NAVIGATING THE DIGITAL AGE: THE EUROPEAN COMMISSION'S DIFFERING APPROACHES TO MERGER CONTROL AND ABUSE OF DOMINANCE IN THE DIGITAL SECTOR

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I. BIG DATA

A. "Digital" Means Data-Driven

We cannot discuss the digital sector without discussing the main force that drives it, i.e. data. The success of digital companies depends on how they use the data they gather to create and improve their services. Data analysis plays an important role in the competitive dynamics of digital markets. Through data analysis, companies learn how to use their resources more efficiently and how to gain a competitive advantage over their rivals.

The use of data by companies has formed a major part of the conversation in the competition sphere in recent years. This is usually in the context of "Big Data," and the ways in which its use could be considered abusive of a dominant position or problematic when mergers bring together large sets of data. In particular, the European Commission (the "Commission") has devoted considerable attention to Big Data[2] and has incorporated elements of Big Data analysis in its merger practice since at least 2008.[3] However, while it may appear that the risks related to Big Data are common to both mergers and to cases involving abuse of dominance, the Commission's approach to Big Data in these two contexts is somewhat inconsistent. In the following sections, we will consider this discrepancy by looking at specific examples from the Commission's practice.

B. Mergers: A Short-Cut to Data Advantage

The value of data largely depends on its volume, quality and how quickly it can be collected and processed. A sufficient volume of data can be built over time or there is also the option of acquiring companies that already have large sets of data at their disposal. In the digital sector, where the race to develop new functionalities is always on, companies are increasingly focusing on this option. According to one estimate, the number of Big-Data-related mergers doubled between 2008 and 2013 – from 55 to 134.[4]

The digital sector's increased interest in acquisitions has, in turn, attracted the Commission's attention. In one of her recent speeches, Commissioner Vestager stated that "the more important data becomes for competition, the more closely we need to look at mergers that bring together large sets of data."[5] The theory of harm related to such mergers would be that, by combining large data sets, which are of central importance to the offering but inaccessible to competitors, the merging parties can improve their product or service after the merger in a manner which competitors will be unable to match (i.e. the parties to the merger would use data to create a barrier to entry). This theory, however, requires that competitors cannot reasonably replicate the data in other ways – for example, by obtaining it from data brokers or by collecting and analyzing it. In other words, the combined data would have to offer the merging parties a unique, non-replicable advantage. The Commission has assessed a number of mergers involving elements of Big Data, but so far the Commission has been unable to identify such a unique, non-replicable advantage in any of these cases.

For example, in its *Google/DoubleClick* decision the Commission concluded that the merged entity, and certainly DoubleClick by itself, would not have access to unique, non-replicable data because the type of information collected by DoubleClick is relatively narrow in scope.[6] Other companies active in online advertising had the ability to collect large amounts of more or less similar information that is potentially useful for advertisement targeting. In other words, the data was, in the Commission's view, replicable and therefore not a barrier to entry. More recently, the Commission reviewed the merger between Facebook and WhatsApp, analyzing whether Facebook could use WhatsApp as a potential source of user data to improve its advertising. It ultimately concluded this was not the case, and that this potential use would not hamper competition.[7]

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2 For example, Commissioner Vestager has illustrated in her speeches a focus on the importance of data today. See for examples, "Big Data and Competition" (available here) and "Competition in a Big Data World" (available here).

3 See for example, Case No COMP/M.4731, *Google/DoubleClick*, decision of March 11, 2008 ("*Google/DoubleClick*") (available here); and Case No COMP/M.4854, *TomTom/TeleAtlas*, decision of May 14, 2008 (available here).

4 European Data Protection Supervisor, "Report of Workshop on Privacy, Consumers, Competition and Big Data 2 June," July 11, 2014, at 1; (available here).

5 Vestager, "Clearing the Path for Innovation," Speech at Web Summit, Lisbon, November 7, 2017 (available here).

6 *Google/DoubleClick*, supra note. 3, para. 269.

