Data, Platforms and Competition Law

Prof. Dr. Torsten Körber, University of Cologne

The merger of Facebook and WhatsApp, the EU proceedings against Google, and the investigations of Facebook by the German Federal Cartel Office (FCO, Bundeskartellamt) have cast a spotlight on the economic role of data. The following contribution to the European Commission’s project “Shaping competition policy in the era of digitization” (September 2018) explores the significance of data and data protection in competition law.¹

I. The Role of Data in the Internet Economy

Two-sided business models pave the way for innovative, inexpensive services that were hitherto not possible (e.g., “free” Internet searches, social networks, map services or operating systems). At the same time, however, this raises questions about “data ownership” and about the value of data as economic goods and assets of power. Data, or insights derived therefrom, are particularly valuable for Internet businesses that follow multi-sided business models.

1. The Definition of Data

The very term “data” already requires a differentiated analysis. Understood in a very broad sense, every piece of information is ultimately “data”. But not all data are the same. There are differences between, for example: inventory, transactional and user data; personal and non-personal data; individualized, pseudonymized and anonymized data; new and old data; data voluntarily provided by the user and data collected automatically by the service providers themselves (e.g., user profiles or tracking via Internet logs, cookies, etc.)² While data protection laws restrict the access to personal data, other legislations strive to facilitate access to non-personal data.³ The distinction between these categories is, however, in flux.

2. “Data Ownership”

It is not only the definition of data that turns on countless facets. It is also still largely unsettled who owns which data (and, in some cases, to which degree).⁴ Contrary to widespread opinion, the “owners” of data (or rather, the entities entitled to the right of disposal of data) are not just the Internet users about whom a particular piece of

² See also German Monopolies Commission, Special Report 68, 2015, para. 74 et seq.
data provides insights (such as the location of the Internet access, search interests, etc.) and who are therefore protected by data protection laws (provided that they are natural persons). Moreover, to grant exclusionary rights for certain data to one (or more) persons necessarily excludes others from the use of these data. Regarding the role of data for innovation, this might reduce consumer welfare rather than protecting consumer interests. For example, the data espionage rules of the German Criminal Code protect the entity who has stored the data or who gave permission for the storage to occur (e.g., the service provider). From a legal as well as an economic point of view, a good argument can be made to allocate the value of a piece of information at least partially to the party that has linked and processed the data and gained commercially valuable insights in the process.

3. The Economic Importance of Data

As discussed above, data, in particular personal data, are of great commercial importance to the Internet economy. Three aspects merit special attention.

First, like any other good, data can be the object of contract, allowing it to be the main product of a market. There are businesses, such as market research companies, that specialize in the collection and analysis of data, which is “sold” to third parties in processed form.

Second, at first sight, data seem to have evolved into a kind of “Internet currency.” Businesses with multi-sided business models (such as search engines or social networks) offer their services on at least one side of the platform without a fee, instead collecting user data in order to optimize their services. Seemingly free Internet services therefore to a certain extend swap “data for data.” The idea of “data as a currency” is, nevertheless, problematic, if not deeply flawed, as we will see later.

Third and most importantly, data are also a valuable resource. Data can contribute to the optimization of all services offered on the multi-sided platform, and therefore indirectly contribute to the generation of revenues. The collection and processing of user data enables companies such as Google or Facebook to improve the quality of service (e.g., for Internet searches) or even to offer certain innovative services in the first place. The user also benefits from advertising, in particular because the advertising side finances the service for which the consumers would otherwise have to pay. After all, a search engine or social network must be able to generate revenues in some manner. This simple fact is unfortunately often ignored in the public debate.

From a competition perspective, the situation is thus ambivalent. While access to

---

5 But see Zech, GRUR 2015, 1151, 1154.
8 Cf. Geradin/Kuschewsky (fn. 6), p. 4.
10 Cf. Geradin/Kuschewsky (fn. 6), p. 3.
“data” as a resource can increase consumer welfare, questions arise as to how a concentration of data in the hands of a few companies can hinder competition and contribute to abuses of market power. Data is an especially important “competitive factor” in the multi-sided Internet market and thus possibly also a “power factor.”

II. Data as a Competitive Factor and a Power Factor in the Internet Economy

1. “Data Power” and Market Power

Attempts to determine market power in the Internet economy often result in simple-minded reasoning following the same pattern: “Google has a 90% market share for search, so Google has control over 90% of data. Data are a factor of market power, therefore Google is dominant because of its data power and must be regulated or even broken up.” Such an assessment fails because it assumes a series of constants where in reality, only vague and barely researched variables exist.

