Data and Competition Law

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- *I hope it makes clear that we don't need a whole new competition rulebook for the big data world. Just as we didn't need one for a world of fax machines, or credit cards, or personal computers. What we do need is to pay close attention to these markets and to take action when it's necessary.*
- *Competition rules can't solve every problem on their own. But they can make an important contribution to keeping digital markets level and open. So that consumers get innovative products at the right prices. And so that digital entrepreneurs, however big or small, have a fair shot at success*

Policy Reports

- EU EDPS: Privacy and competitiveness in the age of big data (March 2014)
- German MonopolKommisssion: Competition Policy in Digital Markets (May 2015)
- UK CMA: Commercial use of consumer data (June 2015)
- French and German NCA: Competition Law and Data (May 2016)

Mainstream view

- Focus on data more than algorithms

- Competition policy can deal with data issues
  - Apply the standard theories
    - Market power: power over price and quality, power to act independently
    - Harm to consumer welfare
  - Case-by-case analysis but market power and harm is unlikely

- Competition policy is a complement and not a substitute to other legal instruments
  - Consumer protection
  - Privacy regulation

Personal data and Big data

- Competition law and Personal data
  - Any information that can identify individuals directly or indirectly
  - Issues
    - Discrimination
    - Privacy
    - Relationship between competition law protecting consumer welfare and privacy protecting the fundamental right of privacy
- Competition law and Big Data
  - Collection, storage and analysis of very large datasets (not only personal data, also anonymised data)
  - To reveal patterns of information not visible from smaller datasets
  - Issues: algorithmic governance and power

Market power

- Intensity of barriers to entry
  - Data is non-exclusive and non-rivalrous, *not* like oil
  - Data is short-lived
  - Data is ubiquitous, inexpensive and easy to collect

  - BUT data collection can be limited by contractual restriction and/or hard to get (e.g. health data)
  - Data storage: requires data centres (like 'power plants')
  - Data analytics: based on deep learning algorithm

- Feedback loops
  - User loop: more users → more data → better quality → more users
  - Monetisation loop: more users/data → more ads → more investment → more users/data
  - Thanks to direct and indirect network effects

Theories of harm

- Data economics have positive welfare effects

- Innovation and efficiency
  - Better products and better process
  - McAfee: companies that make the most of their data are 5% more productive and 6% more profitable than their competitors
  - McKinsey: possible savings of up to €300 billion a year in the public services in the EU

- Free services
  - Customer data are monetized on the other side of the two-sided market

- More targeted products and dynamic pricing
  - Reduce information costs
  - Welfare effect of perfect discrimination

Theories of harm

- Exploitative abuses in ‘free’ markets
  - Excessively low privacy protection (German *Facebook* case)

- Exclusionary abuses
  - Refusal to give access to an essential facility (close to *IMS* case)
  - Leverage (French energy case, Belgian lottery case)
  - Raise rival costs

- Discrimination
  - Against consumers
  - Against competitors (*Google* case)

Relationship between Competition law and other legal instruments

- Not substitute
  - Case *Asnef-Equifax* (2006)
  - *Any possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection*

- But complement
  - Data portability will help switching
  - but may be not enough: need of interoperability

- Institutional design
  - FTC review of *Facebook/WhatsApp*: Director of the Bureau of Consumer Protection reminded the privacy obligations

Traditional and new issues

- Where lies the market power?
  - Data collection
    - Multi-sided markets with free and not free segments
    - Data as essential facility
    - Non price exploitation
  - Data storage
    - Servers as a public utility
  - Data analysis
    - Deep learning algorithm
    - Steeper experience curve
    - Autonomy and liability

Traditional and new issues

- Can the market power be abused and what can be the remedies
  - Give access to data
  - Give access to algorithm

- Relationship with other laws
  - Consumer protection
  - Privacy