

COMPETITION AND BIG DATA

The legal highlights of a joint report by the French and German competition authorities on the use of data are discussed by **TIM COWEN**

This May, France's *Autorité de la concurrence* and Germany's *Bundeskartellamt* (BKA) published a joint report, 'Competition law and data'.¹ On the same day as the release of the report, the *Autorité* announced a 'full-blown' sector inquiry into data-related markets. The BKA has already been investigating Facebook for possible abuse of data use. The new report reviews issues for competition authorities involved with taking competition cases relating to big data and data collection in the digital economy. It reviews data as a source of market power relating to transparency and data-related anti-competitive conduct.

THE MARKET FOR DATA

The report supports the point made by various commentators that, like any other economic product, data is something that can form the basis for market power, and the substitutability between different types of data needs to be assessed in working out whether market power exists or arises from a hoard of data. (See also an article in which I argue that companies can have unique treasure troves of data that are a source of market power.)² See too the panel for how the report positions data.

In particular, the report recognises that in relation to mergers:

"Also, in assessing possible restraints of competition resulting from a merger, competition authorities may have to cast a close look at the advantages the new entity will have by combining different sets of data. In particular, a combination of different data troves could raise competition concerns if the combination of data makes it impossible for competitors to replicate the information extracted from it."

This was a central issue in Facebook's acquisition of WhatsApp, where I acted for interested third parties in making their case.

EXCLUSIONARY PRACTICES

The report canvasses the various exclusionary practices that may be available to a dominant player whose market power is derived from its position in data.

Refusal to access. For example, data could be an essential facility and the basis for an access case, but:

"The ECJ [European Court of Justice] has circumscribed compulsory access to essential facilities to only a limited

number of cases as even a dominant company cannot, in principle, be obliged to promote its competitor's business... These ECJ requirements would only be met, if it is demonstrated that the data owned by the incumbent is truly unique and that there is no possibility for the competitor to obtain the data that it needs to perform its services."

Interestingly, it might be thought that since many sources of data are non-replicable, then a collection of non-replicable sources, leading to a unique treasure trove of valuable data, might be relatively easily demonstrated to be an essential facility.

Discrimination. Discriminatory access to data is considered to be a potential exclusionary abuse, and the case of *Cegedim* is reviewed:

"Cegedim, the leading provider of medical information databases in France, refused to sell its main database (called OneKey) to customers using the software of Euris, a competitor of Cegedim on the adjacent market for customer



Vertical integration can entail discriminatory access to information and distort competition.

relationship management (CRM) software in the health sector, but would sell it to other customers. The French competition authority considered such behaviour as discriminatory and concluded that, given that OneKey was the leading dataset on the market for medical information databases and



that Cegedim was a dominant player on the market for medical information databases, such a discriminatory practice had the effect of limiting Euris's development between 2008 and 2012."

More generally, the report recognises the issues that arise with platforms where vertical integration can entail discriminatory access to strategic information with the effect of distorting competition:

"For instance, some marketplace operators also operating as online retailers may get access to information about their competitors selling on that marketplace and about the behaviour of consumers. By identifying the range of products that are globally more in demand, an integrated platform could then be able to more efficiently adjust the range of products it sells as well as the pricing of its products. A similar effect could be achieved by such a

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In Facebook’s acquisition of WhatsApp the European Commission confirmed the established view as set out by the European Court of Justice (in the case *Asnef-Equifax 2006*) by stating:

“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.”

Nevertheless the ECJ has gone further when considering ‘by object’ restrictions of competition law. In the *Allianz Hungária* case (2013) for instance, the ECJ held that the impairment of objectives pursued by another set of national rules could be taken into account to assess whether there was a restriction of competition (in this instance, by object). Referring to German competition law, the German Federal Court of Justice has stated that contract terms incompatible with the laws regulating general conditions and terms of trade might be an abuse of a dominant position if the use of the terms is based on the firm’s market dominance.

