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Big data and competition law in the digital sector: Lessons from the European Commission's merger control practice and recent national initiatives

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ABSTRACT

The phenomenon of “big data” has been catching the attention of competition practitioners over the past years, as it challenges (and helps modernize) several traditional tenets of competition law. In this context, the article seeks to provide insights on three specific issues, on the basis of the European Commission merger control practice and the nascent practice of certain national competition authorities. First, how big data fits within the definition of a relevant market, in particular in view of the free nature of data collection and certain online services. Second, whether and how the accumulation of big data could lead to competitive harm, which the Commission is yet to characterise clearly. Third and last, whether competition law should also address privacy infringements, with a focus on the ongoing German investigation into Facebook. On each of these three topics, the coming months and years will tell whether the Commission and NCA will maintain their current cautious approach or rather consider that competitive issues relating to big data mandate a more (pro)active and innovative enforcement policy.

Le phénomène du «big data» fait actuellement l'objet d'une attention croissante, tant il questionne (et contribue à moderniser) certains aspects traditionnels du droit de la concurrence. Dans ce contexte, l'article vise à apporter des éléments d'analyse sur trois questions spécifiques, à la lumière de la pratique décisionnelle de la Commission européenne en matière de contrôle des concentrations et de la pratique naissante de certaines autorités nationales de concurrence. Premièrement, comment le big data s'inscrit dans la définition d'un marché pertinent, eu égard notamment à la gratuité des données collectées et de certains services offerts en ligne. Deuxièmement, de quelle manière la concentration de données pourrait avoir des effets anticoncurrentiels, ce que la Commission n'a pas encore clairement caractérisé dans sa pratique décisionnelle à ce jour. Troisièmement, dans quelle mesure le droit de la concurrence devrait également appréhender des violations de la protection des données personnelles, en particulier au vu de l'enquête visant actuellement Facebook en Allemagne. Sur l'ensemble de ces questions, nous verrons dans les prochains mois et années si la Commission et les ANCs décident de conserver une approche prudente ou, au contraire, d'adopter une politique plus (pro)active et innovante à l'égard des questions liées au big data.

Big data and competition law in the digital sector: Lessons from the European Commission's merger control practice and recent national initiatives

Introduction

1. Big data is one of competition law's latest buzzwords, inspiring a wealth of legal and economic literature, numerous conferences, and even studies by national competition authorities (“NCAs”) on the impact of big data on competition.¹ The French Competition Authority (“FCA”) also launched a sector inquiry into big data in online advertising,² while the German Bundeskartellamt (“BKA”) opened an investigation into a potential abuse of dominance by Facebook arising from the company's privacy policies.³

2. However, at the time of writing (mid-July 2016), this whirlwind of activity has yet to lead to the European Commission (“the Commission”) clearly establishing specific harm to competition through the use of big data. This also appears to be the situation in the Member States. Therefore, the contours of this topic remain relatively blurred, as confirmed by recent statements by Commissioner

1 Autorité de la concurrence and Bundeskartellamt, Competition Law and Data, 10 May 2016 (the “Franco-German Study”) (<http://www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf>); UK Competition and Markets Authority (“CMA”), The commercial use of consumer data, June 2015 (the “CMA Study”), (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/435817/The_commercial_use_of_consumer_data.pdf); Bundeskartellamt, 9 June 2016, Working Paper - The Market Power of Platforms and Networks - Executive Summary (http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Zusammenfassung.pdf?__blob=publicationFile&v=4).

2 Aut. conc., déc. n° 16-SOA-02 du 23 mai 2016 relative à une saisine d'office pour avis portant sur l'exploitation des données dans le secteur de la publicité en ligne. The English press release is available here: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=630&id_article=2780.

3 Bundeskartellamt initiates proceeding against Facebook on suspicion of having abused its market power by infringing data protection rules, 2 March 2016, available at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html.

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Margrethe Vestager: “If a company’s use of data is so bad for competition that it outweighs the benefits, we may have to step in to restore a level playing field. But we shouldn’t take action just because a company holds a lot of data. After all, data doesn’t automatically equal power.”⁴ The truth is that the competition community is still eagerly waiting for a first emblematic case pertaining to the anticompetitive accumulation and/or use of big data. In this context, the forthcoming Commission’s review of Microsoft’s acquisition of LinkedIn⁵ is likely to attract significant attention.

3. Companies have always collected data for a variety of purposes, and whether data may raise antitrust concerns is not a novel issue. The FCA and its Belgian counterpart, in particular, have found that the use of data has given rise to abuses of a dominant position.⁶ The Commission also found that in certain circumstances databases could be considered as essential facilities to which access should be given on fair, reasonable and non-discriminatory terms.⁷

4. However, in recent years, the dramatic change in the magnitude and scope of data collection, storage and use has put the notion of «big data» in the spotlight. As a generic term, “big data” refers to 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. Big data is therefore often summarised by the “3 Vs” formula: volume, velocity and variety.⁸

5. Big data has become an indispensable tool for online business, especially for companies that offer free services to their customers, as typified by providers like Facebook and Google. User’s data, including personal data, has therefore been deemed by some as the “new oil” of the Internet and the “new currency” of the digital economy.⁹ As Commissioner Vestager explained in plain language, “[v]ery few people realize that, if you tick the box, your information can be exchanged with others. (...) Actually,

you are paying a price, an extra price for the product that you are purchasing. You give away something that was valuable.”¹⁰

6. Although public attention has so far mostly focused on search engines and social networks, many other industries process big data and are thus potentially affected. For example, it was recently reported that Monsanto became the biggest investor in big data in agriculture following its acquisition of Climate Corp., a powerful big data analytical tool; in a nutshell, with wireless sensors installed on tractors, Monsanto can now accumulate detailed information on a field-by-field basis, covering a third of U.S. farmland.¹¹ Other potentially affected sectors include e-commerce (e.g. Amazon), online advertising, energy, telecommunications, insurance, banking, transport and even video games. As a very recent example, “Pokémon Go”, an augmented reality mobile game, heavily relies on big data.¹²

7. Notably, it should be clear from the outset that big data is not synonymous with personal data. Personal data is defined under Regulation (EU) 2016/679 (the “General Data Protection Regulation”) as any information relating to an identified or identifiable natural person, who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.¹³ Big data is a broader concept, encompassing both personal and non-personal data.¹⁴ This distinction is important, since some of the competitive issues raised in this article pertain only to personal data, while others may also equally apply to all types of data.

8. *From a competitive perspective*, big data may be both a blessing and a curse. On the one hand, big data is a tremendous tool that can help digital companies improve the quality of their services, exploit new business opportunities and/or provide services that are more individualised for each customer, such as behavioural targeted advertisements.¹⁵ On the other hand, the collection and accumulation of data may raise specific risks regarding competition, as stressed by the Franco-German Study. First, data may constitute a barrier to entry for new entrants, if they cannot have access to the same variety

4 Speech delivered by Commissioner Margrethe Vestager on 17 January 2016 at the Digital Life Design (DLD) Conference in Munich, Competition in a big data world.

5 MLex, 14 June 2016, Microsoft, LinkedIn deal needs green light in Brussels.

6 Aut. conc., déc. n° 14-D-06 du 8 juillet 2014 relative à des pratiques mises en œuvre par la société Cegecim dans le secteur des bases de données médicales; Aut. conc., déc. n° 14-MC-02 du 9 septembre 2014 relative à une demande de mesures conservatoires présentée par la société Direct Energie dans les secteurs du gaz et de l’électricité. See also the Belgian Autorité de la concurrence, Beslissing No. BMA-2015-P/K-27-AUD van 22 september 2015 Zaken nr. MEDE-P/K-13/0012 en CONC-P/K-13/0013, Stanleybet Belgium NV/Stanley International Betting Ltd en Sagevas S.A./World Football Association S.P.R.L./Samenwerkende Nevenmaatschappij Belgische PMU S.C.R.L. t. Nationale Loterij NV.

7 Commission decision of 3 July, 2001 in Case COMP D3/38.044 – *IMS Health*; European Court of Justice (“ECJ”), *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*, Case C-418/01.

8 Franco-German Study, p.4.

9 Speech delivered by Commissioner Margrethe Vestager on 17 January 2016, op. cit. See also the speech of former Consumer Protection Commissioner Meglena Kuneva on 31 March 2009 at the Roundtable on Online Data Collection, Targeting and Profiling, SPEECH/09/156: “Personal data is the new oil of the Internet and the new currency of the digital world.”

10 Interview of Commissioner Vestager with L. Crofts and R. McLeod, published in MLex on 1 January 2015.

11 I. M. Carbonell, The ethics of big data in big agriculture, *Internet Policy Review*, March 2016, Vol. 5, Issue 1.

12 DML Central blog, 14 July 2016, «The Secret Sauce in Pokemon Go: Big Data», <http://dmlcentral.net/secret-sauce-pokemon-go/>.

