Article:
Zingales, N orcid.org/0000-0001-7717-2247 (2017) Between a rock and two hard places: WhatsApp at the crossroad of competition, data protection and consumer law. Computer Law & Security Review, 33 (4). pp. 553-558. ISSN 0267-3649

https://doi.org/10.1016/j.clsr.2017.05.018

Between a rock and two hard places: WhatsApp at the crossroad of competition, data protection and consumer law

Nicolo Zingales*

ABSTRACT
On 11 May 2017, the Italian antitrust and consumer protection authority (Autorita' Garante della Concorrenza e del Mercato, or AGCM) adopted two decisions in its proceedings against WhatsApp. Both proceedings, initiated under the consumer protection mandate of AGCM, relate to WhatsApp's terms of service and privacy policy (together referred to as "ToS" hereinafter). In particular, one qualified as "unfair" and "aggressive" WhatsApp's process of obtaining user consent for its updated ToS, while the other established the unfairness of specific clauses of WhatsApp's ToS. This comment will address the former decision, while making reference to other proceedings opened against the consumer communication service or its mother company in relation to its latest ToS update.

1. Historical and regulatory background

WhatsApp's ToS update in August 2016 was a consequential one: the Californian company announced, buried in the fine print of several provisions it had introduced, that it would share certain data (including most notably the phone number through which users are identified) for marketing purposes and product improvement with its new mother company Facebook. This attracted the attention and concern of commentators[1] for a number of reasons. First, the new arrangement broke with WhatsApp's longstanding "no ads policy"[2], which strictly rejected the use of advertising affirming that "when advertising is involved **you the user** are the product" (emphasis in the original). Secondly, many users felt betrayed also because WhatsApp, adding fuel to the fire, had committed after the its acquisition by Facebook in 2014 to change "nothing", stressing that there would have been no partnership with Facebook if that required a compromise on the core principles that define the company, its vision and its product[3].

The ToS update was also particularly controversial since the assumption of continued adherence to WhatsApp's anti-advertising posture played at least some role in the antitrust clearance of the transaction. While the European Commission approved the concentration on different grounds (namely, the dynamic nature of the affected markets and the simultaneous use by consumers of multiple communication services), the investigation did consider the possibility that Facebook would collect data from WhatsApp users who are also on the social network[4]. Ultimately,

* Lecturer in Competition and Information Law, Sussex Law School
[1] See e.g. Dan Tynan, 'WhatsApp privacy backlash: Facebook angers users by harvesting their data', The Guardian (25 August 2016), https://www.theguardian.com/technology/2016/aug/25/whatsapp-backlash-facebook-data-privacy-users; Gennie Gebart, What Facebook and Whatsapp's Data Sharing Plans Really Mean for User Privacy', EFF Deeplinks (31 August 2016), https://www.eff.org/deeplinks/2016/08/what-facebook-and-whatsapps-data-sharing-plans-really-mean-user-privacy-0; Bryan Barret, 'WhatsApp's Privacy Cred Just Took a Big Hit', Wired (25 August 2016), https://www.wired.com/2016/08/whatsapp-privacy-facebook/
[2] 'Why we don't sell ads', WhatsApp Blog (18 June 2012), https://blog.whatsapp.com/245/Why-we-dont-sell-ads?
[3] 'Facebook', WhatsApp blog (19 February 2014), https://blog.whatsapp.com/499/Facebook
[4] European Commission, Press Release IP 14-1088, 3 October 2014,

however, this scenario was deemed unrealistic given that the required change in WhatsApp's privacy policy would likely generate a migration of users to other consumer communication services. In addition, the Commission gave some credence to the merging parties' argument that there would be major technical obstacles to matching a user profile across the two platforms – an argument which is buttressed by the supervened ToS update, and on which the Commission recently fined Facebook €110 million for providing inaccurate information in the course of the merger review[5].