For example, it is debatable whether a “market for search services” or for “social networks” even exists and how to define it. On the one hand, based on the aspect of demand-side substitutability it could be argued that there are several specific search markets, on the other hand, one could argue that both, Google and Facebook, compete on a market for user attention.

2. Much Data = Much Market Power?

The public discussion about “data power” often focuses solely on the amount of data. This leads to the impression that the simple formula “much data = much market power” applies. However, such a purely quantitative viewpoint is inadequate. Considering the diversity and scope of application of data (and the corresponding demands), a company’s market power cannot solely depend on the sheer volume of data a company has at its disposal. Rather, inter alia, the type and quality of the data, their relevance in regard to the specific markets in question, as well as the aims in using the data must also be taken into account. Not all data hold the same value for each service or each purpose, or even have any value at all. In addition, data often lose their value over time.

As explained above, more data can contribute to delivering better products than competitors. But more data is not necessarily better. It does not seem farfetched that the extraction and processing of additional data from a particular data set might not actually pay for itself, because a possible quality gain pales in relation to the effort and cost required. Economists would speak of declining marginal returns.

---

3. Quality of Databases, Algorithms and Services

In evaluating a company’s “data wealth” and the market power potentially derived therefrom, it is not simply the “raw data” that is dispositive. Ultimately, it is not so much the “raw data” that is valuable, but rather the databases that are built, and the information and insights gained, from the “raw data.” Companies such as Google and Facebook press the “coal dust particles” of raw data to valuable insights and services (“diamonds”) by combining them with other data and processing them. The quality of the derived knowledge depends not only on the amount of data, but also to a significant degree on the quality of the data processing algorithms. Moreover, the market success and, potentially, the market power of a company depend on the quality and competitiveness of the services that utilize the data. For example, despite the fact that Google by no means suffers from “data poverty,” its social network “Google+” is by far not as successful as Facebook.

4. Data as Inexhaustible and Non-Rival Goods

Knee jerk reactions along the lines of the “much data = much power” pattern are further inappropriate in light of the special features data possesses compared with other resources. Even if data lose value over time, data are not consumed upon use, unlike most physical resources. The same piece of data can generally be used over and over again – by the same or by different companies. Moreover, other than money, the consumers can spend their data and keep them for further uses at the same time. Finally, most data, by definition, are non-rival commodities different from patents, copyrights or business secrets (which were, for example, subject of the Microsoft proceedings). That Company A has access to a piece of data does not generally prevent Company B from collecting, processing and using the same or similar data.

This might be different with regard to industrial data that are generated in the context of “industry 4.0”, by automated cars etc. Such data might be rival goods even without clear rules on “data ownership” because they are kept secret from competitors who are not granted access to the data bases. Whether this is a competition law (or even regulatory law) problem, is not yet clear. As long as there is no evidence for market failure, it should be left to the undertakings to find solutions on a contractually basis.

5. Conclusion

In sum, there are many unknowns in the Internet economy regarding the relevance of data from an economic or legal viewpoint. Basic research is urgently needed before

hasty interventions in new markets, currently only beginning to be understood, do more harm than good. The term “data power” is not a legal expression but rather a political concept. Moreover, competition law does not prohibit the existence of market power, and by extension “data power,” as a single factor in determining market power, is likewise not prohibited. Finding that a company holds a dominant position in the market only means that it is subject to the competition law prohibitions of abusive practices, not that it has in fact infringed them.

III. Data-Related Exploitation of Internet Users

1. Excessive “Data Price”

Academic debate and legal practice regarding the relationship between competition law and data protection law are still quite limited. Proceedings on the subject include the Google/DoubleClick\(^\text{19}\) and Facebook/WhatsApp\(^\text{20}\) mergers, which were investigated on both sides of the Atlantic, as well as the EU Commission’s investigations of Google regarding Search, Google Shopping\(^\text{21}\) and Android,\(^\text{22}\) and the German FCO’s investigation of Facebook.\(^\text{23}\)

There are suggestions in academic writing that companies such as Google or Facebook exploit Internet users.\(^\text{24}\) These allegations generally are based on three assumptions, which are in and of themselves accurate to a certain extent: First, user data are economically valuable; second, users pay for seemingly free services with said data; and third, users are often not at all aware of this exchange or at least do not fully comprehend the value of their data, such that information asymmetries exist that could be exploited by companies. Based on these assumptions, some authors claim that users do not receive adequate consideration for their valuable data. This gives rise to an assumption of a price related abuse or the existence of unfair trading conditions.\(^\text{25}\)

The theory of the “ignorant Internet user” seems far too generalized these days. Furthermore, the thesis that customers’ data are considerably more valuable than the

---


\(^\text{21}\) See COMM., 27 June 2017, AT.39740 – Google Shopping; Körber, NZKart 2015, 415 et seq. with further references.


