Theories of Harm in 'Data-Driven' Mergers

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Abstract: This contribution argues that (i) the review of mergers should consider the economic implications of privacy as a theory of harm and that (ii) a merger should be conditionally cleared if it involves a large amount of users' data. Otherwise, digital platforms are able to exploit data protection loopholes. We have witnessed the emergence of highly innovative technologies based on intelligent business solutions where platform users pay nothing in return for the use of a service. Nonetheless, such users pay with their own data. Should ownership of an online platform change, then the new owner will take over large amounts of data. This process shifts the focus from an interest in pure innovation to an interest in data.

Privacy Policies as of 2018	Change of Ownership
Google	If Google is involved in a merger, acquisition, or sale of assets, we'll continue to ensure the confidentiality of your personal information and give affected users notice before personal information is transferred or becomes subject to a different privacy policy.
Facebook	If the ownership or control of all or part of our Products or their assets changes, we may transfer your information to the new owner.
Instagram	If the ownership or control of all or part of our Products or their assets changes, we may transfer your information to the new owner.
Linked-In/Microsoft Windows 10/Skype	There is no mention of an ownership change following a merger or acquisition.

I. INTRODUCTION

In *Facebook/WhatsApp, Microsoft/LinkedIn* and *Microsoft/Yahoo*, consumer communications apps, social and professional networking services, and internet search services are all recognised as being provided 'free of charge' but they could be 'monetised' through other means, including advertising or charges for premium services.[1] In *Microsoft/Skype*, it was difficult to monetise consumer communications, as competitors offer them free of charge.[2] In *Facebook/WhatsApp*, users of consumer communications apps were 'very price-sensitive', expecting such apps to be provided for free'.[3] In *Hutchinson 3G UK/Telefonica*

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[1] See COMP/M. 7217, *Facebook/WhatsApp*, 3 October 2014, paras 31 and 47; COMP M. 8124, *Microsoft/LinkedIn*, 20 January 2017, para 87; COMP M. 5727, *Microsoft/Yahoo! Search*, 18 February 2010, para 33.

[2] COMP M.6281, *Microsoft/Skype*, paras 86 and 76.

[3] *Facebook/WhatsApp*, para 90.

UK, it was acknowledged that the mobile market in the UK is 'more and more data centric' and 'operators seek to monetise this trend'.[4] In *Publicis/Omnicom*, the merging parties having marketing data analytics capabilities were used for targeted advertising.[5] In *Telefonica/Vodafone/Everything Everywhere/JV*, the relevant market for data analytics services[6] included prospective analytics with a view to increasing the customer base, cross-selling and loyalty analytics.[7] In *WPP/TMS*, the market for research services and media measurement services aimed at measuring and understanding consumer attitudes and purchasing behaviour.[8]

Merger case	Investigation	Remedies
Google/Double Click 2008	Phase II	Article 8 (1) compatible
Microsoft/Yahoo 2010	Phase I	Article 6 (1) (b) compatible
Microsoft/Skype 2011	Phase I	Article 6 (1) (b) compatible
Microsoft/LinkedIn 2016	Phase I	Article 6 (1) (b) in conjunction with Article 6 (2) compatible with commitments
Facebook/WhatsApp 2014	Phase I	Article 6 (1) (b) compatible
Telefonica/Vodafone 2012	Phase II	Article 8 (1) compatible
Sanofi/Google 2016	Phase I	Article 6 (1) (b) compatible
IMS Health/Cegedim 2014	Phase I	Article 6 (1) (b) in conjunction with Article 6 (2) compatible with commitments
TomTom/TeleAtlas 2008	Phase II	Article 8 (1) compatible
Publicis/Omnicom 2014	Phase I	Article 6 (1) (b) compatible
IMS Health/Cegedim Business 2014	Phase I	Article 6 (1) (b) in conjunction with Article 6 (2) compatible with commitments
Hutchinson 3G UK/Telefonica UK 2016	Phase II	Article 8 (3) prohibited

In *Hutchinson 3G UK/Telefonica UK*, the Commission defined a single market for retail mobile telecommunications services to end customers, but did not divide it further by type of service, e.g., voice, data or SMS; by type of network technology, i.e., 2G, 3G and 4G; or by end-user.[9] It considered it inappropriate to narrow down separate markets for voice services, SMS/MMS services and data services.[10] In *Telefonica/Vodafone*, the Commission examined mobile Commerce, including mobile payments, advertising and, most importantly, data analytics.[11] It identified the relevant market for the wholesale supply of mobile wallet platforms, but 'left open' whether a market for secure storage also includes secure storage on devices attached to the handset or cloud-based solutions, or whether the market for online advertising should be narrowed down further to search and non-search services.[12] JV would be acting as an intermediary for the one-stop-shop sale of digital advertising, including 'push' and 'intelligent

[4] COMP/M.7612, *Hutchinson 3G UK/Telefonica UK*, 11 May 2016, paras 435 and 517 respectively.

