World Competition Day, 2016

Interface between Competition and Intellectual Property Rights

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Contents

Preface

International Days are observed to draw the attention of society at large on issues that are extremely important for human development in the present and particularly for the future.

Competition Policy falls into this category and this is why a global movement led by CUTS International has been celebrating and calling for the adoption of a World Competition Day (WCD) on 5th December, the date of the adoption of the first-ever Set on Competition Policy by the United Nations General Assembly 35 years ago. Since 2010, over 24 countries have supported the call and celebrated this Day. One of the biggest achievements of our advocacy efforts has been the declaration of the National Competition Day made by the Philippines Office for Competition, Department of Justice. It is essential for countries to take such steps in their advocacy efforts as consumers need to realise the potential benefits of an effectively implemented competition regime, and also know about their role in making competition regimes work worldwide.

Considering the exponential technological advancements across the global market and its implications on the consumer, the theme for this year's WCD is "Linkages between Competition and Intellectual Property". It is a recognized fact that innovation and competition are two of the most important pillars which support and foster the growth of an economy. The peculiarity of the interface between competition and IPRs which have similar objectives but different tools of enforcement make their interaction intriguing and puzzling. Thus, keeping in mind the overarching issues which lie at the linkage between competition and IP, we thought that the complex theme could be justified and explained through the voices of prominent global experts. Owing to this thought process, the World Competition Day E-Compendium was born and we are proud to release the first edition of this annual publication. The 2016 E-Compendium consists of select articles on the theme and is an attempt to guide the discourse on related issues which lie at the interface between competition and intellectual property rights.

Finally, I would like to thank all the authors for their valuable contributions and for being part of our endeavour to spread the word on competition and its benefits. It is my sincere hope that the readers enjoy this edition and also celebrate with us the essence of competition and acknowledge the immense benefits which it offers.

Pradeep S Mehta
Secretary General
CUTS International

Big Data and Antitrust: A European Competition Law Introduction

Pedro Callol[1]

1. Introduction: data and its key competitive role

In the era of the information society, data has become a key factor of production, an input without which it appears impossible to compete. Raw data is in most instances freely available and in massive amounts in the Internet through various channels or methods (Internet searches, social networks); or data is available through direct purchase either from data aggregators or intermediaries or from selected operators, either in consideration for money or in consideration for some type of service (*e.g.*, information provided by customers via e-commerce sites or other Internet tools). In this context, data is like a raw material which becomes valuable when appropriately selected and processed.

Therefore, regardless of whether the information is more or less readily available, the key seems to lie in the ability to be able to collect and process enormous amounts of information in a manner that is commercially meaningful. The assignation of commercial value to enormous amounts of data seems to be associated to the notion of "big data", which is a much-used term in recent times.
Once data has been accessed, companies maximize the use of that data in a variety of manners, for instance:

- Search engines use data of searches carried out by their users to improve the quality of future search results.
- Search engines and social networks use big data on searches to identify marketing trends and tailor individual-specific information. Geo-location technologies (enabling digital marketing linked to exact location, for instance) can be combined with marketing information of the individual user to deliver dynamic content, on-the-spot and targeted advertising or marketing, for instance, in many likely ways that maximize the possibilities of commercial success. Likewise, e-commerce businesses use their data on actual purchases to make product recommendations and targeted promotions to individual customers.

[1] Pedro Callol is an associate at Callol, Coca & Asociados, SLP which is a leading corporate law firm based in Madrid, Spain. He has twenty years of specialist antitrust, trade regulation and transactional experience.

- Data can be processed to segment consumer surveys and cluster types of clients. In the case of consumer companies handling mass communication strategies, data clusters can be used to tailor targeted communications according to consumer groups' profiles.

  Big data marketing therefore aims at segmenting data with the aim of creating targeted and relevant communications from companies to customers. Whereas the traditional approach to marketing looked at a few key market segments, digital based big-data marketing looks at unlimited segments seeking individualization

  From a competitive standpoint, data has become a key driver of competition across virtually all markets. Data is "non-rivalrous",[2] implying that, in principle, it can be used by as many actors as required, as access by one does not prevent access by many (potentially infinite) more. From a competition law enforcement standpoint, it seems therefore that access to data should generally not be a problem, unless firms somehow succeed in making it artificially difficult for a given company to be able to access data.