7 Case No COMP/M.7217, *Facebook/WhatsApp*, decision of October 3, 2014 (available here), paras. 190-191.

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The Commission's merger decisions relating to Big Data demonstrate that so far the Commission has approached the topic of Big Data with caution and has been hesitant to conclude that the combination of large sets of data could create a barrier to entry.

C. Dominance: The Winner Takes It All

When data is in the hands of one company, it can provide that company with a significant competitive advantage, which could be difficult for rivals to overcome. While some competition authorities have considered the use of essential data as a barrier to entry (for example to raise entry costs or gain or maintain market power),[8] the Commission has not yet explicitly addressed the use of Big Data in the context of abuse of dominance. This is particularly surprising in the context of the Commission's recently published decision in the *Google Shopping* case.[9] Big Data forms a huge part of Google's business model, and arguably a huge part of its role in dominating the online search sphere. The Commission, however, decided not to incorporate the elements of Big Data into its theory of harm. Instead, in the *Google Shopping* decision, Big Data forms a part of the definition of the relevant market for search engines.

In several paragraphs of the *Google Shopping* decision, the Commission argues essentially that the volume of data accumulated by Google's search engine creates a barrier to entry to potential competitors.[10] In the Commission's view, the establishment of a fully-fledged general search engine requires obtaining a large quantity of data upon which relevancy algorithms can be built and improved.[11] As the volume of data increases and accumulates, so too, do the relevance and accuracy of results. Equally, as data volumes increase, the amount of errors made decreases. The large volume of data is, therefore, indispensable in developing an effective general search engine. The Commission also notes that Google's rivals are unable to match Google's data advantage. According to the decision, the costs of crawling and indexing the deep Web are so high that even Google's large competitors such as Yahoo or Ask cannot keep up with Google's spending in this area.[12] Google's unparalleled data advantage is further confirmed by the fact that a number of start-ups have also attempted to launch competing general search services since 2007 but none of these companies have been able to establish a significant market presence.[13]

The Commission's decision relies on Google's data advantage to establish its dominance on the market for search services but does not go so far as to suggest that Google misused this data advantage to maintain its market power. Still, the Commission's considerations relating to Google's data advantage have some precedential value because, for the first time, the Commission concluded that the sheer accumulation of data, which is otherwise freely available, can effectively constitute a barrier to entry.

D. Conclusions

Unlike in the *Google Shopping* abuse of dominance case, the Commission seems hesitant in merger cases to conclude that consumer data could be non-replicable. The specific characteristics of the market for search services, which is arguably the most data-heavy of all the online markets, explains, to some extent, the difference in approach. The source of the Commission's hesitation, however, seems also rooted in the very nature of EU merger control proceedings. Given the strict timetable to which the Commission has to adhere, and the immediate impact of its decision on the market ("deal or no deal"), the Commission's caution appears warranted. Intervening too soon in fast-moving markets may have the counterproductive effect of chilling innovation.

In addition, the merger analysis is, by its nature, always prospective, and the Commission faces the challenge of predicting *ex-ante* how data issues may impact markets in the future. In the fast-moving platform environment, where new solutions are constantly being tested, it is

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8 See, for example, a fairly recent decision by Czech Competition authority, in which a transport data management company CHAPS was fined for abusing its dominance by refusing to supply rivals with updated transport timetable data between April 2008 and August 2015 (available here).

9 Case AT.39740, *Google Search (Shopping)*, decision of June 27, 2017 ("*Google Shopping*") (available here).

10 See, for example para. 328 of the *Google Shopping* Decision, where the Commission notes that "entering or expanding in general search services on mobile devices therefore requires the same magnitude of investments as for those for general search services on static devices, and the volume of data already accumulated create the same barriers to new entrants."

11 *Google Shopping*, supra note. 9, para. 286.

