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I. INTRODUCTION

It is now trite to observe the amount of data generated by modern society. Statistics abound about the data-rich environment created by technological advances and the digital economy:

> every couple of days, humanity now generates 5 exabytes of data; this roughly corresponds to the volume of data produced in the entire period between the dawn of time and 2003;[2]
>
> every day, we create 2.5 quintillion bytes of data—so much that 90% of the data in the world today has been created in the last two years alone.[3]

These data may be personal: social media content, eMail addresses, employment histories, financial information, shopping habits, and so on. Commercial enterprises (online and offline) proactively collect these types of data to improve their services, design and target marketing, and sell to third parties. This raises real questions about how to protect personal data against unauthorized or inappropriate use. The European institutions have recognized this challenge and are progressing towards a more stringent, harmonized data protection regime through the proposed General Data Protection Regulation.[4]

Several observers have also called for privacy to play a greater role in merger control, including under the European Merger Regulation.[5] Notably, in a 2014 preliminary opinion, the European Data Protection Supervisor criticized the European Commission for not assessing market power by reference to "control of commercialisable personal information" and instead adopting "a purely economic approach to the [*Google/DoubleClick*] case" where it failed to consider "how the merger could have affected the users whose data would be further processed by merging the two companies' datasets … that were not envisioned when the data were originally submitted." In doing so, the Commission was said to have "neglected the longer term impact on the welfare of millions of Users in the event that the combined undertaking's

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[2] Fabien Curto Millet, *La concurrence dans l'economie numerique*, A QUOI SERT LA CONCURRENCE 480 (2014).

[3] www-01.ibm.com/software/data/bigdata/what-is-big-data.html.

[4] This paper does not address the debate over whether over-zealous privacy regulation may stifle innovation and create barriers to entry for small- and medium-sized enterprises, at a time the European Union is seeking to re-energize an entrepreneurial spirit in a digital single market.

[5] Council Regulation (EC) No 139/2004 of January 20, 2014 on the control of concentrations between undertakings.

information generated by search (Google) and browsing (DoubleClick) were later processed for incompatible purposes."[6]

This paper argues that privacy concerns should not enjoy specific privileges under the European Merger Regulation and there are no sound policy reasons that support their introduction. It observes the ways in which privacy issues are already taken into account in the Commission's substantive assessment, and it highlights the risks that arise from an over-emphasis on access to data in merger control.

II. PRIVACY CONCERNS DO NOT ENJOY SPECIFIC PRIVILEGES UNDER THE EUROPEAN MERGER REGULATION

Merger control in Europe developed with an explicit and exclusive focus on competition. As Nicholas Levy has described, "in the final negotiations during late 1988 and 1989 leading to the adoption of the Merger Regulation … the principal debate at the time was between those favouring a competition-based test and those urging that explicit account be taken of social, industrial, and employment considerations."[7]

That debate culminated in a purely competition-based substantive test: The Commission must prohibit mergers that would significantly impede effective competition and approve those that would not.[8] Neither the Commission's ability to take account of efficiencies[9] nor its power to accept commitments[10] undermines this principle; both require an assessment of competition in the relevant market.

The Commission has observed these principles in its decisional practice (as noted by the European Data Protection Supervisor in its 2014 preliminary opinion). Two cases, in particular, illustrate the point. First, in *Google/DoubleClick*, the Commission considered whether contractual restrictions on the use of data collected by DoubleClick might be jeopardized after it was integrated with Google. The Commission stressed that its decision "refers exclusively to the appraisal of this operation with Community rules on competition" and that the parties would remain subject to other legal obligations: "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]

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[6] *Privacy and Competitiveness in the Age of Big Data: The Interplay between Data Protection, Competition Law and Consumer Protection in the Digital Market*, Preliminary Opinion of the European Data Protection Supervisor, ¶¶ 62-66 (March 2014).

[7] Nicholas Levy, EUROPEAN MERGER CONTROL LAW: A GUIDE TO THE MERGER REGULATION ¶ 2.03 (2014).

