

Big Data an Ongoing Concern for EU Competition Law

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The question of how “big data” should be treated in merger control and antitrust enforcement was a key issue for the European Commission and national regulators in European Union member states in 2016, with competition authorities of individual countries and the EU Commission addressing the issue through published reports, investigations and merger decisions. Big data refers to increasingly large data sets that companies collect from activity on the web, including on social networking sites and connected devices. The emergence of big data is the result of the exponential growth in both the availability and automated collection of information, which has prompted the development of complex algorithm-based analytics to spot patterns. Companies collect and analyze this data to improve the quality and scope of their services as well as to offer more targeted advertising services.

One of the key questions is whether, and to what extent, access to and use of big data can be considered to confer market power in relation to a particular goods or services market. Another central issue is whether, and to what extent, concerns around big data should be considered data privacy or data protection issues as opposed to competition law issues. Antitrust authorities in Europe addressed these emerging questions in 2016, but there is no doubt that the responses will be further refined and clarified this year.

Joint Report on Big Data

In May 2016, the French Competition Authority and German Federal Cartel Office published a joint report on big data, which identified issues that antitrust authorities should consider when assessing the interplay among big data, market power and competition law. The key issues concerned potential data concentration and foreclosure of competitors in related markets (*e.g.*, online advertising) resulting from a transaction, and potential contractual foreclosure or marginalization of competitors active in markets where the data is used. Also in May 2016, the French authority announced a “full-blown sector inquiry into data-related markets and strategies.” The Competition and Markets Authority in the U.K. had analyzed the topic in a June 2015 report on “the commercial use of consumer data.” While also addressing consumer protection laws, the U.K. report outlined potential competition law issues similar to those identified in the German and French authorities’ joint report.

Merger Control

Competition authorities have raised questions about the concentration of data resulting from a merger of two firms active in the collection and sale of big data. They also have expressed concerns about potential vertical foreclosure effects that may arise when two firms active in vertically or otherwise related activities in the big data value chain (*e.g.*, data collection and online targeted advertising) merge.

The EU Commission already confirmed in its August 2014 Facebook/WhatsApp decision that privacy-related concerns flowing from the increased concentration of data within the control of one company as a result of a transaction would fall within the scope of EU data protection rules, not EU competition law rules. In its Facebook/WhatsApp merger investigation, the EU Commission looked at the potential impact of data concentration on online advertising and concluded that, regardless of whether Facebook would introduce advertising on WhatsApp and/or start collecting WhatsApp user data for advertising purposes, the transaction raised no competition concerns. Besides Facebook, the EU Commission determined, a number of alternative providers would continue to offer targeted advertising after the transaction, and a large amount of internet user data that is valuable for advertising purposes is not within Facebook’s exclusive control. In its

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December 6, 2016, decision on the Microsoft/LinkedIn transaction, the EU Commission confirmed its approach in Facebook/WhatsApp that privacy-related concerns do not generally fall within the scope of EU competition law but clarified that privacy-related concerns can be taken into account in a competition assessment to the extent that consumers see it as a significant factor in the quality of the services offered. The EU Commission concluded that data privacy was an important parameter of competition among professional social networks on the market and could have been negatively affected by the potential data concentration as a result of the merger, but it ultimately cleared the transaction subject to certain conditions.

Antitrust Enforcement

Another area of concern is that big data could result in the foreclosure or marginalization of competitors active in markets where the data is used. Concerns include refusing to provide access to the data, requiring contractual exclusivity provisions, conditioning access to a valuable data set on the use of a company's own data analytics services or using big data as a vehicle for price discrimination against different customer groups. Notably, in March 2016,

the German Federal Cartel Office opened an investigation against Facebook for allegedly violating the country's competition laws (alleged abuse of a dominant position) by infringing German data protection rules. Details of the investigation are not yet publicly available; therefore, it is unclear whether the German authority would consider a violation of data privacy rules also a violation of competition laws, at least under certain circumstances.

Conclusion

The competitive dynamics of transactions and other business relations involving big data are complex, and the technologies and related business models around it are evolving rapidly. Competition agencies around Europe are paying ever-increasing attention to this phenomenon. It is clear that big data is and will continue to be on the agenda of European competition authorities for years to come. That focus on the issue is expected to provide further guidance to companies on the legal implications under EU competition laws of the concentration and use of big data and the delineation between privacy and data protection and competition laws.