Editors
Sir David Edward
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Assimakis Komninos

Ian S. Forrester QC LL.D.

A Scot without Borders
Liber Amicorum - Volume II

Peter Alexiadis, Jean-Yves Art, Carl Baudenbacher, Jean-François Bellis, Kent Bernard, Helmut Brokelmann, Eleanor M. Fox, Ayşe Gizem Yaşar, Rosa Greaves, Ayşe Güner, Gönenç Gürkaynak, Barry E. Hawk, Nicholas Khan, James Killick, Assimakis P. Komninos, Santiago Martínez Lage, Valérie Meunier, Jorge Padilla, Mark Powell, Francesco Setti, Luís Silva Morais, Jacques Steenbergen, Pablo Trevisán, Mathieu Vancaillie, James S. Venit, Denis Waelbroeck, Karen Williams.

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IAN S. FORRESTER QC LL.D.
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Foreword

Sir David Edward
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It is a great honour and a special delight to be able to present this Liber Amicorum to Ian Stewart Forrester QC LL.D. on the occasion of his 70th birthday.

Ian comes from a formidable family of Scottish Presbyterian ministers and professors of divinity in whose footsteps he has followed as an elder and regular preacher at St Andrew's Church of Scotland in Brussels. While firmly rooted in the faith of his ancestors, the intellectual rigour of David Hume and Adam Smith, and the civil law traditions of Scots law, he has, like so many Scots down the ages, sought broader horizons – mainly in Brussels, but now in Luxembourg, with more than a passing dalliance with the common law in New York and London, as well as the cultural life of Japan and the byways of Serbian politics. His endless good spirits and quirky sense of humour have made him friends as well as professional connections all over the world.

Ian was born in Glasgow in 1945, the son of a well-loved and respected schoolmaster and outstanding cricketer – one talent that Ian did not, as far as we know, inherit. The youngest child of the family, who lost his mother tragically early, he was educated at Kelvinside Academy and Glasgow University where he took the traditional Scottish general arts degree (MA 1965) followed by a degree in law (LL.B. 1967). This was a glittering period in the annals of the University, marked by debating successes with the late Alan Rodger (Lord Rodger of Earlsferry) and later, in a North American debating tour, with James Douglas-Hamilton (Lord Selkirk of Douglas). He continued his studies at Tulane University (MCL 1969), Louisiana being carefully selected as a civil law island within a common law sea. Ian returned there to teach on many occasions. It was in New Orleans that he met Sandra Keegan, who became his wife.

Before returning to Scotland after Tulane, Ian spent some time as an intern with Davis Polk in New York, and then returned to prepare for the Scots Bar as the 'devil' (pupil) of David Edward. But his time with Davis Polk had brought him into a case involving a Palestinian hijacked plane, which continued to take him to places like Beirut in the

1970s. This was somewhat disconcerting for his devil-master, while opening new casements onto the foam of international practice. Despite these distractions, Ian was admitted to the Scots Bar in 1972, and 'took silk' (becoming a QC) in 1988. In the meantime, he took the New York Bar in 1977, and he was later admitted to the English Bar in 1996.

Ian had moved in 1973 to Cleary Gottlieb in Brussels as one of the first generation of UK lawyers who arrived there when the UK joined the European Communities. For the next forty-two years Brussels was to be his home. It is where he raised a family, together with Sandra, becoming the proud father of two sons, Alexander and James, both of whom have resisted the law to date, despite bedtime stories which, Ian confessed, were a soporific means for him to find the clearest expression of his arguments in the case before him at the time.

Meanwhile, he moved from Big Law to Boutique Law, creating Forrester & Norall with Chris Norall, later joined by Alastair Sutton, and then back to Big Law when Forrester Norall & Sutton merged with White & Case. His appointment to the Luxembourg bench will round off Ian's illustrious career as a practitioner.

Ian belongs to the generation that 'made' the English-speaking competition law bar in Brussels, until then the monopoly of a few continental law professors and some Belgian French-speaking lawyers. He was fortunate to participate in many of the leading cases in the formation of key principles of EU law, particularly EU competition law. Examples are *Bosman* on freedom of movement in sport; *Bullock (Distillers)* on restricting exports through discriminatory pricing; *GSK* on parallel trade of pharmaceutical products; *Servier* and *Pfizer* on the precautionary principle; *Magill*, *IMS Health* and *Microsoft* on the interface of competition law and intellectual property law, and in particular, on compulsory licensing; *Rambus* on standard setting bodies and Article 102; *Intel* on unilateral conduct/discounts; *Chalkor* on the standard of judicial review of Commission decisions; and Servier on what promises to be a defining case in EU law on reverse settlements.

Ian has not just lived these cases professionally but also academically. He toured the amphitheatres and debated these and other cases with students, professors and researchers. There was never a conference he declined, to the despair of his faithful secretary and PA, Pauline Tart, who had to manage an unmanageable calendar.

Ian is also a prolific writer of seminal articles. His 'Laicisation of Community Law - Self Help and the Rule of Reason: How Competition Law Is and Could be Applied', co-authored with Chris Norall and published in 1984, remains a must-read for students of EU competition law. His articles on the modernization of EU competition law, when Regulation 1/2003 was being prepared, and on due process in EU competition law enforcement have also been influential, and he has written about the EU judicial system from a comparative law perspective.

Ian is generous with his time and talents and has been a mentor to many younger lawyers. A typical scene is Ian in an office full of papers and books surrounded by younger colleagues discussing a case. He has had a long association with the Jessup Moot Court and has also been the head of White & Case's global pro bono practice. He has also been a trustee and strong supporter of the European Baroque Orchestra, and recently embarked on a new career side line as narrator in 'The Snowman' concert and Master of Ceremonies at the Brussels Christmas Carol Concert.

His many qualities have been recognized in his appointment as Honorary Professor of European Law and the award of an LL.D. at his alma mater the University of Glasgow, and as an Honorary Bencher of the Middle Temple.

This Liber Amicorum is an occasion to mark the outstanding merits of a remarkable man and express the long lasting, deep, affectionate friendship by three generations of colleagues in this preface and in the contributions themselves. In this point of transition in an extraordinarily full professional life, we wish Ian all the best for an ever fruitful and rewarding time at the EU Bench.

David, Jacquelyn and Makis

Contributors

Peter Alexiadis
Gibson Dunn

Jean-Yves Art
Microsoft

Carl Baudenbacher
EFTA Court

Jean-François Bellis
Van Bael & Bellis

Kent Bernard
Fordham University School of Law

Helmut Brokelmann
Martínez Lage, Allendesalazar & Brokelmann

Eleanor M. Fox
New York University School of Law

Ayşe Gizem Yaşar
ELIG

Rosa Greaves
University of Glasgow

Ayşe Güner
ELIG

Gönenç Gürkaynak
ELIG

Barry E. Hawk
Fordham University School of Law

Nicholas Khan
European Commission

James Killick
White & Case

Assimakis P. Komninos
White & Case

Santiago Martínez-Lage
Martínez Lage, Allendesalazar & Brokelmann

Valerie Meunier
Compass Lexecon

Jorge Padilla
Compass Lexecon

Mark Powell
White & Case

Francesco Setti
Avvocati Associati Franzosi
Dal Negro Setti

Luís Silva Morais
Luís Silva Morais Sérgio Gonçalves do Cabo & Associados

Jacques Steenbergen
Belgian Competition Authority

Pablo Trevisán
Estudio Trevisán Abogados

Mathieu Vancaillie
Ashurst

James S. Venit
Skadden Arps

Denis Waelbroeck
Ashurst

Karen Williams
European Commission

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IAN S. FORRESTER
QC LL.D.
Biography

I. Career

Ian S. Forrester QC LL.D. is a teacher, author and practitioner specialising in European law. He is partner at White & Case LLP (to September 2015), based in its Brussels office, and head of the Firm's worldwide pro bono practice. He has lectured widely on EU legal and policy topics and published extensively on these themes, particularly competition, customs, dumping, pharmaceuticals, sport, the precautionary principle, and human rights. Several articles concentrate on due process in competition cases.

Honorary Professor and Honorary Doctor of Laws at Glasgow University since 2009, he is a member of the Faculty of Advocates (the Scottish Bar) since 1972; he is also a member of the bars of England (1996), Belgium (1998) and New York, to which he was admitted in 1977 after examination, under special order of the New York Court of Appeals, following a challenge to the constitutional propriety of excluding non-resident aliens from bar membership. He was appointed Queen's Counsel in 1988, and Bencher, Middle Temple in 2012.

His early career was spent with Maclay, Murray & Spens in Scotland; Davis Polk & Wardwell in New York; and Cleary Gottlieb Steen & Hamilton in New York and Brussels. He co-founded the boutique firm Forrester & Norall in 1981, which enlarged to Forrester Norall & Sutton in 1989, and merged with White & Case in 1998.

