

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**The intersection between competition and data privacy – Note by BIAC**

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More documents related to this discussion can be found at  
[www.oecd.org/competition/intersection-between-competition-and-data-privacy.htm](http://www.oecd.org/competition/intersection-between-competition-and-data-privacy.htm)

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## BIAC

### 1. Introduction

1. *Business at OECD* (BIAC) is grateful for the opportunity to comment on the relationship between competition and privacy laws.

2. The digital economy is increasingly driven by data, with technological advancements such as machine learning elevating its importance and complexity. These evolutions have rendered data to be an increasingly important aspect of competition law assessment, especially where data may function as a crucial input or product. To illustrate the power of data in machine learning, one might consider a simple non-technological analogy from agriculture: just as seeds require soil, water, and nutrients to grow into crops, learning algorithms (seeds) need data (soil) to develop into sophisticated programs (crops). The availability of data directly correlates with the learning potential of an algorithm – without data, there is nothing to learn. This underscores the significance of “big data” in the machine learning process.

3. Amidst this backdrop, concerns about the impact of data on consumers and markets are intensifying. Debates are focusing on issues such as the role of privacy as a consumer preference and the potential for privacy regulations to restrict competitiveness, for instance by limiting or prohibiting data portability or interoperability. This intersection, and the idea of needing cooperation between competition law and privacy law enforcement, is an evolution from the view that these two areas of the law are distinct.

4. Given the diversity of privacy and competition laws across jurisdictions and the constant evolution in related jurisprudence, competition authorities and data protection authorities must navigate the intersection of these domains with caution. The 2019 *Meta* decision by the German Federal Cartel Office (Bundeskartellamt or BKartA) is illustrative of the possible tension between the two areas.<sup>1</sup>

5. In this controversial case, it was eventually decided that Meta (formerly Facebook) had exploited its dominant position in the German market for social networks for private users by making the use of its social-network platform conditional on users granting extensive data collection permissions, not only for Facebook itself, but also for other sources, such as Meta’s other services and third-party service providers. In its decision the BKartA concluded that Facebook’s terms and conditions infringed both data protection regulations and competition law. However, the case was reviewed by several courts. First, the Higher Regional Court in Düsseldorf suspended the Authority’s decision having serious doubts on whether the decision had the right legal basis.<sup>2</sup> Subsequently, the German Federal Supreme Court overturned the Higher Regional Court’s judgment, reinstating the consequences of the Authority’s decision, but based on the reasoning of an exclusionary

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<sup>1</sup> Bundeskartellamt, Case Summary: Facebook, Exploitative Business Terms Pursuant to Section 19(1) GWB for Inadequate Data Processing, Case B6-22/16 (Feb. 15, 2019), [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?\\_\\_blob=publicationFile&v=3](https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=3).

<sup>2</sup> Case VI-Kart 1/19, Facebook/Bundeskartellamt, Judgment of the Higher Regional Court Dusseldorf of 26 August 2019, <https://www.d-kart.de/wp-content/uploads/2019/08/OLG-D%C3%BCsseldorf-Facebook-2019-English.pdf>.

and exploitative abuse.<sup>3</sup> Due to this divergence between the German courts, the Higher Court of Dusseldorf requested a preliminary reference from the Court of Justice of the European Union (CJEU).<sup>4</sup> The CJEU eventually decided that Competition Authorities can investigate violations of GDPR as potential abuses of a dominant position, but that when doing so they are bound by a duty of sincere cooperation with the relevant data protection authority.<sup>5</sup> By doing so, the CJEU essentially recognized the dual role of data as both a competitive tool and a privacy concern. This may guide other authorities and courts in how to address the intersection of competition law and data protection regulations.