In the United States, although the proposed acquisition escaped antitrust challenge, the a substantiated complaint by the Electronic Privacy Information Center (EPIC) and other civil society organizations[6] forced the Federal Trade Commission (FTC) to consider the hypothesis that WhatsApp would change its policy after Facebook's acquisition. FTC Director Jessica Rich responded writing a letter to the merging parties warning about the legal consequences of violating privacy promises[7]. The letter clarified that a company needs the *express consent* of consumers to be able to use data in a manner that is materially inconsistent with promises made at the time the data was collected, thus aligning the FTC position on the matter with the obligations laid out in the consent decree under which Facebook recently settled FTC charges of deception[8]. Unsurprisingly, in light of the discrepancy between the notion of "express consent" and the way in which the ToS update was communicated to WhatsApp users, a further complaint was filed by EPIC together with the Center for Digital Democracy just four days after the announcement of WhatsApp's ToS update. The FTC assured that it would "carefully review" the matter- but no formal action has been taken to date[9].

Back to the other side of the Atlantic, the ToS update triggered a number of legal actions in the context of data protection law. In particular, in the first decision taken on the matter on 27 September 2016, the Hamburg Commissioner for Data Protection and Freedom of Information ordered Facebook to stop processing data of German WhatsApp users, due to the absence of an effective consent from WhatsApp users to the data sharing, and the lack of any alternative legal

---

http://europa.eu/rapid/press-release_IP-14-1088_en.htm

[5] European Commission, Press Release IP- 17- 1369, 18 May 2017, http://europa.eu/rapid/press-release_IP-17-1369_en.htm

[6] *In the Matter of Facebook, Inc*., (2009) (EPIC Complaint, Request for Investigation, Injunction, and Other Relief), https://epic.org/privacy/inrefacebook/EPIC-FacebookComplaint.pdf; *In the Matter of Facebook, Inc.*, (2010) (EPIC Supplemental Materials in Support of Pending Complaint and Request for Injunction, Request for Investigation and for Other Relief), https://epic.org/privacy/inrefacebook/EPIC_Facebook_Supp.pdf; *In the Matter of Facebook, Inc.,* (2010) (EPIC Complaint, Request for Investigation, Injunction, and Other Relief) , https://epic.org/privacy/facebook/EPIC_FTC_FB_Complaint.pdf; *In re Facebook. Inc.*, Decision and Order, No. C-4365 (2012), available at http://www. ftc.gov/en forcementlcasesproceedings/092-3184/facebook-inc

[7] Letter From Jessica L. Rich, Director of the Federal Trade Commission Bureau of Consumer Protection, to Erin Egan, Chief Privacy Officer, Facebook, and to Anne Hoge, General Counsel, WhatsApp Inc. (10 April 2014), available at https://www.ftc.gov/public-statements/2014/04/letter-jessica-l-rich-director-federal-trade-commission-bureau-consumer

[8] FTC press release (10 August 2012), 'Facebook Must Obtain Consumers' Consent Before Sharing Their Information Beyond Established Privacy Settings', https://www.ftc.gov/news-events/press-releases/2011/11/facebook-settles-ftc-charges-it-deceived-consumers-failing-keep

[9] *In the Matter of Facebook, Inc.*, (2016) (EPIC Request for Investigation, Injunction and Other Relief), https://www.epic.org/privacy/ftc/whatsapp/EPIC-CDD-FTC-WhatsApp-Complaint-2016.pdf

basis for doing so[10]. On the same day, the Italian data protection authority (hereinafter DPA) launched an investigation concerning WhatsApp's compliance with the purpose limitation principle, as well as to "whether the data of WhatsApp users that do not use Facebook will be disclosed to the Menlo Park company"[11].