[5] COMP M. 7023, *Publicis/Omnicom*, 9 January 2014, paras 11 and 619.

[6] COMP/M. 6314, *Telefonica UK/Vodafone UK/Everything Everywhere/JV*, para 191.

[7] Ibid paras 192 and 193.

[8] Ibid para 197; COMP/M. 5232, *WPP/TMS*, 23 September 2004, para 13; COMP/M. 2291, *VNU/ACNielsen*, 12 February 2001, paras 10 to 12.

[9] *Hutchinson 3G UK/Telefonica UK*, paras 251, 255 and 259.

[10] Ibid para 262.

[11] Ibid paras 26 and 88.

[12] Ibid paras 102, 110 and 151 respectively.

bulk' SMS', 'pull offers', display advertising, coupons and vouchers.[13] In contrast, the merging parties submitted that targeted advertising should be treated similarly to display advertising in order to reach out to their desired consumer audience.[14] Due to the technical and commercial features of mobile advertising, e.g., the size of ads and the possibility of advertising outlets near the location of a smartphone holder, the Commission considered the existence of a sub-market for mobile search advertising; thus, this was also 'left open'.[15] However, the majority of the respondents to the Commission's survey submitted that, within mobile advertising, targeted marketing messaging should be considered as a separate market from search and non-search advertising.[16] The two markets were not substitutable due to existing differences in marketing scope and reach, campaign objectives, advertising functions, pricing models, targeting possibilities, consumer data collection and consumer behaviour.[17] The recognition of such a market would have been significant, as the tracking technology would have clearly been able to exploit the personal location data of mobile subscribers. The conduct would have involved targeted advertising only, rather than the sharing of location data with retailers, more specifically, for achieving online price discrimination. However, one could also argue that targeted advertising on the basis of location tracking is only a first necessary step towards the implementation of behavioural price discrimination.[18]

In *Microsoft/Yahoo!Search*,[19] the Commission considered that a new entrant would have to overcome barriers to entry and, as a result, could incur 'significant costs' associated with developing and updating the search algorithm. Although the decision did not consider privacy, it did raise a relevant issue with regard to the transfer of data by advertisers from one system to another.[20] In *Google/Double Click*,[21] the Commission emphasised the pro-competitive benefits in the form of network effects. These stemmed from serving commercial ads due to the 'large amounts of customer-provided-data' compared to the more limited amounts of data collected by competitors.[22] However, the Commission was not concerned about privacy; quite the contrary, it mentioned that the collection of data allowed for 'better targeting of ads' by advertisers.[23] While the Commission mentioned the legal framework of privacy rules, it did not thoroughly investigate the economics of privacy, in particular, targeted advertising. It simply assumed that customers could have sufficient bargaining power to extract lower prices.

In *Microsoft/LinkedIn*, the software solution offered by Microsoft helps companies to manage customer interactions from sales, marketing or customer databases. LinkedIn offers sales intelligence solutions to professionals interested in personal data, financial information or contacts metrics in order to reach out to potential customers.[24] Similarly, in *IMS Health/Cegedim Business*, business intelligent solutions included tracking technologies and data analytics, including aggregation, matching, consolidation and verification.[25] Again, the exact delineation of the markets for the provision of healthcare professional databases and for sales tracking data was left open.[26] The Commission did not narrow down the market for the provision of business intelligence solutions,[27] though the latter could have looked at the functionality of the software for reporting and analysis or for advanced

[13] *Telefonica UK/Vodafone UK/Everything Everywhere/JV* paras 140 to 142.

[14] Ibid para 146.

[15] Ibid paras 152 and 159.

[16] Ibid para 160.

[17] Ibid para 161.

[18] On targeted advertising and online price discrimination, see AD Chirita, 'The Rise of Big Data and the Loss of Privacy', in M Bakhoum, B Gallego Conde, MO Mackenordt and G Surblyte (eds) *Personal Data in Competition, Consumer Protection and IP Law – Towards a Holistic Approach?* (Berlin, Heidelberg, Springer, 2018),11-17.