6. This submission adds to BIAC's previous contributions on related topics, including ex-ante regulation and competition in digital markets,<sup>6</sup> abuse of dominance in digital markets,<sup>7</sup> consumer data rights and impact of competition,<sup>8</sup> interactions between competition authorities and sector regulators,<sup>9</sup> competition enforcement and regulatory alternatives,<sup>10</sup> and the evolving concept of market power in the digital economy.<sup>11</sup>

## 2. The Role of Data as a Source of Market Power and Competitive Advantage

7. Data plays a crucial role in the modern business landscape; it can serve both as an engine for competition and as a mechanism for hindering or limiting competition. Under the right circumstances, data is a foundational element that allows firms to enhance the quality of their products and services significantly. By leveraging data, companies can gain insights into consumer behavior and preferences. This understanding enables them to tailor their offerings to meet the specific needs and desires of their target audience. Furthermore,

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<sup>3</sup> Case KVR 69/19, Bundeskartellamt/Facebook, Judgment of the German Federal Court of 23 June 2020, [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/BGH-KVR-69-19.pdf?\\_\\_blob=publicationFile&v=1](https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/BGH-KVR-69-19.pdf?__blob=publicationFile&v=1).

<sup>4</sup> Case Kart 2/19, Bundeskartellamt/Facebook, Decision of the Higher Regional Court Dusseldorf of 24 March 2021, [https://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2021/Kart\\_2\\_19\\_V\\_Beschluss\\_20210324.html](https://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2021/Kart_2_19_V_Beschluss_20210324.html).

<sup>5</sup> Case C-252/21, Meta Platforms and Others, ECLI:EU:C:2023:537 (July 4, 2023), <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62021CJ0252>.

<sup>6</sup> OECD, Ex-Ante Regulation and Competition in Digital Markets – Note by BIAC, DAF/COMP/WD(2021)79 (Nov. 24, 2021), [https://one.oecd.org/document/DAF/COMP/WD\(2021\)79/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2021)79/en/pdf).

<sup>7</sup> OECD, Abuse of Dominance in Digital Markets – Contribution by BIAC, DAF/COMP/WD(2020)38 (Nov. 25, 2020), [https://one.oecd.org/document/DAF/COMP/GF/WD\(2020\)38/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2020)38/en/pdf).

<sup>8</sup> OECD, Consumer Data Rights and Competition – Note by BIAC, DAF/COMP/WD(2020)46 (May 28, 2020), [https://one.oecd.org/document/DAF/COMP/WD\(2020\)46/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)46/en/pdf).

<sup>9</sup> OECD, Interactions between Competition Authorities and Sector Regulators – Contribution from Business at OECD (BIAC), DAF/COMP/GF/WD(2022)64 (Nov. 18, 2022), [https://one.oecd.org/document/DAF/COMP/GF/WD\(2022\)64/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2022)64/en/pdf).

<sup>10</sup> OECD, Competition Enforcement and Regulatory Alternatives – Note by BIAC, DAF/COMP/WP2/WD(2021)18 (May 31, 2021), [https://one.oecd.org/document/DAF/COMP/WP2/WD\(2021\)18/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2/WD(2021)18/en/pdf).

<sup>11</sup> OECD, The Evolving Concept of Market Power in the Digital Economy – Note by BIAC, DAF/COMP/WD(2022)34 (June 9, 2022), [https://one.oecd.org/document/DAF/COMP/WD\(2022\)34/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2022)34/en/pdf).

data can be instrumental in driving innovation. It can provide businesses with necessary information to identify market opportunities, spurring innovation, and also allow for the optimizing of processes based on insights gained through the analysis of that data. Additionally, data can be a powerful tool for cost reduction. Firms can identify inefficiencies within their operations and processes and take corrective actions to streamline their functions and reduce operational expenses.

8. For example, in the digital advertising segment, knowing consumer preferences can make online advertising more relevant to consumers and more efficient in terms of spend for advertisers. In the electronic wearables segment, health data can provide consumers with information that allows them to lead a healthier lifestyle and can identify when there is a risk of potentially serious health issues.