Just a week later, the Spanish DPA opened its own investigation, probing Facebook specifically on the type of information exchanged received from WhatsApp, the purpose for which it is used, the period of retention, and the options that are offered to users to object[12]. At this point it became clear that, since the concern about Facebook's practices in relation to WhatsApp was shared by a number of data protection authorities, the case offered a perfect opportunity for joint action under the coordination of the Article 29 Working Party. On 26 October 2016, the Working Party issued a letter to the Menlo Park company detailing the general concern for "the validity of the users' consent […] and the effectiveness of control mechanisms offered to users to exercise their rights", and announcing a coordinated action "to clarify those concerns and to ensure that the principles and rights set forth in European and national Data Protection laws are upheld in a consistent manner across the EU"[13]. Following the letter, which also requested further information about the exact categories of data, the sources and a list of recipients and potential third parties, the UK Information Commissioner's Office publicly acknowledged to have received Facebook's commitment to suspend the transfer of data to Facebook from WhatsApp users within the UK[14], a commitment extended by the communication service to the whole European Union territory[15].

Finally, and most recently, Facebook was also brought before the Berlin County Court by German consumer protection association *Verbraucherzentrale Bundesverband* (VZBV), which requested an injunction to stop the data-sharing and ensure that Facebook deletes the data that WhatsApp has already transferred to it[16].

2. Significance of the AGCM investigation

The above list of proceedings provides a good illustration of the highly controversial character of the changes introduced in August 2016. At the same time, it is striking that, despite the fact that issues such as changes of ToS clearly fall into the competence of consumer protection authorities,

[10] The Hamburg Commissioner for Data Protection and Freedom of Information, 'Administrative Order against the mass synchronization of data between Facebook and Whatsapp', Press Release 27.10.2016, available at https://docmia.com/d/504564

[11] Garante per la protezione dei dati personali, 'Il Garante privacy avvia istruttoria su WhatsApp', Press Release 27.10. 2016, http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/5460932

[12] Agencia Española de Protección de Datos, 'La AEPD inicia actuaciones de investigación por la comunicación de datos entre Whatsapp y Facebook', Press Release 5.10.2016, http://www.agpd.es/portalwebAGPD/revista_prensa/revista_prensa/2016/notas_prensa/news/2016_10_05-ides-idphp.php

[13] http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2016/20161027__letter_of_the_chair_of_the_art_29_wp_whatsapp_en.pdf

[14] Elizabeth Denham, 'Information Commissioner updates on WhatsApp / Facebook investigation', ICO Blog (7 November 2016), https://iconewsblog.wordpress.com/2016/11/07/information-commissioner-updates-on-whatsapp-facebook-investigation/

[15] See Natasha Lomas, 'Facebook-WhatsApp data sharing now on pause in UK at regulator's request — and across Europe', Techcrunch (8 November 2016), https://techcrunch.com/2016/11/08/facebook-whatsapp-data-sharing-now-on-pause-in-uk-at-regulators-request/

[16] See 'Vzbv sues Whatsapp', Marktwaechter Digitale Welt Press Release (30 January 2017), https://www.icpen.org/files/icpenDownloads/17_01_30_pm_whatsapp_klage_en.pdf

no action had so far been taken in this area in relation to the Facebook/Whatsapp's conduct. This is surprising when considering the high-profile nature of this case, arguably indicating a perceived inadequacy of consumer protection tools in addressing issues which present a significant overlap with privacy and data protection law. Yet it is clear that, as rightly stated by the AGCM in its decision (para. 50)[17], the applicability of privacy and data protection legislation to the conduct at issue does not exempt an undertaking from compliance with the law of unfair commercial practices.

To be clear, what the AGCM took issue with has nothing to do with the deceptive nature of WhatsApp's prior announcements, or even with the completeness of the information provided in the new ToS about the extent of data sharing. Rather, it was the form in which consumer consent was extracted for acceptance of the updated ToS, which according to the AGCM failed to fulfill WhatsApp's obligation under consumer protection law to provide an effective choice. The case thus represented an opportunity to address the interaction between consumer consent and data subject consent, but also (as explained below) to bring competition considerations into consumer protection analysis.

