

BIG DATA, PRIVACY AND COMPETITION LAW: DO COMPETITION AUTHORITIES KNOW HOW TO DO IT?



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I. INTRODUCTION

It has become customary to open any article or discussion on big data referring to it as “the oil of the internet,” the “currency of the digital economy” or using Hal Varian’s famous analogy: “data is to information as sand is to silicon chips.”

There is, however, another quote that we find appropriate or, rather, relevant: according to Prof. Dan Ariely “Big data is like teenage sex; everyone talks about it, nobody really knows how to do it, everyone thinks everyone else is doing it, so everyone claims they are doing it.”²

The quote might have been conceived to depict the commercial side of discussions on big data, but our submission in this brief piece is that when it comes to competition authorities and judges, the analogy still holds. Indeed, competition enforcers—like teenagers—think they don’t yet know how to do it, when in reality they do, because it is actually pretty simple and there is not much room for new inventions.

Competition authorities appeared to share this stance, but recent moves suggest an evolution in their thinking.

On June 2, 2014 the European Data Protection Supervisor (“EDPS”) held a closed door workshop at the European Parliament in Brussels in which it tried to advance its view — published earlier in its Preliminary Opinion on “Privacy and competitiveness in the age of big data”³ — that competition law should intervene to address privacy and data-related concerns and perceived regulatory gaps. This reflex is certainly not new; given its vaporous scope and the wide variety of remedies available, it is relatively common for agencies in Europe and plaintiffs in the U.S. to think of competition law as a hammer suitable for all sorts of nails. As one of us explained at the abovementioned EDPS workshop, competition law is a tool that has the flexibility to intervene whenever there is a competition problem, however novel or unforeseen. Importantly, it is not designed, nor is it well-suited, to address non-competition concerns, including privacy issues. Whilst the message may have been somehow anticlimactic in that setting, it did enjoy the support of the only competition authority in the room, the European Commission. Back then we thought we could safely assume that all competition authorities would share the arguably obvious view that competition law should kick in when there is a competition problem. That is what EU case law and decisional practice suggested.⁴ But as in many other respects, the past few years have shaken our assumptions and what seemed obvious back then is now in dispute.

Competition authorities all over the world have devoted increasing attention to this issue, giving it further visibility and propelling debates. In March 2016, the German Bundeskartellamt opened proceedings against Facebook on suspicion of having abused its market power by infringing data protection rules.⁵ Then in May 2016, France’s Autorité de la concurrence together with

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2 Dan Ariely Facebook page, January 6, 2013.

3 EDPS Preliminary Opinion on Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy, March 2014.

4 See Commission Decision of March 11, 2008 in case No COMP/M.4731 – *Google/DoubleClick*, at 368); Commission Decision of October 3, 2014 in case No COMP/M.7217 - *Facebook/Whatsapp*, at 164, 188, fn 69; Commission Decision of January 9, 2014 in case No COMP/M.7023 - *Publicis/Omnicom*, at 625-630; Case M.8124 *Microsoft/LinkedIn* (decision not yet publicly available); and Judgment of November 23, 2006, *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v. Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, C-238/05, ECLI:EU:C:2006:734.

5 Bundeskartellamt, Press Release: *Bundeskartellamt initiates proceeding against Facebook on suspicion of having abused its market power by infringing*

the Bundeskartellamt published a joint paper on data and its implications for competition law.⁶ These developments have been accompanied by a plethora of conferences, speeches and publications, such as the one you are now reading.

It still remains unclear whether this is because it is believed that there really are novel issues, whether the exercise is merely aimed at showing that the standard analytical framework remains perfectly applicable or whether those moves are simply intended as a way of signaling that competition law is keeping up with economic and societal changes. Be that as it may, the welcome debate that has been triggered has also given room to calls to change competition law, to widen its scope or to supposedly “refine” its goals.

What we submit below is that such views are misguided, and that while big data raises fascinating new possibilities and business opportunities, it does not bring about any novel competition law issues and that if “old” competition problems ever arise (which we do not fully exclude), those could be well addressed under our traditional framework.

II. DATA AS AN ASSET LIKE, AND UNLIKE, ANY OTHER

Competition law applies established, time-tested principles across all industries—whether regulated or not—and regarding literally every sort of product, service and asset, ranging from endives, vitamins, and steel pipes, to robots and social networks, and these across any conceivable market.

Competition law has also applied to data before.⁷ This, in itself, should indicate (i) that it is suited to dealing with data-related concerns and (ii) that such concerns are not new and cannot be excluded. Indeed, data is an asset, big data can be a big asset, and we know from experience that the accumulation or use of assets may, depending on the circumstances, generate competition problems. This means that, conceivably, the possession of big data could translate into barriers to entry, market power or the ability to foreclose, or that it could facilitate collusion.