13 Article 4 of 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, OJ L 119, 4.5.2016, p.1.

14 Non-personal data can be classified in two categories, namely “pseudonymous data” and “aggregate data.” In both cases, the data do not enable to identify a particular individual either because they are stored in an anonymous format or because they are the result of a combination of personal or pseudonymous data.

15 Franco-German Study, Section II. 4. a, b and c.

and volume of data.¹⁶ Second, data enhances market transparency and could therefore facilitate market collusion (e.g. by making the detection of a deviation from a tacit or explicit collusion easier).¹⁷ Third, there is also a high risk that some market players may be tempted to adopt exclusionary conduct in relation to data, in view of precluding rivals from accessing the same information.¹⁸ It is hoped that the FCA's ongoing sector inquiry into big data in online advertising will shed further light on these issues.

9. This article will solely be concerned with competition law-related issues, leaving aside other potentially relevant areas such as data protection and consumer protection rules.¹⁹ It will explore the current status of the law and the ongoing debate regarding how competition law—and especially merger control—views the accumulation of data from the perspective of potential harm to competition. The focus, more specifically, will be on Commission merger decisions that address big data in the digital sector. A large part of the article will deal more specifically with online advertising markets, as these have given rise to the most notable developments thus far and are the specific topic of the above-mentioned FCA's sector inquiry.

10. From this perspective, the Commission's practice provides answers with regard to (at least) three interesting issues. First, whether big data fits within an analysis of relevant market(s) (I.). Second, how to measure competitive harm depending on whether sufficient data remains available to competitors (II.). And third, whether and how privacy infringements can also harm competition (III.).

I. Fitting big data within a relevant market analysis

11. Given the various and specific applications of big data, competition authorities face a challenging exercise in defining a market (or markets) for big data (1.), which may explain the Commission's (and NCAs') thus far cautious approach (2.).

1. The challenge of defining a market for big data

12. Under current practice, market definition and market shares are in principle the starting point of a competition analysis—especially with respect to mergers and abuses of dominance. Defining a relevant market is useful in determining which goods or services actually or potentially compete. It also enables a competition authority to measure a firm's ability to exercise market power.

13. Although under its Notice on the definition of a relevant market,²⁰ the Commission is deemed to assess product substitutability from both demand and supply side, the main focus of market definition is often on demand-side substitutability, i.e. to what degree would customers substitute one product for another. In this respect, the Commission traditionally relies on the SSNIP test,²¹ which assesses in particular whether customers would switch to readily available substitutes in response to a hypothetical small but permanent price increase. In that sense, a product market can exist only if a product or service is available to customers.

14. Under this customary approach, data that is used only internally as an input to another service, such as advertising services, cannot constitute a relevant product market. Only if data is directly sold to customers could the provision of that information potentially constitute a relevant market.²² However, if there is no demand to purchase big data and consequently no sale of such data, there can be no market.

15. However, those classical tenets of competition law are coming under challenge in the context of the digital economy. First, because free products or services can constitute a relevant market: for example, in *Microsoft/Skype*,²³ the Commission accepted that although most video communication services were available for free, there could be a relevant market for such services.²⁴ Similarly, in its ongoing investigation about Google Search, the Commission expressed the preliminary view that Google was dominant on the market for general Internet search services, although such services are for free.²⁵

16. In such cases, however, identifying the relevant product markets at stake may prove difficult. Indeed, in order to measure the substitutability between various free

¹⁶ Ibid., pp. 11–13.

¹⁷ Ibid., pp. 14–15.

¹⁸ Ibid., pp. 15–25.

¹⁹ For example, the CMA recently found that cloud storage providers could be breaching consumer protection law by inserting clauses giving them the ability to “change the service or terms of the contract at any time, for any reason and without notice; suspend or terminate the contract without notice for any reason; automatically renew a contract at the end of a fixed term without giving notice or withdrawal rights” (see the CMA consumer law compliance review dated 27 May 2016 and available at <https://www.gov.uk/government/consultations/cloud-storage-consumer-law-compliance-review>).

²⁰ OJ C 372, 9.12.1997, pp. 5–13.

²¹ The Hypothetical Monopolist or Small but Significant Non-transitory Increase in Prices (SSNIP) test.

²² As set out, in particular, in D. Tucker and H. Wellford, *Big Mistakes Regarding Big Data*, *Antitrust Source* (Dec. 2014), at 8.

²³ Commission Decision of 7 October 2011 in Case COMP/M.6281 - *Microsoft/Skype*.

²⁴ Ibid., §§. 78, 80, 81 and 87.

²⁵ Brussels, 15 April 2015, IP/15/4780, Antitrust: Commission sends Statement of Objections to Google on comparison shopping service; opens separate formal investigation on Android.

services, the SSNIP test is not of much help, precisely because it relies on a price increase. In order to solve this problem, some have suggested that competition authorities may consider applying an “adapted SNNIP test”, that could potentially take two forms.²⁶ Instead of simulating the effect of a price increase, one could simulate the effect of a degradation of quality, and in particular of data privacy policies. If, as a result of a hypothetical small but permanent degradation of quality of a given service, users switch to other services, the latter will belong to the same product market. Another possibility to measure substitutability would be to extend the SNIPP test to the other (paying) side of the market.

17. Second, because high market shares do not necessarily translate in market power. In *Microsoft/Skype*, the Commission found in particular that in the “nascent and dynamic” sector of consumer communication services, where almost all products were offered for free, market shares were not necessarily an appropriate proxy to assess market power.²⁷ The Commission also emphasised that competition was based on non-price parameters such as quality and innovation, and that barriers to entry were low. That led the Commission to consider that Microsoft’s post-merger market share of 80 to 90% on the narrowest possible relevant market for video calls delivered on Windows-based PCs would not give rise to competition concerns in view of (i) the dynamic character of the sector and (ii) the fact that consumers could easily switch to alternative providers.²⁸ Most importantly, that somewhat unorthodox approach received the General Court’s unequivocal backing.²⁹

18. So far, competition authorities have essentially analysed big data as an input, usually collected for free and used internally by online companies to develop or improve the quality of other services, such as targeted advertising or data analytics services. Most online companies such as Google or Facebook are multi-sided platforms offering distinct services to different categories of users, namely consumers and merchants/advertisers. The platform is an interface enabling these different categories of users to interact. On the consumer side of the market, companies like Google and Facebook offer free services, such as Internet search or communication services to consumers. This activity enables the platforms to collect a large amount of data on their consumers. On the business side of the market, the same companies use the data collected to sell services enabling advertisers/merchants to better target consumers using their platforms. This business model differs from traditional, single-sided companies, thereby making the analysis more difficult for competition authorities.

26 This was discussed during the conference “New Frontiers of Antitrust” organised by Concurrences on 13 June 2016 in Paris.

27 *Ibid.*, §§ 78-80.

28 *Ibid.*, §§ 120-132.

29 Case T-79/12 *Cisco Systems e.a./ Commission* [2013] ECLI:EU:T:2013:635, in particular points 65-74. The Commission publicly hailed the General Court for upholding its «assessment of new markets and technologies» (MEMO/13/1137 published by DG Competition on 11 December 2013).

19. However, in addition to being an input, the data collected can also itself be traded. Indeed, given the growing importance of data in the digital sector, a number of online platforms, such as Twitter, are increasingly tempted to change their business model and to start selling, exchanging or licensing data itself (instead of services incorporating such data). Those platforms treat their datasets as an additional source of revenues, by providing such datasets to third parties, which use it as a «raw material».³⁰ As explained by the CMA’s recent study on consumer data³¹ and the FCA’s decision opening the French sector inquiry,³² there is already a trend towards trading data itself,³³ which should sooner or later translate into the competition authorities’ decisional practice pertaining to market definition. Considering a relevant market consisting of the trade of data would actually be more in line with the reality of today’s digital economy, where data is used both as an internal input and as a tradable item. As discussed in Section I.2 below, the Commission appears to have already made space for such a scenario.

2. The Commission’s (and NCAs’) cautious approach

20. In the digital sector, the Commission has already accepted to consider the collection of data as a relevant market in a case where data was actually sold to customers. In *TomTom/Tele Atlas*,³⁴ the Commission identified the provision of navigable digital map databases as a relevant product market. A digital map database is a compilation of digital data which typically includes (i) geographic information which contains the position and shape of each feature on a map (e.g., road, river, etc.), (ii) attributes which contain additional information associated with features on the map (e.g., street names, driving directions, etc.), and (iii) display information.³⁵ Such a database, which is not in itself a digital map, is used by customers to generate digital maps and provide services based on map information. Digital map databases are sold to manufacturers of navigation devices, producers of navigation software and providers of non-navigation applications.

