

some observers remained skeptical about the Commission's ability to secure such far-reaching remedies, given that under the Modernisation Regulation (Reg 1/2003), structural remedies can only be imposed as a last resort, where there is no equally effective behavioural remedy (or where such a behavioural remedy would be more burdensome than a structural remedy). Notwithstanding this, in the past nine months both E.ON and RWE have entered binding commitments with the Commission to divest their respective electricity and gas transmission systems businesses to suitable purchasers, essentially pre-empting the ownership unbundling measures in the Third Energy Package. These cases mark the first time that the structural divestment commitments have been accepted by the Commission in the energy sector, and for this reason they are important precedents, not only for energy incumbents, but for all companies being investigated for suspected competition law infringements, particularly abuse of dominance.

In addition to the above concluded cases, investigations are ongoing into potential abuse of dominant position in the form of long term electricity contracts in Belgium (Electrabel) and France (EDF), as well as into possible foreclosure in the

Italian and French gas markets by ENI and GDF respectively, and the French wholesale electricity market by EDF.

What Next?

On the one hand, going forward it will be interesting to see whether more investigations into energy incumbents are initiated and if so, in which Member States. (Investigations thus far have notably been focused in France, Germany and Belgium.) On the other hand, the imposition of a €1 billion fine on E.ON and GDF may hammer home the message to energy companies that they risk huge fines by engaging in anti-competitive activity. And even if a company manages to avoid the imposition of sanctions by agreeing on commitments with the Commission, the E.ON and RWE cases demonstrate that such commitments can be far-reaching and may well require the sale of whole businesses. Given these clear warnings and impending implementation of the ownership separation provisions of the Third Energy Package, perhaps we will after all see a reduction in the number of antitrust investigations, as the energy incumbents change their ownership structures and adapt long-held market practices. □

Radio Frequency Identification: New EC Recommendations

By Paul Van den Bulck (McGuireWoods)

Radio frequency identification (RFID) technology is considerably expanding throughout the world. It is used in sectors as diverse as transportation, distribution and health. This new technology provides extremely interesting economic prospects, notably for cost reduction, products traceability, and productivity gains. However, the European Commission has expressed concerns over the threat RFID poses to personal data protection.

RFID consists in the transmission of radio waves to and from a tag, in order to communicate the identity of

the tag or the information it contains from a distance, in such a manner that the interaction may occur without the knowledge of the individuals concerned. Therefore, RFID can potentially process personal data concerning identi-

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fied or identifiable individuals without their knowledge or consent. Concerned with the privacy issues, the EC has laid down a framework for the development of RFID, so that the potential socio-economic benefits of this technology are not made at the expense of public interest and citizens' privacy.

The Commission's recommendation of May 12, 2009 is consistent with Directive 95/46/EC on the processing of personal data, and Directive 2002/58/EC on privacy

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and electronic communications. Its content adds up to the existing framework governing personal data processing, which applies to RFID. However, contrary to the aforementioned directives, the recommendation merely provides guidelines, and its provisions are not obligatory.

Its aim is to provide Member States with a framework to ensure that the development of RFID is lawful, ethical, socially and politically acceptable, respectful of the right to privacy, and consistent with data protection principles.

Recommendations

Risk Assessment

The EC calls for the development of national frameworks for the assessment of the impact of RFID on privacy and data protection. According to the EC, Member States should notably ensure that operators (i.e., persons who determine the purposes and means of operating an RFID application):

- Conduct an assessment of the implications of the RFID application implementation for the protection of personal data and privacy, including whether the application could be used to monitor an individual.
- Take appropriate technical and organizational steps to ensure the protection of personal data and privacy.
- Designate a person or group responsible for reviewing the impact assessments and the appropriateness of the steps taken to ensure the protection of personal data and privacy.

Member States are asked to support the Commission in identifying the RFID applications that might raise information security threats with implications for the general public, and develop or apply a scheme, such as certification or operator self-assessment, in order to demonstrate the appropriateness of the protection and security measures taken, in relation to the assessed risks.

Public Information

According to the recommendation, operators should develop and publish a concise, accurate and easily understood information policy for their RFID applications that would include the operator's identity, the application's purpose, the nature of the data processed, potential privacy risks, and a summary of the privacy and data protection impact assessment.

In addition to this general information, operators should indicate the presence of RFID readers to individuals through the use of a European logo. The use of a logo is also recommended to inform individuals of the presence of tags on products sold to consumers. In this case, the EC favors an "opt-in" approach, meaning tags should be removed or deactivated when the sale of the product

occurs, unless the consumer expressly agrees for the tag to remain active.

However, this "opt-in" system would only be necessary where the impact assessment concludes that tags remaining operational represent a likely threat to privacy or the protection of personal data. Furthermore, the recommendation provides that the public should be informed of the potential benefits and risks of RFID technology. For the Commission, raising awareness among the public is key to a satisfying development of RFID.

Radio Frequency Identification can potentially process personal data concerning identified or identifiable individuals without their knowledge or consent.

Conclusion

The Commission recommendation appreciates both the benefits and risks associated with RFID. However, the framework it lays down in order to organize a lawful and satisfactory development of this technology is not binding for the Member States. Therefore there is no guarantee that national laws will develop the safeguards for which the Commission calls. □

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