9. Data also underpins the business models of major online platforms that specialize in probabilistic matching services. These platforms, such as search engines, social media, online marketplaces, video streaming platforms, and application-based ride-hailing services, thrive on extensive datasets that enable efficient matching between users or between users and the platform. In addition to enabling more efficient matching, data allows these platforms to address unmet demand and to create new markets that did not exist in the pre-digital economy.

10. For example, finding suitable holiday accommodation used to be a costly exercise. It required intermediation from travel agencies that offered a limited choice to consumer. Now, however, hotel booking platforms allow consumers to quickly make a choice amongst a wide variety of options filtered based on an array of parameters, as data availability has reduced information cost and expanded user choice. More data collection and more efficient use of data by a platform may simultaneously improve the user experience, revenue for the “analogue” world (e.g., hotels, merchants), and platform revenue, making it a win-win-win scenario.

11. Despite the numerous procompetitive benefits, data also has the potential to limit competition by creating or exacerbating competitive restraints, such as entry barriers or foreclosing (potential) competition. For example, when established firms have access to vast amounts of data, it may be difficult for new entrants to compete since they lack the same level of insight into consumer behavior and market dynamics. Or, in contrast, the accumulation and analysis of data, when shared amongst firms, could facilitate collusion.

12. Data can also enable firms to engage in price discrimination. With detailed information about consumers, companies can adjust their pricing strategies to charge different prices to different consumers based on their willingness to pay, which may not always be in consumers’ best interest. If firms use data to exploit behavioral biases, they can manipulate consumer choices, leading to decisions that may not align with the consumers’ best interests.

13. Lastly, data can be used to exclude or degrade rivals. Firms with access to large datasets may use this information to create obstacles for competitors, either by making it difficult for them to access key data (foreclosure), by using their data advantage to create products or services that are difficult to replicate or by engaging in self-preferencing.

14. Consequently, while recognizing the potential efficiencies related to the use of data by companies, competition authorities also need to assess how data impacts market structure, conduct, and performance, and whether data-centric mergers, acquisitions, agreements, or practices raise antitrust concerns or necessitate remedies. These potential effects have been the subject of several high-profile investigations and legal actions by competition authorities.

- *RealPage*: The U.S. Department of Justice Antitrust Division is investigating whether pricing software consolidating charged rents from landlords that recommends daily rent prices functioned as a collusive tool for landlords to set rent in the U.S.<sup>12</sup> U.S. state attorneys general and consumers have already initiated lawsuits alleging the same.<sup>13</sup>
- *Amazon*: The U.S. Federal Trade Commission (FTC) and 17 state attorneys general are suing Amazon for allegedly maintaining monopoly power in online marketplace services.<sup>14</sup> According to the complaint, Amazon's access to troves of consumer data enables it to degrade certain search qualities and unfairly leverage network effects (creating significant entry barriers).
- *Google Search (Shopping)*: The European Commission (EC) fined Google for systematically giving prominent placement to its own comparison-shopping service and demoting rival comparison-shopping services in its search results.<sup>15</sup> This type of self-preferencing was made possible due to evidence of the fact that users click far more often on results that are more visible, i.e., the results appearing higher up in Google's search results.
- *Meta / Kustomer*: The EC conditionally cleared the acquisition of Kustomer by Meta.<sup>16</sup> The EC found that Meta would have the ability, as well as an economic incentive, to engage in foreclosure strategies vis-à-vis Kustomer's close rivals and new entrants, such as denying or degrading access to the application programming interfaces (APIs) for Meta's messaging channels. According to the EC, such foreclosure strategies could reduce competition in the market for the supply of customer relationship management (CRM) software and the market for the supply of customer service and support of CRM software, leading to higher prices, lower quality, and less innovation. To address these concerns Meta offered comprehensive API access commitments.

15. In summary, while data can be a powerful tool for businesses to improve and innovate, it may also be considered as offering a means to potentially distort the functioning of an efficient market.

