

# ICN Project: ‘Competition law enforcement at the intersection between competition, consumer protection, and privacy’

## Report: Summary of ICN member actions and policy responses to key intersection issues and next steps for the Project

### 1. Summary of the Report

The ICN Project ‘Competition law enforcement at the intersection between competition, consumer protection, and privacy’ project (**Project**) seeks to increase the understanding of how ICN member agencies consider the issues which lie at the intersection of competition, consumer and privacy law enforcement, and to share knowledge and expertise developed by ICN members in dealing with these issues.

This report is a summary of ICN member actions and policy responses to key intersection issues, based on survey responses received from 19 ICN member jurisdictions, and were provided from the perspective of members as competition agencies (**Report**).<sup>1</sup> The survey questions focused on ICN members’ experiences in the context of enforcement, inquiries and policy making.

The Report identifies some common themes and trends across responses, and is structured as follows:

- Background to the Project, including key tasks:
  - Task 1: Research and Background; Issue Identification (a review of academic literature and nearly a dozen agency responses – completed). **See Attachment A.**
  - Task 2: ICN Survey Analysis (a summary of ICN member actions and policy responses to key intersection issues - i.e. section 3 of this Report). See relevant **Attachments B and C.**
  - Task 3: webinars on intersection issues (three undertaken, one planned). See Webinar summaries at **Attachment D.**
  - Task 4: using Tasks 1-3 create a public ‘agency considerations’ document (consolidated final project output expected mid-2022).
- Summary of survey responses (Task 2):
  - Section 1 considers the **use of market studies and sector inquiries** as a tool to understand complex digital markets that cut across competition, consumer and privacy concerns

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<sup>1</sup> Survey responses were received from the following ICN member jurisdictions: Albania, Croatia, Hungary, Czech Republic, the European Commission, Kenya, Italy, Canada, Japan, Mexico, Turkey, Moldova, Singapore, Georgia, Sweden, United States, United Kingdom, France, and Australia.

- Section 2 considers the **role of data access and accumulation** in merger analysis across jurisdictions
  - Section 3 considers the **imposition of remedies in merger decisions and enforcement actions** that require firms to share data
  - Section 4 considers **engagement and cooperation between domestic agencies** that are separately responsible for competition, consumer and privacy regulation
- Proposed next steps for the Project.

The Report concludes that the intersection between competition, consumer and privacy considerations is increasingly relevant in the context of a data-driven society. Across competition authorities, similar approaches have been taken to better understand how global competition and consumer protection policy must evolve in step with changing practices in data collection and use.

As originally outlined in the Project Scoping Paper approved by the Steering Group on 19 February 2020 the next step of the Project is to create an 'agency considerations' document (Task 4: Final project output). The agency considerations document will synthesise the information gathered through the component tasks of the Project

The finalised agency considerations document will provide a useful tool for agencies considering intersection issues in policy and practice, including those issues which benefit from both domestic and international engagement with other regulators or agencies.

## 2. Background to Project

This section outlines:

- the rationale for the Project and Survey
- provides a summary of project works to date
- describes the survey provided to ICN members

### **Rationale for the Project:**

The intersection between competition and consumer laws has been well recognised by governments, regulators and in academic literature.<sup>2</sup> In recent years, this intersection has become even more complex, with rapid changes in technology and data collection leading to privacy or data protection regulation intersecting with competition and consumer laws. As a result, competition authorities around the world are increasingly facing complex legal and policy questions that touch upon competition, consumer and privacy laws.

Competition, consumer and privacy considerations may sometimes complement each other. For example, competitive markets could lead to strong privacy protections if firms compete on the basis of privacy features offered. Equally, strong privacy protections which ensure consumers are well informed of what is happening to their personal data may also achieve the goals of consumer law in providing transparency and ensuring businesses do not mislead users about privacy protections or the use of consumer information. Consumer protection laws may also prevent firms from misleading consumers about how they disclose and use consumer data.

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<sup>2</sup> See for example OECD work such as the Joint Meeting of the Competition Committee and the Committee on Consumer Policy on 28 November 2018 inter alia on i) Personalized Pricing ii) Quality in Zero Price Economy; ABA 68th Antitrust Spring Meeting, April 21-24, 2020 "Where Competition and Consumer Protection Meet"; Bundeskartellamt, Consumer Protection and Competition Law, Meeting of the Working Group on Competition Law, 6 October 2016.

However, the interaction between competition, consumer and privacy laws may lead to tensions that create significant challenges for competition agencies. There are some concerns that strong consumer and privacy protections may inhibit innovation or competition, particularly in relation to data access and sharing; or that complex regulatory requirements pertaining to data collection or processing may favour large incumbents and harm the ability of other firms to enter and compete. As the volume, nature and scope of consumer data continues to grow exponentially,<sup>3</sup> these tensions are only likely to increase in complexity.

The global nature of the digital economy and data collection mean that the tension between competition, consumer and privacy law arises internationally. However, there are significant differences in the way that ICN member jurisdictions approach these functions. To capture these different approaches, ICN members provided survey responses across 2020<sup>4</sup> outlining how their jurisdiction understands and approaches the issues that arise at the intersection of competition, consumer and privacy law. This Report provides a high level summary of those survey responses in order to provide a practical focus for the Project, including any real-world examples of the issues arising from this intersection in competition law enforcement cases.

Establishing a common understanding of the various approaches by ICN members to these issues will enhance our ability to develop best practice approaches to intersection issues.

### **Summary of Project works to date:**

The Project was initiated in early 2020 with project leads: Canada, Italy and Australia. A scoping paper was approved by the Steering Group in February 2020 and outlined four tasks to be completed.

Task 1 (Research and background; issue identification) involved two parts, firstly collecting the pertinent economic/legal literature (US FTC, US DOJ, EU DG COMP, Portugal, Colombia) and then using this to create an issues paper (drafted by Italy – Attachment A). The issues paper was approved by the ICN Steering Group in January 2021 and may need to be updated given developments since it was first drafted.

Task 2 (Member Input) involved gathering the perspectives of ICN members, including examples of real-world cases of the issues arising from this intersection in competition law enforcement cases. A summary of ICN member actions and policy responses to key intersection issues is contained in section 3 of this Report. The survey questions are included at Attachment B and a list of relevant market studies referred to in survey responses is set out at Attachment C.

Task 3 (Discussion) involved network-wide webinars conducted over a period of roughly 18 months on intersection issues as follows:

- Webinar 1 – ‘Competition law enforcement at the intersection of competition, consumer protection and privacy,’ 22 June 2020.

This discussion focussed on data-related issues at the intersection of competition and privacy. Topics for discussion included:

- Collaboration between data protection and competition authorities with the possibility of joint investigations for data driven mergers. A distinction was

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<sup>3</sup> ACCC, [Digital Platforms Inquiry Final Report](#), p. 379.

<sup>4</sup> Most responses were submitted in August and September 2020, with the exception of one submitted in November 2020 and another in January 2021.

also drawn between privacy and data protection laws – with the latter imposing limits on the free flow and sharing of data.

- Recent international enforcement cases were discussed and a desire expressed for increased strategic enforcement. Examples were offered which demonstrated cooperation between data protection and consumer protection authorities (such as in Norway) and a preference noted for adopting a holistic approach to issues in the digital economy and continued cooperation between authorities.
- Webinar 2 – ‘Recognising roles and Resolving Tensions: Intersection between competition, consumer protection and privacy,’ 14 April 2021.

This discussion had a broader scope and covered the following topics.

- With the emergence of the digital economy and digital platforms, the intersection between competition, consumer protection and privacy is more relevant than ever.
- These three policy goals have previously been thought to be complementary – but is this ‘old’ paradigm still valid?
- What new intersections between the three policies have been raised recently, and how should regulators deal with issues raised by this intersection?
- In discussing these topics, the panel recognised there is an increasing gulf between the objectives – particularly between privacy and competition. For example, protecting access to consumers’ data may be seen to raise barriers to entry and expansion; while encouraging data sharing and interoperability to promote competition may give rise to privacy concerns. However, these issues may be overcome by clear communication and cooperation between regulators that deal with each objective.
- Webinar 3 – ‘Intersection between competition, consumer protection and privacy,’ 7 September 2021.