3. Factual background

The facts at the origin of this dispute certainly did not escape the attention of those WhatsApp users who had been monitoring the communication service for possible changes following Facebook's acquisition. However, as it is clear from the AGCM's decision, the expectations of attention of an "average consumer" who is "reasonably circumspect" cannot be held to such high standard. To be clear, the notice received by consumers accessing the service on or after 25 August 2016 was merely the following:

> *WhatsApp is updating its terms of service and privacy policy to reflect new functionalities, such as WhatsApp calls. Read the terms and the policy to know more about the available options. To continue using WhatsApp, kindly accept the terms and the policy by [30 days after reading]*[18].

The message was followed by a sizeable "ACCEPT" button for users to express consent. While a user was not bound to accept the entirety of ToS (and in particular the sharing of data with Facebook) in order to continue using the service, no option was given in the first instance to make a partial acceptance of the new terms. To do that, one would need to click on the word "Read" in the aforementioned text, or alternatively on the sentence "To know more about the key updates of our Terms and Privacy Policy" included at the bottom of the text. Both actions would take a user to a new page featuring a pre-ticked checkbox next to a clause indicating that users share the information of their WhatsApp account with Facebook to improve their experience with Facebook's products and advertising. The same clause clarified that this information is limited to the users' metadata, assuring that in any event "chat and telephone number will not be shared on Facebook".

---

[17] Provvedimento PS 10601 and Provvedimento CV 154, both available at http://www.agcm.it/stampa/comunicati/8754-ps10601-cv154-sanzione-da-3milioni-di-euro-per-whatsapp,-ha-indotto-gli-utenti-a-condividere-i-loro-dati-con-facebook.html

[18] An identical message was also sent to users who had not expressed their acceptance within 30 days, with the additional clarification that, should they fail to accept, they would have to interrupt their use of the services.

A user wishing not to share this information would then be required to untick the checkbox, and then click on the ensuing ACCEPT button. Alternatively, that user would have the option of de-activating the data sharing within 30 days of acceptance by unticking the checkbox "Share account information" in Settings > Account.

4. The decision

The AGCM found that WhatsApp's conduct constituted an unfair and aggressive commercial practice pursuant to articles 20, 24 and 25 of the Italian Consumer Code- the national implementation of the articles 5, 8 and 9 of Directive 2005/29. To reach that conclusion, the AGCM made a number of important points.

First, as already mentioned, the AGCM quickly disposed of the objection on subject matter jurisdiction, clarifying that the practice at issue did not affect the competence of the DPA. In particular, the AGCM assuaged the concerns of interference with the mandate of DPAs by recognizing that, should any such authority claim exclusive or concurring competence on the matter, the AGCM would suspend its proceedings pursuant to article 27.1bis of the Consumer code. Interestingly, the cited article establishes that the AGCM exercises his jurisdiction on unfair commercial practice "also in regulated sectors" – supposedly interpreted by the authority as including privacy and data protection- "upon receiving the advisory opinion of the competent authority", which however did not materialize in this particular case. Nevertheless, since the practice was undertaken through electronic communications, the AGCM was specifically required by article 27.6 of the Code to obtain a preliminary opinion to the communications authority (Autorita' per le Garanzie nelle Comunicazioni, or AGCOM). AGCOM's opinion, submitted on 4 May 2016, stressed the increasing importance of smartphone ecosystems in the digital economy (and more generally of the web for social interactions), pointing to the fact that Facebook Messenger and WhatsApp hold two of the top three positions in the market for instant messaging. AGCOM emphasized that both the use of smartphones and the Internet facilitate and significantly amplify the effects of the commercial practice under investigation, strengthening the undue influence on consumers in light of the widespread adoption of the services in question.

Another important element of contention was whether the conduct at issue falls within the scope of the consumer Code. Here, WhatsApp tried to argue that its main function is the transmission of messages between users (rather than advertising), hence the transfer of communication data to Facebook would not constitute a "commercial" practice. It recalled to that effect the recent opinions of the European Data Protection Supervisor (EDPS) refusing to accept the qualification of personal data as "mere economic asset" or as "counterperformance" to a contract[19]. However, AGCM dismissed this arguably misconstrued reference by pointing out that the use of data as counterperformance in social media is recognized both in the context of antitrust[20] and consumer protection law[21], and that the company itself admitted that the introduced data sharing was conceived *inter alia* to improve advertising, generating financial gains for Facebook.

