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The Data-Driven Economy. Remarks in the Light of Selected Issues in the Competition Law

Introduction

With the efforts to create a digital Europe, the significance and the development of state – of – the – art technologies substantially increases.¹ On 19 February 2020, the European Commission (hereinafter the EC, the Commission), published the European strategy pertaining to data,² which presupposes a novel and genuinely unprecedented approach to development.³ Data has begun to play a vital role in global, EU-wide, and domestic economies, as it constitutes “the driving force of economic development”.⁴ The data economy is thus a notion which

1 The implementation of the single digital market is comprehensively outlined in Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *A Digital Single Market Strategy for Europe*, SWD 2015, 100 final, Brussels, 06.05.2015, Document 52015DC0192, COM, 2015, 192 final.

2 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *A European strategy for data*, Brussels, 19.02.2020, Document 52020DC0066, COM, 2020 66 final, hereinafter as *A European strategy for data*.

3 In the EU strategy *EUROPA 2020*, the approach to development presupposed an economy based on knowledge and innovation, which was how intelligent development was envisioned. At present, the European strategy for data sets out a new approach to development, where the economy is data – driven. For the previous paradigm see Communication from the Commission *EUROPE 2020 A strategy for smart, sustainable and inclusive growth*, Brussels, 03.03.2010, Document 52010DC2020, COM, 2010, 2020 final, p. 11 ff.

4 *A European strategy for data*, p. 2 ff. Concerning the impact of data on economic development, see G. Koloch, K. Grobelna, K. Zakrzewska – Szlichtyng, B. Kamiński, D. Kaszyński, *Intensywność wykorzystania danych w gospodarce a jej rozwój – analiza diagnostyczna*.

describes the utilization of data potential⁵ in the private and public sectors, shared⁶ in order to achieve economic growth.⁷ This strategy is expected to be implemented across the EU Member States within the next 5 years.⁸ The European strategy for data represents a successive stage in the process of building the Digital Single Market.⁹ It was published simultaneously¹⁰ with the Communication of the Commission: Shaping Europe's Digital Future¹¹ and the White Paper on Artificial Intelligence – A European approach to excellence and trust.¹² This conception, formulated by means of political acts which determine the goals and directions of development, should be reflected in the legislation. The adoption of the General Data Protection Regulation (GDPR),¹³ the regulation on the free flow on non – personal data,¹⁴ the cybersecurity act¹⁵

5 Commission Staff Working Document: Guidance on sharing private sector data in the European data economy accompanying the document Communication from the Commission to the European Parliament, the Council, the European economic and social Committee and the Committee of the Regions “Towards a common European data space” COM, 2018, 232 final, Brussels, 25.04.2018, SWD, 2018, 125 final, p. 1. Hereinafter: Guidance on sharing private sector data.

6 Proposal for a Regulation of the European Parliament and of the Council on European data governance Data Governance Act, Brussels, 25.11.2020, Document 52020PC0767, COM, 2020, 767 final, 2020/0340, COD, p. 1. Hereinafter: Data Governance Act and A European strategy for data, p. 7 ff.

7 Guidance on sharing private sector data, p. 1.

8 A European strategy for data, p. 1.

9 <<https://www.gov.pl/web/cyfryzacja/gospodarka-oparta-o-dane-przemysl->>.

10 A European strategy for data, p.1 ff.

11 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Shaping Europe's digital future, Brussels, 19.02.2020, Document 52020DC0067, COM, 2020, 67 final. Hereinafter: Shaping Europe's digital future.

12 White Paper on Artificial Intelligence – A European approach to excellence and trust, Brussels, 19.02.2020, Document 52020DC0065, COM, 2020, 65 final.

13 Regulation EU 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, Official Journal of the European Union of 04.05.2016, L 119/1, Document 32016R0679.

14 Regulation EU 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non – personal data in the European Union, Official Journal of the European Union of 28.11.2018, L 303/59, Document 32018R1807.

