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Banking and big data

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Banking and big data

ABSTRACT

Big data is changing the competitive landscape of the banking industry. Banks are using new technologies (blockchain, artificial intelligence) and exploit large databases to offer new services to their clients. New players (FinTechs, Big Techs) are also able to offer banking services online (electronic payments, loans, financial advice….). What will be the impact of big data on the banking industry? Is there a need to update competition laws and banking regulations? The first article offers a synthesis of the various issues related to big data in banking and introduces the papers of the authors who contributed to this special issue.

Le big data change les perspectives concurrentielles dans l'industrie bancaire. Les banques utilisent de nouvelles technologies (blockchain, intelligence artificielle), exploitent des masses de données importantes afin de proposer de nouveaux services à leurs clients. De nouveaux acteurs (FinTechs, Big Techs) sont désormais capables d'offrir des services financiers en ligne (paiements numériques, prêts, conseils automatisés…). Quels sont les enjeux concurrentiels relatifs au big data dans le secteur bancaire ? Est-il nécessaire d'adapter le droit de la concurrence et la réglementation bancaire ? Le premier article propose une synthèse des différentes questions relatives à ce sujet et présente les contributions des auteurs de ce numéro special.

Fintech and access to data

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I. Introduction

1. Digital technology and big data have transformed the competitive landscape of the banking sector by allowing entrants to offer more efficient, diversified and affordable services. Incumbent financial institutions face increasing competition from new entrants including fintech firms, challenger banks, established tech companies and companies providing third-party data services (e.g., firms providing big data storage and analytics, programming interfaces, etc.). In this new landscape, the availability of, and access to, data has become a key competitive driver. While big data presents new opportunities, the scope of available data and how to govern access to that data pose new challenges for the industry and for competition authorities around the world. Key questions include whether incumbents should be required to share their data with new market entrants; whether, and to what extent, access to and use of big data can be considered to confer market power; and whether and, to what extent, concerns around big data should be considered under competition law as opposed to data protection rules. Any discussion on data access will inevitably be closely linked to the specificities of the market, the type of data, and its use and importance as a tool to compete.

2. In this article we examine recent and legislative initiatives that address issues surrounding access to data, specifically for the fintech sector, as well as more broadly. While there is currently no established European Commission ("Commission") or national legal framework on how to deal with access to data in the banking sector in any Member State of the European Union, we examine how the wider ongoing policy debate around access to data in the wider digital sphere is equally relevant to some of the questions surrounding the role of data in the fintech sector.

II. Recent sector-based initiatives

3. The second Payment Directive 2015/2366[1] ("PSD2") entered into application on 13 January 2018 and sets out the regulatory framework that facilitates access to customers' account data. Most Member States have transposed the rules and adopted national regulations to give the PSD2 effect. The PSD2 enables new regulated market entrants other than banks (i.e., fintech and other tech companies entering the payment services sector such as, for example, Apple Wallet, Google Pay and Samsung Pay) to access a customer's bank account information and associated data and/or request payments, with a customer's explicit consent. Some Member States have introduced related initiatives, with the UK leading the way with its "Open Banking" initiative, which gives customers more control over their personal account data and has enabled them to share their current account information securely with third-parties since January 2018.[2] In the U.S., by contrast, while banks are subject to certain restrictions on how they can use customer data under the Gramm-Leach-Bliley Act, there is no legislation similar to "PSD2" governing non-financial institutions. Rather, the U.S. has adopted a sectoral and state-specific approach to data usage and privacy.

4. The Commission's Regulatory Technical Standards for strong customer authentication and common and secure open standards of communication have been central to

1 Directive (EU) 2015/2366 of the European Parliament and the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC.

2 This initiative followed the UK Competition and Markets Authority ("CMA")'s Retail Banking Market Investigation, Final Report, 9 August 2016.

achieving the objectives of the PSD2.[3] Other important legislation for the sector includes the proposed revised e-Privacy Regulation[4] designed to establish a new legal framework for privacy of electronic communications together with the General Data Protection Regulation[5] ("GDPR"); the Network and Information Systems Directive, which requires financial institutions to take appropriate cybersecurity measures;[6] and the Unfair Commercial Practices Directive.[7]

5. Neither the PSD2 nor these sectoral pieces of legislation contain provisions giving financial authorities specific competences regarding the protection of competition in the payment services sector, and the general competition law enforcement framework remains applicable.

