

Data & Dominance: Any theories of harm?

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Overview

Context

Four possible concerns about data under Article 102 TFEU :

1. Refusal to share data
2. Abusive discrimination
3. Leveraging customer data
4. Exploitation by unlawful processing or unfair term

} **Exclusionary**
} **Exploitative**

Conclusions

Context – Why are we here?

Populism?

Increased call for intervention to counter Big Tech, Big Data, Market Concentration etc.

Risks with data increasingly examined by Commission, NCAs & other regulators:

- **2014:** European Data Protection Supervisor opinion on privacy & competitiveness [here](#)
- **2015:** German Monopoly Commission Report on Digital Markets [here](#)
- **2015:** UK CMA report on Commercial Use of Consumer Data by Dot.Econ/AM [here](#)
- **2016:** French & German NCAs publish report on Competition Law & Data [here](#)
- **2017:** European Commission consults on “Building the European Data Economy” [here](#)
- **2017:** European Commission publishes “Towards a common European data space” [here](#)
- **2018:** EBA, ESMA and EIOPA publish joint report on big data for financial firms [here](#)
- **2018:** Dutch NCA publishes Insight on competition risks of big data [here](#)
- **2018:** Italian NCA conducts big data fact finding survey [here](#)
- **2018:** European Data Protection Board issue view on economic concentration [here](#)

GDPR enters into effect in May 2018 → Change of tone?

*“This is an industrial revolution, but is also a **societal revolution** because it changes how we interact as humans” – Margrethe Vestager, Competition Commissioner, July 2018*

Context – Let's start from first principles

Is competition law relevant?

Dominance is the key competition prohibition under which data concerns have been analysed.

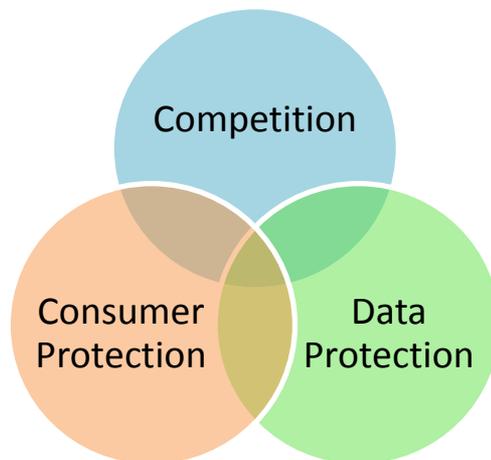
Article 102 TFEU:

- Is there a position of dominance?
- Is there an abuse? Can it be justified?

Has digitalisation and automation increased ability of firms to act **independently** and eliminate all **effective** competition?

Important role for data protection and consumer law

Regulatory humility needed – competition law cannot solve all problems.



1 (a) – Refusal to share data

Generally

No duty to contract – even dominant firms are free to choose with whom they wish to deal.

Exceptionally

Under CJEU rulings in *Magill*, *Bronner*, *IMS* and *Microsoft*, a refusal to share data may be abusive if the data is indispensable to compete, prevents a new product emerging, there is current unmet consumer demand, and the refusal is exclusionary.

But is data an “essential facility”?

- Regulation 1/2003 places burden of proof on claimant (Article 2).
- Factually very difficult to show as data is often replicable, alternative sources, etc.

Various regulatory efforts at EU level enable pro-competitive data sharing

- Regulation 715/2007: Access to technical information for motor vehicles.
- MiFID2 Directive: Enabling access to certain trading data.
- Payment Services Directive: Enables sharing customer account data.
- REACH Regulation: Enables sharing results of substance testing to lower costs.
- Regulation 80/2009: Requires equal access to computerised reservation systems and introduces Code of Conduct for air travel booking.
- GDPR Article 20: Data portability right to shift data to new controller.

1 (b) – Refusal to share data

Only a few competition cases – Some win, some lose

Reuters Instruments Codes (RICs) (AT.39654) [here](#)

- Thomson Reuters licensing policy did not allow customers to use RICs to retrieve data from competitors' consolidated real-time data-feeds for trading / securities.
- In 2012, Commission obtain commitment to enable financial firms that use RICs to switch to competing providers of consolidated real-time data-feeds.
- In 2016, GC uphold commitment following challenge by Morningstar (T-76/14).

IMS/Cegedim (M.7337) [here](#)

- IMS held "industry standard" brick structure to arrange data for sales / doctors.
- In 2014, conditional clearance imposes obligation on IMS to share brick structure.

Contact Software (AT.39846) [here](#)

- Dassault (& Parametric) refuse to licence CAD software to Contact Software to allow it interoperate with Contact's PDM software.
- In 2015, complaint rejected as data not indispensable; work-arounds available and possible to compete. In 2017, GC confirm DG Comp analysis on appeal (T-751/15).

Thoughts:

Data, software and services are functionally related so likely to see more cases.
But Commission keen to preserve incentive to innovate.

2 (a) – Abusive discrimination

Generally

Case law on discrimination under Article 102 is mixed – not always clear if a distinct abuse.

