

ANTITRUST TRADE AND PRACTICE

Expert Analysis

Antitrust and ‘Big Data’: New Terrain for Inquiry?

Defined by Oracle as “the derivation of value from traditional relational database-driven business decision making, augmented with new sources of unstructured data,”¹ many Internet companies are collecting and analyzing so-called “big data” every minute of every day. For example, a recent study, tracking just a dozen or so apps on an Android phone, found that the apps tracked the phone’s location more than 3,000 times per week—or once every three minutes. Groupon alone tracked the phone’s location more than 500 times per week.² This is not an isolated circumstance, but just one more instance of big data defining how companies in technology-driven industries compete in the marketplace today.

Many have noted that big data is characterized by three “V’s.”³ The first is volume—the vast expansion in computer power and the tracking of consumer behavior means that companies are accumulating much more data than they have had in the past. The second is velocity—data is being accumulated and analyzed at instantaneous speeds. But at the same time, the speed of data collection means that outdated data is worth much less.

The third is variety—companies are tracking and collecting many different aspects of consumer behavior in order to better reach them. Big data is markedly different than data collection in the past, and it presents unique challenges to regulators, including those in antitrust enforcement. Companies engaging in big data collection and analysis should be aware of potential antitrust enforcement in this area in the coming years.

The Enforcement Context

Antitrust enforcement agencies, including those in the United States and Europe, are taking note of big data, and there is an increasing sense among many that Internet firms’ accumulation of personal data will be an issue that enforcers will be examining closely for anticompetitive effects.⁴

In fact, Deborah Feinstein, director of the FTC’s Bureau of Competition, in May 2015 wrote a piece for Competition Policy International’s Antitrust



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Chronicle on this topic, in which she discussed “[t]he growing importance of data to modern business” and noted that the FTC, for a long time, has “examined the ways that firms compete using big data as a product, an input, or a tool for making competitively significant decisions.”⁵

Concerns relating to the effect of big data on competition are not limited to the U.S. agencies, moreover, as competition enforcers in Europe

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also are focused on the implications of big data for antitrust enforcement. Margethe Vestager, the European Commissioner for Competition, made comments about the relationship between competition law and big data at a conference in January, observing: “[I]f just a few companies control the data you need to satisfy customers and cut costs, that could give them the power to drive their rivals out of the market.”⁶

In addition, the European Data Protection Supervisor (EDPS), Peter Hustinx (since retired), released a report in 2014, in which he called for greater interplay between data protection, competition law and consumer protection to meet the challenges of the Internet.⁷ Notwithstanding the fact that antitrust enforcers in both the United States and EU insist that big data is—and should be—a relevant concern in an antitrust investigation, academics and practitioners continue to vigorously debate whether and how to apply antitrust law in this area.

Procompetitive Effects

Whether the accumulation of and access to big data poses significant anticompetitive effects is an open question. At the heart of the debate as to whether big data is a proper place for antitrust inquiry is the fact that the efficiency and responsiveness of big data is generally recognized to have substantial procompetitive benefits. Specifically, scholars and others have pointed out that big data often provides services that are free to consumers, that data-driven services are higher in quality, and that it is difficult to design a remedy to any supposed anticompetitive harm of big data accumulation.

Big data is often associated with free or low-priced services for consumers. For example, Facebook, Google and many other companies that collect large amounts of consumer data to provide to consumers also provide free services, such as email, search and social networking to consumers. Low prices for consumers are, of course, a highly desirable outcome in antitrust law.⁸ Many companies are also now using big data to leverage “dynamic pricing,” to better respond to changes in the marketplace.⁹ Dynamic pricing can be more efficient than static pricing, meaning lower prices overall, although price discrimination can, in some circumstances, raise anticompetitive concerns.

Companies also use big data to compete with each other on quality.¹⁰ Companies can use big data to minimize time consumers have to spend looking for information or the product they want.

Amazon, for example, uses big data and algorithms to generate highly user-specific product recommendations. It is hard to imagine Netflix being as successful as it is without offering enticing options as soon as the user is finished binge-watching “House of Cards.” And Google’s search engine results are increasingly tailored to the particular user as well. Consumers highly value personalized and responsive products. Amazon, Netflix and Google serve consumers more efficiently and personally than their brick-and-mortar antecedents.

Given these strong procompetitive uses for big data, some have observed that designing a remedy to suit any anticompetitive effect of big data while also preserving these benefits to customers is difficult, if not impossible. One article pointed out that proposed remedies, such as forced sharing of data

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(i.e., an essential facility), divestiture of product lines, and greater transparency in data collection are really targeted at privacy, not antitrust.¹¹ The article contends that antitrust should not be a substitute for more robust privacy regulation and protections.¹² Requiring companies to share their data, for example, could require constant oversight and administration from a regulatory agency or court, something that antitrust agencies try to avoid.¹³ Because so much data is being collected so frequently, it could be difficult to determine what must be shared for competitive purposes.

Anticompetitive Effects

Some academics and regulators have called for greater scrutiny of potential anticompetitive effects from big data accumulation, however, and the inquiry has focused on three main areas: market definition, barriers to entry, and privacy.