This discussion built on the second webinar to explore how the competition, consumer, and privacy intersection should be navigated. The discussion focussed on the following three topics:

- Tension: The application of different regulatory regimes may produce inconsistent results, potentially requiring trade-offs - or rules of priority - to be made.
- Instrument choice: Something that presents as a competition problem may on investigation turn out to have a consumer (or privacy) issue at its heart, or vice versa. This affects both the substantive framework and the availability of appropriate remedies. Fundamentally, the goal is to identify the source of a market failure, which allows you to select the appropriate tool.
- Tool availability / forum shopping: Two (or more) regimes may apply, with an equivalent result (the Bundeskartellamt’s Facebook decision may be an example of this). According to the decision Facebook breached German competition law and the EU’s General Data Protection Regulation (GDPR), and so it seems the case could have been pursued under either regime, albeit with different precedent effects and potential remedies. In other cases, tool selection may depend on availability. In another example, it has been noted that the FTC could approach privacy rulemaking by carving off discrete privacy issues that can be framed as an issue of consumer deception and use its well-established consumer protection rulemaking function.

- ICN Annual conference, plenary session, 'Competition law enforcement at the intersection between competition, consumer protection and privacy,' 14 October 2021.

This discussion progressed our thinking about intersection issues even further and canvassed views such as that:

- There is not necessarily a tension between privacy and competition and in fact we need to talk more about integration not intersection.
  - We need to think about data differently, as a price increase, as data increases are potentially damaging to consumers.
  - We need to fashion and develop theories of harm that incorporate this as a consideration that are consistent and integrated. This is relevant for both merger theories of harm and conduct theories of harm. We should be more adventurous and creative about developing theories of harm that bed down these concerns.
  - There are strong synergies between both competition and privacy and enforcement. The synergies are far greater than any tensions. Where there are tensions, we can work closely together to resolve them. There is huge merit in working together proactively so that we can be on the front foot of shaping agendas and the future.
- A further webinar has been proposed for early 2022.
  - Summaries of each of the webinars completed to date and the plenary session at the 2021 ICN Annual Conference (Task 3) are available at Attachment D.

### 3. Survey of ICN members – Task 2

Survey responses were received from 19 ICN member jurisdictions and were provided from the perspective of members as competition agencies.<sup>5</sup> The survey questions focused on ICN members' experiences in the context of enforcement, inquiries and policy making:

- Competition law investigations at the intersection between competition, consumer protection and privacy
- Market studies and inquiries examining issues relating to the intersection between competition, consumer protection and privacy
- Consideration of current and proposed laws, guidelines, etc. aimed at data protection, data mobility and/or data interoperability

It should be noted that both the survey responses and this document summarising those responses are not exhaustive records of agencies' previous experiences. These should not be treated as a comprehensive record of agencies' investigation, enforcement, inquiry, or policy experiences. Rather, this document is for illustrative purposes, to allow ICN members to increase their understanding of the way that other jurisdictions approach the relevant issues.

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<sup>5</sup> Survey responses were received from the following ICN member jurisdictions: Albania, Croatia, Hungary, Czech Republic, the European Commission, Kenya, Italy, Canada, Japan, Mexico, Turkey, Moldova, Singapore, Georgia, Sweden, United States, United Kingdom, France, and Australia.

## Summary of survey responses

### 1. Use of Market Studies

The survey responses suggested that authorities are increasingly using market studies or sector inquiries as a tool to better understand complex digital markets and analyse issues involving competition, consumer, and privacy. As noted above, a list of relevant market studies referred to in survey responses is set out at Attachment C.

#### *Issues explored*

The markets explored varied significantly across the studies and inquiries referred to in survey responses. Some studies and inquiries were particularly broad, covering a wide range of markets and issues. For example:

- The Australian Competition and Consumer Commission's (ACCC) Digital Platforms Inquiry considered the impact of search engines, social media platforms and other digital content aggregation platforms on competition in media and advertising services markets. This resulted in a wide-reaching final report with competition, consumer, and privacy implications across various markets.
- Similarly, the Italian Competition Authority (AGCM)'s Big Data Sector Inquiry considered big data across a broad range of sectors, including telecommunications, media, digital platforms, information technology, insurance and banking.

In contrast, some studies and inquiries had a narrower focus on a particular market or segment of a market. For example:

- The Competition and Consumer Commission of Singapore's (CCCS) Online Travel Booking Market Study focussed on competition and consumer concerns associated with the provision of online flight and accommodation booking services.
- The French Autorité de la Concurrence is currently undertaking a sector-specific inquiry into 'fintechs' and financial payment services.

Some survey respondents also referred to particular markets or issues being explored in other formats, separate from a market study or inquiry. For example, the United States' Federal Trade Commission (FTC) can use public hearings or workshops to explore issues in particular markets, such as its 2018 public hearings on privacy, big data, and competition. Other jurisdictions referred to using discussion papers and standalone reports to explore issues, such as the CCCS's discussion paper on data portability published in collaboration with Singapore's Personal Data Protection Commission.

Like the markets explored, the themes and issues explored in inquiries and studies were also diverse. However, some common themes across several survey responses included a consideration of data portability<sup>6</sup>, personal data regulation, discriminatory practices in online specialised search (e.g., travel booking, taxi services), structural distortions to competition in the market for internet of things (IoT), the impact of technology-led innovation in the financial services sector, and digital advertising services.

#### *Outcomes of the market studies*

The outcomes of these studies are varied. In some cases, inquiry reports made recommendations for significant policy reform or future enforcement action. For example, the Competition Authority of Kenya used 'soft enforcement' to address conduct identified in its

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<sup>6</sup> The AGCM's Big Data Sector Inquiry recommended expanding data portability requirements; the CCCS published a paper on data portability in collaboration with the Singapore Personal Data Protection Commission; and the FTC held a 2020 workshop on data portability.

2016 Inquiry into pricing and conditions of unstructured supplementary service data (USSD) platform access. In other cases, inquiry reports served to highlight issues or to educate consumers. For example, the European Commission DG Competition's 2020 Consumer Internet of Things Sector Inquiry publicly identified behaviour which was conducive to structurally distorting competition, for example contractual and de facto restrictions on data access and interoperability.

Outside of market studies or inquiries, some respondents referred to discussion papers, workshops, or opinions that explored market issues or dynamics.<sup>7</sup> For example:

- The Competition and Consumer Commission of Singapore produced a discussion paper on data portability in collaboration with the Personal Data Protection Commission, which discussed the impacts and benefits of a data portability requirement for business innovation, market competition and consumers.
- In the US, the Federal Trade Commission held several workshops. The 2020 Workshop on Data Portability examined the potential benefits and challenges to consumers and competition raised by data portability. In collaboration with the US Food and Drug Administration, the 2020 Workshop on Biosimilars brought together consumer protection and competition expertise to support appropriate adoption of biosimilars, discourage misleading statements about biosimilars, and deter anticompetitive behaviours in the biologic marketplace.
- In France, the Autorité de la Concurrence, in delivering their Opinion on data processing in the online advertising sector in 2019, analysed the functioning of the market for online 'display' advertising dominated by Google and Facebook, and examined how data is collected and processed in this market.

## **2. Data accumulation or access as a factor in merger decisions and its designation as a source of market power**

The survey responses revealed that ICN members have considered data accumulation or access as a potential source of market power in a number of instances, particularly in the context of merger decisions. For example, in the Seek Asian Investments / Jobstreet merger decision, Singapore's CCCS recognised the control and ownership of data, including personal data, as a source of market power. As part of its assessment, the CCCS also considered wider consequences of allowing mergers that consolidated data control and ownership; the CCCS examined whether the post-merger entity, with greater market dominance, would have an increased the acquirer's ability to collect personal data and further enhance its market power.

ICN members also recognise that a strategic advantage from the accumulation of, or access to, data may be constrained by privacy or data protection regulations. For example, the UK Competition and Markets Authority (CMA) noted that the existence of data portability rights could be relevant to consideration of whether a merger has resulted, or is likely to result in, a substantial lessening of competition if those rights could prevent lock-in effects post-merger.