15 Regulation EU 2019/881 of the European Parliament and of the Council of 17 April 2019 on the European Union Agency for Cybersecurity and on information and communications

and the open data directive¹⁶ make up the legislative output to date, thanks to which the data economy may be shaped and pursued.¹⁷

The adoption of a new approach to development entails a range of issues of legal, economic and social nature that need to be examined and studied in greater detail. However, the scope of these issues is very broad indeed, which is why this paper focuses on the data economy as it relates to selected questions in competition law.¹⁸ Specifically, this includes observations regarding threats associated with the sharing of confidential business data, or data subject to intellectual property protection laws,¹⁹ between participants in the market economy, i.e. enterprises,²⁰ as well as actions which restrict competition in the light of the new approach to development.

Sharing Confidential Company Data in the Private Sector

Exploiting the potential of data sharing in the private sector²¹ naturally links the data economy and competition law.²² In accordance with the

technology cybersecurity certification and repealing Regulation EU No 526/2013, Official Journal of the European Union of 07.06.2019, L 151/15, Document 32019R0881.

16 Directive EU 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re – use of public sector information, Official Journal of the European Union z 26.06.2019, L 172/56, Document 32019L1024.

17 A European strategy for data, p. 4. On the implementation of development policy, see the Development Policy Act of 6 December 2006, Journal of Laws 2020, item 1378 and e.g. K. Kokocińska, *Prawny mechanizm prowadzenia polityki rozwoju w zdecentralizowanych strukturach władzy publicznej*, Poznań 2014; K. Kokocińska, *Współzależność prawa i programowania*, in: *Administracja a strategie i polityki publiczne*, ed. A. Jurkowska – Gomułka, Warsaw 2016, pp. 25–37, K. Kokocińska, *Wybrane formy prowadzenia polityki rozwoju*, in: *Instrumenty i formy prawne działania administracji gospodarczej*, ed. B. Popowska, K. Kokocińska, Poznań 2009, pp. 135–180, K. Kokocińska, *Współdziałanie podmiotów władzy publicznej na rzecz rozwoju*, „Ruch prawniczy, ekonomiczny i socjologiczny” 2015, vol 3, pp. 181–191.

18 A European strategy for data, pp. 5 and 14.

19 Data Governance Act, p. 1, note 3.

20 Enterprises and consumers as participants of the market economy are discussed in K. Strzycki, *Prawo gospodarcze publiczne*, Warsaw 2011, p. 388.

21 A European strategy for data, p. 7.

22 *Ibidem*, p. 5 and 14. On the risk of potential breaches of the competition law, see Recital (29) of the Data Governance Act.

proposal for a EU data governance regulation [hereinafter the Data Governance Act] sharing data as part of the new approach to development also applies to data which is commercially confidential and regulated by intellectual property protection laws.²³ This creates a risk of competition being restricted and enterprises potentially losing their competitive advantage²⁴ as well as – in the opinion of this author – the possibility of the freedom of economic activity being violated.

Here, the principal deliberations set out with Art. 11(1) and (3–6) of the Act on Combating Unfair Competition of 16 April 1993 [hereinafter the CUC], pursuant to which the disclosure, use or obtaining of information which is confidential to the enterprise constitutes an act of unfair competition.²⁵ The aforementioned statute is intended to protect this-

