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Big data not a competition issue in EU yet

Commenting on possible competition issues raised by big data, EU Competition Commissioner, Margrethe Vestager stressed that currently concern over online businesses protecting personal information does not necessarily mean that companies have broken competition rules. "We don't need a whole new competition rulebook for the big data world," said Vestager, speaking at the DLD Conference in Munich on 17 January.

"While Vestager acknowledged that companies' control over data, and the role of data in competition, are emerging issues that the Commission needs to keep an eye on, she also emphasised that they have not yet seen any evidence of competition law infringements in this area or prohibited a merger due to data-related concerns," said Becket McGrath, Partner at Cooley LLP. "The debate around the role of data in competition has been leapt on by those looking to make life harder for large tech companies. My reading of the speech is that the Commissioner saw a need to set the record straight, in the face of such lobbying, and manage expectations over the prospects for intervention."

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Legal action against Privacy Shield in EU "seems inevitable"

The EU College of Commissioners reached political agreement on 2 February on a new framework for trans-Atlantic data transfers, entitled 'Privacy Shield' ('PS'); this EU-US arrangement follows the Court of Justice of the EU's ('ECJ') 6 October 2015 ruling, which found the EU-US Safe Harbor decision to be invalid.

The PS is designed to ensure the privacy rights of EU citizens when their data is transferred to the US, and, says the European Commission ('EC'), 'reflects the requirements set out by the ECJ.' The PS is yet to be finalised and the final text will need College approval. EU Commissioners Andrus Ansip and Věra Jourová have been mandated to enact the arrangement.

"The EC must still prepare an adequacy decision, the legal document which approves the PS as a valid data transfer mechanism under the European Data Protection Directive. This will need to be carefully drafted by the EC as it will be scrutinised heavily and it was the flaws in the previous adequacy decision that the ECJ, amongst other things, had issue with," says Kolvin Stone, Partner at Orrick.

Key provisions of the PS include robust obligations on US companies to guarantee privacy rights for EU citizens whose data is exported; transparent limitations on access to data by US public authorities; an annual joint review of the arrangement; and new redress rights for EU citizens who feel that misuse of their data may have occurred.

The Article 29 Working Party ('WP29') met to discuss PS and published a statement on 3 February, welcoming the agreement and noting that at present, binding corporate rules and standard contractual clauses are legal methods for transferring personal data. However, the WP29 will only be able to assess PS' legality and confirm the validity of other data transfer methods once the full text is decided. "It seems extremely unclear what the US is in reality delivering," says Liz Fitzsimons, Legal Director at Eversheds. "The WP29 has in effect noted that it has been given some words of comfort but wants to see what the agreements and documents actually say and deliver." The full text is set to be delivered by late February.

Dr. Ulrich Baumgartner, Partner at Osborne Clarke, believes that "it seems inevitable that legal action against the PS from privacy campaigners will follow. Those will take time for the EU courts to decide, but the level of assurance provided by Safe Harbor in the past seems unlikely to be fully regained."

Tech concerns raised about UK draft Investigatory Powers Bill

The Science and Technology Committee published its report on the UK's draft Investigatory Powers Bill: technology issues on 1 February, which expresses concerns relating to the lack of clear definitions within the bill, the impact of the data collection obligations on communications services providers ('CSPs') particularly pertaining to the technical feasibility of retaining 'internet connection records' and the associated costs, and the need for clarification regarding encryption and equipment interference.

"The report clearly identifies a number of actual and potential problems arising from the current wording of the bill. Even having reviewed the issues in the light of balanced evidence and representations, and acknowledging the need for a law of this nature, the Committee's report recommends that the wording of the bill and the approach to it are revised in a number of ways," said Liz Fitzsimons, Legal Director at Eversheds LLP.

The wider impact of the Bill is currently being considered by a Joint Select Committee that is expected to publish its report on 11 February, and which may put forward further recommendations for change.

"The Government's power to require removal of electronic protection to data has alarmed CSPs as it is seen as an attack on encryption," adds Victoria Hordern, Senior Associate at Hogan Lovells. "Additionally, serious concerns have been expressed about the obligation on CSPs to assist intelligence and LEA with equipment interference activity or hacking."