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A LEGAL RESPONSE TO DATA-DRIVEN MERGERS

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Personal data lead a double life in digital society: they are a digital reflection of our physical and spiritual selves while also being of economic value, given the revealing insights and predictions that are gleaned from them. Amassing a large volume and variety of data is therefore a core commercial objective of firms involved in data analysis and profiling.

This 'data grab' is facilitated in two primary ways. First, it is legitimised by the data protection framework, for instance when individuals consent to personal data processing or such processing is necessary for the performance of a contract. These legal bases for the collection of large volumes and varieties of data have long been, rightly, criticised by data protection advocates but their limits – including whether an individual can be excluded from a service if she refuses consent - are only now being tested before administrative authorities and courts. The fruit of these challenges has yet to be borne. Similarly, the principle of 'data minimisation', key to ensuring the proportionate aggregation of data, has thus far remained dormant, although calls mount for it to be rendered operational (see, for instance, Hildebrandt 2018).

The second way in which such a data grab is facilitated – through mergers and acquisitions – has received less critical attention. Competition law is the main legal instrument available to public authorities to curtail the exercise of private power. Yet, competition law remains generally unconcerned with the *acquisition* of power, provided that power does not significantly impede effective competition on relevant markets. Thus, merger control provides a facilitating framework for mergers motivated by data acquisition (data-driven mergers). This is despite the fact that such mergers often undermine data protection policy.

This provocation acknowledges that competition law cannot be instrumentalised to achieve data protection aims yet argues that it should not be applied in a manner that actively hinders the achievement of effective data protection, as is currently the case (section 1). Rather, there must be realistic and holistic oversight of data-driven mergers to limit the long-term implications of such transactions on the effectiveness of data protection rights (section 2).

The role of competition law in undermining data protection

Competition law is designed to promote consumer welfare, which is enhanced when consumers receive lower price and better quality products as well as more choice and innovation. Yet, mergers and vigorous competition limit choice by reducing the number of firms operating on any given market. Thus, it is arguable that competition law does not seek to preserve choice as such. Rather, competition authorities only intervene in acquisitions where effective competition is likely to be significantly hindered. Data protection and privacy concerns frequently fall into the blind spot of such economic analysis, as the *Facebook/WhatsApp* transaction vividly illustrates.

That transaction received attention on both sides of the Atlantic. The US Federal Trade Commission approved the merger, subject to the proviso that WhatsApp continue to honour its existing commitments to users (FTC 2014). In practice, this meant that

WhatsApp users were given notice, that Facebook would transfer their names and phone numbers to Facebook, and a choice – a take-it-or-leave-it choice. In the EU, the transaction was similarly approved, with the Commission noting that 'any privacy-related concerns flowing from the increased concentration of data within the control of Facebook…do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules' (*Facebook/WhatsApp* 2014, para 164). Data protection and privacy concerns stemming from the data aggregation were overlooked, with two elements of the Commission's reasoning meriting further attention.

First, while it may seem trite to state, where firms are not competing, mergers will ordinarily not be deemed to lessen effective competition. Thus, for instance, the Commission held that as consumers 'multi-home' (by using several applications) on the market for consumer communications applications, the acquisition would not negatively impact upon competition on that market. Pursuant to such logic, the acquisition by data giants of firms in markets in which they are not yet operating, or where they do not yet face a competitive constraint, would not be problematic. A good example is Google's acquisition of mapping company Waze, approved in the UK on the grounds that Waze did not yet exercise a competitive constraint on Google. Such reasoning facilitates defensive acquisitions of nascent competitors before they reach the scale to disrupt the status quo in the market (Stucke and Grunes 2016). Facebook's acquisition of WhatsApp, a 'maverick' firm offering individuals superior data protection, could be viewed from this perspective. The Commission did not however examine the impact of the merger on the future quality of the 'privacy' offered by both, despite acknowledging that Facebook Messenger and WhatsApp could be differentiated on the basis of privacy policies (*Facebook/WhatsApp* 2014, para 102).

