

Competition Law in The Age of “Big Data”: When Something is Free, you are the Product

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‘Technologies such as Google, Facebook and Apple are undermining democracy and allowing fear and greed to drive anti-competitive behavior. The motives that are breaching Competition Law are as old as Adam and Eve. It’s about greed. fear. And when you combine that with power you get a very poisonous cocktail’

Margaret Vestager, EU Competition Commissioner

Abstract:

This paper explores whether competition authorities should incorporate data violations when they assess concentrations and abusive behavior of technological undertakings.

2017 will be remembered as a year in which the European Commission (COM) imposed fines on technological undertakings, such a social platform, for breaching European Union (EU) Competition Law. Data, seen as the new oil of the digital market, are considered to be the input of these undertakings on which the COM declared non-jurisdiction. It is important to underline that the product market of online platforms is not data. However, since technological undertakings provide users with a certain (free) services in exchange of data, this may give power to competition authorities to claim jurisdiction when they assess concentration or abusive behavior. According to the COM, the objective of Competition Law is the promotion of (current) economic value, and data for the time being is not considered to be one of economic value.

The operation of platforms is not geographically limited to a certain Union or a Country. Whereas at the Union level the EU Competition Authority perception of data under the second pillar is narrowed, a

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Member State of the same Union such as Germany treats this question broader. On the other hand, a third country (including GCC Countries) may also opt for a similar application based on the existing comparative practice.

The article is structured as follows: Part 1 provides introductory remarks on big data and competition law; Part 2 deals with the impact data have on digital market and EU Competition Law. Part 3 deals with the Commission’s (lack of) powers in the online market with a case illustration in the digital platforms. Part 4 explores the role of the national authorities of the Member States in the online market. Finally, the last part provides conclusion and recommendations.

Key terms:

big data, competition law, dominant position, abuse, mergers.

I. Introduction:

The last decade has witnessed dramatic technological changes in the digital market.⁽²⁾ However, the rhythm of legal transformation of competition law is too slow, and at times non-existent. EU competition Law was created sixty years ago within the Coal and Steel Treaty based on static models and analysis of industrial organization with consumer welfare as its main aim.⁽³⁾ This trend is extended and followed in the world of digital platforms too. The current instruments of competition authorities are seen outdated and obsolete for analyzing many data-driven mergers.⁽⁴⁾ Companies providing zero price goods and services in exchange of their data are leaders in the digital market with the well-known players such as Facebook, Google, LinkedIn, Apple, and Microsoft.⁽⁵⁾

Consumers have profited from these undertakings through services provided for free with rapid innovation and improved quality.⁽⁶⁾ However, as we all know and as Prof. Friedman stated decades ago, 'there's no such thing as a free lunch'.⁽⁷⁾

(2) The digital revolution is often termed the 3rd Industrial Revolution, following the first Industrial Revolution of the 18th – 19th Century driven by steam and the second wave caused by the electrical revolution of the late 19th and early 20th centuries, See e.g., Maull, R., Godsiff, P. and Mulligan, C.E.A., 2014. The impact of datafication on service systems. In System Sciences (HICSS), 2014 47th Hawaii International Conference on (pp. 1193-1201).

(3) The Treaty establishing the European Coal and Steel Community (ECSC), which was signed on 18 April 1951 in Paris, came into force on 23 July 1952 and expired on 23 July 2002. See also How the European Union works, A citizen's guide to the EU Institutions, European Commission Directorate-General for Press and Communication Publications, Brussels, 2003.

(4) Nikolinakos, N.T., 2006. EU competition law and regulation in the converging telecommunication, media and IT sectors (Vol. 20). Kluwer law international.

(5) Case No. COMP/M.4731 Google/DoubleClick Commission Decision of 11 March 2008, Case No. COMP/M.4731 Google/DoubleClick Commission Decision of 11 March 2008, Case No. COMP/M.4731; Microsoft/Yahoo! Commission Decision of 18 February 2010, Case No. COMP/M.5984; Facebook/Whatsapp, Commission Decision of 3 October 2014.

(6) Costa-Cabral, F. and Lynskey, O., 2017. Family ties: the intersection between data protection and competition in EU Law. *Common Market Law Review*, 54(1), pp.11-50.

(7) Friedman, M., 1975. There's no such thing as a free lunch. Open Court Publishing Company.

The European Competition Commissioner, Margarethe Vestager (Vestager) discussing the link between data, privacy, and competition, stated: ‘Very few people realize that, if you tick the box, your information can be exchanged with others... Actually, you are paying an extra price for the purchasing product.’⁽⁸⁾ Vestager made a similar point during her confirmation hearings before the European Parliament, where she described data as ‘the new currency of the Internet’.⁽⁹⁾ She also stated that the COM will comprehensively analyse the role of online platforms in the market and examine the non-transparency of search results and pricing policies. For instance, the way they use the information they acquire, the relationship between platforms and suppliers and the promotion of their own services to the disadvantage of competitors to the extent these are not already covered by competition law.⁽¹⁰⁾ One has to make an exact distinction between owning and using the data.⁽¹¹⁾ The perception stands that all the companies are hungry for data but not all of them are able to digest them. Vestager continuously used to repeat her motto: ‘we should not serve tech, tech should serve us’.⁽¹²⁾

The second part of this article defines ‘data’ and its nexus to Competition Law. The response from the European Commission emphasizing the (lack of) jurisdiction dealing with data will follow in the third part. This is

(8) Competition Commissioner, Margarethe Vestager, available at: <https://www.theguardian.com/world/2017/sep/17/margrethe-vestager-people-feel-angry-about-tax-avoidance-european-competition-commissioner>.

(9) James Kanter, ‘Antitrust Nominee in Europe Promises Scrutiny of Big Tech Companies’, *New York Times*, 3 October 2014;

(10) European Commission, ‘Antitrust: Commission Launches e-commerce Sector Inquiry’, Press Release, 6 May 2015, http://europa.eu/rapid/press-release_IP-15-4921_en.htm.

