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COMMENTARY

European Antitrust Enforcers Move on Holders of Big Data

Recent months have seen a surge of new initiatives by European antitrust enforcers applying competition law rules to holders and processors of "big data." Big data often is described as the accumulation of a significant volume of different types of data, produced at high speed from multiple sources, whose handling and analysis might require new and more powerful processors and algorithms.[1] Although public attention has so far mostly focused on search engines and social networks, many other industries, such as online advertising, energy, telecommunications, insurance, banking, or transport process big data and are thus potentially affected.

While issues around the collection and use of data have arisen before the European Commission in the past, notably in some merger control decisions, the focus has shifted to national antitrust enforcers who are starting to test the applicability of competition law tools to the processing (collection, transfer, and holding) of big data, in particular as an element in potential abuse of dominance cases.

Recent developments include the March 2016 abuse of dominance case against Facebook in Germany, a joint Franco-German report on the interplay between big data and competition released on May 10, 2016, and the announcement of further enforcement action in France. Other Member States such as the UK and Italy have looked at some of the relevant issues in the past and are likely to take steps in future.

These developments arise in the context of an increasing recognition of the value of data sets and of the revamping of European data protection rules. In the wake of the adoption of the new General Data Protection Regulation, which sets new standards for the protection of personal data in the EU,[2] including by enhancing individuals' control over their data (e.g., via a new right for data portability), antitrust regulators have started to test the applicability of competition law tools to big data issues.

European Commission and European Data Protection Supervisor

The Commission has analyzed data issues in the past, in a number of merger control cases. In its *Google/DoubleClick*[3] decision of 2008, the Commission assessed whether the combination of the parties' databases would impede competition; privacy issues were raised but did not play any decisive role in the Commission's decision. In *TomTom/TeleAtlas*,[4] the

Commission looked at the risk that the accumulation of data could lead to a lowering of the level of protection of confidential data. More recently, the Commission was called to review the merger between *Facebook* and *WhatsApp*,[5] where it analyzed whether Facebook could use WhatsApp as a potential source of user data to improve its advertising but concluded this was not the case to a point that it could hamper competition. The Commission stressed that, in accordance with established case law,[6] any pure privacy-related concerns would fall outside its jurisdiction under merger control,[7] contrary to the situation prevailing in the U.S., where privacy-related remedies were imposed as part of the transaction approval.[8]

Outside merger control, the Commission already considered that codes and structure of databases could be an essential facility to which access should be given in cases such as *IMS*[9] and *Reuters*.[10]

Recently, EU Commissioner Vestager confirmed the Commission's interest in big data and competition, in particular with regard to privacy issues and data as an asset, during a speech in January 2016.[11] She also stressed that the Commission so far had not found an antitrust problem with regard to data. The pending antitrust cases against Google target its advertising and Android businesses but are not expressly addressing big data.

The European Data Protection Supervisor ("EDPS"), the European data protection authority, has also taken an interest in the debate, through the publication of an opinion in 2014[12] and the organization of several workshops on the intersection of antitrust and data protection.[13]

Opening of Abuse of Dominance Case against Facebook by German Federal Cartel Office

In March 2016, the German Federal Cartel Office ("FCO") opened proceedings against Facebook for an alleged abuse of dominance. The FCO suspects that Facebook might abuse its dominant position in social networks through its privacy terms and conditions. In particular, the FCO suspects that Facebook's privacy terms could violate German privacy laws. Although the mere violation of privacy law by a dominant company would not be actionable under antitrust law, the FCO will assess whether Facebook's position allows it to impose contractual terms that would otherwise not be accepted by its users.

While previous Commission decisions had analyzed the impact of data collection on companies' market position on advertising markets, the FCO case is the first to link the collection of data from users and potential abuse of market position (vis-à-vis the users).

The case is likely to take years to decide, most importantly because the FCO will have to show that Facebook is dominant on a "market" even though it does not charge users,[14] and to establish that Facebook could not have imposed its conditions were it not for its dominant position, which will involve complicated counterfactual analyses.

The move was well received by EU officials: the EU's data-protection chief welcomed the initiative as a positive development.

French and German May 10 Report on Competition Law and Data

Even before opening the Facebook case, the FCO and the French antitrust authority (*Autorité de la Concurrence*) had begun work on a joint report on competition law and big data, which was published on May 10, 2016.

The report does not call for increased enforcement action but rather provides an overview of how the two authorities view the impact of big data on antitrust law and the potential theories of harm. For the most part, the report tries to place data in the context of established antitrust principles (such as data raising barriers to entry or data in the context of exclusionary or exploitative abuses). The report refers to a number of past cases that illustrate how authorities have analyzed data issues in antitrust cases and provides guidance on which issues authorities are likely to focus on in future.

The report argues that future cases could be based on a theory that abusive conduct arises from a firm's capacity to derive market power from data that its competitors cannot match. In assessing this "data advantage," authorities are

likely to assess whether data is scarce or easily replicable, and whether the scale and scope of data collection matters.