Professor Forrester has appeared before the European Courts, European Commission and national courts and agencies in several leading cases, including *Magill* (compulsory licensing); *Bosman* (football transfers); *Microsoft* (compulsory licensing); *IMS* (compulsory licensing); *Pfizer Animal Health* (the precautionary principle); *Government of Gibraltar v Council* (status of Gibraltar Airport); *Glaxo Spain* and *Syfait et al v GlaxoSmithKline* (parallel trade in pharmaceuticals); *Les Laboratoires Servier* (settlement of patent disputes); *Chalkor* (due process and judicial review); *Canon* (dumping); *A and Others v. National Blood Authority* (can a blood transfusion be a 'defective' 'product'); *Bellona Foundation v EFTA* (environmental protection).

He is a Trustee of the European Union Baroque Orchestra; a Member of the Dean's Advisory Board, Tulane University School of Law; a Member of Glasgow University School of Law's Advisory Committee; and a Member of the Board of Trustees, Academy of European Law, Trier.

II. Education

Attended Kelvinside Academy, Glasgow; graduated from Glasgow University (MA 1965; LLB 1967; LL.D. honoris causa 2009); received an MCL from Tulane University of Louisiana (1969).

III. Selected publications

Books

'The German Civil Code, a translation and introduction', 1975

'The German Commercial Code', 1979

'The German Marriage Law', 1976, North Holland/Kluwer/Fred Rothman (co-author)

'The German Legal System', 1971, pamphlet, Rothman (co-author)

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Competition law and personal data crossing in digital markets

Gönenç Gürkaynak*, Ayşe Güner, Ayşe Gizem Yaşar

I. Introduction

A number of issues arise with regard to competition law and data protection, in particular in the online services context. For one, the relationship between competition law and privacy is yet to be fully understood[1] and we discuss below the aspects of this conundrum: first, we look into the issue of whether privacy risks arising in digital markets should be addressed within the competition law analysis; second, we try to identify cases where collecting personal data or depriving access to personal data could be anti-competitive and constitute a breach of competition law. The question of how competition authorities should intervene in cases of a competition law infringement in markets involving data aggregation is also an interesting debate. Our article attempts to provide an insight into these questions, by laying out the legislation, cases and antitrust discussions where in which these questions have been addressed so far.[2]

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* The author thanks Evita Aravantinou for her work in the progress of this article.

1 See Kuner, C., Cate, F.H., Millard, C., Svantesson, D.J.B. & Lynskey, O., 'When two worlds collide: the interface between competition law and data protection', *Oxford Journals, International Data Privacy Law*, Volume 4, Issue 4, pp. 247-248, p. 247 (2014).

2 For the sake of clarity, we note that the discussions in this article focus on the crossroads between data protection and substantive competition law rules. Any issues that could arise in terms of data protection concerns in the procedural competition law are not discussed in this article.

II. The role of privacy in competition law

Competition and privacy are two areas of law that closely interact with each other. Competition and privacy laws share common goals which, among others, include 'the promotion of growth, innovation and the welfare of individual consumers'.[3] Although the compliance or infringement of one set of rules would not necessarily mean the same for the other, the infringement of either set of rules eventually results in harming the subject of the data.

1. Legal background related to competition law & data privacy

Before delving into the antitrust considerations regarding data protection, we discuss the legal background for competition law and data privacy.

Under European Union ('EU') competition law, the main legislation is the Treaty on the Functioning of the European Union ('TFEU'), and specifically Articles 101-107. In that regard, Article 101 provides the basis for prohibiting agreements that would prevent, restrict or distort competition within the internal market, such as cartel agreements among competitors. Article 102 aims to prevent abuse of a dominant position. In either of these cases, the European Commission ('Commission') has the authority to bring a case against undertakings and impose administrative monetary fines up to 10 per cent of the annual turnover. Similarly, under the US antitrust regime, three main pieces of legislation exist: the Sherman Act, the Federal Trade Commission Act, and the Clayton Act. Unlike the EU competition law regime, under the US regime, criminal penalties are also provided.[4] Likewise, many countries today have their own competition law regime that imposes either administrative and/or criminal penalties when there is an infringement.

Whether under the EU competition law rules or the US antitrust rules, the aim of the competition law regime is the same – maintenance of consumer welfare. As the former Vice President of the European Commission responsible for Competition Policy, Joaquín Almunia delivered in his speech entitled 'Competition in the online world', '[t]here is a general agreement between the EU and the US on the fundamental objectives of antitrust laws and policies; that is, to ensure consumer welfare in terms of price, quality, innovation and choice. In addition, we both believe that a sound analysis based on economic effects is crucial.'[5] Similarly, the Federal Trade Commission of the

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3 Preliminary Opinion of the European Data Protection Supervisor, 'Privacy and competitiveness in the age of big data: the interplay between data protection, competition law and consumer protection in the Digital Economy' (2014), available at https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2014/14-03-26_competitition_law_big_data_EN.pdf.

4 For instance, under the Sherman Act, a corporation could receive up a fine of up to $100 million and an individual could receive $1 million as well as up to 10 years of prison (see Federal Trade Commission 'The Antitrust Laws', available at https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws).

5 Joaquín Almunia, 'Competition in the online world' (11 November 2013) available at http://europa.eu/rapid/press-release_SPEECH-13-905_en.htm.

US ('FTC') provides that '…for over 100 years, the antitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.'[6]

In terms of data protection rules in the EU, Article 2(a) of the Data Protection Directive 95/46/EC ('Directive') defines personal data as 'any information related to an identified or identifiable natural person.'[7] The right of protection of personal data as a separate right has been provided under the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.[8] The Charter of Fundamental Rights of the European Union ('Charter') recognizes 'the protection of personal data' as a fundamental right.

For the time being, the main set of rules with regard to data protection in Europe is the Directive.[9] Article 6(1)(b) of the Directive sets out the circumstances under which data can be collected, namely for specific, explicit, legitimate purposes. Essentially, it is the concept of consent which constitutes the basis for legitimizing the processing of personal data, in particular in the online context. Article 8(2) of the Charter stipulates that '(…) data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law.' The Article 29 Data Protection Working Party's[10] Opinion 15/2011 ('Opinion') explains in detail the concept of consent within the meaning of the Directive and the E-Privacy Directive, as well as the conditions for the validity of consent. As explained in the opinion, to process personal data, the mere existence of consent may not be in and of itself sufficient as the consent should also conform to the conditions set out in the Directive and the E-Privacy Directive. According to Article 2(h) of the Directive,[11] consent should be free, informed and specific. Articles 7(a) and 26(1) of the Directive add to the list of conditions, requiring consent to be given, either explicitly or implicitly, in a way that leaves no doubt. Furthermore, consent can be withdrawn at any time, as

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6 Federal Trade Commission 'The Antitrust Laws', available at https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws.

7 Dir. 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

8 European Data Protection Supervisor, 'Data Protection Legislation', available at https://secure.edps.europa.eu/EDPSWEB/edps/EDPS/Dataprotection/QA/QA2.

9 The Directive will be amended with the General Data Protection Regulation in the near future. The General Data Protection Regulation mainly aims to harmonize data protection regulations in the EU. To that end, it provides for a single Data Protection Authority, within the concept of a one-stop shop. While the article was being written, the General Data Protection Regulation had not yet been adopted.

10 Art. 29 Working Party Disclaimer provides that 'The Article 29 Data Protection Working Party was set up under the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. It has advisory status and acts independently.' available at http://ec.europa.eu/justice/data-protection/article-29/index_en.htm. Art.30 of the Directive and Art. 15 of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications or the 'E-Privacy Directive') sets out the duties of the Art.29 Data Protection Working Party.

11 Art. 2(h) reads as follows: '(T)he data subject's consent shall mean any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed'.

per Articles 6(3), 9(3) and 9(4) of the E-Privacy Directive. The above could be summarized as the need for consent to be unambiguous, thus allowing no room for multiple interpretations.[12] Finally, for the data subject, personal data should be portable from one data controller to another without burden.[13] The importance of this right to data portability ('RDP') was also emphasized by Almunia.[14]

Finally, the E-Privacy Directive, regulating the use of cookies, should also be mentioned, since cookies are relevant in the collection of personal preference data by online search engines. The Commission defines cookies as 'a small piece of data that a website asks your browser to store on your computer or mobile device. The cookie allows the website to "remember" your actions or preferences over time.'[15] Cookies are used for online behavioural target advertising by companies providing ad servicing; as the Article 29 Working Party explains, '(. . .) the [online behavioural advertising] industry relies heavily on cookies and similar technologies that store and gain access to information in the user's terminal device.'[16] Article 5 of the E-Privacy Directive has introduced the obligation to acquire the user's consent before storing cookies.