(11) Sivinski, G., Okuliar, A. and Kjolbye, L., 2017. Is big data a big deal? A competition law approach to big data. *European Competition Journal*, 13(2-3), pp.199-227.

(12) Vestager, stated she takes a tough but fair approach to regulating the world’s biggest tech companies. She is not known for giving Silicon Valley companies an easy ride. Vestager offered a simple suggestion to tech companies looking to operate in Europe: show your trustworthiness by abiding by its rules. That sounds obvious, but tech companies have struggled to do so, with giants like Google, Facebook, Amazon, Apple and Microsoft getting into hot water with the EU.

illustrated with the case of Facebook/WhatsApp acquisition in which the COM 'raised their hands' as a sign of lack of jurisdiction. Once this idea was established, although with huge debate regarding the competence of competition authorities dealing with technological platforms, which input is data, an opposing decision occurred. This brings us to the fourth part where a national competition authority, such as the Federal German Cartel, dealt with data, arguing that Facebook may abuse its dominant position. A member state of the European Union comes up with a broader scope regarding the same Company such as FB. Will this inconsistency prevail or a search for common ground will occur remains controversial?

Therefore, the rationale between the two authorities related to their dissimilar approach toward the same issue is also emphasized in this paper. So far, antitrust law finds itself at the crossroad between Big Data, market power and the transformative effects that the Internet is having on markets on a daily basis.⁽¹³⁾

II. The Problem Called "Big Data":

As mentioned, in the last decade the collection of online data from the digital businesses had grown enormously.⁽¹⁴⁾ The (EU) internal market from static has become extremely dynamic through its digitalization.⁽¹⁵⁾

(13) Pitruzzella, G., 2017. Big Data and Antitrust Enforcement. *Rivista italiana di Antitrust/Italian Antitrust Review*, 4(1).

(14) 'While it is ubiquitous today, however, 'big data' as a concept is nascent and has uncertain origins. Diebold (2012) argues that the term "big data . . . probably originated in lunch-table conversations at Silicon Graphics Inc. (SGI) in the mid-1990s, in which John Mashey figured prominently". Despite the references to the mid- nineties, a figure shows that the term became widespread as recently as in 2011', look for more at Gandomi, A. and Haider, M., 2015. Beyond the hype: Big data concepts, methods, and analytics. *International Journal of Information Management*, 35(2), pp.137-144. See also Diebold, F.X., 2012. On the Origin (s) and Development of the Term 'Big Data'. See also Cukier, K, Data, data everywhere: A special report on managing information. *The Economist Newspaper*.

(15) Also in 2015, the European Commission adopted its 'Digital Single Market Strategy', based on three pillars: '(1) better access for consumers and businesses to digital goods and services across Europe; (2) creating the right conditions and a level playing field for digital networks and innovative services to flourish; (3) maxi =

Many, from both academia and the industrial sector, have shown their interest on whether data is a problem, and whether it should be analyzed from the competition law perspective.⁽¹⁶⁾ Defining big data can be challenging although an inspiring endeavor. Doug Laney, since 2001, tried to define Big Data based on the three ‘Vs’, such as: Volume, Velocity and Variety.⁽¹⁷⁾ 14 years later, OECD confirmed the same formations.⁽¹⁸⁾ In general terms, this notion explains the gathering, processing, examination and visualization related to very large data.⁽¹⁹⁾

Professors such as Ezrachi and Stucke have been cited frequently by the competition ‘community’ in defining the concept as the volume of both structured and unstructured data that undertakings can seize on a regular basis and the methodologies used to manage and analyse it.⁽²⁰⁾ The phrase ‘Big Data’ is new and is used to refer to the collecting, analyzing and processing large quantities of data through sophisticated methods such as advanced algorithms. The preeminent definition comes from the preliminary opinion of the European Data Protection Supervisor, as gigantic digital datasets held by corporations, governments and other large organizations extensively analysed by

= mizing the growth potential of the digital economy’. Decisions can be challenged before the EU Courts by the addressees of those decisions and, on certain conditions, by third parties, which are directly and individually concerned by the same.

(16) Rubinfeld, D.L. and Gal, M.S., 2017. Access Barriers to Big Data. *Ariz. L. Rev.*, 59, p.339.

(17) Laney, D., 2001. 3D data management: Controlling data volume, velocity and variety. META Group Research Note, 6(70).

(18) OECD, “Data-driven Innovation for Growth and Well-being”, 2014.

(19) Gupta, P. and Tyagi, N., 2015, May. An approach towards big data—A review. In *Computing, Communication & Automation (ICCCA)*, 2015 International Conference on (pp. 118-123). IEEE. Bedi, P., Jindal, V. and Gautam, A., 2014, September. Beginning with big data simplified. In *Data Mining and Intelligent Computing (ICD-MIC)*, 2014 International Conference on (pp. 1-7). IEEE. Demchenko, Y., Grosso, P., De Laat, C. and Membrey, P., 2013, May. Addressing big data issues in scientific data infrastructure. In *Collaboration Technologies and Systems (CTS)*, 2013 International Conference on (pp. 48-55). IEEE.

(20) Ezrachi, A. and Stucke, M.E., 2017. Two Artificial Neural Networks Meet in an Online Hub and Change the Future (of Competition, Market Dynamics and Society). See also Isitor, E. and Stanier, C., 2016. Defining Big Data.

computer algorithm.⁽²¹⁾

Some authors clarify the three Vs, others have provided four and lately a research proves that 7V's or more of big data can be structured, such as: Volume, Velocity, Variety, Value, Veracity, Variability, Visualization etc.⁽²²⁾ This is primarily provided by online businesses including search engines like Google, Yahoo and Bing; social media platforms like Facebook, LinkedIn, and Twitter and providers like Thomson Reuters, etc.⁽²³⁾ Big data were recently declared to represent a new and significant class of economic assets that fuel the information economy.⁽²⁴⁾ While many big data applications are concerned with factual data, like machine processes or weather forecast, businesses such as companies and undertakings are increasingly using massive quantity of personal information to understand, predict and shape human behavior⁽²⁵⁾

(21) Preliminary Opinion of the European Data Protection Supervisor, Privacy and competitiveness in the age of big data: The interplay between data protection, competition Law and consumer protection in the digital economy, March 2014.