A number of cases internationally have specifically identified data accumulation as a practice that encourages exclusionary practices. For example, in a number of the European Commission's merger decisions (2012 Telefonica UK / Vodafone, 2016 Verizon / Yahoo, 2018 Apple / Shazam, 2014 Facebook / Whatsapp, 2016 Microsoft / LinkedIn, and 2016 Sanofi / Google), the European Commission considered the effect of data accumulation on the post-merger firm's market dominance. While these transactions were all cleared,

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<sup>7</sup> For example, the Competition Bureau Canada (CBC) conducted a market study in December 2017 on technology-led innovation in the Canadian financial services sector, specifically focusing on identifying structural and regulatory barriers faced by entrants in the payments, lending, and investment sectors, all in the Canadian context. In 2019, the Competition and Consumer Commission of Singapore (CCCS) conducted an Online Travel Booking Market Study concerned with provision of flight tickets and hotel accommodation booking systems to Singaporean consumers.

concerns about data collection and utilisation were central to the determination of whether the mergers would have a negative impact on effective competition. In most of these cases, with the exception of Apple / Shazam and Facebook / WhatsApp, the European Commission concluded that the existing or future data protection laws (in particular, the GDPR) would help constrain firms' ability to collect personal data.

A few authorities provided insights into the specific consumer harms that may arise with data accumulation practices. For example, while the EasyPark / Inteleon merger was cleared, the Swedish Competition Authority highlighted that increased access to data may also enable targeted advertising and marketing. In the United States, the Amazon / Wholefoods merger decision raised fact-specific issues as to whether increases in data collection are the equivalent of a price increase or quality reduction for every transaction or interaction on a shopping or merchandise online marketplace.

Despite a consideration of data or privacy factors as an element of competition in merger decisions, various authorities draw a clear separation between more general privacy protections and merger decisions; in the UK, the CMA has stated that they can only address any impact on data protection rights to the extent that these are linked to competition concerns.

#### *Enforcement action by agencies*

In addition to its relevance to merger assessments, data accumulation is increasingly a consideration in competition or antitrust infringement cases. For example:

- in the 2009 EDF Energy decision in France, the Autorité de la Concurrence held that the non-replicable customer database held by EDF was likely to give an unfair advantage to its subsidiary new entrant EDF ENR, determining that this access to data would produce a distinct advantage for EDF ENR that could not be replicated by other competitors.
- in 2016, as part of its investigation into Google LLC, the Hungarian Competition Authority took into account data collection, processing, utilisation, and sharing issues in the context of the parties' business model and commercial conduct. Despite the fact that data protection was not considered as a competition issue in this matter, Google made a number of commitments generally aimed at increasing the transparency of Google's user data processing and utilisation. Specific commitments made by Google included comprehensible and unambiguous wording of consumer choices regarding their data, consumer rights, and potential obligations, presented in a separate and easy-to-access webpage or hyperlink.

### **3. Remedies (resulting from merger decisions or enforcement action) requiring sharing of data**

Compared to the number of authorities that identified data accumulation as a contributor to market power or a limit to effective competition, a smaller number of authorities referred to the imposition of remedies that require certain data to be shared with competitors. For example:

- in Canada, in the *Commissioner of Competition v Toronto Real Estate Board (TREB)* matter, TREB was ordered to include certain listing data in the data feed that was distributed to members and to remove restrictions of the use of listing data in the feed for internal and analytical use.
- in Singapore, the Seek / Jobstreet merger was conditionally cleared on the basis of a number of behavioural and divestiture commitments, including divesting the complete assets of jobs.com.sg, to address concerns that the merged entity may utilise its



large database of listings to populate jobs.com.sg, leading to substantial increases in content and traffic for this website.

- the 2012 Enerest / Electricite de Strasbourg merger was cleared conditionally with data sharing as a central requirement; Electricité de Strasbourg (the acquirer) committed to establishing a database, accessible to any competitor, that contained the necessary customer information to facilitate the design of tailored offers, which would also have to comply with privacy and data processing laws.

However, it is important to consider the privacy implications of remedies that require entities to share data to ensure effective competition. In the 2014 GDF-Suez decision, France's Autorité de la Concurrence (the Authority) held that the use by GDF-Suez (the incumbent operator) of its regulated tariff database inherited from its past monopoly position to promote its own competitive offers was an abuse of market dominance. Interim measures required GDF-Suez to grant competitors access to its contact information and consumption data. However, the Authority noted that the data that had to be disclosed was only that which was strictly necessary to ensure effective competition among suppliers, amidst concern from companies and private individuals about the possible disclosure of their data. This matter highlighted the additional considerations when data sharing is used as a remedy; it had to be done in compliance with French privacy law and the recommendations of the French data protection authority, the Commission on Information Technology and Liberties (CNIL).

#### **4. Increasing engagement between competition, domestic privacy and consumer agencies**

In light of recent developments in privacy law, including the GDPR and comparable data protection and privacy regulation in other countries, as well the critical role data collection and use performs in the business models of many large businesses including advertiser funded digital platforms, the same (or similar) conduct may need to be scrutinised by competition, consumer and/or data and privacy authorities. It is therefore increasingly important that such agencies work together domestically and internationally.

The increasing levels of cooperation between competition agencies across national borders noted in survey responses (for example, the French and German competition authorities' joint report 'Competition Law and Data') suggests that we can expect greater coordination in managing competition and consumer protection matters going forward, particular in the context of large digital platforms. Whilst this cooperation presents significant opportunities for effectively addressing potential *competition concerns* associated with digital platforms and/or data practices that may be global in nature, coordination between agencies with different remits, powers and priorities (e.g. between data protection and competition authorities) may present significant challenges.

Across different jurisdictions, perceived competition issues closely related to digital markets have highlighted the need to cooperate with other national regulators. There has been increased engagement between competition agencies with privacy and consumer agencies, particularly in the UK, Sweden, and Italy. For example:

- At the same time the market study into Online Platforms and Digital Advertising was published, the Competition and Markets Authority (CMA) announced the creation of the Digital Regulation Cooperation Forum (DRCF). The DRCF aims to support coordination between the CMA, the data protection regulator (the Information Commissioner's Office), and the communications regulator (Ofcom), creating a coherent regulation of the UK digital economy and enhancing the global impact and position of the UK.
- In Sweden, ongoing efforts are being made to improve cooperation with the Swedish Consumer Agency (SCA) and the Swedish Data Protection Authority. Coordination

between the SCA, the Swedish Consumer Agency and the Swedish Data Protection authority has included a joint proposal to the Swedish Government on its research policy<sup>8</sup>, and a joint seminar on privacy, consumer protection and competition policy in data-driven society in November 2020.

- In Italy, the Big Data Sector Inquiry was jointly carried out by the AGCM with the Communications Regulator and the Data Protection Authority. It proposed a number of policy recommendations including reducing asymmetries in online marketplaces and users and extending data portability.

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<sup>8</sup> A more formalised dialogue with the Swedish Consumer Agency and the Swedish Data Protection Authority began in the fall of 2019, when the three authorities decided to collaborate on a joint contribution to the Government on its research policy and the forthcoming research policy bill. In the joint letter to the Government, the authorities highlighted the importance of integrated and interdisciplinary research into digital platforms (and how they use personal data), as well as data-driven markets.

## Conclusion – Task 2

The survey responses by ICN member jurisdictions reveal that the intersection between competition, consumer and privacy considerations is increasingly relevant in the context of a data-driven society. Across competition authorities, similar approaches have been undertaken to better understand how global competition and consumer protection policy must evolve in step with changing practices in data collection and use.

Common patterns of market studies covering both broad analysis of digital markets, and more specialised market studies into specific sectors or industries, and considerations of data accumulation and control in merger adjudications have reinforced the notion that data privacy protection can be linked to competition concerns and does not operate as a separate consideration for regulators.

As engagement continues to increase between competition agencies with their privacy and consumer counterparts domestically, there is opportunity for robust engagement and consultation between jurisdictions to result in a more holistic and coordinated approach to the challenges posed by the intersection of competition, consumer, and privacy laws.

### 4. Final task and next steps:

A further webinar is proposed in early 2022. This will finish the series of four webinars which form Task 3 of the Project.

The next and final step of the Project is to create an ‘agency considerations’ document (Task 4). The agency considerations document will synthesise the information gathered through Tasks 1 to 3 of the Project and provide a useful tool for agencies considering intersection issues in policy and practice, including those issues which benefit from both domestic and international engagement with other agencies or regulators. It will likely cover considerations for agencies when dealing with intersection issues in their enforcement cases and market inquiries.

The co-chairs expect to finalise the agency considerations document by mid next year. We propose to develop a dedicated page for the Intersection Project on the ICN website that would become the home for the ‘agency considerations’ document, as well as other supplementary documents and links to relevant sources.

