PRIVACY RIGHTS AT A CROSSROADS: PARALLEL ENFORCEMENT OF “CONSUMER CONTROL” BY PRIVACY REGULATORS AND ANTITRUST AUTHORITIES

Pulina Whitaker, London
Christina Renner, Brussels
May 14, 2020
Presenters

Pulina Whitaker
London

Christina Renner
Brussels
What are privacy rights?

- Information rights
- If consent is used, it must be fully informed and freely given
- Rights to control how personal data is used: primary or secondary purposes
- Rights to access and request deletion or restriction of data usage
- Rights to export data to another provider
- Right to object to legitimate interest processing
What is the purpose of antitrust?

- Protect healthy competition on the merits
- Prevent restrictive and abusive behaviours
- *Ex post* intervention
GDPR REGIME

• Came into force 25 May 2018

• Enforcement action by DPAs:
  – Information notice: provision of information to DPA
  – Enforcement notice: requirement to take or refrain from certain action
  – Assessment notice: to allow audits, inspections, observations etc for an assessment
  – Monetary penalty: range of fines

• Range of regulatory fines so far:
  – Small (EUR 100) – large (EUR 200 m (under /EUR 50m (final)
  – Class/group action or individual claims
  – No need to have suffered financial loss
FINE FACTORS

- **Gravity and nature** — The overall picture of the infringement. What happened, how it happened, why it happened, the number of people affected, the damage they suffered, and how long it took to resolve.

- **Intention** — Whether the infringement was intentional or the result of negligence.

- **Mitigation** — Whether the firm took any actions to mitigate the damage suffered by people affected by the infringement.

- **Precautionary measures** — The amount of technical and organizational preparation the firm had previously implemented to be in compliance with the GDPR.

- **History** — Any relevant previous infringements, including infringements under the Data Protection Directive (not just the GDPR), as well as compliance with past administrative corrective actions under the GDPR.

- **Cooperation** — Whether the firm cooperated with the supervisory authority to discover and remedy the infringement.

- **Data category** — What type of personal data the infringement affects.

- **Notification** — Whether the firm, or a designated third party, proactively reported the infringement to the supervisory authority.

- **Certification** — Whether the firm followed approved codes of conduct or was previously certified.

- **Aggravating/mitigating factors** — Any other issues arising from circumstances of the case, including financial benefits gained or losses avoided as a result of the infringement.

Morgan Lewis
<table>
<thead>
<tr>
<th>MONTH</th>
<th>Sum of Fines (up to month)</th>
<th>Number of Fines (up to month)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jul 2018</td>
<td>€ 400,000</td>
<td>1</td>
</tr>
<tr>
<td>Sep 2018</td>
<td>€ 400,300</td>
<td>2</td>
</tr>
<tr>
<td>Oct 2018</td>
<td>€ 400,688</td>
<td>3</td>
</tr>
<tr>
<td>Nov 2018</td>
<td>€ 420,688</td>
<td>4</td>
</tr>
<tr>
<td>Dec 2018</td>
<td>€ 436,388</td>
<td>9</td>
</tr>
<tr>
<td>Jan 2019</td>
<td>€ 50,437,276</td>
<td>12</td>
</tr>
<tr>
<td>Feb 2019</td>
<td>€ 50,502,384</td>
<td>24</td>
</tr>
<tr>
<td>Mar 2019</td>
<td>€ 50,964,684</td>
<td>32</td>
</tr>
<tr>
<td>Apr 2019</td>
<td>€ 51,273,819</td>
<td>40</td>
</tr>
<tr>
<td>May 2019</td>
<td>€ 51,833,345</td>
<td>48</td>
</tr>
<tr>
<td>Jun 2019</td>
<td>€ 52,917,895</td>
<td>57</td>
</tr>
<tr>
<td>Jul 2019</td>
<td>€ 368,275,670</td>
<td>65</td>
</tr>
<tr>
<td>Aug 2019</td>
<td>€ 371,528,505</td>
<td>74</td>
</tr>
<tr>
<td>Sep 2019</td>
<td>€ 372,435,028</td>
<td>83</td>
</tr>
<tr>
<td>Oct 2019</td>
<td>€ 406,947,402</td>
<td>112</td>
</tr>
<tr>
<td>Nov 2019</td>
<td>€ 408,062,202</td>
<td>132</td>
</tr>
<tr>
<td>Dec 2019</td>
<td>€ 429,819,732</td>
<td>155</td>
</tr>
<tr>
<td>Jan 2020</td>
<td>€ 457,930,442</td>
<td>169</td>
</tr>
<tr>
<td>Feb 2020</td>
<td>€ 458,816,532</td>
<td>198</td>
</tr>
<tr>
<td>Mar 2020</td>
<td>€ 466,677,568</td>
<td>230</td>
</tr>
<tr>
<td>Apr 2020</td>
<td>€ 467,471,268</td>
<td>233</td>
</tr>
<tr>
<td>May 2020</td>
<td>€ 467,476,268</td>
<td>234</td>
</tr>
</tbody>
</table>
BIG DATA

