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Questions that Have Arisen since the EU Decision on the Whatsapp Acquisition by Facebook*

*Vicente Bagnoli***

ABSTRACT: On October 3rd, 2014, the European Commission (EC) concluded the analysis of the transaction by which Facebook, Inc. ("Facebook", USA) had acquired WhatsApp Inc. ("WhatsApp", USA) by way of a purchase of shares for US$ 19 billion, which contributed to Facebook's strategy of focusing its business on mobile development (Case no. COMP/M.7217). In its decision, the EC stated that the deal would raise no competition concerns and authorised the proposed acquisition of WhatsApp by Facebook concluding that Facebook Messenger and WhatsApp are not close competitors and that consumers would continue to have a wide choice of alternatives for consumer communication apps after the acquisition. The EC analysed potential data concentration issues only within the scope that the acquisition could weigh down competition in the online advertising market. Privacy-related concerns from the increased concentration of data within the control of Facebook because of the deal with WhatsApp are not an EU Competition Law matter. Notwithstanding, just some months after the decision two national competition authorities (Germany and Italy) opened procedures against Facebook. In Germany, the Bundeskartellamt initiated in March 2016 a proceeding against Facebook – Facebook Inc., USA, the Irish subsidiary of the company, and Facebook Germany GmbH, Hamburg – on suspicion that

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** Professor of Law at Mackenzie University; PhD in Philosophy and General Theory of Law at Sao Paulo University – Law School; visiting researcher for Post Doc at Max Planck Institute for Innovation and Competition; Master in Economic and Political Law at Mackenzie University – Law School; member of ASCOLA; member of the scientific committee of the Observatory on Competition Law Enforcement – Portuguese Catholic University of Porto; nongovernmental advisor of ICN; World Bank Group and WIPO Short Term Consultant; member of ICC; Counsellor of IBRAC; President of the Antitrust Section of the Brazilian Bar Association, Sao Paulo (2013-2015); President of the Law Committee of the Italian Chamber of Commerce of Sao Paulo – Italcam; founder-partner of Vicente Bagnoli Law Office; bagnoli@vicentebagnoli.com.br.

Facebook had abused its market power by infringing data protection rules with its specific terms of service on the use of user data. In Italy, in May 2017, the Autorità Garante della Concorrenza e del Mercato (AGCM) fined WhatsApp EUR 3 million for having forced its users to share their personal data with Facebook as a conclusion of two investigations opened in October 2016 concerning infringements of the Consumer Code. The present article proposes to answer three main questions concerning the EC decision on the WhatsApp acquisition by Facebook: (i) Did the EC apply the best tools to analyse the case?; (ii) Could the EC have addressed a decision that would somehow interfere in the privacy field?; and (iii) Could the procedures in Germany and Italy have been avoided?

KEYWORDS**:** Facebook; WhatsApp; Big Data; Competition Law; Privacy; Data Protection.

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Digital Economy, Big Data and Competition Law*

*Roberto Augusto Castellanos Pfeiffer***

ABSTRACT: Big data has a very important role in the digital economy, because firms have accurate tools to collect, store, analyse, treat, monetise and disseminate voluminous amounts of data. Companies have been improving their revenues with information about the behaviour, preferences, needs, expectations, desires and evaluations of their consumers. In this sense, data could be considered as a productive input.

The article focuses on the current discussion regarding the possible use of competition law and policy to address privacy concerns related to big data companies. The most traditional and powerful tool to deal with privacy concerns is personal data protection law. Notwithstanding, the article examines whether competition law should play an important role in data-driven markets where privacy is a key factor.

The article suggests a new approach to the following antitrust concepts in cases related to big data platforms: assessment of market power, merger notification thresholds, measurement of merger effects on consumer privacy, and investigation of abuse of dominant position.

In this context, the article analyses decisions of competition agencies which reviewed mergers in big data-driven markets, such as Google/DoubleClick, Facebook/WhatsApp and Microsoft/LinkedIn.

It also reviews investigations of alleged abuse of dominant position associated with big data, in particular the proceeding opened by the Bundeskartellamt against Facebook, in which the German antitrust authority prohibited the data processing policy imposed by Facebook on its users.

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** Professor of the Faculty of Law of University of São Paulo, Brazil. PhD (University of São Paulo). LLM (University of São Paulo). Former Commissioner of the Brazilian Competition Authority (CADE). Roberto.pfeiffer@usp.br.

The article concludes that it is important to harmonise the enforcement of competition, consumer and data protection polices in order to choose the proper way to protect the users of dominant platforms, maximising the benefits of the data-driven economy.