(22) Volume indicates the ever-increasing amount of data collected. Velocity refers to the accelerating speed at which data is created and processed. Big data has made it possible to process data in real-time. Variety suggests the different forms and sources of data. 90% of data created is "unstructured," meaning it is not easily captured or analysed. Value refers to the positive business outcomes created by a data solution. Businesses aim is to focus on getting maximum value from their big data strategy, which can lead to a substantial competitive advantage. Veracity denotes the reliability of data. While data is powerful, inaccurate data is worthless. Variability provides for the uncertain nature of data whose meaning is changing constantly and visualization refers to the need to present data in an accessible and meaningful way. The reporting functionality of big data is equally as important as the processing and analysis. See more Ashley DeVan, the 7Vs of Big Data, available at: <https://www.impactradius.com/blog/7-vs-big-data/>. 7 April 2016.

(23) Big data is frequently characterized by four "Vs": volume, velocity, variety, and value. See also Emmanuel, I. and Stanier, C., 2016, November. Defining Big Data. In Proceedings of the International Conference on Big Data and Advanced Wireless Technologies (p. 5). ACM.

(24) Rubinfeld, D.L. and Gal, M.S., 2017. Access Barriers to Big Data. *Ariz. L. Rev.*, 59, p.339.

(25) The EDPS Strategy 2015-2019, available at https://edps.europa.eu/sites/edp/files/publication/15-07-30_strategy_2015_2019_update_en.pdf. European Data Protection Supervisor, Privacy and Competitiveness in the Age of Big Data: The Interplay Between Data Protection, Competition Law and Consumer Protection =

However, it should be underlined that Big Data analysis brings benefits and disadvantages to the individuals whose data is analyzed, as well as other individuals indirectly affected by such analyses.⁽²⁶⁾ They comprise personal information about end users, their profile information, and also other types of data such as publicly available information including financial, technical, health etc.⁽²⁷⁾ It is a fact that almost nobody argues that Big Data is always bad. Some authors go with the neutrality principle that Big Data is neither good,⁽²⁸⁾ nor evil, but their use and control may weaken the competition altogether.⁽²⁹⁾ Certainly, in governmental hands, big data can be used in the security sector.⁽³⁰⁾ However, it may be argued that being in possession of current (and future) private technologies, at least until the General Data Protection Regulation (GDPR) application starts to apply, they shall be carefully maintained.⁽³¹⁾ Regardless how unpredictable the future looks, it will be impossible to continue to ignore Big Data from now on.⁽³²⁾ With this background in

⁼ in the Digital Economy (preliminary opinion Mar. 2014) available at https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2014/14-03-26_competition_law_big_data_EN.pdf. See also: Opinion 8/2016, EDPS Opinion on coherent enforcement of fundamental rights in the age of big data, 23.09.2016.

(26) Zarsky, T.Z., 2016. Incompatible: The GDPR in the Age of Big Data. *Seton hall L.R ev.*, 47, p.995.

(27) Farrell, J., 2012. Can privacy be just another good. *J. on Telecomm. & High Tech. L.*, 10, p.251.

(28) Kennedy, J., 2017. The Myth of Data Monopoly: Why Antitrust Concerns About Data Are Overblown. Information Technology and Innovation Foundation.

(29) Ezrachi, Ariel. *EU competition law: an analytical guide to the leading cases*. Bloomsbury Publishing, 2016, page 454. See also Trattner, Marina. *Assessment of anti-innovative mergers in high technology markets. What kind of substantive test should be done to protect innovation?* (2016). See also: Barnard, C., 2013. *The substantive law of the EU: the four freedoms*. Oxford University Press.

(30) Gert Vermeulen and Eva Lievens (Eds), *Data Protection and Privacy under Pressure Transatlantic tensions, EU surveillance, and big data*, Antwerp | Apeldoorn | Portland Maklu, 2017.

(31) The Regulation entered into force on 24 May 2016 and it shall apply from 25 May 2018, available in the EU official website: http://ec.europa.eu/justice/data-protection/reform/index_en.htm.

(32) Diebold, F.X., 2012. *A Personal Perspective on the Origin (s) and Development =*

mind, going back to Competition Law framework, the potential harm of data-driven mergers and abuses of dominant companies built on data, should be under scrutiny.⁽³³⁾ Some, within the antitrust community are starting to appreciate the competitive benefits and risks of data-driven mergers.⁽³⁴⁾ Others, however, argue that competition law should have a limited role, if any within the agenda of Big Data.⁽³⁵⁾

There is a strong bond between data with both, consumer law and competition law interchangeably.⁽³⁶⁾ The more companies undertake data-driven business strategies; competition officials and courts will likely confront the competitive implications of Big Data. Data is also part of the work of institutions such European Commission (EU COM), US Federal Trade Commission (FTA) and national authorities' enforcement for more than a decade now. The EU COM in particular had the opportunity to assess whether existing competition enforcement tools are adequate and satisfactory to address possible competition concerns arising from companies' accumulation of data that could enhance market power in any possible form.⁽³⁷⁾ This is in further detail illustrated below.

III. Competition Law Response:

Although an exhaustive description of the legal framework of EU Competition Law is inappropriate here, it is indispensable to indicate the key features. Professor Slot describes Competition Law as the

= of Big Data The Phenomenon, the Term, and the Discipline, Second Version. See also: Data, B., 2012, January. Big Impact: New possibilities for international development. In World Economic Forum, Davos, Switzerland. [http:// www3. We forum. org/ docs/ WEF TC MFS Big Data Big Impact Briefing](http://www3. We forum. org/ docs/ WEF TC MFS Big Data Big Impact Briefing).