12 Id., para. 304.

13 Id., para. 301.

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particularly difficult (and dangerous) to make these predictions.[14]

Finally, the Commission, which is already criticized for disadvantaging U.S. platform businesses, and confronted with accusations of protectionism, treads slowly in the area of Big Data. The first test case relating to Big Data is, therefore, more likely to come from the area of abuse of dominance than it is from that of merger proceedings, for the simple reason that in the *ex-post* analysis it will be easier for the Commission to see developments relating to Big Data, and to defend its position before the Court.[15]

II. INNOVATION

A. Why does Innovation Matter?

Innovation is a key dimension of competition, not only in the digital economy, but also in pharmaceuticals, medical devices, energy and mobile telecoms. Consequently, innovation is one of the five principal goals set out by Commission President Juncker in the "Europe 2020" strategy. As a specific tool to promote innovation in the EU, however, merger control has come to the fore only relatively recently. The European Parliament's 2013 study "The Contribution of Policy to Growth," for example, did not highlight merger control as capable of having an impact on the "Innovation Union."[16]

B. The Theory, in Theory

To contextualize, however, economists themselves disagree on the extent of the relationship between mergers and innovation. To some, an "innovation" theory of harm in merger control is consistent with the original concept of competition as a dynamic process, such that a merger's impact on dynamic competition deserves *at least* as much attention as its static effect.[17] Others caution, however, that the academic literature shows there is no *automatic* relationship between mergers and innovation: to assess innovation effects in the digital economy, one needs a case-by-case analysis,[18] taking into account, for example, direct and indirect network effects, multi-homing and access to data.[19] Many dispute poorly defined "innovation markets."

C. Challenges in Practice

Whatever the economic theory may reveal, it is clear that in practice the Commission regularly considers the impact of mergers on innovation in specific current and future markets.[20] It examines the importance of innovation to the sector, R&D costs, the number of effective competitors and the strength and the closeness of the merging parties in their innovation efforts.[21]

14 See Loriot's testimony before the House of Lords in the Inquiry on online platforms and the Digital Single Market: "When you have new, complex issues, it is challenging for competition authorities to predict the development that you may see now in some markets, not all of them. But to ex ante tell you that such a market would have evolved in a certain way is not always obvious either"; House of Lord's Inquiry on online platforms and the Digital Single Market, Evidence Session No. 11 Heard in Public Questions 95–108, November 10, 2015.

15 See Loriot's testimony before the House of Lords in the Inquiry on online platforms and the Digital Single Market: "We have a system of administrative law in which we may impose penalties. We first have to find infringements and then we may have to impose penalties. Companies may appeal these decisions to the Court of Justice and therefore it is critical for us that the rights of defence are properly ensured, so that we give the time and examine"; House of Lord's Inquiry on online platforms and the Digital Single Market, Evidence Session No. 11 Heard in Public Questions 95–108, November 10, 2015.

16 European Parliament, The Contribution of Competition Policy to Growth and the EU 2020 Strategy, IP/A/ECON/ST/2012-25 (July 2013), Table 5: Effect of competition instruments on the Flagship Initiatives, at pg. 29.

17 Federico, "Horizontal mergers, innovation, and the competitive process," (2017) *JECLP* 8(10) 668 ("Federico (2017)").

18 Veugelers, "Innovation in EU merger control: walking the talk," (2012) *Bruegel Policy Contribution* 4 ("Veugelers (2012)").

19 Scholl, "Why the new merger control thresholds in Germany," (2017) *JECLP* 8(4) 219.

20 Petit, "Significant impediment to industry innovation: a novel theory of harm in EU merger control?" International Centre for Law & Economics White Paper (2017) ("Petit (2017)").

21 Laitenberger, "EU competition law in innovation and digital fairness in the consumer welfare space," MLex / Hogan Lovells, Brussels, October 10, 2017 ("Laitenberger (Oct 2017)").