Against the foregoing, consent is the key word in personal data protection – to the extent the data collector receives consent (complying with the applicable data protection rules), it will have the authority to process personal data. In the end, it is up to the users' discretion whether the data collector can process the personal data. That said, with technological improvements, '[a]lmost every day brings new, sophisticated methods to collect and process information from unsuspecting users.'[17] These developments raise the question of whether consent is really freely given by well-informed internet users.[18]

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12 The need for unambiguity is well illustrated by the Facebook Beacon service, which was shut down following a class action suit (*Lane et al v. Facebook, Inc. et al*, C 08-3845 RS (N.D. Cal. 2010)). Facebook Beacon was embedded into certain websites, from which it recorded Facebook users' activities. Afterwards, it would broadcast the activities in the form of notices to designated groups of the user's friends. The specific feature that raised the most complaints was its opt-out notice, which was designed to offer the user the option to show or hide his activities. This notice, however, appeared in a small window that one could easily overlook and which disappeared fast, before the user had enough time to react. At the same time, the user's lack of response was considered consent and his/her activity was broadcast.

13 Art.18 of the proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data ('General Data Protection Regulation').

14 Joaquín Almunia, 'Competition and personal data protection' (26 November 2012) available at http://europa.eu/rapid/press-release_SPEECH-12-860_en.htm.

15 *Commission's Information Providers Guide – The EU Internet Handbook – Cookies,* available at http://ec.europa.eu/ipg/basics/legal/cookies/index_en.htm.

16 Art. 29 Data Protection Working Party's Opinion 16/2011 on EASA/IAB Best Practice Recommendation on Online Behavioural Advertising (8 December 2011*) available at* http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2011/wp188_en.pdf, p.3.

17 Almunia, *supra* note 14.

18 See Art.29 Data Protection Working Party's Opinion 15/2011 on the definition of consent (13 July 2011) available at http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2011/wp187_en.pdf.

2. Case law and recent discussions regarding the role of privacy in competition law

Privacy concerns playing a role in competition law is a discussion recently introduced in the legal field and has only been dealt with on limited occasions so far. The two sides of this issue have remained polarized. While one side supports that privacy risks arising in digital markets should be evaluated by antitrust analysis, the other side argues the contrary. The discussion below attempts to provide a summary of these viewpoints.

(a) Two sides of the coin – debated issues

One of the earlier mentions of the relationship between competition law and data protection in Europe can be found in Almunia's speech[19] dating back to the year 2012. Almunia underlined the importance of personal data, admitting, at the same time, the absence of Commission cases where either 'the accumulation or the manipulation' of personal data was used to violate EU competition law.[20] However, he left the door open to a future development in jurisprudence, where the aggregation or the use of or exclusive access to personal data may give rise to competition law problems. The new Commissioner, Margrethe Vestager, has picked up where Almunia left off on the issue, with great interest in understanding the significance of data protection rules, and more importantly the functioning of markets, such as the digital market, where data protection rules are highly relevant and developments happen at a rapid rate.[21]

In March 2014, the European Data Protection Supervisor issued a Preliminary Opinion[22] on the issue of interplay between data protection, consumer protection and competition law. This opinion provided that the 'application of competition law (. . .) can be used as a tool to foster dynamic efficiency in digital markets and to encourage innovation.'[23] It also underlined the need for cooperation between these areas of law, admitting, however, that such an initiative would constitute a challenge. More recently in 2015, subsequent to the Preliminary Opinion, the European Data Protection Supervisor Giovanni Buttarelli stated that in digital markets, as new issues arise such as the aggregation of big data, new solutions are called for to deal with the problems of the

19 Almunia, *supra* note 14.

20 Almunia, *supra* note 14.

21 See e.g., Statement by Commissioner Vestager on Google antitrust investigations at the European Parliament (ECON committee meeting) (11 November 2014), available at http://europa.eu/rapid/press-release_STATEMENT-14-1646_en.htm; Commitments made at the Hearing of Margrethe Vestager, Commissioner for Competition (October 2014), available at http://www.europarl.europa.eu/RegData/etudes/BRIE/2014/536309/IPOL_BRI(2014)536309_EN.pdf.

22 Preliminary Opinion of the European Data Protection Supervisor Peter Hustinx, 'Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy'(March 2014), available at https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2014/14-03-26_competitition_law_big_data_EN.pdf.

23 Hustinx, *supra* note 22, at p. 33.

future.[24] He stated that '[t]he tools of competition enforcement are quite flexible and able to respond to dynamic markets.'[25] Rather than having antitrust authorities take privacy analysis into account, Buttarelli stated that he calls for a 'careful study' to 'address imbalances which could damage competitiveness as well as individual rights.'[26] In Buttarelli's opinion, one such solution is a closer dialogue between competition authorities and data protection/consumer agencies.

On that note, some academics and other writers on the topic strongly take the position that privacy risk analysis should not be factored into the antitrust analysis. For instance, Richard Craig, in referring to the recent *Facebook/WhatsApp* deal (discussed below), takes the position that 'there is nothing illegal per se about a company acquiring a significant database of personal data.'[27] Craig further argues that the type of remedies available under competition law (such as structural remedies) but unavailable under the data protection regime may appear suitable to fight off privacy concerns. That said, he explains that privacy risks could be addressed by an antitrust regime only if those risks are such that they would result in an impediment to effective competition.[28] Craig further provides that unless privacy concerns are a risk to effective competition, such risks should be dealt with by way of amendment of relevant data protection legislation.[29] On a similar vein, James Cooper argues that if companies are banned from collecting 'big data', this may implicate a violation of fundamental rights, such as protected speech under the First Amendment of the US Constitution.[30] Cooper further underlines subjectivity concerns in case antitrust analysis were to also include privacy considerations: 'allowing antitrust enforcers to consider privacy would inject an undesirable level of subjectivity into antitrust enforcement decisions, which is likely to attract socially wasteful rent-seeking expenditures and to deter beneficial data collection efforts.'[31]

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24 European Data Protection Supervisor Giovanni Buttarelli, 'Privacy and Competition in the Digital Economy' (Speaking points at the European Parliament´s Privacy Platform) (21 January 2015), available at https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Speeches/2015/15-01-21_speech_GB_EN.pdf.

25 Buttarelli, *supra* note 24, at p. 4.

26 Buttarelli, *supra* note 24, at p. 4.

27 Richard Craig, 'Is Facebook's WhatsApp deal a privacy disappointment?', *Data Protection Law&Policy*, October 2014, pp.8-9, p. 9.

28 Craig, *supra* note 27, at p. 9.

29 Craig, *supra* note 27, at p. 9.

30 James Cooper states, 'Even if we were to accept privacy as an antitrust consideration, an antitrust order limiting the ability of a firm to collect and analyze consumer data is likely to raise some First Amendment issues.' (James C. Cooper, 'Privacy and Antitrust: Underpants Gnomes, the First Amendment, and Subjectivity', *George Mason University Law and Economics Research Paper Series* (2013), available at http://ssrn.com/abstract=2283390, p.11).

31 Cooper, *supra* note 30, at p. 2.

(b) Case law

In *Google/DoubleClick* and in *Facebook/WhatsApp*, the two cases that have so far drawn the most attention regarding this particular issue of data compilation, the antitrust authorities examined and eventually cleared these mergers involving heavy data aggregation. Whether privacy should be a factor in the competition law analysis was also addressed in these cases.

(i) Google/DoubleClick

The earlier case that set the groundwork on this discussion is Google's acquisition of DoubleClick Inc., which was eventually cleared by the Commission after the completion of a second phase investigation.[32] While the FTC also reviewed and cleared the merger, in both the Concurring Statement of Commissioner Jon Leibowitz and Dissenting Statement of the former FTC Commissioner Pamela Jones Harbour, concerns over privacy were raised.[33] While Leibowitz took a broader approach in terms of privacy and online behavioural advertising beyond the merging entities,[34] Harbour stated that it is unclear at this stage how the mass amount of information aggregated by these two entities would be utilized post-transaction. Harbour specifically noted that:

> The merger creates a firm with vast knowledge of consumer preferences, subject to very little accountability (…) I have paid particularly close attention to the privacy debate surrounding this transaction. In addition, I have considered (and continue to consider) various theories that might make privacy 'cognizable' under the antitrust laws, and thus would have enabled the Commission to reach the privacy issues as part of its antitrust analysis of the transaction.[35]

In seeking ways to bend traditional antitrust analysis to also include privacy concerns, former Commissioner Harbour extensively discussed the potential concerns related to network effects both in terms of antitrust and privacy, and in Cooper's words, 'worried that the network effects from combining the parties' data would risk depriving consumers of meaningful privacy choices.'[36] Harbour also suggested that the FTC did not thoroughly scrutinize the parties' intentions into the use of data and could have required that the parties implement some form of mechanism to avoid the aggregation and/or exchange of data, such as a firewall. Harbour said that the future approach to data

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32 Case COMP/ M.4731 – *Google/DoubleClick* (11 March 2008).

