



Application of EU merger control law to Big Data

16th EU-China Competition Week
Beijing, 12 March 2018

Prof. Dr. Stephan Simon¹

Senior Expert Mergers/
Case Manager
Transport Directorate
DG Competition

¹ The views expressed are those of the author and cannot be regarded as stating an official position of the European Commission
These slides are part of a presentation and cannot be fully understood separately from that presentation. Ideas presented here are intended to promote further discussion and analysis. They may not represent a complete or well-articulated picture of the author's view.

Outline

- ❑ What is "Big Data"?
- ❑ Data & Competition Law
- ❑ Big Data & Mergers
 - ❑ Jurisdiction: Thresholds
 - ❑ Market definition
 - ❑ Factors for competitive assessment
- ❑ Practice: EU Case Law
- ❑ Conclusion

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
- 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

Jurisdiction

- Jurisdiction based on turnover thresholds may not capture important case
- 2016: DG COMP launches thresholds consultation (Background is Facebook/WhatsApp)
- 2017: Germany introduces a new threshold
 - New Para. 1(a) GWB: EUR 400 million deal value

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?*

Most relevant DG COMP merger cases

- Google / DoubleClick (advertising data, 2008)
- Microsoft / Yahoo! Search (internet search data, 2010)
- Telefonica UK / Vodafone UK / Everything Everywhere / JV (big data analytics, 2012)
- Publicis / Omnicom (big data analytics, 2014)
- Facebook / WhatsApp (consumer communication data, 2014)
- IMS Health / Cegecim Business (healthcare databases, 2014)
- Sanofi / Google / DMI JV (healthcare data, 2016)
- Microsoft/LinkedIn (personal data, 2016)

Data as Entry Barrier

- Microsoft / Yahoo! Search
 - Horizontal overlap between Microsoft's Bing and Yahoo! as well as advertising business Panama and adCenter. Cleared unconditionally despite 3 → 2 merger and high entry barriers
- Bazaarvoice/PowerReviews (US DoJ 2014)
 - Blocked as the merged entity created a near monopoly on the market for rating and review of platforms, with bid data being an entry barrier

Facebook / WhatsApp (2014)

- Would Facebook use WhatsApp's user data for its advertising business?
- Cleared unconditionally on grounds that
 - Technically difficult to match the data sets
 - Privacy policy of WhatsApp would need to be changed and users would then switch away to competitors like Telegram or Threema
 - Strong competitors in online search advertising exist (Google)

Microsoft / LinkedIn (2016)

- Microsoft's largest acquisition to date (USD 26 billion deal), cleared with remedies in December 2016
- Several horizontal / vertical / conglomerate relationships
- Data-related concerns raised primarily in customer relationship management (CRM) market
- Allegation: LinkedIn full dataset required by CRM suppliers to develop machine learning functionalities

Microsoft / LinkedIn (2016)

- Commission found no risk of foreclosure as:
 - LinkedIn data not essential to develop machine learning
 - Other data available on the market
 - Not established that LinkedIn would have made data available to third parties
- Aggregation of data for advertising (horizontal overlap) no concerns either, as large amount of internet user data for advertising continues to be available

Microsoft / LinkedIn (2016)

Conglomerate effects: tying Windows/Office and LinkedIn = leverage of Microsoft's strong position in operating systems (Windows) and productivity software (Office) to foreclose LinkedIn's competitors?
→ increase in LinkedIn users + network effects → concerns → remedies

Conclusion

- DG COMP has already looked at data-related issues in a number of cases
- 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 merger raises competition concerns
- Tools are flexible enough to deal with digital economy

More information

- Bundeskartellamt and Autorité de la Concurrence: Competition Law and Data (2016)
- Cilea, Andrea/Manigrassi, Luca: EU merger control and big data. Quid Novi Sub Sole? Concurrences, 2017
- Kadar, Massimiliano/Bogdan, Mateusz: "Big Data" and EU Merger Control – A Case Review. JECLAP 2017.
- OECD on Big data (2016)
<http://www.oecd.org/daf/competition/big-data-bringing-competition-policy-to-the-digital-era.htm>