[19] Opinion 8/2016 on coherent enforcement of fundamental rights in the age of big data of 23 September 2016; and Opinion 4/2017 on the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content" of 14 March 2017

[20] Merger procedure, Case No. COMP/M.7217 – Facebook/WhatsApp, 3 ottobre 2014; 'Refining the EU merger control system', Speech by Commissioner Vestager, Studienvereinigung Kartellrecht, Brussels, 10 March 2016

[21] Common position of national authorities within the CPC Network concerning the protection of consumers on social network, Brussels, 17 March 2017, http://europa.eu/rapid/press-release_IP-17-631_en.htm; Proposal of Directive 634/2015 on certain aspects concerning contracts for the supply of

Finally, and more on the merits of the conduct under investigation, WhatsApp argued that there was none of the "harassment, coercion, or undue influence" elements required under article 25 of Code for a practice to be considered "aggressive" in accordance with article 24. It contended that it had provided users with sufficient notice, in particular through an unavoidably full screen informing about the TOS update, and two additional informative pages which included even the summary of the main changes. WhatsApp provided users with a full screen, which "was unavoidable", in relation to the process of acceptance of the changes concerning the treatment of personal data; and two informative pages which even included the summary of the main changes. The AGCM did not explicitly address these arguments, but concluded that the initial screen and the pre-ticked checkbox failed to adequately convey the possibility of refusing the data sharing with Facebook, and rendered difficult the concrete exercise of this option. It went on illustrating that a user would only be able to modify his selection through a more complex procedure, and that instructions to do so were only available in the second screen -the appearance of which was triggered only in the eventuality that a user decided to read more information about the ToS update. Furthermore, the AGCM took issue with the uncertainty about the continuation of the service, generated by the communications sent to users who did not express their acceptance within the initial 30 days of their use of WhatsApp.

A further interesting point concerns WhatsApp's claim that it had gone beyond the amount of information provided by other widely used mobile applications, and thus the "normal degree of specific competence and attention that consumers can reasonably expect from a professional" in accordance with article 20 of the Code. AGCM was not convinced by this argument either, in light of the significance of the commercial activity carried out and of the fact that the company (with 30-50 million users) represents an important player in the relevant national market.

For all these reasons, considering that the conduct significantly affected the freedom of choice or behavior of the average consumer and thereby led to a commercial decision that would not otherwise take place, the AGCM found the practice to be in violation of article 20 (unfair commercial practice), 24 (aggressive commercial practice) and 25 (resort to "harassment, coercion or undue influence") of the Consumer Code.

5. Quantification of the fine

One of the issues that have given rise to much discussion following publication of this decision is the way in which AGCM calculated the € 3million fine imposed to WhatsApp for the aforementioned violations. Article 27.13 of the Code mentions a number of factors to be taken into account for quantification of the fines imposed by the AGCM pursuant to its consumer protection mandate.

The first one is the gravity of the infringement, which in the view of the authority was particularly serious because of the "insidious nature" of the extraction of consent to the use of data for profiling and advertising. One could argue that this qualification suggests a concern not merely of aggressiveness, but also of deception–a scenario that is regulated under article 22 of the Code and the AGCM did not address.

---

digital content , Brussels, 9 December 2015 COM(2015) 634 final, http://ec.europa.eu/justice/contract/files/directive_-digital_content.pdf

The second element was the characteristics of the professional in question, being of particular relevance that the undertaking was "leader" in a market that extends to the whole country (as pointed out by AGCOM), is dynamic and innovative and concerns the acquisition, exchange and use of relevant personal information which has substantial economic value.. Here, while one can imagine that the authority meant to condemn what it deemed innovation by trickery, it would have arguably been preferable to explain more in detail the role played by innovation considerations towards the determination of the fine.