33 Concurring Statement of Commissioner Jon Leibowitz in the matter of *Google/DoubleClick*, F.T.C. File No. 071-0170 (20 December 2007) (hereinafter 'Concurring Statement of Commissioner Jon Leibowitz'), available at https://www.ftc.gov/sites/default/files/documents/public_statements/concurring-statement-commissioner-jon-leibowitz-google/doubleclick-matter/071220leib_0.pdf.

34 Leibowitz stated: '[…]notwithstanding the Commission's decision to approve the merger, we still need to address the fundamental issues of consumer privacy and data security raised by online behavioral advertising, which go well beyond the two companies involved in this acquisition.' (Concurring Statement of Commissioner Jon Leibowitz, p.2).

35 See Dissenting Statement of Commissioner Pamela Jones Harbour in the matter of *Google/DoubleClick,* F.T.C. File No. 071-0170 (2007) (hereinafter 'Dissenting Statement of Commissioner Pamela Jones Harbour') available at http://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf, p. 10.

36 Cooper, *supra* note 30, at p. 4.

mergers would need to change; taking into account not only the parties' representations but also market research as well as a definition of a putative market for personal data.[37]

(ii) Facebook/WhatsApp

In *Facebook/WhatsApp*, while considering the potential effects of data aggregation in the online advertising market (the market in which Facebook is active in and collects data), the Commission took a clear position regarding the relationship between data protection and competition law.[38] The Commission stated that 'any 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.'[39] This is the clearest statement adopted by the Commission on the topic so far. In addition, the Commission did not find that the data aggregated due to the transaction would hamper competition in the online advertising market, where only Facebook is active (rather than WhatsApp) and the kind of data collected by the two entities would not benefit either of them post-transaction. In that regard, the Commission provides that the type of personal data that would have been valuable for Facebook – age, gender, verified name, social group, activities – is not within the scope of WhatsApp's current data collection.[40] The Commission also evaluated two theories of harm, one being the introduction of advertising on WhatsApp, and the other being WhatsApp's ability to become a potential source of valuable data for advertising. As a result of its analysis and both abovementioned theories of harm, the Commission did not find a threat to effective competition arising from the data aggregation.[41]

3. Analysis

As discussed above, competition law intervention in cases that may implicate privacy sensitivities -- particularly due to heavy data aggregation -- which may at that point in time not necessarily be anti-competitive, but may be capable of raising competition law problems in the future, is hotly debated. While the issue is more prone to appear in mergers, where large sets of personal data are already being compiled by the merging parties pre-transaction and would be combined if the transaction is cleared, non-merger cases may also be implicated. As a result, the question of whether antitrust authorities should consider potential consumer harm caused by a merger due to privacy issues (in

37 See also Pamela Jones Harbour, 'The Emperor of All Identities', *New York Times* (18 December 2012), available at http://www.nytimes.com/2012/12/19/opinion/why-google-has-too-much-power-over-your-private-life.html?_r=0.

38 Case COMP/M.7217 – *Facebook/WhatsApp* (3 October 2014).

39 Case COMP/M.7217 – *Facebook/WhatsApp*, para.164.

40 Case COMP/M.7217 – *Facebook/WhatsApp*, para 166. As discussed in the decision (para. 181), WhatsApp does have access to its users' phone book and phone numbers. That said, the Commission did not consider this as a source for valuable information for advertising and provided that it is at best 'marginal' to Facebook. According to the decision, Facebook already has access (as well as other suppliers of smartphone applications) to the users' names and mobile phone numbers (para. 181 of the decision).

41 The Commission relied on the parties' representations that WhatsApp would not have targeted ads and that the type of information available to WhatsApp would not be a beneficial source of personal information to Facebook (Case COMP/M.7217 – *Facebook/WhatsApp*, paras. 168-190).

addition to competition law issues) is often asked.[42] Privacy regulators are then turning to antitrust authorities for the protection of consumers from the privacy risks that may emanate from digital market mergers.[43]

As discussed above, the former Commissioner suggested that there were several scenarios where privacy issues could be or should have been interjected in the competition law analysis of the *Google/DoubleClick* merger. Harbour provided that there are unanswered network effects questions. One is that, as a result of the network effects that may emanate from the transaction, search engine competitors could exit the market, leaving the consumers with fewer choices, which, in turn would 'reduce the incentives of search firms to compete based on privacy protections or related non-price dimensions.'[44] Harbour then encouraged the merged entity to reveal clearly the kind of information that it intended to gather, as well as how this information would be used, in an effort to provide consumers full control over the extent of information they disclose.[45] The former Commissioner even called for a global approach to consider and perhaps adopt the privacy principles used in international jurisdictions so as to 'facilitate global commerce'.[46] Buttarelli's speech goes even further, to propose, for instance, a new form of abuse of dominance where the dominant firm would use 'non-negotiable "privacy policies"'.[47]

At first glance, the former Commissioner's suggestion may be appealing in addressing consumer welfare issues related to data protection. At this point, it may even be possible to argue that competition law may have the ability to address data privacy issues in a more effective way than data protection law. To elaborate, competition law provides both behavioural and structural remedies to address a behaviour which can create an infringement, while data protection law only provides behavioural remedies.[48] However, as discussed below, this may entail the problem of over-expanding the boundaries of competition law.

In that regard, it has been argued that, to the extent the investigated conduct does not breach competition rules, antitrust authorities should not interfere based on public policy concerns, including consumer privacy.[49] Cooper has taken this debate to the next level and actually analysed whether privacy concerns could be addressed within the scope of antitrust analysis by offering privacy the role of a 'metric of competition', asking the following question: 'If the conduct leads to lower levels of privacy, isn't

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42 Craig, *supra* note 27, at p.8.

43 Lisa Kimmel and Janis Kestenbaum, 'What's Up with WhatsApp? A Transatlantic View on Privacy and Merger Enforcement in Digital Markets', *Antitrust*, Vol. 29, No. 1, Fall 2014, pp.48-55, available at http://awards.concurrences.com/IMG/pdf/fall14-kimmel_c_.pdf, p. 50.

44 Dissenting Statement of Commissioner Pamela Jones Harbour, footnote 25.

45 Dissenting Statement of Commissioner Pamela Jones Harbour, p. 12.

46 Dissenting Statement of Commissioner Pamela Jones Harbour, p.1 1.

47 Buttarelli, *supra* note 24, at p. 5.

48 Craig, *supra* note 27, at p. 9.

49 See e.g., Cooper, *supra* note 30; Craig, *supra* note 27; Kimmel and Kestenbaum, *supra* note 43.

that the same as lower levels of quality, and therefore evidence of uncompetitive markets?'[50] However, he reached the conclusion that this scenario does not hold up for a number of reasons, in particular due to the subjectivity of the notion of 'quality' for both consumers and antitrust authorities.[51] On the consumer side, the subjectivity is apparent when considering that the quality of targeting in targeted advertising actually increases when ad publishers collect personal data since this allows them to better match consumers with ads. Cooper also discusses the heterogeneity of consumers' approach to privacy concerns, e.g., while some consumers may be more sensitive about their personal data being collected and stored, some others may care less about being tracked online as long as they receive well-targeted services from search engines.[52] On the authority side, Cooper questions whether it is possible to set a 'competitive benchmark' in incorporating privacy sensitivities to the antitrust analysis. Overall, he concludes that as appealing as using competition law to resolve privacy issues may be, antitrust is the 'wrong vehicle',[53] Therefore, the opponents argue that privacy concerns are better left to the legislature rather than antitrust authorities.

On a separate note, competition law does not prohibit competing by 'merits'[54] and to the extent data is aggregated through means that are not anti-competitive, requirements imposed upon market players on the basis of competition law may hamper the healthy functioning of competition. After all, for example, competition law is not able to interfere on the basis that the market is too concentrated.[55] Furthermore, as the president of the French Competition Authority Bruno Lasserre has explained, the usage of personal data is a strong factor in animating competition; and personal data also constitutes a base for innovation, creating added value for tools as ordinary as TVs and cars by allowing the development of 'intelligent objects'.[56] Therefore, in a case where personal data enhances competition as opposed to restricting it, the question of whether a competition authority should interfere based on privacy considerations comes to mind.

The *Facebook/WhatsApp* merger was notable in clearly demonstrating the Commission's position in the privacy-antitrust debate. The Commission's stance in *Facebook/WhatsApp* seems to support the second view addressed in the previous section, i.e.,that competition authorities should not deal with consumer protection issues emanating from privacy concerns.[57] In Craig's words, the Commission 'was not interested in any

50 *Cooper*, *supra* note 30, at pp.7-8.