Secondly, personal data are treated solely as an economic asset, with the proliferation of data viewed positively. A key concern in data-driven mergers is that the aggregation of data by the merging parties will constitute a barrier to market entry for potential competitors. Thus, competition authorities often consider whether potential competitors will have difficulty accessing a sufficient volume and variety of data following the transaction. Viewed through a competition lens, the availability of data on secondary markets, through data brokers and other sources, is a boon while such availability is difficult to square with core data protection principles such as purpose limitation and data minimisation. In *Facebook/WhatsApp*, the Commission held that Facebook's use of WhatsApp data to improve its targeted advertising would not give Facebook a competitive boost as a large quantity of valuable Internet user data for advertising purposes would continue to be available post-merger.[1]

Not only does such reasoning overlook data protection concerns, the end result is that one limb of digital policy – competition law – poses a significant challenge to the effectiveness of another limb – data protection. While proponents of a clear delineation between these legal spheres argue that the ex post application of data protection law should suffice to ensure data protection, such reasoning fails to acknowledge,

and even exacerbates, well-documented structural impediments to individual choice (Solove 2013; Lazaro and Le Métayer 2015). In this context, while individuals may 'consent' to having the merged entity aggregate their data, and continue to use its services, their choice – and control over their personal data – is nevertheless curtailed. Indeed, consent in situations of power asymmetry must be treated with caution (Borgesius et al 2017). The GDPR has the potential to improve the status quo and to deliver individuals more effective data control however, as noted above, its provisions have yet to be interpreted by courts. Furthermore, while technically free to abstain from, for instance, using Google products and services, such freedom requires considerable resources and initiative.

An assessment of the externalities of data-driven mergers

As the European Data Protection Board recognises, the time has come 'to assess longer-term implications for the protection of economic, data protection and consumer rights whenever a significant merger is proposed' (EDPB 2018). This provocation argues that such an assessment requires both a realistic and a holistic approach to data-driven mergers.

To date, most competition authorities have remained wilfully oblivious to the data protection implications of merger transactions, claiming that data protection law should remedy any eventual data protection concerns. Yet, there are avenues available to incorporate data protection into existing competitive analysis, without extending or distorting the aims of competition law.

First, there is now wide recognition that the level of data protection offered to individuals is an element of product or service quality and a competitive parameter on which companies can compete. How such quality if affected by a merger can be examined.

Secondly, when making competitive assessments, competition authorities take into consideration the existing legal framework on a market as contextual background. Data protection forms part of this legal landscape and should be taken into consideration in this way. Yet, the mere existence of data protection regulation should not lead to the assumption that existing market structures reflect individual preferences. In 2012 Farrell, a competition economist, documented a 'dysfunctional equilibrium' on data-driven markets, confirmed more recently by Which? (a UK consumer organisation). Which? suggests that some individuals are 'rationally disengaged': the perceived benefits of searching for data-protection friendly services are outweighed by the costs, making it rational for individuals not to engage in this search (Which? 2018). The GDPR's stronger substantive protection and more effective enforcement provisions have the potential to disrupt and reconfigure this vicious cycle. Competition authorities should nevertheless engage with behavioural economic analysis in order to understand how consumer choice is actually exercised and what inhibitors influence decision making (Fletcher 2017). The law in practice often deviates from the law on the books and therefore, for instance, the mere possibility of data portability under the GDPR does not necessarily prevent 'lock-in' to particular digital services (as assumed by the *Commission in Sanofi/Google/DMI*).[2]

In addition to being realistic when assessing data-driven mergers, it is also necessary to take a holistic approach to such transactions. Competition agencies are not well placed to do this: each notified transaction is examined on its facts alone and many transactions are never notified to these agencies if the turnover of the acquired company is not significant (as is frequently the case with technology start-ups). Thus, technology giants have been able to engage in a strategy of incremental acquisition that when viewed collectively paint a concerning picture of consolidation. Since the early 2000's Google, for instance, has acquired many of its household brands through takeovers: Android; YouTube; Doubleclick; Deepmind; and Nest Labs, to name but a handful (Reynolds 2017).

Recommendation

In light of the complex economic, social and political ramifications of personal data aggregation, a more cautious approach to data-driven mergers must be adopted. This could entail a moratorium on all acquisitions by certain technology giants, as proposed by the Open Markets Institute (Lynn and Stoller 2017). A preferred solution, hinted at by the EDPB in its statement on economic concentration, would be to subject data-driven mergers to a separate 'non-competition' assessment running in parallel to the competitive assessment. Such an assessment is currently afforded to media mergers in many countries, in recognition of the broader implications such transactions can have on media plurality. Given that the volume and variety of data aggregated by technology companies similarly entails broad societal implications, the case for a similar non-competition assessment in data-driven mergers must now be made.

Notes

[1] Case M.7217 – Facebook/WhatsApp [2014] OJ C-417/4, para 189.

[2] Case M.7813 - M.7813 - Sanofi/Google/DMI JV [2016] OJ C-112/1, para 69.

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