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The Commission's practice has met two substantial criticisms in this regard, however. First, "innovation" itself is not defined in the Commission's guidelines, affording officials substantial discretion in their reliance on internal documents, third-party observations and experts to determine the risks of possible harm to "innovation."[22]

Second, while the Commission has examined the potential negative effects of mergers on innovation and investment, it has been much more reluctant to consider dynamic *efficiencies*. The Commission ordinarily assesses such efficiencies only when the parties claim that the merger will produce them.[23] As one commentator has wryly written, however, practice should cut both ways.[24] Furthermore, although the Commission's Horizontal Merger Guidelines recognize gains from R&D and innovation, the merging parties face a high standard of proof: the efficiencies must benefit consumers, be merger-specific and be verifiable. By contrast, to establish any harm, the Commission applies a *probabilistic* framework.[25]

D. Drawing on the Antitrust Toolbox

Evaluating such transactions exposes difficulties even where the merger concerns existing product market overlaps, such as defining the market for the very first time and, particularly in the digital economy, evaluating competition for the market.[26] Evaluation of a merger's impact on innovation is even more complex and may require a variation of the case team's usual toolbox. For example, where platforms are concerned, merger evaluation might focus less on market shares and profit margins, and more on contestability indicators (e.g. entry barriers, routes to end-users).[27] Several such indicators might be drawn from the framework traditionally associated with the analysis of unilateral effects,[28] particularly in the digital economy.[29]

E. Innovation in Abuse of Dominance

By contrast to the more recent role for innovation in merger control, the Commission has analyzed innovation effects in abuse of dominance cases since the early 1990s and in digital economy cases since the early 2000s.[30] *Magill TV Guide*[31] first established an abuse of dominance by the holder of an intellectual property right, through refusing to license such right so as to prevent the innovation of a new product.

As in the ongoing merger control debates in the EU over the specificity and likelihood of potential competition due to any future products, the EU courts, in cases subsequent to *Magill TV Guide*, have focused on whether an abuse could occur in the absence of a *particular* innovation by the licensee, and just how probable the market (i.e. demand) for such innovation must be. The Commission's position, which the EU courts have endorsed, was settled during the interoperability cases which began in the early 2000s: abusiveness may be analyzed directly in terms of innovation. In other words, it is not necessary that the refusal to license must prevent the emergence of a new product in order to be abusive under Article 102 TFEU.

Evidence of the extension even appears in the recent *Google Shopping* decision. The Commission decided that Google held a dominant position in the national markets for general search services and, by more favorably displaying its own comparison shopping services, reduced competitors' incentives to improve and to create new types of services.

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22 Brandenburger, Breed & Schöning, "The Role of Innovation in Merger Control – A Hot Topic," *Competition Policy International* (2016) ("Brandenburger (2016)").

23 Veugelers (2012), supra note. 18.

24 Petit (2017), supra note. 20, pg. 8.

25 De Coninck, "Innovation in EU merger control: in need of a consistent framework," (2016) *CLPD* 2(3) 41.

26 Brandenburger (2016), supra note. 22.

27 Capobianco, "Challenges for competition law enforcement and policy in the digital economy," (2017) *JECLP* 9(1) 19.

28 Federico (2017), supra note. 17.

29 Laitenberger, "Enforcing EU competition law: principles, strategy, and objectives," Fordham University 44th Annual Conference on International Antitrust Law and Policy, New York City, September 15, 2017 ("Laitenberger, Fordham (2017)").

30 For a fuller history, see Reynolds & Best, "Article 102 and innovation," 39th Annual Fordham Conference on International Antitrust law and Policy, September 20-21, 2012.

31 Case IV/31851, *Magill TV Guide*, decision of December 21, 1988 ("*Magill TV Guide*") (available here).

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F. History doesn't Repeat, but does It Rhyme?

Certain differences are apparent here. While the Commission takes into account the effect of a merger on innovation incentives, it ordinarily does so in respect of a well-defined current or future market.[32] By contrast, the Commission evaluates innovation in cases of alleged abuse of dominance in respect of potential or even hypothetical markets.[33] Much as with Big Data, the difference here could be attributable to the time-constrained nature of merger review, which focuses attention on the specific relationship between the merging parties. The difference in treatment, although not confined to the digital economy, affects it more acutely, because innovation is so central to competition in the digital economy. The difference in contexts, however, should not preclude the use in merger review of the contestability "tools" of the antitrust trade.

