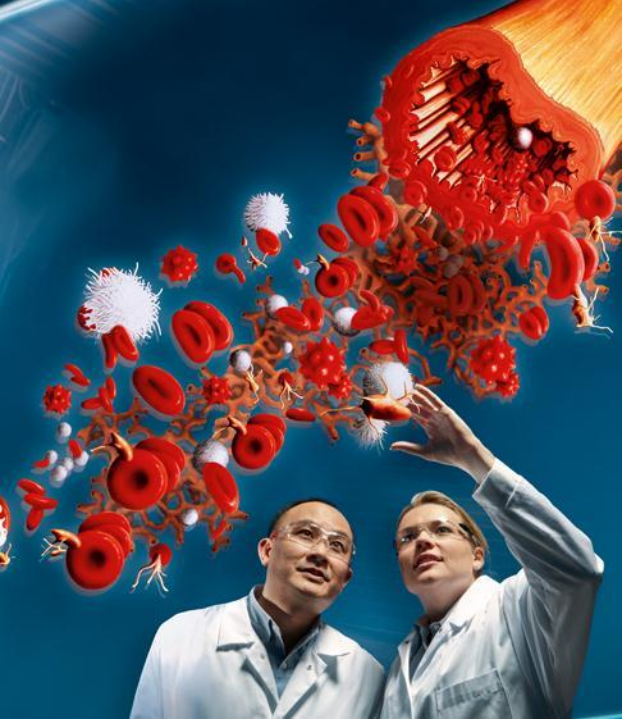

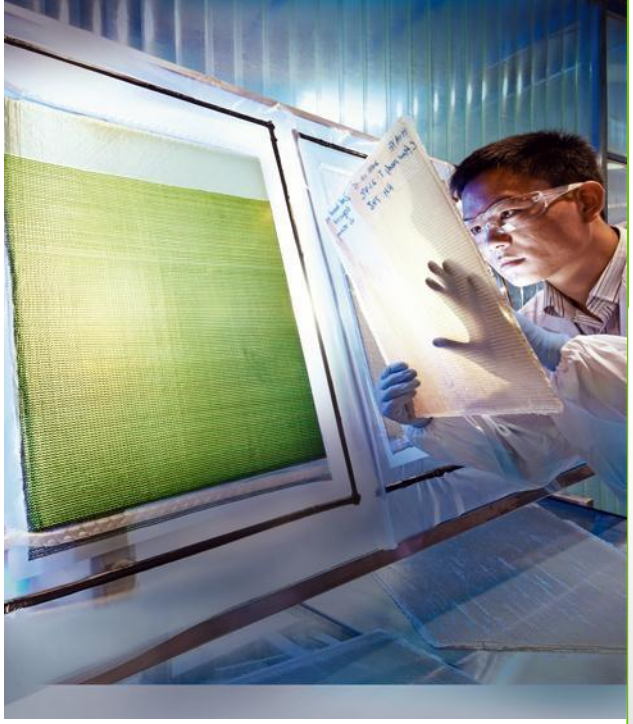

Science For A Better Life

Competition Law & Data Privacy
Bucharest, Pharma Law Convention 2-3 April, 2014

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Competition Law & Data Privacy

Topics:

1. **Relation between Competition Law and Data Privacy**
2. **The usage of Private Data**
3. **Privacy Data and Competition investigations**

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Are we in a collide period of law domains?

Reference: http://ec.europa.eu/competition/antitrust/overview_en.html

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Competition is a basic mechanism of the market economy which encourages companies to offer consumers goods and services at the most favorable terms. It encourages efficiency and innovation and reduces prices. In order to be effective, competition requires companies to act independently of each other, but subject to the competitive pressure exerted by the others.

Under EU law, personal data can only be gathered legally under strict conditions, for a legitimate purpose. Furthermore, persons or organizations which collect and manage the personal information must protect it from misuse and must respect certain rights of the data owners which are guaranteed by EU law.

Reference: http://ec.europa.eu/competition/antitrust/overview_en.html

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Data privacy in the digital age is increasingly attracting attention during competition law investigations.

