



Big data and competition & Bird & Bird

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Scottish Competition Forum

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"I very much recognise the profile of big data as being the new currency of the Internet. Here we have something extremely valuable because, when you have access not only to one person's data but to millions and billions of data, then you can make analysis which is completely different from what you were able to do five or ten years ago, because you have new tools"

Margrethe Vestager, October 2014

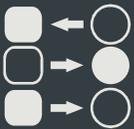
Competition and big data



The value of data



Competition and data protection – separate issues?



Market definition – services and data



Market power



Competition and data protection – convergence?



Conclusions

A bit of history



Data protection historically not a competition issue

Competition authorities did not enforce data protection rules

- Case C-238/05 *Asnef-Equifax*, concerned a register of solvency and credit information relating to banking customers

"...any possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection"
- *Facebook/WhatsApp*

"Any privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules"

So where can competition issues arise?

Market definition

- Competition authorities traditionally focused only on paid-for markets, eg. the sale of online advertising space, intermediary services in online advertising and provision of display ad serving technology (*Google/DoubleClick*)
- But increasing recognition that free services are also important, eg. consumer communications services (WhatsApp, Skype) and social networking services (Facebook, Google+) (*Facebook/WhatsApp*)
- In *Facebook/WhatsApp*, Commission also considered data as a possible market in its own right – but an obstacle to the traditional concept of a market was that the parties didn't commercialise their data

Market power

How does it apply to data?

- Measuring market power in free markets can be difficult – difficult to calculate value and (sometimes) volume
- Large quantities of data *could* allow their holders to exploit economies of aggregation and create entry barriers
- But the data is often ephemeral and transaction-specific – possession of even quite large quantities of data may not be an obstacle to another provider
- Commission in *Facebook/WhatsApp*: if merged entity were to start collecting data from WhatsApp users, some might switch to other consumer communications apps
- In any event, would be a concern only if control of data allowed Facebook to strengthen position in online advertising
- But many other large data collectors

Abuse

Ownership of data not itself anti-competitive

- Possession of large quantities of data not itself anti-competitive – requires abuse (in Article 102 cases) or SIEC/SLC (in mergers)
- As above, data protection concerns not of themselves grounds for competition intervention
- Repeated criticism of competition authorities by European Data Protection Supervisor for focusing only on the economic issues (eg. in *Google/DoubleClick*)
- But in fact quite detailed analysis of data issues
 - DoubleClick would have no market power to impose changes on customers
 - ISPs and other service providers have potentially broader and richer sets of data for advertisers to mine

But clear that competition law provides tools

French authority tackles exclusionary effect of large datasets

- French competition authority: GDF Suez had used consumer data on 11 million customers compiled under its former regulated status to target them to win back/switch in competitive markets – an advantage that its competitors did not have
- Ordered GDF Suez to make the data available to competitors, subject to safeguards agreed with French data protection authority

Evolution of the position...



Microsoft/LinkedIn

An update of the historical approach

- No competition concerns arising from combination of data
- Any combination of data would be subject to data protection rules – and GDPR will reinforce individual control of data
- If combination of data is permitted, two ways in which mergers may raise horizontal concerns:
 - may increase merged entity's market power in market to supply this data, or raise barriers to competitors in markets where this data is necessary
 - may eliminate competition between the parties if they competed on the basis of their data
- But not in this case – data not made available to third parties, and their combined datasets are relatively small

"We don't just assume that holding a large amount of data lets you stop others competing. After all, it might not be difficult for other companies to get hold of the same data, by collecting it from their own users or even buying it in. Or the data we're talking about might not be all that important in order to compete.

...
But it's possible that in other cases, data could be an important factor in how a merger affects competition. A company might even buy up a rival just to get hold of its data, even though it hasn't yet managed to turn that data into money. We are therefore exploring whether we need to start looking at mergers with valuable data involved, even though the company that owns it doesn't have a large turnover"

Margrethe Vestager, September 2016.

"There is an initial suspicion that Facebook's conditions of use are in violation of data protection provisions. Not every law infringement on the part of a dominant company is also relevant under competition law. However, in the case in question Facebook's use of unlawful terms and conditions could represent an abusive imposition of unfair conditions on users. The Bundeskartellamt will examine, among other issues, to what extent a connection exists between the possibly dominant position of the company and the use of such clauses."

Bundeskartellamt, May 2016

French/German joint report

Useful analysis of the issues

- Follows CMA study on the commercial use of consumer data in 2015
- Joint report in May 2016 considers
 - whether collection, processing and use of data may give market power – "data is like sunshine" v. "not all data is the right data"
 - types of data-related conduct that are potentially anti-competitive – exclusionary conduct, eg. refusal to give access, discrimination, exclusivity and tying, and price discrimination
 - whether data protection rules should take precedence over competition rules – concludes that competition authorities should consider privacy where it affects competition

Conclusions



Conclusions

Waiting for the "right case"...

- Long-running debate about the extent to which competition analysis can take account of data protection concerns
- Historical hard line seems to be softening
- Increasing recognition of some of the ways in which data can be critical to competition, and how control of data can restrict it
- But the landmark case hasn't yet arisen
- National authorities increasingly involved
- May see EU legislation in this area
- Note that Commission also considering data-based thresholds for merger review

And finally...

Big data as a competition enforcement tool

The screenshot shows the website of the Swiss Competition Commission (COMCO). The page title is "La COMCO sanctionne des entreprises de construction de routes et de génie civil". The article text is as follows:

Berne, 04.10.2016 - Huit entreprises actives dans la construction de routes et le génie civil se sont entendues sur les prix ainsi que sur la répartition de plusieurs centaines de soumissions entre 2002 et 2009 dans les districts de See-Gaster (SG), de March et Höfe (SZ). La Commission de la concurrence (COMCO) a sanctionné les entreprises pour un montant total d'amendes d'environ cinq millions de francs. Une des entreprises n'a pas été sanctionnée en raison de sa coopération.

L'enquête de la COMCO a été ouverte en avril 2013 par des perquisitions suite notamment à une analyse statistique des procès-verbaux de soumissions.

A red circle highlights the sentence: "L'enquête de la COMCO a été ouverte en avril 2013 par des perquisitions suite notamment à une analyse statistique des procès-verbaux de soumissions."

Thank you & Bird & Bird

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