A third factor was the duration of the infringement, which AGCM found problematic given that users who had not accessed WhatsApp since 25 August 2016 were still subject to the practice in question. However, the authority did take into account one attenuating circumstance with respect to the mitigation of the effects of the practice, in particular that WhatsApp had stopped its transfer of data to Facebook within the European Union.

6. Comment

This is a sensible and well-reasoned decision applying traditional consumer law tools to a relatively novel concept of "commercial practice" (the acquisition of consumer data) which is also increasingly under the scrutiny of other regulators- most notably, competition and data protection authorities. Without doubt, the decision constitutes an important step towards the clarification of some needle questions, including the relevance of competition and data protection considerations in consumer law. This is an issue that was recently addressed at a rather general level by the European Commission's Guidance on Unfair Commercial Practices[22] in relation to both the aforementioned areas.

On data protection law, the Guidance stresses that "data protection violations should be considered when assessing the overall unfairness of commercial practices […], particularly in the situation where the trader processes consumer data in violation of data protection requirements". Examples made in this respect are not particularly detailed, referring to the information requirement of data protection law and to the use of data for direct marketing purposes or *any* other commercial purposes like profiling, personal pricing or "big data applications". Nevertheless, they do point to the need to assess the legality of the practice from a data protection perspective, and the AGCM in this decision described the formal process in which this should take place (article 27.1bis).

On competition law, the Guidance explicitly indicates that breaches of competition rules should be taken into account when assessing unfairness under the unfair commercial practice directive, but failed to offer any concrete example of the interaction between these two regimes. In this respect, the analysis conducted by the AGCM is particularly instructive, incorporating market dynamics into crucial parts of the analysis[23].

First, the determination of "undue influence" hinges significantly on a recognition of the

[22] Commission Staff Working Document, Guidance on Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, Brussels, 25.5.2016, SWD(2016) 163 final, http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf

[23] That is probably of no coincidence considering that rapporteur in this case was Gabriella Muscolo, well known in the antitrust community among other things due to her position -prior to taking the new role of AGCM Commissioner- as judge for the specialized IP and commercial courts in Rome, where she handled several competition cases. See http://www.agcm.it/collegio/componenti/48-organizzazione/collegio/6945-gabriella-muscolo-sp-1151980042.html

company's position in the market. This resembles the assessment of market power for competition purposes, concluding that consumers use WhatsApp daily even in replacement of regular telephony, and therefore can hardly abandon it. Going forward, perhaps this type of assessment could be improved with a more structured analysis of market power, including for example measuring elasticity of demand and explicitly identifying other elements, such as countervailing buyer power and the notion of network effects which the AGCM seems to allude to. WhatsApp in its defense tried to raise one key element of the merger decision, the large incidence of "multi-homing" in the consumer communication market, but this point was not sufficient to mitigate the AGCM's recognition of the somewhat special position of WhatsApp as market leader. The understanding of the prominent position of WhatsApp, which evokes the concept of "special responsibility" of a dominant firm, permeates throughout the decision - including the quantification of the sanction. It also affects the degree of professional diligence and the information duties of the firm, a conclusion which could arguably be extended to data protection law under the fairness and accountability principles.