2. Business strategies related to data and competition law

2.1 *Areas of competitive concern surrounding data.*

The Joint Report on Competition Law and Data, cited, refers to three possible areas where data plays a role in competitive analysis. First, data as a source of market power; second, data as a factor reinforcing market transparency; and third, data as basis for firm conduct potentially raising competition concerns.[3]

(a) Regarding data as a source of market power, although in principle data may be widely available, even at a price, in some sectors and circumstances the leading companies may have such a large base of data that the question arises whether any third party has the capacity to match the same volume and variety of data. In an extreme hypothetical scenario, the possession of a supposedly enormous and unmatchable amount of data may amount to a barrier to entry.

The Joint Report also reminds that economic sectors such as social networking and search engines are highly concentrated. Network effects would lead to tipping towards a single, most successful, operator

[2] Term used by the 2016 Joint French and German Competition Authority Report on Competition Law and Data, page 36.

[3] Joint Report, cited, at page 11.

(snowball effects).[4] Clearly, the type of concern displayed here should not in principle raise any antitrust concerns, as success which is the result of competition on the merits, is fine under the antitrust laws. However, this kind of barrier to entry may be a key factor in prospective analysis (merger control) as well as in the analysis of past conduct, particularly potentially abusive unilateral conduct.

(b) Regarding market transparency and the general trend identified that the increasing use of digital data is often associated with greater market transparency.[5]

(c) Indeed, in markets where commercial or marketing data is valuable, the incentives for companies already enjoying a good position in the acquisition of data are high to appropriate additional data. In that struggle, the potential for anticompetitive conduct is evident.

2.2 *Agreements and concerted practices aimed at restricting third party access to data.*

Non-unilateral (*i.e.*, agreements or concerted practices) strategies seeking to appropriate commercial data may take place if, for instance, a marketing information company enters into exclusivity agreements, or arrangements with similar effects to exclusivity, with the generators of marketing information (retail outlets, consumers, etc.). This appropriation strategy would seek to prevent entry by alternative marketing information companies.

The competition law on vertical restraints has made it clear that agreements by means of which a company seeks to monopolize the sales of another company, carries with it a risk of exclusion of companies competing to purchase the same good or service, as well as a softening of competition and increased risk of collusion in cases of cumulative contracts. This will be the case particularly where market shares are high and particularly in excess of 30%, barriers to entry are high and there is potential for third party anticompetitive foreclosure.[6]

2.3 *Unilateral conduct aimed at restricting third party access to commercial data.*

In addition to the infringement of 101 TFEU, a company may potentially breach Article 102 TFEU, which prohibits the abuse of a dominant position.

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4 Joint Report, cited, at page 13.

5 Joint Report, cited, at page 14.

6 European Commission Guidelines on Vertical Restraints (OJ C130 of 19 May 2010), for instance at points 129, 194.

2.2.1 *Dominance.*

Dominance has been defined by the Courts[7] as a "*position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers*." Large Internet companies controlling large clusters of big data could potentially be dominant depending, of course on the circumstances.[8]

2.2.2 *Existence of abuse.*

Dominance is not an offence by itself; however, the Court of Justice has found that a firm in a dominant position "*has a special responsibility not to allow its conduct to impair undistorted competition in the common market*".[9]

Conduct by a dominant company aimed at preventing competitors or new entrants from accessing relevant data may run counter to the European competition law rules.[10] Unilateral (abusive) conduct may take the form of exclusive dealing, refusal to supply, selective price cutting[11] and, in some circumstances, the insertion of "most favoured nation" clauses in agreements with clients or suppliers.[12]

3. Data and merger control.

3.1 *The (recurrent) issue of merger control thresholds.*

Due to the nature of data and data analytics, data mining and data processing companies' interaction with technology is intimate. In that

[7] For instance, see Judgment of the European Court of Justice of 13 February 1979, *Hoffmann-La Roche & Co AG v Commission*, Case 85/76.

[8] For more detail on the notion of dominance under EU law we refer, for instance, to EC's Guidance on the EC's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02).

[9] Judgment of the Court of First Instance of 1 April 1993, *BPB Industries plc v Commission*, Case T-65/89.

[10] See Section III "*General approach to the exclusionary conduct*" of the Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02).

[11] Judgment of the European Court of Justice of 16 March 2000, *Compagnie maritime belge transports SA v Commission*, Case C-395/96P; Judgment of the Court of First Instance of 7 October 1999, *Irish Sugar v Commission*, Case T-228/97.

[12] Decision of the Higher Regional Court of Düsseldorf of 9 January 2015 confirming the Decision of the Bundeskartellamt to prohibit the use of MFN clauses by HRS, a hotel reservations portal, which in practice prevented HRS hotel partners from making better offers anywhere else, including direct sales. Similarly in the UK, for instance, see https://www.gov.uk/government/news/cma-closes-hotel-online-booking-investigation.

regard, it is probably fair to refer to some recent developments in the area of merger control which may possibly apply to future mergers and acquisitions in industries where big data and data processing play a key role.

