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Competition Law and Data: Are the existing antitrust tools fit for purpose?

Speakers: Martim Valente, Legal Director, CMA
Tim Lamb, Competition and Regulatory Counsel, Facebook
David Parker, Director, Frontier Economics

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Venue: Fried, Frank, Harris, Shriver & Jacobson

Data is often seen not as a competition law issue but rather as an issue which concerns data protection enforcement, as evidenced by the adoption of the General Data Protection Regulation at EU level. Nevertheless, Martim emphasized the willingness of the CMA to understand data and its potential impact from a competition perspective. Tim expressed some doubts as to the relevance of antitrust intervention. David provided an insight on the effects of data on online platforms.

Martim Valente

The competitive value of data is increasingly becoming an area of focus for competition regulators as the commercial relevance of data for business increases. The CMA is carefully considering any intervention in this area. In response to the challenges raised by data, the CMA has recently established its Data Unit. The overarching purpose of the Data Unit is to enhance the CMA's understanding of the digital economy and make sure its practices, interventions and capabilities keep pace with the evolution of business models.

In more detail, the Data Unit will allow the regulator to:

- understand digital and technology businesses and business models;
- capture, analyse and draw conclusions from large data sets;
- share those data sets with partners and parties in cases where appropriate;
- use data and algorithms in developing appropriate remedies; and
- store some data as part of a growing knowledge bank.

The underlying goal is to ensure the CMA is fully prepared to respond swiftly and appropriately to the challenges and opportunities brought about by data.

Some views have also been shared on the CMA's experience of data to this date:

- **Access to data.** Remedies imposed following the Retail Banking market investigation have enabled customers to gain more control over data collected by banks.
- **Merger control.** The UK share of supply test allows the CMA to call in transactions where turnover thresholds are not met but there could be a 'data issue'. In cases where the control/accretion of data is a key consideration, focus may be more on the rationale for the transaction rather than overlaps etc.



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Tim Lamb

The digital disruption has given rise to considerable debate as to whether competition law has the right tools to address perceived new challenges.

Competition law has withstood the test of time and been used to address competition concerns across a very broad range of industries ranging from heavy industry to financial services. That suggests that existing principles of competition law are likely flexible enough to be applied to the tech industry and it would be unfortunate if competition law needed separate sectoral rules in relation to specific industries.

There is pressure from certain circles to expand or move away from the consumer welfare standard and towards an assessment which might factor in general public interest goals as well as more generic social and economic considerations. It is unclear how one might balance out such considerations with the consumer welfare standard and risks introducing uneven application of competition law.

An area which has received much attention recently is whether data protection might fall within the remit of competition law and especially under the enforcement of provisions relating to dominant positions. But, how do you balance out privacy v competition considerations? Moreover, there are concerns that data protection and competition law serve fundamentally different aims and the use of competition law to enforce an alleged free standing infringement of data protection law is not necessarily desirable.

Indeed, experience would suggest that such enforcement has resulted in established competition law principles being stretched. The questions that have been raised thus far include, (i) whether there would be any causal link between an alleged dominant position and an alleged infringement of competition law, and (ii) what would be the basis for asserting that data protection law should be applied more stringently by larger companies.

David Parker, '*Data and Online Platforms*'

Online platforms are characterized by the interaction they create between users and advertisers, and so are two-sided markets. Data can have different impacts on the market power of online platforms depending on the characteristics of the platform. In particular, it is useful to make a distinction between the following two types of platform.

- **Two directional platforms** where the purpose of the platform for the advertisers is to reach users, and the purpose of the platform for the user is to reach advertisers. Examples include ride-hailing apps such as Uber and property portals such as Rightmove
- **One directional platforms** where the purpose of the platform for the advertisers is to reach users, but the purpose of the platform for users is to reach the content offered by the platform.



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Two-directional platforms generally give rise to reinforcing indirect network effects. A platform with more users becomes more attractive to advertisers, which becomes more attractive to users, and so on. As a result, these markets have a tendency to “tip”, with the most popular platform pulling away.

However, it is not obvious that data materially affects competitive development or the level or nature of market power in these platforms. At the margin, better data on (e.g.) consumer behaviour could lead to a more attractive product for advertisers, but the fundamental source of market power in these markets is the existence of indirect network effects, rather than data.

One directional platforms do not give rise to reinforcing indirect network effects in the same way. For these platforms, more users means that the platform is more attractive to advertisers, but having more advertisers does not mean that the product is more attractive to users (and may even be the reverse). If so, there is no particular tendency for these markets to tip.

However, data could make a difference to this dynamic. If users provide data that can be used to enhance the quality of the product, then the more users there are, the more attractive the product will be to users, and so there will be more users. As above, more users also attract more advertisers, so data can give rise to reinforcing network effects in this circumstance. This is the logic of the European Commission dominance finding relating to Google Search in the Google Shopping decision. The Commission argues that Google uses its consumer data on existing searches to improve the search product in a way that cannot be replicated by rivals.

The existence of data may also give rise to standard vertical foreclosure issues in online platforms (although this is not specific to online platforms). If certain data arising from an online platform is required for a rival’s downstream service to operate, this could give rise to foreclosure concerns. Such concerns seem to underpin the compatibility issues identified in Microsoft/LinkedIn, for examples, but were also present in offline situations in historic cases such as IMS Health and TV listings.

Finally, there is no obvious implication of data for market definition in the platform context. However, there may be relevant markets for the provision of certain types of data where vertical foreclosure is a potential concern, where the key issues will be the usual market definition of questions of whether there are good substitute sources of data available.