23 Data Governance Act, p. 1, note 3.

24 Recital (29) of the Data Governance Act and A European strategy for data, p. 7.

25 Art. 11(1) of the Act on Combating Unfair Competition of 16 April 1993, *Journal of Laws of 2020*, item 1913. Hereinafter: CUC. See also Art. 11(3) CUC: “Obtaining confidential enterprise information constitutes an act of unfair competition, in particular when this occurs without the consent of the entity entitled to use or dispose of the information, and results from the unlawful access, appropriation, or duplication of documents, objects, materials, substances, or digital files which encompass that information or enable inferences about their content”; Art. 11(4) CUC: “Use or disclosure of confidential information of an enterprise constitutes an act of unfair competition, in particular when this occurs without the consent of the entity entitled to use or dispose of the information, and violates the obligations to restrict its use or disclosure arising under the statute, legal transaction or other act, or when it has been effected by a person who obtained the information by committing an act of unfair competition”; Art. 11(5) CUC: “Disclosure, use, or obtaining information which is confidential to the enterprise constitutes an act of unfair competition also when at the moment of its disclosure, use or obtaining a person had the knowledge or, maintaining due diligence, could have the knowledge that the information had been obtained directly or indirectly from one who had used or disclosed it in the circumstances specified in Section 4”; and Art. 11(6) CUC: “Use of confidential information of an enterprise which consists in producing, offering, marketing, as well as inbound or outbound movement and storage of goods for that purpose constitutes an act of unfair competition, if a person who performed the act in question had the knowledge or, maintaining due diligence, could have the knowledge that the properties of the goods, including aesthetic and functional properties, their manufacturing or selling process have been to a substantial extent formulated as a result of the act referred to in Section 1, effected in the circumstances specified in Section 4.” See also Directive EU 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know – how and business information against their unlawful acquisition, use and disclosure, *Official Journal of the European Union* of 15.06.2016, L 157/1, Document 32016L0943.

kind of information. Assets and resources are what determines the competitive advantage of enterprises,²⁶ while their confidentiality is one of the crucial elements of that advantage.²⁷ Sharing such data creates a risk of the potential restriction of competition as well as potential loss of the advantage if the law-sector-specific and competition related provisions – is not adequately aligned²⁸ with the needs of the data – driven economy.²⁹

Given the above, this author undertakes a somewhat broader analysis. It needs to be noted that there is a notion in jurisprudence according to which the freedom of economic activity, ensured under Articles 20 and 22 of the Polish Constitution³⁰ not only spans the freedom to engage in, conduct, and terminate economic activity,³¹ but also covers free competition.³² It seems legitimate, therefore, to conclude that a potential limitation of competition due to sharing the confidential data of an enterprise may result in a violation of the freedom of economic activity. This approach may be inferred from the rationale to the judgment of the Constitutional Tribunal of 19 January 2010, file no. SK 35/08 which,

26 D. Grego – Planer, *Potencjał konkurencyjny ukrytych liderów polskiej gospodarki*, Toruń 2016, p. 63. Regarding assets and resources see also M. J. Stankiewicz, *Konkurencyjność przedsiębiorstwa. Budowanie konkurencyjności przedsiębiorstwa w warunkach globalizacji*, Toruń 2002, p. 22 ff. Also, data constitutes a resource required to manufacture goods or/and provide services; see A European strategy for data, p. 2 ff.

27 A. Michalak, *Ochrona tajemnicy przedsiębiorstwa. Zagadnienia cywilnoprawne*, Zakamycze 2006, p. 21.

28 Certain Member States have already begun adjusting their legislation. One of the examples is the “(...)Finnish law on secondary use of health and social data, creating a data permit authority”; see A European strategy for data, p. 6 see also note 15.

29 Ibidem, p. 6 see also note 16.

30 Articles 20 and 22, Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997, no. 78, item 483 as amended. Hereinafter: CRP.

31 E. Kosiński, *Aspekt prawny wolności gospodarczej*, „Kwartalnik Prawa Publicznego” 2003, vol. 3, no. 4, 2003, p. 13 ff.

32 See e.g. K. Pawłowicz, *Prawo człowieka do swobodnej działalności gospodarczej*, in: *Prawa człowieka w społeczeństwie obywatelskim*, ed. A. Rzepliński, Warsaw 1993, p. 69 ff., J. Węgrzyn, *Wolność prowadzenia działalności gospodarczej*, in: *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, ed. M. Jabłoński, Wrocław 2014, p. 522, J. Kołacz, *Swobody cząstkowe a swoboda działalności gospodarczej*, „Ruch prawniczy, ekonomiczny i socjologiczny”, 2008, vol. 2 – 2008, p. 80.

