DATA AND PLATFORM POWER

Those looking to rein in the power of the global internet platforms could look to legal and policy responses to data monopolies, writes **ORLA LYNSKEY**

The 'soft power' exercised by technology giants over public discourse and policy as a result of their funding of think tanks and academic research was the focus of significant media attention over the summer months. People are now "waking up to the power" of Google, Amazon and Facebook, according to Barry Lynn a former senior fellow at the New America Foundation.

Policymakers in Europe have, however, been alert to the power of digital platforms. For instance, the European Commission suggested in 2015 that the manner in which certain online platforms "use their market power raises ... issues that warrant further analysis beyond the application of competition law in specific cases".[1] The Commission was right to suggest that the power exercised by digital platforms leads not only to economic consequences but also has broader societal ramifications. These economic and societal consequences stem, in large part, from the control exercised by digital giants over vast quantities of data, including personal data.

The question is whether the current legal and regulatory framework can, and should, seek to constrain this power in the public interest. To answer this question, it is first necessary to identify how and why certain digital platforms are key data aggregators in the digital ecosystem. Next, it is necessary to consider why such data aggregation and processing might merit further analysis, beyond the existing legal framework. Suggestions have been made in both the European Union and the US that technology giants should be treated as digital utilities, like other utility providers such as electricity or gas providers, and be subject to specific legal obligations as a result.

What exactly this might entail for these technology giants has not been specified. However, it is possible to imagine that should such a special responsibility be imposed on digital utilities it might involve one of three options:

- An obligation to unbundle
- A prohibition on further consolidation
- A requirement to grant access to the digital utility or its assets on non-discriminatory terms.

Each of these options are likely to be vehemently contested by the technology giants; however, of the three the prohibition on further consolidation seems the least radical and most feasible.

PLATFORMS AS DATA AGGREGATORS

Digital platforms are an example of a two, or multisided, market. This means that they act as the intermediary between one side of the market, for instance individual internet users, and others with whom they connect, including other individuals, advertisers, service or content providers. As they act as an interface for these online interactions, digital platforms are in a unique position to control the flow of information – and data – between participants in the digital ecosystem, and to gather data about the actions of each of these parties in the digital sphere. Therefore, a platform like Facebook can gather data about the login patterns of an individual user, how long they spend online, what content they are interested in, with whom they interact, etc.

While all digital platforms have this potential ability to control and gather data, some companies appear to have a superior ability to do so as a result of the volume and the variety of the data available to them. This is most notably the case with Facebook and Google. These platforms can be set apart from others in four (non-exhaustive) ways.

First, these platforms are omni-present in the digital environment. For instance, in 2016 of the top ten smartphone applications in the US (based on the number of average unique users per month), only two (Apple Music and Amazon app) were not owned by either Google (YouTube, Google Maps, Google Search, Google Play, Gmail) or by Facebook (Facebook, Facebook Messenger, Instagram).[2] Moreover, as discussed below, their presence has been augmented by a lax ex ante regulatory regime for mergers and acquisitions, allowing Google and Facebook to gobble up would-be competitors and innovators. Crucially, this omni-presence allows these companies to gather a significant volume of data from a wide variety of sources.

Second, these platforms act as critical chokepoints in the digital ecosystem: the exclusion of an application from Google's Android operating system or a business from Google's search results is likely to scupper the economic viability of these dependants. They are 'must-deal-with' partners.

Third, network effects have a role to play in the success of these platforms. For instance, Facebook's success can – in part – be attributed to the fact that any other social network will offer fewer opportunities for connection. Similarly, the data amassed by Google Search can be used to enhance the relevance of its future search results. This superior ability to attract eyeballs – user attention – leads in turn to a superior ability to monetise their offerings. It is unsurprising that the entirety of the growth in digital advertising revenue in 2016 was extracted by two companies: Google and Facebook.[3] Success breeds success.

A fourth and potential way in which these platforms manage to aggregate data is through privileged partnerships with public bodies. One such example is the partnership between Google's DeepMind and the NHS Royal Free Trust in London (a public hospital). This saw the trust hand over the data of 1.6 million patients without their consent and without a commitment on DeepMind's part to separate this data from that held by its parent company. While such examples are thankfully rare, they do illustrate that future public–private collaborations will augment and enhance the datasets of digital giants.

The benefits of large scale data aggregation and processing are frequently extolled in the context of 'big data' processing. The predictive power of processing such data can, for instance, lead to more relevant search results and shopping suggestions as well as the more efficient allocation of resources.

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Moreover, the law does not prohibit the aggregation of such data. For instance, although the systematic collection and storage of personal data by public authorities constitutes a prima facie violation of the right to private life, which may be justifiable if it serves a legitimate objective and is proportionate, this right is not directly applicable to the private sector.