The following is a remarkable statement from the joint report that privacy can be taken into account in competition law assessments:

“Indeed, even if data protection and competition laws serve different goals, privacy issues cannot be excluded from consideration under competition law simply by virtue of their nature. Decisions taken by an undertaking regarding the collection and use of personal data can have, in parallel, implications on economic and competition dimensions. Therefore, privacy policies could be considered from a competition standpoint whenever these policies are liable to affect competition, notably when they are implemented by a dominant undertaking for which data serves as a main input of its products or services. In those cases, there may be a close link between the dominance of the company, its data collection processes and competition on the relevant markets, which could justify the consideration of privacy policies and regulations in competition proceedings.”

Change wrought by the Treaty of Lisbon. The report goes on to note that the Treaty of Lisbon changes the underlying position, and may change the factors that can be taken into account in competition law assessments:

“Article 167(4) of the Treaty on the Functioning of the European Union provides that, ‘The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.’ Article 16 of the TFEU, while not explicitly mandating that data protection aspects be considered in all actions conducted by the EU pursuant to the Treaties, does affirm that ‘everyone has the right to the protection of [their] personal data’.

“Even as it remains open to question whether these provisions carry specific obligations for competition authorities, the European data protection supervisor has advocated, in 2014, a shift in policy and a ‘more holistic approach to enforcement’, in which a more systematic dialogue is maintained between competition, consumer and data protection authorities, ‘wherever a specific case arises in which consumer welfare and data protection concerns appear to be at stake’.”



There is a remarkable statement that privacy can be taken into account in competition law.



The report agrees with statements made by the UK CMA, by saying:

“In merger control cases, the question of data privacy might particularly become relevant from a competition standpoint if a given undertaking benefits from a strong market power towards its end users. Indeed, firms that gain

a powerful position through a merger may be able to gain further market power through the collection of more consumer data and privacy degradation. If two horizontal competitors compete on privacy as an aspect of product quality, their merger could be expected to reduce quality.”

DISCUSSION OF ACADEMIC LITERATURE CASES AND CONCLUSIONS

The remainder of the report reviews the literature, cases and arguments on both sides of the debate, and is worth considering in detail for those closely involved in these issues. Among its conclusions are:

“To date, the risk of foreclosure associated with the concentration of data in digital industries has mostly been looked at in the context of merger control. This does not exclude the use of antitrust enforcement tools to tackle behaviour related to the collection and processing of data, similarly to what has already occurred in some non-digital markets. There are several possible ‘data-based’ conducts, whether exclusionary or exploitative, which could, depending on the circumstances of the case, lead to enforcement action...”

“However, the theories of harm underlying the prohibition of such conducts are premised, for the most part, on the capacity for a firm to derive market power from its ability to sustain a data trove unmatched by its competitors. A case-specific assessment of the reality and extent of the ‘data advantage’ needs to be undertaken to bear out or reject this premise. In doing so, consideration should be given at the outset to the features which are particularly found in online markets (network effects, multi-homing, and market dynamics) which may or may not be conducive to market power, before proceeding to determine whether data contributes to the creation or strengthening of market power.”

And when reviewing the contribution that data can make to market power:

“Two aspects of particular relevance when looking at data’s contribution to market power can be identified: the scarcity of data or ease of replicability, on the one hand; whether the scale/scope of data collection matters, on the other.”

Overall the report is a welcome, authoritative and useful contribution to the way in which these matters will be addressed by competition authorities and the courts, and the themes are likely to be important at a global level.

TIM COWEN leads the competition law team at *Preiskel & Co*, London, where his practice covers a full range of technology and competition law matters. He is also an IIC board member. This article reflects his own views and does not comprise any legal advice. The joint paper also contains copious references for further reading about this important area of competition law.

REFERENCES

- 1 Autorité de la concurrence and Bundeskartellamt (2016). Competition law and data. bit.ly/23GUvUq
- 2 Cowen T. (2016). Big data as a competition issue: Should the EU Commission’s approach be more careful? *European Networks Law & Regulation Quarterly* 4 (1).
- 3 Competition and Markets Authority (2015). The commercial use of consumer data. bit.ly/1d4fihB