliminary Opinion on data protection and scientific research" *EDPS*, 2020, https://edps.europa.eu/sites/edp/files/publication/20-01-06_opinion_research_en.pdf ("A public interest basis under data protection law for dominant companies to disclose data to researchers would need to be clearly formulated and laid down in EU or Member State law, as well as being accompanied by a rigorous proportionality test and appropriate safeguards").

[81] See Vezzoso, "Pro-competitive".

[82] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

[83] D'Cunha, "In memory", 130 ("Now we see that it becomes harder to enforce privacy rules (…) the more powerful a company becomes (…) This is illustrated by the recent $5 billion settlement for the violation of the 2011 consent decree that was *negotiated between* the FTC (not *imposed by the FTC on*) Facebook", emphasis in the original).

[84] Vestager, "Privacy and competition".

suggested also in the previous Sections. In a one-page Statement, to be read in the context of the EU Commission's investigation into the proposed acquisition of Shazam by Apple, the European Data Protection Board (EDPB)[85] stressed the urgency to "assess longer-term implications for the protection of economic, data protection and consumer rights whenever a significant merger is proposed, particularly in technology sectors of the economy". The EDPB considered that there was a link between "[i]ncreased market concentration in digital markets" and a threat to (degradation of) "the level of data protection and freedom enjoyed by consumers of digital services". More broadly, the Board considered that "data protection and privacy interests of individuals are relevant to any assessment of potential abuse of dominance as well as mergers of companies, which may accumulate or which have accumulated significant informational power".[86] The EDPB expressed similar considerations more recently, with regard to the proposed acquisition of FitBit by Google. According to the Board, "[t]here are concerns that the possible further combination and accumulation of sensitive personal data regarding people in Europe by a major tech company could entail a high level of risk to the fundamental rights to privacy and to the protection of personal data". It also "urges the parties to mitigate the possible risks of the merger to the rights to privacy and data protection before notifying the merger to the European Commission." The EDPB also reiterated its offer to "contribute its advice on the proposed merger to the Commission if so requested".[87]

The concerns of data protection authorities regarding longer term, broader welfare effects than traditionally considered by the competent authorities when enforcing competition law is understandable and justified.[88] For once, in striking contrast to the ideal of a knowledge-based society, a data-based economy is characterised by situations of profound asymmetries of information. First of all, as the ACCC explains, "consumers are generally not aware of the extent of data that is collected nor how it is

[85] The EDPS is also a member of the Board.

[86] "Statement of the EDPB on the data protection impacts of economic concentration", *EDPB*, 27 August 2018, https://edpb.europa.eu/our-work-tools/our-documents/autre/statement-edpb-data-protection-impacts-economic-concentration_pt.

[87] "Statement on privacy implications of mergers", *EDPB*, 19 February 2020, https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_statement_2020_privacyimplicationsofmergers_en.pdf.

[88] D'Cunha, "In memory", 131 ("Concentration in markets, for which there is now ample evidence, has an obvious impact on meaningful choice when it is all but impossible to opt-out of participation in digital life").

collected, used and shared by digital platforms" and these latter moreover "tend to understate to consumers the extent of their data collection practices while overstating the level of consumer control over their personal user data".[89] Digital platforms in particular have significant incentives to accumulate a broad range of increasingly detailed personal information about the largest number of consumers, and to persuade them to permit this to occur. To achieve this, these market players often resort to hidden tracking technologies, as well as to the concealment of their data practices from the consumers based on a toxic mix of legal and technological measures.[90] An ensuing and plausible concern is that the abundant information collected about consumers could be used against them,[91] according to the dynamics and imperatives of so-called "surveillance capitalism".[92] A further important information asymmetry affecting the society at large lies at a deeper level, namely between the human and the "machine": only machines (i.e. the sophisticated data analysis techniques fuelling them) are increasingly able to systematically extract valuable information out of masses of structured and unstructured data that are otherwise incomprehensible to the human mind. Several are the significant implications of these asymmetries from a broader societal perspective, which our institutions are still struggling to apprehend. It is already abundantly clear, however, that some forms of information asymmetries can be sources of market failure to the extent that they prevent competitive processes from operating effectively and efficiently. Compounded by network effects and economies of scale and scope,[93] they have already given rise to the phenomenon of Big Tech, with which competition authorities worldwide are currently trying to come to terms.[94]

Given the significance of the phenomenon, and the need to respond quickly and effectively to the challenges it poses, it is already quite apparent that an appropriate reaction would need to go beyond what competition law, data protection (and consumer protection) working in silos can

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[89] "Digital platforms inquiry", 23; see also Crémer, Montjoye and Schweitzer, "Competition policy", 28.