invoking the jurisprudence in the domain of public economic law, states as follows: “The essence of conducting economic activity, construed as a public subjective right, is the freedom of a private – law entity to engage in and carry out such an activity. Both public authorities and other legal entities are charged with the obligation to refrain from intervening – whether through legal or factual actions – in the sphere of free economy. An entity exercising their freedom makes fundamental decisions in several areas. In particular, they decide about: (...) the methods and the scope of conducting the activity, including activity in the fields of: (...) competition (...)”.³³ Effective competition is characterized by competing – a rivalry³⁴ of enterprises (on equal terms) and striving to produce and then supply the consumer with products or/and services of the best possible quality and at the most advantageous prices.³⁵ Consequently, sharing data that is “(...) vital for competition (...) enables enterprises to gain knowledge concerning market strategies of their actual or potential competitors (...) including information relating to future prices, production costs, quantities and volumes, turnover, sale, or capacities”³⁶ will, in the opinion of this author, affect the resources which have an impact on the competitiveness of an enterprise.³⁷ Again, this may lead to potential restriction of competition³⁸ and, in the broad sense, a potential violation of economic freedom. It may be argued that

33 Rationale to the Judgment of the CT of 19 January 2010, SK 35/08., p. 10.

34 On competition or rivalry of businesses, see e.g. D. Miąsik, *Reguła rozsądku w prawie antymonopolowym*, Zakamycze 2004, pp. 28–31., C. Norgren, *Sprawnie funkcjonujące rynki – wyzwanie dla urzędów antymonopolowych i rządów*, in: *Ochrona konkurencji i konsumentów w Polsce i Unii Europejskiej (studia prawnoprawno – ekonomiczne)*, ed. C. Banasiński, Warsaw 2005, p. 49 and M. J. Stankiewicz, op. cit., p. 18.

35 <<https://www.europarl.europa.eu/factsheets/pl/sheet/82/polityka-konkurencji>>. Concerning competition, see also E. Próchniak, J. Zygadło, *Ochrona konkurencji i konsumentów*, Bydgoszcz 1998, pp. 9–12.

36 Recital 29 of the Data Governance Act.

37 On the assets and resources of businesses see M. Błaszczuk, *Przedsiębiorstwo jako elastyczny system zasobów*, “Handel Wewnętrzny” 2017, vol. I, no. 3, pp. 29–39.

38 On the potential restriction of competition in connection with the sharing competitively sensitive data, see Recital 29 of the Data Governance Act.

data will be shared in the public interest³⁹ while respecting the private interests of the entrepreneurs.⁴⁰ However, the counter argument to this is that, due to hypothetically detrimental phenomena which inhibit competition and infringe the liberty of economic activity, the balance between public interest and the interests of the entrepreneurs will be undermined.⁴¹

At this point, it may be briefly noted that data sharing among enterprises will influence the parameters of competition.⁴² Based on the Data Governance Act, which sets forth that: “(...) data – based products and services developed in one Member State may need to be customised to suit the preferences of customers in another Member State (...). As such, data needs to be able to flow easily through EU – wide and cross – sector value chains (...)”,⁴³ it may be inferred that implementation of the new approach to development will promote increased quality of products and/or services.⁴⁴ The data used by businesses⁴⁵ will reflect the needs of the market⁴⁶ and therefore be a “vehicle of information”

39 A European strategy for data, p. 6, 21.

40 Ibidem, p. 13 note 39 and p. 18.

41 On preserving the balance of interests, see Summary of the Opinion of the European Data Protection Supervisor on EDPS Opinion on the European strategy for data, 2020/C 322/04, p. 1., Hereinafter: EDPS Opinion Summary.

42 On the actions of entrepreneurs which affect the parameters of competition, see Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co – operation agreements, Official Journal of the European Union of 14.01.2011, C 11/1, Document 52011XC0114 04. Hereinafter: the Guidelines on horizontal co – operation agreements. On the question of impact of data sharing on the product quality, price, innovativeness and production, see G. Koloch, K. Grobelna, K. Zakrzewska – Szlichtyng, B. Kamiński, D. Kaszyński, *Intensywność wykorzystania danych w gospodarce a jej rozwój – analiza diagnostyczna*.