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<sup>12</sup> Heather Vogell, Department of Justice Opens Investigation Into Real Estate Tech Company Accused of Collusion with Landlords, ProPublica (Nov. 23, 2022), <https://www.propublica.org/article/yieldstar-realpage-rent-doj-investigation-antitrust>.

<sup>13</sup> Danielle Kaye, RealPage Hit With North Carolina Antitrust Probe Over Rent Costs, Bloomberg Law (Mar. 4, 2024), <https://news.bloomberglaw.com/antitrust/realpage-hit-with-north-carolina-antitrust-probe-over-rent-costs>.

<sup>14</sup> Press Release, Fed. Trade Comm'n, FTC Sues Amazon for Illegally Maintaining Monopoly Power, (Sept. 26, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-sues-amazon-illegally-maintaining-monopoly-power>.

<sup>15</sup> Case AT.39740, Google Search (Shopping), Comm'n Decision (June 27, 2017), [https://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39740/39740\\_14996\\_3.pdf](https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf).

<sup>16</sup> Case M.10262, Meta (Formerly Facebook) / Kustomer, Comm'n Decision (Jan. 27, 2022), [https://ec.europa.eu/competition/mergers/cases1/202242/M\\_10262\\_8559915\\_3054\\_3.pdf](https://ec.europa.eu/competition/mergers/cases1/202242/M_10262_8559915_3054_3.pdf).

### 3. The Trade-Offs and Complementarities Between Privacy and Competition

16. Privacy is often perceived as an integral aspect of quality or as a non-price characteristic that influences consumer demand and overall welfare. It is a multifaceted concept that plays a crucial role in the decision-making process of individuals when they engage with various products and services. The level of privacy offered by a company may significantly impact a consumer's choice, as many consumers highly value confidentiality and security of their personal information. It is not merely considered a matter of personal preference but a dimension of quality that can significantly influence consumer behavior, thereby impacting demand.

17. Privacy extends beyond individual consumer choice. Given its importance to consumers, privacy can also serve as a pivotal source of competition and differentiation among firms. Companies may leverage their privacy policies and practices as a unique selling proposition to distinguish themselves from competitors. This competitive edge is particularly relevant in industries where consumer data is a central part of the business model. Moreover, beyond being a competitive factor as manner of differentiation, privacy is also recognized as a fundamental consumer right and a societal value, reflecting its importance in broader context. This reflects the growing awareness and demand for respectful treatment of personal information in the digital age.

18. However, the emphasis on privacy is not without its drawbacks. Upholding privacy standards can lead to significant costs and operational inefficiencies. For instance, stringent privacy measures may impede the availability and diminish the quality of data that organizations rely on for various purposes, including market analysis, product development, or customer service enhancement. Furthermore, privacy can restrict the extent and advantages of data sharing and aggregation, which are often essential for innovation and the development of new technologies. The complexity and uncertainty surrounding data governance and compliance also makes it difficult and costly for organizations to navigate the intricate web of privacy regulations and to ensure adherence to legal requirements.

19. Below are some examples of how these different aspects of privacy impact and challenge business practices:

- Privacy can serve as a significant aspect of a product's appeal, influencing consumer choice and fostering competition among businesses. A prime example of this is DuckDuckGo, a search engine that has carved out a niche for itself by prioritizing user privacy. This product feature attracts consumers who place a high value on maintaining control over their personal information on the internet.
- In the realm of social media, personal data stands as a crucial resource for companies. However, the collection of data, particularly from sensitive demographics such as adolescents, can be a matter of quality concern for specific user groups, such as parents. These users may prioritize platforms that demonstrate a higher level of care and discretion in the handling of personal information of their children.
- Compliance with privacy regulations can increase costs for data-intensive products and services. This rise in expenses could potentially act as a deterrent to innovation and efficiency within the data-driven sector. For instance, a study by PwC revealed that a substantial majority, eighty-eight percent, of companies worldwide report

that compliance with the General Data Protection Regulation (GDPR) incurs costs exceeding \$1 million annually.<sup>17</sup>