[8] The 1989 Merger Regulation contained a test as to whether a concentration "creates or strengthens a dominant position as a result of which competition would be significantly impeded." This was recast in 2004 to consider whether a concentration would "significantly impede effective competition."

[9] Recital 29 of the European Merger Regulation notes it is "appropriate to take account of any substantiated and likely efficiencies" but makes clear that this consideration relates to the determination of the "impact of a concentration on competition in the common market."

[10] Recital 30 of the European Merger Regulation notes the Commission should be able to declare a concentration compatible with the common market where commitments are "proportionate to the competition problem and entirely eliminate it."

[11] Case COMP/M.4731 *Google/DoubleClick*, ¶¶ 258-265 and 368.

Second, in its 2014 review of the *Facebook/WhatsApp* merger, the Commission disregarded privacy issues upfront when assessing the impact of the transaction on the provision of advertising space and provision of user data valuable for advertising purposes:

> 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.[12]

III. POLICY REASONS DO NOT SUPPORT THE INTRODUCTION OF PRIVACY AS A DISCRETE CRITERION IN MERGER CONTROL

It is clear that privacy is not currently a discrete criterion for substantive assessment under the European Merger Regulation. This leaves the question of whether it should be. In the view of the authors, it should not.

The case for including privacy as a discrete consideration rests, presumably, on the concern that the merged firm might exploit data in ways that were not anticipated by individuals when they consented to their data being used by one of the merging parties. To illustrate, assume you provided information about your medical history to a life assurance company which is subsequently acquired by a bank. The bank may have an incentive to use your information in ways you had not anticipated, such as deciding whether to offer you a mortgage.

This may be a real concern, both at an individual level and for society as a whole. But that does not make it a question for merger control, any more than whether a merged firm should be allowed to make staff redundant or increase productivity in a way that may harm the environment (both of which might be viewed as efficiencies in a conventional merger control analysis).

Merger control seeks to protect the competitive process from structural market changes that threaten the efficient allocation of resources. This increases productivity, ensures continued innovation, and maximizes consumer welfare:

> effective competition brings benefits to consumers, such as low prices, high quality products, a wide selection of goods and services, and innovation. Through its control of mergers, the Commission prevents mergers that would be likely to deprive customers of these benefits by significantly increasing the market power of firms.[13]

In contrast, privacy legislation seeks to protect individuals (specifically their personal data) from unwarranted exploitation by commercial enterprises and governmental organizations. The European Court recognized this distinction in its 2006 *Asnef-Equifax* judgment: "any possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection."[14]

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[12] Case COMP/M.7217 *Facebook/WhatsApp*, ¶ 164.

[13] Commission's Guidelines on the assessment of horizontal mergers (the "Horizontal Guidelines"), ¶ 8.

[14] Case C-238/05 *Asnef-Equifax v Ausbanc*, ¶ 63.

The focus of merger control on questions of competition does not undermine the importance of privacy law or any other issue that could be affected by market concentration. The issues are complementary. To the extent European stakeholders have concerns about the scope of data protection, there is no better case for using merger control to address them than for any other social agenda.

IV. PRIVACY ISSUES CAN BE RELEVANT TO THE SUBSTANTIVE ASSESSMENT OF MERGERS

None of this prevents the Commission from taking privacy issues into account in its substantive assessment under the European Merger Regulation. As consumers become more aware of privacy issues, both the ways firms manage and protect their data and the controls they offer to consumers are becoming important parameters of competition.[15] Firms offer robust protections and controls to protect personal data from inadvertent disclosure not only because they are required to do so by law, but because it strengthens their competitive offering.

