# DISMEMBERING PRODUCERS FROM CUSTOMERS: THE *GOOGLE/SANOFI* JOINT VENTURE


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# I. INTRODUCTION

It is a short fifteen page non-opposition decision, yet it is very telling about mergers in the digital economy – and the European Commission's difficulties to grapple with such mergers. Google (through its subsidiary Verily Life Science) and Sanofi (through Aventis) created a joint venture, nowadays known as Onduo, to join forces in the treatment of diabetes. The European Commission in February 2016 took the decision not to oppose that merger.[2] The decision illustrates the shifts of economic power in the platform economy and it presents a striking remedy for concerns that may be raised.

# II. CONTROLLING MAGAF MERGERS

It is not an everyday task for the European Commission to investigate mergers with one of the MAGAF companies – Microsoft, Amazon, Google, Apple and Facebook – involved. While such concentrations may have massive implications for markets and competition, they often slip through the holes of merger control. The *Facebook/WhatsApp* merger, arguably one of the most important (and expensive) mergers in the digital economy is a telling example of the difficulties of the European Commission to get hold of such cases.[3] Due to the low turnover of WhatsApp, the European merger control regulation was not applicable and only the construction of a referral case from Member States allowed the Commission to look at the case (and to not oppose it). The German legislature reacted with introducing a transaction value threshold: If the purchase price for the acquisition exceeds 400 million Euros, the case needs to be notified regardless of the turnover of the target.[4] Such a rule would have caught *Facebook/WhatsApp*. The Commission has not yet introduced such legislation.

Slipping through the net is by no means exceptional: According to Wikipedia, the MAGAF companies had more than 625 mergers. Of these, only 12 were notified to the European Commission, and only 2 cases faced substantial opposition to the merger. Put differently: Amazon, Alphabet and the like managed to grow substantially through external means (i.e. by buying up other companies). This was not even monitored intensely by the relevant competition authority let alone opposed.

# III. THE CASE AND THE DECISION

With two strong companies forming a joint venture, jurisdiction for the European Commission was no problem in *Sanofi/Google*. Sanofi is active in research, development, manufacturing and marketing of pharmaceuticals. Google (or today: Alphabet), apart from running the search engine, is active in various areas, also in the field of life sciences, in particular with data-related services. The new company aims to offer:

> services for the management and treatment of diabetes, including data collection and processing and data analysis (the "Services"). In addition, the JV may commercialise certain products, such as specialised continuous glucose monitoring devices ([Products the JV may supply in the future]), insulin pumps ([Products the JV may supply in the future]) and insulin ([Products the JV may supply in the future]) which can be used alongside the Services.[5]

Essentially, what the new company does is to create a digital e-health platform for diabetes patients, which will be developed by Google.

The Commission analyzed five relevant markets: insulin, insulin delivery systems (such as insulin pumps), glucose monitoring systems, services for the management and treatment of diabetes using an integrated digital e-medicine platform and data analytics services.[6] Sanofi holds strong positions with market shares between 20 and 40 percent in the first two markets. The Commission does not provide numbers for the platform or the data analytics market.

2 European Commission, 23.2.2016, Case M.7813, *Sanofi/Google/DMI JV*.

3 European Commission, 3.10.2014, Case M.7217, *Facebook/WhatsApp*.

4 Section 35(1a) Act against Restraints of Competition (in the version of the 9th amendment 2017).

5 Para. 5 of the decision.

6 Para. 17 of the decision.

Looking at conglomerate effects, the Commission analyzed the risk of bundling products, devices and services and/or the risk of limiting interoperability. The Commission concludes on this aspect:

> the Parties do not only lack the ability to foreclose rivals but also the incentive to do so given that by preventing third parties' insulins and devices to work with the Services and the Platform, the JV would drive patients away, making such a strategy unprofitable for the JV.[7]

This conclusion is based on two grounds: First, patients today use different suppliers for insulin and different systems to apply it. In order to get customers to the platform it would be unwise to only allow Sanofi-products to the platform. Second, the Commission notes that the platform will use open standards to maximize profitability.

Also, Google would not be able, according to the Commission, to leverage market power from Google Search by limiting visibility of alternative providers of such services in the search results since "the choice of a particular insulin device/product is generally made by healthcare professionals on the basis of the patient's specific needs."[8] (It remains unclear at this point in how far healthcare professionals are immune from Google's influence.)