- Despite the financial burdens, it remains crucial for companies to continue investing in GDPR compliance. The consequences of failing to comply can be severe, including hefty fines. Amazon, for example, is facing a fine of €746 million from the Luxembourg data protection authority.<sup>18</sup>

20. The interests and objectives of privacy and competition laws are not always fully aligned. These challenges necessitate a more balanced approach from competition authorities. Therefore, BIAC recommends that competition authorities thoughtfully assess how privacy regulations, standards, and enforcement may affect the competitive landscape so as to develop an appropriate balance that safeguards consumer privacy without stifling competition or hindering technological progress. Two recent cases provide examples of how competition authorities have considered privacy-related concerns in their competitive assessment:

- *Facebook*: The German competition authority prohibited Facebook from combining user data from different sources (Facebook, WhatsApp and Instagram).<sup>19</sup> The German competition authority worked in close cooperation with the data protection authority to clarify the data protection issues. It was determined that all services could continue to process data, but that they can only share the data if voluntary consent was given by the user. Nevertheless, the German competition authority viewed Facebook's conduct as a so-called exploitative abuse as its practices would primarily be to the detriment of consumers who use Facebook, but it would also impede competitors that are not able to amass such a wealth of data.
- *Apple – ATT*: Investigations into Apple's App Tracking Transparency (ATT) feature by competition authorities in France, Poland, Italy, and Germany highlight the challenges of ensuring fair competition.<sup>20</sup> These investigations highlight the unforeseen consequences of data protection rules and principles potentially being used by companies to distort competition. In particular, if privacy is recognized as

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<sup>17</sup> A Privacy Reset — from Compliance to Trust-Building, PwC, <https://www.pwc.com/us/en/services/consulting/cybersecurity-risk-regulatory/library/privacy-reset.html>.

<sup>18</sup> Stephanie Bodoni, Amazon Attacks EU Privacy Watchdog It Claims Was Out to Get It, Bloomberg (Jan. 9, 2024), <https://www.bloomberg.com/news/articles/2024-01-09/amazon-attacks-eu-privacy-watchdog-it-claims-was-out-to-get-it>.

<sup>19</sup> Bundeskartellamt, Case Summary: Facebook, Exploitative Business Terms Pursuant to Section 19(1) GWB for Inadequate Data Processing, Case B6-22/16 (Feb. 15, 2019), [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?\\_\\_blob=publicationFile&v=3](https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=3)

<sup>20</sup> Press Release, Autorité de la concurrence, Targeted Advertising / Apple's Implementation of the ATT Framework (Mar. 17, 2021), (<https://www.autoritedelaconcurrence.fr/en/communiqués-de-presse/targeted-advertising-apples-implementation-att-framework-autorite-does-not>); Press Release, UOKiK, Apple – the President of UOKiK Initiates an Investigation (Dec. 13, 2021), [https://uokik.gov.pl/news.php?news\\_id=18092](https://uokik.gov.pl/news.php?news_id=18092); Press Release, Autorità Garante della Concorrenza e del Mercato, Case A561 (May 11, 2023), <https://en.agcm.it/en/media/press-releases/2023/5/A561-A561B>; Press Release, Bundeskartellamt, Bundeskartellamt Reviews Apple's Tracking Rules For Third-Party Apps (June 14, 2022), [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/14\\_06\\_2022\\_Apple.html?nn=3591568%20](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/14_06_2022_Apple.html?nn=3591568%20).

a potential efficiency and legitimate interest, it could also in parallel be invoked as potential justification for anticompetitive conduct. The ATT feature allows users to opt-out of personal data tracking for personalized advertising, advertising measurement purposes, or data-sharing with data brokers. The practice prevents rivals from accessing personal data relevant to advertising when users opt out of tracking and therefore could be seen as being in line with data protection principles. However, the practice was also found to discriminate between Apple's own services and competitors as the feature applies only to non-Apple services, thereby possibly constituting a violation of competition law.

