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Privacy and Merger Control in the EU

Francisco Enrique González-Díaz of Cleary Gottlieb Steen & Hamilton offers his take on the relationship between privacy issues and merger analysis, on the back of the Google/DoubleClick merger, which raised concerns over personal data.



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PRIVACY AND MERGER CONTROL IN THE EU

Francisco Enrique González-Díaz examines the issue of privacy and merger control in the EU

In the context of a number of recent antitrust cases, and most prominently in the Google/DoubleClick matter¹, it has been argued² that the merged entity would have access to so much useful information about consumers' preferences that their privacy rights would be somehow negatively affected. These claims thus raised the question whether the European Commission could take the protection of privacy into account when assessing the compatibility of a concentration under the EC Merger Regulation ("ECMR").³

(1) Privacy Issues Are Outside The Scope Of The ECMR

(i) *Non-Competition related Matters Such as the Protection of Privacy Fall Outside The Scope Of Review Under The ECMR*

The objective of the ECMR is to prevent transactions that would significantly impede effective competition in the common market, not to guarantee privacy protection. Non-competition issues, such as data privacy (i.e., policies referring to users of data) and data security (i.e., policies referring to the unintended use of data), fall thus outside the scope of the ECMR. This is clearly evidenced by a literal and systematic interpretation of the ECMR itself:

- As stated in Recital 6, the objective of the ECMR is "*to permit effective control of all concentrations in terms of their effect on the structure of competition in the Community.*"
- The ECMR legal bases both relate to the protection of competition, and hence consumer welfare.
 - Its first legal basis is Article 83 EC (now Article 103 of the Treaty on the Functioning of the European Union hereinafter "TFEU"), which permits the Council to adopt regulations "*to give effect to the principles set out in Articles 81 and 82.*" (Now Articles 101 TFEU and 102 TFEU).

- Its second legal basis is Article 308 EC (now Article 352 (1) TFEU), which permits the Community to "*give itself the additional powers of action necessary for the attainment of its objectives.*" Those objectives are clearly enunciated in Recital 2 of the ECMR: (i) "*instituting a system ensuring that competition in the internal market is not distorted,*" as set out in Article 3(1)(g) EC (now Article 3 (1) b TFEU); and (ii) ensuring that "*the activities of the Member States and the Community are to be conducted in accordance with the principle of an open market economy with free competition,*" as set out in Article 4(1) EC (now Article 119(1) TFEU).

- This is also confirmed by Article 2(1) ECMR. According to this provision, mergers must be appraised "*with a view to establishing whether or not they are compatible with the common market*" and, their review must be conducted "*in accordance with the objectives of this Regulation*", i.e., ensuring that competition is not distorted. This appraisal must take into account "*the need to maintain and develop effective competition within the common market*", as well as a number of competition related factors including, as explained below, the interests of consumers.
- Article 21 ECMR – which allows Member States to take into account non-competition considerations in order to prohibit or impose conditions on Community dimension concentrations – cannot be applied by the Commission.⁴ Indeed, the only standard the Commission can apply in reviewing a merger is, as set out in Article 2(2) of the ECMR, whether the concentration is likely to "*significantly impede effective competition in the common market.*" The Commission cannot thus either block a concentration or impose conditions on the merging parties on the basis of considerations other than the impact on competition on the proposed transaction.

(ii) *The Consumer Interest Protected By The ECMR Equates With Consumer Welfare*

The overriding principle protected by the ECMR is consumer welfare. Properly understood, the principle of consumer welfare in the merger control context refers only to those aspects of a transaction that affect the supply and demand for goods/services (i.e., that affect price, quantity, quality, innovation choice, etc.). The reference in Article 2(1)(b) ECMR to “the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers’ advantage and does not form an obstacle to competition” must therefore be read in this context that is to say that consumer interests are relevant to the merger assessment only for the purpose of assessing whether the degree of competition that will remain post-transaction will be sufficient to preserve consumer welfare.

The fact that non-competition issues, such as privacy, fall outside the scope of ECMR is perfectly consistent with the general consensus that merger control should focus on the objective of ensuring that consumer welfare not be harmed as a result of a significant impediment to effective competition. Indeed, introducing non-competition related considerations into a merger analysis (e.g., environmental protection or privacy) would lead to a potentially arbitrary act of balancing competition against potentially diverging interests. For example, the consumption of cigarettes is generally viewed to result in an external cost (a negative externality) that is not borne by the individual consuming the cigarette but by other individuals.⁵ As a result, an unregulated and competitive cigarette industry may result in a price of cigarettes that is “too low” and an output of cigarettes that is “too high” from the point of view of maximising social welfare. A hypothetical merger between two competing cigarette manufacturers that would lead to a significant impediment to competition in the market for cigarettes could, in principle, increase social welfare by resulting in an increase in the price (and a restriction in the output) of cigarettes.⁶ However, this could not justify, under the ECMR, the approval of all mergers between cigarette manufacturers.⁷ Rather, the possible distortion created by this type of externality is more effectively remedied by a policy tool specifically targeted at that possible distortion (such as a tax on cigarette consumption).

