



UiO : **Department of Private Law**

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Data Privacy and Competition Law in the Age of Big Data

**The Commercialization of Personal Data and its
Theoretical and Practical Implications for Data
Privacy Law and Competition Law**



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Agenda

1. **Setting the scene – commercialization of personal data**
2. **Data and competition law**
 1. How does data affect balance of economic power?
 2. Could data be used to foreclose competition?
3. **Privacy and competition law**
 1. To what extent is privacy an antitrust concern?
 2. Can firms exercise market power by degrading data privacy or excluding competition in data privacy?
4. **Conclusion**



Personal Data as Valuable 'Input' and 'Currency'

- **Personal data**
 - The new oil
 - The new currency
- **Value for business**
 - Improve the quality & profitability of services
 - Source of innovation
 - Targeted ad
 - Google & Facebook USD 106 bill in ad revenue (2016)
- **Value for consumers**
 - “Free(mium) services”
 - Time saved from using search ~ EUR 140 billion
 - Price reductions
 - Source of revenue
 - PDS & social networks that pay users for sharing



Research Question

- What are the theoretical and practical implications of the commercialization of personal data:
 - For the foundations and policy boundaries of
 - Data privacy law and
 - Competition law?
 - For the intersection between the two?

Commercialization of Personal Data and its Implications for Competition Law

Commercialization of Personal Data and Competition Law

- **How does commercialization of personal data impact the application of competition law rules?**
 - Mergers
 - Article 101
 - Article 102
- **Personal data can be an issue**
 - In defining markets
 - In assessing market power and dominance
 - In assessing abuse of dominance or anticompetitive conduct
 - In enforcing competition law remedies
- **Focus on three issues:**
 - Role of data and related network effects for market power
 - Data-related anticompetitive conducts
 - Privacy as antitrust law concern

Merger Control and Personal Data

- **Merger cases**
 - Merger & acquisitions in data-rich industries tripled (2008-2012, OECD)
- **Key issues**
 - Notification thresholds
 - Data concentration issues
- **Turnover-based thresholds**
 - Nature of data-driven business models
 - Audience and data → monetization
 - Acquisition before monetization
 - E.g. Facebook/Instagram (2012)
 - Google/Waze (2013)
 - Facebook/WhatsApp (2014)
 - Initiatives to introduce other metrics?
 - Transaction-value (.ge, .at, .eu?)
 - Other metrics?



Merger: Personal Data & Market Power

- **Key issue**
 - How does data affect balance of economic power?
 - Can control over data constitute an entry barrier?
- **Downplaying arguments**
 - Data as a source of market power not entirely new
 - E.g. Bronner (1998), IMS Health (2004)
 - Higher standard of proof
 - Consumer data is
 - Ubiquitous
 - Non-rivalrous
 - “It’s not about the data, it’s about the algorithm”
 - Dominance is short-lived
 - Competition is just a ‘click away’



Data-Driven Network Effects & Beyond

- **Data-driven network effects**
 - Scale – volume
 - Scope – variety
 - Speed – velocity
 - Spillover effects

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



Margrethe Vestager

Related Developments

- **EC Google Decision**
 - Three sources of entry barriers
- **A US Court in Bazaarvoice/Power-Reviews (2014)**
 - '[d]ata and network effect' give Bazaarvoice 'significant & durable competitive advantage'.
 - Ordered divestiture of consumer-generated data to third party
- **Joint report by the French and German CAs**
 - Underline the role of two factors in assessing the role of data for market power.
 - 1) scarcity of data (ease of replicability); & 2) the significance of scale & scope of data for competitive performance
- **German amendment**
 - Access to data in assessing market power + working paper on how to do it
- **EC Com on 'EU Data Economy' & proposal for 'Free Flow of Data'**
 - Problem: Firms generating data do not share with third parties
 - Aim: Opening and incentivizing access & sharing of machine generated data
 - Access based on FRAND terms