(33) Harsdorf, N., 2017. Digital Economy: New Test in Austrian Merger Control. *Journal of European Competition Law & Practice*, pp.1-2.

(34) Russom, P., 2011. Big data analytics. TDWI best practices report, fourth quarter, 19, p.40.

(35) Tucker, D.S. and Wellford, H.B., 2014. Big mistakes regarding big data.

(36) Boutin, X. and Clemens, G., 2017. Defining Big Data in Antitrust.

(37) Commission (EC), 'Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control' <http://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html> accessed 24 February 2017.

night watchmen of a market economy.⁽³⁸⁾ In the EU, looking from the perspective of the pillars, three are considered important: Concerted practices, Abusive behavior by dominant undertakings and Merger control⁽³⁹⁾ Concerted practices are anticompetitive agreements, which have as their object or effect the restriction of competition. Such practices are considered unlawful unless they are exempted by economic benefits.⁽⁴⁰⁾ Secondly, Monopolies or market dominant undertakings are not allowed to abuse their market power, either through exclusionary or through exploitative behavior. Exclusionary conduct consists of actions by dominant undertakings to protect or extend their dominant position.⁽⁴¹⁾ Exploitative conduct describes practices through which dominant undertakings exploit consumers or the other side of the market in general.⁽⁴²⁾ Germany’s decision to sanction FB for abuse of dominant position, is the example considered below. Merger control is the third pillar in most competition laws worldwide.⁽⁴³⁾ Within the EU, Mergers are primarily regulated under secondary legislation.⁽⁴⁴⁾ Three

(38) Emeritus Professor Slot opens in this way his second edition on Competition Law, see more Slot, P.J. and Farley, M., 2017. *An Introduction to Competition Law*. Bloomsbury Publishing.

(39) Eleanor M.Fox, Damien Gerard, *EU Competition Law, Cases, Texts and Context*, Edward Elgar Publishing 2017; see also Whish, R. and Bailey, D., 2015. *Competition law*. Oxford University Press, USA. A.M., 2010. *Competition and development: Towards an institutional foundation for competition enforcement*. *World Competition*, 33, p.275.

(40) Article 101 and 101(3) TFEU, See also: Whish Richard/Bailey David, *Competition Law*, 7th Edition, Oxford University Press, 2012, p. 3. See also Jones, A. and Sufrin, B., 2016. *EU competition law: text, cases, and materials*. Oxford University Press.

(41) Article 102 TFEU; see also Vickers, J., 2005. Abuse of market power. *The Economic Journal*, 115(504).

(42) Elhauge Einer/Geradin Damien, *Global Competition Law and Economics*, 2nd Edition, Hart Publishing, Oxford 2011, p. 270; See also Kaplow, I., 2010. Why (Ever) Define Markets?. 124 *Harv. L.Rev*, 437.

(43) Kovacic, W.E., Mavroidis, P.C. and Neven, D.J., 2014. Merger control procedures and institutions: A comparison of EU and US practice. *The Antitrust Bulletin*, 59(1), pp.55-109.

(44) Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24/1, 29 Janu-

types of mergers exist: horizontal, vertical and conglomerates.⁽⁴⁵⁾

Horizontal mergers may have anticompetitive effects if the resulting firm has a dominant market power.⁽⁴⁶⁾ However, vertical and conglomerate mergers may also exclude or impair rival competition. So far the large technological undertakings possessing the consumers data and the other companies' advertisement are mostly reviewed based on the third pillar, being horizontal or non-horizontal.⁽⁴⁷⁾ The consumers are offered services for free⁽⁴⁸⁾ whereas the advertisement is paid in exchange for the consumer's data.⁽⁴⁹⁾ This occurs in the two-sided market.⁽⁵⁰⁾ So far there have been no cases in the United States or the Europe Union level that have found Big Data itself to be a basis for a theory of harm on antitrust grounds for mergers or from the other two

= ary 15 2004; See also: Implementing Regulation (IR) Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 (published in OJ L 133, 30.04.2004, p.1) amended by Commission Regulation (EC) No 1033/2008 of 20 October 2008 (published in OJ L 279, 22.10.2008, p. 3) – Consolidated version of 23 October 2008. See also Marks, M.L. and Mirvis, P.H., 2015. Managing the pre-combination phase of mergers and acquisitions. in *Advances in Mergers and Acquisitions* (pp. 1-15). Emerald Group Publishing Limited.

(45) Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16 April 2008.

(46) Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5 February 2004., See also Federico, G., Langus, G. and Valletti, T.M., 2017. *Horizontal Mergers and Product Innovation: An Economic Framework*.

(47) Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18 October 192 2008. See also Gaughan, P.A., 2010. *Mergers, Acquisitions and corporate restructurings*. John Wiley & Sons.

(48) Microsoft/Skype, Case No.COMP/M.6281, from 07.10.2011, available at <<http://ec.europa.eu>>, para. 75.

(49) Sokol, D.D. and Comeford, R.E., 2016. Does Antitrust have a role to play in regulating big data?

(50) Fillistrucchi, L., 2017. Network Effects and the Efficiency Defense in Mergers Among two-sided Platforms. See also Gürkaynak, G., İnanılır, Ö., Diniz, S. and Yaşar, A.G., 2017. Multisided markets and the challenge of incorporating multisided considerations into competition law analysis. *Journal of Antitrust Enforcement*, 5(1), pp.100-129.

pillars. Nevertheless, they had the opportunity to do so. However, on the other hand, national authorities have taken initiative against some of the giants, including FB.

