

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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The intersection between competition and data privacy – Note by Poland

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More documents related to this discussion can be found at
www.oecd.org/competition/intersection-between-competition-and-data-privacy.htm

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1. Introduction

1. From the perspective of the Polish Competition Authority (Office of Competition and Consumer Protection, UOKiK) the developments in the digital economy lead to an increasing number of overlaps between data protection and competition law. The growing interest of competition law and data protection law in their mutual relationship has become noticeable in the recent years. Drawing from the experience of competition law, it has been identified that non-compliance with data protection legislation may contribute towards establishing novel theories of harm.¹ Additionally, it remains within the scope of competition authorities' interests, how to address alleged pro-privacy justifications of potentially anticompetitive conduct.² From the perspective of data protection law, there is a growing interest in addressing the economically founded imbalance of power between online platforms and their users, especially with regard to the requirements of validity of consent.³

2. The different underlying conceptual foundations of competition law and data protection law have led to opening a regulatory dialogue between these two areas of law. In many cases, competition law and data protection law have the potential to support each other's objectives through coordinated enforcement. In particular, competition law offers a toolkit for assessing abusive reliance on alleged pro-privacy justifications of anti-competitive behaviour. Data protection law may not be sufficiently equipped to address the potential misuse of data protection concepts as a justification for otherwise harmful behaviour.

3. Further, one of the areas of complementarity between competition law and data protection law are the data-related provisions in ex ante regulations for digital markets. They may serve as a blueprint for novel theories of harm in antitrust enforcement. UOKiK does recognise the potential for referring to ex ante regulations for digital markets as a guidance towards recognising patterns of harmful conduct in the digital economy, including conduct concerning data processing.

4. Drawing from the experiences of the EU law and the Polish jurisdiction, this contribution presents the key areas of intersection between data protection and competition law and its procedural implications. One of the examples of the overlaps between data protection law and competition law is the preliminary investigation into the Apple App Tracking Transparency Framework, currently conducted by UOKiK.⁴ The investigation

¹ See Case C-252/21 *Meta Platforms* ECLI:EU:C:2023:537.

² See Competition and Markets Authority, Investigation into Google's 'Privacy Sandbox' browser changes, <https://www.gov.uk/cma-cases/investigation-into-googles-privacy-sandbox-browser-changes>.

³ See: European Data Protection Board 'Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms' (adopted on 17 April 2024), <https://www.edpb.europa.eu/our-work-tools/our-documents/opinion-board-art-64/opinion-082024-valid-consent-context-consent-or-en>. Noteworthy, the EDPB Opinion refers to the concept of "large online platforms", which potentially may include the DMA concept of "gatekeepers" and the DSA concept of "very large online platforms".

⁴ https://archiwum.uokik.gov.pl/aktualnosci.php?news_id=18091

concerns competition law implications of Apple’s policy to request consent from users for analysing their behaviour in third-party applications.

2. Intersection of competition law and data protection law

5. The relevance of data acquisition and data processing by online platforms as well as other digital undertakings underpins the development of the attention economy.⁵ However, access to user’s attention is prone to restrictions and limitations imposed by undertakings through their technological power to design access requirements. This can occur through the design of a platform, an operating system or other types of software. The power to restrict third-party access to user’s attention is especially visible in the digital advertising market. Within a broader turn towards establishing the so-called walled gardens, i.e. large-scale digital ecosystems built upon first-party datasets, alleged pro-privacy character of the conduct seems to serve as its justification.⁶ At the same time, available empirical data supports the claim that conduct which allegedly is privacy-motivated, leads to noticeable negative economic consequences for the markets.⁷

6. The risk of “regulatory gaming” is particularly significant at the intersection of competition law and data protection law.⁸ As rightly pointed out in the scholarship, it has become tempting for digital companies to weaponize privacy as a justification for potentially anticompetitive conduct.⁹ Accordingly, while privacy per se is unlikely to present an independent justification for anticompetitive behaviour, it is crucial for competition authorities to be capable of demystifying alleged pro-privacy character of the presented justifications. From the perspective of UOKiK, alleged privacy-related justifications of potentially anticompetitive conduct require a careful assessment on a case-by-case basis. While the EU law does not preclude competition authorities from addressing compliance with the GDPR¹⁰, cooperation with data protection authorities in that regard could be considered as beneficial.

7. From the perspective of UOKiK, an analysis aimed at exposing alleged privacy-related justifications may include an analysis of necessity and proportionality of the measure in question. Depending on the factual circumstances of a given case and the legal standard applied, other criteria may be required. In this context, it may be helpful to identify the minimum standard of necessity (i.e. necessary conduct) imposed by the privacy

⁵ See European Commission, Directorate-General for Competition, Montjoye, Y., Schweitzer, H., Crémer, J., Competition policy for the digital era, Publications Office, 2019, <https://data.europa.eu/doi/10.2763/407537>, 30.