21. In conclusion, privacy is a multifaceted issue that influences consumer demand, competition, and innovation. While it serves as a key differentiator and reflects societal values, it also brings about economic and regulatory challenges.

#### 4. The Coordination and Coherence of Competition and Privacy Policies and Institutions

22. Competition and privacy are subject to different legal frameworks, sometimes overseen by different authorities, and often applicable across various jurisdictions, which leads to a complex interplay.

23. In the U.S., privacy regulations can vary significantly as individual states have enacted their own privacy laws. At the federal level, the absence of a baseline federal privacy law means that the FTC oversees privacy regulations, in addition to handling competition matters. This dual role of the FTC can lead to efficiencies due to the consolidation of review processes under a single authority, though different FTC teams would handle the groundwork, depending on whether privacy or competition laws are at issue.

24. In contrast, the European Union (EU) has a more harmonized approach to privacy regulations through the GDPR, which is enforced by national data protection authorities and national courts. Competition law in the EU is governed by the Treaty on the Functioning of the EU (TFEU) and several (implementing) regulations, with enforcement carried out by the EC's Directorate-General for Competition, national competition authorities, and courts. The 2023 landmark decision in *Meta Platforms* by the CJEU highlighted the intricate relationship between privacy and competition law in the EU.<sup>21</sup> The judgment brought forward several points that have had a significant impact, not only on the privacy and data protection landscape of the EU, but also on the scope of the national competition authorities' powers. The CJEU ruled that the German Federal Cartel Office did not exceed its powers when it found a GDPR violation during an investigation into an abuse of dominant position. This finding was deemed necessary to establish the existence of abuse of a dominant position on the internal market within the meaning of Article 102 of the TFEU.<sup>22</sup> The CJEU added, however, that to find such a violation, a national competition authority must follow relevant decisions or investigations conducted by the data protection authority.<sup>23</sup>

25. Competition and privacy often intersect in complex ways. There are instances where the objectives of competition and privacy law may either conflict or overlap.

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<sup>21</sup> Case C-252/21, *Meta Platforms and Others*, ECLI:EU:C:2023:537 (July 4, 2023), <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62021CJ0252>.

<sup>22</sup> *Id.* ¶ 62.

<sup>23</sup> *Id.* ¶ 63.



Theoretically, there are three potential outcomes: (i) clear conflicts between the two frameworks; (ii) perfect harmony and consistency between the two frameworks; and (iii) the most difficult one, a grey zone in which complying with one framework has a negative effect on the goals pursued by the other framework without being in direct conflict.

26. Consequently, the intersection between competition and privacy law can lead to a range of regulatory challenges, including tensions, gaps, or inconsistencies in how data-related markets and practices are governed. Competition authorities may encounter challenges in handling sensitive data, whether it be accessing, analyzing, or protecting it. Additionally, when competition authorities impose behavioral remedies, such as data access, data sharing or interoperability, these can have implications for the rights and obligations associated with data, potentially conflicting with privacy regulation. Competition authorities may also struggle to access foreign data in global investigations due to national privacy laws that restrict the exportation of sensitive data.

27. At the enforcement level, coordination and cooperation between competition and data protection authorities is essential to maintain consistent interpretation of these legal concepts. Nevertheless, while data protection authorities can assist competition authorities in achieving a correct, coherent, and consistent interpretation of the data protection rules, competition authorities remain responsible for balancing the privacy benefits with the anti-competitive restrictions in a competition law assessment.