51 Cooper, *supra* note 30, at p.16.

52 Cooper, *supra* note 30, at p. 10.

53 Cooper, *supra* note 30, at p. 19.

54 See Bo Vesterdorf 'Theories of self-preferencing and the duty to deal - two sides of the same coin?' (2015) *Competition Law&Policy Debate*, Volume 1, Issue 1, pp.4-9, available at http://ssrn.com/abstract=2561355, p.5.

55 See Kuner, Cate, Millard, Svantesson & Lynskey, *supra* note 1, at p. 248.

56 See Bruno Lasserre, 'Données personnelles, le droit de la concurrence doit-il prendre en compte la protection de la vie privée', *New Frontiers of Antitrust*, Concurrences N.2-2013, pp.26-28, p. 28.

57 See e.g., Cooper, *supra* note 30, at p. 7.

possible harm to privacy.'[58] The Commission's stance that data protection concerns should primarily be dealt with under the data protection legislation umbrella has already found supporters in academia.[59]

III. Discussion of whether collecting personal data or depriving access to personal data can be anti-competitive and constitute a breach of competition law

Recent discussions and case law circle around two major enforcement areas when it comes to antitrust problems emanating from the collection and retention of personal data, namely merger control and abuse of dominance.

In terms of data mergers, as discussed below, the main concern appears to be the potential increase in network effects resulting from data compilation and whether this increase in network effects restricts competition, especially by raising the entry barriers in the market. A most notable discussion on this issue was presented in the dissenting statement of former Commissioner Harbour in *Google/DoubleClick*, who approached the network effects with cynicism. That said, so far, certain authors have suggested that network effects arising from the compilation of data should not be considered worrisome in and of themselves. This was also agreed by the Commission in *Facebook/WhatsApp*.

In terms of dominance-related issues, an important question is whether refusing to supply user data to competitors when the data controller is dominant could constitute a form of anticompetitive behaviour. This question brings forth the issue of whether data can be considered an 'essential facility'. If the answer is 'yes', this would allow the competition authorities to impose upon a dominant player the duty to share data under the essential facility umbrella.

58 Craig, *supra* note 27, at p. 8.

59 Craig, *supra* note 27, at p. 9; Kimmel and Kestenbaum, *supra* note 43, p. 53.

1. Data mergers

When undertakings combine large datasets through mergers, the competition law implications are questioned primarily in relation to network effects. Former Commissioner Harbour was among the earliest to raise concerns regarding the potential antitrust issues in data mergers emanating from the network effects.[60] According to the former Commissioner, in *Google/DoubleClick*, the network effects could eliminate any 'meaningful competition' in online advertising as a result of the aggregation of data.[61] This, she stated, would be in the form of combining the search information obtained by Google and browsing information obtained by DoubleClick.[62] The former Commissioner suspected that post-transaction, other market players would not be able to 'overcome the network effects and offer an equally focused level of behavioral targeting.'[63]

(a) Google/DoubleClick

As a merger that raised much interest on both sides of the Atlantic, *Google/DoubleClick* was among the first major data mergers in the digital market (which was, at the time, 'a relatively new industry'[64]) that the Commission assessed and eventually cleared, although not before a Phase II review of the transaction and the FTC's clearance in the case came through. The transaction was a vertical merger, drawing attention to 'how antitrust concerns in vertical mergers can arise from access to information and the market power that information can confer.'[65] In addition to the non-horizontal effects, the Commission also assessed the potential horizontal effects, taking account of the fact that the parties could become competitors in the future as they were both beginning to develop tools and platforms that could compete with each other's services.

A major issue expressed by Google's competitors in the transaction as well as former Commissioner Harbour was whether the combination of Google's and DoubleClick's data sets would result in Google becoming a 'super-intermediator'[66] with a market position and data sources that could not be attained by its rivals. As the FTC explained, 'it was argued that the incremental volume Google could gain from this strategy would

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60 As the former Commissioner explained: 'A network effect arises when a good or service increases in value as more people use it. Feedback fosters acceptance and enhances popularity, which generates even more feedback, in a continually self-reinforcing loop.' (Dissenting Statement of Commissioner Pamela Jones Harbour, p. 5.)

61 Dissenting Statement of Commissioner Pamela Jones Harbour, p. 8.

62 Dissenting Statement of Commissioner Pamela Jones Harbour, p. 7.

63 Dissenting Statement of Commissioner Pamela Jones Harbour, p. 8.

64 Brockhoff, J., Jehanno, B., Pozzato, V., Buhr, C.C., Eberl, P. and Papandropoulos, P., 'Google/DoubleClick: The first test for the Commission's nonhorizontal merger guidelines', European Commission Competition Policy Newsletter, Number 2 — 2008, pp. 53-60, available at http://ec.europa.eu/competition/publications/cpn/2008_2_53.pdf, p. 53.

65 David Went and Stephen Kinsella, 'Google/DoubleClick and the Power of Information to Raise Antitrust Concerns in Vertical Mergers', *Global Competition Policy*, MAR-08 (1) (2008), available at http://www.sidley.com/~/media/Files/Publications/2008/03/GoogleDoubleClick%20and%20the%20Power%20of%20Information%20t__/Files/View%20PDF/FileAttachment/WentKinsella%20GCP%20Mar08(1), p. 3.

66 Dissenting Statement of Commissioner Pamela Jones Harbour, p. 8.

be enough to "tip" the ad intermediation market to Google' due to network effects.[67] In their analysis of the transaction, both the Commission and the FTC have acknowledged the presence of network effects in ad intermediation, however both authorities found it unlikely that the competitors would be forced to exit the market, eventually clearing the transaction.

(b) Facebook/WhatsApp

In Facebook's acquisition of WhatsApp, taking into account the competitors' replies and in light of the market investigation, the Commission analysed the network effects in the consumer communications services market, which was the market with the highest relevance for the purposes of the transaction. The Commission acknowledged the existence and potential anticompetitive implications of network effects. However, it further found that there was an overwhelming number of factors mitigating the potential competition law risks, in particular market foreclosure, such as low barriers to entry and the ease of multi-homing by consumers of multiple consumer communications apps. The Commission concluded that 'while network effects exist in the market for consumer communications apps, in the present case, on balance, they are unlikely to shield the merged entity from competition from new and existing consumer communications apps.'[68] As explained above, overall, the Commission did not see any competitive concerns arising from the combination of Facebook's data set with that of WhatsApp.

There have been both positive and negative responses to the Commission's findings in the case, and several authors have found the Commission's approach inadequate due to reasons similar to those expressed by former Commissioner Harbour in terms of network effects.[69] On the other hand, post-*Facebook/WhatsApp* some authors have expressed the Commission's eagerness towards examining 'data as a factor that confers market power on the merged entity' as well as 'the potential network effects of concentrations in the big data age.'[70]

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67 Statement of Federal Trade Commission Concerning *Google/DoubleClick*, FTC File No. 071-0170 (20 December 2007), available at https://www.ftc.gov/es/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf, p. 10.

68 Case COMP/M.7217 – *Facebook/WhatsApp* , para. 135. The Commission did not stop there and also looked into whether the transaction 'is likely to lead to any merger-specific substantial strengthening of network effects', finally also finding this possibility to be 'unlikely' (Case COMP/M.7217 – *Facebook/WhatsApp,* paras.136-140).

69 Susannah Sheppard, 'The EU's Traditional Analysis of the Facebook, WhatsApp Deal – Do We Like it?' (17 October 2014), available at http://www.scl.org/site.aspx?i=ed38934.

70 See 'Big data a growing factor in competition assessments, says expert as Facebook receives sign off for WhatsApp takeover' (3 October 2014), available at http://www.out-law.com/en/articles/2014/october/big-data-a-growing-factor-in-competition-assessments-says-expert-as-facebook-receives-sign-off-for-whatsapp-takeover-/.

(c) Discussion

Although network effects have been associated with market foreclosure risks and approached with scrutiny,[71] there are certain aspects of multi-sided industries characterized by network effects (such as search engines) that could actually justify the incentive of market players in digital markets to engage in transactions that bear the potential of increasing the network effects.

First off, companies active in multi-sided markets characterized by network effects need to attract at least two distinct groups of users (such as search engine users and advertisers) to use their products/services. In other words, they need to get all sides 'on board.'[72] If they do not succeed in doing so, the network effects will then result in the company losing market power.[73] If we take the example of online search engines, a search engine has to attract first the searchers, i.e.,users who search content on the internet, and the advertisers, and needs to ensure that searchers will go and purchase products that are advertised by the advertisers.[74] If the search engine fails to 'match' a sufficient number of search users with advertisers, it will not be able to survive on the market.