While Task 4 will officially complete the Intersection Project, our common experience indicates an ongoing need for sharing experiences and guidance in this area. The co-chairs have identified further work which would be of value such as:

- Case studies for agencies when dealing with intersection issues in their enforcement cases and market inquiries, as well as models for domestic cooperation.
- An environmental scan of relevant work performed by other international networks or organisations.

While these matters are still under consideration, we consider it useful to foreshadow these potential areas for further work by the co-chairs on this important subject.

## Attachment A – Task 1: Issues identification

### ICN Steering Group Project – Competition law enforcement at the intersection between competition, consumer protection, and privacy

#### *Task 1: Issues identification*

#### **Introduction**

This paper identifies for competition agencies relevant issues at the intersection between competition, consumer protection and privacy (“intersection”). It is based on a review of academic literature and nearly a dozen agency responses<sup>9</sup>. The issues identified below consist of a structured list of descriptive and non-conclusive considerations that might arise at the intersection coupled with some open questions for further analysis, with the understanding that not all considerations may be appropriate in all jurisdictions due to the specific legal, legislative, regulatory or political regimes in which competition agencies operate.

In particular with the increased attention to the digital economy, competition agencies may be faced with business practices, including data practices, that raise also consumer protection and/or privacy concerns.

#### Competition, consumer, and privacy law and policy

*Competition law and policy* aim at ensuring that, through competitive markets, consumers have the widest possible range of choice of goods and services at the lowest possible prices. Competition law and policy aim at ensuring the functioning of the competitive market. Thus, competition law and policy undertake to prevent certain types of conduct that interfere with competition, notably restrictive agreements, especially cartels, harmful conduct by a monopolist or dominant firm and anticompetitive mergers.

*Consumer law and policy* aim at ensuring that consumers are able to exercise informed economic choices. Consumer policy may address, among other things, information asymmetry as between sellers and buyers, false and misleading advertising, and contract terms that are not understandable or disproportionate.

*Privacy law and policy* aim at ensuring personal data protection, defining when, how and to

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<sup>9</sup> This paper was prepared by the Italian Competition Authority with the contribution of the Bundeskartellamt, DG Competition, US DoJ and US FTC. An annex to this paper includes a bibliography of the reviewed literature. Some articles are cited in the paper for reference with the label “ref. [number of the article]”.

what extent information about a person is collected, processed and communicated by and between undertakings. Privacy legislation, where existing, tends to provide basic protections to consumers and data subjects, as well as affording rights to better control their data. In particular, most jurisdictions operate a consent-based regime (ref. 3 and 76), which provides consumers the ability to control how their data are collected and used by agreeing or withholding their consent. In addition, in some jurisdictions, data protection legislation confers other rights including the right to data portability (ref. 45 and 65).

Sometimes the different above-described regimes may complement each other, while in other circumstances tensions may arise. In some instances, competition agencies may be the best placed authority to tackle directly a specific data practice as an anti-competitive conduct, while in others they may rely on privacy and/or consumer protection authorities.

#### Consumer data and the data value chain

Concerns about consumer data tend to be at the center of issues related to the intersection. The focus on consumer data<sup>10</sup> practices is driven by many factors, including the increased use of data and computing power to offer ever more complex price menus,-like price discrimination for consumers and yield management for companies (ref. 2, 18); the development of behavioral economics (ref. 11) and a greater academic understanding of interactions between competition and consumer concerns; the growth of the tech sector and user data as “payment” for products and services (ref. 19), and the related value of user data for targeted advertising, product improvement, as well as the risk that data can act as a barrier to entry.

In this context, scholars, practitioners and policymakers are debating whether and to what extent data are related to potential market failures in digital markets, such as market power, information asymmetry, externalities and bounded rationality.

This involves an understanding of consumer data value chain. Businesses collect, process and use consumer data in many ways. The value chain can be simplified to data i) collection/accumulation, ii) access and sharing and iii) utilization/personalization (ref. 76). These are briefly described below.

*Data collection/accumulation.* Consumer data may be collected in a number of ways: for instance, volunteered explicitly by a consumer as part of its interactions with businesses;

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<sup>10</sup> The term “consumer data” indicates data concerning consumers, where such data have been collected, traded or used as part of a commercial relationship. This term is also broader than “personal data” (the focus of privacy and data protection legislations) since it may also capture data concerning consumers even where such data cannot necessarily be traced to the individual.

observed in the course of interacting with a website or using a service, device or application; and inferred from other data. Typically, but not always, the entity collecting data is also the one who determines the purposes for and the manner in which such data is, successively, processed. Lastly, data separation can be mandated by competition agencies as a remedy to a competition infringement or to a merger/acquisition.

*Data access and sharing.* Businesses in charge of the data processing may have different incentives in sharing the data under their control. Data access or sharing initiatives can be voluntary, such as within a contractual arrangement to develop a complementary product. In addition, businesses can sell consumer data to third parties (potentially subject to consumer approval or anonymization, depending on the regulatory regime in place). Moreover, data access or sharing can be mandated by competition agencies as a remedy to a competition infringement or to a merger/acquisition. Lastly, in some jurisdictions businesses may be required to share data by law.

*Data utilization/personalization.* Businesses can use the consumer data they have collected in a variety of ways, including, to train machine learning and other forms of analysis underpinning artificial intelligence systems; to increase the quality or functionality of their core products or services and develop new related ones; offer consumers greater personalisation (including, possibly, personalised pricing or offers); sell third parties' advertising products or other targeted services.

Part I of this paper focuses on how competition law enforcement accounts for privacy and personal data issues. Part II presents examples of how the interaction of competition, consumer and privacy regimes can mutually support one another. Part III describes ways the interaction of these disciplines may lead to tensions and trade-offs. The final section looks at interagency coordination.

## **I. How does substantive competition assessment account for privacy and personal data issues?**

Data issues arising at different steps of the data value chain can be considered in a competitive assessment.

Competition agencies may be willing to take into consideration data at the collection/accumulation step when it can be considered equivalent of a price increase or quality

decrease (ref. 15, 30). Data accumulation may decrease quality if its collection reduces privacy, when privacy is valuable to consumers and/or an important aspect of quality competition in the relevant market considered (ref. 48). In other cases, privacy may be considered just another good (ref. 23).

More specifically, competition agencies can consider:

- whether there exists a market for data (ref. 1, 5, 21), assessing whether data is a good in itself (e.g., in the case of trading of personal data);
- whether a merger affects the level of privacy offered in the market or whether it should defer to privacy legislation (ref. 73);
- whether there may be exclusionary abuses of dominant position/monopolisation under traditional theories of harm - such as the possible tying of privacy notices (ref. 16) – as suggested in the reviewed literature;
- whether there may be exploitative abuses of dominant position (in jurisdictions where it is an infringement of competition) resulting in the reduction of privacy protection below competitive levels, and/or collecting personal data above competitive levels, or whether it should defer to privacy/consumer protection legislation (ref. 9, 14, 49);
- whether there may be anticompetitive agreements among competitors concerning privacy as any other agreement concerning an element of competition such as:
  - ✓ an agreement to exchange information on planned changes on privacy policies (ref. 24); or
  - ✓ an agreement not to introduce privacy enhancing measures or technologies or to interpret legally binding privacy standards in a restrictive and uniform manner (ref. 48).

Data utilization/personalization is another step of the data value chain where competition enforcement may consider data issues. With the advent of tracking technologies, it has been argued that the willingness to pay of each user can be estimated very precisely and prices can be determined accordingly. The use of data can improve firms' ability to provide personalised services as well (ref. 62). At the same time, this practice might raise potential competition concerns (ref. 78): in some circumstances it might be possible to qualify personalised pricing as an exclusionary abuse, specifically whenever firms use their pricing strategies to apply lower prices to rivals' customers, in an attempt to foreclose the market; in jurisdictions where

exploitative abuses are pursued under antitrust law, personalised pricing could be conceived as a form of excessive or unfair pricing, under the rationale that some consumers are charged higher prices for reasons not related to costs.

In general terms, from an economic point of view, antitrust intervention against data personalization (which includes not only personalised prices and/or services but also targeted advertising and personalised product recommendations or rankings) may be appropriate in a limited number of circumstances as it can increase static and dynamic allocative efficiency. For competition agencies that implement a consumer welfare standard, interventions could in theory be possible to deal with the impact on distribution outcomes that can arise when surplus is transferred from consumers to producers, while for those that apply a total welfare approach, spaces for interventions might be even more rare.

