



EU Antitrust, Big Data and the Sharing Economy

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¹ The views expressed are those of the author and cannot be regarded as stating an official position of the European Commission
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What is "Big Data"?

- Collection, storage and analysis of very large datasets that can reveal patterns of information that would not be visible from smaller datasets or individual data points
- 4 "Vs": **Volume, Velocity, Variety, Value**
- Big data allows firms to:
 - Improve product performance
 - Exploitation of new business opportunities
 - But also to accumulate market power which can be abused

What is "Big Data"?

- Big data concept very much related to platforms and online market places which are typically two-sided markets
 - Often one side of the platform "pays" with data
 - Sharing /collaborative economy: Matchmakers
- Platforms can serve as a tool for new entrants to enter the market
- Can also entrench dominant positions:
 - possibility of network effects/ tipping point
 - single homing or multi homing?

Data & Competition Law: not a new topic

- 2006: *Asnef* judgment: Data protection "as such" = not a matter for competition law
- *"since 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." C-238/08 – Asnef-Equifax, para. 63"*
- 2008: *Google/DoubleClick* merger decision

Data & Competition Law: main issues

- Data as a currency (“free” products / two-sided markets)
- Data as an output (e.g. *Thomson/Reuters* merger case 2008)
- **Data as an input (mostly about big data)**
- Data protection as a quality factor (mostly about personal data, e.g. German *Facebook* case)

Big Data & Competition Law

- Main theories of harm:
 - **Mergers**
 - Horizontal (~accumulation of data)
 - Vertical (input foreclosure)
 - **Antitrust**
 - Data as a barrier to entry when assessing dominance
 - Exclusionary conduct (e.g. refusal to supply, predation)
 - Data as a means for price discrimination (exploitative abuse)

Commissioner Vestager on Big Data

"[...] companies need to make sure they don't use data in a way that stops others competing.

But that doesn't mean there's a problem, just because you hold a large amount of data.

After all, the whole point of big data is that it has to be big. Because, with the right tools, you can find patterns in a large set of data that you just wouldn't see in a smaller one. And we don't want to discourage companies from putting in the effort to collect that data."

- Brussels, 29 September 2016

Market Definition

- Data may in itself be a relevant antitrust market
 - Example: Dun & Bradstreet / Quality Education Data (US FTC, 2010)
- Data are important for platforms: In two-sided markets one side often does not pay in monetary terms but with data. Still a market worth looking at, even if other metrics than value is needed for the assessment
- Two sides separate relevant product markets? (Groupement des Cartes Bancaires)
- Or platform as a whole? (American Express, USA)

Market Definition

- Is Uber a provider of transport services or a platform/ an intermediary?
- Judgment of the ECJ of 20 December 2017 in C-434/15:
“an intermediation service such as that [provided by Uber], the purpose of which is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys, must be regarded as being inherently linked to a transport service and, accordingly, must be classified as ‘a service in the field of transport’ within the meaning of EU law.”

Competition Law vs Regulation - Platforms

- Result of ECJ-ruling in Uber: Spain can regulate it as transport company
- Commission Communication on Online Platforms and the Digital Single Market (May 2016)
- Fairness in platform-to-business relations
 - Autumn 2017: public consultation
 - Q1 2018: legislative proposal on fairness in platform-to-business relations expected

Competitive assessment (1)

- Careful balancing exercise of pro- and anti-competitive effects
- Key issue is whether collection and use of big data results in a "**data advantage**"
 - *Is data a key element for the product's success?*
 - *Is it about the data or the ability to analyse data?*
 - *Does data present increasing or decreasing returns of scale?*
 - *How quickly does data become outdated?*

Competitive assessment (2)

- Probably most important question: **is data replicable?**
- Relevant factors:
 - *Can data be purchased on the market?*
 - *Are customers locked-in (e.g. due to network effects)?*
 - *Do customers multi-home?*
 - *What is the level of vertical / horizontal integration of the firm(s) collecting data?*
 - *Do privacy rules constrain the collection / use of data?*

Example: Google search case

■ Google Shopping

- Google has the power to and in fact did manipulate search traffic for its own benefit
- Google should treat its own comparison shopping service and those of rivals in the same way
- Statement of Objections sent 15 April 2015
- Negative decision with fines of € 2.42 billion 27 June 2017

Example: Google search case

- Companies can build large platforms, both locally and globally, transform companies into gatekeepers to consumers for other market players. This is particularly so in industries in which network effects reinforce and perpetuate market dominance.
- Access to big data is becoming a major barrier to entry
- Digital platforms also tend to operate as **two-sided platforms**, with users on one side and advertisers on the other. The more users you have, the more valuable the platform becomes to advertisers. And the more advertising revenues are earned, the more investments can be made to attract additional users
- Google has a 75 percent share of the European search market according to consultancy comScore
- The case is not about Google's dominance in search. The case is about the alleged abuse of that dominance with the aim to exclude competitors from other markets where Google faces competition from large or small innovative rivals



European Commission

Example: Google search case

Google

Links to standalone pages of specialised search services

All Shopping Images Videos News More Settings Tools

About 69,500,000 results (0.58 seconds)

AdWords ("paid search")

nike.com - Nike Shoes Range - Buy Today & Get Free Returns
www.nike.com/Shoes
 Get Fresh, Classic & Iconic Nike Styles. Shop The Latest Nike Shoes Now!
 Next Day Delivery · Get The Latest Styles · Over 2500 Styles · Returns Are Free & Fast
 Styles: Air Max, Air Jordan, Air Huaraches, Roshe One, Flyknit

Nike For Men
 Fresh, Vintage & Exclusive Styles For Men. Get The Latest At Nike.com

Nike Lifestyle
 Explore Nike Lifestyle Sneakers and Apparel. Shop Now On Nike.com.