6. A number of national competition authorities in the EEA have published studies[8] on the impact of fintech in the financial sector, each of which, identify new challenges and potential risks of foreclosure of new entrants by incumbent banks and make a number of recommendations to reduce those risks. These authorities highlight the lack of incentives for banks to grant fintech and tech companies access to key account data. The Portuguese authority, for example, warns that the risks of foreclosure it identified are not completely dispelled by the PSD2; while the Dutch authority calls for a refinement of the conditions set out in the PSD2 and implementing regulations.[9]

7. However, in March 2018, the Joint Committee of the European Supervisory Authorities ("ESAs") published a report on big data analyzing its impact on consumers and financial firms.[10] Interestingly, the ESAs found that while the development of big data poses some potential risks to financial services customers, currently the benefits of innovation outweigh these and many of the risks identified are mitigated by existing legislation.[11]

8. In a study on competition issues in fintech published in July 2018 ("the Study"),[12] the European Parliament's ECON committee noted the difficulty of applying traditional competition assessment tools (such as market definition and market power) in fintech because of the broad landscape of users, operators, services and strategies.[13] Traditional market indicators such as market shares, prices or profit margins fail to explain the economic relationships between supply and demand in the provision of fintech services given that some of these services are offered free or are provided through multi-sided platforms with several stakeholders intertwined.[14] The Study also stressed the role of data in assessing the competitive position of a company and that control over unique datasets should be one of the main factors to consider when assessing potentially anticompetitive conduct.[15]

9. However, the Study concluded that, currently, the market for fintech services is "*too fluid*"[16] to reach firm conclusions on the existence of competition concerns that would necessitate "*the deployment of competition tools on a large-scale basis.*"[17] It also noted that competition rules by themselves may be insufficient to ensure a level playing field and stressed that under competition rules, a refusal to access/supply constitutes an anticompetitive conduct only in cases of *"essential facilities"*, a concept that may not easily apply to datasets.[18] For instance, in *Oscar Bronner*, the Court of Justice of the European Union ("CJEU") ruled that a product or service is indispensable if there are no alternative products or services and there are obstacles, technical, legal or economic, which make it impossible or unreasonably difficult for a company active in the downstream market to develop products or services without access to the indispensable ones in the upstream market.[19] The Study noted that "*in the age of big data, where advanced data capture techniques allow for the creation of valuable datasets at a reasonable cost, it is*

3 Commission Delegated Regulation (EU) 2018/389 of 27 November 2017 supplementing Directive (EU) 2015/2366 of the European Parliament and of the Council with regard to regulatory technical standards for strong customer authentication and common and secure open standards of communication, in force since 14 March 2018. The Regulation applies from 14 September 2019. However, some general obligations for access interfaces apply since 14 March 2019.

4 Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications), COM(2017)10 final, 10 January 2017.

5 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119, 4.5.2016.

6 Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union.

7 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ("Unfair Commercial Practices Directive").

8 Dutch Competition Authority study, Fintechs in the payment system: the risk of foreclosure, 19 December 2017 - the authority stated on its website it "*will keep a close watch on whether or not banks offer providers of new payment products access to payment information. If necessary, ACM can take enforcement action against anticompetitive practices*"; UK Financial Conduct Authority Business Plan 2018/19, 9 April 2018 - the FCA stated it will review the use of data by financial services firms in order to assess potential opportunities and harms and where the FCA may need to intervene, p. 27; Spanish Competition Authority's market study on the impact on competition of technological innovation in the financial sector (fintech), E/CNMC/001/18, 13 September 2018; Portuguese Competition Authority's *Issues Paper*, Technological Innovation and Competition in the Financial Sector in Portugal, October 2018.

9 Spanish Competition Authority's market study on the impact on competition of technological innovation in the financial sector, op. cit., p. 7.

10 Joint Committee of the European Supervisory Authorities, Joint Committee Final Report on Big Data, JC/2018/04, 15 March 2018.

11 Id., p. 23, para. 105.

12 Study requested by the European Parliament ECON committee, Competition issues in the Area of Financial Technology (fintech), July 2018.

