



UiO : **Department of Private Law**
University of Oslo

Reigning in FinTech through Data Protection Law and Competition Law

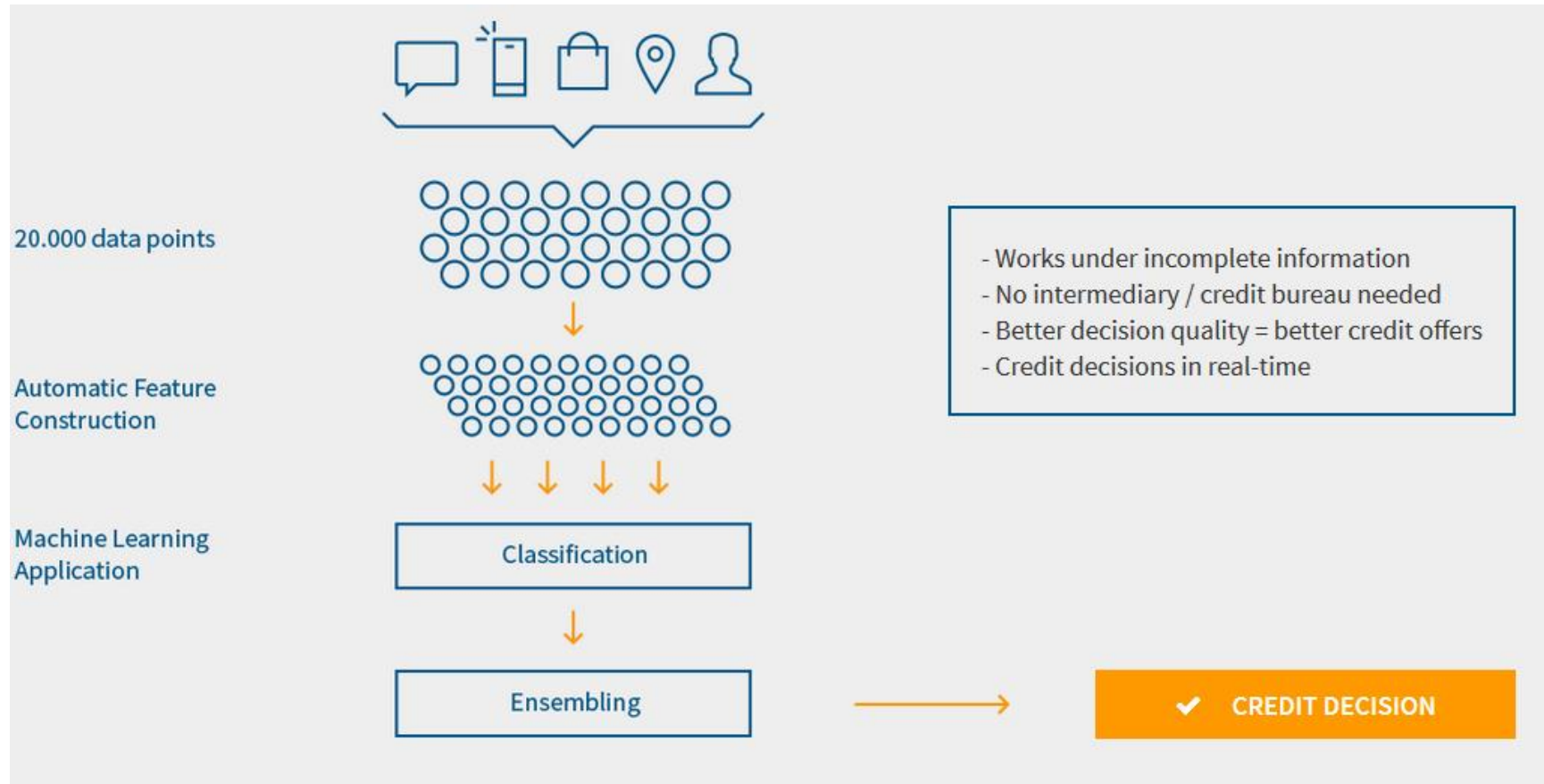


Samson Esayas, NRCCL

27 April 2017

'All Data is Credit Data'

Douglas Merrill, founder ZestFinance & Former CIO at Google



What are the Issues? (Agenda)

- **Three major trends**
 - ‘Digital land grab’
 - Emergence of the omnipresent companies
 - Data concentration as a barrier to entry
 - Need for sharing or accessing data?
 - Leveraging existing market position
 - Data



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

Data as a Competitive Advantage

Drive for 'Digital Land Grab'

