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**The intersection between competition and data privacy – Note by Greece**

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Antonio CAPOBIANCO  
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08

**JT03545549**

## Greece

### 1. Introduction

1. This Note overviews the intersection between data protection and competition law which has become an increasingly important issue in the new continuously evolving digital landscape. It first delves into the recent experience of the Hellenic Competition Commission (“HCC”) in the merger context, focusing on the privacy concerns and implications assessed by the authority.

2. It then shifts focus to the interaction between the data protection and competition law, highlighting on the HCC’s initiatives and the cooperation it has developed with the national data privacy regulator, so that they can ensure the effective application and enforcement of their respective policy realms.

### 2. Is privacy an antitrust problem? The HCC’s experience

3. The digital economy is characterized by rapid technological developments and the combination of economic and digital power. The corresponding unprecedented magnitude of data collection and the indispensability of online platforms for markets and citizens raise challenges for both competition and data privacy enforcers. New touchpoints are rapidly appearing as antitrust and data privacy laws both focus on the digital economy.

4. Interactions between antitrust and data privacy are the most common in the digital sector. From online advertising, search and social media, to location- based services, many digital businesses are driven by personal data processing and data-driven services have become deeply ingrained in consumers’ everyday lives. This has placed the digital economy front and center in data privacy enforcement. The size and economic importance of many digital platforms has made them a strategic priority for competition law<sup>1</sup>.

5. In this new digital landscape, privacy enforcers are intensely focused on protecting individuals from unlawful data processing, while competition law focuses on the role of data in driving competition, particularly in the digital economy. These enforcement regimes are interacting in the digital economy, where privacy and personal data are substantial to competition.

#### 2.1. Privacy considerations in HCC’s practice- Imposition of remedies with privacy implications

6. Data privacy has become material to competition considerations especially in digital markets due to the continuously evolving digital economy. A merger case with privacy considerations and implications was recently assessed by the Hellenic Competition Commission. The HCC examined various data- based theories of harm and determined that the competition concerns arising therefrom could be alleviated and effectively addressed through the imposition of behavioral remedies.

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<sup>1</sup> Douglas, Erika, Digital Crossroads: The Intersection of Competition Law and Data Privacy July 6, 2021, Temple University Legal Studies Research Paper No. 2021-40, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3880737](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3880737)

7. In particular, on April 18, 2022, the Hellenic Competition Commission unanimously approved Delivery Hero's acquisition of sole control over companies (a) Alfa Distributions SA, (b) Inkat SA, (c) Delivery.gr Single Member P.C. and (d) E-table Online Restaurant Reservations Single Member P.C. ("E-table Single Member P.C.") subject to commitments offered by Delivery Hero<sup>2</sup>.

8. In Greece, Delivery Hero (a Berlin-based, digital platform which is mainly active in the provision of online ordering and food distribution services in more than 40 countries around the world) operates the online delivery platform "e-food", through which consumers connect with restaurants, supermarkets, convenience stores and other local stores as well as the online convenience store "e-food market".

9. Delivery.gr Single Member P.C. operates the online platform "delivery.gr", which provides online intermediation services (ordering) for restaurants, supermarkets, convenience stores and other local stores. E-table Single Member P.C. provides online intermediation services for reservations in restaurants, through the "e-table platform"<sup>3</sup>.

10. The HCC defined the relevant markets for the transaction in question as primarily the market for online intermediation; the market for the supply of supermarket products; the market for the supply of grocery products; and the market for specialised local stores for coffee, fast meals etc. Regarding those markets, the merged entity's e-food and delivery.gr platforms would have a very high combined market share on the market for online intermediation for the sale of groceries.

11. The platforms that Delivery Hero operates (e-food, instashop) as well as the target companies' platforms (delivery.gr, e-table) are online-intermediation platforms, through which their providers address two distinct categories of customers: a) the business users and b) their final consumers/ end-users. The operation of these platforms consists of intermediating between the two above-mentioned different categories of platform users, in order that, through the latter, the two categories of users can 'communicate' and achieve a transaction between them. In this sense, online intermediation platforms are defined as two-sided markets. A key feature of two-sided markets is the presence of strong direct and indirect network effects, as the value of the use of the platform by one group of customers depends on, and is determined by, the size of the platform's other group of customers. In the present case, the more final consumers/ end-users e-food platform acquires, the more benefit for the restaurants/business users results, since through the platform the restaurants can communicate and reach more final consumers/end-users<sup>4</sup>. Both e-food and e-table platforms have significant market power in the respective markets in Greece. The e-food platform is the leading delivery service having over 20 000 restaurant-business users and approximately one million end-users, while e-table is the largest online table reservation application in Greece.

