Regulating Big Data: a Competition Law or Consumer Protection Concern?

Extended Abstract

Miriam C. Buiten

December 1, 2017

Abstract

With the emergence of digital markets, the collection and use of personal data by companies has attracted the attention of competition authorities and legal scholars. It is debated whether big data should play a role in competition law enforcement, and to what extent consumer and data protection law should be used to regulate the collection of personal data. Economists have so far been much less involved in this debate, although economic theory can offer valuable insights as to the likely effects on competition of big data. This paper aims to fill this gap in the literature, addressing the following questions: What are the economic features of big data? Given the nature of big data, are companies able to exclude competitors from their data and gain market power? Are network effects likely to result in entry barriers or other competition law concerns in digital markets? And finally, insofar big data raise mainly privacy concerns, is competition policy the appropriate instrument to address these concerns? The initial analysis suggests that data are unlikely to offer companies a sustainable competitive advantage, given that data are non-rival and can easily be duplicated by competitors. The main concern of big data is privacy protection, which may be addressed more effectively by consumer protection policy than by competition law.

Keywords: Big Data, Market Power, Competition Law, Privacy, Consumer Protection
Extended Abstract

In the era of digital markets, companies are able to collect an unprecedented amount of personal information about their customers. Big data, meaning the collection, storage, and analysis of large and varied datasets, are of increasing importance (Ohlhausen and Okuliar, 2015). For an increasing number of companies, the use of these data is key to their business model. This has led competition authorities and legal scholars to question whether big data should receive more attention in the enforcement of competition law.

With respect to mergers, the potential relevance of big data was highlighted in the Facebook/WhatsApp merger case. The merger was approved by the European Commission in October 2014.\(^1\) When Facebook notified the acquisition of WhatsApp in 2014, it informed the Commission that it would be unable to automatically match Facebook users’ accounts with WhatsApp users’ accounts. However, in August 2016, WhatsApp announced updates to its terms of service and privacy policy, including the possibility of linking WhatsApp users’ phone numbers with Facebook users’ identities. In response, the European Commission fined Facebook EUR 110 million for providing misleading information during the merger investigation.\(^2\)

Notably, big data featured in this case because of the privacy considerations involved in the information being shared. Some commentators argue that since big data are increasingly employed in all areas of the economy, it can be expected that data-related aspects feature prominently in Commission cases (Kadar and Bogdan, 2017).\(^3\) Some commentators have suggested to expand the scope of competition laws to include antitrust concerns related to the use of personal data (Stucke and Grunes, 2015).

However, if privacy considerations are the main concern of big data, the question is whether this concern should be dealt with by competition authorities, or could be better addressed by consumer protection regulation. The European Commission introduced a new Data Protection Regulation\(^4\) to regulate companies’ behaviour with regard to their customers’ personal information. Competition Commissioner Vestager stated: “I don’t think we need to look to competition enforcement to fix privacy problems. But that doesn’t mean I will ignore genuine competition issues just because they have a link to

---

\(^1\)Case No COMP/M.7217 - FACEBOOK/WHATSAPP, Brussels, 03.10.2014 C(2014) 7239 final.
\(^3\)Kadar and Bogdan (2017) refer to, for example, Case M.4731 Google/DoubleClick, Case M.5727 Microsoft/Yahoo Search Business and Case M.8124 Microsoft/LinkedIn.
Indeed, in order to determine what role big data should play in competition law analysis, we should ask whether big data raise competition concerns - concerns that cannot be dealt with adequately by consumer protection law.

This paper addresses this question, using economic insights to determine the likely effects of big data on competition. From an economic perspective, this paper investigates i) if and how big data affect competition and market power, and therefore ii) to what extent big data raise competition concerns, or mainly privacy concerns, and hence iii) whether competition policy is the appropriate instrument to address these concerns, as compared to consumer protection law and privacy regulation.

First, this paper will examine how big data should be characterised from an economic point of view. The paper will consider the economic features and effects of big data, such as network effects and entry barriers, in order to establish the likely effects on competition of big data. In particular, it will explore whether data-related network effects on search engines and other two-sided digital markets can result in a “tipping effect” in favour of one large incumbent. The paper will discuss how likely it is that big data can award a firm lasting market power, given that data can easily be duplicated and consumers can get their services from multiple providers (multi-homing). Insofar big data cannot offer firms a lasting competitive advantage, big data may not lead to exclusion of potential competitors.

Next, the paper will consider whether, insofar big data mainly raise privacy concerns, competition law is the right tool to address these issues. If the main concern of big data is privacy, consumer protection may be a more effective tool to respond to big data than competition policy.

Overall, the paper will focus on the need to clarify the policy concerns related to big data, in order to deal with these concerns using the most efficient and effective regulatory instrument.

References