The Commission highlighted data protection as a competitive differentiator between consumer communications applications in the *Facebook/WhatsApp* case: "These differences related to … (iv) the privacy policy (contrary to WhatsApp, Facebook Messenger enables Facebook to collect data regarding its users that it uses for the purposes of its advertising activities)."[16]

This is most obviously relevant when the Commission assesses a horizontal overlap between the merging firms to consider whether a concentration would "eliminate[e] important competitive constraints on one or more firms."[17] These constraints can include privacy policies as a qualitative aspect of the parties' offerings. Where a merged firm would have reduced incentives to promote or invest in privacy protection, that may be a relevant factor in the competitive assessment. This could apply even where the parties did not have access to large quantities of data. The removal of an important "maverick" that has developed innovative data-protection and control systems could potentially raise competition issues by reducing innovation in data privacy, even if the merging parties were not otherwise close competitors.[18]

Two points nevertheless bear emphasis. First, the Commission's role is to assess the effect of a merger on the competitive process. Privacy protection may be part of that dynamic but it is not its object. Second, we must guard against the creation of an "efficiency offence." If a merged firm can analyze data more effectively than the merging parties, this should improve the quality of their services and stimulate rivals to respond—which is all to the benefit of consumers.

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[15] The European Data Protection Supervisor recognized this in the 2014 preliminary opinion: "In certain markets, consumers may consider a privacy-friendly service to be of better quality than a service which has an unclear or opaque privacy policy. In the provision of legal and medical services, private banking, security services, and exclusive luxury resorts, businesses typically compete on protecting privacy" (¶ 73).

[16] *Facebook/WhatsApp*, ¶102.

[17] Horizontal Guidelines, ¶ 22(a).

[18] The Horizontal Guidelines note: "in markets where innovation is an important competitive force … effective competition may be significantly impeded by a merger between two important innovators" (¶ 38).

V. INTERVENTION SHOULD BE THE EXCEPTION, NOT THE RULE

Indeed, competition authorities should be slow to intervene where competition drives firms to use data more effectively.[19] The Commission's decisional practice reflects this and a clear analytical framework has emerged.

First, there is a distinction between firms that use data as an input for their own services and those that sell data as a separate commercial activity. There is no economic market for the former. In *Facebook/WhatsApp*, for example, the Commission noted that neither party sold data to third parties and found no basis for defining a market for personal data.[20] Rather, the Commission defined a market for online advertising and analyzed the impact of the accumulation of user data by Facebook on that market. The Commission has reached a similar conclusion in several other cases.[21]

Second, where data are used solely as an input, the pertinent issue is whether access to those data acts as a barrier to entry. This is unlikely to be the case in many instances, for several reasons:

- **Data are cheap.**[22] As the Executive Office of the U.S. President has observed, "we live in a world of near-ubiquitous data collection" with "near-continuous collection, transfer, and re-purposing of information."[23] The costs of collecting, storing, and analyzing data are low and continue to decline with the costs of the relevant technology[24] as variable-cost cloud computing replaces fixed-cost proprietary infrastructure.
- **Data are non-rivalrous.**[25] Personal data collected by one firm are not used up—the same information is still available to others. An individual's age, for example, can be collected by a social media platform, an eMail provider, an eCommerce shop, or an off-line loyalty card program. The circumstance that one platform has collected a piece of information does not preclude another from doing the same.

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[19] For a discussion of the European Commission and U.S. authorities' review of relevant competition cases, *see* Darren S. Tucker & Hill B. Wellford, *Big Mistakes Regarding Big Data*, ANTITRUST SOURCE (2014).

[20] *Facebook/WhatsApp*: "The Commission has not investigated any possible market definition with respect to the provision of data or data analytics services, since, subject to paragraph (70) above, neither of the Parties is currently active in any such potential markets" (¶ 72).

[21] Cases COMP/M.4726 *Thomson/Reuters*; COMP/M.5529 *Oracle/Sun Microsystems*; COMP/M.5232 *WPP/TNS*; COMP/M.6314 *Telefónica UK/Vodafone UK/Everything Everywhere/JV*; COMP/M.6921 *IBM Italia/UBIS*.

