Application of EU merger control law to Big Data

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Outline

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- Big Data & Mergers
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  - Market definition
  - Factors for competitive assessment
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- 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 / Cegedim 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)