KEYWORDS: Big Data, competition law, digital economy, privacy, abuse of dominant position.

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Party Autonomy: Removing Obstacles to Legal Diversity in the European Market*

*Afonso Patrão***

ABSTRACT: One of the main obstacles to the internal market is legal diversity: Member States often adopt different legal standards not only within public and economic law but also with regard to private law. The traditional approach of European Institutions (harmonising legislation among Member States) was soon complemented by the principle of mutual recognition; these two methodologies embodied the European strategy for minimising the problem. However, a third European tool is becoming obvious: to give private parties the ability to choose the applicable law.
This *new approach* enhances regulatory competition among Member States and turns unessential the unification of national rules, which suits best the proportionality principle. Party autonomy as a means for overcoming the difficulties of legal diversity is not only a reality in European statutory law – which already brought the ability for choosing the applicable law to contracts, torts, divorce, inheritance, alimony, matrimonial property – but is also highlighted in ECJ's case-law, which declared legal diversity is not a barrier to the basic freedoms as long as parties may choose the applicable rules.
The article will focus on the grounds and advantages of this method to address the issue of legal diversity, advocating its use in areas where the traditional approach is ineffective or impossible (such as some rights *in rem,* within the scope of the freedom of movement of capital).

KEYWORDS: Party autonomy; Internal market; Conflict of laws; Legal diversity; free movement

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** Assistant Professor, Faculdade de Direito da Universidade de Coimbra, 3030-489, Coimbra, apatrao@fd.uc.pt.

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The Boundaries of EU Copyright Law: Cheese, Jeans and a Military Report in the Court of Justice*

*Nuno Sousa e Silva***

ABSTRACT: Copyright is a centrepiece in the ongoing construction of the digital single market. Evidently, copyright only applies to works. Thus, the definition of its scope lies in knowing what a work is. Although that was not envisioned nor intended by the lawmaker, the Court of Justice has adopted a European notion of work in its controversial decision C-5/08, *Infopaq*, conflating it with the one of originality. Such an approach has been confirmed and expanded by subsequent case law. The Court has already fleshed out the main criterion for a creation to enjoy copyright – it must be original in the sense of being the author's own creation – and seems to reject any additional criteria. However, the boundaries of the European notion of work are still unknown. Some recent preliminary ruling requests will allow some clarification. One asks about the possibility of copyright protection for the taste of a specific cheese (C-310/17, *Levola Hengelo*). Another one deals with the protection of a fashion design for jeans (C-683/17, *Cofemel*) and yet another concerns a military report (C-469/17, *Funke Medien*). After describing the evolution of the law on the EU notion of copyright, this article frames and critically analyses the questions surrounding these cases, proposes answers thereto and makes a prediction of the outcome, i.e. the Court's decision, in each of them.

KEYWORDS: Copyright; work; EU law; Court of Justice; harmonisation

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** Assistant Lecturer at the Porto Faculty of Law, Universidade Católica Portuguesa. nsousaesilva@gmail.com.

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The Impact of EURODAC in EU Migration Law: The Era of *Crimmigration*?*

*Benedita Menezes Queiroz***

ABSTRACT: Counter-terrorism and public security measures have significantly altered EU immigration law. Under the premise that EU instruments which regulate EU immigration databases influence the legal regime of irregularity of migrants' statuses, the present article argues that the latest developments in the area of data technology contribute to the phenomenon of "crimmigration". This is so not only because they may generate a sort of "digital illegality" due to their impact on the categorisation of migrants, but also because they enable a conflation of treatment of irregularity, asylum seeking and criminality. This article focuses on the recent amendments and proposals for amendments to the EURODAC Regulation, a database that regulates the asylum fingerprint system in the EU. This is revealing of the ongoing broadening of the purpose of that data and law enforcement access to the collected information. The argument finds its basis in three main trends common to these databases: the erosion of the principle of purpose limitation, the widening of access to data by law enforcement authorities, and the digitalisation of borders through biometrics. Ultimately, this article claims that the level of surveillance of certain categories of migrants that may cross the borders of the EU puts at risk the distinction between illegally staying irregular migrants and criminals, given that the treatment of their personal data is insufficiently clear in practice.

KEYWORDS: EURODAC, asylum seekers; illegally staying third-country nationals; immigration databases; crimmigration; surveillance; digital borders.

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** Porto, Portugal, bmqueiroz@porto.ucp.pt (Guest Assistant Professor, Universidade Católica Portuguesa, Escola de Direito Porto and Teaching Assistant, School of Transnational Governance, European University Institute, Italy).