A final concern that the Commission looks into is – in the words of a competitor – that "the data analysis is used to make the patient more dependent on [Sanofi's] insulin," or simply to lock-in patients to the services.[9] The Commission relies on the parties' assurance that they will respect data portability – as they have to with the General Data Protection Regulation. In this new norm, entering into force on May 25, 2018, Article 20 provides for a right of users to ask for portability of their personal data from one service to another.

The Commission writes:

> According to the Parties, data portability will be driven by patient demand and preferences and Google will support the JV in affording patient data portability in compliance with the applicable rules in this regard. In this context, the Parties stated that they do not intend to prohibit or prevent the export of data by patients or healthcare professionals and will work to enable the export of data in interoperable formats.[10]

On these grounds, the Commission did not see a reason to oppose the planned merger.

## IV. DISMEMBERING PRODUCERS FROM CUSTOMERS

The merger decision showcases the large scale developments that take place in the digital economy. Imagine being a diabetes patient. Now, thinking back 20 years: What would be your main concern in treating your diabetes? Having insulin ready. The supply relation to – for example – Sanofi would be your major customer relationship. Thinking a couple of years ahead, this may have changed: The most important issue may be to have access to your data on the platform that regulates your diabetes treatment. While the supply of the pharmaceuticals may still be the prime concern, the more important customer relationship may be to the platform (i.e. Google), not the producer, Sanofi.

This is typical for businesses where a platform squeezes in to organize and digitalize the relationship of consumers with the good of their preference: The producers of the sought-after product or service are dismembered from their customers. The management of preferences is provided by a platform operator that controls all sorts of related business-relations. Taking the case at hand as an example: With e-health on the rise, it is less and less the professional healthcare specialist who manages and advises the patient but the platform operator who may work with professional healthcare specialists. The platform brings together different customers and suppliers. This is efficient, transaction costs will probably be reduced. Yet, in this scenario, the key supplier, namely the producer of an illness-treating pharmaceutical, loses the contact with its customers and falls into the position of a supplier somewhere in the backyard of the platform. The same holds true for the doctor or healthcare

7 Para. 84 of the decision.

8 Fn. 38 of the decision.

9 Para. 66 of the decision.

10 Para. 68 of the decision.

specialist. Pharmacists will also depend upon the platform since supply will be organized via e-commerce, not a brick-and-mortar point of sale. Insurance companies better fit into this ecosystem.

This is the logic of platforms: they squeeze an efficient matchmaker into a customer-relationship that so far had been dominated by the producer. Now, it is dominated by a data-driven service-provider. Similar situations may be found in all sorts of platform markets, be it the delivery of food, services like Uber or Airbnb, or – put to extremes – in the management of daily life through digital assistants in your home. While the real interest of the consumer is for getting the product (food, a taxi, a bed and whatever Alexa organizes for you), the gatekeeper is a different company. Due to the importance of data and the transparency of the customer for a data analytics expert plus the control of many other aspects of the customer's life (e.g. through control of the operating system on your mobile phone or the selection of your search results on the Web etc.), this gatekeeper reaches a non-contestable position. With the winner-take-all dynamics of typical platform markets, it may soon be a business dominated by one single platform.

This is a strange distortion of traditional concepts of competition. Competition is a discovery procedure, to use the famous words by Friedrich von Hayek; it is the working mechanism of coordinating supply and demand. In the platform economy, the discovery procedure with its anarchic power is reduced to data management and algorithmic decision making by an intelligent computer. Supply and demand are now coordinated by the nearly invisible hand of a private company. This company decides whether Sanofi may supply insulin or not and who is the healthcare professional to be consulted.

The efficiency that the gatekeeper on a platform may generate in the beginning may soon be replaced by a profit-maximizing regime that controls and steers customer needs and limits the competitive possibilities of producers. The autonomous decision making process of different undertakings in competition is reduced to catering to the wishes of the platform operator.

These are the three consequences of competition for the market: A gatekeeper steps in and dismembers customers from producers. Customers are locked in with the platform provider. Competition is pushed into the backyard of the platform where different companies may fight for access to the platform.

Does the Commission see this development with a sharp eye? Doubts remain. The focus of the analysis in the *Sanofi/Google* case is not on the effects of the platform but the strengthening of Sanofi in insulin supply while it seems that Sanofi may soon easily depend on Google much more than the other way round. If diabetes patients log their data with a platform and find it a neat helper for managing their illness, they will be hooked to the platform – not to the provider of their health-enhancing pharmaceutical where there are competitors.

The Commission found it worth noticing that the platform will be accessible via different browsers,[11] probably pointing with this hint at the risk that Google may use dependency of patients to lure them to using an Alphabet-gateway for access. But in this matter, as well as in other regards, the Commission does not take commitments from Google, but completely relies on the assurances of the parties to the merger.