While all theoretically possible, in our view there is certainly no automatic causality. It is only in very specific circumstances that mere access to data might be the source of a competition law problem. One could in fact even claim the contrary: that the exponential improvement of firms’ ability to collect data, its potential uses, and the surge of business models—both online and offline—might result in much more competition.

Interestingly, many of the writings on the topic intend to argue, most often in the abstract, that big data will always, or never—depending on the author—be a barrier to entry, or give rise to foreclosure, for example. In our view, many of these pieces, on both sides of the argument, resort to a rhetorical method that consists in rebutting only the most extreme view posited by those on the opposite side. For example, if an author claims that data is typically replicable and hence not likely to give rise to barriers to entry, the rebuttal is likely to indicate that in some cases data may not be replicable, jumping directly to the conclusion that replicability is a “myth” and thus barriers to entry are likely.

That approach may be useful in showing that extreme dogmatic positions may be wrong, but it does not help to find the correct, prudent attitude to the issue.⁸ In our view, both are right and both are wrong. The problem is that discussing in the ab-

data protection rules, March 2, 2016, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html.

⁶ Autorité de la concurrence and Bundeskartellamt, *Competition Law and Data*, May 10, 2016, available at: <http://www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf>.

⁷ See, for example, Judgment of the Court of April 29, 2004, *IMS Health GmbH & Co. OHG and NDC Health GmbH & Co. KG*, C-418/01, ECLI:EU:C:2004:257; Commission Decision of September 4, 2012 in Case No COMP/M.6314 – *Telefónica UK/Vodafone UK/Everything Everywhere/JV*; Commission Decision of October 3, 2014 in case No COMP/M.7217 - *Facebook/Whatsapp*.

⁸ Avid readers of CPI may have spotted a commonality between this line of reasoning and a previous contribution to this publication: see Alfonso Lama-drid de Pablo, *Antitrust and the Political Center*, CPI Antitrust Chronicle, January 2013 (2) available at: <https://antitrustlair.files.wordpress.com/2013/01/antitrust-and-the-political-center.pdf>.

stract whether or not big data can be a barrier to entry, or whether or not it might give rise to foreclosure, may not make much sense, as all these questions need to be assessed on a case-by-case basis, depending on the data and depending on the market. Unfortunately, there are no easy one-size-fits-all solutions for this problem either.

The joint Autorité de la concurrence - Bundeskartellamt report in fact seems to share this belief, at least at a wider level, as (a) it makes clear the point that the competitive impact of data depends on many factors that need to be considered on a case-by-case basis, and (b) when discussing possible theories of harm it makes general arguments about how standard theories of harm often used in antitrust could apply to data, applying the same logic that would apply to any other asset (the one exception, concerning privacy, is discussed below). This is all sensible, and arguably quite obvious.

Ultimately, data is an asset, and like all assets (be it infrastructure, intellectual property or a raw material), it is unique in its very own way, is of relative importance depending on the context or market, and it presents its particular challenges to competition law enforcement.

In the case of data one may, for example, need to consider the potentially dynamic nature of data-driven markets and the possibly fleeting value of data when undertaking market definition exercises; when assessing the value or indispensability of a given set of data one must also be aware of the fact that some data is rivalrous but that some is not, that some data is sometimes—but not always—ubiquitous and cheap and that some is not (as Robert Mahnke put it in a previous CPI contribution, “there are data, and then there are data”).⁹ One should be mindful of the fact that what defines barriers to entry is not equality, but functional equivalence, or of the reality that privacy can be a parameter of competition when personal data is relevant. Importantly, one must realize that more often than not the relevance of data lies not in volume, but in the analytics, how it is processed and used, and that as easy as it might be for rivals to attribute the success of a company to its access to data, “skill, foresight and industry” usually matter more than the data itself. The growing role of data as an asset also underscores the difficulties of effectively incorporating the verified efficiencies into the legal assessment of a given conduct or merger.¹⁰

While undeniable, these challenges—which are not necessarily exclusive to data—are only a useful reminder of the importance of detailed, cautious and fact-based analysis; they do not require radical changes or innovations to our standard, flexible, substantive analytical framework.¹¹

In sum, against a background of a very polarized debate where some seem to favor beliefs not grounded in facts (a fashionable trend these days), we opt for an objective case-by-case, fact-based assessment. That is what we do daily in our discipline; competition law has the economic and legal tools, the expertise for and the habit of examining whether assets are important, substitutable and replicable (or not) in a given setting. This is why if in a given case we came up with the conclusion that the possession of big data raises a competition issue (which in our view is rather unlikely but certainly plausible) our current rules can perfectly apply and why no new rules are needed. “It depends” may be a frustrating answer, but it might, as in this case, be the right one.