21. In cases involving online advertising, the Commission has thus far skirted the issue of defining a relevant market for big data as such, presumably because in the cases analyzed so far data was not sold to customers.

30 I. Graef, *Market Definition and Market Power in Data: The Case of Online Platforms*, *World Competition Law & Economics*, 2015, Vol. 38, Issue 4.

31 CMA Study, §§ 2.40-2.44.

32 Déc. n° 16-SOA-02, §§ 10–11.

33 Such as “Facebook Topic Data,” developed by Facebook in partnership with Datasift, which for the first time allows insights to be drawn from posts, likes, comments and shares across the entire Facebook network (<https://www.facebook.com/business/news/topic-data>, <http://www.datasift.com/products/pylon-for-facebook-topic-data/>).

34 European Commission decision of 14 May 2008 in Case COMP/M.4854 – *TomTom/TeleAtlas*, §§ 17–38.

35 *Ibid.*, § 17.

The Commission's analysis has focused on data-related services and functionalities, instead of the data itself. For example, the Commission identified a market for marketing data services, further segmented into (i) marketing information services, (ii) market research services and (iii) media measurement services.³⁶ Such market did not consist of the actual sale of data, but of services incorporating the data as an input.

22. Nonetheless, the door to defining a market consisting of the sale of big data appears to have implicitly opened in the *Facebook/WhatsApp* case, which examines online advertising. Facebook collected data regarding its users and analysed that data in order to serve "targeted" advertisements on behalf of advertisers. However, Facebook neither sold any of that data nor provided data analytics services as a stand-alone product separate from the advertising space itself. As regards WhatsApp, it did not store or collect any data about its users that could be of value for advertising purposes. The Commission stated that it did not investigate "any possible market definition with respect to the provision of data or data analytics services, since, neither of the Parties is currently active in any such potential markets."³⁷ Conversely, had any or both of the parties been active in the "provision of data," the Commission may have delved further into defining a potential relevant market for big data.

23. The above-mentioned FCA's ongoing sector inquiry should provide further insights on this issue. In its decision of 23 May 2016 opening the sector inquiry, the FCA considers that where data is acquired from third parties in bulk or with added value, in order to enhance the quality of services or to develop new services, this can be considered as "products supplied on a relevant market."³⁸ The FCA will also assess, in particular, the degree of substitutability between various commercial offers for data used by companies active in online advertising.³⁹

24. In this context, the pressure is building on competition authorities to define a relevant market (or markets) for big data. Various commentators and public/private entities—including the European Data Protection Supervisor ("EDPS")—are advocating for a more innovative approach in this respect, leaving aside the question of whether data is sold to customers or not. Indeed, they are in favour of defining what former US FTC Commissioner Pamela Jones Harbour called "a putative relevant product market comprising data that may be useful to advertisers and publishers who wish to engage in behavioural targeting."⁴⁰ These commentators

emphasise that firms are constantly finding new ways to use/monetize big data, far beyond the initial purposes for which the data was originally collected.⁴¹ Defining such a putative market, while perhaps "unusual,"⁴² would enable the Commission to take into account a form of potential competition for acquiring/collecting data that could be used to improve the quality and the relevance of services or to develop new products.⁴³ In addition, the EDPS suggested that the finding of two separate markets for (i) the collection of data and (ii) the use thereof to supply another service under competition analysis may help to highlight instances of breaches of data protection rules.⁴⁴ Along the same lines, others have suggested that competition authorities should define "wholesale markets for data and access to consumers," in order to adequately deal with competitive problems linked to big data.⁴⁵

25. Given the above considerations, and despite the lack of fully conclusive precedent at this stage, the existence of a market (or markets) for big data appears sensible, at least where such data is available for purchase. Where data itself is not traded, it may nonetheless have an important role to play in market definition. Under one view, consumers could be considered as «paying» for the free services they are using by providing personal data.⁴⁶ Another view - more widely held - is that the relevant market actually comprises the two interdependent platform sides (i.e., the consumer side and the business side, as referred to above).⁴⁷

36 Commission decision of 9 January 2014 in Case COMP/M.7023 – *Publicis/Omnicom*, § 618. Commission decision of 4 September 2012 in Case COMP/M.6314 – *Telefónica/Vodafone/Everything Everywhere*, §§ 197–198.

37 Commission decision of 3 October 2014 in Case COMP/M.7217 – *Facebook/WhatsApp*, § 72.

38 Déc. n° 16-SOA-02, § 16: "(...) dans ce cadre, les données peuvent être considérées comme des produits fournis sur un marché pertinent."

39 *Ibid.*, § 19.

40 Dissenting Statement of Commissioner Pamela Jones Harbour of 20 December 2007, *Google/DoubleClick*, FTC File No 071-0170.

41 P. Jones Harbour, *Competition & Privacy in Markets of Data*, Comments to European Parliament (26 November 2012), p. 4.

42 P. Jones Harbour acknowledges that such a definition "may be unusual under traditional market definition principles" (P. Jones Harbour, *The Transatlantic Perspective: Data Protection and Competition Law*, in *Communications and Competition Law: Key Issues in the Telecoms, Media and Technology Sectors*, F. Cugia di Sant'Orsola, R. Noormohamed and D. Alves Guimaraes [eds.], IBA Series, Vol. 25).

43 I. Graef, *op.cit.*, at 5.3.

44 Preliminary Opinion "The interplay between data protection, competition law and consumer protection in the Digital Economy" of the EDPS, March 2014, p. 27: "Powerful suppliers of various digital services may initially collect personal data on a massive scale in one market to provide a certain service in that market. One of these suppliers could then process these data, which in competition terms could be defined as input, to supply another service and/or sell the data for processing by another firm which provides services in another distinct market. If, according to the analysis, the 'second' type of service using the data as an input belongs to a separate market, then this service would be deemed non-substitutable with the service for which the data were originally collected. Thus, competition analysis could support the conclusion, from a data protection perspective, that data are being processed for separate and possibly incompatible purposes unbeknown to the individuals who have supplied the data. Such a conclusion could be more evident in cases where the two types of services are perceived by customers to be very different. The application of competition rules could therefore help highlight instances of breaches of data protection law."

45 Centre for European Policy study: *Competition Challenges in the Consumer Internet Industry – How to Ensure Fair Competition in the EU*, February 2016, pp. 4 and 21.

46 Preliminary opinion of the European Data Protection Supervisor, March 2014, *op.cit.*, in particular §§ 1, 10 and 57; A. Burnside, *No Such Thing as a Free Search: Antitrust and the Pursuit of Privacy Goals*, *CPI Antitrust Chronicle*, May 2015 (2).

47 Bundeskartellamt, Working Paper - *The Market Power of Platforms and Networks - Executive Summary*, pp. 6-8. For further economic insights, see L. Wiethaus, *Do Internet users really pay with information about themselves?*, *Concurrences* N° 4-2015, p. 55.

26. In any event, in view of the fast-moving nature of the digital economy, big data should soon become part of the competition authorities' assessment pertaining to market definition. Whether defining a market for big data would bring any change to the analysis remains, however, to be seen, since as explored in Section II, big data already plays a significant role in the Commission's merger control analysis.

II. The main test: Does sufficient data remain available for competitors?

27. The specific competition issues raised by big data vary from case to case, as these largely depend on the factual setting at stake. This section will mainly examine the Commission's merger control practice in the most prominent cases involving big data, which all relate to online advertising markets: *Google/DoubleClick* (1.), *Facebook/WhatsApp* (2.) and *Telefónica/Vodafone/Everything Everywhere* (3.). The first two cases concern similar issues, relating to the accumulation of huge datasets resulting from the concentration between leading digital companies (i.e. Google/DoubleClick and Facebook/WhatsApp), and its impact on the online advertising market(s). The third case, *Telefónica/Vodafone/Everything Everywhere*, is slightly different since it addressed the concentration of data coming from three mobile operators that were not viewed, pre-merger, as key actors in big data. In each of these cases, the Commission examined how much data remained available, post-transaction, for advertising or data analytics purposes, and whether that amount would suffice for competitors to match the advantages gained by the merging parties through the operation.⁴⁸ This involved asking, in particular, whether there are any substitutes to the data and the accessibility of the data. In each case, the Commission answered the question in the positive, i.e. it found no competition concerns that would necessitate remedies or even a prohibition.

28. Outside of those cases relating to online advertising, the Commission analyzed other issues pertaining to big data (including potential efficiencies), as detailed below (4.).

1. *Google/DoubleClick* (M.4731, 2008)

29. This was the first case in which the Commission assessed the competitive impact of a transaction involving digital companies holding significant amounts of data, including a company that was already a heavyweight in the digital world.⁴⁹ It was also the Commission's first application of its 2007 Non-Horizontal Merger Guidelines.⁵⁰ As will be discussed below, the Commission's assessment—following a Phase 2 procedure—eventually did not reveal compelling issues stemming from the accumulation of the parties' data.