Also, from a legal perspective, competition agencies might be faced with the challenge to tackle discriminations aimed directly at consumers and not more traditional ones targeting undertakings. Moreover, in jurisdictions where it is an infringement, if the possible exploitation of consumers is to be pursued, competition agencies would need to deal with the comparison of the impact of personalisation on the surplus of two different groups of consumers, dealing with a negative impact on the ones with the highest willingness to pay and a positive impact on the ones with the lowest willingness to pay.

Prohibiting price discrimination may result in firms collecting data in order to discriminate in other ways, for example applying different sales services (ref. 11 and 62).

## II. Intersection of competition and consumer and privacy goals: areas of mutual support and challenges in selecting the appropriate tools

There are cases where the intersection provides mutual support; that is, where consumer and privacy and competition regimes can work in mutually reinforcing ways. This is because the application of one regime may relate to the goals of the other, or a finding from one regime may be relevant to another, or to the analysis required by another; moreover, issues that present as a competition problem may on investigation turn out to also present a consumer (or privacy) issue, or vice versa.



In this context, privacy, consumer protection and competition can act as substitutes or complements or they could be totally unrelated to one another, depending on the specific facts of the business practice under consideration.

Three categories of mutual support are addressed below: transparency, fair data processing and portability.

### Transparency and informed choice

Firstly, consumer protection laws, which seek to remedy the market failure caused by asymmetric information, can promote competition by discouraging certain data practices.

At the collection step, consumers can be poorly informed about how their data are collected and, to the extent that there is an issue of asymmetric information, and businesses mislead or deceive consumers, there may be a role for consumer policy enforcement (ref. 11, 36).

In that regard, reducing information asymmetry between users and digital operators during the data collection phase might ensure that consumers receive adequate, precise and immediate information on why their data are collected and that users are able to exercise their consumer choices knowingly and effectively. The enforcement of consumer protection rules will not only provide direct protection for consumers, but also assume a pro-competition role to the extent that users are placed in a position to more consciously and actively exercise their consumer choices.

Also, a problem of asymmetric information might arise at the data utilization/personalization step as consumers may not be aware of how platforms use the data they provide or that are inferred from their behaviour. Consumers need to receive adequate information about how their data are used and make their choices accordingly. In that regard, consumer protection can bring awareness about the actual personalisation of prices/services giving the possibility to consumers to opt out if they wish (ref. 78).

Secondly, in a similar way, data protection rules can also provide support to competition goals when the compliance with privacy law contributes to create a level-playing field by promoting competition on privacy standards at the level set by the data protection legislation or even above. For example, appropriate enforcement of privacy legislation transparency rules can ensure that consumers have easy access to trustworthy information about how firms process their data, in turn empowering consumers to make informed choices about their preferred

privacy level when navigating digital markets and therefore stimulating competition on privacy standards.

Establishing in which circumstances competition and consumer or data protection regimes apply as substitutes or complements may depend on the facts as well as a jurisdiction's view on the appropriate role of its legal or regulatory regimes. For the same data collection or data utilization practices, some competition agencies would argue that intersection concerns related to such data practices can be better addressed through consumer protection or privacy law, while other competition agencies would use instead their enforcement powers to ascertain whether a data practice may amount to an antitrust violation, and complement the consumer protection or privacy regime regardless of whether the same data practice underlying the antitrust violation is also found to breach the consumer protection or privacy regime.

This difference in views raises a number of possible issues for further discussion:

- *To what extent a violation of data protection rules can be also configured as an abuse of dominant position? When should competition agencies assume that the enforcement of data protection legislation and consumer laws is not “enough” (to ensure that consumer preferences about privacy are reflected in the market) and antitrust intervention is warranted?*
- *Is there a regulatory failure from privacy agencies? Do privacy regulators lack the power to intervene or - despite having the necessary power - they do not enforce it sufficiently?*
- *Would only users of a dominant firm, as a consequence of antitrust intervention, enjoy a higher effective level of privacy protection?*
- *How should the competitive benchmark be defined in exploitative abuses of dominant position? When should competition agencies rely on legally binding privacy standards or on market-based privacy standards as competitive benchmark?*
- *How could exclusionary theories of harm based on privacy be framed?*
- *How would competition agencies deal with a code of conduct shared among competitors? Would these agreements be treated more favourably because they may enhance compliance with data protection rules or even going beyond them?*
- *To what extent data utilisation and personalisation practices that might potentially foster a firm's ability to offer better and innovative products could also be in contrast with the objectives of consumer law and data protection rules?*

The above considerations refer to the potential intersection and mutual support between, on one hand, competition and, on the other hand, consumer protection or privacy. However, there could be areas of intersection between privacy and consumer protection regimes as it can be difficult to distinguish between the right to be informed under consumer protection and privacy laws: for instance a data personalization practice could potentially be implemented without the full awareness and consent of consumers who may not be aware not only that firms keep detailed profiles about them based on data they have volunteered or that are directly observed by the firm, but also that businesses may infer preferences from consumer behaviour using advanced data analytics or machine learning tools. Whether this intersection could be of relevance from the perspective of a competition agency likely will depend on the facts and the legal and regulatory regimes in place in a particular jurisdiction.

### **Fair processing of data**

One of the fundamental principles of data protection regulations is that of lawful and fair processing which includes all procedures aimed at ensuring transparency, confidentiality, security as well as compliance with the principles of data minimisation, purpose limitation and storage limitation. The principle of lawful and fair processing becomes even more relevant in the context of the use of complex algorithms to analyse data, which may lead to unexpected detrimental results to individuals' interests.

Compliance with this principle generally may contribute to competition goals as it can deter businesses from implementing anti-competitive behaviour based on unfair data processing practices.

As for the mutual support category of transparency and informed choice described above, competition and privacy regimes may apply in parallel or as substitutes depending on the circumstances of the specific data practices under scrutiny and the approach of the competition agencies. Similar issues for discussion would apply.

### **Portability**

Data portability is a user's ability to download its data from a platform in a format that allows it to use the data somewhere else. Data portability has the potential to reduce barriers to entry, to stimulate innovation, and to lower switching costs for individuals. Accordingly, the right to

data portability is often attributed a competition-based rationale in addition to its data protection objective (ref. 45). Also, regulation allowing for data portability may make it easier for consumers to quickly move from a dominant firm that imposed unwanted privacy policies, thus countervailing the effect of an exercise of market power (ref. 34).

Despite being in general a useful tool, a general data portability right could differ in terms of scope and objectives from a specific competition law remedy, and therefore an effective competition remedy may need to go beyond the rights guaranteed by privacy legislation (ref. 45, 50, 76). Also, portability might help to boost consumer choice only where there is already the presence of several competitors.

Moreover, in order to make portability effective, operational details particularly matter as the use of different formats might not allow for the actual transfer of data between competitors (ref. 65) and consumers need to understand its usefulness in specific sectors so that it is not considered only as an abstract possibility.

Lastly, data standardization initiatives might offer a solution as they can enhance competition by increasing the incentives of firms to collect and share data (ref. 53, 74, 79 and 80), as well as facilitate portability of data.

Possible issues for further discussion:

- *When is data portability likely to be useful from a competition perspective?*
- *Which information should be considered portable?*
- *When is data standardization likely to raise privacy concerns as it can increase too much diffusion of consumer data?*
- *Should standardisation be a bottom up process from self-driven market forces or top down imposed by legislation?*
- *How can the right balance be found in relation to the appropriate level of standardisation that might be needed as it can, on the one hand, favour interoperability but, on the other hand, reduce product differentiation that seems to be especially relevant to succeed in the digital sector?*

### III. Intersection of competition and consumer and privacy goals: possible tensions

There are areas where academic literature has identified potential conflicts arising at the intersection. For example, it has been claimed that privacy legislation is capable of hindering unfettered competition, at least in some contexts. This could be the case, for example, if privacy legislation makes it more difficult for personal data to be shared among market players, including given the difficulty of identifying a valid justification for sharing, and of ensuring sufficient transparency for the consumers concerned. If the data in question is needed for rival firms to be able to compete, it is important that privacy rules are calibrated in a way that does not undermine competition. In addition, remedies taken in competition cases (for example to enhance third party access to data) should take account of the applicable rules on the consumer and privacy side, to the extent relevant to the competition case.