[19] *Microsoft/Yahoo!Search Business*.

[20] Ibid para 140.

[21] COMP/M. 4731, *Google/DoubleClick*.

[22] Ibid para 179.

[23] Ibid para 182.

[24] *Microsoft/LinkedIn*, para 57.

[25] *IMS Health/Cegedim Business*, paras 40-41.

[26] Ibid paras 73 and 80.

[27] Ibid para 105.

analytics, including data mining and statistics.[28] The implications of offering 'open' rather than closed market definitions is adding to a nebulous understanding of online platforms, as these are actively involved in a variety of tiny markets; some of the latter are engaged in the study of big data analytics.

II. ARE INNOVATION INCENTIVES DEAD OR ALIVE?

In digital markets, one sensitive issue has been whether the merged entity will continue to invest in innovation. In *Facebook/WhatsApp*, the underlying assumption was that customers could easily switch to competing services if the merged entity were to reduce the amount of innovation.[29] Being recognised as 'recent and fast-growing', the consumer communications sector was portrayed as characterised by 'frequent market entry and short innovation cycles in which large market shares turn out to be ephemeral'.[30] However, as recent events have shown, digital giants like Facebook could lose their market share due to reputational damage following data breaches rather than to their innovation cycles. The latter are also referred to in *Microsoft/Skype* under the same assumption that, in these markets, innovation cycles are short-lived.[31] As both software and platforms are constantly redeveloped, innovators lead the market solely for a short while.[32] In both *Microsoft/LinkedIn* and *Microsoft/Yahoo Search!*, there is recognition that Microsoft could make it more difficult for alternative intelligent solutions 'to compete and bring innovation in the market', whilst Yahoo would require heavy investments in upgrading data, storage for a web search index and advanced algorithms.[33] There is a potential contradiction as, although Yahoo was recognised as a 'weak innovative force' that 'may lose the ability to provide important innovations', Yahoo's incentives to innovate would not be reduced, as Google would have similar incentives.[34] The same conclusion was valid for Microsoft, in that it would be unlikely to reduce its incentives to innovate.[35] It was assumed that the new platform (*Microsoft/Yahoo Search!*) could compete more effectively with Google.[36] Prospectively, these predictions have proved to be inaccurate. The post-merger reality is often a different one in which not all conglomerates become successful innovators. Retrospectively, one could question whether Yahoo/Search or LinkedIn are better services than before, in particular whether significant achievements based on innovation could also be highlighted.

III. DO WE HAVE A WORKABLE THEORY OF HARM?

Several attempts have already been made to address the nefarious effects of the accumulation of data by advancing theories of harm to consumers. None of these so-called 'theories' was ultimately a workable theory that could be applicable to all data-driven mergers in recent practice. This sub-section will map the most relevant theories of harm and, based on their criticism, offer a workable theory of harm.

(i) Consumer Harm Due to Degradation of Quality and Targeted Advertising

Both *Facebook/WhatsApp* and *Yahoo/Search* offer a different kind of theory of harm, which is discussed as a 'theoretical' possibility, leading to a bifurcated analysis of 'targeted advertising' and 'degradation', i.e., diminution, of quality.[37] The catalyst for

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[28] Ibid para 99.

[29] *Facebook/WhatsApp*, para 94.

[30] Ibid para 99. A Schumpeterian understanding of innovation cautions against the risks for competition authorities when assessing innovation incentives ex ante, which is also pervasive in the area of merger control; see AD Chirita, 'Editorial: Competition and Regulatory Trends in Digital Markets' (2017) Competition Law Review 12 (2), 126.

[31] *Microsoft/Skype*, para 83.

[32] Ibid para 83.

[33] *Microsoft/LinkedIn*, para 246; *Microsoft/Yahoo! Search*, para 140.

[34] *Microsoft/Yahoo! Search*, paras 141, 203, 206 and 219.

[35] *Microsoft/LinkedIn*, para 275.

[36] *Microsoft/Yahoo! Search*, para 192.