The issue of merger control thresholds is likely to be revised in view of the mergers and acquisitions frenzy in the technology sector. Turnover thresholds are an indicator of size; but size only has any significance if considered in relative terms. In the antitrust world, such significance is normally put in contrast with the remaining competition in a given market. That is the reason why turnover thresholds as such sometimes do not signify much: banking, insurance or private equity related mergers and acquisitions may involve huge turnover figures and yet have no implication whatsoever from an antitrust standpoint. Conversely, acquisitions of technology firms with only minimal turnover, may have antitrust implications when the technology or intellectual property involved, for instance, are scarce or amount to large market shares in the relevant markets.

Some degree of concern has been sparked by the *Facebook/Whatsapp* acquisition, which could well have escaped scrutiny by the European Commission, had it not been because the notifying party used the reasoned submission system under Article 4.5 of EC Regulation 139/2004, on the control of concentrations between undertakings [13] (**ECMR**), and the countries originally competent to review the merger (Spain, Cyprus and the UK) all agreed to enable the Commission to review it under the ECMR. It is symptomatic in this regard that the two most significant countries with original jurisdiction to review the merger were countries with market share based merger thresholds: the UK has a share of supply test and Spain and Portugal a market share threshold. Cyprus has, as we understand, very low thresholds. As we have advocated in the past, market share thresholds are a much better proxy of market power than turnover thresholds. The pros and cons of market share and similar thresholds have been discussed elsewhere and we refer to such discussion for more detail.[14] It suffices to say here, that thresholds based solely on turnover may be ill-equipped to deal with technology mergers, also those where big data is of significance since, as we have seen, often these businesses are not exclusively based on turnover generation: the currency of these markets may sometimes not be money, but data. Furthermore, some of these acquisitions may only have a

[13] OJ L 24, 29 January 2004, p. 1.

[14] P. CALLOL, *A practical Guide on How to Deal with Market Share Thresholds: Risks and Solutions in Multijurisdictional Transactions*, [2012] ECLR, Issue 11. That paper attempted to examine with objectivity the advantages and disadvantages of market share thresholds and the tools available to maximize legal certainty and minimize prior analysis costs.

prospective value, with many millions being paid for businesses, which are sometimes little more than a gamble on the success of a new or disruptive business model.

Already in March 2016, Competition Commissioner Ms. Vestager mentioned the issue of merger control thresholds and review of relevant technology acquisitions with a large big data component that may well go unnoticed.[15] The solution may lie in leaving the ECMR thresholds unaltered, while relying on the streamlined referral system envisaged in the ECMR which, as Ms. Vestager recognizes, has enabled Commission review of the *Facebook/Whatsapp* merger (although arguably due to the mercy of the affected stakeholders). However, the European Commission seems to be wondering now if the ECMR thresholds are broad enough to catch significant transactions in eh digital sectors and other industries that involve large data sets. The same sources state that the EU's competition directorate plans to start a 12-week public consultation to collect views and opinions on whether the purely turnover based thresholds set out in the ECMR should be amended.[16]

3.2 *Data in recent merger control matters.*

The issue of data and big data is in the spotlight for currently ongoing mergers such as the *Microsoft/Linkedin* or *Verizon/Yahoo*. Some European merger control precedents have already at least identified some issues surrounding competition appraisal of big data (see section 2, above). The Joint Data Report contains a good study of merger control precedents where data has played a role. Bearing in mind the features of marketing data, which in its traditional view does not seem to be related to a multi-sided market, as there is only one set of clients deriving a non-strictly monetary benefit from the company collecting and processing data, we would underline the following:

(a) Dynamic competition in the electronic data related markets might normally make up for any apparent loss of competition and/or apparent barriers to entry. However, depending on research and development, marketing and other expenses, the barrier to entry caused by existing big data clusters may be considerable, although this is to be established on a case-by-case basis.

[15] https://ec.europa.eu/commission/2014-2019/vestager/announcements/refining-eu-merger-control-system_en

[16] Source: Mlex, 8 August 2016. See http://ec.europa.eu/smart-regulation/roadmaps/docs/2017_comp_003_evaluation.pdf

(b) Mergers of companies with access to client data amounting to large shares of market could in theory create a considerable barrier to entry in the market. However, the merger decisions that have identified this type of potential conern, have also dismissed it, given that such a potential advantage could be matched by competitors or that the data are available in the Internet for anyone wishing to exploit them. This was assessed in the *Facebook/Whatsupp* and the *Google/DoubleClick* merger Decisions of the European Commission.