Anticompetitive Conducts Related to Personal Data

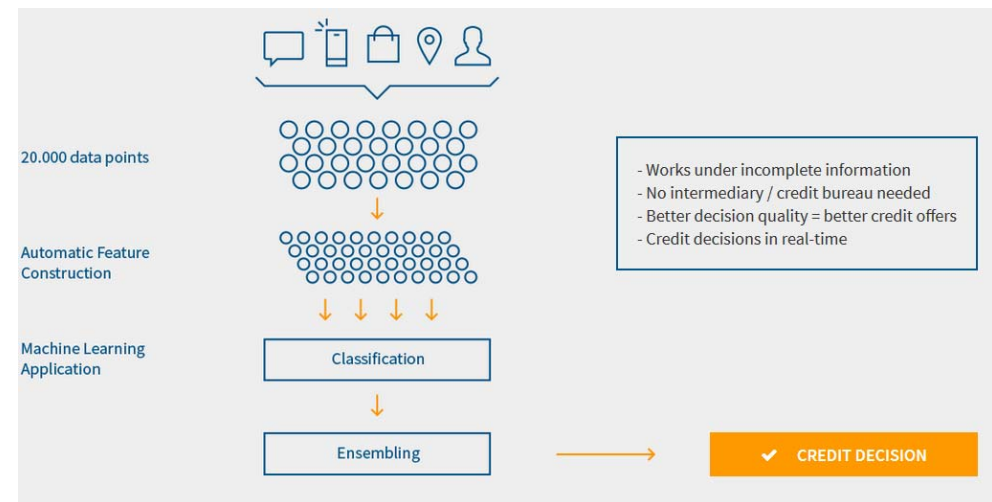
Data-Related Anti-Competitive Conducts

- **Key issue**
 - Could data be used to foreclose competition?
- **Article 101**
 - Pricing algorithms that rely on personal data
 - Data pooling
- **Article 102**
 - Refusal to deal?
 - Discriminatory access to data?
 - Restricting data portability?
 - Cross usage of data?
 - Cross-usage in breach of data protection?

Data and Article 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?**
 - Discussing what data to use?
 - Sharing the algorithm?
 - Data pooling (sharing)?
 - Pooling in breach of DP law?
 - *Allianz Hungária Biztosító Zrt, v Gazdasági Versenyhivatal* [2013]

Kreditech – ‘all data is credit data’



Data and Article 102

- **Denial of access to personal data**
 - Commission investigation on banks for refusing access to bank account information
 - Art 102
 - French Competition Law Authority (2014) ordered energy and gas supplier GDF Suez
 - To grant its competitors access to parts of its database relating to consumers b/c
 - Data was not obtained based on ‘competition on the merits’
 - Database gives GDF unjustified advantage over its competitors +
 - Financially unreasonable to replicate
 - Apply to digital markets?
 - More likely with Personal Data Stores (PDS) – centralized
- **Restriction on portability**
 - EC 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

Con.

- **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 (e.g. Google – Gmail contacts to Buzz and Google+)?
 - Cross-usage in breach of data protection rules as exclusionary abuse?
 - Does the infringement represent deviation from 'competition by merits'?
 - What if the breach contributes to acquiring a dominant position?
 - Google Street View v. Apple Maps
 - » EU: C-457/10 P *AstraZeneca v Commission* EU:C:2012 :770
 - Microsoft/LinkedIn

Privacy and Competition Law

Competition Law and Data Privacy

- **Collection of data → privacy concerns**
- **Key issue**
 - Is privacy an antitrust concern?
- **Two approaches**
 - Fundamental rights approach
 - Privacy as a non-price competition parameter



Privacy as a Non-Price Competition Parameter

- **Can privacy be a non-price parameter? Yes,**
 - Facebook/WhatsApp (2014)
 - Data privacy as a key non-price parameter of competition
 - Microsoft/LinkedIn (2016)
 - Privacy can be ‘a significant factor of quality’ for professional SNs
- **Open questions**
 - When are two firms considered to be competitors based on these parameters?
 - What constitutes reduction in privacy and what are the incentive to reduce?
 - What is the benchmark? Optimal (competitive) level of privacy?
 - What evidences?
 - How to assess?

Con.

- **Mergers**

- Microsoft/LinkedIn (2016)
 - Integration & promotion of LinkedIn through Microsoft Windows and Office products
 - Reduced consumer choice in relation to privacy
- Facebook/WhatsApp (2014)
 - Change in business model of WhatsApp?
 - WhatsApp collecting more data in order to introduce ad?
 - WhatsApp lacks incentive to do so b/c
 - » Collecting more data could lead to some users switching to 'less intrusive' and ad free texting apps
 - Two weaknesses
 - » Overestimates users ability to constrain companies behavior on privacy policies
 - » Reducing privacy was considered as unprofitable strategy

- **Cartel – Art 101**

- Agreeing on standardized privacy polices?
 - E.g. 2010 Microsoft announcement on six months storage of search queries
- Privacy standard setting organizations or trade associations?
 - 'Do Not Track' initiative

Con.

- **Abuse of dominance – Art 102**

- Blocking privacy-enhancing app/technology

- Disconnect complaint (2015)
- Essential facility?
- Combination?



- Excessive data collection?

- Report by French and German CLAs (2016)
- Excessive data collection as an exploitative conduct if in breach of DPL

- Lack of transparency on data collection & use?

- **The German Facebook Case**

- Investigating Facebook for abusing its dominant position by imposing unfair terms

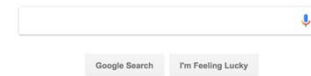
- What is the bench mark for adequate/optimal terms of service?

- Data protection rules

- Cf 2013 case KZR 58-11 – VBL-Gegenwert

- ‘Use of illegal general terms & conditions by a dominant company can constitute an abuse’

Google



90% market share



50% market share

Summary

- **Competition law is flexible enough but needs to adopt**
 - Data value
 - Take account of data-driven network effects in market power assessment
 - Data-related conducts
- **Privacy can be a quality (non-price) competition parameter**
 - Privacy degradation can be a result of loss of competition
 - Tools and techniques for assessing degradation privacy
 - Privacy law can provide normative guidance (=IP law)
 - Goal: enables companies to compete to offer beyond what is prescribed under the law
- **Need for closer collaboration**
 - DPAs, Consumer Protection and Competition Authorities
 - Initiatives for 'Digital clearing house'



Thank you!!