[37] *Facebook/WhatsApp*; *Microsoft/Yahoo! Search*.

this bifurcated theory is the consumer-protection function inherent in competition law,[38] as the primary focus of consumer law is on advertising and quality. In recent years, most notably after the enactment of the Guidance Paper on the prioritisation of cases under Article 102 TFEU, there has been an extension of the consumer-protection function with a further welcome focus on consumer choice and implications for innovation. As the areas of abuse of dominance and mergers are intertwined, this extension of enforcement is helpful and pragmatic. More specifically, the legal test applicable to mergers is focused on the 'creation or strengthening' of a dominant position following the merger. Disregarding such consumer considerations could therefore lead to an enforcement gap;[39] consumer law is not equipped to deal either with monopolistic power or with mergers.

In the first scenario in *Facebook/WhatsApp*, the Commission examined the theoretical possibility of introducing targeted advertising following a change in WhatsApp's privacy policy and data collection for the same purpose of targeted advertising.[40] These scenarios were dismissed due to the possibility of switching from Facebook and WhatsApp to other services and the existence of alternative providers of data for the purpose of advertising, e.g., Apple, Amazon, eBay, Microsoft, AOL, Twitter, Yahoo!, IAC, LinkedIn, Adobe and Yelp.[41] In the second scenario, in *Yahoo/Search*, the Commission examined the theoretical possibility of degradation of the organic search due to the trade off from paid results. This possibility was easily dismissed because 'when a platform tries to attract more users through greater relevance on the organic search it runs the risk of losing revenues on the advertising side'.[42] As adCenter and Bing will process more traffic, more data will then be available for experimentation which, in turn, will also 'tend to increase' the quality of the new product through better ad matching and higher conversion rates of sale. It was firmly believed that the new platform would eventually become an effective competitor of Google.[43] In *Google/Double Click*, there was also consideration of the same possibility of the degradation of Double Click tool's quality, including bundling Double Click with Google's intermediation services.[44]

In *Publicis/Omnicom*, the Commission examined whether big data may facilitate online targeted advertising and become crucial to conducting a business and to attracting new advertisers.[45] By contrast, in *TomTom/TeleAtlas*, the Commission found that the merged entity was most likely to have the ability to increase prices, degrade quality or delay access for some manufacturers and navigation software providers of digital maps.[46] However, confidentiality concerns were considered similar to product degradation in that the perceived value of the navigable digital map for manufacturers would be lower if the latter feared that confidential information would be shared with TomTom.[47] These concerns were later dismissed due to the limited amount of information of competitive value exchanged between Tele Atlas and its customers.[48] Given the dismissal of the above counterfactual scenarios, one could extract as a preliminary conclusion that the consumer harm caused in these cases by an accumulation of data was not taken too seriously. The most plausible explanation is that both the degradation of quality and targeted advertising are primarily

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[38] In the area of mergers, see, the reference to the reduction of quality in the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of mergers between undertakings, OJ [2004] C 31/5, para 36 on decreasing quality; para 65 on deteriorating quality. In the context of free goods, as more emphasis has to be placed on quality, rather than on price, this could therefore enforce a consumer-protection function of competition law, see M Gal and D Rubinfeld, 'The Hidden Costs of Free Goods: Implications for Antitrust Enforcement', (2016) Antitrust Law Journal (80) 3, 542.

[39] In the same vein, see M Gal and D Rubinfeld, 'The Hidden Costs of Free Goods: Implications for Antitrust Enforcement', (2016) Antitrust Law Journal (80) 3, 546, at footnote 143 on Facebook's privacy cases, highlighting that, due to the absence of monetary consideration, some courts decided that consumer law does not apply.

[40] *Facebook/WhatsApp*, paras 173 and 185 and para 180 respectively.

[41] Ibid para 188.

[42] *Microsoft/Yahoo! Search*, para 204.

[43] Ibid para 192.

[44] *Google/DoubleClick*, para 289.

[45] *Publicis/Omnicom*, para 625.

[46] *TomTom/TeleAtlas*, para 210.

[47] Ibid para 274.