13 Ibid.

14 Ibid.

15 Id., p. 13.

16 Id., p. 15.

17 Ibid.

18 Id., p. 88.

19 Case C-7/97, Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, judgment of 26 November 1998, ECLI:EU:C:1998:569, para. 38–46.

difficult to consider a dataset as 'indispensable'. *In the field of payment services, for example, access to data by competitors is a matter addressed by financial regulatory rules*".[20]

In its Annual Economic Report 2019[21], the Bank for International Settlements ("BIS") notes that while the entry of big tech companies into financial services could make the sector more efficient, their role in finance raises issues that go beyond traditional financial risks. To tackle these issues, BIS calls for global regulatory and policy coordination between financial regulators, competition authorities and data protection bodies.

10. These reports raise the question as to whether the role of big data is different in the fintech space, and whether competition law principles considered for other data-rich sectors, should similarly apply to the financial sector. We summarize below the main policy initiatives surrounding the competition law assessment of big data generally.

III. Recent competition policy initiatives

11. In their joint report on big data issued in May 2016, the French and German competition authorities identified refusals to give access to data and discriminatory access to data as potential competition issues resulting from the collection of big data in the digital economy and identified two parameters of particular relevance when assessing the interplay between data, market power and competition law: the scarcity of data or ease of replicability and the scale and scope of datasets.[22]

12. In April 2017, the Organisation for Economic Co-operation and Development ("OECD") called for caution in reacting to the challenges posed by big data.[23] In particular, authorities should examine on a case-by-case basis whether, in the relevant market, the data is replicable, whether it can be collected from other sources, the degree of substitutability between datasets, how quickly data becomes outdated and how much data a potential entrant needs to compete.[24] The OECD noted that extreme remedies such as requirements to share data should be carefully weighed and used only when there are no less intrusive alternatives.[25]

13. On 13 March 2019, the Digital Competition Expert Panel appointed by the UK Chancellor of the Exchequer and chaired by Professor Jason Furman, former chief economist to U.S. President Obama, issued a similar report[26] making strategic recommendations for changes to the UK's competition framework to face the opportunities and challenges of the digital economy. The report stressed the need to fast-track enforcement in digital markets, placing less reliance on large fines and enabling action that targets and remedies issues more directly, while lowering the standards for judicial review. The report also proposed the establishment of a pro-competition digital markets unit tasked, notably, with the implementation of personal data mobility (i.e., giving consumers greater control of their personal data, in a similar way to the "Open Banking" initiative) and systems built on open standards.

14. On 4 April 2019, the Commission published a report[27] prepared by three special advisers ("the Advisers") appointed by Competition Commissioner Margrethe Vestager to explore how EU competition policy should evolve in the digital age. The Advisers identified strong "economies of scope" across the digital economy, which favour the development of ecosystems, giving incumbents a strong competitive advantage that makes them "*very difficult to dislodge*".[28] The Advisers also identified a "*reasonable concern that dominant digital firms have strong incentives to engage in anti-competitive behaviour*" that require "*vigorous*" competition enforcement and adjustments to the way competition law is currently applied,[29] including potential data-sharing or interoperability remedies for dominant technology companies if required to ensure effective competition.[30] While the Advisers considered that the existing basic framework of EU competition law remains relevant and sufficiently flexible to protect competition in the digital age, they advocated a departure from certain established concepts, doctrines and methodologies—such as consumer welfare, market definition and market power—and more emphasis on theories of harm and identification of anti-competitive strategies.[31]

15. Discussing access to data, the Advisers noted that there are cases where an obligation to ensure data access—and possibly data interoperability—"*may need to be imposed*"[32] and added that "[w]*here vertical and conglomerate integration and the rise of powerful ecosystems may raise concerns, requiring dominant players to ensure data interoperability may be an attractive and efficient alternative to calling for the break-up of firms—a way*

20 Study requested by the European Parliament ECON committee, op. cit., pp. 88–89.

21 Bank for International Settlements, Annual Economic Report: III. Big tech in finance: opportunities and risks, 23 June 2019.

22 French Competition Authority and Bundeskartellamt, Competition Law and Data, 10 May 2016, p. 53.

23 OECD, Big Data: Bringing Competition Policy to the Digital Era, Executive Summary, DAF/COMP/M(2016)2/ANN4/FINAL, 26 April 2017, p. 3.

24 Id., p. 4.

25 Ibid.

26 Unlocking digital competition, Report of the Digital Competition Expert Panel, 13 March 2019.

27 Competition Policy for the Digital Era, a report by Jacques Crémer, Yves-Alexandre de Montjoye, Heike Schweitzer, 4 April 2019.