[90] Cfr. Katharine Kemp, "Concealed data practices and competition law: Why privacy matters", 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3432769.

[91] Crémer, Montjoye and Schweitzer, "Competition policy", 28.

[92] Zuboff, *The Age*.

[93] See also Section II above.

[94] See "Online platforms and digital advertising" for the latest comprehensive analysis of this phenomenon with regard to Google and Facebook, as well as for a broad array of possible solutions.

traditionally provide. On the one side, new forms of coordinated enforcement between authorities should be urgently explored.[95] Interesting in this respect is the proposal made by the EDPB in the already mentioned Statement, in which it was suggested that data protection authorities can assist competition authorities with the assessment of the impact of potential abuses of dominance as well as mergers "on the consumer or society more generally in terms of privacy, freedom of expression and choice" as well as with the "the identification of conditions or remedies for mitigating negative impacts on privacy and other freedoms." Both the substantial assessment and the identification or remedies could be "separate to and independent from, or integrated into, the analysis carried out by competition authorities during their assessment under competition law".[96] On the other, this could facilitate the full exploration of the normative dimension of privacy with regard to competitive processes.

Digital Clearinghouse 4.0

Besides traditional enforcement, competition policy is bound to take an increasingly regulatory turn.[97] On the one side there is the increasing recognition that traditional enforcement action is no longer enough to address the broad concerns emerging from digital markets, and that some form of *complementing* ex-ante regulation is required.[98] On the other side, there is a broader role for competition authorities to play in accompanying (giving an "helping hand" to) the shaping of the digital markets in a way that better aligns the interests and incentives of the firms with those of consumers and society.

Data protection authorities are likely to be supportive of changes making competition policy more effective in dealing with big data issues, as they have often noted that under the current market conditions it is very difficult for individuals to be in control of their data. Moreover, if data protection considerations have entered the competition arena, there is of

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[95] D'Cunha, "In memory", 130 ("The big challenge is to move on to consider real-life investigations").

[96] "Statement of the EDPB".

[97] Furman *et al.*, "Unlocking digital competition", under "Competition"; "Online platforms and digital advertising"; Rupprecht Podszun and Fabian Brauckmann, "Germany's pressing ahead: The proposal for a reformed competition act", *CPI*, 6 November 2019, under "Europe column", https://www.competitionpolicyinternational.com/germanys-pressing-ahead-the-proposal-for-a-reformed-competition-act/.

[98] Ibid.

course much work to do putting competition consideration into the data protection arena.[99]

Intense interactions are already happening on a case-by-case scenario, as the *Facebook* case shows, but going forward more structured forms of collaboration are going to be needed, following in the steps of the EDPS' initiative to create a Digital Clearinghouse. Officially launched on 29 May 2017, the Digital Clearinghouse currently meets twice a year.[100] The 2016 EDPS Opinion already suggested that, among the activities that could be carried out by Digital Clearinghouse, there was "using data protection and consumer protection standards to determine 'theories of harm' relevant to merger control cases and to cases of exploitative abuse as understood by competition law under Article 102 TFEU, with a view to developing guidance similar to what already exists for abusive exclusionary conduct."[101] During the second meeting, one of the topics discussed was the development of "[b]est practice for data protection and consumer authorities to support competition authorities in the case of digital sector mergers".[102] As a follow up to the second meeting, during the third meeting regulators focused on theories of harm related to collusive and personalised pricing. Non-price factors in competition and consumer enforcement analysis were discussed during the fourth meeting, as well as how the essential facility theory applies to the specificities of data resources.[103] The topic of regulating non-monetary price services was further explored during the fifth meeting.[104] Interestingly, the already mentioned February 2019 *Facebook* decision of the Bundeskartellamt was discussed in parallel to the consumer action taken by the European Commission, together with consumer protection authorities and concluded in April 2019, which led to a change to the company's "Terms and Services".[105] Finally, at the November 2019 meeting the more ex-ante perspective was discussed, in particular with regard to connected cars and fintech.[106]

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[99] For a very early and incomplete attempt see again Vezzoso "Pro-competitive".

[100] See "Big data & digital clearinghouse", *EDPS*, 2019, https://edps.europa.eu/data-protection/our-work/subjects/big-data-digital-clearinghouse_en.

[101] "Opinion 8/2016", 15 (reference omitted).

[102] "Big data & digital clearinghouse".

[103] Ibid.

[104] Ibid.

[105] Ibid.

[106] Ibid.