1. The EU Commission’s (Lack of) Powers:

Following the cases like Google, LinkedIn, and Facebook, the (lack of) powers of the European Commission was discussed in great detail.⁽⁵¹⁾ The main function of the COM, based on the primary legislation is to safeguard the application of EU Law and take good care of the general interest of the Union.⁽⁵²⁾ However, this is not always easy.⁽⁵³⁾ The powers of the institutions should also not be exceeded, taking in consideration the balancing strength.⁽⁵⁴⁾ Based on Vestager’s interview concerning COM’s Decision on FB,⁽⁵⁵⁾ she explicitly stated that the COM has taken a more firm position to crack down on breaches of the Merger Regulation (EUMR) only. It is in the COM’s power to try to calm the boiling water while the merged concentrations breach the merger rules.⁽⁵⁶⁾

Since, the European, and global industry is changing considerably and

(51) Giovanni Pitruzzella, Big Data and Antitrust Enforcement, *Revista Italiana di Antitrust*, N.1 2017.

(52) Article 17 of the Treaty on European Union (TEU), Articles 234, 244 to 250, 290 and 291 of the Treaty on the Functioning of the European Union (TFEU), and the Treaty Establishing a Single market.

(53) The current Commission puts more attention to the ECMR proper application in comparison to the previous one. See: Drauz, Gotz, Thomas Chellings worth and HertaHyrkas. “Recent Developments in EC Merger Control. “*Journal of European Competition Law & Practice* 1, no. 1 (2009): 26.

(54) Odudu, O., 2010. The wider concerns of Competition Law. *Oxford Journal of Legal Studies*, 30(3), pp.599-613.

(55) European Commission, Press release, Mergers: Commission alleges Altice breached EU rules by earl implementation of PT Portugal acquisition, Brussels, 18 May 2017, available under: http://europa.eu/rapid/press-release_IP-17-1368_en.htm.

(56) Eleanor M. Fox, Walter J. Derenberg Professor of Trade Regulation at New York University School of Law, *International Economic Law Trade, Developing Countries, Markets and Competition Laws: How Developing Countries Are Trying to Improve Their Economic Wellbeing by Harnessing Markets to Work for Them*. Available at UN Audiovisual Library of International Law, <http://legal.un.org/avl/ls/Fox E IEL.html#>.

the numbers of mergers and acquisitions increase on a daily basis, it is vital to understand the limits of powers in this field.⁽⁵⁷⁾ Although internet based services have been in existence primarily for a decade and a half, most competition authorities have taken a ‘hands off’ approach⁽⁵⁸⁾ with regard to the internet industry and internet businesses when data has been under discussion.⁽⁵⁹⁾ The actuality, as addressed here, is that many of the current analytical economic tools do not address Big Data issues. Competition authorities have better tools to assess price effects. But they have far cruder tools to assess a merger’s effect on non-price competition, including the degradation of privacy protection.⁽⁶⁰⁾ This is problematic with the growth of multi-sided markets, where the products offered is free.

The fact that something is free may distort a consumer’s evaluation

(57) Holtgrewe, U., 2014. New technologies: the future and the present of work in information and communication technology. *New technology, work and employment*, 29(1), pp.9-24. See also, Hagedoorn, J. and Duysters, G., 2002. The effect of mergers and acquisitions on the technological performance of companies in a high-tech environment. *Technology Analysis & Strategic Management*, 14(1), pp.67-85. See also: Lipsey, R.G., Carlaw, K.I. and Bekar, C.T., 2005. *Economic transformations: general purpose technologies and long-term economic growth*. OUP Oxford.

(58) It was argued that these issues are related to privacy and should be solved by other institutions. Although, The European Data Protection Supervisor’s (EDPS) discussed it in depth for the first time, which helped spark the debate and research on how the three areas of law (antitrust, privacy, and consumer protection) intersect. See more at European Data Protection Supervisor, *Privacy and Competitiveness in the Age of Big Data: The Interplay Between Data Protection, Competition Law and Consumer Protection in the Digital Economy* (preliminary opinion Mar. 2014) [hereinafter EDPS PRELIMINARY OPINION], available at https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2014/14-03-26_competition_law_big_data_EN.pdf.

(59) The only Internet company whose practices have been the object of major competition investigations is Microsoft. The European Court found that Microsoft had tied special software its Media Player to its own computer operating system, *WHISH/BAILEY* (supra note 3), p. 693. 12, see also Ly, B., 2017. *Never Home Alone: Data Privacy Regulations for the Internet of Things*. U. Ill. JL Tech. & Pol’y, p.539.

(60) Grossklags, J. and Acquisti, A., 2007, June. *When 25 Cents is Too Much: An Experiment on Willingness-To-Sell and Willingness-To-Protect Personal Information*.

of non-price dimension of competition such a product quality.⁽⁶¹⁾ When Competition Authorities solely focus on the ‘paid’ advertising side of these multi-sided markets and ignore the merger’s impact on the ‘free’ side, both consumers and advertisers remain harmed.⁽⁶²⁾

2. “Data” in The European Commission:

In the merger case of Facebook (FB) with WhatsApp (WA) the COM was notified based on the third pillar. As mentioned above, nowadays in the EU, mergers play a greater and a more critical role in shaping the structure of digital markets. In the digital world, they have become global search engines and global social networks.⁽⁶³⁾ It is the very first area where Big Data were recognized as an issue related to the market power of a certain concentration. The novelty is, that horizontal mergers do not have the priority in the analysis of anticompetitive effects anymore, but also vertical and conglomerates are entering the stage too. Any such data combination could only be implemented by the merged entity to the extent it is allowed by applicable data protection rules with respect to the collection, processing, and use of (big) data. Analysis of the merger party’s ability to pool the different data from now on should be undertaken. In more practical terms, the case of social platform such as FB has been in detail considered below.⁽⁶⁴⁾

(61) Su, H.C., 2012. Thinking, Fast, Free, and Fashionable: Competition and Consumer Protection in a Mobile Internet World. *Antitrust*, 27, p.82.