30. Google already acted as a provider of online advertising space on its own website and offered intermediation services for online advertisements through its ad network, AdSense. DoubleClick provided “ad serving” technology, i.e. technology that ensures that once online advertising space has been sold by a publisher (e.g., Google) to an advertiser, the correct advertisement actually appears (i.e. is served) on the publisher's online space at the right place and time. DoubleClick sold ad serving technology to both publishers and advertisers.

31. Both companies collected and stored vast amounts of data. Google collected data relating to its users' search and browsing history on the Internet. DoubleClick collected, on behalf of its clients (advertisers and publishers), data from end customers (i.e. Internet users) on its servers hosting its ad serving products. The Commission drew a distinction between (i) data created on the advertiser side by use of DFA (DART For Advertisers, DoubleClick's product for advertisers) and (ii) data created on the publisher side by use of DFP (DART For Publishers, DoubleClick's product for publishers). Data created through the use of DFA contains information about “a subset of the web-browsing behaviour of the user across the websites of all the publishers who carry ads of DFA customers, that is to say advertisers.”⁵¹ Data generated through the use of DFP consists, in particular, of a record about “which advertiser or ad network has been selected to fill a specific ad space at a given time for a given web page of the publisher's whole website as well as the IP address of the user who had requested the web page.”⁵²

32. The Commission assessed a foreclosure scenario under which the mere combination of DoubleClick's assets with Google's assets—and in particular data on customer online behaviour—could allow the merged entity to achieve a position that its competitors could not replicate. Under that theory of harm, as a result

49 Commission Decision of 11 March 2008 in Case COMP/M.4731 – *Google/DoubleClick*.

50 Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008, p. 6. The Guidelines were actually adopted on 28 November 2007 (see IP/07/1780).

51 *Google/DoubleClick*, § 182.

52 *Ibid.*, § 186.

48 The Franco-German Study also analyses this string of cases in this manner (see pp.45–46).

of this combination, Google's competitors would have been progressively marginalised, and Google would have ultimately been able to raise the prices of its intermediation services for online advertisements.⁵³ The Commission described its concerns as follows: *"It is not excluded that, from a factual point of view, the merged entity would be able to combine DoubleClick's and Google's data collections. Such a combination, using information about users' IP addresses, cookie IDs and connection times to correctly match records from both databases, could result in individual users' search histories being linked to the same users' past surfing behaviour on the Internet. For instance, after such a match, the merged entity may know that the same user has searched for terms A, B and C and visited web pages X, Y and Z in the past week. Such information could potentially be used to better target ads to users."*⁵⁴

33. However, the Commission discarded the possibility that the merged entity could operate such a combination. First, DoubleClick was contractually prohibited from "cross-using" the data collected through the use of DFA and DFP.⁵⁵ This meant that each contract between DoubleClick and individual advertisers or publishers stipulated that the user data collected by DoubleClick through DFA and DFP could only be used by DoubleClick for the purposes of the relevant contract. Thus, DoubleClick could not use such data for the purpose of improving the targeting of advertising for any other advertiser or publisher. Second, DoubleClick lacked the ability to change those contractual terms, in particular because advertisers and publishers were clearly reluctant to allow their competitors to benefit from the use of what they considered as "their" data.⁵⁶ DoubleClick also lacked the incentive to seek to obtain such contractual amendments. This is essentially because abandoning its role as a neutral service provider would require far-reaching changes to DoubleClick's business model.⁵⁷

34. Moreover, the Commission emphasised that even if Google's and DoubleClick's data collections were available as input for DoubleClick, Google's competitors already had various means of combining data on searches with data about users' web surfing behaviour.⁵⁸ For example, some competitors ran search engines and simultaneously offered ad serving technology (e.g., Microsoft and Yahoo!). Others could purchase data or targeting services from third parties, or purchase data from Internet service providers (which can track all of the online behaviour of their users). In addition, some of such data was potentially much broader and richer than data collected by DoubleClick (or even the merged entity). Therefore, even if Google had been able to use the data collected by

DoubleClick, this would not have squeezed out competitors and ultimately enabled the merged entity to charge higher prices for its intermediation services for online advertisements.

35. This case clearly affirms that for the purposes of competition analysis, data is considered as an "asset," which was not necessarily an obvious conclusion back in 2008. In addition, it arises from the Commission's analysis of foreclosure risks that the test is whether the combination of data collections could enhance the merged entity's competitiveness *"in a way that would confer on the merged entity a competitive advantage that could not be matched by its competitors."*⁵⁹ In *Google/DoubleClick*, prima facie, an external observer may have suspected anticompetitive effects, in view of the size of the combined datasets. However, since even after a Phase 2 investigation, the Commission did not find any harm to competition, it suggests that the above-mentioned test could rarely be met. Still, the Commission's assessment might differ if conducted today, in view of the fast-moving nature of the markets concerned, which the Commission itself had already described as *"dynamic and rapidly evolving."*⁶⁰

2. Facebook/WhatsApp (M.7217, 2014)

36. The Commission's review of Facebook's acquisition of WhatsApp received extensive media coverage, not least due to the USD 19 billion that Facebook committed to the transaction. In addition, the parties were heavyweights in the digital sector. At the time, Facebook's social networking platform had 1.3 billion users worldwide, of which 250–350 million were also users of the Facebook Messenger application ("app"). WhatsApp's social communications app had 600 million users worldwide and was particularly popular in Europe.⁶¹

37. With regard to big data, the Commission focused its analysis on the market for online advertising services, on which only Facebook was active. Facebook collects data on its users and analyses that data in order to serve "targeted" advertisements on behalf of advertisers. On its side, at the time of the Commission's review, WhatsApp sold no form of advertising and did not store or collect data about its users that would be valuable for advertising purposes. In addition, the messages that users send through WhatsApp were stored only on the users' mobile devices or cloud, but not on WhatsApp's servers. Despite these findings, the Commission investigated whether Facebook's position in a potential overall online advertising market—currently between 20 and 30 percent—was likely to be strengthened as a result

⁵³ Ibid., § 359.

⁵⁴ Ibid., § 360.

⁵⁵ Ibid., §§ 183–184 and 188.

⁵⁶ Ibid., §§ 261 and 363.

⁵⁷ Ibid., §§ 263–266 and 363.

⁵⁸ Ibid., §§ 364–365.

⁵⁹ Ibid., § 364.

⁶⁰ Ibid., § 118.

⁶¹ Those figures are taken from: E. Ocello, A. Subocs and C. Sjödin, What's Up with Merger Control in the Digital Sector? Lessons from the *Facebook/WhatsApp* EU merger case, *Competition Merger Brief* 1/2015, p.2.

of the increased amount of data that would fall under its control as a result of acquiring WhatsApp.⁶² Two theories of harm came under the spotlight.

38. First, the Commission assessed whether post-transaction, the merged entity could introduce targeted advertising on WhatsApp by analysing user data collected from WhatsApp's users (and from Facebook users who also use WhatsApp). It found that the merged entity would have no incentive to do so, since this would require WhatsApp to deviate from its established "no ads" product policy, which could prompt some of its users to switch to competing apps that remained "ad-free."⁶³ In any event, even if the merged entity sought to introduce targeted advertising on WhatsApp, a sufficient number of alternative providers of advertising services competed with Facebook for acquiring online advertising space. Such competitors include Google, Yahoo!, MSN and local providers.⁶⁴ Notably, the Commission did not seem to examine how much data those competitors accumulated as compared to Facebook, but merely focused on the acquisition of advertising space.

39. Second, the Commission examined whether the merged entity could collect data from WhatsApp users for the purpose of better targeting ads on the Facebook social networking platform towards WhatsApp users who are also Facebook users.⁶⁵ In addition to doubts regarding the merged entity's ability to engage in such integration,⁶⁶ the Commission found that the merged entity would have no incentive to do so, in particular because it would require WhatsApp to change its privacy policy, which could prompt some users to switch to other apps perceived as less intrusive.⁶⁷ In any event, even if Facebook integrated the data collected from WhatsApp users, it would not allow it to strengthen its position in advertising, given the presence of a sufficient number of alternative providers of online advertising services, including Apple, Amazon, eBay, Microsoft, AOL, Yahoo!, Twitter, IAC, LinkedIn, Adobe and Yelp.⁶⁸ The Commission's reasoning relied on the fact that "*there will still continue to be a large amount of Internet user data that are valuable for advertising purposes and that are not within Facebook's exclusive control.*"⁶⁹

40. Broadly, under both aforementioned theories of harm, the Commission considered data concentration only insofar as it was relevant to analysing competitive effects on advertising markets. This case confirms that the Commission essentially examines how much data remains available for competitors to provide advertising

services, as it did in the *Google/DoubleClick* case. One also notes a reference to the General Court's finding in *Cisco* (T-79/12) that high market shares do not necessarily point towards market power in the market for consumer communications services.⁷⁰

41. In addition, the *Facebook/WhatsApp* case set out a useful analytical framework for exclusionary behaviour in the digital world, since the Commission acknowledged the existence of network effects and the fact that an increase in a company's market power through data collection capabilities could eventually bring about distortions of competition on advertising markets. Although ultimately no anticompetitive concerns were eventually found to exist in that case, the Commission could use that theory of harm against Facebook (or other digital companies) in a few years' time, depending on the evolution of the competitive landscape in general and Facebook's market power specifically.