#### *Privacy legislation dampening competition*

Firstly, some literature indicates that the “notice-and-consent framework” adopted by some data protection regulations is inadequate to protect privacy (ref. 63-64). Indeed, there are not only differences between stated and revealed preferences (ref. 15), that determine the so-called “privacy paradox”, but also revealed preferences do not necessarily reflect the real underlying preferences of users as (ref. 76):

- preferences are not static but are malleable in that they depend in the way in which privacy options are framed; depending on the context, two identical situations might lead to different privacy behaviours (ref. 4);
- service operators may take advantage of the fact that consumers tend to stick with default privacy settings due to their status quo bias; in such a context, service providers may be able to nudge users in certain directions; and
- consumers are affected by some decision-making hurdles such as asymmetric information, bounded rationality and other cognitive/behavioural biases (ref. 7).

These demand-side market failures may inhibit competition on privacy. Consequently, a better understanding of how much consumers value privacy and engage with privacy notices appears to be needed (ref. 73).

Secondly, some literature considers that competition agencies rely too much on the effectiveness of data protection law, which might still not function well, in relation, for

example, to the combination of databases in mergers and effects of portability rights (ref. 3, 15). More awareness in relation to the powers of privacy regulators and how they use them is needed.

In addition, some literature indicates that consent-based models for privacy regulation may also adversely impact on competition as they may advantage and entrench larger incumbents, especially those that operate across multiple markets. This has been found to be particularly pronounced in markets with less price flexibility, such as in zero-price markets. Similarly, other research has found that the need for consent and compliance at each stage of the online advertising supply chain increases pressures for vertical integration (ref. 3, 12 and 76).

Moreover, it has been argued that privacy legislation might reduce the incentive to share data as it might determine liabilities and compliance costs, damaging relatively smaller rather than larger players. It can, consequently, strengthen the role of players which have the ability to process internally the data collected from various sources, leading to a possible increase of market concentration (ref. 12, 25, 47, 76).

Finally, some literature indicates that privacy legislation might also impact innovation and dynamic competition as it can significantly increase the cost to start-up a new technology venture (ref. 27, 33).

Possible issues for further discussion:

- *Would a better utilisation by privacy regulators of their statutory principles (in terms, for example, in Europe, of purpose limitation and data minimisation) lead to better competitive outcomes?*
- *Should competition agencies advocate for new privacy rules or for a more strategic interpretation of the existing ones?*
- *As today, generally, the privacy legal framework does not impose additional legal responsibilities on entities with “data power”, should competition agencies advocate for increased privacy legal responsibilities for firms with data power?*
- *Are there lower protections for consumers when their data are merged by the post transaction new entity as opposed to when their data are shared through data portability between two competitors?*
- *Should competition enforcement give more weight to factors that might offset the negative effects of the privacy legislation on competition? For example, in a merger of small firms,*

*should more weight be given to the ability of the merged firms to share data in ways that enhance efficiency that, as independent firms, privacy legislation might discourage?*

- *Does the possible reduction of investment consequent to the cost increase determined by privacy legislation reduce welfare? Or does, to the contrary, privacy legislation prevent firms from coming into existence that engage in harmful activity and could encourage new types of innovation in the longer run?*

1.

### **Forced sharing remedies**

The data access/sharing phase of the value chain seems to give rise to a possible tension between competition and privacy regimes. Sharing or granting access to consumer data to actual competing businesses, and/or potential new entrants or firms active in other markets, can raise different issues.

Besides the theories of competitive harm relative to quality considerations explored in the previous paragraph, other ones may relate to raising barriers to entry or rival costs through privileged/exclusive access to consumer data. The entrenchment of dominant positions may impede small competitors and new entrants to compete effectively or to enter due to the lack of comparable data plus the effects of scale economies/network effects and the tipping nature of some markets (ref. 44).

Under competition law, a dominant undertaking may be required only exceptionally to provide access to data that are indispensable and not easily duplicated in order to safeguard competition in one or more markets. Even in those circumstances in which data are an important source of competitive advantage and a barrier to entry, antitrust law does not necessarily require companies to supply the data they collect to their competitors. An obligation to supply could act as disincentive to invest in those activities through which data are collected and analysed that might bring benefits to consumers in the forms of innovative services.

More specifically, competition agencies in relation to possible mergers and exclusionary abuses of dominant position/monopolisation, can envisage a remedy mandating data access and might give consumers the opportunity to opt-out of sharing their data to address concomitant privacy concerns or to opt-in by granting their consents first, depending on the applicable data protection law. Moreover, competitors may agree to share among them data of their users raising competition concerns that can, however, be overcome if possible benefits in

terms of efficiency outweigh negative impacts on competition. Some literature also warns about the implications of data access in the case of mergers between data brokers (ref. 39).

Possible issues for further discussion:

- *Could dominant undertakings justify the refusal to grant access to the data they have collected, and/or generated, by invoking obligations under privacy law?*
- *Should consumers always be allowed to object and/or provide their consent to the sharing of their personal data when the sharing has not been mandated by law but rather by a competition authority as an interim measure or competition remedy?*

2.

#### **IV. Interagency cooperation**

Besides the above described issues that arise at the intersection, a more integrated approach among agencies is needed to ensure that:

- the objectives of one policy area are not undermined by the actions taken by the other agencies;
- the appropriate enforcement tools are used according to the facts of the case.

More specifically, competition, privacy, and consumer protection agencies together should share information and ideas in taking enforcement action and developing/advocating for policy change when and where needed. Collaboration might be also organisational, with a shared programme of work or reciprocal programmes to second staff in the other agencies. This might be especially needed towards the privacy regulator, that may seem more “culturally” distant than competition and consumer protection agencies. In particular, some scholars have discussed coordination problems between the competition agencies and data protection regulators which arise under certain scenarios (ref. 70).

Privacy and consumer protection regulators are internationally represented, respectively, by the Global Privacy Enforcement Network (GPEN) and International Consumer Protection and Enforcement Network (ICPEN) and the need might arise for ICN to liaise with them.

Possible issues for further discussion:

- *Is there a need to advocate for more convergent statutory obligations or a better alignment among the respective legislations?*



- *Is the creation of a specific mechanism for inter-institutional cooperation in specific cases involving data concerns at the intersection needed? For example, is there a specific need for an exchange of information between the different domestic agencies? Is there a specific need for competition agencies to have access to privacy expertise under the tight timeline of competition assessment of mergers?*
- *After the ICN has adopted the final document (“agency considerations document”) in the context of the present project, should it liaise with GPEN and ICPEN?*
- *How should competition agencies deal with the claims, made by firms, that, because of privacy legislation, they are prevented from disclosing personal data in RFIs or inspections, or are required to inform data subjects of such disclosures?*

## Attachment B – Task 2: Survey template

ICN Steering Group project:

*Competition law enforcement at the intersection between competition, consumer protection, and privacy*

Task 2 – Member input

The purpose of Task 2 is to gather the perspectives of ICN members to provide a practical focus for the project, including any real-world examples of the issues arising from this intersection in competition law enforcement cases. The tables below provides a template for ICN members to complete, to provide examples of **competition law agency action** and **current policy responses** that are relevant to the project.