- **Manifestations**

- Expansion into new product or service areas
 - Google offers 70+ free services (email, search, maps, video, SN, OS, Wallet payment...)
- Aggressive data collection practices
 - Broad terms, controversial/deceptive data collection practices
 - Consolidation

Google
Services



One Google Account for everything Google



Financial Sector is Catching Up

- **Similar tendencies**

- Expansion into new ‘unconventional’ product or service areas
 - Banks as social networks, e.g. German bank Fidor
 - Insurance companies tracking driving, exercising, eating habits
 - Partnership with
 - Manufacturers of home appliances, wearables ...E.g. Fitbit
 - Mobile service providers, phone manufacturers, food stores
- Aggressive data collection practices
 - Broad terms, collection of data when not using financial services

- **PSD2 makes easier for BigTech to offer financial services**

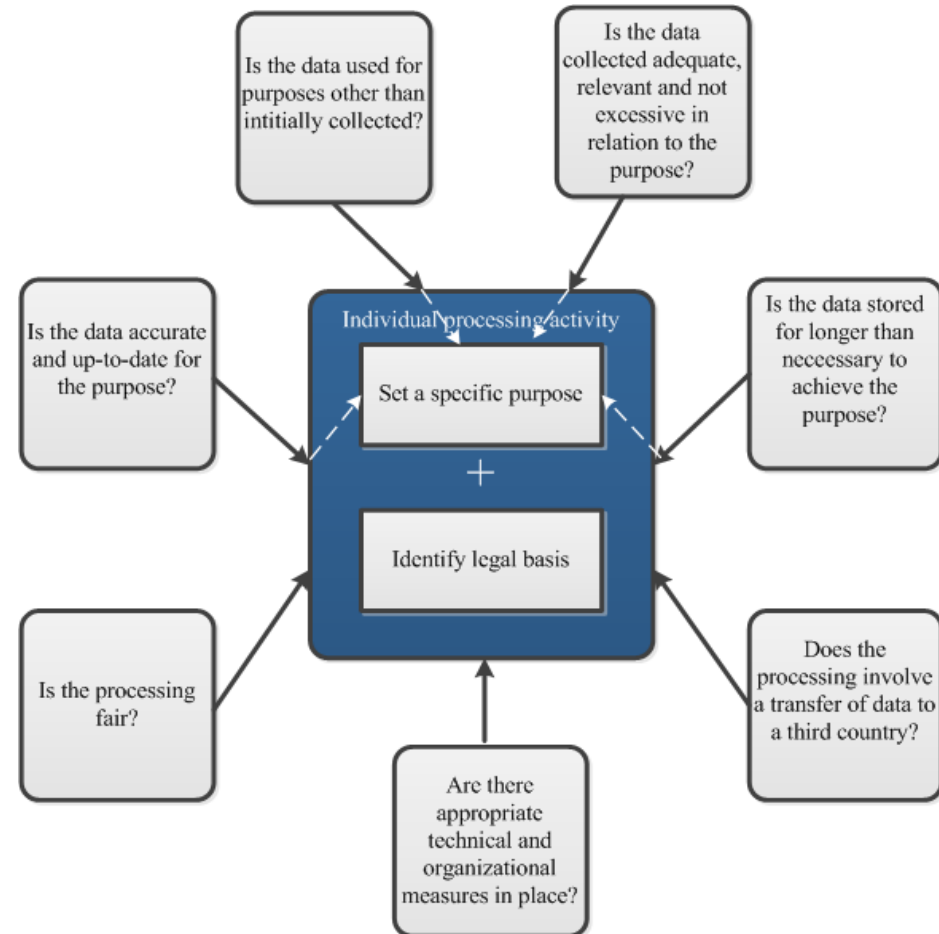
- Facebook – reregistered patent on credit scoring; license for eMoney
- Google – many partnerships

- **Emergence of the ‘omnipresent’ companies**

- Manifold of services generating personal data

Economies of Scope & Atomized Approach in DP Application

- **Specific & legitimate purpose**
 - Basis for initial collection
 - Assessing compliance
- **Assumptions**
 - (i) distinguishing among different processing activities and
 - (ii) relating every piece of personal data to a particular processing, and
 - (iii) if each processing is compliant, the data privacy rights of individuals are not endangered
- **Challenges**
 - Difficult to (i) & (ii)
 - Possibly additional risks



Competition Law and Private Economic Power

- **Neutralize concentration**
 - Breaking up Google?
 - EP non-legislative resolution 2014
 - Privacy in merger cases
- **Political power of digital platforms**
- **Looking back**
 - Broader socio-political goals
 - Ordoliberal (Germany ca 1958)
 - Economic freedom
 - Preservation of ‘free society’
 - ‘Big is bad’
 - Economic power → political power

[T]he market power of some digital companies has reached a politically relevant dimension. Therefore, today we also have to take care that economic power does not turn into political influence



Andreas Mundt

President of the Bundeskartellamt

Scaling Data Protection: Enhanced Responsibility?

