

MOVE TO REGULATE BIG DATA COMPETITION: EU READY TO TAKE THE FIRST STEP

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This article attempts to identify the new direction in which the European competition regulators are headed. The German cartel office, 'Bundeskartellamt's' scrutiny of the Facebook privacy policy and their earlier collaboration with the French antitrust authority to issue a joint report on Big Data signals a new initiative. At the EU level, collaboration with the European Data Protection Officers is being witnessed to regulate the Big Data players in a better manner. While it is still not feasible to say that the EU Competition Commission is going to begin enforcing data protection laws, it is moving in a direction to ensure that in its decisions it will not turn a blind eye to the objectives of ensuring privacy while pursuing its main objective of enforcing European Competition Law. The article capitulates the recent developments in this regard by the National Competition Authorities in the European Union, hereinafter "EU" and the signaling of new EU rules which may facilitate the Competition Authorities to regulate the companies which collect and hold consumer data.

I. INTRODUCTION

Consumers worldwide are concerned with the data that is being collected by companies like Facebook and Google whether it is through user searches on Google or personal data profiles which are fed into big databases on Facebook. While legislators and data protection officers may have looked at these concerns and identified privacy issues, the competition authorities in EU have decided to arm themselves with new ammunition to address Big Data players' behaviour which impacts competition as well. Not only that, in a trendsetting move, the Competition Commission, hereinafter, "Commission" has joined hands with the data protection officers to develop a holistic understanding of the nascent Big Data and the way it impacts individuals and competitors. The proactive approach of EU regulators to prepare themselves for Big Data is an inspiring move which promises a shift in EU competition policy in the coming years.

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II. WHAT IS BIG DATA?

Big Data may be defined as large amounts of different types of data, produced at high speed from multiple sources whose handling and analysis require new and more powerful processors and algorithms.¹ However, it is difficult to define data without placing it in the manner and scale at which it is collected. While at a small scale, data collection may seem harmless and difficult to monetize, we are now witnessing humongous databases of consumer information resultant from the network effects leading to repositories with humongous collections which are of immense commercial value. The data in isolation is not of concern, but the information it provides about individuals, such as their behaviour, preferences, age, geographic location, social status, political views or turnover achieved by a business entity. Currently, the focus of regulation is 'personal data' which defined according to Article 2 of Directive 95/46/EC of the European Parliament and of the Council is any information pertaining to an identifiable natural person by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity which is extensively regulated therein.

III. BIG DATA AND ITS NEXUS WITH COMPETITION LAW

Going by the recent developments, the power arising out of such accumulation of data is also a matter of concern for the EU Competition Authorities. The behaviour however, is to be looked at in a different way than the data protection officer would. The Commission is concerned with behaviour of undertakings which collect or hold big data and the manner in which they are capable of affecting competition. Such behaviour may include merging with smaller entities for the data they hold, or driving out competitors which do not hold or are incapable of collecting such data, alluding to a new source of market power.² Concomitantly, the European Data Protection agencies have been looking into the interplay of data protection and competition law to achieve aims of consumer protection, an example of which is the preliminary opinion of the European Data Protection Supervisor which examines the interplay between the issues of privacy and competition in the digital economy.

¹ European Union 2014, 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*, viewed on 7 March 2017, [https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2014/14-03-26_competition_law_big_data_EN.pdf] at 6.

² *Autorité de la concurrence* and *Bundeskartellamt*, "Competition law and data", 2016 viewed on 7 March 2017, [<http://www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf>].

IV. LEGAL BASIS FOR ENFORCING PRIVACY OBJECTIVES THROUGH COMMISSION

While some may question the legal basis for the competition authorities looking into data protection issues, Article 16 of the Treaty on Functioning of the European Union, hereinafter, “TFEU”) which recognises everyone’s right to protection of personal data, when read with Article 7 TFEU which identifies the Commission’s obligation to ensure that the laws and policies are applied in a consistent manner, allows for a concerted enforcement through data protection agencies and the Commission. In addition to that, all EU agencies including the Commission are bound to protect and promote rights set out in the European Charter of Fundamental Rights, Article 8 of which provides for the right to data protection. While it is not the objectives of data protection that the Commission is seeking to enforce, but data related power might result into market power which might result in agreements precluding competitors or mergers which are not adequately addressed by the turnover thresholds. As we see below, the Commission and the national regulators have begun examining these aspects of data related power.