[22] According to one observer, basic demographic information sells for about $0.0005 per person; even a detailed profile of an individual about to make a purchase—and therefore valuable to advertisers—typically costs well under one dollar. (*See* Emily Steel, *Financial Worth of Data Comes in at Under a Penny a Piece*, FINANCIAL TIMES (July 12, 2013).)

[23] Executive Office of the President, *Big Data: Seizing Opportunities, Preserving Values 2* pp. 4 and 39 (2014).

[24] James Manyika, et al., *Big Data: The Next Frontier for Innovation, Competition, and Productivity,* MCKINSEY GLOBAL INST. (June 2011): "The ability to store, aggregate, and combine data and then use the results to perform deep analyses has become ever more accessible as trends such as Moore's Law in computing, its equivalent in digital storage, and cloud computing continue to lower costs and other technology barriers."

[25] The Commission recognized this in *Google/DoubleClick*: "the combination of data about searches with data about users' web surfing behaviour is already available to a number of Google's competitors today" (¶ 365).

- **Data ownership is dispersed.** The increasing digitization of products and processes has resulted in data being held by billions of individuals around the world. This makes it nearly impossible for any one player to foreclose its rivals.
- **Historic data have little value.** "70% of unstructured data is stale after only 90 days,"[26] so data collection and analysis increasingly occur on a real-time basis. Historic data collected by incumbent platforms provide little competitive advantage. There are many examples of new entrants disrupting markets and quickly acquiring leading positions, despite the presence of supposedly stronger incumbents.
- **Data are subject to diminishing returns.** While data can generate benefits, the marginal value of additional data for statistical analysis is limited. As explained by Fabien Curto Millet, a tenfold increase in data only divides the margin of error of a prediction by three.[27] Success comes from using personal data effectively, not from collecting every last item of available information. The key issue is processing and analysis; the scarcity is human talent.

The Commission has investigated whether access to data could operate as a barrier to entry on several occasions and never found this to be the case. In *Google/DoubleClick* the Commission found that merging the parties' data sets and data tools would not foreclose rivals: "Other companies active in online advertising have the ability to collect large amounts of more or less similar information that is potentially useful for advertisement targeting."[28]

In *Microsoft/Skype* the Commission found barriers to be low, citing the quick growth of Facebook and the "immediate success" of new entrants Viber, Fring, and Tango.[29] In *Facebook/WhatsApp* the European Commission found "there are currently a significant number of market participants that collect user data alongside Facebook" and that "there will continue to be a large amount of Internet user data that are valuable for advertising purposes and that are not within Facebook's exclusive control."[30]

All these decisions recognize that the collection and analysis of personal data are likely to be concerns only in the most exceptional of cases.

VI. CONCLUDING REMARKS

Privacy is not the objective of merger control, nor should it be. The objectives of competition law and privacy law are complementary and there is no sound basis for confusing the two. That does not prevent the Commission from analyzing the way firms compete to offer better protections and controls over personal data. But that is an analysis of the competitive process, not the adequacy of the privacy protections themselves.

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[26] Citi Research 2013 Retail Technology Deep Dive.

[27] Millet, *supra* note 2.

[28] *Google/DoubleClick*, ¶¶ 269 and 364. The U.S. Federal Trade Commission reached the same conclusion. (*See* FTC Statement in *Google/DoubleClick*, FTC File No. 071-0170, page 12: "neither the data available to Google, nor the data available to DoubleClick, constitutes an essential input to a successful online advertising product.")

[29] Case COMP/M.6281 *Microsoft/Skype*, ¶¶ 90-93.

[30] *Facebook/WhatsApp*, ¶¶ 188-189.

The occasions when access to personal data results in barriers to entry or other competitive harm are likely to be rare, and the Commission's experience bears this out. By contrast, market solutions are certainly the best way of enhancing privacy protections for consumers beyond the minimum protections guaranteed by privacy law. Intervention in that competitive process should be the exception, and not the rule.