Data Sharing and the Data Economy: Aspirations and Legal Realities

Competition Law: Its Impact on Data Sharing and the Data Economy

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Data Economy, Data Sharing & Competition Law

• Data economy
  – Market place where data is at the core of the value creation process
  – Relies on data sharing

• Competition law
  – Promotion of ‘effective and undistorted competition’
    • Enhance consumer welfare
  – Focusing on economic activity in a market

• Three pillars
  – Merger control
  – Cartels (TFEU Art 101)
  – Abuse of dominance (TFEU Art 102)
Agenda

1. Competition law as a facilitator of data sharing
2. Data sharing concerns under competition law
3. Data sharing by governments & competition
Competition Law as a Facilitator of Data Sharing

- **EU ‘Data Economy’ Communications**
  - Companies that generate data do not share with third parties (downstream use)
  - 50% experienced portability problems
  - Undermines competition and stifles innovation

- **What role can competition law play?**

- **The ‘essential facility’ doctrine**
  - Examples: Telecom lines, railways, ports
  - Imposes a duty to supply on dominant undertakings
  - If refusal to supply has the effect of foreclosing competition in a secondary market

- **Can competition law force data sharing?**

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Data as an Essential Facility

- **Data as ‘essential facilities’**
  - Magill (1995)
  - Microsoft (2007)

- **Mostly for refusal to license proprietary data (IP protected)**

- **High standard of proof: 4 conditions**
  - 1) Indispensability;
  - 2) Refusal prevents emergence of a new product/technical dev’t where there is a potential consumer demand;
  - 3) Refusal prevents effective competition in the secondary market; and
  - 4) Refusal is not objectively justified.
Challenges with Digital (Consumer) Data

• **Indispensability**
  – No alternative sources of data and
  – Technical, legal or economic obstacles that make it impossible or unreasonably difficult to collect the data

• **Downplaying arguments**
  – Ubiquitous & multi-purpose
  – Non-rivalrous

• **Facebook/WhatsApp merger**
  – All ‘Internet user data’ substitutable for advertising
    • Data from Facebook & WhatsApp substitutable → Google, Apple, Microsoft, AOL, Twitter, LinkedIn, Adobe, Yelp and ISPs

• **What about for improving services?**
  – Doesn’t apply to horizontal competitors

Cont.

• **Denial of access to financial data**
  – Commission investigation on banks for refusing access to bank account information despite consent
    • Both Art 101 & 102
    • Related to Payment Service Directive 2 (PSD2)?

• **French CLA**
  – GDF Suez (2014)
  – Ordered to grant its competitors access to parts of its database relating to consumers (contact & consumption data) b/c
    • Data was not obtained based on ‘competition on the merits’
    • Database gives GDF unjustified advantage over its competitors +
    • Financially unreasonable to replicate

• **How to balance?**
Data Privacy as an Objective Justification for Not Sharing

- Refusal to give access may be justified
  - Can data privacy obligations justify refusal to give access to data?
  - GDF Sues refused due to data protection obligations

- Margin of appreciation
  - Legal basis under data protection?
    - GDPR Article 6(1(c))
      - Processing ‘necessary for compliance with a legal obligation to which the controller is subject’.

- GDF Suez
  - FCA & CNIL collaborated and asked for opt-out
  - Many opted-out

Limitations of the ‘Essential Facility’ Doctrine

- Doesn’t apply where there is no dominance
- Doesn’t apply to horizontal competitors
- Can’t be used to seek access in order to open-up new markets
- Questions over its applicability to consumer data
- Procedural and administrative challenges
- Plus, competition law is slow
EU Regulatory Instruments Facilitating Data Sharing

- **PSD 2**
  - Facilitates access to bank and transaction information

- **Software Directive**
  - Interoperability information

- **PSI Directive and the new European Interoperability Framework**
  - Government held-data

- **Medicines Approval Regulation**
  - Pharmaceutical testing data

- **Other instruments with consumer focus**
  - GDPR Art 20 data portability
  - Right of data ‘retrieval’ (Article 13 of Draft Digital Content Directive)
  - Smart meter data (Energy Efficiency Directive)
  - Energy consumption data for industrial customers (Gas and Electricity Directives)

Comm. ‘EU Data Economy’ & the Proposed Regulation for the Free Flow of Data

- **Objective**
  - Creation of an effective EU single market for data-based services,
  - Remove remaining barriers to a competitive data-driven economy in Europe

- **Mechanisms**
  - Data producer’s right to authorize the use of data
  - Data portability right for companies, esp SMEs
  - Access based on FRAND terms after anonymization

- **Included in the draft Regulation**
  - Porting of data by professional users (Art 6)
Competition Concerns from Data Sharing

• **Three issues**
  - Data sharing erects entry barriers
  - Sharing of price related information
  - Sharing of personal data in breach of data protection rules?