28. Collaboration can help prevent or reduce both over or under-enforcement, particularly in data-driven mergers, where post-merger the acquirer has the ability and incentive to combine data from the target with its own data. For example, in the EC's clearance of Facebook's acquisition of WhatsApp, the EC stated that the acquirer Facebook would not have the ability and incentive to collect data from the target WhatsApp. It also expressly stated that any privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the transaction did not fall within the scope of the EU competition law but within the scope of the EU data protection rules.<sup>24</sup> However, post-merger, Facebook combined data from WhatsApp's user account with Facebook's user account by forcing users to accept sharing personal data with Facebook. This triggered investigations by competition, data protection, and consumer protection authorities worldwide, where a coordinated approach may have been more efficient and productive. Subsequently, the conditional clearance by the EC of Google's acquisition of Fitbit illustrated that the EC is willing to adopt conditions which have an impact on data and privacy, while noting that it could not assess the actual compliance with data protection rules.<sup>25</sup> Google committed not to use Fitbit health and wellness data for advertising purposes and to request the user's consent to use data with other Google services.

29. Given these complexities, it is increasingly recognized that advocacy, policy development and enforcement can benefit from a more collaborative approach between competition and data protection authorities. Such collaboration could take different forms: (i) collaboration can be very high level, for instance by participating in joint networks or forums; (ii) it can be limited to policy and advocacy, for instance by publishing joint papers or guidelines; (iii) it can be on the enforcement level, by joint sector inquiries or joint investigations; (iv) it can be structurally, for instance, by the including a cooperation

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<sup>24</sup> Case M.7217, Facebook/WhatsApp, Comm'n Decision (Oct. 3, 2014), ¶ 164, [https://ec.europa.eu/competition/mergers/cases/decisions/m7217\\_20141003\\_20310\\_3962132\\_EN.pdf](https://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf).

<sup>25</sup> Case M.9660, Google/Fitbit, Comm'n Decision (Dec. 17, 2020), ¶ 452 n.300, [https://ec.europa.eu/competition/mergers/cases1/202120/m9660\\_3314\\_3.pdf](https://ec.europa.eu/competition/mergers/cases1/202120/m9660_3314_3.pdf).

obligation in relevant legal framework; or (v) it can be institutionalized, by the combination of both competences in one authority. Most of these forms of cooperation can be found in practice:

- *Cooperation and information sharing*: in 2023, the Turkish Personal Data Protection Authority and the Turkish Competition Authority signed a cooperation and information-sharing protocol to ensure more effective enforcement of the respective laws by way of carrying out joint work in cases that fall within the competence of both authorities and that require rapid and effective intervention; publishing joint reports to raise awareness and convey a common message to undertakings; organizing joint presentations and discussion programs and trainings, etc.<sup>26</sup>
- *Joint Sector Inquiries*: The Italian competition, data protection, and telecommunications authorities are collaborating on a joint sector inquiry into “big data.”<sup>27</sup>
- *Cooperation Platforms*: The Netherlands established the Digital Regulation Cooperation Platform (SDT) in 2021, which includes various authorities such as data protection, competition (and consumer protection), financial, and audiovisual media authorities.<sup>28</sup>
- *High-Level Groups*: The EC has launched a high-level group to ensure a consistent regulatory approach and to provide advice on the implementation of the Digital Markets Act (DMA).<sup>29</sup> This group includes European bodies from competition, data protection, consumer protection, telecommunication, and audiovisual media authorities.

30. In terms of coordination and coherence, while privacy and competition law may have synergies, the goals of competition and privacy can also be at odds in some circumstances. For example, privacy can be relevant to competition law where it functions as an important input or quality factor, which may necessitate data transparency in tension with privacy law. Pushing these regulatory regimes to completely converge and assimilate, could potentially confuse, rather than strengthen, the enforcement of either. In addition, while different forms of cooperation and coordination can be found in practice there is no one-size-fits-all solution. Authorities are currently still experimenting with different degrees of cooperation and most cooperation is limited to the national, as opposed to the international, level.

