



British Institute of
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Comparative Law

Session 2 Data Driven Platforms and converging enforcement of EU rules

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VALUE OF DATA - COMMERCIAL USE OF DATA

- What do companies do with data and why are they interested in data?
 - (i) Gather the data;
 - (ii) mine the data;
 - (iii) analyse the data – create intelligence (patterns) from the data;
 - (iv) Store the intelligence.
- Nothing new. This has been done for decades.
- What is new, is the nature, amount and use of data collected.
- The problem (from a privacy point of view) is that companies not only store the intelligence, but also store all the personal data gathered.
- The reason for storing data, in addition to intelligence, is for potential future use.
- The intelligence is where the money is made. Thus, storing the data for future use is purely to potentially profit from that data if it can be turned into intelligence at a later stage, as data in and of itself is worthless.

SIGNIFICANT MARKET POWER

- According to the joint report between the BKA/CC (May 2016), data can be a source of market power provided that:
 - (i) access to a large volume of variety of data is important in ensuring competitiveness on the market;
 - (ii) the collection of data may result in entry barriers when new entrants are unable either to collect data or to buy access to the same kind of data.
- Conducts depriving some competitors from access to data could also weaken competition and even lead to exclusion of competitors:
- (i) refusal to allow access to data;
- (ii) discriminatory access to data or exclusive contracts could be abusive behaviour in certain circumstances;
- (iii) Data could also be a vehicle for price discrimination.
- Data collection may also facilitate collusion when these data are used to fix prices through the use of algorithms.
- Even though market transparency as a facilitating factor for collusion has been debated for several decades now, it gains new relevance due to technical developments such as sophisticated computer algorithms.

COMPETITION LAW CAN DEAL WITH DATA USED TO CREATE SIGNIFICANT MARKET POWER

- Can competition law deal with these data problems?
- Yes!
- The three pillars of competition law:
 - (i) Restriction of competition (Article 101 TFEU);
 - (ii) Abuse (Article 102 TFEU);
 - (iii) Significant impediment to effective competition (EUMR).
- These three pillars are all about the same thing – abuse of market power.
- These pillars – or the substantive law – are perfectly capable of dealing with the accumulation of data and online platforms.

ONLINE PLATFORMS

- European Commission's Communication on Online Platforms and the Digital Single Market Opportunities and Challenges for Europe (May 2016)
- Online platforms are subject to existing EU rules in areas such as:
 - (i) competition;
 - (ii) consumer protection;
 - (iii) protection of personal data; and
 - (iv) single market freedoms.
- Compliance with these rules by all, including platforms, is essential to ensure that all players can compete fairly.
- This will create trust for both businesses and the general public to confidently engage with online platforms.
- Are there limits to antitrust?

LIMITS TO ANTITRUST

- Are other laws, such as IP, data protection, consumer protection, better able to deal with issues arising as a result of online platforms?
- There are many problems created by the digital world – competition law cannot possibly deal with all of them.
- Privacy came up in *Microsoft/Skype* and other mergers where the Commission was asked to look into privacy, it turned out to be difficult.
- In *Asnef-Equifax* [Case C-238/05] relating to exchange of personal information on solvency and credit worthiness, the CJEU recognised 'any possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law, [as] they may be resolved on the basis of the relevant provisions governing data protection.'
- However, the tide is turning.
- In *Allianz Hungaria* [Case C-32/11] the CJEU recognised that an infringement of one area of law could possibly be a factor in deciding that there has been an infringement of competition law as well, therefore it was possible that a breach of data protection law could constitute an infringement of competition law (e.g. through exclusionary behaviour or collusion).

TREATY OBLIGATIONS

- Under the Lisbon Treaty, EU has a positive obligation to uphold fundamental rights, and not simply a negative obligation to avoid abuse of market power.
- These fundamental rights include not only privacy or data protection, but also the freedom to establish a business and freedom of expression.
- The preliminary Opinion of the EDPS in 2014 on Privacy and competitiveness in the age of big data acknowledged:

media
is
choice
given

‘Competition law and merger control were explicitly used to ensure plurality, a goal closely tied to the right to freedom of expression; it is open to debate whether the time is approaching where plurality of choice in privacy-intrusive, personal data-fuelled digital markets should be given similar treatment.’

JURISDICTION/PERFORMANCE

- Some ECN initiatives:
 - House of Lords Report Select Committee on European Union, Online Platforms and the Digital Single Market, 10th Report of Session 2015/16.
 - BKA/CC report on Big data (May 2016).
 - CMA – Online vertical practice (21 June 2016).
 - MonopolKommission main report chapter V Digital Markets: The sharing Economy and FinTechs (20 September 2016).
- ICN has a big role to play in this agenda.
 - The ICN can seek input from its members in order to develop standards and best practices which can be applied consistently across a variety of jurisdictions.