[48] *TomTom/Tele Atlas*, para 276.

the mission of consumer laws. In contrast, the mission of competition law in the area of mergers is to balance the existence of conglomerate effects. Both *Microsoft/Yahoo Search* and *Microsoft/Skype* evaluated these effects but, nonetheless, dismissed them.[49]

(ii) Consumer Harm Due to Horizontal Effects

In *Microsoft/Skype*, consideration was given to the horizontal effects on consumer communications including instant messaging, voice and video calls on PCs having Microsoft's Windows operating system, and on enterprise communications.[50] None of these effects were considered to be significant. In *Facebook/WhatsApp*, the horizontal effects were dismissed since only Facebook is active in the provision of online advertising services.[51] In *Telefonica/Vodafone/Everything Everywhere/JV*, the Commission examined whether the merger could give rise to horizontal effects, but concluded that JV could face competition from a number of market participants, including Google and Apple.[52] Given the low market shares and the presence of several strong competitors, no horizontal effects were identifiable in *IMS Health/Cegedim Business* with regard to intelligent business solutions; nonetheless, such effects were identified with regard to the provision of syndicated primary market research.[53]

(iii) Consumer Harm Due to Conglomerate Effects through Tying or Bundling

In *Microsoft/Yahoo Search*, it was found that the existence of conglomerate effects may increase Microsoft's ability to leverage its market power in areas other than online advertising including notably its PC operating systems and personal productivity apps.[54] In particular, Microsoft could negotiate distribution agreements with manufacturers for the default making of its search technology. The consumer harm inflicted through such bundling was rather surprisingly considered 'unlikely to be significant'.[55] In *Microsoft/Skype*, similar conglomerate effects were identified due to Microsoft's dominant position in the market for Windows operating systems, the Internet Explorer browser and Office apps software.[56] In particular, Microsoft could degrade the interoperability of Skype with competing operating systems and platforms and instead interoperate solely with Microsoft's Lync app.[57] Furthermore, Microsoft could technologically integrate Skype and Windows as a 'must-have' product or engage in commercial bundling of Skype with Microsoft's Windows operating system or Office app.[58] On appeal, the Commission was criticised for not having considered such conglomerate effects, in particular 'the ability of and the incentives for the new entity to use its position on the consumer communications market as leverage to distort competition on the enterprise communications market'.[59] However, the Court found that the theory of harm based on conglomerate effects was 'complex and abstract' based on a generic assumption that 'concentrations giving rise to conglomerates do not usually generate competition concerns'.[60] Conglomerate effects were also dismissed in *Publicis/Omnicom* because the parties would not have the ability or incentive to leverage a position on one market to another by means of tying or bundling or other exclusionary practices.[61] In *Telefonica/Vodafone/Everything Everywhere/JV*, the Commission considered any conglomerate effects stemming from the combination of products in related markets which may facilitate the ability and incentive of the merging parties to leverage a

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[49] *Microsoft/Yahoo! Search*, paras 244; *Microsoft/Skype*, paras 158 and 214.

[50] *Microsoft/Skype*, 7 October 2011; *Cisco Systems Inc and Messagenet SpA v Commission*, Case T-79/12, ECLI:EU:T:2013:635.

[51] *Facebook/WhatsApp*, para 165.

[52] *Telefonica UK/Vodafone UK/Everything Everywhere/JV*, paras 523 to 528.

[53] *IMS Health/Cegedim Business*, paras 166 and 189 respectively.

[54] *Microsoft/Yahoo! Search*, paras 243.

[55] Ibid paras 244.

[56] *Microsoft/Skype*, para 133.

[57] Ibid paras 135 and 213.

[58] Ibid paras 137 and 138.

[59] Case T-79/12, *Cisco Systems Inc and Messagenet SpA v Commission* ECLI:EU:T:2013:635, para 107.

[60] Ibid para 112; subsequently, the Court rejected the theory of harm based on conglomerate effects as purely speculative, at para 121.

[61] *Publicis/Omnicom*, para 673.

strong market position from one market to another through tying or bundling; thus, no concerns were identified.[62] In *Sanofi/Google/DMI JV*, the Commission looked at the potential for conglomerate effects.[63] It examined the ability to foreclose rivals through tying, bundling or limiting the interoperability with competing providers.[64] The Commission found that neither JV, nor the parties had a market position which could be leveraged to exclude third-party device manufacturers, insulin providers or providers of digital services for the management and treatment of diabetes. The parties lack such an incentive; otherwise, by preventing third-parties' insulins and devices from working, JV would drive patients away.[65] No conglomerate effects were found in *IMS Health/Cegedim Business*.[66]