Similarly, while this data processing is regulated by data protection frameworks, data protection law does not prohibit processing per se. Instead, it puts in place a framework of checks and balances that companies like Facebook must respect when processing personal data. Of most relevance here is the principle of 'data minimisation', under which data should not be excessive in relation to the purposes for which it is collected and/or further processed.

By defining the purposes for data processing broadly to circumvent this data minimisation principle, companies run the risk of falling foul of another principle, 'purpose limitation'. According to this principle, data should be collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with these purposes. While this principle would suggest that data processing cannot be justified for broad, open-textured purposes, in practice in the digital sphere it often is, and this processing is given further legitimacy by reliance on the consent of the individual involved to one-sided contractual terms. In reality, the ability of the data protection framework to curtail the power of digital platforms is therefore limited.

The only legal framework to deal explicitly with the power of private companies is competition law (EU) or the antitrust framework (US). In the EU, competition rules prohibit companies with market power from abusing this power by excluding equally efficient competitors or exploiting their consumers. The US provisions make it unlawful for any person to "monopolise, or attempt to monopolise... any part of the trade or commerce among the several states, or with foreign nations". In practice, this monopolisation is only unlawful when acquired or maintained through improper means. The legal framework does not therefore assume that monopoly power is, of itself, problematic yet, as noted above, policymakers are increasingly

uneasy about the power of digital giants. Why is this so, and is this concern justified?

THE FLIP-SIDE OF DATA AGGREGATION

The market power of digital giants may enable them to behave in a way that excludes equally efficient competitors from the market, or prevents the emergence of credible competition. These are typical antitrust concerns, but policymakers are now turning their attention to the role of personal data in this picture. The aggregation of personal data from a variety of sources gives rise to obvious privacy concerns. When such aggregation is conducted by a behemoth like Google or Facebook, it also exacerbates the existing information and power asymmetries between these data giants and the individuals who use their services. This personal data can therefore be leveraged in a way that militates against individual interests.

For instance, it could be used to gauge the 'reserve price' of a user when shopping online in order to offer him or her a particular product at the highest price possible. Equally, it could be used to target swing voters in an election campaign with materials that are likely to influence their vote. In other words, if information is power, then this information can be used to determine the commercial and societal opportunities individuals are offered, as well as to influence their choices. This picture is complicated by the fact that competitors suggest that without access to a similar treasure trove of personal data, they are unable to compete with these digital giants. Policymakers may therefore query whether despite the ostensible benefits of big data processing by internet giants, this 'data power' needs to be tamed in some way.

CURTAILING THE DATA POWER OF DIGITAL GIANTS: THE NUCLEAR OPTION

One drastic way in which this data power could be curtailed is by forcing the break-up of digital giants. If a company like Google (or Alphabet, as the parent company is called) is able to aggregate data in part because of the omni-presence of its products, then by enforcing the structural separation of its component services the concerns of data aggregation are mitigated. The European Parliament approved a resolution to this effect in 2014 when it called on the European Commission to "prevent any abuse in the marketing of interlinked services by operators of search engines" and "to consider proposals with the aim of unbundling search engines from other commercial services".[4] This resolution fell on deaf ears. While unbundling via regulation has occurred in some sectors, in particular where the economic operators in the sector are vertically integrated and competitive segments of their operations are used to prop up less competitive segments, competition law is often the preferred tool to deal with such problems as and when they arise. As the then digital economy commissioner, Günther Oettinger, put it, breaking up and expropriation are "instruments of the planned economy, not the market economy".

In a similar vein it is has been argued that digital giants should be treated as public utilities and regulated at such. If such calls are motivated by the impact of these giants on actual and potential competition, then again regulators might point to the role of competition law provisions in rectifying such problems. Potential competitors of dominant companies might argue that access to personal data is an 'essential facility' to compete with dominant firms. To make this case, a competitor would need to show that the data is indispensable or objectively necessary for it to compete in a related (downstream) market and that the refusal to give access to that data is likely to lead to the elimination of competition in that market. Under EU competition law rules, this refusal should likely lead to consumer harm and not be objectively justified.

Even if competitors could illustrate that access to this data is an essential facility, this raises thorny policy issues. Indeed, the duplication, or multiplication, of the datasets held by dominant data aggregators is a counter-intuitive solution from a data protection perspective: while it might foster more competition, it would lead to less control and greater risk on the part of individual users. It is for this reason that a straightforward 'access' requirement is inappropriate in this area, unless accompanied by a requirement on the part of the dominant company to delete the data. Given the implications this would have for the property rights of the dominant company, this seems unlikely. One more realistic solution might be to prevent the artificial aggregation of data through strategic acquisitions on the dominant company's part. This merits further consideration.