III. FAIRNESS

A. Why Fairness, Why Now?

People may not think about politics all the time, but they do deal with the market every single day. And an ever greater proportion of our lives is governed by the market, largely because of the many digital products and services that we use. Once employed principally to consume, such products now empower us to interact, even to compete, and "fairness" has been increasingly used to define the appropriate boundaries of competition in the EU.

B. Should Competition Law Pursue Fairness?

Whether competition law should pursue fairness is debatable. Contemporary critical responses to increases in inequality have led some to propose a range of reforms,[34] while others have criticized the imprecise nature of fairness as disqualifying it as an objective standard.[35] Other approaches have sought to pin "fairness" to existing concepts within EU competition law, such as competition on the merits,[36] or to distinguish using "fairness" as a value in itself from using it as a tool to achieve other economic and social aims.[37]

In its decisional practice, the Commission has generally not invoked fairness, but has substituted it with more objective standards,[38] yet in its decisions enforcing the EU's rules on abuse of dominance and on merger control[39] "fairness" is not so easily disregarded. As the sections

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32 See Petit (2017), supra note. 20. Even in respect of a chemicals merger in 2017 (Case M.7932), the Commission's widest focus did not extend to innovation of just any kind. In its investigation the Commission examined each market in which a party was an actual or a potential competitor of the other party, or will be on the basis of its lines of research or early pipeline products. As that decision states, "R&D players do not innovate for all product markets composing the entire industry at the same time… [but] have specific discovery targets." Nor was the downstream market open-ended in the case: "The spaces where innovation competition takes place are thus broader than an individual downstream… market, but are nonetheless small." In practice innovation concerns in a given merger case appear to be limited to its industry: "The investigation suggests that the Transaction would be likely to significantly diminish innovation competition in a number of innovation spaces within the… industry." By contrast, the CJEU has held that the Commission may establish an abuse of dominance by restricting innovation if the "refusal [to license] is preventing the emergence of a new product for which there is a potential consumer demand, that it is unjustified and such as to exclude any competition on a secondary market," without confining the application of that rule to a particular industry: Case C-418/01 *IMS Health* (*"IMS Health"*), para. 38.

33 The CJEU has held that "for the purposes of the application of [*Magill TV Guide*], it is sufficient that a potential market or even hypothetical market can be identified": *IMS Health*, supra note. 32, para. 44.

34 Baker & Salop, "Antitrust, competition policy, and inequality," 10 *Georgetown Law Journal* (2015) 1-28.

35 Stigler, "The Law and Economics of Public Policy: A Plea to the Scholars," (1972) 1 Journal of Legal Studies 4: "Fairness is a suitcase full of bottled ethics from which one freely chooses to blend his own type of justice."

36 Lamadrid de Pablo, "Competition law as fairness," (2017) *JECLP* 8(3) 147 ("Lamadrid (2017)").

37 Laitenberger, Fordham (2017), supra fn. 29: "I would like to stress in closing the impact that keeping markets fair, level, and well functioning can have on our economies and societies." The impact could include a greater range of choices and a wider freedom to choose: Lamadrid (2017), supra note. 36.

38 Dolmans & Lin, "Fairness and competition law: a fairness paradox," (November 2017) *Concurrences Review* ("Dolmans & Lin (2017)"), pg. 4.

39 For a helpful taxonomy of fairness from horizontal, vertical and procedural perspectives, see Trebilcock & Ducci, "The Multifaceted Nature of Fairness in Competition Policy," *Competition Policy International* (2017).

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below discuss, while "fairness" plays a role in both abuse of dominance and in merger control, a distinction can be drawn between the *forms* which it takes. In the former, fairness appears in a substantive form, while in the latter, it relates principally to procedure.