(iv) Consumer Harm due to the Exclusionary Effects of Data Combination

In *Facebook/WhatsApp* and *Google/Double Click*, the overarching theory of consumer harm is based on the exclusionary effects of data combination. Again, the existing concerns were too easily dismissed, often with not too plausible explanations. For example, in *Facebook/WhatsApp*, it was simply mentioned that 'there will continue to be a large amount of Internet user data that are valuable for advertising purposes and that are not within Facebook's exclusive control' and that 'there are currently a significant number of market participants that collect user data alongside Facebook'.[67] Although this was an easy way of dismissing any exclusionary effects on competing rivals, this statement did not helpfully consider how the data combination could subsequently exploit consumers. A similar approach to foreclosure effects was applied to *Google/Double Click*.. It highlighted that the data collected by Double Click was 'relatively narrow in scope' and that 'other companies active in online advertising have the ability to collect large amounts of more or less similar information that is potentially useful for' targeted advertising, e.g., Yahoo!'s Blue Lithium collection of behavioural data.[68] All in all, neither the merged entity, nor Double Click alone could access 'unique, non-replicable data'.[69] Indeed, the merged entity would need to renegotiate contractual terms.[70] This was the theory of harm underpinning the combination of data. Although targeted advertising was a cause for concern, the available technology to implement it was still at an early stage: 'the type of behavioural targeting that lies at the core of these network effects is an emerging technology which neither Double Click nor Google have developed vis-à-vis Yahoo!, Blue Lithium or AOL's Tacoda'.[71]

Publicis/Omnicom underwent a similar assessment where it was noted that the large majority of competing rivals are 'at least similarly placed to the merged entity to get access to big data analytics'.[72] Again, the focus was exclusionary, which examined whether competing advertising agencies would continue to have access following the merger. Competitors offered mixed responses: some were still relying on the offline world, whilst others noted the increasing importance of big data.[73] They confirmed, however, that there would be access to a large number of third-party providers of big data analytics and that some of them had already developed their own data analytics tools.[74] But none of the rival media owners believed *Publicis/Omnicom* to be 'better placed than its competitors post-merger to get access to big data analytics'.[75] Even if the merged entity were to block access

[62] *Telefonica UK/Vodafone UK/Everything Everywhere/JV*, paras 518-522.

[63] *Sanofi/Google/DMI JV*, para 85; thus, this was not the case.

[64] Ibid para 84.

[65] Ibid para 84.

[66] *IMS Health/Cegedim Business*, para 275.

[67] *Facebook/WhatsApp*, paras 189 and 188 respectively.

[68] *Google/DoubleClick*, paras 269 and 270.

[69] One could add here the explanation that data is 'non-rivalrous' in the sense that its collection cannot prevent others from collecting identical data, see D Rubinfeld & M Gal, 'Access Barriers to Big Data', (2017) Arizona Law Review 59, 339, p. 369.

[70] *Google/DoubleClick*, para 303.

[71] Ibid para 303.

[72] *Publicis/Omnicom*, para 628.

[73] Ibid para 626.

[74] Ibid para 627.

[75] Ibid para 628.

to Publicis/Omnicom's own data analytics platform, the impact would still be rather limited, as 'many other providers are developing big data platforms, or will be able to access similar data and not be disadvantaged'.[76] Based on this survey, the Commission concluded that there are no serious doubts with regard to big data since a sufficient number of alternative providers of big data analytics will still be available.[77] However, a number of manufacturers of portable navigable devices were concerned that the merged entity would increase map database prices, offer lower quality or delay the availability of new features and updates.[78] By contrast, in *TomTom/Tele Atlas*, the Commission arrived at the conclusion that, although the merged entity had the ability to foreclose, it would simply lack any incentive to do so.[79] Any price increase in the downstream market would not be profitable for the merged entity. More important, however, was that the merged entity would gain access to commercially sensitive information regarding the downstream activity of rivals.[80] This would allow it to compete less aggressively or make entry and expansion less attractive for competitors. Due to vertical integration, confidential information could be shared with TomTom.[81] In this respect, the Commission considered it unlikely that such confidentiality issues could lead to a significant impediment to effective competition in the market for navigable digital map databases and that the merged entity would still have the incentive to protect its customers' confidential information.[82]