⁶ See Klaus Wiedemann “Can Data Protection Friendly Conduct Constitute an Abuse of Dominance under Art. 102 TFEU?” (2023) Max Planck Institute for Innovation and Competition Research Paper No. 23-15, 28ff.

⁷ Laub, Rene and Miller, Klaus and Skiera, Bernd, The Economic Value of User Tracking for Publishers (April 14, 2024). Available at SSRN: <https://ssrn.com/abstract=4251233> or <http://dx.doi.org/10.2139/ssrn.4251233>; Aridor, Guy and Che, Yeon-Koo, Privacy Regulation and Targeted Advertising: Evidence from Apple's App Tracking Transparency (January 17, 2024). Available at SSRN: <https://ssrn.com/abstract=4698374> or <http://dx.doi.org/10.2139/ssrn.4698374>.

⁸ See Colangelo G. (2023) “The Privacy-Antitrust Curse: Insights from GDPR Application in EU Competition Law” ICLE White Paper 2023-10-12, 24.

⁹ Ibid.

¹⁰ Case C-252/21 *Meta Platforms* ECLI:EU:C:2023:537 [62].

legislation. Further, it may be beneficial to distinguish between the standard of necessity and a conduct going beyond that standard. Taking into account the special responsibility of a dominant undertaking not to distort competition, alleged privacy-friendliness of its conduct should not be considered to be a free-pass justifying the abuse of dominance.

3. Cooperation

8. Avoiding “regulatory gaming” may be supported by establishing mechanisms of cooperation between competition authorities and data protection authorities. Both the appropriate legal framework and the actual cooperation between the authorities are relevant in this context. The Court of Justice of the EU (CJEU) provided procedural guidelines in this regard¹¹, which are further supplemented by national procedural rules. Therefore, the efficiency of coordinated competition law and privacy law enforcement rests upon a polycentric system of norms.

9. In the Polish jurisdiction, there are at least two potential avenues of administrative authorities’ cooperation. First, compulsory cooperation between authorities which is required by law.¹² This is usually the case for compulsory consultation procedures, where a formal opinion of another authority needs to be taken into account in the primary proceedings. Importantly, this type of consultation needs to be anchored in a legislative act, empowering both authorities to cooperate.

10. Second, there is a possibility for a more flexible cooperation between authorities seeking mutual assistance in exchanging information, opinions and establishing facts of the case.¹³ The Polish Act of Competition and Consumer Protection contains a provision obliging all public administration bodies to make available to UOKiK all information and other materials relevant to a specific case.¹⁴ This provision further strengthens the legal framework of cooperation between authorities on the national level.

11. The design of the system of judicial review of authorities’ decisions adds a level of complexity to the issues of cooperation between competition and data protection authorities in Poland. While UOKiK’s decisions in the field of competition protection are subject to review by common courts, the decisions of the Polish data protection authority are subject to review by administrative courts. With no substantive overlaps between the judicial review in the common court system and in the administrative court system, there is a limited possibility for a comprehensive judicial assessment of the cooperation mechanisms adopted in a particular case.

12. The cooperation between the UOKiK and the Polish data protection authority is currently being developed. This is seen as a necessary and beneficial development in light of the jurisprudence of the CJEU and the national legal system. While the experience is limited so far, it already contributes to building a mutual understanding and trust. The cooperation will further contribute to ensuring a consistent interpretation of competition law and data protection law in the Polish jurisdiction.

¹¹ Case C-252/21 *Meta Platforms* ECLI:EU:C:2023:537 [56ff].

¹² Art. 106 of the Code of Administrative Procedure (Dz. U. z 2024 r. poz. 572).

¹³ See art. 72 of the Act of Competition and Consumer Protection (Dz.U. z 2024 r. poz. 594).

¹⁴ Art. 72 of the Act of Competition and Consumer Protection (Dz.U. z 2024 r. poz. 594): “Public administration bodies shall be obliged to make available to the President of the Office files in their possession and information relevant to proceedings pending before the President of the Office.”

4. Conclusions

13. The Polish Competition Authority appreciates the developments in the digital economy and supports the idea of cooperation with data protection authorities in this regard. Understanding the risk of “regulatory gaming” is crucial to appropriately addressing the challenges posed by the conduct of online platforms and other digital undertakings. The capability to understand and expose the potential misleading nature of the alleged pro-privacy justifications has become fundamental in responding to anticompetitive practices in the digital economy. In order to ensure appropriate efficiency of coordinated enforcement, UOKiK is open for cooperation with data protection authorities. While the substantive aspects of the cooperation mechanisms are largely influenced by the EU law, the Member States enjoy a certain amount of flexibility in applying its procedural aspects.