12. The HCC's decision followed an in-depth investigation of the proposed merger between Delivery Hero and the target companies reviewing the merger for horizontal, vertical and conglomerate effects. The HCC's investigation revealed that the combination of the parties' activities in the market for online intermediation for restaurant reservations through the target's e-table platform and in the online intermediation market for food

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<sup>2</sup> See [HCC Decision No. 775/2022 \(press release\)](#)

<sup>3</sup> Alfa Distributions SA is active in the wholesale supply of consumer goods to supermarkets. Inkat SA is active in the wholesale supply of groceries and operates the retail grocery store chain Kiosky's.

<sup>4</sup> HCC Decision No. 775/2022, paras. 63-64.

ordering, through Delivery Hero's online platform e-food, would give rise to conglomerate effects.

13. The HCC considered theories of harm related to the collection and combination of data from a company that offers more than one platform services. Given that both the e-food and the e-table platforms have significant market power in the respective markets, as a result of the transaction, the merged entity would have both the ability and the incentive to bundle the two services vis-à-vis their business users, thereby reducing the ability or incentive of e-table's competitors to compete effectively on the market for online restaurant reservation services. Consequently, important barriers to entry/or expansion would be established, and these would be able to keep market concentration high for the foreseeable future.

14. Further, according to HCC's assessment, the combination of end-user data collected from e-food and e-table would allow the merged entity to implement personalized promotion strategies, thereby giving it a competitive advantage to such a degree that the merged entity's competitors would no longer be able to compete effectively.

15. The transaction was cleared by the HCC regarding horizontal effects of the merger without remedies. The HCC considered that following the transaction, the combined entity's e-food and delivery.gr platforms would have a high combined market share on the market for online intermediation for the sale of groceries, however, given the bargaining power of other supermarkets, it concluded that the merged entity would not be able to substantially restrict competition on the market, compared with the pre-merger situation.

16. With respect to conglomerate effects arising from the transaction, the HCC cleared the merger with the adoption of the behavioural commitments proposed by Delivery Hero, in order to address concerns on such effects. In particular:

- Delivery Hero (especially through e-food) unreservedly undertook, in the Greek territory, the obligation not to bundle the online intermediation services for food ordering with the online reservation services in restaurants (through e-table) when offered to business users (i.e., restaurants). The latter would be free to purchase each of the services separately.
- The company also unreservedly undertook, in the Greek territory, the obligation not to provide special discounts to business users and/or not to charge reduced commissions/fees when these business users buy online intermediation services for food ordering (especially from e-food) as well as online restaurant reservation services (either through the e-food platform, in case the e-table service is integrated appears on it, or directly from the e-table).
- In addition, Delivery Hero would not use end-user data collected from the e-food platform to implement personalized promotion strategies for the e-table services and vice versa, unless end users have previously provided consent to receive personalized advertising and marketing communications, in accordance with existing data protection rules.

17. According to the HCC's decision, implementation of the commitments would be monitored by a specially appointed Monitoring Trustee. The duration of the commitments was set for two (2) years from the date of completion of the transaction, i.e. acquisition of control over E-Table Single Member P.C. At the end of the second year of adoption of the commitments, the extension of the duration of commitments for one (1) more year shall be considered based on quantitative data submitted to the Trustee, whereas the company reserves the right to request the HCC to review the remedies in the event that market conditions change significantly and permanently. In this respect, the HCC may decide to

extend the duration thereof by one (1) year, depending on the evolution of the market dynamics.

## 2.2. Privacy related theories of harm developed and used in HCC's practice

18. In the review of the merger case, the HCC considered theories of harm related to the collection and combination of data from a company that offers more than one platform services.

19. As a part of its assessment of the concentration, the HCC took into account the concerns regarding the competitive advantage that e-table might obtain from the access to personal data of end-users (e.g. related to their geographical location and preferences), which it would be able to retrieve from the e-food platform. A main concern examined by the HCC was that the merged entity, through the combination of the two platforms, e-food and e-table and the collection and processing of users data, either of business users or final consumer/end-users to achieve a better targeting in terms of personalized rebates or personalized advertising, which could potentially lead to the creation a significant competitive advantage for the merged entity, with respect to competing digital ecosystems, thereby enhancing foreclosure effects on competitors through *data bundling* practices, but also leading to exploitative effects in the relevant markets, for instance by limiting privacy.