- Focus of regulators on collection of data
- Is collection properly informed?
- Do consumers really have effective control rights over personal data
- Monetisation of big data is now entrenched in service providers business models
- Is it a “price to pay” for free services e.g. social media platforms, file sharing apps
- Cookies: the next stage for personal data?
- PECR: now and next?
SECTION 03

AT A CROSSROADS: ENTERS ANTITRUST
The crossroads

**Competition Law**
Protect competition, not competitors.
- Maximize consumer welfare
- Encourage firms to behave competitively
- Permit firms to take advantage of the benefits that come from internal or jointly-created production efficiencies, or from innovation

**Privacy Law**
Protect personal data, respect private life.
- Lawful, fair, transparent (i.e., consent)
- Data collection for specified and legitimate purpose
- Data minimization: collect/store only as necessary
- Data accuracy
- Data integrity & confidentiality

Morgan Lewis
The very basis of it all

“Data is the new currency.”

Margrethe Vestager,
EU Commissioner for Competition
Antitrust issues in data aggregation and handling

- The starting point: Determining the value of data: freshness, granularity, uniqueness, velocity?

- The concern: Creating or consolidating an insurmountable data advantage
  - Mass aggregation of personal data provides unique “competitive edge”
  - Use of data across business purposes leverages this unique competitive advantage

- The problem: Isn’t this what competition is about?

Morgan Lewis
The big question

When does this harm competition on the merits?
Blurring the borders between antitrust and consumer/privacy protection

- **Initial scope of EU investigations**: recourse to traditional theories of harm in network industries: “platform power”

- **The bridge to privacy rules**: “unfair trading practices”

- **Germany’s FCO’s controversial approach**: violation of data protection *consent rules* as benchmark for abuse of a dominant position – BUT: challenged under appeal

- **Recent EU investigations cover privacy law territory with the antitrust rule set**: *How* is data gathered, pooled, processed, used and monetized: “data power”
SECTION 04

PRIVACY AND ANTITRUST DURING THE COVID-19 PANDEMIC
Antitrust and privacy during the COVID-19 pandemic

• Testing and tracing: an increased *public* need for collection of private data; and employer obligation to protect staff
• Tracing apps: the treasure trove of data
• Is it intrusive collection or serving the public cause
• A test for striking the right balance
• EDPB/DPA guidance on contact tracing apps: emphasize need for anonymity, proper control, proportionality and deletion obligations
Enforcement action by antitrust regulators

- Limiting (mandatory) data collection on grounds of antitrust or privacy
- Imposing portability of data for customers
- Imposing fair access to data (against remuneration)
- Imposing interoperability between different platforms and data
- *Ex ante* regulation?

Morgan Lewis
Recommendations

• Check consent, accessibility and transparency requirements

• Documentation of procedures

• Fairness check: Is there a proper balancing of interests?

• Antitrust sanity check: If the conduct involved some other input (besides data), would antitrust law care about it?

Morgan Lewis
We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

To help keep you on top of developments as they unfold, we also have launched a resource page on our website at


If you would like to receive a daily digest of all new updates to the page, please visit the resource page to [subscribe](http://www.morganlewis.com/topics/coronavirus-covid-19) using the purple “Stay Up to Date” button.