A second aspect where one can see find resonance of competition principles is the assessment of abuse of this special position, in particular where it is recognized that company "leveraged" the heavy reliance of consumers on the application to obtain a "consent that is broader than necessary to continue using the application". While this is not exactly the classic "leveraging" theory, where one company uses its dominant position in one market to strengthen its position in another connected market, it might well be a necessary adaptation to the context of data-driven ecosystems, where data constitute an input for future market expansion. Alternatively, Facebook/Whatsapp's conduct can be seen through the prism of exploitation, as an imposition of "unfair trading conditions" in violation of article 102 (a) TFEU. If personal data is an asset which can be considered a counterperformance to a contract, then it is not too much of a stretch to expect that such data constitutes a fair price for the service offered, as recently noted by EU Competition Commissioner Margrethe Vestager[24]. This theory is not entirely new to Facebook, who is already subject to an investigation by the German competition authority for abusive imposition of unfair ToS[25]. The specific theory of harm on which the investigation is grounded has not been clearly spelled out, but it has transpired from the press release that there is considerable doubt about the validity of the ToS *in particular* under German data protection law (a hint that the issue might also be one of consent under consumer law) and that this might lead to an abuse under competition law if sufficiently connected with Facebook's market dominance. In particular, the authority ascribes to the notion of "special responsibility" of a dominant company the obligation to use adequate ToS "as far as these are relevant to the market", which suggests that lawfulness of ToS falls under antitrust scrutiny whenever they allow a company to engage in a practice that affects competition in the market. As the chairman Andreas Mundt points out, in a market financed by advertising such as the one Facebook is operating in, it is essential to examine whether the consumers are sufficiently informed about the type and extent of data collected[26].

It goes without saying that assessing the adequacy of ToS under the standards of parallel legal regimes is no easy task for competition authorities, even if limited at determining whether the

[24] Margrethe Vestager, 'Making data work for us', Speech at Data Ethics event on Data as Power, Copenhagen, 9 September 2016, https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/making-data-work-us_en

[25] Bundeskartellamt, 'Bundeskartellamt initiates proceeding against Facebook on suspicion of having abused its market power by infringing data protection rules' , Press Release 02.3.2016, http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html?nn=3591286

[26] *Id.*

data provided are 'excessive' in relation to the economic value of the service provided[27]. This is why it is important that these determinations be made working in close contact with DPAs and consumer protection agencies – and where relevant with the European commission and the competition agencies of other EU member states[28]. For this reason, the proposal advanced by the EDPS for a "digital clearing house", made of contact points in authorities responsible for regulation of digital services, should be seriously considered to deal with the interaction of the three aforementioned bodies of law[29]. A continued inter-institutional dialogue can foster crosspollination and help bring more structure and predictability into this regulatory puzzle.

[27] This is the basic standard applicable to gauge the fairness of a price under EU competition law, which requires examining whether (i) the price-cost margin is excessive and (ii) the price imposed "is either unfair in itself or when compared to competing products". See Case 27/76, *United Brands v Commission* [1978] ECR 207, paras. 250-252. Interestingly, the term "excessive" was also used recently by the Belgian DPA to refer to Facebook's data collection through cookies, social plug-ins and pixels. See Belgian Privacy Commission, Recommendation no. 03/2017 of 12 April 2017, available at https://www.privacycommission.be/sites/privacycommission/files/documents/recommendation_03_2017_0.pdf; and 'The Belgian Privacy Commission publishes new recommendation relating to the processing of personal data by Facebook through cookies, social plug-ins and pixels' (16.5.2017) at https://www.privacycommission.be/en/news/belgian-privacy-commission-publishes-new-recommendation-relating-processing-personal-data

[28] This type of cooperation was explicitly acknowledged in the Bundeskartellamt's press release on the Facebook investigation, supra n. 25.

[29] Per EDPS proposal, the proposed activities of the Digital Clearing House would include: (1) discussing (but not allocating) the most appropriate legal regime for pursuing specific cases or complaints related to services online, especially for cross border cases where there is a possible violation of more than one legal framework, and identifying potential coordinated actions or awareness initiatives at European level which could stop or deter harmful practices; (2) 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; (3) discussing regulatory solutions for certain markets where personal data is a key input as an efficient alternative to legislation on digital markets which might stifle innovation; (4) assessing the impact on digital rights and interests of the individual of sanctions and remedies which are proposed to resolve specific cases; (5) generally identifying synergies and fostering cooperation between enforcement bodies and their mutual understanding of the applicable legal frameworks. See EDPS Opinion 8/2016 on coherent enforcement of fundamental rights in the age of big data of 23 September 2016, p. 15.