Accordingly, policy issues, such as privacy, are not suitably addressed in a merger control procedure, but should be dealt with, if such a need were to be identified, by ad hoc, specifically targeted legislation.⁸ Indeed, privacy interests are addressed in Directive 95/46⁹ and Directive 2002/58¹⁰ (both of which are based on Article 14 EC and Article 95 EC, now Articles 26

TFEU and 114 TFEU), Article 6 TEU (now Article 6 TEU) and Article 8 ECHR, and all Internet operators must abide by their legal obligations under these instruments or any other that may be adopted to supplement them.

Such instruments are also far more efficient in addressing privacy issues than the ECMR, as they are industry-wide in scope. Internet privacy issues are relevant to the entire industry as they are inextricably linked to the very nature of the technology used by every participant on the Internet. Information is generated in relation to virtually every event that occurs on the Internet, although the nature of the data, the circumstances in which it is collected, the entities from whom and by whom it is collected, and the uses to which it is put, vary considerably. This situation is generally unrelated to any particular transaction and is not in any way specific to it or the parties thereto. More importantly, any modification of the status quo in terms of the current levels of privacy protection must involve the industry as a whole, taking account of the diversity of participants and their specific circumstances.

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Issues of privacy and data security are of course of great importance, as maintaining user trust is essential for the success of any Internet operator of the Internet as a whole. Internet operators thus have strong incentives to practice strong privacy and security policies in order to safeguard user data and maintain user trust.

In its Decision in the Google/DoubleClick the European Commission followed, correctly, this general approach. In paragraph 368 thereof the Commission clearly stated that “This Decision refers exclusively to the appraisal of this operation with Community rules on competition, namely whether the merger is compatible with the objectives of the Merger Regulation in that it does not impede effective competition in the common market. As enshrined in Recital 36 of the Merger regulation, the Community respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In any event, this Decision is without prejudice to the obligations imposed onto the parties by Community legislation in relation to the protection of individuals and the protection of privacy with regard to the processing of personal data, in particular 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 and 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) and Member States implementing

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legislation, which apply to the processing of personal data activities performed by the parties to the merger and by the entity resulting from the merger operation. Irrespective of the approval of the merger, the new entity is obliged in its day to day business to respect the fundamental rights recognised by all relevant instruments to its users, namely but not limited to privacy and data protection.”¹¹ [footnotes omitted].

This position is also fully in line with the position adopted in the US authorities in the in Google/DoubleClick where the FTC stated that: “The Commission has been asked before to intervene in transactions for reasons unrelated to antitrust concerns, such as concerns about environmental quality or impact on employees. Although such issues may present important policy questions for the Nation, the sole purpose of federal antitrust review of mergers and acquisitions is to identify and remedy transactions that harm competition. Not

only does the Commission lack legal authority to require conditions to this merger that do not relate to antitrust, regulating the privacy requirements of just one company could itself pose a serious detriment to competition in this vast and rapidly evolving industry.”

It is now perfectly clear that as far as both European and US merger control are concerned, non-competition considerations and privacy-related issues in particular fall squarely outside its scope of review. ■

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Footnotes

- 1 Case Comp/M.4731-Google/DoubleClick, of 11 March 2008.
- 2 See in particular, BEUC at http://www.epic.org/privacy/ftc/google/beuc_062707.pdf and ULD at http://www.epic.org/privacy/ftc/google/beuc_062707.pdf. These claims have been also made on the other side of the Atlantic. For a summary of this view from a US perspective, see Dissenting Statement of Commissioner Pamela Jones Harbour at <http://www.ftc.gov/os/caselist/0710170/071220harbour.pdf>.
- 3 Council Regulation (EC) 139/2004 of 20 January 2004 [2004] OJ L24/1.
- 4 Article 21(4) provides as follows:
“Notwithstanding paragraphs 2 and 3 [which confer sole jurisdiction on the Commission and prohibit the application of national competition law to ECMR mergers], Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.
Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph.
Any other public interest must be communicated to the Commission by the Member State concerned and shall be recognised by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law before the measures referred to above may be taken. The Commission shall inform the Member State concerned of its decision within 25 working days of that communication.”
- 5 For example, an external cost may be borne by unwilling passive smokers or by society as a whole as a result of a greater burden on the health system.
- 6 The market distortion created by an increase in market power acts in the opposite direction to the market distortion created by the negative externality.
- 7 Indeed, as explicitly stated in the Commission’s press release following its decision to clear the merger between Philip Morris and Papastratos, and in spite of the existence of other social interests concerning the cigarette industry, “[T]he investigation of the deal was done purely on competition terms under the European Union’s Merger Regulation.” (See IP/03/1339, Commission press release of October 3, 2003.)
- 8 This approach is consistent with that taken by the Court of Justice (Case IV/M.553 – RTL/Veronica/Endemol), where the consumer interest – plurality of the media – was only indirectly protected because the transaction was held to result in the creation of a dominant position in TV advertising. In particular, the Commission held (at paragraph 87) that the transaction would result in the creation of “the clear market leader” which “will be in a position to counteract all active attempts to compete from existing players and will render the entrance of newcomers to this market very difficult.” It is thus clear that the Commission’s analysis was focused on competition, and not on non-competition policy issues.
- 9 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 (OJ 1995 L 281/31).
- 10 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) (OJ 2002 L 201/37).
- 11 As Commissioner Kroes stated: “We are looking at the influence on competition and that’s it.” (Bloomberg News)