20. The HCC further used in its assessment *envelopment* theories of harm, whereby a platform with dominance in one market to enter another platform market (whether the platforms are complements, substitutes, or unrelated) by bundling or tying the two platform products. As a result of network effects (from the dominant platform's existing user base) and economies of scope (due to shared technology and data), the competing platforms in the second market would be unable to compete<sup>5</sup>. The HCC considered the strategy of acquisition of e-table platform as a potential envelopment strategy of Delivery Hero, which could prevent/restrict access by competitors the vertical market of the platform it controls in data (or in technological data-driven facilities/algorithms) under the pretext of protecting its privacy of users, while at the same time providing access to it to undertakings that it controlled in the same markets.

21. A particular type of envelopment strategy, called "*privacy policy tying*", has been also assessed by the HCC. Such strategy involves a dominant firm obtaining data collection consent from its users in a broad set of circumstances. It then enters another market that features an overlapping user base with its original market (even if the products are unrelated) and uses its data collection consent to obtain data from the overlapping consumers in both markets. The platform sets out to dominate the new market by providing its product for free to all users, in effect "subsidized" by the origin market, and uses the data that it obtains from the new market to entrench its position in its origin market (assuming the data is sufficiently valuable and rare to do so). This entrenchment could be especially strong if the potential competition in the origin market could have come from the now-dominated new market<sup>6</sup>. In this respect, through the practice of privacy policy tying, the merged company could combine the data collected through two separate platforms, e-food and e-table, on the basis of a single consent of the overlapping users, thereby obtaining the incentive to strengthen its position in the new market through the value created by the combined data of the origin market, entrenching its leading position in the origin market.

<sup>5</sup> HCC Decision No. 775/2022, paras 570, 577 and OECD Roundtable on Conglomerate Effects of Mergers – Background Note, p. 26-27 [https://one.oecd.org/document/DAF/COMP\(2020\)2/en/pdf](https://one.oecd.org/document/DAF/COMP(2020)2/en/pdf)

<sup>6</sup> OECD Roundtable on Conglomerate Effects of Mergers – Background Note, p. 27

22. A privacy policy tying may also have may have exploitative effects by limiting consumer privacy. In this context, the HCC took into account concerns raised in the Meta (Facebook) case<sup>7</sup>, as regards the restriction of the right to privacy and the right of self-determination of users, especially with respect to the ability of a company with market power/dominant position (data controller) to impose consent of users to the use of their personal data, since that position is liable to affect the freedom of choice of those users and create a clear imbalance between them and the data controller; as highlighted by the CJEU, this is an important factor in determining whether the consent was in fact validly and, in particular, freely given<sup>8</sup>. In the HCC merger case, e-food platform processes for promotional purposes the following data of its existing users: contact data (name, e-mail address, phone number, ID device), location data (address, postal code, city, country, longitude, latitude), and other information: order history, selection stores, invoices, comments on orders, information about payment method, delivery address and successful orders. It is worth noting that Delivery Hero appeared to leave open the possibility in the future of combining the data that would be collected by the e-food and e-table platforms, once e-table's service is included in the primary platform, stating that “[.] in case the e-table service is integrated into the efood platform, then the same approach [i.e. regarding data processing] will be used, which applies to all existing efood users.”

23. Further, another theory of harm taken into account by the HCC relating to data collection and use is that through *vertical integration* (through vertical market concentration), the merged entity may gain access to commercially sensitive information about the activities of its competitors active in the upstream or downstream markets, which would allow it to implement less aggressive pricing policies in the downstream market to the detriment of consumers, or to put competitors at a disadvantage in the downstream market. This theory of harm was examined in both the Apple/Shazam<sup>9</sup> and Google/Fitbit<sup>10</sup> mergers and the CVC/Ethniki<sup>11</sup> merger.

24. In HCC's view, the above data bundling strategies may have a negative effect on the privacy of the users of the platforms and further create barriers to entry into the markets in question, thus resulting in a decrease of the ability or incentives of competitors to compete effectively.

25. More specifically, as highlighted in HCC's decision, competing platforms may not have easy access to consumer data, since, ready-to-eat food delivery platforms such as e-food do not sell (or share) data they collect to other players (e.g. advertising agencies), with the consequence that there is no market where such data is sold, and if there was, it would consider any effects of concentration on advertising markets. The HCC also considered that there is an imminent risk that the merged entity would have the ability and incentive to engage in data bundling strategies, due to the effects it may have on its stock market value in the short or medium term, considering the range and quality of the data it would be able to collect on the consumer preferences, especially in the event of an increase in the number of restaurants collaborating with e-table, a possibility which could not be ruled out given the capacity of the market and the relatively low penetration of online platforms in Greece.