\(^\text{25}\) Cf. Newman, (Fn. 24), p. 441 et seq. (without further substantiation); see also Weber, ZWeR 2014, 169, 175.
services provided by companies like Google and Facebook is a mere allegation lacking verifiable proof. Public debate often overlooks the fact that such “free” services are of considerable value to users. That said, it is a problem that there is a great deal of uncertainty regarding both the value of user data and the value of Internet services financed by advertisements. Some authors deduce an exploitation of consumers from the assertion that the user data were “extremely valuable” while the marginal costs of additional units (e.g. for an addition answer to an Internet query) were close to zero. This assumption, however, is faulty because it not only vastly overestimates the value of raw data, but also fails to take into account that the value of a product is determined primarily by markets, not by production costs.

There are, however, markets in which fee-based offers compete against free, advertising-financed products based on data collection and processing. For example, most users prefer free, advertising-financed apps, even though the ad-free version usually only costs a few Euros. While some might tend to see this as a result of information asymmetries, there are more indications that Internet users regard the consideration for their attention and the related disclosure of their data as completely reasonable. This applies all the more since the data are, strictly speaking, not depleted upon disclosure. Thus, unlike money, users can use the same data to “pay” several times over.

2. Infringement of Privacy Law

Particular problems arise in this context of the relationship between competition law and privacy/data protection law. As a rule, while competition authorities must undoubtedly take the right to privacy into account when applying competition law, the right to privacy is not in itself protected through the application of competition law.

a) The FCO’s Facebook Case

However, the FCO’s (Bundeskartellamt’s) Facebook case raises the question of whether a dominant company commits an abuse of its dominant position by violating data protection rules. As disclosed in a press release of 2 March 2016, it opened a proceeding against Facebook Inc., Facebook’s Irish subsidiary, and Facebook Germany GmbH in Hamburg for an alleged abuse of market power through violations of data protection laws.

On 19 December 2017, the FCO took the second step and issued a preliminary assessment, in which it extends and underscores this line of reasoning: “According to the authority’s preliminary assessment, when operating this business model Facebook, as a dominant company, must consider that its users cannot switch to other social networks. Participation in Facebook’s network is conditional on registration and unrestricted approval of its terms of service. Users are given the choice of either accepting the “whole package” or doing without the service. A private use of the

26 See, for example, Wendehorst/Graf von Westphalen, NJW 2016, 3745, 3746 f.
network is dependent, among other things, on the fact that Facebook can unrestrictedly collect every kind of user data from third sources, attribute it to the user's Facebook account and use it for numerous data processing activities. According to the Bundeskartellamt's preliminary assessment, Facebook's terms of service are at least in this aspect inappropriate and violate data protection provisions to the disadvantage of its users. In view of the company's dominant position, it can also not be assumed that users effectively consent to this form of data collection and processing. In this proceeding, the Bundeskartellamt focuses on the collection and use of user data from third party sources. The proceeding does not concern the collection and use of data on the Facebook network itself.28

With respect to the possibility that unfair or intransparent terms and conditions may constitute an abuse prohibited by Section 19 GWB or Art. 102 TFEU, two questions must be carefully distinguished:

First, the question arises as to whether a dominant company violates competition law if it exploits its market power in order to impose conditions to which contractual partners would not agree under conditions of functioning competition. This is a classic question of competition law, which is to be prima facie answered in the affirmative. If a dominant company asserts conditions whereby contractual partners are exploited and/or competitors are foreclosed, the company is likely to abuse its market power if this conduct is possible precisely because it holds a dominant position (that is, if the implementation of these conditions would not be possible in a comparable market with functioning competition).29

Second, the question is raised whether such a strict causal link between market dominance and the creation of unfair conditions is required, or whether the establishment of unfair conditions by a dominant company per se violates competition law. The fact that both Section 19 GWB and Art. 102 TFEU refer to an abuse of a dominant position and not, for example, more generally to an abuse by a company dominant on the market, clearly points to the requirement of such a causal link.