*Morgan Lewis*
Pulina Whitaker’s practice encompasses both labor and employment matters as well as data privacy and cybersecurity. She manages employment and data privacy issues in sales and acquisitions, commercial outsourcings, and restructurings. Pulina provides day-to-day advisory support for multinationals on all employment issues, including the UK’s Modern Slavery Act and gender pay reporting requirements. She also advises on the full spectrum of data privacy issues, including compliance with the General Data Protection Regulation.
Christina Renner concentrates her practice on European Union and German merger control, competition, and antitrust law, with experience in cartels and general behavioral matters, abuse of dominance, and EU state aid laws. Christina regularly advises clients concerning mergers reviewed by the European Commission and the German Federal Cartel Office, as well as the French, Austrian, and Belgian competition authorities. She has experience handling multi-jurisdictional filings for a variety of clients and regularly advises on complex competition compliance matters.
BRUSSELS

Located in the heart of the European Union’s capital city, our Brussels office is a key player in the antitrust and competition arena. Our lawyers are part of a collaborative, global, multioffice team that works with clients to meet their business objectives through the careful structuring and skilled implementation of effective legal strategies.

We represent clients before the European Commission and EU member state competition authorities, and our team includes lawyers who are qualified to appear before the European Court of Justice.

ANTITRUST & COMPETITION

Our Brussels team provides clients with the full spectrum of antitrust and competition services. Our experience includes addressing complex multijurisdictional issues ranging from preventive counseling and merger control to the defense of “bet the company” litigation, including global cartel cases.

ACCOLADES

- Ranked, 6 practices, 12 lawyers, Chambers Europe (2019)
- 300+ lawyers recognised, Chambers, all publications (2020)
- Client Service 30, BTI Client Service A-Team (2002–2020)

ABOUT US

Morgan Lewis is recognized for exceptional client service, legal innovation, and commitment to its communities. Our global depth reaches across North America, Asia, Europe, and the Middle East with the collaboration of more than 2,200 lawyers and specialists who provide elite legal services across industry sectors for multinational corporations to startups around the world.
With a broad English law practice offering a wide range of business and commercial services, Morgan Lewis has represented corporations doing business in the UK and around the globe from our London office for more than three decades. We work seamlessly with our other offices throughout Europe, Asia, North America, and the Middle East to serve the needs of clients in the UK and worldwide.

OUR SCOPE

- The corporate team serves clients in a broad range of commercial transactions, covering mergers and acquisitions (M&A), joint ventures, and debt and equity financings in the public and private markets, including listings on the London Stock Exchange.
- The tax practice provides planning and structuring advice for companies and individuals involved in cross-border situations.
- Our finance team is widely recognised for its advice on emerging market matters, and it advises on leveraged finance and private equity, project finance, restructuring, structured transactions, debt securities, and private placements.
- Investment management lawyers advise sponsors and investors on international private equity, hedge, and other private investor funds. We advise clients in interdisciplinary areas, including European and international taxation, UK and European Union financial services regulation and compliance, executive compensation, and corporate governance.
- Our competition lawyers provide leading antitrust and regulatory advice, both from a UK and an EU perspective.
- The dispute resolution team handles a wide range of sophisticated international commercial litigation, arbitration, insurance recovery, and white collar matters, representing clients in most courts and arbitration venues, including in primary offshore jurisdictions.
- Our labour and employment lawyers focus on high-level employment litigation, management workplace disputes, and day-to-day advisory work. As part of this team, we have proficient immigration lawyers who guide organisations and individuals through all of the complexities of the UK immigration system.
ACCOLADES

- Recommended, 17 practices and 34 individual lawyers, *The Legal 500 UK* (2020)
- 300+ lawyers recognised, *Chambers*, all publications (2020)

ABOUT US

Morgan Lewis is recognized for exceptional client service, legal innovation, and commitment to its communities. Our global depth reaches across North America, Asia, Europe, and the Middle East with the collaboration of more than 2,200 lawyers and specialists who provide elite legal services across industry sectors for multinational corporations to startups around the world.
**Our Global Reach**

Africa

Asia Pacific

Europe

Latin America

Middle East

North America

**Our Locations**

Abu Dhabi

Almaty

Beijing*

Boston

Brussels

Century City

Chicago

Dallas

Dubai

Frankfurt

Hartford

Hong Kong*

Houston

London

Los Angeles

Miami

Moscow

New York

Nur-Sultan

Orange County

Paris

Philadelphia

Pittsburgh

Princeton

San Francisco

Shanghai*

Silicon Valley

Singapore*

Tokyo

Washington, DC

Wilmington

*Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan Lewis operates through Morgan, Lewis & Bockius, which is a separate Hong Kong general partnership registered with The Law Society of Hong Kong as a registered foreign law firm operating in Association with Luk & Partners. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.
THANK YOU