Data Aggregation in the Competition Law Analysis

Big Data in the Platform Economy
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Speech Commissioner Vestager ‘

Relevance of data to competition law

Speech Commissioner Vestager ‘Competition in a big data world’ (Jan. 2016):

‘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’. 
Data in a two-sided business model

Data used to increase relevance of search results, suggested social network interactions and purchase suggestions

Data used to provide better and more targeted advertising possibilities
Economic characteristics of data

• Economies of scale and scope relating to data
  o Volume and variety of data provides benefit to providers

• Data as a network effect
  o Data also provides benefit to customers

• Feedback loop
Is data an entry barrier?

<table>
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<tr>
<th>No</th>
<th>Yes</th>
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<tbody>
<tr>
<td>Data is a non-rivalrous good</td>
<td>Access to data can be made exclusive</td>
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<td>Data is widely available</td>
<td>Specific data is needed to operate an online platform</td>
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<td>Users multi-home</td>
<td>Network effects reduce the possibility for users to multi-home</td>
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Nuanced approach: volume and variety of data may form a barrier to entry

**BUT** there are diminishing returns to scale
Market definition of online platforms

- Search engines:
  - *Microsoft/Yahoo* merger: analysis of online advertising market; existence of market for online search was left open
  - Ongoing *Google* case: practices on the market for online search advertising and the market for online search

- *Facebook/WhatsApp* merger:
  - Relevant market for online advertising and potential sub-markets
  - Potential relevant market for communications apps and social networks

- Market definition based on services provided
Market for data?

- **2012 speech** former Competition Commissioner Almunia: ‘we have not had to define a market for personal data or for any of its particular usages’
- **2014 Facebook/WhatsApp merger** parties were not active in potential markets for the provision of data or data analytics services

- Market for data has been defined in cases where it was truly traded as a product:
  - *TomTom/TeleAtlas*: databases of digital maps
  - *Thomson/Reuters*: databases of financial information

- In online platforms, data is usually ‘merely’ used as input
Market for data?

• Definition of a hypothetical or potential market for data in addition to the relevant markets for the services provided

• More forward-looking and dynamic analysis:
  o Data is not just an input, but also enables market players to detect trends for potential new products

• Reflects market reality:
  o Mergers and particular types of conduct seem to be incentivised by the prospect of having extra data
Combination of datasets in mergers

- US FTC Commissioner Pamela Jones Harbour suggested in her dissenting statement in Google/DoubleClick:
  to define ‘a putative relevant product market comprising data that may be useful to advertisers and publishers who wish to engage in behavioral targeting’

- **Google/Nest** merger in the US:
  - Nest did not compete with Google in any relevant product market
  - Merger possibly reinforced Google’s position with regard to access to data about the behaviour of consumers
Market for data?

• Substitutability of data:
  o Online versus offline data
  o Different types of online data

• US *PeopleBrowsr/Twitter* case:
  o Twitter discontinued PeopleBrowsr’s full access to its tweets
  o PeopleBrowsr argued that:
    - Twitter data is a ‘*unique and essential input*’
    - social networking sites like Facebook ‘*do not provide the same rich set of public data regarding users’ sentiments and influence*’
Market power in data

• Combination of factors which leads to strong market position of incumbents:
  o Next to data, need for a well-functioning algorithm
  o Because of transient nature of data, a stable user base provides a competitive advantage for incumbents

• Ability to adapt to the changing intentions of users as soon as possible
Market power in data

• How can value be attributed to data?
  o Volume or quality of data do not seem to constitute adequate indicators
  o Instead, look at the ability of an undertaking to monetise the collected information

• Share of total turnover earned by undertakings active in a potential market for data
Market power in data

- Potential competition as an alternative proxy for dominance – some relevant indicators:
  - data is a significant input into end products;
  - incumbent protects the exclusivity of its dataset so that competitors cannot freely access the necessary data;
  - there are few or no actual substitutes readily available on the market;
  - it is not viable for a potential competitor to collect data itself in order to develop a new dataset with a comparable scope to that of the incumbent
Conclusion

• Situations can be identified in which data forms an entry barrier

• There is a need to define a potential market for data even if data is not traded as a stand-alone product

• Data can be a source of market power and should be analysed as such
See also:


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