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<sup>7</sup> Decision B6-22/16, BKA Facebook, 06 02 2019.

<sup>8</sup> CJEU - C-252/21 - Meta Platforms and Others v Bundeskartellamt, ECLI:EU:C:2023:537

<sup>9</sup> Case M.8788 – Apple/Shazam (6.9.2018).

<sup>10</sup> Case M.9660 – Google/Fitbit (17.12.2020).

<sup>11</sup> Case M.10301 – CVC/Ethniki (24.2.2022).

26. In addition, the possibility of sharing users' data through the integration of e-food and e-table platforms, if not in the short term, at least in the medium term or within a reasonable period of time, would have a negative potential impact on the privacy of users, given that even if the platform typically obtains the required consent for data use from users, the latter may not have the possibility, due to the market power of the e-food platform, to refuse a possible data bundling practice, subject to which, the users cannot use the e-food platform, unless they accept the data collected by e-food to be used for e-table (“*take-it or leave-it offer*”)<sup>12</sup>.

### 3. Complementarities and challenges

27. Competition and data privacy law are often described as complementary, because the two regimes both seek to benefit consumers. However, each legal realm has its own distinct objectives through which it pursues such consumer benefits: privacy law seeks to protect individual’s data privacy rights and interests, while antitrust law works to ensure efficient competition in the marketplace.

28. Data privacy legislation often contains objectives that emphasize the protection of rights or interests of individuals. A primary goal of data privacy law is to ensure that individuals have effective control over their data and can choose how it is processed. Competition law seeks to benefit consumers through a broad, economic efficiency prescription, rather than the individualized rights or interests. While the protection of privacy benefits individual consumers, competition achieves this benefit collectively, through economic efficiency.

29. Despite the different objectives, frameworks and regulatory approaches between competition law and data privacy law, synergies from cooperation between competition authorities and privacy regulators may lead to more coherent regulation to effectively address any challenges arising from the intersection of competition and privacy.

### 4. Co-operation

30. In Greece, the privacy regulator is the Hellenic Data Protection Authority ([HDDA](#)). HDDA is responsible for supervising the implementation of the provisions of the GDPR (Article 51(1), recital 123), Law 4624/2019 and other regulations concerning the protection of the individual from the processing of personal data. HDDA contributes to the consistent implementation of the GDPR throughout the European Union and to this end it cooperates with the supervisory authorities of the EU Member States and with the Commission.

31. Though no relevant experience exists so far on consulting HDDA for HCC’s case assessments, the two authorities, recognizing the need for a comprehensive and coherent approach to new challenges within the rapidly evolving digital landscape and business models, signed a Memorandum of Cooperation in August 2022<sup>13</sup>.

32. HCC and HDDA agreed on further tightening the links between them, sharing know-how and building on both Authorities’ experience with the aim of benefiting citizens, the economy and the public interest in general, while ensuring the freedoms and rights of individuals, in particular the protection of personal data, based on timely and effective

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<sup>12</sup> HCC Decision No. 775/2022, par. 587

<sup>13</sup> See press release [here](#)

cooperation and exchange of information and views, as well as providing mutual assistance in case examination and joint investigations, within their respective competences.

## 5. Conclusions

33. The evolving landscape of the digital economy requires a comprehensive and balanced consideration on the intersection of competition law and data privacy law. This interaction between the two legal realms demands cooperation across agency bounds to develop cohesive and effective enforcement strategies for the digital economy.

34. It has become more evident than ever that data protection and competition authorities can no longer achieve their goals in isolation, as separate enforcement of competition and data privacy law bears the risk to undermine enforcers' shared interests, creating overlap and unnecessary gaps or tension between the two areas of law. Effective cooperation between competition and data protection authorities is critical for a comprehensive approach and even more crucial in cases involving data-driven business models or data-related theories of harm.

35. The Hellenic Competition Commission recognizes the importance of cooperation with data privacy authorities in a constantly evolving digital landscape and the need to develop innovative strategies to address competition concerns in this dynamic environment. Through its efforts highlighted by the continuing and enhanced cooperation with the data privacy regulator and commitment to respond to new challenges, HCC may contribute more effectively to the achievement of the ultimate goal of benefiting consumers.