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CONCLUSION

The idea of 'emergent properties' in data privacy: towards a holistic approach

Samson Y. Esayas ✉

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'The whole is more than the sum of its parts.'¹

This article applies lessons from the concept of 'emergent properties' in systems for data privacy law. This concept, rooted in the Aristotelian dictum 'the whole is more than the sum of its parts', where the 'whole' represents the 'emergent property', allows systems engineers to look beyond the properties of individual components of a system and

Data Concentration as a Barrier to Entry

Data Concentration as a Barrier to Entry

- **Commission Consultation on FinTech (March 2017)**
 - Barriers to entry for SMEs due concentration in data
 - Scale in data + network effects (+data protection law) → entry barrier
- **Can competition law force access to data?**
- **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 (contact & consumption data)
 - B/c database
 - Gives GDF unjustified advantage over its competitors + financially unreasonable to replicate
- **High standards from the CJEU**
 - Microsoft, Bronner, IMS Health

Commission Communication on 'EU Data Economy'

- **Goal**
 - Opening and incentivizing access & sharing of machine generated data
- **Suggested mechanisms**
 - Data producer's right to authorize the use of data
 - Access based on FRAND terms after anonymization
- **Good for competition but good for privacy?**
 - Effective anonymization?



Brussels, 10.1.2017
COM(2017) 9 final

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL
COMMITTEE AND THE COMMITTEE OF THE REGIONS

"BUILDING A EUROPEAN DATA ECONOMY"

{SWD(2017) 2 final}

Leveraging Existing Market Position

Leveraging by BigTech

- **Leveraging power over platform**
 - Preferential treatment of own services
 - Google search example
- **Leveraging power over data**
 - Repurposing data?
- **Data protection**
 - E.g. purpose limitation

The screenshot shows a Google search for "gas grill" with approximately 44,000,000 results. The search interface includes a search bar, navigation tabs (Web, Images, Maps, Shopping, More), and search tools. Below the search results, there are several sponsored advertisements and an "Alternatives" section. The "Alternatives" section is highlighted with a red box and contains three items: "Supaprice Best stock of gas grills from £150.00", "Kelkoo Great deals on gas grills from £129.00", and "Shopzilla Best prices on gas grills from £180.00". To the right of the "Alternatives" section, there are two more sponsored ads: "Gas Grill at Amazon" and "Cheap Gas Grill". The "Gas Grill at Amazon" ad is also highlighted with a red box and includes a star rating of 4.5 and 336 reviews. Below the sponsored ads, there are organic search results for "Weber.com - Weber® Grills - Gas", "Gas Grills: Shop at Sears for Your Outdoor Cooking Gear", and "Natural Gas Grills - Home Depot".

EC Statement of Objection on Google

Data Protection and Competition Law

- **Belgian case**
 - Fine of €1.9 million on the Belgian National Lottery
 - For repurposing PD acquired as a legal monopoly to open markets
- **Data protection breaches → Competition law breaches**
 - **The German Facebook Case**
 - Investigations on Facebook for abusing its dominant position
 - By imposing unfair terms that breach data protection rules
 - Report by French and German CLAs (2016)
 - Collection of data in breach of DPL could constitute ‘abuse’

Towards Closer Cooperation

- **FinTech**
 - DPA & FA
 - France - Forum FinTech
- **And beyond**
 - EDPS: ‘Digital clearing house’
 - DPAs, Consumer Protection and Competition Authorities
 - Similar national forums



**Summary of the Forum on the use of data in retail general insurance
Financial Conduct Authority (FCA)/ Information Commissioner's Office (ICO)
Monday 16 January 2017**

In September 2016, the FCA published a feedback statement following its Call for Input on Big Data in retail general insurance. The feedback statement highlighted stakeholders' concerns about the use of data and data protection issues. As a result the FCA and the ICO held a joint forum to further engage with the industry.

This document provides an overview of the three areas that were discussed in the breakout sessions:

- Social media.
- Obtaining consent and transparency of data.
- Data protection.



Thank you!!