To get both sides on board, personal data is an unparalleled tool in the case of search engines. Personal data enables the search engine to provide better service to both sides of the market: on the one hand, search engine users will be more satisfied with a search engine providing results fitting their preferences and when ads suiting their needs pop up.[75] On the other hand, advertisers will be more content if advertised products and services are actually purchased by interested search users. In this case, search engines, having used personal data, manage to provide a satisfactory result to both the search engine users and advertisers. The quality-enhancing aspect of personal data which benefits consumers is apparent.[76] Thus, to the extent a merger is capable of increasing service quality, can competition authorities disallow it merely to protect the smaller

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71 See e.g., Organisation for Economic Co-operation and Development – Roundtable on Two-Sided Markets – Note by the Delegation of the European Commission (28 May 2009), available at http://ec.europa.eu/competition/international/multilateral/2009_jun_twosided.pdf, para.59 et seq.; Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02) (hereinafter referred to as 'Guidance on Abusive Exclusionary Conduct'), para. 17.

72 Jean-Charles Rochet and Jean Tirole, 'Two-Sided Markets: A Progress Report', *The RAND Journal of Economics*, Vol.37, No.3, Autumn, 2006, pp. 645–667.

73 As former commissioner Almunia has provided, 'Winners emerge quickly in the digital industry, but they can disappear just as quickly.' (see Joaquín Almunia, 'Competition in the online world' (11 November 2013) available at http://europa.eu/rapid/press-release_SPEECH-13-905_en.htm).

74 As Ratliff and Rubinfeld explain: 'The sale of advertising to businesses and the display of advertisements to consumers take place in a two-sided market at the hub of which sits the content publisher (and any other intermediaries facilitating the sale or display of the advertising). The publisher's function is to match consumer eyeballs with the marketing messages of businesses; the publisher profits when it is able to attract the consumer eyeballs at a cost less than the amount the businesses are willing to pay the publisher to display their ads to these consumers.' (James D. Ratliff & Daniel L.Rubinfeld, 'Is There a Market for Organic Search Engine Results and Can Their Manipulation Give Rise to Antitrust Liability?', available at http://ssrn.com/abstract=2473210, p.5).

75 See Frank Pasquale, 'Dominant Search Engines: An Essential Cultural & Political Facility', *The Next Digital Decade - Essays on the Future of the Internet*, Chapter 7, pp. 401-417, Berin Szoka, Adam Marcus, eds., TechFreedom, Washington, D.C. (2010), available at http://ssrn.com/abstract=1762241, p.406.

76 See Andres V. Lerner, 'The Role of "Big Data" in Online Platform Competition' (26 August 2014), available at http://ssrn.com/abstract=2482780, pp.10-19.

and/or potential competitors in the market when there is no actual harm to competition? Competition authorities could also ask this question in data mergers, keeping in mind that data is an essential tool in digital markets.

The second aspect of network effects which calls for attention is the following: as the Commission affirmed in *Facebook/WhatsApp*, the mere existence of network effects is not a competition law problem in and of itself, and network effects have to be analysed on a case-by-case basis.[77] As a result, former Commissioner Harbour's concerns in terms of network effects may not actually be applicable in all data mergers. Turning once again to *Facebook/WhatsApp*, as the Commission explained, in the market for online advertising services (a platform market entailing network effects) in which Facebook was active but WhatsApp was not, since data collected by WhatsApp was not 'valuable for advertising purposes', the consumer data that would move from WhatsApp to Facebook post-merger would likely not be of use to Facebook in online advertising services.[78] Such a data merger would thus not be likely to increase the network effects where the combined data sets are valuable in different markets. To conclude, approaching network effects *de facto* as a factor of market foreclosure in data mergers may therefore not be an adequate competition law policy.

2. Dominance

When a dominant player holds large amounts of personal data, there could be potential competition law risks pursuant to Article 102 of the TFEU. One primary Article 102 debate in this regard is whether, under a theory of refusal to supply (or under essential facilities doctrine), the competitors could successfully establish an abuse of dominance claim. This depends on several criteria to be established. As the Commission provides in its Guidance on Abusive Exclusionary Conduct, the Commission will consider these practices as an 'enforcement priority' if all the following are established: '(i) the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market, (ii) the refusal is likely to lead to the elimination of effective competition on the downstream market, and (iii) the refusal is likely to lead to consumer harm.'[79]

(a) Can data be an 'essential facility'?

In discussing whether personal data can be considered an essential facility, the problem is actually two-fold: first, in the context of digital markets, as Kucharczyk puts it, 'Could the highly competitive and diversified online environment ever produce a digital essential facility?'[80] Second, even if one were to consider user data to be an essential

77 Case COMP/M.7217 – *Facebook/WhatsApp*, para.130.

78 Case COMP/M.7217 – *Facebook/WhatsApp*, para.166.

79 Guidance on Abusive Exclusionary Conduct, para. 78 et seq.; also see Vesterdorf, *supra* note 54, at p. 6.

80 Jakob Kucharczyk, 'Essential vs Useful: Can Online Services Be "Essential" or Are They Simply Very Useful?' (4 March 2015), available at http://www.project-disco.org/competition/030415-essential-vs-useful-can-online-services-essential-simply-useful/ . Kucharczyk actually discusses whether the online service itself can be considered an 'essential facility', not personal data per se. He reaches the conclusion that 'defining an essential digital platform'

facility, could an undertaking be forced to disclose it under the applicable data protection legislation?

In terms of whether personal data can be treated as an essential facility, the discussions appear to focus on the unlikelihood of personal data fulfilling the conditions of this doctrine, especially in digital markets. In that regard, the first issue would be whether the data gathered and retained by the dominant undertaking could be deemed an objectively necessary input and the refusal of its supply by the dominant undertaking would be such that effective competition in the downstream market would be prevented. Put differently, whether a competition authority would consider the supply of the refused data as objectively necessary for competitors to be able to compete effectively on the downstream market. The Commission explains that for an input to be indispensable, there would have to remain 'no actual or potential substitute on which competitors in the downstream market could rely so as to counter — at least in the long-term — the negative consequences of the refusal. In this regard, the Commission will normally make an assessment of whether competitors could effectively duplicate the input produced by the dominant undertaking in the foreseeable future.'[81]

In the most basic sense, if an undertaking is trying to apply the refusal to supply or an essential facility doctrine to force the dominant undertaking to supply the input it holds, its argument would be that the defendant, i.e.,the dominant firm, holds 'bottleneck control over an input or resource (facility) essential for competition'[82] which would be commercially non-viable or impossible to duplicate, and therefore the dominant firm should be forced to share this facility.[83] Geradin and Kuschewsky were among the first to discuss the difficulties in considering personal data an essential facility.[84] As Areeda and Hovenkamp explain, 'the essential facility doctrine concerns vertical integration'[85] and therefore requires the existence of an upstream market for the facility. This raises the question of whether there is a market for 'personal data'. While former Commissioner Harbour has suggested that there is a need for defining data as a separate relevant market,[86] opponents of this view point out that aside from cases where undertakings achieve turnover over the sale of personal data, there cannot be a relevant market for personal data. This is because 'a personal data market is not truly analogous

is very problematic.

81 Guidance on Abusive Exclusionary Conduct, para. 83.

82 See Marina Lao, 'Search, Essential Facilities, and the Antitrust Duty to Deal', *Northwestern Journal of Technology and Intellectual Property*, Volume 11, Issue 5, Article 2, pp. 274-319, p. 287.

83 See Frank Pasquale, 'Dominant Search Engines: An Essential Cultural & Political Facility', *The Next Digital Decade - Essays on the Future of the Internet*, Chapter 7, pp. 401-417, Berin Szoka, Adam Marcus, eds., TechFreedom, Washington, D.C. (2010), available at http://ssrn.com/abstract=1747289, p. 422.

84 Damien Geradin and Monika Kuschewsky, 'Competition law and personal data: Preliminary thoughts on a complex issue' (2013) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2216088, p. 13.

85 Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law*, Vol. III A (Boston, Little, Brown and Company, 1996), para. 771a.