42. It may be questioned whether the Commission should not have opened a Phase 2 investigation of the case in order to fully assess the implications of the fact that Facebook, by acquiring data held by WhatsApp, would in any case accumulate significant knowledge on both Facebook and WhatsApp consumers, i.e. roughly 1.5 to 2 billion people.⁷¹ In addition, although data is available from other sources than WhatsApp, it can be argued that such data is not really a substitute for data collected by WhatsApp.⁷² Those points may have deserved a more in-depth investigation than the one undertaken by the Commission.

3. *Telefónica UK/Vodafone UK/Everything Everywhere/JV* (M.6314, 2012)

43. *In this case, UK mobile network operators ("MNOs") Telefónica, Vodafone and Everything Everywhere (EE) set up a joint venture (the "JV Co") in the field of mobile commerce in the UK. The JV Co was intended to provide services to its three parent companies, as well as to other companies, by establishing a platform accessible by network users (i.e., consumers) through their mobile phones. This platform would enable customers to carry out online transactions and would provide mobile advertising platform services to advertisers and media agencies. The JV Co was also destined to supply data analytics services, by providing reporting analytics, business development analytics and loyalty analytics. To this end, the JV Co would rely on the various customer data collected through the operation of its transaction platform and its advertising services. The data collected by the JV Co would be based on three data sources: (i) basic customer data collected by*

⁶² *Facebook/WhatsApp*, §§ 164–167.

⁶³ *Ibid.*, § 174.

⁶⁴ *Ibid.*, §§ 176–179.

⁶⁵ *Ibid.*, § 180.

⁶⁶ *Ibid.*, § 185.

⁶⁷ *Ibid.*, § 186.

⁶⁸ *Ibid.*, §§ 187–189.

⁶⁹ *Ibid.*, § 189.

⁷⁰ *Ibid.*, § 99.

⁷¹ T. Cowen, *Big Data as a Competition issue: Should the EU Commission's Approach Be More Careful?*, *European Networks Law & Regulation Quarterly*, 2016, Vol. 4, Issue 1, p. 14.

⁷² *Ibid.*

the MNOs, (ii) data collected through the mobile wallet, and (iii) data collected on the basis of contracts with merchants. The JV Co would then use this data to offer targeted marketing services to advertisers.

44. In this case, the Commission assessed “*whether the JV Co would foreclose competing providers of data analytics or advertising services by combining personal information, location data, response data, social behaviour data and browsing data and by so creating a unique database that would become an essential input for mobile advertising that no competing provider of mobile data analytics services or advertising customer would be able to replicate.*”⁷³

45. The Commission noted that the data to be collected by the JV Co was also already available to a large extent to both existing and new market players (such as Google, Apple, Facebook, card issuers, reference agencies or retailers), who were using such data to provide targeted advertising.⁷⁴ Notably, the Commission considered that customer data was “*generally understood to be a commodity,*” as customers tended to give such data to many market players, who would then gather and market it.

46. In addition, alternative ways to reach large numbers of consumers existed, such as utilities providers or Internet service providers.⁷⁵ Some third parties claimed that MNOs would be uniquely placed to access customers (geo)location data, which would enable MNOs to reach customers at the “right” moment (typically by sending ads relating to shops where the customer is located). The Commission dismissed that argument, given the presence of a variety of sources of geo-spatial data that are not dependent on MNOs, such as Apple, Facebook or Google (which have access to customers’ location information through apps connected to mobile phones’ operating systems). More generally, the Commission considered that most of the data collected by the JV Co would also be accessible to third parties for the purpose of being used to offer advertising or data analytics services.

47. On the basis of these and other elements, the Commission dismissed the risk of foreclosure, since many other strong and established players were also capable of offering comparable solutions.⁷⁶

48. This case illustrates the Commission’s view of big data as generally non-rivalrous and widely available, such that the concentration of a significant amount of consumer data in the hands of a few companies did not mean that competitors would necessarily be excluded from accessing all or part of such data through other means. It is also interesting to note that the Commission expressly termed consumer data as a “commodity”.

⁷³ Telefónica UK/Vodafone UK/Everything Everywhere/JV, § 539.

⁷⁴ Ibid., § 543.

⁷⁵ Ibid., § 544.

⁷⁶ Ibid., § 557.

4. Other relevant cases

49. Outside of the three cases examined in Sections II.1, 2 and 3 above in relation to online advertising and data analytics, big data has played a significant role in at least three other Commission decisions examined below.

4.1 TomTom/Tele Atlas (M.4854, 2008)

50. This decision deals with the acquisition by TomTom, a producer of portable navigation devices (PNDs), of Tele Atlas, a producer of navigable digital map databases, which TomTom used as an input for the navigation software that it then either inserted in its own PNDs or sold to other PND manufacturers. As a key difference with other cases reviewed in this article, the Commission considered that producing a map database for navigational purposes would be very costly and resource intensive because part of the features of such a database would have to be compiled manually by a fleet of vehicles and regularly updated.⁷⁷ This adds some nuance to the view according to which data would generally be available to all companies in large quantities at a low price.

51. The Commission discarded risks of input foreclosure, i.e. whether the merged entity was likely to have the ability and the incentives to increase prices of map databases (on the upstream market), or degrade their quality or delay access for PND manufacturers and navigation software providers competing with TomTom (on the downstream markets).⁷⁸ In particular, the parties submitted that efficiencies would derive from the integration of TomTom’s data to improve Tele Atlas’ map database, in particular because TomTom gathered significant feedback data through its large customer base, e.g. in the form of error corrections.⁷⁹ Although the Commission eventually considered the magnitude of such efficiencies as uncertain, this illustrated, as soon as in 2008, the Commission’s acceptance of the idea that the accumulation of big data may generate efficiencies.

4.2 Microsoft/Yahoo Search (M.5727, 2010)

52. In this decision the Commission assessed Microsoft’s acquisition of Yahoo’s business in Internet search and online search advertising.⁸⁰ When focusing on the concentration’s effects on the Internet search market (on which both parties offered a search engine), the Commission considered that the new entity, by increasing the scale of its data collection, would actually be able to provide better services to users. Therefore, it was plausible “*that the merged entity through innovation and through its access to a larger index will be able to provide personalized search results better aligned to users’ preferences.*”⁸¹

⁷⁷ TomTom/Tele Atlas, §§ 24–26.

⁷⁸ Ibid., §§ 190–251.

⁷⁹ Ibid., § 246.

⁸⁰ Commission Decision of 18 February 2010 in Case COMP/M.5727 – Microsoft/Yahoo! Search Business.

⁸¹ Ibid., §§ 225–226.

53. Instead of raising risks for competition, the transaction was actually likely to have a positive impact on competition, because the merged entity would enjoy a greater scale of data collection, which would help it to innovate in its search engine and thereby reinforce competitive pressure on Google. That decision shows that the Commission is, in certain instances, open to the idea that the accumulation of big data may be pro-competitive. Just like any asset, one might say. This is another indication that in the Commission's view, big data does not necessarily require a competitive analysis that would differ from that applied in relation to other types of assets.

4.3 *Publicis/Omnicom* (M.7023, 2014)

54. This transaction—eventually aborted—was intended to combine two of the world's largest advertising and communication companies. Shifting away from big data *stricto sensu*, the case sheds light on the data analytics market, which directly derives from big data, since it is defined as “*the process of examining large amounts of data of a variety of types (‘big data’) to uncover patterns, correlations and other useful information.*”⁸² The Commission examined a foreclosure scenario whereby the merged entity would develop its own big data analytics platform and exclude competitors from accessing it.⁸³ That scenario was eventually discarded. In its assessment, the Commission looked more particularly (among other issues) into whether big data could become in the near future a key factor in helping advertisers to better target their offers to customers through the use of data analytics. The market test confirmed that, from the perspective of competing advertising companies, big data was becoming important for digital advertising and social media, where data was more easily available and collected.⁸⁴ Interestingly, however, media owners considered the concept of big data was still in its infancy and not yet relevant for them, except for data mostly present in online advertising.