What is the Commission doing about it?

It appears that presently, the Commission is observing the national competition agencies’ initiatives in this direction as test cases for future intervention. The *Bundeskartellamt* is currently investigating Facebook's potential abuse of dominance by imposing unfair privacy terms which may violate German law.³ Concurrently, the French antitrust authorities published a report in collaboration with the *Bundeskartellamt* on Big Data’s impact on antitrust law.⁴ Last year in June, the UK Competition and Markets Authority also highlighted potential anticompetitive effects of Big Data collection, and a potential to exclude competitors.⁵

These competition concerns have reverberated through to the EU competition commission as well. Earlier this year, EU Commissioner Margarethe Vestager announced that EU plans to scrutinise competition concerns related to big internet companies building coffers with consumer data.⁶ She

³Press Statement by Bundeskartellamt, (2016), [online] available at:https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html

⁴ Supra note 2.

⁵Press Statement by Competition and Markets Authority, (2015), [online] available at:<https://www.gov.uk/government/news/cma-publishes-findings-on-the-commercial-use-of-consumer-data>

⁶Auchard, E., (2016), *EU competition chief to eye 'big data' concerns in merger probes*, REUTERS, available at: <http://www.reuters.com/article/us-europe-data-competition-idUSKCN0UV0ZG> [Accessed 6 March 2017].

raised several reasons for why the Competition commission is taking a closer look at the mergers involving big data companies. According to her, if a company uses consumer data in a way that outweighs benefits for consumers or disregards their privacy, the commission will not hesitate from stepping in. She also suggested, that the new issues associated with Big Data may warrant the Commission empowering itself with new rules to regulate these companies better. What kind of new rules can be expected to come into force may become clearer after the Commission finishes its impact assessment.⁷

It is also to be mentioned that soon after, in a Big Data and Competition conference organised in September 2016, the commission appeared to have joined hands with the Data Protection Agency to address these concerns together.⁸ While the Commissioner noted advantages which Big Data provides such as accurate personalised recommendations, she signalled that companies need to factor privacy at the time of collecting data and not merely as an afterthought and ensure that such data is used in a way that does not hamper competition.⁹

V. COMPETITION COMMISSION & TREATMENT OF DATA HOLDING

MERGER CASES

There are certain examples of merger cases involving data holding companies which were presented for approval before the EU Commission and secured merger approvals. For instance in 2008, the Google/DoubleClick merger met with opposition because of concerns like Google would be able to track online consumer behaviour in a better manner once it is merged with DoubleClick, an “ad-serving” technology provider was nonetheless approved considering there were other competitors who would still exert significant competitive pressure¹⁰. Moreover, in the 2014 Facebook/Whatsapp merger case, the commission looked deeper into the privacy concerns when Facebook sought to merge with Whatsapp and took note of the privacy concerns such as Facebook’s ability to use Whatsapp data to improve its online advertising or concerns regarding change in the end to end

⁷Out-Law (2016), *Competition authorities could get greater powers to tackle 'big data issues' through new EU laws*, Out-Law[Online], 3 Oct, available from:<https://www.out-law.com/en/articles/2016/september/competition-authorities-could-get-greater-powers-to-tackle-big-data-issues-through-new-eu-laws/> [Accessed 6 March 2017].

⁸Vestiges, M (2016), *Big Data and Competition*, transcript, *Europa.eu*, 29 September, viewed 6 March 2017, https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/big-data-and-competition_en at 1-2.

⁹*Id* at 12.