43 Data Governance Act, p. 3.

44 For instance, Finland saw an increase in the quality of healthcare. In that respect, see also: *Intensywność wykorzystania danych...*

45 Sectors in which data access applies are outlined in Data Governance Act, p. 2.

46 *Intensywność wykorzystania danych...*

Concerning examples of prospectively shared data, see Communication from the Commission to the European Parliament and the Council Guidance on the Regulation on a framework for the free flow of non – personal data in the European Union, Brussels, 29.05.2019, Document 52019DC0250, COM, 2019, 250 final, hereinafter Guidance on the Regulation on non – personal data.

and at the same time a “key” to satisfying social and economic demand. Although this paper does not delve into the issue, it is still worth noting (referring briefly to product quality) that this is a compelling area for further, detailed jurisprudential studies.

The Data Economy and the Potential Risk of Monopolies, Oligopolies and Collusion Between Enterprises

The data economy involves the wide application of state-of-the-art technologies,⁴⁷ which is why the new approach to development necessitates appropriate conditions in which the approach can be implemented (e.g. the introduction of adequate safeguards to protect data,⁴⁸ cloud services or quantum computations).⁴⁹ On the other hand, modern technologies may cause monopolies and oligopolies to emerge,⁵⁰ therefore actions to foster an economy which efficiently utilizes data can indeed entail potential risks in that respect.⁵¹ Nonetheless, the above market types are formed⁵² in connection with the digital infrastructure required to implement the new approach and assure conditions for the subse-

47 *Intensywność wykorzystania danych...*

48 EDPS Opinion Summary, p. 1.

49 <https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/ITRE/PR/2021/02-23/1212999PL.pdf>.

50 M.K. Kolasiński, *Unijne prawo konkurencji*, in: *Podstawy prawa Unii Europejskiej z uwzględnieniem Traktatu z Lizbony*, ed. J. Galster, Toruń 2010, p. 548 ff.

51 By way of analogy to A. Jurkowska – Gomułka, see *Polityka elektromobilności i polityka konkurencji: korelacje*, in: *Prawne i ekonomiczne aspekty rozwoju elektromobilności*, ed. K. Kokocińska, J. Kola, Monografie Prawnicze, Warsaw 2019, pp. 19–38 and M. Jacolik, *Rozwój elektromobilności w Polsce w kontekście wybranych zagadnień prawa konkurencji*, „Zeszyt Studencki Kół Naukowych Wydziału Prawa i Administracji UAM”, No. 9, Poznań 2019, pp. 69–82. Furthermore, the potential emergence of monopolies and oligopolies may be deduced from the questions asked in the Draft Report on a European strategy for data, namely: “Who will this trend benefit? Will the data create opportunities for companies of all shapes and sizes, or will data be concentrated in the hands of a few technological giants?”; see Draft Report on a European strategy for data p. 9.

52 M.K. Kolasiński, op. cit., pp. 546 and 548.

quent functioning of data – driven economy,⁵³ but it does not occur as a result of sharing a specific range and category of data (although it is possible for monopolies and oligopolies to be established in this case as well). This appears to follow from the assertions made in *Przemysł+*, a study prepared by the Ministry of Digital Affairs, in which “the data – driven economy is the next, fourth stage of digital development (...). (...) a race in which the future shape of the data economy is at stake gathers pace, with (...) major technological concerns, (...) economic blocs (...) as actively involved participants.”⁵⁴

The emergence of a monopolistic market is likely to be observed in two stages. Technologically advanced enterprises⁵⁵ may rise to be leaders in the process of implementing the new approach to development. Hypothetically, this creates a situation where rules and conditions – governing the use of digital infrastructure, for instance – can be dictated and actually made binding. Consequently, an advantage is achieved over businesses with inferior capital already in the initial phase of implementation.⁵⁶ It is evident that only large technological companies can afford to become involved in developing the data – driven economy⁵⁷ (unlike SMEs⁵⁸). Mechanisms which jeopardize free competition, such as monopolies⁵⁹ can also materialize at a later stage, when the data economy has already begun to function. Businesses with considerable capital have the ability to employ highly advanced technologies to carry out data –

53 On the required digital infrastructure see *Shaping Europe’s digital future*, pp. 1–6.

54 M. Borowik, L. Maśniak, R. Kroplewski, H. Romaniec, *Przemysł +*, p. 7.

55 At present, solutions such as cloud services enjoy little popularity in Europe. On data – related infrastructure and technologies see: *A European strategy for data*, p. 9 ff.