55. In relation to big data analytics as such, the Commission considered that post-transaction, there would remain “*a sufficient number of alternative providers of big data analytics to the merged entity.*”⁸⁵ Therefore, despite the fact that the concentration would have enabled the merged entity to expand data collection, competitors would still have access to a sufficient amount of accessible data analytics for advertising purposes. That clearly echoes the Commission's findings in relation to big data in the *Google/DoubleClick*, *Facebook/WhatsApp* and *Telefonical/Vodafone/Everything Everywhere* cases above.

5. Conclusions

56. Much ado about not much? That may be a tempting conclusion in view of the absence of significant issues raised in the Commission's decisional practice. Indeed, in each of the cases summarised in Sections II.1, 2 and 3 above, relating to online advertising markets, the Commission found that post-merger, the parties' combined data would not result in a unique and non-replicable advantage, essentially given their competitors' ability to procure sufficient amounts of data, either themselves or from third parties (i.e., data brokers or data analytics providers). Therefore, in relation to online advertising and/or data analytics, the Commission has thus far not identified an instance where the accumulation of data raised significant competitive concerns leading to remedies or a prohibition. However, each case must be assessed individually, and general conclusions should not be drawn too quickly, whether in relation to advertising or data analytics, or any other sector that relies heavily on big data. For example, the *TomTom/Tele Atlas* case reminds that in certain instances, heavy costs are associated with the collection of data.

57. At first glance, the Commission's findings in relation to big data—and especially the efficiencies and pro-competitive effects discussed by the Commission in *TomTom/Tele Atlas* and *Microsoft/Yahoo Search*—could be considered as an “optimistic” view of big data, whereby big data would bear three main characteristics.⁸⁶ First, it is non-rivalrous and non-exclusive, meaning that the use of data by a specific company does not prevent that company's competitors from obtaining the same information from a specific client. The non-rivalrous nature of data is confirmed in particular where customers “multi-home,” i.e. they use several providers to perform similar services (and therefore provide their data to multiple operators). Second, the data is, in large part, widely available for purchase and inexpensive. Third, the cost of collecting data is usually low.

58. However, upon closer examination, the Commission does not take big data lightly, since the theories of harm pursued in the aforementioned cases are also compatible with a more “sceptical” view of big data.⁸⁷ Under that view, entry barriers vary based on the industry considered and may increase due to network effects. In this regard, the OECD warned in 2014 that data-driven markets “*can lead to a ‘winner takes all’ result where concentration is a likely outcome of market success.*”⁸⁸ In addition, the non-rivalrous nature of data can sometimes be called into question, for example, if providers of online

82 *Publicis/Omnicom*, § 617.

83 *Ibid.*, § 625.

84 *Ibid.*, § 626.

85 *Ibid.*, § 630.

86 Those characteristics are well-explained by D. Tucker and H. Wellford, *op. cit.*, p. 3. See also p. 36 of the Franco-German Study.

87 See in particular I. Graef, *op. cit.*; M. Stucke and A. Grunes, *Debunking the Myths Over Big Data and Antitrust*, *CPI Antitrust Chronicle* (May 2015).

88 OECD, *Data-driven Innovation for Growth and Well-being*, Interim Synthesis Report 7, October 2014.

platforms seek to withhold their data from competitor access.⁸⁹ Moreover, high fixed costs may be involved in, e.g., maintaining a data centre.

59. The same theories of harm could therefore enable the Commission to find instances of competition concerns in cases where the accumulation of big data clearly has anticompetitive consequences, typically if it acts as a barrier to entry for competitors. The fact that no such cases have arisen to date does not mean that harm will never be found. More specifically, the Commission's forthcoming review of Microsoft's acquisition of LinkedIn is understood to raise potential issues relating to the acquisition of big data.⁹⁰ Mrs Vestager was cited as saying that the Commission would look at whether “*the data purchased in the deal has a very long durability and might constitute a barrier to entry for others or if they can be replicated so that others stand a chance to enter the market*”.⁹¹ That case will also be seen as a test case for Mrs Vestager, since all other big data-related cases were decided when Mr Almunia was Competition Commissioner.

60. Heightened scrutiny may now come from France, where on 23 May 2016 the FCA launched a full-blown sector inquiry into data-related markets and strategies with a specific focus on promotion and loyalty programs in online advertising, as well as behavioural advertising. Some of the targeted theories of harm sound familiar. In particular, the FCA will seek to determine whether certain actors hold leading positions and competitive advantages that are linked to their capacity to exploit certain datasets that are essential to the competitive functioning of the market and that no competitor could duplicate.⁹² The FCA's experience, as gathered through the sector inquiry, may, of course, potentially lead to opening individual cases.

61. In any event, one should not lose sight of the fact that the Commission's ex-ante assessment in the context of merger control is based on a number of estimates and assumptions as to the evolution of markets. Over time, those assumptions and estimates may need to be corrected, particularly in a rapidly evolving sector where today's leader may be tomorrow's underdog. *Ex post* monitoring is therefore crucial to allow competition authorities to tackle new issues or those issues for which their ex-ante assessment was insufficiently informed. In addition to individual enforcement cases (or in anticipation of these), sector inquiries such as the FCA's recent initiative are a useful tool for competition authorities to gather a broader view of the trends and risks of the relevant markets.

62. Big data also raises key procedural merger control questions, since companies accumulating large datasets do not always generate revenues that meet EU or national filing thresholds. The *Facebook/WhatsApp* case is a typical example: in view of the value of the transaction (USD 19 billion) and the important issues that it raised, it was considered appropriate that the Commission could review the acquisition. However the transaction did not meet the EU filing thresholds, because WhatsApp had a turnover of only around €10 million. The Commission ultimately reviewed the transaction because Facebook requested a pre-notification referral under Article 4(5) of the EU Merger Regulation; however, if the conditions for such referral had not been met, the Commission would not have reviewed the transaction. This raises the question of whether the Commission should complement its current turnover-based threshold by another threshold based on the value of the transaction—as the U.S. thresholds—in order to catch transactions such as Facebook/WhatsApp, taking place on innovative and fast-evolving markets.⁹³ The Commission seems to acknowledge that in certain cases, data may be the underlying value of a transaction, even where the parties' sales are low.⁹⁴ It remains to be seen whether that will actually lead the Commission to amend the current EU merger control thresholds.

63. All in all, data has clearly become increasingly important, and one should expect the Commission to be faced more and more with big data-related issues. However, it should be emphasised that data remains no more than an asset, or a commodity, and the Commission will arguably continue to treat it accordingly.

III. Can privacy infringements also harm competition?

64. The flurry around big data and competition law largely relates to the interplay of big data, competition law and privacy concerns. Various commentators argue that if the accumulation of data raises the risk of infringing privacy, this should be tackled by competition authorities “*as part of their competitive analysis*.”⁹⁵

65. While competition law is not intended to address privacy breaches (1.), the fact remains that privacy may be a parameter of competition (2.), and arguments that competition law should also address privacy concerns have gained impetus over the past two years (3.).

⁸⁹ I. Graef cites the example of Facebook prohibiting third parties in its general conditions from scraping content off its platform (I. Graef, *op. cit.*, Section 3.1).

⁹⁰ MLex, 13 June 2016, Comment: Microsoft takeover of LinkedIn could spark concerns about data collection, privacy.

⁹¹ Bloomberg, 17 June 2016, Data May Be Key in Microsoft-LinkedIn Probe, EU's Vestager Says.

⁹² Déc. n° 16-SOA-02, § 21.

⁹³ E. Ocello, A. Subocs and C. Sjödin, *op. cit.*, at p. 2.

⁹⁴ MLex, 10 March 2016, Vestager considers sales thresholds, further simplification in merger reviews. See also MLex, 14 June 2016, Comment: Incoming EU chief economist aiming for new era in antitrust analysis.

⁹⁵ A useful summary of the status of the academic debate in the U.S. is provided by D. D. Sokol, and R. E. Comerford, Does Antitrust Have a Role to Play in Regulating Big Data? (January 27, 2016), *Cambridge Handbook of Antitrust, Intellectual Property and High Tech*, Roger D. Blair & D. Daniel Sokol (eds.), Cambridge University Press, forthcoming. Available at SSRN: <http://ssrn.com/abstract=2723693>.