In *Telefonica/Vodafone/Everything Everywhere/JV*, the Commission considered the likelihood of a strategy to technically or commercially foreclose access to essential inputs for the provision of mobile wallet products offered to final consumers.[83] This was found not to be the case, as there are a considerable number of alternative banks.[84] In reaching its view, the Commission subsequently noted that the market concerned is a 'nascent and evolving' one and that there will be additional competition coming from future new technologies based on software, cloud-based SEs, micro-SD, NFC stickers and sleeves.[85] It questioned whether the merging parties would indeed have the technical ability to substantially foreclose access to SIM-based SEs to competing mobile wallet providers, including the ability to degrade competing mobile wallets functioning with an alternative SE.[86] Due to the availability of dual architecture smartphones, competitors could offer their products using embedded SEs, including stickers for maximising consumer reach.[87] Relying on Ofcom's technical expertise, the Commission examined whether the merging parties had a technical ability to foreclose competing mobile wallet providers, including preventing the downloading of a competing mobile wallet app without blocking access to the entire app store.[88] Following an in-depth technical analysis, it was felt that the blocking of the entire traffic from a given IP address 'would not make economic sense' for the merging parties and would be detected by consumers.[89] It was therefore concluded that the parties would have no ability either to technically block or to degrade a competing mobile wallet app from being downloaded, installed or updated on a handset operating on the network of the parties, including the automatic setting of preferences to SIM-based SE or further delisting of mobile datasets capable of supporting rival mobile wallets.[90]

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[76] Ibid para 629; a small minority of respondents noted, however, that the impact on them will be negative.

[77] *Publicis/Omnicom*, para 630.

[78] *TomTom/Tele Atlas*, para 190.

[79] Ibid para 230.

[80] Ibid para 252.

[81] Ibid para 253.

[82] Ibid paras 254 and 255 respectively.

[83] *Telefonica UK/Vodafone UK/Everything Everywhere/JV*, para 248.

[84] Ibid para 249.

[85] Ibid para 259.

[86] Ibid para 263.

[87] Ibid para 268.

[88] Ibid paras 294, 295 to 306.

[89] *Telefonica UK/Vodafone UK/Everything Everywhere/JV*, paras 307 and 308. For adverse consumer reactions, see, para 435.

[90] Ibid paras 307, 313 and 347 respectively.

In *Sanofi/Google/DMI JV*, with regard to data analytics services in the field of healthcare, the Commission did not identify any risk of market foreclosure; there were alternative providers, including one competitor offering data analytics tools in-house.[91] In *IMS Health/Cegedim Business*, the Commission found that IMS does not have the ability or the incentive to successfully foreclose access to experience and clinical trials data.[92] A majority of competitors submitted to the Commission that it was difficult to collect such data from multiple sources, which also involves a considerable cost.[93] Thus, the transaction did not raise vertical effects.[94] There are alternative suppliers of healthcare professional databases, including aPureBase and Veeva.[95] The Commission identified vertical foreclosure effects with regard to healthcare professional databases and sales tracking data. It reached the conclusion that IMS will effectively have the ability to foreclose access to its brick structure to competing providers of such databases or make access more onerous for customers.[96] IMS will be the owner of a stronger offer in the customer interaction software.

In *Microsoft/LinkedIn*, the Commission tipped the balance in favour of pro-competitive benefits following two counter-factual merger scenarios, specifically, assuming that LinkedIn had no incentive to monetise its data on a stand-alone basis and that Microsoft would have access to LinkedIn's data and use it to improve its software solutions. Then, the merger may have pro-competitive effects, i.e., new products or improvements to existing ones to the benefit of consumers 'based on a dataset to which otherwise no one would have access'.[97] The Commission's optimism was fuelled by uncertainty over whether LinkedIn's Sales Navigator could become an important input.[98] Therefore, no foreclosure of competing providers of alternative software solutions was foreseeable.[99] As Intel explained, although LinkedIn's data is 'very useful', it is not the only source of data. There are many other sources available of 'unstructured information about commercial markets and cognitive solutions'.[100] The majority of competing intelligent solutions providers submitted that the impact on effective competition of the proposed merger would be negative.[101] In contrast, the Commission considered it unlikely that the overall impact would be negative and unlikely to lead to consumer harm.[102] Even if Microsoft were to use LinkedIn's data, this is unlikely to affect a significant number of Microsoft's competitors through a significant price increase or a reduction in the incentives to innovate.[103] The underpinning philosophy of this final assessment is recognition that, although 'data is a relevant input', it is not an 'essential' one.[104] Referring to the *Microsoft/LinkedIn* merger where the quest was 'whether bringing the companies' data together would make it too hard for others to compete', the Commissioner for Competition suggested that 'controlling a large amount of data shouldn't become a way to shut rivals out of the market'.[105] However, 'this wasn't an issue (…) as other companies still had access to plenty of data'.