**Table 1-1: Agency action:** Competition law investigations at the intersection between competition, consumer protection and privacy

Agency	Investigated parties/ case name	Category of investigation/case	Conduct	Stage of data value chain	Intersection with consumer and privacy laws	Remedy
<i>Name of agency – plus identification of whether agency is a multi-function agency</i>	<i>Party that is the subject of the enforcement investigation,</i>	<i>Specify the type of investigation/case: 1. Merger/acquisition 2. Abuse of dominance/ Monopolisation 3. Anti-competitive practices (please specify) 5. Other (please specify)</i>	<i>Description of the conduct, including:</i> <ul style="list-style-type: none"> <li><i>brief details of the data practices</i></li> <li><i>the relevant competition legislation that the conduct is alleged to contravene and</i></li> <li><i>the status of the investigation (e.g. in litigation, resolved with remedies [include a description of the remedy])</i></li> </ul>	<i>Specify the stage in the data value chain with which the conduct is concerned:</i> <ol style="list-style-type: none"> <li><i>Data collection</i></li> <li><i>Data processing</i></li> <li><i>Data utilisation</i></li> <li><i>Data sharing</i></li> <li><i>Other (please specify)</i></li> </ol>	<i>Description of how the matter intersects with, or requires consideration of, relevant consumer and privacy laws, including:</i> <ul style="list-style-type: none"> <li><i>whether data protection standards were considered an element of competition and any research or investigation supporting these conclusions</i></li> <li><i>a description of any relevant legislation</i></li> <li><i>how the agency took into account these issues in its enforcement matter,</i></li> <li><i>any liaison between the competition authority and the</i></li> </ul>	<i>Description of the remedy/penalty and how the competition law remedy may address any consumer or protection concerns.</i>

Agency	Investigated parties/ case name	Category of investigation/case	Conduct	Stage of data value chain	Intersection with consumer and privacy laws	Remedy
					<p><i>consumer protection and/or privacy/data protection authority and</i></p> <ul style="list-style-type: none"> <li><i>whether the same conduct resulted in any action under the consumer and privacy laws or changes to policy or legislation.</i></li> </ul>	

**Table 1-2: Agency action:** Market studies and inquiries examining issues relating to the intersection between competition, consumer protection and privacy

Agency	Description of market study/inquiry	Enforcement investigations/cases considered	Intersection between competition, consumer and privacy laws	Outcomes
<i>Name of agency – plus identification of whether agency is a multi-function agency</i>	<i>Description of market study/inquiry, including the origins, progress and results of the market study/inquiry and the markets/sectors examined</i>	<i>Description of any enforcement investigations/cases considered (can cross-reference to Table 1-2)</i>	<p><i>Description of any consideration of relevant competition, consumer and privacy laws, including:</i></p> <ul style="list-style-type: none"> <li><i>a description of any relevant legislation considered</i></li> <li><i>any examination of enforcement matters or investigations that considered these issues,</i></li> <li><i>any liaison between the competition authority and the consumer protection and/or privacy/data protection authority and</i></li> <li><i>whether the consideration of this intersection between laws led to any action under the competition, consumer and privacy laws or changes to policy or legislation.</i></li> </ul>	<i>Findings and recommendations of the study/inquiry</i>

**Table 1-3: Policy responses:** Consideration of current and proposed laws, guidelines, etc aimed at data protection, data mobility and/or data interoperability

<b>Jurisdiction</b>	<b>Legislation/ guideline and status</b>	<b>Objective of the law/guideline</b>	<b>Consideration of competition policy in the regulatory impact statement or other supporting analysis</b>	<b>Any post-implementation evaluation of the competition impact of the policy</b>
<i>Name</i>	<i>Name, dates, status (eg, stage in legislative or government processes)</i>	<i>Identification of whether the policy change is aimed at addressing competition concerns (e.g. data mobility and interoperability requirements), consumer concerns or data protection/privacy concerns</i>	<i>Summary of the consideration given to competition policy issues in published material accompanying the law</i>	<i>Description of any key post-implementation evaluation by a government agency or commissioned by a government agency</i>

Please provide your completed template to [InternationalACCC@acc.gov.au](mailto:InternationalACCC@acc.gov.au)

Attachment C – Task 2: ICN member responses on: Market studies / sector inquiries relevant to competition, consumer and privacy law

Jurisdiction	ICN Member Agency	Market study / inquiry title	Description of market study / inquiry	Outcome
Albania	Albanian Competition Authority	Market Study in Competition and Data Protection	<ul style="list-style-type: none"> <li>Market study considered the implementation of the GDPR and competition law.</li> <li>Looked at relevant European cases on big data, mergers and abuse of dominant market power cases.</li> </ul>	<ul style="list-style-type: none"> <li>Recommended future cases be taken on data interoperability and data transfer.</li> <li>However no further investigations took place arising from this study.</li> </ul>
Australia	Australian Competition and Consumer Commission (ACCC)	Digital Platform Services Inquiry	<ul style="list-style-type: none"> <li>A five year ongoing inquiry with six-monthly interim reports that monitor the markets for the supply of digital platform services.</li> <li>The inquiry is required to take into consideration the intensity of competition in the markets for the supply of digital platform services (including concentration of power), and practices of individual suppliers which may result in consumer harm.</li> <li>The inquiry is not to review the operation of any Australian law relating to privacy.</li> </ul>	<ul style="list-style-type: none"> <li>The <a href="#">first interim report</a> (published 23 October 2020) provided an in-depth analysis of online private messaging services in Australia and updated previous ACCC analysis in relation to search and social media. It did not make any recommendations but did reaffirm a number of recommendations made by the ACCC's previous Digital Platforms Inquiry Final Report.</li> <li>The <a href="#">second interim report</a> (published 28 April 2021) provided an in-depth consideration of competition and consumer issues associated with the distribution of mobile apps to users of smartphones and other mobile devices. It specifically focuses on the two key app marketplaces used in Australia, the Apple App Store and the Google Play Store.</li> <li>Future reports may make independent recommendations, and/or lead to ACCC action to address issues or conduct that raises concern under the Competition and Consumer Act.</li> </ul>

Jurisdiction	ICN Member Agency	Market study / inquiry title	Description of market study / inquiry	Outcome
		Digital Advertising Services Inquiry	<ul style="list-style-type: none"> <li>The inquiry focuses on the competitiveness, efficiency, transparency, and effectiveness of markets for supply of ad tech services and ad agency services.</li> <li>The final report must be provided to Government by 31 August 2021.</li> </ul>	<ul style="list-style-type: none"> <li>The <a href="#">Preliminary Report</a> was published on 28 January 2021.</li> <li>The Final Report may include recommendations for law or policy change and may lead to ACCC action to address behaviour that raises concerns under the Competition and Consumer Act.</li> </ul>
		Digital Platforms Inquiry	<ul style="list-style-type: none"> <li>Inquiry into the impact of digital search engines, social media platforms and other digital content aggregation platforms on the state of competition in media and advertising markets, in particular in relation to the supply of news and journalistic content, and the implications of this for media content creators, advertisers and consumers.</li> </ul>	<ul style="list-style-type: none"> <li>The <a href="#">Final Report</a> (published 26 July 2019) made 23 recommendations relating to law and policy changes.</li> <li>Among these recommendations were a number that related specifically to privacy and data protection, including recommendations for reform to Australia's privacy law to ensure consumers are informed and protected in relation to how their data is collected and used.</li> <li>Some of these recommendations have been <a href="#">accepted by the Government</a> and are being progressed.</li> </ul>
Canada	Competition Bureau Canada (CCB)	Market Study on Technology-led innovation in the Canadian financial services sector	<ul style="list-style-type: none"> <li>This Market Study (<a href="#">completed December 2017</a>) was to examine structural and regulatory barriers faced by entrants and potentially impeding innovation and competition in the payments, lending and investment sectors. This included but was not limited to, barriers presented by limited access to consumer data and key infrastructure.</li> </ul>	<ul style="list-style-type: none"> <li>Recommendations to regulators and policymakers resulting from the study included but were not limited to recommendations that: <ul style="list-style-type: none"> <li>regulators and policymakers examine the benefits of an Open Banking-like regime to reduce barriers to competition and facilitate consumer switching</li> <li>rules and regulation be principles-based, technology-neutral, activity-based, and risk-based to ensure consumers receive the same</li> </ul> </li> </ul>