Nike For Women
 Shop Iconic Styles For Women And Find The Full Range Now At Nike.com

Nike Running
 Go The Distance With The Nike Running Collection. Shop Now!

Nike Collectie bij Zalando - Vind hier de highlights - zalando.be
www.zalando.be/Nike
 Gratis verzending & retour. 100 dagen gratis retour!
 Gratis Klantendienst 7/7 · Eenvoudig betalen · 3 tot 4 dagen levertijd · Meer dan 1500 merken
 Herenschoenen · Nike Collectie · Nike Jongens Collectie · Nike Meisjes Collectie · Damesschoenen

Nike Shoes - kickz.com
www.kickz.com/Nike-Chaussures
 4.8 ★★★★★ rating for kickz.com
 Super Choix de Chaussures Nike chez KICKZ.com - Livraison rapide!

Generic search results

Nike Mens Shoes, Clothing and Accessories. Nike.com (UK)
www.nike.com/gb/en_gb/c/men
 Shop Nike Store for mens shoes, clothing and accessories. Browse shirts, shorts, trousers, jackets, hoodies, and more for a variety of sports. Order online >

Women's Shoes & Trainers. Nike.com UK.
store.nike.com/gb/en_gb/pw/womens-shoes/7ptZoi3
 Find women's shoes and trainers at Nike.com. Returns are always free.
 Running · Gym & Training · Nike Air Max Jewell Premium · New Releases

Men's Shoes & Trainers. Nike.com CA.

Shop for nike shoes on Google Sponsored

Nike Lunar Mont Royal Golschoen €62.99 Nike Official	Nike Air Max Typha ... €110.00 Nike Official	Nike Wmns Air Presto Shoe ... €87.50 FreshCotton 27% price drop
Nike Air Max 2017 ... €190.00 Nike Official ★★★★★ (57)	Nike Air Force 1 (Ps) - Sneakers €55.00 Sarenza	Nike FS Lite Trainer 4 ... €80.00 Nike Official ★★★★★ (3)
Nike Free RN Flyknit 2017 ... €130.00 Nike Official ★★★★★ (3)	Nike Free RN 2017 ... €110.00 Nike Official ★★★★★ (20)	Nike Air Max 1 Ultra 2.0 €129.90 Stylefile.nl

Specialised search results (Google Shopping)

Competition

Example: Google's dominant position in general search

- Market share
- Barriers to entry and expansion
 - Significant investments
 - More queries → more **data** → easier to provide relevant results
 - **positive feedback effects from data**: more users → higher chance that online advertisement results in sale → search engine can charge higher price to advertisers → more money to re-invest
- **Multi-homing** is infrequent
 - minority of users in the EEA multi-home
 - users trust in the relevance of results provided by Google
- Lack of countervailing buyer power

Example: Microsoft / LinkedIn

- Microsoft's acquisition of LinkedIn, cleared with remedies in December 2016
- **Aggregation of data**: Microsoft's data + LinkedIn's data = risk of input foreclosure? no concerns as
 - Data for developing a machine learning CRM functionality available on the market
 - Large amount of internet user data for advertising continues to be available
- Conglomerate effects: tying Windows/Office and LinkedIn = foreclosure of LinkedIn's competitors? → increase in LinkedIn users + **network effects** → concerns → remedies

Example: Bottin (France)

- Bottin supplies mapping software
- Retailers pay to become visible to consumers
- Google Maps free for retailers
- Bottin in 2012: Predatory Pricing
- French Competition Authority: No predation because Google recoups its cost through the sale of advertising
- Paris Court of Appeals agrees (2015)

Example: Facebook (Germany)

- Bundeskartellamt opened proceedings against Facebook on 2 March 2016
- Abuse of Facebook's dominant position in the market for social networks
- "take it or leave it" nature of Facebook's privacy policy: consumers cannot use Facebook unless they accept the privacy policy without any adaptations
- Facebook's privacy policy allows it to combine consumers' personal data with data collected from the consumers' internet browsing outside of Facebook (e.g. through cookies). Such data is mainly used for targeted advertising.

Conclusion

- DG COMP has already looked at data-related issues in a number of cases, mostly in the field of merger control
- It is likely that there will be more cases going forward as data becomes more and more important across all industries
- No need to reinvent the wheel – key issue is not whether a case has a data angle, but whether a certain conduct raises competition concerns
- Tools are flexible enough to deal with digital economy