(62) The issues we explore are timely. Until early 2015, the EU and US competition authorities, which were supposed to screen mergers to prevent those likely to be anticompetitive, largely did not consider the implications of a data-driven economy on competition policy. There are some exceptions, as we discuss. But that is rapidly changing, with the Europeans taking the lead. The European Commission in 2015 launched an antitrust competition inquiry into the e-commerce sector in the EU. The inquiry, according to the Commission press release, ‘will allow the Commission to identify possible competition concerns affecting European e-commerce markets’

(63) Google/DoubleClick, Commission Decision of 11 March 2008, Case No. COMP/M.4731; Microsoft/Yahoo!, Commission Decision of 18 February 2010, Case No. COMP/M.5984; Facebook/Whatsapp, Commission Decision of 3 October 2014.

(64) Feuer, L.S., 2011. Who is Poking around Your Facebook Profile: The Need to Reform the Stored Communications Act to Reflect a Lack of Privacy on Social Net- =

The COM fined FB with 110 million euro's for giving incorrect information and breaching the EUMR.⁽⁶⁵⁾ During the investigation of this acquisition, FB was asked twice, whether they will use WA consumer's data and the answer was 'negligently' given wrong or incorrectly. However, the most significant question in why FB paid billions to purchase the WA, which was in deep loss, if the data were not vital, as FB inclined to argue? Awkwardly, the COM in this case underestimated the real value of the data, although FB purchased WA for US \$19 billion at a time when they reported millions in net losses, which suggest that the real time data was included in the price.

While the total fine imposed on FB is nominally much higher than previous fines imposed by the COM for similar infringements, it only represents 0.44% of FB's turnover during the year 2016. Analysis shows that the fine is just as 'formal' as it could be. In this case, even though indications were given by US Federal Trade Agency (FTA) that data should be taken more seriously under consideration, the EU COM declared to have lack of jurisdiction. As underlined, COM fined the company only for providing incorrect and misleading information on the technical possibility of automatically matching FB and WA users' data. In any case, as the rules stand, the harm would have been considered based on the scope of the relevant market: product and geography, the market structure, the significance of data for the supply of the specific service and other sources through which companies' relevant data/information can be collected.

The analysis of Big Data is likely to be particularly relevant in the assessment of horizontal mergers among companies active in online advertising, where Big Data is seen as a key input in the provision of

= working Websites. Hofstra L. Rev., 40, p.473. Terms such as 'friend request', 'like', 'app', 'like', 'tag' See more in: 'Friend', techterms.com, <http://www.techterms.com/definition/friend> (last updated Nov. 20, 2009); Like, FB, <http://www.facebook.com/help/like> (last visited Apr. 20, 2012).

(65) Commission decision of May 17, 2017, Case No. M.8228 FB/WA.

targeted ads.⁽⁶⁶⁾ However, in the case of FB, the EU COM found that there will continue to be a large amount of internet user data that are valuable for advertising purposes and that are not within the merged entity's exclusive control.⁽⁶⁷⁾

Regarding the facts, in 2014 merger review proceedings, the COM during the investigation of FB and WA assessed the effects of the proposed transaction in three relevant markets: 1. Consumer communications applications (CCA), where both companies were actively competing through apps (messenger), 2. Social Networking Services (SNS)⁽⁶⁸⁾ and 3. Online Advertising Services (OAS) where only FB was active. The third service should have automatically not been analyzed further. In relation to the CCA and the SNS, whether the network effects that characterize these markets could shield the merged entity from competition from new and existing rivals, the COM found that no such concerns would arise in view of a number of factors that mitigated the impact of such network effects.⁽⁶⁹⁾

The COM also investigated the fact whether those network effects could be strengthened in post-festum. The separate user networks of FBM and WA messenger were to be combined into one larger network, stemming from some form of integration between the parties' services. One possible form of integration, presented as an example in the clearance decision, was cross-platform communication, but the scope of the COM's investigation was not limited to this example.⁽⁷⁰⁾ However, the COM also found that no competition concerns would arise in this respect. The COM sent a request to FB for information discussing the technical feasibility of different forms of integration, including user-

(66) Boutin, Xavier, and Georg Clemens. «Defining» Big Data» in Antitrust.» (2017).

(67) Facebook/Whatsapp, Commission Decision of 3 October 2014, Case No. COMP/M.7217.

(68) Baran, K.S., Fietkiewicz, K.J. and Stock, W.G., 2015, May. Monopolies on Social Network Services (SNS) Markets and Competition Law. In ISI (pp. 424-436).

(69) Ibid. paragraphs 131-134.

(70) Ibid. paragraphs 137 and 159.

matching possibilities. Both in the Form CO and in reply to the request for information, FB stated that no integration was possible, because, among other reasons, automated matching between FB and WA users would not be achievable.⁽⁷¹⁾ Regarding the OAS, the COM examined possible competition concerns in the event that FB started collecting and using WA user data for advertising purposes.

The COM noted that gathering WA user data would require FB, among others, to match each user's WA profile with users FB profile, something that, according to FB's submissions, would be difficult to achieve on an automated basis. However, the COM found that, even if FB had collected data from WA users, this transaction would not be harmful to competition in online advertising, as a large amount of user data that is valuable for advertising purposes would continue to exist outside FB's exclusive control.⁽⁷²⁾ Two years later, in 2016, FB first contacted the COM, describing the scheduled update at enabling FB to gain access to, and use, certain data of WA users. FB intention, as stated, was to use WA user data to introduce certain product improvements. The COM's investigation revealed that, first, the information provided by FB during the 2014 merger review proceedings was incorrect and/or misleading, contrary to what FB stated in the Form CO and in its reply to a request for information. Based on these findings, the COM sent FB a statement of objections in 2016, setting out its preliminary conclusions that FB had violated Article 14(1) EUMR which prescribes fine up to 1% of the total turnover of one year. Even then, the EU COM, based on the fruitful cooperation as indicated, reduced the fine in half. It seems the COM's discretion in relation to sew and cut once more was present on stage.

(71) *Ibid.* paragraphs 138-139 and 160-161).