9 Robert Mahnke, *Big Data as a Barrier to Entry*, CPI Antitrust Chronicle May 2015 (2).

10 For a more detailed comment on these difficulties, see Alfonso Lamadrid de Pablo, *The double duality of two-sided markets*, [2015] Comp Law 64, Available at: https://antitrustlair.files.wordpress.com/2015/05/the-double-duality-of-two-sided-markets_clj_lamadrid.pdf.

11 When it comes to substantive “refinements,” we are not persuaded, for example, by the proposals to define intermediate “data markets” (as proposed by Pamela Jones Harbour in her now often invoked dissent to the FTC’s *Google/Double Click* decision, in that case in relation to “data used for targeted advertising purposes”) as we cannot see how an intermediate data market may be a meaningful market in the sense of competition law, except perhaps when the data is subject to trade. If the alleged problem is that the use of data might have consequences in some markets, then what makes sense is to define and look directly at those markets as we always do. Returning to one of our opening analogies, this proposal would be akin to a suggestion to run cases on sand instead of chipsets. Some non-substantive refinements may nevertheless be necessary; this may be the case, for example, of turnover-based merger thresholds that may fail to capture the value of a data-driven transaction.

III. FACTORING IN PRIVACY CONSIDERATIONS?

Until now, we have reasoned quite simply that if there is a proven competition issue, then competition law should apply; and if there is no such issue, then naturally competition law should not apply. This has been a widely held view up until now—including by the ECJ¹² and the European Commission¹³—but one that has recently been put into question by the issue of privacy.

Some, however, have recently, and strongly, advocated the view that the protection of personal data should, as a fundamental right, be factored into the consumer welfare standard that guides the application of competition law, thereby departing from a purely economic analysis thereof. In our view, such calls for reform may be misguided.

Privacy is undoubtedly an important issue, and there may indeed be a need for better privacy regulation through tailored privacy laws; in our view, in fact, privacy may be too important to be left to competition lawyers and competition authorities.

The most powerful argument against the inclusion of standalone privacy considerations into the competition analytical framework is perhaps that there is nothing so special about privacy as to distinguish it from other fundamental rights or from other legitimate and important public policy goals. Accordingly, if one were to accept the contention that the competition laws must be applied in such a way as to ensure privacy is respected, there would be no apparent reason not to do the same with any other right or legitimate public goal. This would lead to the absurd result of turning competition law into a law of everything, which would not only entirely deform the discipline but would also provide a great starting point for a dystopian novel.

It is true, however, that in some cases privacy can be a parameter or a dimension of competition, and in this sense could fall into the scope of competition law; but even in these cases it is arguable that competition authorities are well placed to deal with restrictions of this sort of competition and to identify optimal and non-competitive privacy terms. Indeed, if competition law often struggles dealing with prices, not to mention innovation considerations, factoring privacy considerations into the competition analysis could pose great hurdles or bring about an undesirable degree of discretion on the part of authorities lacking the necessary expertise on privacy matters. The ongoing Bundeskartellamt investigation into Facebook has brought to the fore some of these issues.¹⁴

To conclude, one must be mindful that the scope of competition law is, fortunately, limited to a relatively narrow set of economic concerns; it is about balancing restrictions of competition with countervailing economic efficiencies. Other issues of public importance remain outside of its realm; they are rightly left to legislators, not to ultra-specialized agencies and lawyers, and not even to courts. Within its margins, we often like to say that competition law is a distillation of common sense through years of application by those judges and specialized agencies, infused with mainstream economics. Applying time-tested principles, competition law has over the years managed to deal with conflicts between different public policy goals, and has been flexible enough to cope with markets and assets of all forms, no matter how supposedly unique or distinctive. Our concern is that by making exceptions or contortions to address big data, or by factoring in exogenous elements such as privacy, one might very well ruin the mix.

12 See Judgment of November 23, 2006, *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v. Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, C-238/05, ECLI:EU:C:2006:734, para. 63: “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.”

13 See Commission Decision of October 3, 2014, Case M.7217 – *Facebook/WhatsApp*, C(2014) 7239 final, para. 164: “privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the Transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules,” Case M.8124 *Microsoft/LinkedIn* (decision not yet publicly available).

14 Alfonso Lamadrid de Pablo, *Facebook, Privacy and Article 102- a first comment on the Bundeskartellamt's investigation*, chillingcompetition.com, available at: <https://chillingcompetition.com/2016/03/02/facebook-privacy-and-article-102-a-first-comment-on-the-bundeskartellamts-investigation/>.