Jurisdiction	ICN Member Agency	Market study / inquiry title	Description of market study / inquiry	Outcome
				<ul style="list-style-type: none"> <li>protections no matter their service provider</li> <li>○ regulations not stifle innovation and competition in the digital era.</li> </ul>
Europe	European Commission	Consumer Internet of Things Sector Inquiry	<ul style="list-style-type: none"> <li>The inquiry will consider the nature, prevalence and effects of potential competition issues in the sector for the Internet-of-Things for consumer-related products and services in the EU.</li> <li>This follows early indications that certain company practices may structurally distort competition. These practices include restrictions on data access and interoperability, self-preferencing and practices linked to the use of proprietary standards.</li> </ul>	<ul style="list-style-type: none"> <li>Launched in <a href="#">July 2020</a>, a preliminary report is expected to be published in the first half of 2021 with a final report to follow mid-2022.</li> <li>If the inquiry identifies specific competition concerns, it could result in investigations to ensure compliance with EU competition rules.</li> </ul>
		e-commerce Sector Inquiry	<ul style="list-style-type: none"> <li>Inquiry focused on barriers to cross-border online trade in e-commerce in relation to consumer goods and digital content (including geo-blocking).</li> <li>The inquiry considered competition law and did not consider consumer and privacy laws.</li> </ul>	<ul style="list-style-type: none"> <li>The final report was published in <a href="#">May 2017</a>.</li> <li>Resulted in several infringement proceedings concerning vertical restrictions (resale price maintenance, territorial restrictions).</li> <li>The final report highlighted the widespread collection of consumer personal data.</li> </ul>
France	Autorité de la concurrence	Sector inquiry into data-related markets and strategies	<ul style="list-style-type: none"> <li>This sector inquiry was launched in the wake of the Autorité's joint report with the German Bundeskartellamt titled 'Competition Law &amp; Data', <a href="#">published in 2016</a>. The joint report analysed the implications and challenges for competition authorities resulting from data collection in the digital economy as well as in other industries.</li> </ul>	<ul style="list-style-type: none"> <li>The joint report that led to the sector inquiry found that while privacy concerns are not, in and of themselves, within the scope of intervention of competition authorities, competition law is not irrelevant to personal data.</li> </ul>
		Data processing in the online advertising sector	<ul style="list-style-type: none"> <li>The 2019 <a href="#">Opinion</a> analysed the functioning of the market for online "display" advertising, dominated by Google and Facebook, including how data is collected and processed in this market.</li> </ul>	<ul style="list-style-type: none"> <li>Several litigation investigations relating to the online advertising markets were opened, which are still ongoing and should be concluded in 2021.</li> <li>There are in particular two on-going cases which concern (i) intermediation services in</li> </ul>

Jurisdiction	ICN Member Agency	Market study / inquiry title	Description of market study / inquiry	Outcome
				the online advertising sector and (ii) massive data collection practices.
		Sector-specific inquiry on fintechs	<ul style="list-style-type: none"> <li>Launched in January 2020 as part of its ongoing sector-specific inquiry on new technologies applied to financial services and, in particular, to payment services</li> </ul>	<ul style="list-style-type: none"> <li>An Opinion is forthcoming, but is likely to include analysis of issues relating to the collection, processing and sharing of personal payment data.</li> </ul>
Hungary	Hungarian Competition Authority (GVH)	Market Analysis on Digital Comparison Tools	<ul style="list-style-type: none"> <li>In <a href="#">March 2020</a>, the GVH released its market analysis on digital comparison tools, which examined comparison tools in sectors for retail, accommodation booking and financial products.</li> <li>The study included analysis of data processing activities of digital comparison tools and the information provided to consumers.</li> </ul>	<ul style="list-style-type: none"> <li>The GVH recommended that operators display information to consumers about how their data is or may be collected and used for targeted advertising, and that this information should be provided in an upfront and comprehensible manner.</li> </ul>
Italy	Italian Competition Authority (AGCM)	Big Data Sector Inquiry	<ul style="list-style-type: none"> <li>Sector inquiry into big data carried out jointly by the AGCM, Communications Regulator and Data Protection Authority, with the Final Report released in <a href="#">February 2020</a>.</li> <li>The inquiry involved hearings with academic experts and numerous market operators active in sectors such as telecommunications, media, digital platforms, information technology, insurance and banking; requests for information; and an online survey on a sample of more than two thousand Italian users, to investigate the nonmonetary relationship between the users who provide personal data and the companies that provide digital services.</li> </ul>	<ul style="list-style-type: none"> <li>The report made a number of policy <a href="#">recommendations</a> including but not limited to: <ul style="list-style-type: none"> <li>Information asymmetry between users and online marketplaces is a crucial policy goal which can be reduced by data protection and consumer laws;</li> <li>Data portability should be extended (separate to GDPR) through measures that both increase competition and enhance consumer protection.</li> </ul> </li> <li>AGCM will also be considering whether any conduct considered in the course of the inquiry raises concerns under the Competition Act.</li> </ul>
Singapore	Competition and Consumer	Big Data Market Study ('Data:	<ul style="list-style-type: none"> <li>Market study published in <a href="#">August 2017</a> in collaboration with the Intellectual Property Office of</li> </ul>	<ul style="list-style-type: none"> <li>Reaffirmed that where data protection is a non-price factor of competition, the treatment of personal data may affect how CCCS</li> </ul>



Jurisdiction	ICN Member Agency	Market study / inquiry title	Description of market study / inquiry	Outcome
	Commission of Singapore (CCCS)	Engine for Growth')	<p>Singapore (IPOS) and the Personal Data Protection Commission (PDPC).</p> <ul style="list-style-type: none"> <li>The study sought to explore the implications of the proliferation of data analytics and data sharing on competition policy and law, personal data protection regulation and intellectual property law. It considered six sectors – digital media, finance, healthcare, consumer retail, land transport and logistics.</li> </ul>	considers and assesses the competitive dynamics of the market.
		Online Travel Booking Market Study	<ul style="list-style-type: none"> <li>Market study published in <a href="#">2019</a> on the online provision of booking services for flight tickets and hotel accommodation to Singapore consumers, commercial arrangements and practices of online travel booking providers and competition and consumer protection issues that can arise.</li> </ul>	<ul style="list-style-type: none"> <li>The market study identified certain practices that gave rise to potential consumer and competition issues, including personalised pricing, price discrimination and lack of consent about use of personal data for these purposes.</li> <li>The market study made recommendations about how online travel booking providers should conduct themselves in order to protect consumers and avoid misleading or deceptive practices, and avoid creating competition concerns.</li> <li>Following the market study, the CCCS continues to monitor market developments in the industry.</li> </ul>
Sweden	Swedish Competition Authority (SCA)	Digital Platforms Sector Inquiry	<ul style="list-style-type: none"> <li>A sector inquiry into the functioning of digital platforms in Sweden was initiated in November 2019 and is <a href="#">ongoing</a>. The study aims to investigate whether there are structural competition problems related to digital platforms and if so, whether existing tools are sufficient to address the problems.</li> <li>The inquiry is focusing on digital advertising, digital marketplaces, app stores, audiobooks and restaurant food delivery.</li> </ul>	<ul style="list-style-type: none"> <li>The results of the sector inquiry are expected to be released in the first quarter of 2021.</li> <li>However, the public consultation to date has revealed two main recurring concerns: first, that digital platforms restrict other companies' access to customer data (eg, where a company uses a large platform to sell its products, that platform can prevent the seller from accessing data about its customers which it can use to develop its own services</li> </ul>

Jurisdiction	ICN Member Agency	Market study / inquiry title	Description of market study / inquiry	Outcome
				and offerings); and second, that large platforms that operate in multiple neighbouring markets leverage their power in one market to grow in the other.
Turkey	Turkish Competition Authority (RK)	Sector Inquiry into the intersection of Competition, Consumer Protection and Privacy on E-Marketplace Platforms	<ul style="list-style-type: none"> <li>A sector inquiry into the intersection of competition, consumer protection and privacy on e-marketplace platforms is currently being conducted (launched July 2020) to understand the potential for e-marketplaces to engage in exclusionary and/or abusive practices relating to pricing, platform services or supply.</li> </ul>	<ul style="list-style-type: none"> <li>The study is ongoing, but once completed is intended to assist in building efficient policies based on understanding of the market.</li> </ul>
UK	Competition and Markets Authority (CMA)	Online Platforms and Digital Advertising Market Study	<ul style="list-style-type: none"> <li>Final report published in <a href="#">July 2020</a>, following a year-long study into digital advertising and online platforms. The market study focused on digital platforms which obtain material revenues from online advertising such as Google and Facebook.</li> </ul>	<ul style="list-style-type: none"> <li>No competition investigations were opened as a result of the market study, but recommendations were made for: <ul style="list-style-type: none"> <li>A code of conduct to address the effects of entrenched market power of particularly powerful digital platforms (those with 'strategic market status'),</li> <li>Pro-competitive interventions to address the source of market power of those platforms, and</li> <li>The establishment of a new body, the 'digital markets unit' to implement these functions.</li> </ul> </li> <li>At the same time the study was published, the CMA also announced the creation of the '<a href="#">digital regulation cooperation forum</a>', which aims to facilitate coordination between the CMA, the data protection regulator (ICO) and the communications regulator (Ofcom).</li> </ul>