(72) Commission Decision in Case No. M.7217 *FB / WA*, paragraphs 187-189, here the questions of another discipline, such as contract law arises. The WA consumers became FB consumers during the night without their consent. Should the EU COM take this into consideration, or it should be left to the private enforcement rules as is illustrated below with the examples of Germany, France and Ireland. This issue is not even mentioned by the EU COM in the case of FB.

It is worth mentioning that even the Director of FTC and Bureau of Consumer Protection, USA, notified in written the merging parties that they should continue to honor the privacy of the consumers.⁽⁷³⁾ Although, regarding mergers and privacy, Olhausen, accentuated that if two companies merge and they are competing on their privacy, you may look at that attribute as a competition issue.⁽⁷⁴⁾ However, if they don't compete on the privacy issue, as the case of FB/WA, in that case they consider it to be outside of the scope of competition law but within the framework of consumer law.⁽⁷⁵⁾

At the end of October 2017, The European Commission's Directorate-General for Communications Networks, Content & Technology was calling for comments on a proposal to regulate online platforms.⁽⁷⁶⁾ If different windows are opened, it may be, that gradually but certainly, the whole mosaic will reveal itself.⁽⁷⁷⁾

IV. Data and Abuse of Domination Position- The German Case:

Once established by the COM the lack of jurisdiction regarding data in the case of FB, there was a new development in one of the major EU Member States – Germany. Facebook was introduced to rigorous rules related to data and privacy issues in Germany.⁽⁷⁸⁾ There, it was argued

(73) The Federal Trade Commission Protecting America's Consumers, FTC Notifies FB, WhatsApp of Privacy Obligations in Light of Proposed Acquisition, Available at: https://www.ftc.gov/news_events/press_releases/2014/04/ftc_notifies_facebook_whatsapp_privacy_obligations_light_proposed.

(74) W@Competition Interview with Maureen K. Ohlhausen, available at www.competition.org. Published on Aug 17, 2017.

(75) Both Competition and Consumer Policy are within the powers of the US Federal Trade Commission unlike the European Commission.

(76) The European Commission's Directorate-General for Communications Networks, Content & Technology is calling for comments on a proposal to regulate online platforms.

(77) Not all are optimistic, if one reads carefully the Nobel Prize winner Joseph E. Stiglitz, arguing that an economy dominated by large corporations has failed the many and enriched the few, may have another perspective for monopolies in particular. Available at [ECONOMY](http://www.economy.com) under the title: America has a Monopoly problem and its Huge, October 23, 2017.

(78) James Q. Whitman, The Two Western Cultures of Privacy: Dignity Versus Liberty

that FB allows ‘other friends’ to see what they ‘like’.⁽⁷⁹⁾ According to FB, they only gather data, and simply count the number of IP addresses that visit sites with Like. In 2011, the German data protection Minister Weichert, stated that the “Like” button and other FB actions violated German (and European law). According to him: “whoever visits FB must expect that they will be tracked by the company for two years. “On the other hand, Andreas Mundt, the President of the Bundescartellamt (BKA)⁽⁸⁰⁾ stated: ‘for advertising-financed Internet services such as FB, user data are hugely important. For this reason, it is essential to also examine under the aspect of abuse of market power whether the consumers are sufficiently informed about the type and extent of data collected.’⁽⁸¹⁾

For the first time, a National Competition Authority such as BKA made a link between competition law, specifically the abuse of dominant firm and information as a consumer right. This country announced commencement of proceedings against FB based on article 102 (a) TFEU. One should bear in mind that this assessment is based on domestic German Competition Law, rather than Article 102 TFEU. Article 3(3) of Regulation 1/2004 should be taken in consideration as well, stating that ‘without prejudice to general principles and other provisions of Community Law, paras. 1 and 2 do not preclude the application of national law that may pursue an objective different from

(79) These occurred when people reading Spiegel online, clicking like where identified by their friends. FB admits that the company can see information such as the IP addresses of users who visit a site with a “Like” button. Colangelo, G. and Maggiolino, M., 2017. Big Data, Data Protection and Antitrust in the Wake of the Bunderskartellamt Case Against Facebook. *Rivistaitaliana di Antitrust/Italian Antitrust Review*, 4(1).

(80) The abbreviation BKA is used for Bundescartellamt referring to German Federal Cartel Office.

(81) Bundescartellamt, ‘BKA initiates proceeding against FB on suspicion of having abused its market power by infringing data protection rules’, Press Release, 2 March 2016, http://www.bundescartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_FB.html.

that in articles 81 and 82 of the Treaty.⁽⁸²⁾ Facebook has been under the assumption to have abused its dominant position in the market for social networks by imposing some terms and conditions for user data collection in violation of data protection law.⁽⁸³⁾

According to Mundt, ‘dominant companies are subject to special obligations’. The ‘Special responsibility/obligation’ of a dominant position was developed within the ECJ Case Law.⁽⁸⁴⁾ Seeing from a comparative perspective, the European Commission, as analyzed above, is treating FB as a merger and not an undertaking under dominant position, since it wasn’t considered wise to identify a position in such dynamic markets.⁽⁸⁵⁾ The BKA tried to confine the relevant market to the social network services rather than to follow the COM’s drive with a broader definition of the market, such as AD-supported network services where giants like Google operate. The BKA attempts to balance the abuse of dominant position and the invasion of privacy by a dominant undertaking.⁽⁸⁶⁾ The examples of the proceedings of the BKA against FB in respect to online advertising markets illustrate the diverse response institutions may have towards the same platform. Clearly, competition authorities are still in the early stages of coping with these new phenomena and their approach has to be constantly refined. However, within this labyrinth, a close cooperation of competition authorities throughout Europe, together with growing interactions with

(82) Today Article 101 and 102 TFEU. See more the Bundercartellamt web site: Explanatory notes clarifying: If an undertakings in a dominant position make the use of its service conditional upon the user granting the company extensive permission to use their data, this can be defined as exploitative abuse under Competition Law.