The imposition of unfair terms (particularly terms violating data protection law) by a dominant company should only be understood to constitute an abuse within the meaning of Sec. 19 GWB or Art. 102 TFEU if it is possible for the company to impose these conditions either because: 1) the company’s dominant market position leaves users with no sufficient alternatives available to them (strict causality), or 2) if the conduct has a negative effect on competition because it emanates from a dominant company (effects based causality).30 The former focuses on the abusive exploitation of the opposite side of the market, while the latter focuses on the foreclosure of competitors.


30 See FCJ, 4 November 2003, KZR 16/02, WuW/E DE-R 1206 – Strom und Telefon I.
As the FCO’s Facebook case is about exploitation, strict causality should be required, and it seems very unlikely that the FCO can meet this standard as Facebook’s general terms and conditions do not differ from the comparable terms of other social networks that obviously do not have any market power. In other words, the users accept these terms not because Facebook is, quod non, dominant – in a competitive scenario without any market power, the terms would be the same.

If the terms and conditions of a company allegedly result from unequal contractual bargaining power or other factors, such as a lack of interest of the users in reading and negotiating the terms, this must be assessed under laws regarding general terms and conditions, consumer protection laws or other laws, e.g. data protection laws. Not every inequitable contractual provision constitutes an abuse of market power prohibited by competition law.

b) Special Responsibility of Dominant Companies

The “special responsibility” of dominant companies with regard to competition also cannot justify the application of Art. 102 TFEU to sanction infringements of non-competition law, because this responsibility exists (if one follows the ECJ in this regard) at best for the area of competition law and not for the legal system as a whole. Thus, the “special responsibility” does not offer sufficient grounds for holding dominant companies responsible for non-competition infringements under competition law. These limits exist for good reasons.

First, the protection of, for example, consumer privacy via application of competition law would necessarily remain incomplete, because it would exclude the customers of non-dominant companies, who are no less worthy of the protection of privacy law. Moreover, as the FTC put it in its Google/DoubleClick decision, “regulating the privacy requirements of just one company could itself pose a serious detriment to competition in this vast and rapidly evolving industry.”

Second, if we would accept a general “competitive advantage through violation of the law” doctrine in competition law, conflict of laws problems would arise if the non-competition laws were not applied according to the effects doctrine. For example, a dominant German company that violates certain rules of German privacy, labour, or environmental law might be fined for an abuse of a dominant position while the exact same behavior by a US company (that is not bound by German privacy, labour, or environmental law, but has to follow more relaxed US standards) would go unpunished by competition law simply because the US company does not violate any non-competition law.

Third, competition authorities do not have the competence to enforce non-competition laws. They lack the formal competence because the specific laws in these fields must be enforced by specific other agencies or courts, e.g. by data protection authorities. Moreover, the competition authorities also do not have the expertise to

---

apply a vast variety of non-competition laws.

Forth, if competition authorities were to consider non-competition objectives, this would lead to both the comprehensive politicization of competition law and, ultimately, arbitrary decisions. Involvement of experts from the respective specialist authorities (e.g., the data protection authorities) would not help much, since they could, at best, determine whether data protection is restricted or promoted by the business conduct in question. Balancing data protection with the goal of protecting competition would still be left to the competition authorities. Competition authorities are, however, not in a position to find an appropriate balance. This problem increases exponentially where an array of disparate affected objectives (e.g., privacy protection vs. environmental protection vs. employee protection, etc.) are weighed against the protection of competition. Until legislators provide clear guidelines for competition authorities, the competition authorities are obliged solely to protect competition and must not draw on non-competition reasons to justify competition violations.

It was for precisely these reasons that the German legislators, in Section 42 GWB, deliberately reassigned the political task of weighing competition against non-competition objectives in merger reviews from the FCO to the German Federal Ministry of Economics and Energy.

3. Conclusion

Applying competition law to protect consumer privacy or other non-competition interests is a Pandora’s Box that should remain closed. It is for good reasons that competition law is about protecting competition, and nothing else. Competition then serves consumer welfare and consumer interests. If the level of this protection is not sufficient, other laws and other agencies are called upon to serve further interests like consumer privacy or the protection of the environment.