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<sup>26</sup> Press Release, Rekabet Kurumu, Cooperation and Information Sharing Protocol was signed between Personal Data Protection Authority and the Competition Authority (Oct. 26, 2023), <https://www.rekabet.gov.tr/en/Guncel/cooperation-and-information-sharing-prot-ec943b37fa76ee118ec700505685da39>.

<sup>27</sup> Press Release, Autorità Garante della Concorrenza e del Mercato, Big Data: Agcom, Agcm and Data Protection Authority Survey Published (Feb. 10, 2020), <https://en.agcm.it/en/media/press-releases/2020/3/Big-Data-Agcom-Agcm-and-Data-Protection-Authority-survey-published>.

<sup>28</sup> The Digital Regulation Cooperation Platform (SDT), Auth. for Consumers & Mkts., <https://www.acm.nl/en/about-acm/cooperation/national-cooperation/digital-regulation-cooperation-platform-sdt>.

<sup>29</sup> Press Release, European Comm’n, Digital Markets Act: Commission creates High-Level Group to Provide Advice and Expertise in Implementation (Mar. 23, 2023), <https://digital-strategy.ec.europa.eu/en/news/digital-markets-act-commission-creates-high-level-group-provide-advice-and-expertise-implementation>.

## 5. Conclusion

31. Data has become a pivotal element in the digital economy. The role of data is not only increasingly crucial but also complex, as it is intertwined with the fundamental operations of (digital) markets and the rights of individuals. The way data is collected, processed, and utilized has significant implications for how markets and companies function and how private information is safeguarded.

32. The relationship between privacy and competition is complex, often presenting both trade-offs and complementarities. On one hand, robust competition can lead to better privacy protections as companies may use privacy as a selling point to attract consumers. On the other hand, intense competition might lead to the erosion of privacy standards as companies seek to monetize data. Finding a delicate balance necessitates a thoughtful approach to understand and manage the impacts that these two areas have on each other.

33. Policymakers and regulators may find themselves at a crossroads when it comes to dealing with data-related markets and practices. To effectively manage these issues, there is a need for cooperation and coordination among competition and privacy authorities, as well as other relevant stakeholders.

34. Businesses, too, are confronted with challenges. In particular, businesses may find it difficult to comply with regulations and frameworks that potentially conflict and are increasingly complex to implement, often across numerous jurisdictions. Given the increased difficulty of compliance and the severe consequences of non-compliance, even if unintentional, businesses may choose to comply with the most restrictive and/or comprehensive regimes, which then in turn may stifle innovation elsewhere.

35. To address the complexities and challenges resulting from the interplay between competition law and privacy law, BIAC recommends the following:

- Competition and privacy authorities should adopt a holistic and dynamic strategy when dealing with data-related issues. This approach should recognize the interdependence of consumers and markets, and the diversity that exists within them.
- It is crucial for competition and privacy authorities to foster dialogue and collaboration. This should not only be amongst themselves but also with other stakeholders, including academics and civil society, business, and international regulatory bodies. Such interactions can lead both to a more informed and effective regulatory environment and more dynamic and effective policymaking.
- Ideally competition and privacy authorities should continuously monitor and evaluate the outcomes and effects of their actions and policies. Given the rapid evolution of the data landscape, it is essential that these policies are adaptable to change. This ensures that they remain relevant and effective in achieving their intended goals.
- In addition, businesses should aim to manage the challenges of the complex interplay of competition and privacy laws by being proactive, well-informed, and strategic. In particular, businesses may do so by adopting robust compliance framework for competition law and data protection, regular trainings and compliance audits; foster a culture of minimization of data collection and retention, ensure data portability, and enhance transparency of their activities and policies, etc.

36. In conclusion, BIAC underscores the importance of a proactive and cooperative stance in addressing the multifaceted issues arising from the intersection of data, privacy, and competition. By implementing these recommendations, competition and privacy authorities might be able to better navigate the complexities of the digital economy and protect the interests of consumers and markets alike.