Despite elements of convergence, the differing approaches of authorities around the world toward the protection of privacy create challenges when developing standards and procedures that are accepted globally

The protection of personal data in the European Union and, specifically, how this impacts the rights of individuals and companies where personal data may be collected as part of a competition law investigation requires close review.

Reference: All Content © 2003-2012, Portfolio Media, Inc.

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Companies develop business models whose success is based on acquisition of personal data.

This kind of data allow the company to improve the quality of their services

Key competitive differentiations in the Internet economy.

Large volumes of data by one company may rise barriers for others

Competitive advantage

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Harvard Business School professor Michael Porter Competitive advantage

- Three major ways companies achieve sustainable advantage: cost leadership, differentiation and focus.

Cost leadership means a company provides reasonable value at a lower price. Companies do this by continuously improving operational efficiency.

Differentiation A company can achieve differentiation by providing a unique or high-quality product, by delivering it faster, or by marketing it in a way that truly reaches customers better. Instead of being a cost leader, the company with a differentiation strategy can charge a premium price.

Focus means company understands and service the target market better than anyone else. Player can use either a cost leadership or differentiation strategy, but it focus it on one specific target market. Often it's a tiny niche that isn't being served by larger companies.

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The use of Private Data is becoming a very important way for leading companies to outperform their competitors.

In healthcare, data pioneers are analyzing the health outcomes of pharmaceuticals when they were widely prescribed, and discovering benefits and risks that were not evident during necessarily more limited clinical trials.

If the U.S. healthcare system were to use data creatively and effectively to drive efficiency and quality, the sector could create more than $300bn in value every year. Two-thirds of that would be an 8 percent reduction in U.S. healthcare expenditure. In the developed economies of Europe, government administrators could create more than €100bn ($123bn) in operational efficiency improvements alone by using Data – and that's not including employing advanced analytic tools to reduce fraud and errors and boost the collection of tax revenues.

Reference:http://iveybusinessjournal.com/topics/strategy/why-big-data-is-the-new-competitive-advantage

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The U.S. healthcare system, for instance, has four major pools of data – clinical; activity (claims) and cost; pharmaceutical and medical products R&D and data about patient behavior.

Estimations that if U.S. healthcare fully used all the available techniques that can be enabled by Data, such as analyzing records of real-world medical treatments, their costs and health outcomes to guide physicians on which treatments provide the best outcomes at the best cost, the annual productivity of the sector could grow by an additional 0.7 per cent.

Achieving this boost in productivity will require the combination of data from different sources – often from organizations that have no history of sharing data at scale. Sets of data such as patient records and clinical claims would have to be integrated.

Acting so would create benefits for patients, who would have broader, clearer access to a wider variety of healthcare information, making them more informed but would create benefits for the various industry players also.

Rference:http://iveybusinessjournal.com/topics/strategy/why-big-data-is-the-new-competitive-advantage

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Competition concerns may arise if one company dominates the market for either gathering data or analysing and marketing the information. Under EU Competition Laws, dominant businesses are prohibited from abusing their position in the market. An abuse of dominance can occur when a dominant company refuses to supply or provide access to essential facilities.

EU competition law prohibits agreements, arrangements and concerted business practices which appreciably prevent, restrict or distort competition, or have the intention of so doing, and which affect trade in the EU respectively.

These can trigger the competition investigations.

Reference: Out-law.com

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A question arises as to whether the commission would be obliged to grant access to any personal data contained in the documents in circumstances where the data subject had not identified the data as confidential information.

The precise boundaries of the relationship between the Access to Documents Regulation and competition law inquiries have not been tested and it is conceivable that circumstances may arise where the legitimate interests of the data subject might be detrimentally affected by the transfer of the personal data to third parties (including investigated parties or in a public decision).

The access to Documents Regulation is not the only piece of EU legislation that may be relevant to disclosure of personal data in an EU competition law investigation.