56 Conclusion derived from the description of unequal standing on the market; see *A European strategy for data*, p. 8.

57 Research into new technologies is an option available exclusively to businesses with substantial financial resources; see M.K. Kolasiński, *op. cit.*, p. 549.

58 *Ibidem*. Also concluded from the description of unequal position on the market; see *A European strategy for data*, p. 8.

59 Monopolization and cartelization are defined as threats to the mechanisms of free competition; see K. Strzyczkowski, *op. cit.*, p. 382.

based operations⁶⁰ while relying on big data solutions or business analytics methods.⁶¹ Consequently, data sharing can be taken advantage of in a more efficacious fashion.⁶²

Oligopolistic markets promote cartel collusion;⁶³ thus, hypothetically, technological giants may potentially be inclined to enter into such agreements, for instance with regard to terms and conditions/prices of access to cloud services.

Briefly recapitulating the above, while the status of a monopolistic or dominant enterprise is not prohibited, a prescription is imposed on such conduct or operations of a monopolistic business which violate competition law.⁶⁴ Thus, it is contrary to the provisions of the Competition and Consumer Protection Act of 16 February 2007 [hereinafter CCPA]⁶⁵ to engage in any practices which interfere with competition, such as abuse of dominant position⁶⁶ and any collusion between enterprises.⁶⁷

However, businesses may agree on an arrangement which “contributes to the improved production and distribution of goods” or to “technological or economic progress”, and those constitute exceptions from the general prohibition set forth in Art. 6(1)CCPA.⁶⁸ Such agreements may be arrived at as

60 A European strategy for data, p. 8.

61 *Intensywność wykorzystania danych...*

62 Ibidem, p. 90.

63 M.K. Kolasieński, op. cit., p. 547.

64 Office of Competition and Consumer Protection, *Polityka ochrony konkurencji i konsumentów*, Warsaw 2015, p. 35 ff.

65 Competition and Consumer Protection Act of 16 February 2007, Journal of Laws of 2021, item 275, hereinafter as CCPA

66 Art. 9 CCPA, Art. 102 Treaty on the Functioning of the European Union, Official Journal of the European Union C 202 of 07.06.2016, p. 47, hereinafter as TFEU. See also M. Szydło, *Prawo konkurencji a regulacja sektorowa*, Warsaw 2010, p. 310, M. Szydło, *Nadużywanie pozycji dominującej w prawie konkurencji*, Warsaw 2010, p. 105 ff. and C. Kosikowski, *Publiczne Prawo Gospodarcze Polski i Unii Europejskiej*, 1st edition, Warsaw 2005, p. 311.

67 Art. 6 CCPA, Art. 101(1)TFEU. On the impact of horizontal cooperation agreements on the parameters of competition see the Guidelines on horizontal co – operation agreements.

68 Art. 8(1)(1)CCPA. See also Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, Official Journal of the European Union of 18.12.2010, L 335/36, Document 32010R1217.

part of the efforts contributing to the data – driven economy.⁶⁹ For instance, within the framework of the single European health data space,⁷⁰ this may involve the creation of digital infrastructure to gather and process data for future medical research or pharmacovigilance. Also, one may aim to develop an application to monitor health or support a patient’s compliance with their dosing regimens.⁷¹ The general prohibition on agreements of this kind is suspended to allow for benefits that might not be achieved otherwise,⁷² such as the aforementioned contribution to technological progress, and the enhanced production/distribution of goods, in other words the pursuit of general economic goals and ensuring⁷³ welfare to the consumers.⁷⁴ It is conceivable that the requirements specified in Art. 8(1)CCPA⁷⁵ are likely to be satisfied in connection with actions undertaken to implement the new approach and, ultimately, to function in a genuine data economy.

Conclusions

The data – driven economy offers tremendous opportunities for the EU and domestic economies.⁷⁶ At the same time, there are a number of risks and negative outcomes involved.⁷⁷ These include the sharing of company confidential data as well as information which is subject to intellectual property protection laws and the potential loss of competitive

69 By way of analogy to A. Jurkowska – Gomułka, op. cit., pp. 19–38 and M. Jacolik, op. cit., pp. 69–82.

70 On the single European space for health data, see A European strategy for data, pp. 29–30.

71 On the use of shared health data and related applications, see the Guidance on the Regulation on non – personal data, p. 10.