- Discrimination can amount to an abuse where different prices are offered to different categories of buyers or by partitioning national markets (e.g., **United Brands**, C-27/76)
- Price discrimination is charging different customers or different classes of customers different prices for goods or services whose costs are the same (e.g., **Post Danmark**, C-209/10)
- To prove discrimination, dominant firm must (1) discriminate, and (2) its behaviour must tend to distort the competitive relationship or position of business partners (e.g., **MEO**, C-525/16).

Main Elements

- **Equivalent Transactions:** Is the dominant firm's data sharing process with business partners / competitors the same as its downstream service? (e.g., **British Airways**, C-95/04).
- **Dissimilar Conditions:** Is the data sharing process subject to the same terms and conditions as an associated downstream service? (e.g., **Irish Sugar**, T-228/97).
- **Competitive Disadvantage:** Is the data sharing process capable of causing harm to competition, through delay or refusal? (e.g., **Clearstream**, T-301/04).

2 (b) – Abusive discrimination

Cases where discrimination at issue in data markets:

Commission: Clearstream (found dominant)

Software refusal

- Found to have unlawfully discriminated against its competitor, Euroclear by (i) refusing to supply Euroclear with access to the (upstream) market for primary clearing and settlement services, and (ii) applying discriminatory prices to Euroclear.
- Commission impose cease & desist order. Upheld by General Court (T-301/04)

France: Cegedim (found dominant)

Data refusal

- Cegedim refused to sell pharmaceutical sales data to a customer that used CRM software from its competitor, Euris, to process that data.
- FCA say Cegedim discriminated against customers using competing software.
- Interestingly, the sales data held by Cegedim was not an essential facility, even though it had 78% market share. Also, Euris lost 70% of its customers.
- FCA fine Cegedim €5.7 million in 2014, upheld by *Cour du Cassation* in June 2017.

Thoughts

Potential discriminatory issues that might arise with data:

- Supply of software or data to some competitors but not others.
- Offer better / worse terms to protect or maximise ability for data collection.
- Surveillance of digital footprint to create personalised informational choices.

3 – Leveraging customer data

Customer information is often highly valuable

Lots of statements around value of data – if you are dominant in a data set, can you leverage or cross sell data to enter into another market?

ENGIE France [here](#)

- Complaint by competitor, Direct Énergie and consumer association that ENGIE used data on “regulated” gas customers to facilitate cross selling to “unregulated” gas customers.
- Previous interim measure orders ENGIE to grant competitors access to customer list.
- FCA say historical database and marketing resource on 11 million French gas customers inherited from former monopoly was used by ENGIE to self-promote gas and electricity.
- 22 March 2017: FCA fine ENGIE €100 million in settlement procedure for abuse.

Other recent references:

- **Google Android** (AT.40099) [here](#)
 - Google obstructed rival search engines from collecting valuable user data which “helped Google to cement its dominance as a search engine”.
- **Apple / Shazam** (M.8788) [here](#)
 - Commission concerned Apple would obtain access to commercially sensitive data about customers of competitors to allow Apple to directly target those customers.

4 – Exploitation by unlawful processing or unfair term

Traditional view

- Data protection breach not a matter for competition law (e.g., **Asnef-Equifax**, C-238/05).
- Commission's 2009 Guidance on Enforcement Priorities does not address exploitative abuses.

German BKA Investigates Facebook

- FB tracks user data not generated “on Facebook” but collected from third party sites via APIs.
- BKA exploring certain theories of harm:
 - Service conditional upon extensive permission to access personal data is “exploitative”.
 - Abuse ties more users to its network and excludes other social networks.
 - FB is more and more indispensable for advertising customers.

Two worlds collide

- Some precedent for non-competition breach grounding abuse (e.g., **AstraZenaca**, C457/10)
- Certain assumptions underpin theory:
 - Link between the breach of data protection or consumer rules and market power?
 - Competition law must look beyond mere price parameters?
 - Exploitative abuses have increased relevance for digital markets?
- What about “excessive data collection” rather than actual breach of privacy? Impact of GDPR?

Conclusions

So far, lots of smoke without a fire

- Commission open to new cases, but remains sceptical of dominance claims.
- Reality is that big data is not necessarily indicative of market power if data is replicable.
- In practice, most likely to see expressed in EU Merger Regulation – e.g., “data concentration”:
 - **Facebook/WhatsApp** (2014) M.7217 [here](#)
 - **Microsoft/LinkedIn** (2016) M.8124 [here](#)
- Main theory of harm remains refusal to supply but **“these are the hardest cases to prove”**.

Future

Likely to see novel cases in data and digital markets as open questions remain:

- When is acquisition cost of data prohibitive for market entry?
- Role of exclusive contracts by dominant firms to acquire data?
- Role of GDPR to enable data portability?
- Pooling or cross usage of data sets between established firms?
- Can unlawful processing or unfair term amount to abuse?
- Ownership of data sets in Internet of Things?
- Formal role of Data Protection Authority in Article 102 or EUMR review?

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Thank you

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