Reference: Law360.com

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Protection of Privacy under National Law — United Kingdom

Data Protection In the U.K., the collection and protection of personal data is governed primarily by the Data Protection Act 1998, which came into force on March 1, 2000.

The rights and duties set out in the Data Protection Act are designed to apply generally, but there are some exemptions.

- personal data is processed for the prevention or detection of crime. In appropriate cases, this could be raised in the context of investigation into suspected cartel activity under the cartel offense contained in the U.K. Enterprise Act 2002, which established criminal liability for certain hardcore cartel activity.

A consideration of access to information in the U.K. would not be complete without a brief mention of the Freedom of Information Act 2000 (FOIA), which came into force in full on Jan. 1, 2005. This gives any person, including foreign nationals and companies, access to any information held by public authorities.

Reference: Law360.com

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There are sections for exemptions from disclosure:

The sections of FOIA of most immediate relevance to competition investigations are sections 41 (exemption for information provided in confidence) and 43 (exemption to protect commercial interests).

Protection of Privacy under National Law — France

A case of the French Cour de Cassation has highlighted the tension between data protection and the powers of competition authorities. On Nov. 30, 2011, the Cour de Cassation upheld a decision from Feb. 19, 2010 by the French Court of Appeals of Versailles relating to the search and seizure of emails of employees of the company Janssen-Cilag. The French Commercial Code grants the French Competition Authority the power to inspect the premises of a company suspected of engaging in anti-competitive practices and to search and seize all documents and information relevant to the investigation. The Court of Appeals held that the officials of the French Competition Authority were authorized by a “freedoms and custody judge” to inspect the emails as part of a competition investigation in the pharmaceutical market. Janssen-Cilag and its employees challenged the search on the basis that the French Competition Authority had violated the individuals’ rights to privacy, rights to secrecy of correspondence and rights to protection of personal data by searching all employee emails including private correspondence and third party correspondence.

Reference: Law360.com

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Protection of Privacy under National Law — France

The Court of Appeals held that the seizure of private emails and correspondence, even information that was potentially irrelevant to the investigation, did not invalidate the search and seizure because the inspection had been sanctioned by a judge. The case raises the question about whether public (in this case competition) investigations should be conducted within the boundaries of data protection law and where, in the case of tension, an appropriate balance is to be struck. The case raises complex questions including some that do not have a clear-cut answer. In particular, central to the reasoning upholding the seizure appears to be that the investigation itself was not considered disproportionate and that employees would be permitted to reclaim documents that were private, confidential or irrelevant to the investigation.

However, this position raises a more fundamental issue in terms of the protection of personal data and the rights of defense of the company concerned pending and following resolution of the status of any disputed documents. A perennial problem that has been raised in other contexts is whether the prospect or actual return of disputed documents to their owners provides an acceptable remedy where unlawfully obtained documents have already been brought to the minds of investigating officials or the relevant case team. Even if such documents may not ultimately be used in evidence, there remains a risk that their disclosure to the investigating authority (and potentially other authorities where this is permitted under relevant law) can irretrievably prejudice the rights of individuals and corporations.

Reference: Law360.com

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Data Protection in the EU in Evolution

“Traditionally, the storage and treatment of personal data has been the province of laws and regulations designed to protect the privacy of citizens – and I believe that this will remain of paramount importance in the foreseeable future.

However, the commercial value of personal data has grown exponentially. In spite of this, DG Competition has yet to handle a case in which personal data were used to breach EU competition law.

There is clearly a trade-off here between risks and benefits. Is it wise to leave the search for the right balance to the individual? Can the market strike the right balance? Or perhaps it is better – and safer – to look for stronger regulatory solutions?

I will leave these difficult questions open to debate.

One thing I’m sure of is that we must find a way to preserve the right of all Europeans to a private and dignified life where their preferences, conversations and whereabouts are not systematically broadcast in cyberspace.”

Joaquín Almunia

Vice President of the European Commission responsible for Competition Policy; Privacy Platform event: Competition and Privacy in Markets of Data (Brussels) 26 November 2012

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Thank you!