72 Art. 8 (3)(1) CCPA and Office of Competition and Consumer Protection, op. cit., p. 32.

73 M. Sachajko, *Sankcjonowanie naruszeń zakazu praktyk ograniczających konkurencję na podstawie unijnego oraz krajowego prawa ochrony konkurencji*, Poznań 2018, p. 260 ff.

74 M. Krasnodębska – Tomkiel, *Przedmowa*, in: *Wylaczenia grupowe spod zakazu porozumień ograniczających konkurencję we Wspólnocie Europejskiej i w Polsce*, ed. A. Jurkowska, T. Skoczny, Warsaw 2008, p. 7.

75 Art. 8(1) CCPA.

76 See also M. Borowik, L. Maśniak, R. Kroplewski, H. Romaniec, *Przemysł + ...*, p. 5.

77 See G. Koloch, K. Grobelna, K. Zakrzewska – Szlichtyng, B. Kamiński, D. Kaszyński *Intensywność wykorzystania danych w gospodarce a jej rozwój – analiza diagnostyczna...*

advantage for certain enterprises. Also, there may be foreseeable violations of the freedom of economic activity – the cornerstone of the social market economy which in its turn is a mainstay of the economic system in the Republic of Poland.⁷⁸ To the furthest extent possible, the legal system should ensure the elimination of the potential threats arising from the implementation of the new approach to the development and subsequent functioning in the realities of an economy which efficiently utilizes data, by means of adjusting sectoral regulations and the competition law.⁷⁹ The risk of establishing monopolies and oligopolies may result in hypothetically detrimental outcomes in the development of an economy that makes effective use of data. However, the circumstances laid down as exceptions from the prohibition of collusion, which qualify as admissible under the CCPA, may actually promote that development.

At this point, another question may be posed. The discussed transformation is no doubt an opportunity for the economy⁸⁰, but it remains to be resolved whether this applies to all businesses or only the SMEs, the “weaker” players in the market economy, especially given the vision which accommodates the needs of the SMEs in particular.⁸¹

References

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Grego-Planer D., *Potencjał konkurencyjny ukrytych liderów polskiej gospodarki*, Toruń 2016.

78 Art. 20 CRP.

79 Legislative adjustments have already been undertaken by some Member States. For instance French Digital Republic Bill allowing the public sector to access certain private sector data of general interest, or the Finnish Forest Act obliging forest owners to share information related to the management of the forest with the public sector. Discussions on adapting the competition rules to make them better equipped for the data economy are for example ongoing in Germany. See A European strategy for data, p. 6 notes 14 and 16.

80 Ibidem, p. 4 ff.

81 Guidance on sharing private sector data, p. 1. See also Draft Report on a European strategy for data, p. 9.

- Jacolik M., *Rozwój elektromobilności w Polsce w kontekście wybranych zagadnień praw konkurencji*, „Zeszyt Studencki Kół Naukowych Wydziału Prawa i Administracji UAM” 2019, no. 9.
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SUMMARY

The Data – Driven Economy – Remarks in the Light of Selected Issues in the Competition Law

Data has begun to play a vital role in global, EU-wide and domestic economies. On 19 February 2020, the European Commission published the EU's strategy for data, which outlines a new and unprecedented approach to development. The vision thus described – a data-driven economy – is to be implemented within the next five years. However, this broad undertaking gives rise to a number of legal, economic and social issues which deserve to be more thoroughly examined.

In this paper, the author considers how the data economy relates to aspects of competition law, including threats associated with the sharing of confidential company data, and information protected under intellectual property laws, among the participants of the market economy, i.e. businesses. Also, observations are made concerning the hypothetical emergence of monopolies and oligopolies, as well as collusive agreements between enterprises on the grounds of the new approach to development.

Keywords: Data-driven economy, data economy, competition law, company confidentiality, freedom of economic activity, practices restricting competition

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