28 Id., p. 3.

29 Ibid.

30 Id., p. 9.

31 Id., p. 3.

32 Id., p. 9.

that allows us to continue to benefit from the efficiencies of integration".[33] The Advisers noted that a broad dissemination of data must, however, be balanced against the need to ensure sufficient investment incentives for firms to collect and process data, as well as the need to protect privacy and business secrets.[34]

16. Similar initiatives have been undertaken in the U.S., where the Federal Trade Commission ("FTC") for example recently held public hearings discussing the challenges posed by new technologies to competition and enforcement priorities, including the role data plays in this context.[35] These hearings followed earlier reports by the FTC focused on the impacts of big data on privacy and competition in the digital space.[36] At the state level, the California Consumer Privacy Act, which goes into effect in 2020, provides California consumers with a right to access their information in a portable format, in part, so they can more easily transition between service providers.

IV. Competition policy principles for big data in the fintech space

17. The Commission historically devoted attention to the relevance of datasets in its merger practice (e.g., *Thomson/Reuters*, *Google/DoubleClick*, *TomTom/Tele Atlas*, *Facebook/WhatsApp*, *Verizon/Yahoo*, *Sanofi/Google/DMI JV*, *Microsoft/LinkedIn*, *Bayer/Monsanto*, *Apple/Shazam*). In none of these cases, however, did it identify data as an important competitive asset, or separately define and assess a market for data products or datasets. In its August 2014 *Facebook/WhatsApp* decision,[37] the Commission concluded that privacy-related concerns arisingfrom 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 of the EU competition law rules. Assessing the competitive significance of the data involved, the Commission concluded that a number of alternative providers would continue to offer targeted advertising after the relevant transaction, and a large amount of internet user data that is valuable for advertising purposes is not within Facebook's exclusive control. In its December 2016 decision on the *Microsoft/LinkedIn* transaction,[38] the Commission essentially confirmed its approach in *Facebook/WhatsApp* that privacy-related concerns do not generally fall within the scope of EU competition law. In that decision, however, it 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.[39]

18. In its more recent antitrust decisions, the Commission assessed the importance of big data more critically. In *Google Shopping*, the Commission concluded that the sheer accumulation of data, which is otherwise freely available, can effectively constitute a barrier to entry.[40]

19. Similar focus on data issues is growing in EEA Member States, with developments to watch. In Germany, the Federal Cartel Office («FCO») recently considered that Facebook's collection and combination of user data from various sources without the user's voluntary consent violate European data protection provisions which could be enforced also as an "exploitative abuse" under German competition law rules. The decision is novel in that it constitutes the first decision in which a competition authority has based its finding of an abuse of a dominant position under competition law on a violation of data protection and privacy rules.[41] On appeal, the Higher Regional Court of Düsseldorf suspended the FCO's decision, notably, because it failed to explain how Facebook's violation of European data protection rules affects competition.[42] Reportedly, the FCO intends to appeal against this ruling to Germany's Federal Court of Appeal. In France, the competition authority required GDF Suez[43] (now ENGIE) to give access to its competitors, at its own expense, to some data of its client database to enable them to compete on an even footing as the gas markets opened up. The French authority had found that GDF Suez at the time had "*significant advantage*" over its competitors, potentially excluding competition. GDF Suez had used a large volume of consumer data to facil-

33 Id., p. 125.

34 Id., p. 76.

35 FTC Hearings on Competition and Consumer Protection in the 21st Century held during fall 2018–spring 2019.

36 FTC Report, Big Data: A Tool for Inclusion of Exclusion? Understanding the Issues, January 2016,

37 Case M.7217, *Facebook/WhatsApp*, European Commission unconditional clearance decision of 3 October 2014.

38 Case M.8124, *Microsoft/LinkedIn*, European Commission conditional clearance decision of 6 December 2016.

39 Reference is made in this respect to the May 2019 Lear report on ex-post assessment of merger control decisions in digital markets, prepared for the CMA. The report assesses several recent merger decisions of the CMA involving tech and big data companies with a critical eye regarding the authority's insufficient assessment of, e.g., user experience or influence from the datasets at issue.