On the basis of all the above merger decisions, a preliminary conclusion would suggest that the exclusionary focus based on the question of whether rivals have access to even more data is unhelpful if it does not address the harm caused to consumers through the exploitative use of data. It is furthermore submitted that an exclusive reliance on the market foreclosure test is not in the spirit of consumer and data protection laws.

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[91] *Sanofi/Google/DMI JV*, paras 72 and 76.

[92] *IMS Health/Cegedim Business*, paras 211 and 213.

[93] Ibid para 214.

[94] Ibid para 217.

[95] Ibid para 229.

[96] Ibid paras 242, 244, 254 and 257.

[97] *Microsoft/LinkedIn*, para 249.

[98] Ibid para 250.

[99] Ibid paras 253 and 267.

[100] Ibid para 263.

[101] Ibid para 273.

[102] *Microsoft/LinkedIn*, paras 274 and 275 respectively as well as para 380.

[103] Ibid para 275.

[104] Ibid para 276.

[105] See Commissioner for Competition, M Vestager, Speech: Clearing the path for innovation, Lisbon, 7 November 2017, 4.

IV. CONCLUSIONS

From the *Google/Double Click* merger in 2008 up to *Microsoft/LinkedIn* in 2016, the assessment of data and privacy considerations in mergers slightly improved and hopefully will continue to do so. Overall, the acquisition of large data sets has represented an intelligent and strategic move towards harvesting even more useful data. The focus has been on the exclusionary likelihood of competition on the basis of data rather than on the exploitative likelihood and actual harm caused to consumers following the use of data. A major enforcement weakness has been the belief that data and consumer protection laws are capable of calibrating the imbalance caused by aggressive competition on the basis of data. Nowadays, data has been recognised as a competitive indicator of performance. In transactional theory, the performance indicator has traditionally been the price or the monetary consideration. In online platforms, exchanges have therefore substituted the price with data. However, users of online platforms possess weaker bargaining power; they have no choice but to consent to default terms and conditions and give in to notices of privacy changes. These developments are nefarious and should have been approached differently by the competition authorities.

- First, reliance on consumer law is a fallacy, as, although the latter deals with misleading and comparative advertising, competition law could also activate its consumer-protection function to address targeted advertising and the degradation of quality in the context of online platforms.
- Second, reliance on data protection is another fallacy, as the former cannot block mergers or acquisitions. Furthermore, a data protection compliance checklist may confirm that online platforms indeed attempt to be fully compliant with data protection, e.g., (i) platform users have freely given their consent, even if they had decided not to read lengthy privacy conditions or a platform's terms of use; and (ii) their aggregated data was anonymised and then shared or transferred.
- Third, reliance on the market-foreclosure test as a panacea for competition based on data with a comprehensive but conservative evaluation of access to data and barriers to market entry, often serves mostly competing rivals who need access to the data in question. Without an extension of the test of foreclosure to the analysis of consumer harm from exploitation, there is a risk of under-enforcement.

The vast majority of data-driven mergers have given rise to horizontal effects, e.g., *Google/Double Click*, *Facebook/WhatsApp*, *Microsoft/Yahoo! Search*, *Microsoft/Skype*, *Publicis/Omnicom*, *Cisco & Messagenet*, rather than vertical effects, e.g., *TomTom/Tele Atlas*. Based on the horizontal and vertical dichotomy, only a tiny minority, e.g., *Microsoft/Skype* and *Cisco & Messagenet,* have given rise to conglomerate effects. Nurturing conglomerates in the long run is therefore no longer remotely possible. Too much faith in ephemeral high market shares and a reduction in innovation is also dangerous. In the end, conglomerates become largely bureaucratic, i.e., inefficient, which can only inhibit entrepreneurship and innovation.

How could these concerns be addressed? There is a clear need for better coordination of the enforcement efforts with regard to digital platforms. Institutional cooperation may also help better inform about the wider scope of competition, consumer and data protection laws. It could address enforcement gaps and empower one authority for areas that cannot be dealt with by the others, especially when dealing with monopolies or mergers. Ultimately, existing tests have to be adapted to the requirements and particularities of digital markets. No doubt, some of the competition concerns have already been addressed through specific remedies. Some remedies have inter alia ensured that manufacturers or distributors of PCs do not pre-install LinkedIn on the Windows operating system, that LinkedIn can be removed if pre-installed, and that the interoperability of competing service providers with Windows' office apps is duly maintained.