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European Antitrust Enforcers Move on Holders of Big Data

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

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

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

European Commission and European Data Protection Supervisor

The Commission has analyzed data issues in the past, in a number of merger control cases. In *Google/DoubleClick*,[3] the Commission assessed whether the combination of the parties' databases would impede competition; privacy issues were raised but did not play any decisive role in the Commission's decision. In *TomTom/TeleAtlas*,[4] the Commission looked at the risk that the accumulation of data could lead to a lowering of the level of protection of confidential data. More recently, in *Facebook*/W*hatsApp*,[5] the Commission analyzed whether Facebook could use WhatsApp as a potential source of user data to improve its advertising, but concluded this was not the case to a point that it could hamper competition. Outside merger control, the Commission considered that codes and structure of databases could be an essential facility to which access should be given in cases such as *IMS*[6] and *Reuters*.[7]

Recently, EU Commissioner Vestager confirmed the Commission's interest in big data and competition, in particular with regard to privacy issues and data as an asset.[8] She stressed that the Commission so far had not found an antitrust problem with regard to data. The pending antitrust cases against Google target its advertising and Android businesses but are not expressly addressing big data.

The European Data Protection Supervisor (EDPS), the European data protection authority, has also taken an interest in the debate, through the publication of an opinion in 2014[9] and the organization of several workshops on the intersection of antitrust and data protection.[10]

National competition authorities

The focus of interest on how big data collection might raise antitrust concerns is Article 102 TFEU and its national equivalents.

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

Even before opening the Facebook case, the FCO and the French antitrust authority (*Autorité de la Concurrence*) had begun work on a joint report on competition law and big data, which was published on May 10, 2016. The report does not call for increased enforcement action but provides an overview of how the two authorities view the impact of big data on antitrust law and the potential theories of harm. The report argues that future cases could be based on a theory that abusive conduct arises from a firm's capacity to derive market power from data that its competitors cannot match. In assessing this "data advantage," authorities are likely to assess whether data is scarce or easily replicable, and whether the scale and scope of data collection matters.

The Franco-German report conclusions mirror a report on the commercial use of consumer data published in June 2015 by the UK Competition & Markets Authority (CMA). The CMA identified a host of benefits for consumers, including more targeted advertising and promotions, the provision of free services, improved product development, and more personalized products and services. The CMA also highlighted potential anticompetitive effects arising from big data collection, in particular the ability of companies to obtain market power by virtue of the data they collect and subsequently to use that power to exclude their competitors by preventing or restricting access to and use of consumer data.

More fact-finding is underway and enforcement action could follow. Earlier this year, some French industry players were said to have been contacted by the Autorité to prepare for a market investigation into big data. The investigation will not be directed at any particular company, but generally serves as an investigative tool for the Autorité to better understand market conditions and dynamics.

In November 2015, the UK's Financial Conduct Authority (FCA) issued a call for input in relation

to big data in retail general insurance.[11] The FCA's inquiry in part seeks to understand how big data could affect competition in retail insurance products, in particular private motor and home insurance, and how this could affect consumers. It is due to publish a feedback statement with its initial findings later this year. Those findings could include a more in-depth competition investigation.

In Spain, although there has been no case to date focusing on "big data", in 2009 the Spanish Competition Authority in 2009 issued decisions (upheld by the Supreme Court) against several incument monopolist electricity providers, finding that they had abused their dominant positions by delaying access to their customer databases to new entrants.

Conclusion

For now, national competition authorities are taking the lead in understanding how the collection and use of big data might affect competition. There is a growing consensus among those authorities that existing antitrust laws and enforcement powers should suffice to address any concerns identified and that the most likely concerns will derive from possible abuses of a dominant position. Of course, the collection of data by businesses about customers will continue apace, especially given the growth of the Internet of things. These trends will collide, and no doubt sooner or later one or more authorities will open antitrust investigations into specific companies that have stolen a march over competitors in gathering big data and may be using that data to obtain an advantage over rivals in the same or neighboring markets. There are many procompetitive and pro-consumer benefits to the collection and analysis of big data, but companies gathering such data should consider carefully how they use it and how best to avoid the antitrust risks.

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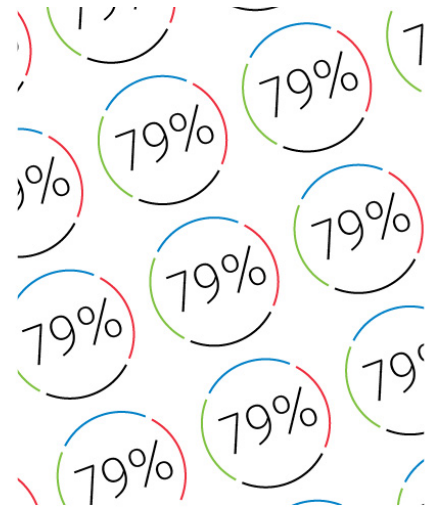

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