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RECONSIDERING DATA-DRIVEN ACQUISITIONS

Dominant companies have been able to increase the quantity and variety of personal data that they process through strategic acquisitions. These acquisitions have been numerous (Google has acquired, on average, more than one company a week since 2010) and often high profile. While Facebook's Mark Zuckerberg stated in 2010 that the company's acquisitions were 'talent acquisitions', motivated by the desire to recruit the staff of the acquired firm, subsequent acquisitions appear to be motivated by the desire to acquire data. Facebook's acquisition of communications application WhatsApp is perhaps the most prominent example of this. Facebook acquired WhatsApp in 2014 for $19 billion, having obtained clearance for the transaction from both the US Federal Trade Commission and the European Commission.

The European Commission acknowledged that Facebook and WhatsApp competed directly in the market for consumer communications applications. However, it concluded that the transaction did not give rise to competitive concerns as there were a number of relevant differences between the applications. It also examined the impact of the

acquisition on the online advertising services market. It concluded that even if Facebook used data gathered via WhatsApp to improve advertising on its social networking service, there would continue to be a large amount of valuable user data that was not within Facebook's exclusive control. Thus, the Commission focused on the impact on participants in the advertising industry of potential data-sharing between Facebook and WhatsApp, rather than on the impact of this sharing on individuals.

By approaching the transaction from this limited perspective, the Commission overlooked a number of critical factors. Although it acknowledged that data protection and privacy can constitute an important dimension of competition between providers, it concluded that privacy was not an important factor in the decision to use these applications in this case (i.e. they did not compete on the basis of privacy). However, as Maurice Stucke and Allen Grunes astutely note, what the Commission overlooked is that this may have been a crucial differentiating factor between the applications from a user perspective.[5] They highlight that a very high percentage of WhatsApp users were already using Facebook's social network. This means that they could easily have used Facebook Messenger, which is integrated in the company's social network and offers similar functionalities. However, they chose not to and one reason may have been the superior privacy and data protection offered by WhatsApp. Thus, Whatsapp could have been viewed as a maverick in the market, offering users a viable alternative to consumer communications applications using the prevailing industry model (a free platform subsidised by data-driven behavioural advertising).

The Commission may have been reluctant to explore this option in full given its firm assertion that "any privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules".[6] Yet, such a hands-off approach is arguably an abdication of the responsibility of the Commission to uphold and promote the EU Charter of Fundamental Rights.[7] It is possible that the Commission was confident in its decision to take such an approach as it considered that technical integration between Facebook and WhatsApp was unlikely to be straightforward. Indeed, it had asked Facebook whether it planned to link or match customers' profiles on WhatsApp with these customers' profiles on Facebook following the acquisition.

Facebook had assured the Commission that the matching of Facebook and WhatsApp users would need to be done manually, by the users themselves. The Commission, however, subsequently concluded that this and other information provided by Facebook regarding the possibility of matching Facebook IDs automatically with WhatsApp users' mobile numbers was incorrect or misleading and that such information had been provided at least negligently, fining Facebook €110 million.[8]

> **"Competition authorities could reconsider how they analyse such data-driven mergers."**

The ultimate outcome of this transaction for WhatsApp users may be that users who wish to keep some personal data (most notably their telephone numbers and personal contacts) out of Facebook's reach may not be able to do so. Facebook plans to use the personal data processed via WhatsApp to "improve Facebook products and provide [users] with more relevant Facebook ad experiences". These plans are currently on hold while Facebook is in dialogue with the Irish Data Protection Commissioner. However, Facebook has suggested the following solution: users of its service prior to August 2016 were given 30 days to indicate their preferences regarding data integration between Facebook and WhatsApp, whereas users after that date can cease to use the application if they do not want their personal data integrated in this way.[9]

Given the well-documented weaknesses inherent in consent in the technological context and the 'take-it-or-leave-it' offer available to WhatsApp newcomers, it is clear that the end result from a data protection perspective is diminished choice in the digital sphere for the privacy conscious. Crucially, however, this transaction also boosts the power of Facebook, an already significant data aggregator. Other acquisitions, for instance, Google's takeover of various home monitoring and automation developers in 2014, allowing it to gather data from inside the home from cameras and smart technology sensors, were also given the go-ahead by competition authorities. These conglomerate mergers were not viewed as problematic given that Google did not compete with any of the companies it was acquiring. However, once again this analysis ignores the data-driven impetus for the transaction and the subsequent accumulation of power – data power – in the hands of the tech giants.

These omissions could be rectified in a number of ways: competition authorities could themselves reconsider how they analyse such data-driven mergers or, alternatively economic transactions could be subject to a parallel non-competition analysis in order to examine their broader societal impact. There has been much resistance to the introduction of non-competition concerns into merger analysis. Yet, given the unprecedented power of technology firms, exercised across all walks of life, this option might be the least radical available to policymakers to keep this power in check.

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