40 Case AT.39740, *Google Search (Shopping)*, prohibition decision (Art. 102 TFEU) of 27 June 2017.

41 Bundeskartellamt, decision B6-22/16 of 6 February 2019, .. Germany's Federal Cartel Office prohibited Facebook Inc., its subsidiaries Facebook Ireland Ltd. and Facebook Germany GmbH (together "Facebook") from making the use of its social network conditional on the collection of user data from multiple sources without the user's voluntary consent. While the FCO did not impose fines on Facebook, it restricted the way Facebook can collect and process user data from third-party sources, including Facebook-owned services, such as Instagram or WhatsApp.

42 Oberlandesgericht Düsseldorf Beschluss, Facebook v Bundeskartellamt, VI-Kart 1/19 (V), 26 August 2019 [in German].

43 French Competition Authority, decision 14-MC-02 on interim measures of 9 September 2014. The authority's decision was upheld by the Paris Court of Appeal, but this judgment is currently under appeal to the Court of Cassation. On 22 March 2017, the French Competition Authority fined ENGIE €100 million for abusing its dominant position by using in particular its historical data file to convert its customers on regulated gas tariffs to market-based contracts for gas and electricity.

itate customer switching from regulated to unregulated offers, and to "win back" customers who had switched to competing unregulated offers. In the Netherlands, the Dutch competition authority recently imposed, for the first time, access to data and to digital platform remedies when it conditionally approved the acquisition of Iddink Group by Sanoma Learning.[44] By comparison, in the U.S., the FTC settled its case against CoreLogic's acquisition of DataQuick Information Systems by ordering CoreLogic to license data assets to a divestiture buyer to ensure its viability as a competitor.

20. Even if case law is developing in relation to the assessment of data as competitive assets in competition law analysis, there is no clear precedent on how data issues should be assessed in the financial sector, or if there are different factors at play when it comes to financial or payment markets. Some important assessments may nevertheless be underway. One case to watch concerns the Commission investigation of Polish and Dutch banking groups. In October 2017, the Commission conducted dawn raids at Polish and Dutch banking groups over online access to bank account information by competing service providers. The press release indicates the Commission's concerns that "[t]*hese alleged anti-competitive practices are aimed at excluding non-bank owned providers of financial services by preventing them from gaining access to bank customers' account data, despite the fact that the respective customers have given their consent to such access*".[45] It is also clear that the Commission is paying close attention to the emergence of new contactless mobile payment services such as Apple Wallet, Google Pay and Samsung Pay.[46]

21. Query how competition law issues surrounding the use of data should be assessed in the financial services context. Four key parameters of assessments have been put forward to assess the interplay between data, market power and competition law: whether the parties actually own or control the data; whether, in the relevant market, the data is replicable; whether the data is unique or reasonably available substitutes exist; and whether the relevant data constitutes a critical input to compete. However, these parameters leave many open questions when assessed in the context of financial services, where sectoral legislation addresses many of the risks associated with big data in connection with confidentiality, privacy and security, and where arguably markets may have lower barriers to entry, or are more fluid, as some of the reports have referenced.

22. In the financial services sector, it may be challenging to enforce any mandatory data sharing to ensure effective competition for a number of reasons. First, it may be unclear what legal rights fintech providers actually have in the data they hold. While such providers control the data they possess, customers may argue that they own the data regarding their own financial transactions while institutional counter-parties to transactions may claim the data is at least partly owned by them. In such cases, solutions based on data portability or data property rights may suffice. Second, data in the fintech space is often an amalgam of raw data coupled with proprietary analytics and data, and it is often difficult to parse them. Obligating a fintech company to share its raw data may not be sufficient to level the competitive playing field, but requiring the sharing of blended data might effectively require a company to disclose proprietary techniques or algorithms. Third, while there has been close regulatory focus on so-called big data, in many use cases, small datasets can be extremely valuable and powerful. Any regulatory policy that focuses on large players and large data sets may therefore create an imbalance in the marketplace. .

23. Many of the questions raised are, of course, not specific to the financial services sector, but they raise particularly interesting questions when assessed in the context of data sets that are already heavily regulated or constrained and where rights to data may not be straightforward. ■

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44 Dutch Competition Authority press release, ACM conditionally clears acquisition of Iddink Group by Sanoma Learning, 29 August 2019.

45 European Commission press release, MEMO/17/3761, 6 October 2017.

46 In a letter addressed to the European Parliament in response to concerns raised over the rollout of Apple's payment technology in Germany, Margrethe Vestager wrote "*the Commission is closely following these developments and their impact on the mobile payment sector*," as reported by *MLex*, "Contactless-mobile payments under 'close' EU watch," 3 October 2018.

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