86 The former commissioner suggested this approach in her dissenting statement in *Google/DoubleClick* as follows '(...) it might have been possible to define a putative relevant product market comprising data that may be useful to advertisers and publishers who wish to engage in behavioral targeting.' She further emphasized this view in *The Emperor of All Identities* (*supra* note 37).

to an economic market defined using competition law tools and used to allocate market shares or power.'[87]

Independent of whether personal data could be defined as a separate relevant market, as the Court of Justice of the EU clarified in *Bronner,*[88] 'the indispensability of the requested product for competitors is a critical element of any duty to deal.'[89] This indispensability is interpreted strictly in case law.[90] Adding to this, the effects of the refusal to deal on the dominant undertaking's part on competition must be so strong that competition on the downstream market must be eliminated or substantially reduced. Craig argues that '[i]t seems very unlikely that there would be many cases in which access to a database of personal data would be essential for the operation of a particular service, or where it would be commercially impossible for a competing undertaking to operate without it. … The Commission is likely to take the view that it will always be possible for a rival to develop its own database of personal information over time, which will enable them to compete effectively.'[91] The Commission in *Google/Double-Click* conceded in this view as it found that competitors of Google such as Yahoo! and Microsoft also independently collect 'data about users' web surfing behaviour', and that '[d]ata is also available from internet service providers, which can track all of the online behaviour of their users, following them to every website they visit.'[92] A Forbes article points out that there are viable competitors to Google such as Amazon, Facebook and Twitter, calling these competitors 'unanticipated.'[93] Manne gives the example where Amazon has also joined in targeted advertising via collecting data through not only searches but also via the purchases conducted on its website.[94] Finally, Lerner gives the example of Bing, which uses other sources to collect data in addition to its own search engine.[95]

As the above discussion shows, establishing the first criterion of theory of refusal to supply data, which is objectively necessary to be able to compete effectively on a downstream market, is difficult. Supporting this theory becomes even more difficult considering that the claimant must still show that: (ii) the refusal is likely to lead to

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87 Richard Craig, 'Big Data and competition – data-rich does not mean dominant' (July 2014), available at http://www.taylorwessing.com/globaldatahub/article_big_data_dominant.html.

88 Judgement in *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*, C-7/97, EU:C:1998:569.

89 Robert O'Donoghue and A. Jorge Padilla, *The Law and Economics of Article 82* (Hart Publishing, Oxford and Portland, Oregon, 2006), p. 426.

90 See e.g., Vesterdorf, *supra* note 37, at p. 7.

91 See Craig, *supra* note 87.

92 Case COMP/ M.4731 – *Google/DoubleClick*, para. 365. The FTC had also taken a similar position in *Google/DoubleClick* (see Statement of Federal Trade Commission Concerning Google/DoubleClick, FTC File No. 071-0170, pp. 12-13).

93 Geoffrey Manne, 'FTC Ends Google Antitrust Investigation. Critics And Competitors: Move On.', *Forbes* (3 January 2013), available at http://www.forbes.com/sites/beltway/2013/01/03/ftcs-google-antitrust-investigation-was-silly-critics-and-competitors-move-on/.

94 Manne, *supra* note 93.

95 Lerner, *supra* note 76, at p. 24.

the elimination of effective competition on the downstream market, and (iii) the refusal is likely to lead to consumer harm. O'Donoghue and Padilla emphasize that even if the input at issue is essential, in a case where the downstream market provides for sufficient competition either actually or potentially (e.g., competitors providing their own products), the imposition of a duty to supply under Article 102 would not be warranted.[96] In terms of consumer harm, the Commission underlines that it would weigh the likely negative consequences of the refusal to supply in the relevant market with that of the negative consequences of imposing an obligation to supply.[97] In other words, only in cases where the consumer harm is so significant, negative effects emanating from the duty to supply in the relevant market could be outweighed. Therefore, it is very unlikely that an applicant would be able to establish a case against a dominant undertaking based on the refusal to supply data.

(b) Duty to supply versus data protection – case of Suomen/Numeropalvelu Oy v. Eniro

Despite the challenge in establishing the criteria of the duty to supply, even if a competition authority were to deem personal data to be an essential facility in a given case, forcing the dominant player to disclose this data may not always be an applicable remedy.

In this regard, it is possible to point to one case where the competition authority found an abuse of dominance because of the dominant player's refusal to supply data to undertakings operating in the downstream market. In *Suomen/Numeropalvelu Oy ('SNOY') v. Eniro*[98] in Finland, SNOY, controller of the sole national database of telephone subscriber information, refused to deliver information to Eniro, for the latter to use this in its free online telephone directory. This refusal was considered by the Finnish Competition Authority ('FCA') to be an abuse of dominance. SNOY justified its behaviour on the grounds of data and privacy protection and, in particular, claimed that Eniro was violating this legislation by offering free search services to individuals without requiring preregistration. The Market Court and, later, the Supreme Administrative Court ruled that since SNOY held a dominant position, Eniro was *de facto* dependent on its service. However, an important turnaround regarding the FCA's finding was that, according to both the Market Court and the Supreme Administrative Court, SNOY's refusal was abusive only pre-September 2005, as in September 2005, new data protection legislation, which required consent in advance from the registered individuals, came into force and, therefore, SNOY was no longer allowed to share the subscriber data.[99]

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96 O'Donoghue and Padilla, *supra* note 89, at p. 443.

97 Guidance on Abusive Exclusionary Conduct, para. 86.

98 *Suomen Numeropalvelu Oy*, (Dnr 1097/61/2003), proposal to Market Court 17.5.2005. See also Press Release by the Finnish Competition Authority (2005), available at http://www.kilpailuvirasto.fi/cgi-bin/english.cgi?luku=news-archive&sivu=news/n-2005-05-18.

99 Finnish Competition Authority (now within the Finnish Competition and Consumer Authority), 'Refusal to Deal' (2009), available at http://www.internationalcompetitionnetwork.org/uploads/questionnaires/uc%20refusals/finland.pdf.

Even though the FCA nonetheless came up with the remedy of the dominant player sharing user data with companies operating in the downstream market, this remedy eventually became non-applicable due to the subsequently established requirement of consent from the subscribers whose personal data would be shared. As set out above, consent is a key factor in sharing and processing of personal data. Therefore, even if a competition authority imposes upon a dominant player the requirement to share users' personal data, personal data may implicate the applicability of other regulations, such as data protection rules, which may not allow the sharing of personal data by the data holder. Therefore, the dominant undertaking may not always be forced to share this facility even if it is essential.

IV. Conclusion

The issue of whether to include privacy risk analysis in antitrust investigations has been a recent but increasingly polarized debate. Two cases in point, *Google/DoubleClick* and *Facebook/WhatsApp* have so far established that competition law authorities, even in cases where there is clear personal data aggregation due to the merger of the parties that collect and retain data, remain reluctant to decipher and deal with privacy risks with the tools granted by competition laws. While one side argues that the privacy risks entailed in the data accumulation should and can be dealt with within the scope of antitrust, others argue that this would result in the overarching of antitrust rules, and may even implicate violation of freedom of speech. Perhaps the better solution is as simple as that proposed by the European Data Protection Supervisor – close coordination of competition law agencies with data protection agencies in cases of big data aggregation.

Currently, the issue of whether privacy considerations should play a role in competition law analysis remains unresolved since, despite the eyebrows raised post-*Google/DoubleClick*, the *Facebook/Whatsapp* merger was also cleared without establishing a role for data protection concerns in the competition law analysis. However, during the Juncker Commission and under Commissioner Vestager's leadership, the Commission's competition policy may well be expected to adopt a different approach. As Commissioner Vestager explained in her commitments, '(. . .) to enforce [competition rules] we need to be as sharp as the businesses in the new markets which are developing at a speed which is completely different from what it would have been five or ten years ago.'[100] Indeed, the digital markets are evolving at high speed and while Commissioner Harbour's concerns expressed in 2008 were, in our view, very forward-thinking, they are now part of antitrust literature and topped with additional issues, therefore attracting much higher competition law attention. Although it is still early to see the general reaction towards *Facebook/Whatsapp*, the case has nonetheless been criticized and may be expected to generate a (much) higher level of criticism when compared to *Google/DoubleClick* considering the increased antitrust awareness since 2008 towards

100 Commitments made at the Hearing of Margrethe Vestager, Commissioner for Competition, *supra* note at p. 3.

data aggregation, combined with the fact that there is now more pressure on the competition law enforcement bodies to take account of data protection concerns.

More problematic is the second issue of whether the accumulation of personal data could have antitrust implications, such as the potential repercussions of network effects in mergers where the parties combine large data sets, as well as an abuse of dominant position due to a failure to supply the data. On that issue, the aggregation of data by an undertaking has not so far been found to violate competition laws. Some argue as far as to state that 'Decades of economic analysis and case law of the European Courts have determined that certain conduct of companies, which are dominant from an economic perspective, is particularly capable of producing harmful effects. As such, the imposition of certain restrictions on their behaviour is justified in order to prevent such harm. However, there is no such presumption established in relation to holding large amounts of personal data. If anything, data protection cases tell us that those in possession of relatively small amounts of personal data can be equally, or even more likely, to cause harm to data subjects than those possessing large amounts, since the latter will often have more sophisticated compliance and security policies in place.'[101]

In terms of data mergers, the Commission has indeed looked into the potential implications of network effects in both *Google/DoubleClick* and *Facebook/WhatsApp*; however, it cleared both transactions without establishing any substantial competition law concerns emanating from network effects. Furthermore, the digital market players' incentive to collect personal data may well be justified when certain particularities of multi-sided markets are taken into consideration. In the end, approaching network effects as a cause of market foreclosure subsequent to data mergers may not be an adequate competition law policy.