French Industry Inquiry and Follow-Up to Franco-German Report

In parallel, the French antitrust authority has indicated plans to launch a market investigation into big data. Earlier this year, some French industry players were said to have been contacted by the Authority to prepare for the market investigation. The market investigation is not directed at any company in particular but generally serves as an investigative tool for the Authority to better understand market conditions and dynamics. Nevertheless, the Authority's president did not exclude the possibility that the investigation's results may lead to the opening of cases against industry players.

United Kingdom

The UK Competition and Markets Authority ("CMA") published a report on "The commercial use of consumer data" in June 2015.[15] This was a fact-finding project aimed at helping the CMA understand how companies used big data, how consumers engage with them, the benefits of big data, and the potential harm to consumers and competition. The CMA identified a host of benefits for consumers, including more targeted advertising and promotions, the provision of free services, improved product development, and more personalized products and services. The CMA also highlighted potential anticompetitive effects arising from big data collection, in particular the ability of companies to obtain market power by virtue of the data they collect and subsequently to use that power to exclude their competitors by preventing or restricting access to and use of consumer data. However, the CMA did not indicate it had identified a specific concern that would lead to opening a new antitrust investigation.

In November 2015, the UK's Financial Conduct Authority ("FCA"), which has the power to enforce competition law in the UK in the financial sector, issued a call for input in relation to big data in retail general insurance.[16] The FCA's inquiry in part seeks to understand how big data could affect competition in retail insurance products, in particular private motor and home insurance, and how this could affect consumers. It is due to publish a feedback statement with its initial findings later this year. Those findings could include a more in-depth investigation by way of a market study.

Italy

Although in Italy the collection and use of big data has not yet appeared on the radar screen of the Italian Competition Authority ("ICA"), the ICA very extensively has applied both the rules on unfair commercial practices and article 102 TFEU to challenge unfair commercial terms imposed by several service providers to their customers. Particularly in the field of abuse of dominance, the pending FCO investigation against Facebook echoes some past investigations of the ICA where the latter treated the financial burdens imposed by the telecom and the electricity incumbents to new subscribers taking over previous subscriptions (that is, the obligation for such new subscribers to pay the unpaid bills of the previous customers to be able to take over the subscriptions) as a form of exploitative abuse. The theory of harm underlying the ICA investigations was that when imposing on subscribers such unfair contractual terms, these dominant suppliers did nothing other than exploit their market power with a view to extracting exorbitant advantages from consumers, a practice that can be assimilated to pricing above competitive level designed to extract monopoly rent from consumers.

Belgium

In September 2015, the Belgian competition authority adopted a settlement decision fining the national lottery approximately EUR 1.2 million for abusing its dominant position. The lottery was found to have been using its client database, under its legal monopoly for public lottery, for selling its new sports betting products, which are under competition.

Conclusion

For now, national competition authorities are taking the lead in understanding how the collection and use of big data might affect competition. There is a growing consensus among those authorities that existing antitrust laws and

enforcement powers should suffice to address any concerns identified and that the most likely concerns will derive from possible abuses of a dominant position. Of course, the collection of data by businesses about customers will continue apace, especially given the growth of the Internet of things. These trends will collide, and we expect that sooner rather than later one or more authorities will open antitrust investigations into specific companies that have stolen a march over competitors in gathering big data and may be using that data to obtain an advantage over rivals in the same or neighboring markets. There are many procompetitive and pro-consumer benefits to the collection and analysis of big data, but companies gathering such data should consider carefully how they use it and how best to avoid the antitrust risks.

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For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/.

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Endnotes

1 As defined in the joint French-German report on Competition Law and Data.

2 *See* Jones Day *Commentary*, "Agreement Reached on the European Reform of Data Protection," Dec. 2015.

3 Case COMP/M.4731, 11.03.2008.

4 Case COMP/M.4854, 14.05.2008.

5 Despite failing to meet the EU turnover thresholds based on turnover, the concentration did meet the national merger thresholds based on market shares in three EU countries, which allowed the EU to review it.

6 Case C-235/08, Asnef, [2006] ECR I-11125, § 63.

7 European Commission Press Release, October 3, 2014.

8 Letter from Jessica L. Rich, Director of the Federal Trade Commission Bureau of Consumer Protection, to Erin Egan, Chief Privacy Officer, Facebook, and to Anne Hoge, General Counsel, WhatsApp Inc.

9 Commission decision of July 3, 2001. in Case COMP D3/38.044, IMS Health.

10 Commission decision of December 20, 2012, in case AT.39654, Reuters Instrument Codes.

11 Commission announcement of January 18, 2016, "Competition in a Big Data World."

12 EDPS, March 2014, "Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy."

13 EDPS, Report of workshop on Privacy, Consumers, Competition and Big Data, June 2, 2014, and other workshops.

14 The question whether services provided free of charge constitute markets is not settled. In an interview of May 2, 2016, FCO President Mundt stated that the FCO's practice was to consider them as markets but also called for the German legislator to clarify the issue.

15 CMA, "The commercial use of consumer data."

16 FCA, "Calls for Inputs: Big Data in retail general insurance."