(83) Baran, K.S., Fietkiewicz, K.J. and Stock, W.G., 2015, May. Monopolies on Social Network Services (SNS) Markets and Competition Law. In *ISI* (pp. 424-436).

(84) Case C-209/10 Post Danmark A/S v Konkurrenceradet [2012] ECR I-0000.

(85) The data owned by a dominant undertaking is truly and unique and there is no possibility for the competitor to obtain the same data, see more: Geradin, D. and Kuschewsky, M., 2013. Competition Law and Personal Data: Preliminary thoughts on a complex issue.

(86) Graef, I. and Van Alsenoy, B., 2016. Data protection through the lens of competition law: will Germany lead the way? LSE Media Policy Project blog.

other concerned regulators such as data protection agencies would be beneficial. Time will prove, whether authorities will continue to deal with the challenges of the digital economy and big data.

In 2016, BKA initiated proceedings against FB related to unfair contractual terms imposed on its users for the use of their data.⁽⁸⁷⁾ BKA's investigation was solely based on its preliminary understanding that FB may be dominant in a stand-alone market for social networks in this country.⁽⁸⁸⁾ However, BKA emphasizes that a breach of data protection law by a dominant undertaking does not of itself constitute a breach of competition law, it is important to consider the potential link between the alleged dominance that takes advantage of non-compliant clauses under data protection rules.⁽⁸⁹⁾

In December 2017 BKA, informed again FB of its preliminary legal assessment of the abuse of dominance preceding which the authority is conducting against the platform. The document states that FB is dominant on the German market for social networks.⁽⁹⁰⁾ The authority held that FB is abusing its dominant position by making the use of its social network conditional on its being allowed without limit to collect every kind of data generated by using third-party websites and merge it with the user's FB account.⁽⁹¹⁾

This time, Mundt defined the abuse of dominant undertaking more

(87)The Bundeskartellamt initiated proceedings against Facebook on 2 March 2016: www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html.

(88)Although 'Dominance' is not considered illegal per se. This should also be checked in the case of Google. See Akman, P., 2017. *The Theory of Abuse in Google Search: A Positive and Normative Assessment under EU Competition Law*. U. Ill. JL Tech. & Pol'y, p.301.

(89)Daly, A., 2016. *Private power, online Information Flows and EU Law –Mind the Gap* (Oxford: Hart Publishing, 2016), Richter, H., 2017. *Private Power, Online Information Flows and EU Law: Mind the Gap*, by Angela Daly.

(90)Preliminary assessment in Facebook proceeding: Facebook's collection and use of data from third-party sources is abusive, Date of issue:19.12.2017.

(91)These third-party sites include firstly services owned by FB such as WA or Instagram, and also websites and apps of other operators with embedded FB APIs.

precisely by stating: “we are mostly concerned about the collection of data outside Facebook’s social network and the merging of this data into a user’s FB account.”⁽⁹²⁾ It is uncertain that those users have ever given their consent to FB’s data tracking and the merging of data into their FB account. Based on this evaluation, when operating as an undertaking in a dominant position, FB is aware that its users cannot switch to other social networks.⁽⁹³⁾ Participation in FB’s network is conditional on enrolment and free approval of its terms of service. The consumers are given the choice of either to accept the “whole package” or nothing. This shows that the form of abuse known as tying or bundling comes into light. To sum up, Mundt, among other things stated that: “data protection, consumer protection and the protection of competition interlink where data, as in Facebook’s case, are a crucial factor for the economic dominance of certain undertaking.”⁽⁹⁴⁾

VI. Conclusion:

To conclude, it is important to underline that Competition Law ultimately met the ‘silicon valley’ companies. Even though the insignificant fine imposed by the European Commission on FB was perceived as a disguise try and there are few Member States of the EU raising the voice regards these issues; the big market players are aware that they are being watched by the Competition Authorities. They are aware that they may be the object of investigation if they restrict or abuse their market power in any possible form.⁽⁹⁵⁾

(92) Via APIs, data are transmitted to FB and are collected and processed by Facebook even when some Facebook users visits other websites. This happens when a user does not even press a «like» button but has called up a site into which such a button is embedded.

(93) Lerner, A.V., 2014. The Role of «Big Data» in Online Platform Competition.

(94)With the preliminary assessment notice, the BKA offers the company a chance to comment on the allegations and provide justification for its conduct an also provide possible solutions. See also Sokol, D. Daniel, and Roisin E. Comerford. “Does antim trust have a role to play in regulating big data?” (2016).

(95)The questions of breaking up the technological companies such as Facebook, Apple, Amazon and Google was broad up, see “The Four: The Hidden DNA of Amazon, Apple, Facebook, and Google” by Professor Scott Galloway, strongly suggesting that the marked is collapsing due to them.

This is an incentive to act cautiously not only in respect to their compliance with competition regulations, but also regarding big data, and in particular regarding the protection of privacy issues. The complexities that Big Data analysis created for purposes of market definition and the assessment of market power for two-sided markets will continue in the future as well. Yet, such evaluations are possible, as seen in the recent case of FB which was not hindered on competition law grounds in the EU level.

These facts could lead to the conclusion that competition authorities shall not react too fast to issue decisions, that are clearly not in a full harmony with decisions from authorities of Member States.⁽⁹⁶⁾ Certainly, such an assessment does not mean that competition law should not play any role in the digital market and that competition authorities should not intervene at all.⁽⁹⁷⁾ Even though it is uncertain that the German approach would be exported to other NCAs or the Commission's practice, the gate is opened.

Three recommendations seem to be considered welcomed in this article. The need for an encompassing and adjusting machinery to be able to analyze the impact big data can have on competition law; the creation of closer network between NCAs of MSs and between NCAs and EU COM; and the application to be conducted only on case-by-case basis.

(96) Monti, G., 2002. Article 81 EC and public policy. *Common Market L. Rev.*, 39, p.1057.

(97) The expression 'digital market' or 'digital world' is used as synonymous to describe a space resulting from electronic means.

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Competition Law in The Age of “Big Data”:

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