CPI TALKS…

…With Terrell McSweeny

In this month's edition of CPI Talks… we have the pleasure of speaking with Terrell McSweeny. Ms. McSweeny is a partner at Covington & Burling LLP, a former Commissioner of the Federal Trade Commission, and a distinguished fellow at Georgetown Law's Institute for Technology Law & Policy. Additionally, she has held senior appointments in the White House, Department of Justice, and the U.S. Senate.

Thank you, Ms. McSweeny, for sharing your time for this interview with CPI.

1. **There is an international ongoing debate on the ways in which competition, data protection, and consumer protection laws interact in the digital economy. Some argue that there is an ethical imperative to meet this challenge and that strong competition enforcement could render data protection rules more effective by facilitating consumer choice. At the other end of the spectrum, others claim that privacy is simply not an antitrust issue. How can we strike the right balance?**

Competition regulators around the world are actively assessing the state of antitrust law and whether technological change requires adjustment to competition frameworks.

In the digital economy we can expect data protection, consumer protection, and competition frameworks to interact with each other to a certain extent. At the same time, it is important to understand that these frameworks are not designed to address the same issues. In some cases, they may be in tension with one another. One the one hand, a competition enforcer may wish to facilitate access to data to alleviate competition concerns. But such access may raise privacy concerns if the data includes personal information. On the other hand, privacy and consumer protection frameworks that allow consumers to easily move their personal data may alter the competitive significance of data by lowering barriers to entry. Striking the right balance depends on thoughtful case-by-case analysis of the facts.

2. **How should we coordinate antitrust cases involving data protection matters with data protection authorities – will there be some sort of institutionalized cooperation, or rather a cooperation on a case-by-case basis? And, how can the case-by-case approach, normally required in dominance investigations, ensure a cohesive data protection policy that addresses industry-wide practices?**

In general, competition agencies should be careful of straying too far into gray zones at the intersection of antitrust law and other legal frameworks. The objectives of these frameworks are not the same and may not always be aligned. If privacy is a dimension of competition in a market before a competition enforcer, then it may be appropriate for the authority to investigate whether there are effects that flow from a loss of that competition. However, competition agencies should avoid picking up the mantle of privacy and consumer protection enforcers. It is important for agencies with subject matter expertise to interpret the laws they enforce.

3. **Can competition problems in the area of data protection and antitrust still be solved sufficiently with structural remedies (as often preferred by competition authorities) or do competition authorities need to pivot to behavioral remedies, also to enable better and faster adaptation to changing circumstances?**

Both U.S. competition agencies have expressed preferences for structural remedies to address harms to the competitive process – though they may resort to behavioral remedies such as licensing in certain circumstances. Depending on the type of data involved, privacy regulations may make behavioral remedies more challenging for competition enforcers.

4. **Should market-dominant undertakings that generate/gather a vast amount of personal and meta data (e.g. Facebook/Twitter in social media; Google in online search; comparison and other ecommerce platforms; Amazon acting as retailer as well as platform for other retailers) be obliged to grant access to their databases to competitors in order to generate a level playing field and/or to counter tipping effects? Are big tech companies essential infrastructures in this regard? If they're not, should we define what an essential facility is differently so as to cover them? Or should we oblige them to grant access to their databases without considering them an essential facility?**

There is no question that data is important in the digital economy. But the value of data depends on the facts. For example, some data are public or can be obtained for a fairly nominal cost. The value of data can also change over time. Data that is old data may grow stale and have less value. Further, data can be non-rivalrous, meaning that the same data can be used by multiple competitors. Such data is not essential. But other data is proprietary and can operate as a barrier to entry. Of course, even proprietary data may not raise competition concerns if others can obtain substitutable data. Generally, the nature, not the volume, of data will determine its competitive significance. Antitrust agencies have proven relatively capable of addressing competition issues around data after careful analysis of its context. Commenters at recent FTC hearings on these topics have expressed a general agreement that simply investing in, or acquiring large quantities of, data is not a cognizable antitrust harm and that requiring a company to provide competitors and new entrants access to data may adversely impact investment and innovation incentives.

It is important for competition enforcers considering these questions to examine whether multi-homing, interoperability, and relatively low barriers to entry in online markets are facilitating competition and innovation with established platforms.

5. **Do you believe that antitrust remedies can properly address data protection concerns? If yes, which remedies can you envision using? And, isn't it necessary to show that antitrust remedies can better address these concerns than dedicated regulations, before applying them? Why would that be the case?**

As I discussed above, data protection frameworks are designed to address the relatively complex question of how much control people should have over their data in a digital economy. They balance a number of aspects of data policy such as choice, transparency, control, access, portability, and correction. Competition tools are limited in addressing many of these issues – and may even be in tension with them.

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