One year after deciding *Sanofi/Google* the Commission took a decision against Facebook for giving wrong information in the *Facebook/WhatsApp* proceedings, relating to the question of integration of user information from the two services.[12] The Commission had relied on the parties' statements, believing that there would be technical barriers to integration that can hardly be overcome.

With a view to the experiences in *Facebook/WhatsApp*, confidence in non-qualified assurances by parties to the merger may be looked at more skeptically.

11 Cf. Fn. 6 of the decision.

12 European Commission, 17.5.2017, M.8228, *Facebook/WhatsApp* (Art. 14.1. proc.).

# V. OUTDATED TOOLS FOR MARKET DEFINITION AND ANALYSIS

The analysis of the Commission lacks a clear concept for tackling the dangers of the platform economy. The growth of the MAGAF companies is not worrying for their strength in their very own fields (like search in the case of Google), but for their reach into other fields. Obviously, there is no guarantee that Google will become the dominant e-health platform operator, so maybe it is not too worrisome that the Commission did not oppose the *Sanofi/Google* team up. Yet, the Commission does not even have the analytical tools for assessing such a case.

### *A. Market Definition*

The key feature showcased by this joint venture is the integration of markets that before had been completely separate: data analytics and insulin. Platform services and insulin pumps. Looking at narrowly defined markets and finding that there is no horizontal overlap between Google and Sanofi does not get to the gist of the case. The gist of this case is the establishment of data services in healthcare and the data-driven locking-in of customers to a specific system. The bigger picture is that this system, the Google-operated e-health platform, is integrated in an even larger environment, where it is easy for a consumer to settle in: a Google-controlled, interoperable ecosystem.

Narrow market definition stands in the way of a proper analysis of such cases. Even though the Commission turns to conglomerate effects, the path dependency is so strong with the definition of markets that it is hard to overcome the bias for narrow separate markets. In the Non-Horizontal Mergers Guidelines, the Commission in 2008 stated: "Non-horizontal mergers are generally less likely to significantly impede effective competition than horizontal mergers."[13]

This sets the tone for the analysis, and the strategies identified in the Non-Horizontal Merger Guidelines for foreclosure may need an update for the digital economy.

The focus on market shares explains why the Commission seems to worry more about Sanofi than about Google. With a market share of 30-40 percent in insulin pumps, Sanofi undoubtedly is a big player. Identifying market shares in data analytics is not even undertaken in this decision, and the strength of Google is thus not put into striking numbers. Thus, the Commission worries that Sanofi may become dominant in the supply of insulin and insulin pumps. It does not shift attention to the fact that Google will determine who supplies what to whom.

### *B. Access to Data*

In reviewing the potential impediment of effective competition, two factors deserve specific attention: access to data and financial power. The first factor is the power of data and access to data.[14] Data analysis profits from network effects. The Commission probably underestimated in the 2016 decision how easily customers may be "hooked"[15] by the intelligent design of apps, platforms and other devices, based on data.

In *Sanofi/Google*, the Commission reiterated that privacy concerns are not a matter for merger control proceedings. The absoluteness with which this statement is made may be misleading. The use of data and the privacy framework are essential parameters in markets, and as all parameters that determine the behavior of companies need to be taken into account. The interplay of privacy concerns on the one hand, and the ability to foreclose markets on the other, may not have been fully acknowledged yet. Furthermore, rights to privacy form the legal framework for exercising market behavior. It may require the same attention as other market entry barriers or determinants of market conduct.

The second factor is the breathtaking financial power of companies like the MAGAF companies, which deserves closer attention. Merger control actually has a bias against financial power, otherwise growing through buying would not be under the specific scrutiny of competition authorities. When merger control was introduced, lawmakers felt that financially powerful companies have the means to reduce competition without really deserving it. In the *Sanofi/Google* decision, financial power is not even mentioned as a factor relevant for the appraisal, although it is expressly mentioned in Article 2 (1)(b) of the Merger Control Regulation. Stopping MAGAF companies from turning one market after the other upside down would require to give meaning to the analysis of financial power in mergers. In its scenarios, the Commission underestimates the possibilities going hand in hand with deep pockets.

13 Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, (2008/C 265/07), para. 11.

14 Germany, in its 9th amendment of the Act against Restraints of Competition, listed access to data as a new market power factor to be taken into account, section 18 (3a).