¹⁰Loughran M and Gatti J, (2008), *Mergers: Main developments between 1 January and 30 April 2008*, Competition merger brief no. 2, accessed 6 March 2017, [http://ec.europa.eu/competition/publications/cpn/2008_2_37.pdf] at 40-41.

encryption but approved the merger for there were adequate competitors to exert competitive pressure¹¹

However, in future there maybe cases wherein a company buys out another company just because of the data it holds, before it has even turned that into profits warranting a closer scrutiny for mergers involving some data element. However it is unlikely that companies will be targeted for merely possessing such data, but it is the manner in which they use and share this data which might be scrutinised. Therefore, it may be reasonably expected that Big Data players including retailers, insurers, car manufacturers and software companies should expect increased scrutiny regarding their use and sharing of the unique data which they possess. They should be wary of shutting competitors out from data use altogether, or allowing it to be used on discriminatory terms or imposing excessive conditions on the use of data.

The Commission has suggested ways to share data such as data pooling, which will allow companies to share the data in a fashion which will enhance competition and wouldn't hurt consumer interests.¹² In addition, the Commission has issued a communication on the applicability of Article 101 TFEU in relation to horizontal co-operation agreements which provides guidance on cooperation without being ascertained under article 101 TFEU which relates to anti-competitive agreements.

VI. INDIAN REGULATORY AUTHORITIES & BIG DATA

While concerns about competitiveness associated with net neutrality are still fresh from the Telecom Regulatory Authority's decision against discriminatory access to data services¹³, Big Data has not come under specific competition scrutiny in India. There were reports which indicated that the Facebook-Whatsapp merger might be looked into¹⁴but there were no follow-up reports as to whether an application of approval was made or not and whether an approval came through. There has been an attempt to make out a case for the Competition Commission examining the Facebook/

¹¹ Ocello O, Sjödin C and Subočs A, (2015), *What's Up with Merger Control in the Digital Sector? Lessons from the Facebook/WhatsApp EU merger case*, COMPETITION MERGER BRIEF no.1, accessed 6 March 2017, [http://ec.europa.eu/competition/publications/cmb/2015/cmb2015_001_en.pdf], at 5-7.

¹² Supra note 8.

¹³ Ghoshal D (2016), *Why TRAI backed net neutrality- and killed Facebook's Free basics in India*, QUARTZ INDIA, Accessed 6 March 2017, [<https://qz.com/612159/why-trai-backed-net-neutrality-and-killed-facebooks-free-basics-in-india/>].

¹⁴SPN Staff Writers 2014, *Facebook-WhatsApp Deal needs approval of India's fair trade regulator*, SiteProNews, Accessed 6 March 2017, [<http://www.sitepronews.com/2014/03/10/facebook-whatsapp-deal-needs-approval-indias-fair-trade-regulator/>].

Whatsapp merger too.¹⁵ While the Competition Commission of India is yet to examine Big Data and its impact on competition, it is noteworthy to mention opinion 83/2015 issued by the Competition Commission of India, wherein dominant position of Whatsapp and Google was alleged by the Informant.¹⁶ The Commission however observed that the informant had failed to make out a case under section 4 of the Competition Act 2002, under which, imposition of unfair or discriminatory terms has to be shown in sale of goods or service or price in purchase or sale of goods or services

VII. CONCLUSION

The developments mentioned above suggest a new development in the offing. Data, which has not been ascertained as a competitive concern, is a major source of power today. The regulators in the EU are keeping a close eye on how Big Data companies are making use of such data. It will therefore not be surprising to see new rules modifying the turnover thresholds in the merger regulation or additional guidelines on article 102 TFEU specifically in relation to data holding companies. The EU competition commission's indication to adapt new rules signals a significant policy change in its approach to handle Big Data.¹⁷ If such indications materialize, the EU Commission will have empowered itself enough to deal with Big Data entities like Facebook and Google which have traditionally been dealt with in the sphere of data protection alone.

¹⁵Bose, A (2014), *A Review Is Needed : Why India's Antitrust Regulator Should Scrutinize the Facebook-WhatsApp Merger*, COMPETITION LAW INSIGHT, accessed 6 June 2017, <https://ssrn.com/abstract=2534732>, at 3-7.

¹⁶ Taj Pharmaceuticals Ltd. and others v. Facebook and others (case No. 83 of 2015).

¹⁷ Supra note 8.