Going forward, the importance of the Digital Clearinghouse as a forum in which the interplay between data protection and competition policy (and consumer law) are discussed against the background of the evolving technological scenario is poised to grow.[107] One of the outputs of these joint reflections could be the publication of opinions or statements swiftly providing guidance to the market actors. Moreover, the format of the Digital Clearinghouse should be replicated and institutionalized at the national level.

Developing a pro-competitive data framework

Finally, discussions should converge on the need to jointly develop a pro-competitive data governance framework in which data subjects can effectively control their data. There is much to do to create more competition and innovation in the digital economy in the interest of consumers and data subjects. Whereas the numerous reports and studies recently produced by competition authorities, governments and other stakeholders in the process of adjusting the policy framework to the new economic (and social) reality have put forth a number of very promising data-related proposals aimed at strengthening competition policy in the digital age, a truly comprehensive pro-competition data governance framework is still largely missing. A pro-competition data governance would ideally be led by a progressive agenda that aims at mobilizing data to enable competition and innovation and provides consumers with the means to exercise their true sovereignty.[108] A suitable data governance framework would then accom-

[107] For some concrete proposals on how "to optimise public enforcement in digital markets by enhancing the co-operation between competition agencies, data protection and consumer bodies in the EU" see also Agustin Reyna, "Optimizing public enforcement in the digital single market through cross-institutional collaboration", 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3529198.

[108] For some encouraging reflections in this same direction, see the recently published Communication by the European Commission, A European strategy for data, 19 February 2020, at 20 ("Individuals should be further supported in enforcing their rights with regard to the use of the data they generate. They can be empowered to be in control of their data through tools and means to decide at a granular level about what is done with their data ('personal data spaces'). This could be supported by enhancing the portability right for individuals under Article 20 of the GDPR, giving them more control over who can access and use machine-generated data, for example through stricter requirements on interfaces for real-time data access and making machine-readable formats compulsory for data from certain products and services, e.g. data coming from smart home appliances or wearables. In addition, rules for providers of personal data apps or novel data intermediaries such as providers of personal data spaces could be considered, guaranteeing their role as a neutral broker", reference omitted).

pany and support the ongoing digital transformation of the economy with its manifold opportunities for data-driven innovations and improved consumer outcomes.

The root of this approach can be found in what is already well known as "Open Data", a movement that has opened-up and continues to open-up valuable public data assets in an increasing number of sectors.[109] In the UK context, the most widely-cited Open Data's success story is Transport for London (TfL), which has been making available public transport data to developers for free and real-time since 2009. Thanks to TfL's open data policy "a number of new business and products have been created, including some competing directly with TfL's complementary products, such as Citymapper".[110] Open Banking has brought this idea forward by showing that it is possible to develop workable frameworks for safe access to data, thereby overcoming technical challenges and misaligned incentives.[111] What Open Banking also suggests is that there are huge, and partly unexpected, potentials in terms of new and innovating products and services when the 'opening' and 'flowing' of even a relatively small slice of data are carefully structured and monitored. Moreover, aftermarkets and complementary markets, especially in digital ecosystems, are *per se* worth protecting, also independently from switching considerations.[112]

Of course, it should be always borne in mind that what worked in a sector (e.g., banking) could not work (or less effectively) in another sector (e.g., social media services). In particular, consumers make careful choices in some contexts but less so in others,[113] and, even beyond the current state of data protection law, much more should be done to put consumers in real control of their data. Along similar lines, competition policy experts appointed by the EU Commissioner advocate for the development of "institutional models that may both help the data subjects to exercise their

[109] There is no shortage of open data's definitions, but basically it can be understood as referring to data made available in a format that is open and machine readable, and which is published under a license that places no restrictions on the data's further use.

[110] Furman *et al*., "Unlocking digital competition", 74.

[111] Ibid., at 5.

[112] See Wolfgang Kerber, "Data sharing in IoT ecosystems and competition law: The example of connected cars", *Journal of Competition Law & Economics* (2019), Advance Access publication.

[113] "Data Availability and Use, Inquiry Report, No. 82, 31 March 2017", *Australian Productivity Commission*, 2017, https://www.pc.gov.au/inquiries/completed/data-access#report ("When the expected benefits are clear, individuals have a stronger incentive to share their data, or to actively consent to their data being shared by those who already have it").

data sovereignty effectively and promote competition".[114] Finally, besides governance of data as top-down governance, it is useful to start thinking of data governance also as data *for* governance. In this respect, data is crucially important also for experimenting with alternative ways in which to participate in the society and in the economy (e.g., data commons, cooperatives, etc).

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[114] Crémer, Montjoye and Schweitzer, "Competition policy", 77.

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