1. Competition law is not intended to address breaches of privacy rules

66. Since the *Asnef-Equifax* case of 2006,⁹⁶ the CJEU's position is unequivocal: privacy issues are not a matter of competition law and pertain to legislation specifically applicable to data protection. In *Asnef-Equifax*, the Court was asked whether Article 101 TFEU prohibited a credit information exchange system concluded between members of a trade association. In this respect, banks were to create a register providing “*solvency and credit information through the computerised processing of data relating to the risks undertaken by participating organisations engaging in lending and credit activities*”.⁹⁷ The data exchanged unavoidably contained sensitive personal data. However, the Court expressly refused to take into account privacy issues in its competition analysis, considering that “*any possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law*” and “*may be resolved on the basis of the relevant provisions governing data protection*”.⁹⁸

67. Data protection is governed by specific rules, as administered by specific regulators, both at the national⁹⁹ and EU¹⁰⁰ levels. To ensure respect of the right to protection of personal data enshrined in particular in Article 8 of the Charter of Fundamental Rights, in 1995, the EU established a specific legal framework for data protection, set forth in Directive 95/46/EC and Regulation (EC) 45/2001.¹⁰¹ These instruments essentially provide that data must be appropriately processed for specific, explicit and legitimate purposes¹⁰² by data collectors, including EU institutions and bodies, and in relation to such processing, also provides various rights for data

subjects.¹⁰³ This regime was recently reshuffled following the EU Data Protection Reform launched in 2012, resulting in a new Regulation and a new Directive.¹⁰⁴

68. Although *Asnef-Equifax* only related to Article 101 TFEU, the same approach arguably applies to merger control, which is not destined to integrate privacy as part of its objectives. Indeed, merger control's objectives were developed “*with an explicit and exclusive focus on competition*”.¹⁰⁵ In addition, recital 24 of the Merger Regulation mentions the “*effective control of all concentrations from the point of view of their effect on competition in the Community*.” Furthermore, § 8 of the Guidelines on the assessment of horizontal mergers does not mention privacy among merger control's objectives or the benefits of competition.¹⁰⁶

69. Unsurprisingly, the Commission has thus far faithfully applied the Court's stance throughout its merger control practice, and therefore has consistently declined to make harm to privacy part of its competition analysis. Instead, the Commission has thus far taken what some critics call a “*pure economic approach*”,¹⁰⁷ in cases such as *Google/DoubleClick* and *Facebook/WhatsApp*.

70. *Google/DoubleClick* provides an early illustration of such approach. The Commission, after assessing the competitive effects of the transaction, ended its decision by emphasizing that it “*refers exclusively to the appraisal of this operation with Community rules on competition*” and that the parties would remain subject to other legal obligations: “*irrespective of the approval of the merger, the new entity is obliged in its day-to-day business to respect the fundamental rights recognised by all relevant instruments to its users, namely but not limited to privacy and data protection*”.¹⁰⁸ For the Commission, privacy concerns are clearly not part of competition law. Interestingly, the U.S. Federal Trade Commission (FTC) reached a conclusion similar to the Commission in terms of antitrust analysis, although former FTC Commissioner Pamela Jones Harbour regretted, in her dissenting opinion, that privacy issues were not part of the FTC's analysis of competitive effects.¹⁰⁹

96 Case C-238/05 *Asnef-Equifax* [2006] ECLI:EU:C:2006:734.

97 As described in point 10 of the Opinion of Advocate General Geelhoed of 29 June 2006 in the same case.

98 Case C-238/05 *Asnef-Equifax*, point 63; see also point 56 of AG Geelhoed's Opinion.

99 At national level, each Member State has appointed a data protection officer in charge of the internal application within its territory of the EU data protection provisions.

100 At EU level, the body charged with the protection of personal data is the European Data Protection Supervisor (“EDPS”), as established by the Regulation on the protection of individuals.

101 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and Regulation (EC) 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

102 Article 6(1) (b) of the Data Protection Directive 95/46/EC.

103 Including rights to information (Section IV of the Data Protection Directive 95/46/EC), to rectification (Article 12 of the Data Protection Directive 95/46/EC) and to access to data (Article 12 of the Data Protection Directive 95/46/EC).

104 The two instruments are: Regulation (EU) 2016/679, *op.cit.*; and Directive (EU) 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119, 4.5.2016, p. 89.

105 P. Gilbert and R. Pepper, *Privacy Considerations in European Merger Control: A Square Peg for a Round Hole*, *CPI Antitrust Chronicle*, May 2015.

106 This § 8 provides: “(...) *effective competition brings benefits to consumers, such as low prices, high quality products, a wide selection of goods and services, and innovation. Through its control of mergers, the Commission prevents mergers that would be likely to deprive customers of these benefits.*”

107 Preliminary Opinion of the EDPS, *op. cit.*, point 4.2.3.

108 *Google/DoubleClick*, § 368.

109 Dissenting Statement of Commissioner Pamela Jones Harbour, *op. cit.*

71. The Commission confirmed its position more recently in *Facebook/WhatsApp*, as it considered that “[a]ny 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.”¹¹⁰ In relation to the same transaction, the FTC adopted an approach quite similar to the Commission’s, as its Bureau of Competition did not object to the transaction on antitrust grounds. However, another branch of the FTC, namely the Bureau for Consumer Protection, sent a letter asking the parties to honour the promises that WhatsApp had made before the FTC, in terms of privacy.¹¹¹

2. Privacy may be a parameter of competition

72. Although privacy breaches, as such, are not a matter for competition law, privacy concerns may nevertheless act as a (subsidiary) non-price parameter of competition. For example, in *Facebook/WhatsApp*, the Commission noted that privacy and security are increasingly valued and constitute one of the drivers of the competitive interaction between consumer communications apps.¹¹² In the same decision, the Commission took into account the fact that WhatsApp users might view Facebook’s collection of their personal data as intrusive, and thereby switch to competing platforms perceived as less intrusive.¹¹³

73. Even where no personal data is involved, confidentiality may also be a competitive parameter. In *TomTom/Tele Atlas*, the Commission considered that confidentiality concerns “can be considered as similar to product degradation in that the perceived value of the map for manufacturers [of portable navigation devices] would be lower if they feared that their confidential information could be revealed to TomTom.”¹¹⁴

74. The Commission’s position is, of course, a “minimalist” approach, as compared to an all-encompassing solution that would make privacy concerns part of competition harm. However, in accepting that privacy concerns are a parameter of competition, this could potentially lead to a finding that if a merger degrades privacy (i.e., a competition parameter), specific remedies should be ordered to guarantee the protection of privacy. The BKA’s investigation into Facebook may be premised on this kind of reasoning.

110 *Facebook/WhatsApp*, § 164.

111 Letter from Jessica Rich, Director, Bureau of Consumer Protection, Federal Trade Commission, to Eric Egan, Chief Privacy Officer, Facebook, Inc., and Anne Hoge, General Counsel, WhatsApp Inc. (April 20, 2014), available at: http://www.ftc.gov/system/files/documents/public_statements/297701/140410facebookwhatappltr.pdf.

112 *Facebook/WhatsApp*, § 87.

113 *Ibid.*, § 186.

114 *TomTom/Tele Atlas*, § 274.

3. A renewed debate: Should competition law address privacy concerns?

75. Despite the Court’s firm position and the Commission’s established practice, there has been a call for reassessing whether privacy concerns could raise competition issues. Indeed, already in 2012, Commissioner Joaquín Almunia suggested that a dominant company could gain an advantage over its competitors by infringing privacy laws: “[a] single dominant company could of course think to infringe privacy laws to gain an advantage over its competitors. (...) The fact that we have not encountered such a case [in which the accumulation or the manipulation of personal data was or could be used to hamper competition] does not mean that we can rule out the practice altogether.” However, in 2014, the *Facebook/WhatsApp* case confirmed that the Commission was not yet ready to tackle privacy concerns as part of its competition analysis.

76. **Criticism from the EDPS.** Signaling a shift in the status quo, in 2014, the EDPS issued a report criticising the Commission’s handling of privacy issues in the context of competition law enforcement (including merger control). For example, in relation to *Google/DoubleClick*, the EDPS stated that the Commission should have considered how the merger could have affected users whose data would be further processed by merging the two companies’ datasets, potentially in view of providing services. By adopting what the EDPS referred to as an “economic” approach, the Commission “neglected the longer term impact on the welfare of millions of users in the event that the combined undertaking’s information generated by search (*Google*) and browsing (*DoubleClick*) were later processed for incompatible purposes.”¹¹⁵ The EDPS considered that the notion of consumer welfare should not be reduced to price, but could also be determined by other factors such as quality or consumer choice, which are also data protection concerns.¹¹⁶ Thus, for competition enforcement in the digital sector, the EDPS advocates the adoption of a specific approach to the notion of consumer harm, which would include harm such as a breach of the right to privacy.¹¹⁷ In this respect, the EDPS announced that it would issue a new opinion during the summer of 2016. At the time of writing (mid-July 2016), no such opinion had been published yet.

77. **The BKA’s investigation of Facebook.** In what appears to be a first amongst competition authorities in Europe, in March 2016, the German BKA took the bold step of examining whether a breach of privacy laws could also run afoul of competition law. In initiating its antitrust investigation against Facebook, the BKA’s succinct press release makes the following three statements. First, there are “indications” of Facebook’s dominant position in

115 Preliminary opinion of the EDPS, op. cit., § 64.

116 *Ibid.*, § 36.

