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Antitrust Group Client Alert: Competition and Big Data in the Spotlight – German and French Competition Authorities Publish Joint Report on Big Data

On 10 May 2016, the German and French competition authorities published a joint report on “Competition Law and Data” in which they analyze the implications and challenges resulting from data collection and exploitation. The joint report foreshadows an increasing interest of competition authorities in the relevance of data when assessing market power or evaluating market conduct under the applicable competition laws.

JOINT REPORT ON COMPETITION LAW AND (BIG) DATA

According to Andreas Mundt, president of the German Federal Cartel Office, and Bruno Lasserre, president of the French Competition Authority

“[b]usiness models particularly in the digital economy often involve a massive collection and use of (personal) data. The aim of the paper is to provide a good overview on the relevant issues by evaluating the state-of-play of the debate and to discuss the various interfaces between Big Data and established concepts of competition law enforcement.”

For this purpose, the joint report identifies three possible theories of harm associated with the collection and exploitation of data:

- Data as a source of market power;
- Data as a source of market transparency; and
- Data-related anticompetitive conduct.

First and foremost, the collection and exploitation of data (internal growth) may raise barriers to entry and, thus, become a source of market power. The same is true for M&A activities leading to a combination of different datasets (external growth). In both cases, new market entrants may be unable to either collect the data themselves or to buy third-party data of the same or comparable quality. Further, strong scale and network effects may protect established companies from effective competition by

smaller rivals and potential market entrants. This could lead to marginalization and even monopolization of data-related markets.

In order to assess if and to what extent established companies in fact enjoy a “data advantage”, competition authorities on a case-by-case basis need to look at the effects of multi-sided markets and network effects, multi-homing and market dynamics. In this context, two factors are likely to be of particular relevance: scarcity and replicability as well as scale and scope of data.

Secondly, the collection and exploitation of data may increase market transparency. While consumers may benefit from greater transparency if it allows them to compare more easily prices or specific characteristics of competing goods or services, it may also facilitate or reinforce (tacit or explicit) collusion on pricing or other competitive variables. Following the German and French competition authorities, this might even be the case when using the same or similar data-crunching algorithms.

Finally, the collection and exploitation of data may facilitate anticompetitive conduct. In case of a merger, two companies that already hold strong market positions in separate upstream or downstream markets may foreclose these markets for new competitors. Further, established companies owning a valuable dataset could engage in exclusionary conduct by tying access to it to the use of its own data analytics services or by applying patterns of cross usage of data. The same would be true if established companies started to use data as a vehicle to facilitate price discrimination between customers or to limit users’ privacy rights, which may be another potential parameter of competition.

CONCLUSION AND OUTLOOK

The move of the German and French competition authorities to jointly publish a report on competition law and big data underscores the increasing focus on data as a parameter of competition and an element of competition law analysis in Europe. It is not a coincidence that the joint report is published shortly after the German Federal Cartel Office initiated proceedings against Facebook and the French Competition Authority announced that it will soon launch a sector inquiry into data-related markets and strategies. The report shows that leading competition authorities in Europe intend to increase their scrutiny of the digital economy and further strengthen their role at the forefront of enforcing competition laws in the digital sector.

Concerns relating to the effect of big data on competition are by no means limited to Europe. In the US, for example, Deborah Feinstein, Director of the FTC’s Bureau of Competition, already in May 2015 highlighted the necessity for competition authorities to examine the ways that firms compete using big data as a product, an input, or a tool for making competitively significant decisions. In January 2016, the FTC also

published a report which addresses the commercial use of big data and focuses on the impact of big data on low-income and underserved populations.

This development affects not only the core digital economy but also many other industries that deal with large data pools, such as healthcare, energy, telecommunications, insurance, banking, hospitality or transport. Therefore, companies in a broad range of industries should be prepared for competition authorities to investigate the relevance of data when assessing their mergers as well as their unilateral or multilateral market conduct.

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