15 Cf. Eyal, Hooked – How to Build Habit-Forming Products, 2014.

Financial power has traditionally been a weak point in merger analysis. This may follow from the fact that financial means do not directly contribute to market power (as the focal point of traditional competition analysis) but need some transformation. Neither the Horizontal nor the Non-Horizontal Merger Guidelines mention financial power at all.

One of the few decisions, expressly noting the financial advantages of a company, is *GE/Honeywell*.[16] The decision makes clear that financial strength helps in securing a strong market position, yet the path opened here is rarely followed in other decisions. In *Alitalia/Etihad*, the Commission expressly rejected the argument that Etihad as an Abu Dhabi airline has vast resources and thus is in a better position in the market than other airlines.[17] The Commission stated that the European competitors making this argument did not substantiate their concerns – as if proving financial power was a duty of companies opposing a merger.

## VI. A STUNNING REMEDY

Sanofi may not require protection from the competition agency. Yet, what about the consumer? Although the Commission uncritically notes the assurances of the merging parties regarding their openness and their willingness to enable portability, the Commission expressly refers to the General Data Protection Regulation and the rule for data portability in Article 20:[18]

> The Commission notes that the Parties would lack the ability to lock-in patients by limiting or preventing the portability of their data given that, according to the draft General Data Protection Regulation ("GDPR"), users will have the right to ask for data portability of their personal data. (…) In light of the above, the risk of the JV locking-in patients to the Services appears unlikely to materialise in the foreseeable future.[19]

The reliance on the GDPR is stunning for three reasons. First, it is noteworthy that the Commission sees it as helpful to rely on this remedy of data portability although it does not identify any concerns. Why would there be a need for data portability if competition is working perfectly fine?

Second, it is striking that the Commission seems to believe that as of May 2018, data portability will work in practice and may thus remedy competitive problems. Telecommunication companies have a duty from regulatory law to allow customers to switch from one phone company to another. Yet, switching in practice is not as simple as that. Companies found ways to obstruct losing their consumers. How much more vulnerable is a process where you want to switch a large amount of data that may be integrated with other content that is not part of your personal data? The belief in the remedy of data portability still needs a practical test.

Third, the Commission underestimates the status quo bias of consumers. If it is burdensome, costly or time-consuming to switch, people will stay with the status quo – even if that brings a lack of quality. Not discussing this issue at all means that behavioral studies have not yet reached peak performance in competition law.

Imagine the same case not with an e-health platform and diabetes data of consumers, but with autonomous driving and industrial data fed into a traffic organizing platform. Would the Commission have taken a similar approach? Would it make data portability a compulsory competition law remedy in appropriate cases for industrial data? The GDPR only applies to personal data, not to non-personal data. Portability may be a key feature for the next industry cases.

Yet, even if portability of data was secured and working in practice, the main concern with the *Sanofi/Google* case would not be addressed by it. Portability of data is a second-best remedy only. It may work in the unlikely case that there are competing platforms. This is unlikely for platform markets due to the monopolization tendencies in such markets. Yet, assuming that there were such a platform, portability would not bring the customers closer to the supplier of what they most need: the real product, the pharmaceutical. This is a problem: the customer no longer profits from competition on the level of its direct contact (the platform), but competition is marginalized. It may take place where suppliers compete for access to the platform. The case at hand shows that even this may be reduced if there are exclusive dealings with one supplier.

16 European Commission, 3.7.2001, M.2220, GE/Honeywell, at paras. 107 ff.

17 European Commission, 14.11.2014, M.7333, Alitalia/Etihad, at para. 342.

18 Article 18 at the draft stage that was known at the time of deciding the case.

19 Para. 69 of the decision.

Suppliers, like Sanofi, no longer receive the direct signals of customers. This leads to the potentially damaging situation of platform competition: the control and steering of the markets involved lies in the hands of one party with less and less possibilities of the different users and contributors of the platform to control the gatekeeper. *Sanofi/Google* illustrates that the Commission has not yet found competition law tools to evaluate such a development.

It is necessary at this point to underline that platform economics of course generate efficiencies and innovations and have unleashed enormous potential in many markets. Yet, the dynamics may be slowed down by gatekeepers that start to abuse their position. If the Commission wants to have a meaningful say in MAGAF merger cases it needs to get rid of narrow market definitions and have a better analysis of conglomerate mergers. It needs to place more emphasis on market power through access to data and financial power. Finally, it needs to come up with a regime of platform regulation, determining the competitive obligations for gatekeepers of the digital world. This requires more than fifteen pages of analysis of a joint venture of one of the big leaders in pharma and one of the big leaders in the world.