In terms of dominance-related antitrust problems, the ability of a competition authority to impose upon a dominant undertaking to share its users' personal data with its competitors has also been questioned. However, the conditions of imposing the duty to deal are already hard to fulfil, and a duty to deal claim becomes even more challenging when data is argued to be the essential facility at issue. This is particularly due to the availability of personal data to many undertakings providing online services, coupled with the fact that undertakings providing online services have to come up with many different methods of collecting personal data and are able to do so without access to personal data collected by their competitors, including competitors with strong market positions.

In the end, it is yet to be seen how the collection of personal data through a merger or an online service provider's refusal to grant access to personal data may constitute a breach of competition law.

101 Craig, *supra* note 87.

Contributors' Bios

Peter Alexiadis
Partner at Gibson, Dunn & Crutcher and Visiting Professor at King's College in London. Formerly a Visiting Professor at Strathclyde University (2003-2010) and Visiting Professor at the Annual ULB Brussels EU Summer School Seminar. He is a guest lecturer on competition policy at the UK's CMA and at Japan's JFTC.

Jean-Yves Art
Assistant General Counsel at Microsoft, in charge of antitrust matters in the EMEA region. Visiting professor i.a. at the College of Europe (Bruges) and at Sciences Po Paris.

Carl Baudenbacher
President of the EFTA Court. Professor at the University of St. Gallen and Chairman of the St. Gallen International Competition Law Forum ICF, Former Permanent Visiting Professor at the University of Texas at Austin, Member of the Board of the University of Texas School of Law Center of Global Energy, International Arbitration and Environmental, Law.

Jean-François Bellis
Partner at Van Bael & Bellis, Brussels. Professor, Institute of European Studies and Faculty of Law, Université Libre de Bruxelles (ULB).

Kent Bernard
Adjunct Professor at Fordham University Law School since 2008. Former Vice President & Assistant General Counsel of Pfizer, Former Deputy Managing Partner of the Pfizer Legal Division.

Helmut Brokelmann
Partner at Martínez Lage, Allendesalazar & Brokelmann. Regular lecturer in EU and competition law at various Spanish Universities.

Sir David Edward
Professor Emeritus of the University of Edinburgh. Judge of the European Court of First instance (1989-92) and of the Court of Justice (1992-2004). He practised as an advocate in Scotland and was Ian Forrester's 'devil-master' (pupil-master).

Eleanor M. Fox
Walter J. Derenberg Professor, New York University School of Law. Formerly, partner, Simpson Thacher & Bartlett. Author of US competition law and EU law casebooks and adviser on competition law and policy to developing and emerging economies.

Ayşe Gizem Yaşar
Associate at ELIG, Attorneys-at-Law. Holds an LL.M. from Panthéon-Assas University, Paris Institute of Comparative Law. Qualified in Istanbul.

Rosa Greaves
Professor of EU Commercial Law at the University of Glasgow and Professor at the Scandinavian Institute of Maritime Law, University of Oslo. Visiting Professor at the Catholic University of Portugal (Lisbon). Formerly Head of School of Law, University of Glasgow.

Ayşe Güner
Senior Associate at ELIG, Attorneys-at-Law. Holds a Juris Doctorate from the Southern Methodist University Dedman School of Law and an LL.M. from Maastricht University, the Netherlands. Qualified in California.

Gönenç Gürkaynak
Managing Partner at ELIG, Attorneys-at-Law. Member of Faculty at Bilkent University Law School and at Istanbul Bilgi University Law School. Holds an LLM from Harvard Law School. Qualified in Istanbul, New York, Brussels (B list) and England & Wales (currently a non-practicing Solicitor).

Barry E. Hawk
Director, Fordham Competition Law Institute and Senior Counsel at LMS Studio Legale Labruna e Associati. Former partner at Skadden Arps LLP. Former Professor of Law at Fordham Law School.

Nicholas Khan
Member of the Bar of England and Wales and Legal Adviser at the Legal Service of the European Commission, currently dealing with competition law. Author of the 6th Edition of Kerse and Khan, EU Anti-Trust Procedure.

James Killick
Partner and former head of the Global Pharmaceutical Industry Group at White & Case LLP. Lectures and writes extensively about competition law in the pharmaceutical sector.

Assimakis P. Komninos
Partner at White & Case LLP. Visiting fellow of University College London and Senior Associate Fellow of the Institute for European Studies at the Vrije Universiteit Brussels. Former Commissioner-Member of the Board of the Hellenic Competition Commission.

Jacquelyn MacLennan
Partner at White & Case LLP. Honorary Fellow, Europa Institute, University of Edinburgh.

Santiago Martínez Lage
Managing partner at Martínez Lage, Allendesalazar & Brokelmann. A former diplomat, he assisted the Spanish delegation during the negotiations for accession to the European Communities. Founder and editor for more than 28 years of Gaceta Jurídica de la UE y de la Competencia.

Valérie Meunier
Dr Valérie Meunier is a Vice President with Compass Lexecon in Paris. Prior to joining Compass Lexecon, she was Assistant Professor in Economics at Aarhus University. She then joined the French competition authority where she was Deputy Chief Economist.

Jorge Padilla
Dr Jorge Padilla is Senior Managing Director and Head of Compass Lexecon Europe. He is a Research Fellow at the Centro de Estudios Monetarios y Financieros (CEMFI, Madrid) and teaches competition economics at the Barcelona Graduate School of Economics (BGSE). He is co-author of The Law and Economics of Article 102 TFEU, 2nd edition, Hart Publishing, 2013.

Mark Powell
Mark Powell is currently Executive Partner of the Brussels office and Head of Competition for the EMEA region with White & Case LLP. Mark has been working with Ian from his early days as a baby lawyer in Brussels in the late 80's. He was an associate and then a partner at Forrester Norall & Sutton prior to the merger in 1998 with White & Case. He has spent the last seventeen years enjoying the great atmosphere in the Brussels office that Ian fostered.

Francesco Setti
Managing partner of Avvocati Associati Franzosi Dal Negro Setti and head of the Life Sciences practice since 1993. From 1978 to 1993 he worked for Ciba Geigy group (now merged with Sandoz group) as internal counsel. He is registered at the Milan Bar.

Luís Silva Morais
Founding Partner of Luís Silva Morais/Sérgio Gonçalves do Cabo. Professor of EU law, competition law and regulation and Jean Monnet Chair (2009) at the University of Lisbon Law School (FDL). Chairman of CIRSF – Research Centre on the Financial Sector (www.cirsf.eu).

Jacques Steenbergen
President of the Belgian Competition Authority. Emeritus professor of competition law at the Law Faculty of the University of Leuven, former partner at Allen & Overy and former member of the Bar Council. Former legal secretary to the President of the Court of Justice.

Pablo Trevisán
Partner and Member of the Board at Estudio Trevisán Abogados. Former General Counsel at BACS Banco de Crédito y Securitización S.A.

Matthieu Vancaillie
Lawyer at Ashurst LLP.

James S. Venit
Partner at Skadden, Arps, Slate, Meagher & Flom LLP.

Denis Waelbroeck
Partner at Ashurst LLP. Professor in EU competition law at the Université Libre de Bruxelles and the College of Europe (Bruges).

Karen Williams
Official of the European Commission, currently Director of the Investigation and Disciplinary Office of the Commission (IDOC). Former Hearing Officer for competition proceedings (2001-2010). Former official at the Directorate General for Competition (now DG COMP) (1985-2001).

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A Scot without Borders
Liber Amicorum - Volume II

It is with great pleasure that we present this Liber Amicorum to Ian Stewart Forrester QC LL.D. on the year of his 70th birthday and at this point of transition in his extraordinary professional life. This two-volume Liber Amicorum is a collection of tributes to Ian Forrester's outstanding career and of a series of articles signed by prominent academics and practitioners around the world on the most current topics in EU law and policies, competition law, human rights and intellectual property.

Born in Glasgow from a Scottish family, Ian Forrester practiced law in multiple cities, Brussels, New York and London, to mention some. He arrived in Brussels in 1973 as one of the first generation of UK lawyers at the time when the UK joined the European Union. He participated in many of the leading cases in the formation of key principles of EU law, particularly EU competition law such as Bosman, Bullock (Distillers), GlaxoSmithKline, Servier, Pfizer, Magill, IMS Health and Microsoft. Ian Forrester lived these and other cases professionally and academically, debating them with students, professors and researchers. He has been a mentor to many younger lawyers and is also a prolific writer of seminal articles. His good spirits and quirky sense of humour have made him friends and professional connections all over the world and this Liber Amicorum is an occasion to mark the outstanding merits of a remarkable man and express the long lasting and affectionate friendship.

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