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"After Thunder Comes Rain": The ECJ Finally Rules on the Boundaries of the EUMR Standstill Obligation

*Luca Villani**

ABSTRACT: In its judgment of 31 May 2018, case C-633/16, the European Court of Justice ruled on the preliminary questions referred by the Danish Maritime and Commercial Court in the context of a merger notified to the Danish Competition and Consumer Authority by KPMG DK and EY DK. The referring court asked the ECJ to clarify on the scope of the so-called standstill obligation imposed on the parties of a notifiable transaction by article 7 of the Council Regulation (EC) No. 139/2004 (EUMR).

The decision was long awaited, since after having imposed several fines for gun jumping practices in recent times, it is the first case ever in which the Court has been asked to take position on the matter through a preliminary ruling. As for substance, the European Court of Justice stated that article 7, paragraph 1 of the EUMR must be interpreted as meaning that a concentration is implemented only by a transaction which contributes to the change in control of the target undertaking.

In doing so, the Court gives a broad overview of the EU merger control system, recalling the fundamental concepts of concentration, control and standstill in order to give a systematic interpretation of the provisions at stake.

KEYWORDS: Merger control; concentration; EUMR; standstill; gun jumping.

* PhD at Roma Tre University, Rome, Italy; Lawyer at Latham & Walkins, LLP. lucavillani07@gmail.com.

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Monetary Fines in EU Mergers: In Need for More Regulation*

*Nora Memeti***

ABSTRACT: Monetary fines represent an important instrument to address violations of Competition Law. The European Commission (EC) and the EU Courts have been primarily engaged in imposing fines in cases of breach of the first pillar, and have rarely dealt with cases of abuse based on the fining guidelines issued in accordance with Article 23(2) of Regulation 1/2003. Compared to the first two pillars, mergers have not received similar scholarly attention.[1] [2] Since 2017, the EC has expressed a growing interest in investigating and imposing significant fines to mergers and acquisitions in breach of procedural matters. Therefore this article addresses the application of Article 14 of the European Union Merger Regulation (EUMR) in imposing fines to mergers with European Union (EU) dimension.

The EC decisions and EU Courts' judgments related to fines on mergers in breach of procedural matters are discussed in four specific sections.

The first section analyses article 14(1) of the EUMR, which empowers the EC to impose a fine of up to 1% of the total turnover in the preceding business year on undertakings for breach of procedural matters, including, among others, for providing incorrect or misleading information. This section will address the case of Facebook as the first case in which the EC imposed fines based on the new EUMR. In this case, although the undertakings mislead the EC, based on the offered cooperation, the Authority decided to reduce the fine. In addition, it is also important to address the legal basis applied by the EC in accepting the offered cooperation as a mitigating factor and whether this may develop into a guiding "precedent" in the future.

* Associate Professor of Law, Commercial Law Department, KILAW, Doha, Kuwait.

[1] The transaction has a Union dimension within the meaning of Article 1(2) of the EUMR.

[2] Damien Geradin and Katarzyna Sadrak, "The EU competition law fining system: A quantitative review of the Commission Decisions between 2000 and 2017", *TILEC Discussion Paper* No. 2017-2018 (2017).

The second section deals with five cases of violations of articles 4(1) and 7(1) EUMR related to fines prescribed in article 14(2) EUMR. With regards to four of them, judgments of EU Courts and decisions of the EC and National Competition Authority (NCA) are analysed. The fifth case, the one on Ernst and Young, provides for the first preliminary ruling on the notion of "gun-jumping".
The third section deals with Article 14(3) and the fining methods on mergers. By reviewing each of these five cases, it is important to address factors taken into consideration when imposing fines. An obvious deficiency is the absence of a legal basis, regardless of whether manifested in hard or soft law. Here it is relevant to inquire in what manner the EC imposes fines and why it occasionally mirrors the fining guidelines applicable to other pillars of EU Competition Law. The last point to be addressed is the one of policy and the need to balance EC discretional powers and relevant legal principles such as legal certainty, equal treatment, transparency, and consistency.[3] The fourth section provides for concluding remarks.

KEYWORDS: EUMR, fines, breach of procedural matters, gun-jumping.

[3] See Frederic Marty and Mehdi Mezaguer, "Negotiated procedures in EU competition law", in *Encyclopedia of Law and Economics*, ed. Alain Marciano, Giovanni Battista Ramello (New York: Springer, 2018).