C. Fairness as a Competitive Process

Although the EU courts have recently emphasized procedural fairness in a case alleging an abuse of dominance in the digital economy (e.g. computer components), the Commission's decisional practice in this area has principally emphasized *substantive* fairness. The Commission pursues this through the concept of competition on the merits.[40] With regard to exclusionary abuses in the digital sector, the Commission's cases on exclusive dealing, product tying or restricted interoperability can be explained on the basis of that concept.

With regard to exploitative abuses, however, the Treaty expressly refers to fairness,[41] and the case law on standard essential patents also refers to fair, reasonable and non-discriminatory terms. Recent cases on alleged abuses of intellectual property rights in copyright management, mobile telecommunications and pharmaceuticals have raised exploitative issues. In practice, however, the Commission seeks to rely on more objective measures (e.g. pricing benchmarks from competitive markets) by which it determines the "fairness" of the conduct at issue.[42]

Such measures presuppose competition as a process, not a result.[43] Lyons argues, for example, that fairness comes from the process by which inequality has been generated: if the process is considered fair, then the observed inequalities are typically considered fair.[44] In the context of abuse of dominance, "fairness" refers to a substantive concept, but its meaning is largely drawn from "competition on the merits" or other objective factors which relate to the rules concerning the conditions for competition.

D. Fairness as a Procedural Safeguard

By contrast, procedural fairness has been called a "key element" in EU merger investigations. Johannes Laitenberger, for example, has emphasized the strictness of the timetable to which a case team must adhere in its merger review as facilitating procedural fairness. This seems to refer to a horizontal procedural fairness as between various sets of merging parties.

Recent decisional practice, however, indicates that the Commission would also emphasize a vertical aspect of fairness, as between the Commission and each set of merging parties. For example, the Commission has ordered fines against merging parties in the digital sector which, it alleged, provided the Commission with misleading information during the merger review. The Commission has subsequently issued statements of objections on this same basis to merging parties in other sectors. Such cases also concerned research and development and product innovation (e.g. pharmaceuticals and renewable energy).

And enforcement has extended, in this vertical respect, to sectors which compete with technologies emerging from the digital economy or which incorporate digital technologies into their products, for alleged "gun-jumping" (e.g. telecommunications and medical diagnostics). In the context of merger control, "fairness" refers to a procedural concept used to protect the integrity of the review process. It cuts both ways, however, as the Commission may choose to act if it decides that the parties' conduct could jeopardize that process.

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40 Laitenberger (Oct 2017), supra note. 21: "[F]airness is firmly anchored in the notion of "competition on the merits," which is so central to the case law on abuse of dominance"; and for an argument that "competition on the merits" renders fairness unnecessary, see Dolmans & Lin (2017), supra note. 38, pg. 11.

41 For example, Article 102(a) TFEU refers to "unfair purchase or selling prices or... trading conditions."

42 Dolmans & Lin (2017), supra note. 38, pg. 14-15.

43 Laitenberger (Oct 2017). Federico (2017), supra note. 17, pg. 670: "[C]ompetition policy has broadly embraced a 'process-view' of competition…"

44 Lyons, "Inequality and Competition Law," *Competition Policy International* (2017).

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IV. MULTI-FACETED APPROACH TO MARKET POWER IN THE DIGITAL ECONOMY

The Commission's approaches to Big Data, innovation, and fairness differ by the context of the Commission's enforcement. In merger cases the Commission seems hesitant to conclude that Big Data could be non-replicable, whereas in the *Google Shopping* abuse of dominance case, the Commission has now gone so far as to rely on a data advantage to establish a dominant position.

The scope for the Commission's innovation concerns also seems wider in abuse of dominance cases than in merger cases, where they appear principally to relate to innovation *within* the industry of the merging parties. By contrast, the EU competition rules might embolden the Commission in finding innovation abuses even *outside* a dominant undertaking's industry.

Finally, the Commission's use of "fairness" in merger cases tends to refer to procedural rules which can promote equal treatment between different sets of merging parties, and which may help to safeguard the integrity of the review process. In abuse of dominance cases, however, "fairness" has taken on a wider, substantive sense through "competition on the merits."

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