• **Barriers to entry due data concentration**
  - Mergers
  - Whether the combination of data by merged entity creates barrier to entry?
  - Scale in data + network effects → entry barrier
  - **Google/DoubleClick, Facebook/WhatsApp**
    - More data → better targeted ads → make it difficult for others to compete!

  The more data you can collect, the more you know, the better product you can provide, but also the more powerful will you be towards others.
- Lesser standard of proof than ‘essential facilities’
  - Possibility of reduced competition is enough
  - Many instances of data sharing orders in merger cases than ‘essential facility’ (Art 102)

- Possible remedies
  - Divestiture of data as a remedy
    - Thomson/Reuters (2008)
    - US: Baazorvoice/Power-Reviews (2014)
  - Restriction on sharing
    - US: Google ITA – DOJ issued order that Google should not use data about ITA customers for its own purposes (2011)
  - Sharing with competitors
    - French CLA Enerest/Electricité de Strasbourg (2012)

Data Sharing and Cartels: Art 101

- Agreements not to share
  - Commission investigation on banks

- Pricing algorithms that rely on personal data
  - Granify
  - FinTech sector
    - Pricing based on consumer data

- Breach of Art 101?
  - Data pooling?
  - Pooling in breach of DP law?
    - Allianz Hungária Biztosító Zrt, v Gazdasági Versenyhivatal [2013]
  - Microsoft/LinkedIn

Kreditech – ‘all data is credit data’
Discriminatory/Tied Access to Data: Art 102

• **Discriminatory/tied access to data**
  – Related to the ‘essential facility’ doctrine
  – French Competition Law Authority (2014)
    • Abuse of dominance
    • Cegedim refused to give access to its medical database to customers using software from a competitor
  – Apply to digital markets?
    • App stores forcing apps to share data? Apple/FT case
    • Joint report from French and German CLA

• **Restriction on portability**
  – Google AdSense statement of objection
    • Exclusivity: requiring third parties not to source search ads from Google’s competitors
  – Restricting data portability of users?
    • Cf with the EC investigation on banks

Cross Usage of Data as an Abuse of Dominance (Art 102)?

• **Cross-usage of data**
  – Belgium: €1.9 million fine for the Belgian National Lottery (France: EDF (2013))
    • For repurposing PD acquired as a legal monopoly to open markets
    • Data not acquired ‘following competition on the merits’
  – Digital companies cross-usage
    • Cross-usage in breach of data protection rules as exclusionary abuse?
      – Deviation from ‘competition by merits’?
    • Joint report by French and German CLAs
      – If there is strong link between the data collection and the undertaking’s market position
Government Data Sharing and Competition Concerns

The Google Examples

- **Google, Sidewalk Labs, Canada**
  - To build High-tech Quayside neighborhood
  - Self-driving “taxi-bots” & busses
  - Equipped with a system that tracks the flow of people and transport vehicles
  - Robot vehicles would move waste and other goods through underground tunnels
  - Wood-composite modular buildings

- **Google DeepMind Project, UK**
  - UCL Hospitals NHS Foundation Trust → 700 radiography scans
  - Moorfields Eye Hospital in London → 1 million eye scans
  - The Royal Free NHS Foundation Trust → a wide range of health information from 1.6 million patients
Concerns from Government Data Sharing

• Mostly data privacy concerns
• Often neglected issues
  – Underestimate the value of data
    • No value-for-money discussions
  – Competition concerns
    • First mover advantage
    • Entrench market position
• Considerations going forward
  • Ensure that the public benefits from the value of data
  • Leverage the walled garden of algorithms of such companies
  • Or Include smaller startups to partner and benefit

Summary and Conclusion

• Data economy and competition law
  – Market place – data sharing is key economic activity
  – Competition law focuses on economic activity in a market
• Competition law as facilitator of data sharing
  – Essential facilitates
  – Difficult for consumer data but possible
• Data sharing concerns
  – Sharing (combining) data erects barrier to entry
  – Sharing price-related information
  – Cross usage of data (in breach of data protection rules)?
• Government sharing
  – Take account of benefits
  – Care not to exacerbate the ‘first-mover’ advantage
  – Using procurement to open-up ‘walled-gardens’
Thank you!!