117 *Ibid.*, § 71.

the market for social networks. Second, the procedure whereby new users agree to allow Facebook to collect and use their personal data may run contrary to German data protection law. Third, if there is a connection between an infringement of privacy laws and market dominance, there could be an abuse of a dominant position.

78. At this stage, however, this investigation raises more questions than answers. It is unclear on which market the abuse would be assessed. While previous Commission decisions had analyzed the impact of data collection on companies' market position on advertising markets, the BKA case is the first to link the collection of data from users and potential abuse of market position (vis-à-vis the users). Prima facie, Facebook's dominant position on a market for social networks¹¹⁸ cannot be ruled out. The BKA could focus its analysis on the market for social networks, assessing whether imposing "unfair" trading conditions degrades the quality of the service. Such analysis could find theoretical support in the view that privacy is a non-price parameter of competition.¹¹⁹ Alternatively, the BKA may investigate effects on markets for online advertising, where Facebook uses its customers' data to provide ad targeting services. It could consider that an abuse on the "social network" side of the market brings anticompetitive consequences on the "advertising" side of the market. In any event, the German antitrust investigation of Facebook is likely to fuel debates in the coming months.¹²⁰

79. The FCA seems to distance itself from its German counterpart's daring initiative. President Bruno Lasserre explained that in case of the breach of rules that do not fall within the scope of competition law (e.g., typically data protection rules), this does not constitute a competition law infringement in itself.¹²¹ In his view, an abuse of dominance can be established, for example, "*only in the case where this behaviour artificially reinforces market power, either by a company looking to eliminate, shutting out or disciplining a competitor or exploiting market power.*" Also notably, the FCA's sector inquiry does not appear to focus on issues raised by the BKA's investigation. In any event, the Franco-German study can be viewed as a sign that, although enforcement priorities may diverge, both authorities are converging on the vast

majority of big data-related issues. In particular, the French and German authorities seem to agree that a legal assessment under competition law can take into account, at least as an element of context, statutory requirements stemming from other bodies of law.¹²²

80. The debate on remedies. In its 2014 report, the EDPS strongly advocated for the use of competition remedies that would address the harm caused to privacy.

81. Among others, the EDPS suggested the imposition of data portability remedies, i.e. giving the user the right to withdraw its personal information and transfer it to another service provider.¹²³ By preventing customer lock-in and allowing "multi-homing", data portability may indeed help achieve some of the objectives pursued by competition rules,¹²⁴ as former Commissioner Almunia already suggested in 2012.¹²⁵ However, data portability is already foreseen in Article 20 of the new General Data Protection Regulation, which will apply as of 25 May 2018. Based on that provision, data subjects will have the right to obtain a copy of data and to have the data transferred from one data controller to another. Since privacy will already impose on all companies ex ante data portability obligations, imposing the same obligation by means of an antitrust remedy would arguably not bring much added value, at least after 25 May 2018.

82. In its 2014 report, the EDPS also suggested that the control of huge personal datasets could be considered an essential facility, and that the appropriate remedy would be therefore to grant competitors access to personal information.¹²⁶ That kind of remedies would however raise questions from the perspective of both competition and privacy rules. From a competition law angle, it will be difficult, to say the least, to characterise big data as an essential facility, since it is generally seen as widely available. That has been confirmed by the Commission's merger control practice, which has always found to date that in spite of the accumulation of data in the hands of merged entities, competitors would still have access to a sufficient amount of data (see Section II above). Mandating access to personal information could also create issues from the perspective of privacy rules, not least because consumers will not expect their personal data being shared with

118 In the *Facebook/WhatsApp* decision, the Commission defined a potential market for "social networking services" (§§ 51–62) but did not assess Facebook's market share on such market.

119 E. Orcello, A. Subocs and C. Sjödin, op. cit., note that "*Privacy could be regarded as a non-price parameter of competition which may be degraded by the merged entity post-merger.*" although they acknowledge that the Commission did not apply such theory of harm in the *Facebook/WhatsApp* case.

120 See the preliminary analysis published on the Chilling Competition blog on 2 March 2016: <https://chillingcompetition.com/2016/03/02/facebook-privacy-and-article-102-a-first-comment-on-the-bundeskartellamts-investigation>. See also: R. McLeod, "Novel But a Long Time Coming: The Bundeskartellamt Takes on Facebook", *Journal of European Competition Law and Practice*, 2016, doi: 10.1093/jecp/lpw039; E. Morgan de Rivery and C. Michaud, Facebook, "More Data, More Problems" – Abus de position dominante sur le marché des réseaux sociaux : réconcilier les positions allemande et française, *L'Observateur de Bruxelles*, n° 104, avril 2016.

121 *MLex*, 8 March 2016, French antitrust authority weighs sector probe into data.

122 Franco-German Study, p.23. The study cites the CJEU ruling in *Allianz Hungaria*, where the Court of Justice took into account the requirement, under Hungarian rules, that car dealers acting as intermediaries or insurance brokers must be independent from insurance companies (Case C-32/11 *Allianz Hungaria* [2013], ECLI:EU:C:2013:160, points 46–47).

123 Preliminary opinion of the EDPS, op. cit., §§ 72 and 83.

124 I. Graef, J. Verschaecken and P. Valcke, Putting the right to data portability into a competition law perspective, available on https://www.researchgate.net/publication/281092445_Putting_the_right_to_data_portability_into_a_competition_law_perspective.

125 Brussels, 26 November 2012, IP/12/460, Commissioner Almunia's speech on "Competition and personal data protection".

126 Preliminary opinion of the EDPS, op.cit., §§ 66-67.

third parties without their consent.¹²⁷ In addition, forcing companies to share with competitors the personal data gathered from their users may have the effect of lessening rivals' incentives to develop their own sources of data.¹²⁸

83. All in all, competition law may not provide the solution to addressing privacy concerns. This may rather come from a more stringent enforcement of privacy rules under the General Data Protection Regulation. The position of competition law on this issue is aptly described by Commissioner Vestager: “*I don't think we need to look for competition enforcement to fix privacy problems; But that doesn't mean I will ignore genuine competition issues just because they have a link to data*”.¹²⁹

Conclusion

84. The Commission may not have found, to date, specific competition concerns relating to big data in the context of a merger case (even following an in-depth analysis) leading to remedies or a prohibition. This does not mean, however, that companies holding significant amounts of data will systematically get “off the hook.” This is for at least three reasons. First, the theories of harm developed by the Commission appear to be broad and flexible enough to catch cases where the accumulation of data by a company could clearly act as a barrier to entry for competitors. The forthcoming Microsoft/LinkedIn review will give the Commission a fresh opportunity to try out some of those theories. Second, the Commission's (favourable) analysis under an *ex-ante* assessment will not necessarily be confirmed *ex post*, especially on fast-moving markets such as in the digital sphere. Indeed, the Commission's theories of harm in the context of merger cases may now yield different results based on evolutions in this area. Third, the Commission is still in the process

of learning the implications of big data and its surroundings. Its May 2016 Staff Working Document regarding online platforms illustrates the Commission's growing interest in – and knowledge of – the sector.¹³⁰

85. Interesting developments could also derive from the Commission's ongoing investigation into Google's alleged favouring of its own comparison shopping services.¹³¹ Although based on publicly available information, that case does not seem to expressly deal with the accumulation of big data, it remains that Google's prominent market position largely relies on its accumulation of an unmatched dataset. The Commission's final assessment in that case could shed light on other facets of the role of big data in competition analysis.

86. Currently, under EU competition law, privacy-related issues are likely to remain one of the most sensitive topics. Depending on its outcome, the Bundeskartellamt investigation of Facebook may break new ground in this respect, but it is uncertain that the German approach would be exported to other NCAs or the Commission's practice. In any event, the intensity of calls for antitrust intervention to resolve privacy-related issues may vary depending on how national data protection authorities tackle new issues and build on the revamped EU legal framework. At this stage, it appears premature to systematically turn to antitrust tools to tackle privacy issues.

87. And in the end, the most significant developments will not necessarily relate to privacy. In view of its broad scope, the French sector inquiry may create far more uncertainty for companies than the groundbreaking, but narrowly focused, German investigation. The commotion surrounding the German investigation should not overshadow the potentially wide-ranging implications of French sector inquiry. ■

127 D. S. Tucker and H. B. Welford, *op.cit.*, pp.9-11.

128 *Ibid.*

129 Speech delivered by Commissioner Margrethe Vestager on 17 January 2016, *op. cit.*

130 Commission Staff Working Document, «Online Platforms», SWD(2016) 172, published on the Commission's website on 25 May 2016.

131 IP/15/4780, 15 April 2015, “Antitrust: Commission sends Statement of Objections to Google on comparison shopping service; opens separate formal investigation on Android”. See also IP/16/2532, 14 July 2016, “Antitrust: Commission takes further steps in investigations alleging Google's comparison shopping and advertising-related practices breach EU rules”.

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