Regarding market definition, big data has changed the calculus because the way data is collected and maintained is markedly different than it was just a few years ago. Indeed, as Feinstein observed, “market definition must account both for the dynamic nature of data, which must be updated and verified to retain its value, as well as the way that firms use data to compete.”¹⁴ Moreover, it is an open question whether data could itself be seen as its own product market, or whether data is simply an input to other products that are actually sold (or given) to consumers.¹⁵ Big data is often associated with two-sided markets, in which advertisers purchase data from, say, a social network and consumers purchase or receive services such as photo-sharing. Defining product markets in the big data context could be a challenge for antitrust regulators.

Concerning barriers to entry, big data could pose an anticompetitive challenge along several different lines.¹⁶ Deborah Feinstein, of the FTC, noted at least two possible instances of a barrier-to-entry problem. First, the data itself could be publicly available, but existing firms have sophisticated analytic techniques that make it difficult for new entrants to effectively make use of the data to compete.¹⁷ Second, the data itself is not publicly available, and the costs of matching existing competitors’ data sets raise impossibly high barriers to entry.¹⁸

In fact, the European Data Protection Supervisor compared big data to an “essential facility,” in which the dominant company has “exclusive control of the information, while competitors lack the technical means to recreate the structure or system upon which the service relies. This effectively prevents entry to the market and restricts consumer choice for the ‘free’ services in question.”¹⁹ Without use of the “essential facility,” innovation will be hampered, because even a superior business model or efficient pricing scheme will not have access to the data necessary to compete. Big data itself can be quite costly to maintain—companies like Google and Apple have been spending billions of dollars building data centers dispersed across the world. Smaller companies cannot afford that scale.

Finally, some have called for greater integration of privacy concerns into an antitrust framework.²⁰ Some view privacy as a form of non-price competition, along with quality and innovation, that is within the remit of the antitrust agencies. Feinstein notes that the FTC’s Bureau of Competition and Consumer Protection work together on mergers with a privacy dimension. In the FTC’s closing statement on the Google/DoubleClick merger, the FTC dipped its toe into the privacy question, stating that it “investigated the possibility that this transaction could adversely affect non-price attributes of competition, such as consumer privacy” before concluding that merger would not.²¹

The European Data Protection Supervisor called for “Joined up enforcement” between competition, data protection and consumer protection regulators “to facilitate a ‘race to the top’ on privacy standards.”²² As privacy concerns continue to predominate in public debate, the odds of significant antitrust involvement in privacy issues will only increase.

Looking Forward

The intersection of big data and antitrust law is an area that is very much in flux. Academics, practitioners and regulators have not reached a consensus on whether antitrust law has any particular application to big data, much less how it applies. But big data has been implicated in a number of antitrust investigations in recent years with varied outcomes.

For example, when Thomson and Reuters merged in 2008, both the Department of Justice and European Commission took the position that the need for a company to collect vast amounts of financial data to effectively compete with the merged firm in the market for data terminals created a significant barrier to entry.²³ To address this concern, both the DOJ and the EC approved the merger on the condition that the merged firm would make copies of its database available for purchase by existing and new potential competitors.²⁴

By contrast, when the DOJ closed its investigation of the Microsoft/Yahoo joint venture relating to search, it recognized that access to a significantly increased data pool was a significant procompetitive benefit of the proposed transaction. Specifically, the DOJ noted, “The increased queries received by the combined operation will further provide Microsoft with a much larger pool of data.... This larger data pool may enable more effective testing and thus more rapid innovation of potential new search-related products.”²⁵ These two contrasting mergers indicate that big data can militate in both procompetitive and anticompetitive directions, and the remedy will be very much dependent on the specific facts at hand.

As access to big data becomes increasingly crucial to competition across a broad spectrum of industries, companies that rely on big data can reasonably expect it to be an area of focus for antitrust authorities. Accordingly, companies should evaluate their big data practices with an eye to possible antitrust enforcement actions in the future.

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11. Darren S. Tucker and Hill B. Wellford, “Big Mistakes Regarding Big Data 10,” ANTITRUST SOURCE (Dec. 2014), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/dec14_tucker_12_16f.authcheckdam.pdf.

12. Id.

13. Id.

14. Feinstein, supra note 5, at 3.

15. See, e.g., Pamela Jones Harbour and Tara Isa Koslov, “Section 2 in a Web 2.0 World: an Expanded Vision of Relevant Product Markets,” 76 ANTITRUST L.J. 769, 773 (2010) (“[W]e suggest the definition of markets for data, separate and apart from markets for the services fueled by these data.”).

16. See generally Howard A. Shelanski, “Information, Innovation, and Competition Policy for the Internet,” 161 U. PA. L. REV. 1663, 1679 (2013) (“[C]ustomer data can be a strategic asset that allows a platform to maintain a lead over rivals and to limit entry into its market.”).

17. Feinstein, supra note 5, at 3-4.

18. Id.

19. ESDP Report, supra note 8, at 31.

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