



Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control

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PRELIMINARY

The European Commission opened up a “*Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control*”¹ addressed to, among others, competition authorities.

The Catalan Competition Authority (hereinafter, “ACCO”) is an independent agency of the Government of Catalonia by Law 1/2009, of 12 February, on the Catalan Competition Authority, which in accordance with Article 2.1 of this regulation “aims to guarantee, improve and promote conditions of free competition and market transparency in respect of the economic activities carried out mainly in Catalonia”. This document is issued in view of ACCO advocacy functions; therefore, references to individual operators are merely intended to illustrate the reality that we wish to discuss, but in no case do they imply any formal and binding assessment of their actions in terms of competition policy.

By means of this document we aim to take part in this consultation. The content we are submitting is mainly based on the Study “*The data-driven economy. Challenges for competition*”² that ACCO published only some weeks ago. We highly encourage you not only to read the excerpts hereby included (focused specifically on mergers aspects) but also to have a look at the whole Report.

We hope this contribution is of your interest and you find it useful. Should you have any doubt or would you like to discuss it personally, we are open to have a meeting as expressly foreseen in the Consultation Strategy³.

The document is divided into 5 parts: (i) The data-driven economy (the value of data), (ii) main challenges and (iii) possible responses of a regulatory nature, (iv) responses by changing modus operandi of the competition authorities and (v) conclusions.

(I) A NEW REALITY: THE DATA-DRIVEN ECONOMY (The value of Data)

Data collection requires expenditure by companies either in the form of the implementation of more or less sophisticated systems of data collection (sensors) or through the offering of free or subsidised products (smartphones) or services (Google) in order to capture user information and derive economic benefit from it at a later date.

In any case, data collection requires an investment meaning that any operator that has such data enjoys a competitive advantage. These large data sets are becoming a core asset in the economy, fostering new industries, processes and products and creating significant competitive advantages⁴.

Some⁵ have argued that data is like crude oil (a basic input, perhaps essential, for the functioning of the economy as a whole and of significant economic value).

¹ http://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html;

² http://acco.gencat.cat/web/.content/80_acco/documents/arxius/actuacions/Eco-Dades-i-Competencia-ACCO-angles.pdf

³ http://ec.europa.eu/competition/consultations/2016_merger_control/consultation_strategy_en.pdf;

⁴ “These large data sets are becoming a core asset in the economy, fostering new industries, processes and products and creating significant competitive advantages”, <http://www.oecd.org/sti/ieconomy/data-driven-innovation.htm>

⁵ <https://www.quora.com/Who-should-get-credit-for-the-quote-data-is-the-new-oil>



However, although the data/oil simile seems correct based on the characteristics given in relation to their importance, it does not adequately capture other elements that distinguish data and which are, perhaps, the cause of some confusion.

Thus, unlike oil, data carried with it the problem of privacy, and, furthermore, information is a not rival element. That is, collection by a particular company does not prevent the collection of the same information by a competitor, unlike oil, which can only be consumed by one company and never two at once. However, the “non-rivalry” of data does not prevent those who obtained it from excluding or attempting to exclude competitors from their data store.

For this reason, an increasing number of merger operations can be explained by the collection of information⁶.

(II) CHALLENGES FOR THE COMPETITION

2.1 A wider perspective

The strong economic performance that can be obtained from data has strengthened the strategy of operators in two-sided markets that are based on information. Such operators release users from monetary payment in order to attract the maximum possible number of users and thereby obtain as much information as possible from this commercial relationship.

The strategy described above means that the users receive a product or service for free. However, as counter-intuitive as it may initially seem, even in a market where users receive a service at zero cost there may be anti-trust issues that adversely impact their welfare.

Specifically, the welfare of users not only depends on the price paid for the service monetarily but also the quality of such service⁷ and the variety of the available supply.

The qualitative variables include the privacy of their data, an element that can also be conceived of as a “non-monetary price.” Specifically, as regards the qualitative factor, in the context of a roundtable of the OECD⁸, the competition authorities specifically considered this to be an objective, even though they were aware of the subjectivity inherent to this element⁹.

We should also note that one of the objectives of the competition authorities is to guarantee the variety that comes from competition.

Variety is a factor that is more sensitive in certain areas, such as the media¹⁰ in which variety may even be synonymous with news quality viewed as a whole. In terms of the Chairman of the FTC, Robert Pitofsky: “Antitrust is more than economics. . . . And I do believe if you have issues in the newspaper business, in book publishing, news generally, entertainment, I think you want to be more careful and thorough in your investigation than if the very same problems arose in

⁶ According to an OECD estimate reported by Ariel Ezrachi and Maurice Stucke, these operations more than doubled between 2008 and 2013 (from 55 to 134). http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-internal-market-subcommittee/online-platforms-and-the-eu-digital-single-market/written/23223.html#_ftn9. The same estimate is referenced in the *Report of workshop on Privacy, Consumers, Competition and Big Data 2 June*. 11 July 2014. https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Big%20data/14-07-11_EDPS_Report_Workshop_Big_data_EN.pdf

⁷ When the product is free, quality becomes particularly relevant according to the European Commission. “Microsoft/Yahoo! Search Business (Case Comp/M.5727)” Commission Decision C(2010) 1077 [2010] OJ C 020/08, para. 101; Microsoft/Skype (Case Comp/M.6281), Commission Decision C(2011) 7279, 7 October 2011, para. 81.

⁸ OECD Policy Roundtables: “The Role and Measurement of Quality in Competition Analysis”, 28 October 2013, <http://www.oecd.org/competition/Quality-in-competition-analysis-2013.pdf>, P. 22

⁹ *Ibid.* P. 6.

¹⁰ “The merger may therefore lead to higher prices or a reduction in choice and quality for readers.” Press release: “Specialist magazines merger could face in-depth investigation”. 07 October 2016. <https://www.gov.uk/government/news/specialist-magazines-merger-could-face-in-depth-investigation>



cosmetics, or lumber, or coal mining. I mean, if somebody monopolizes the cosmetics fields, they're going to take money out of consumers' pockets, but the implications for democratic values are zero. On the other hand, if they monopolize books, you're talking about implications that go way beyond what the wholesale price of the books might be."¹¹

More recently, Giovanni Buttarelli – current supervisor of data protection at European level (EDPS) – stated¹²: “What if Twitter were acquired by a digital giant? This should be of interest to consumer enforcers and antitrust, as well as the privacy community. It would have real implications for freedom of expression online. Merger control provides for the protection of media plurality – this is a concern from an analogue world. We need to update this for the digital reality, as more and more of our lives and objects go online.”

As part of the merger between AT&T Inc. and Time Warner Inc., some people indicated the need to take into consideration the impact of this transaction on variety in media¹³.

2.2 Risks for competition

An economy characterised by data as an element of special relevance displays some unique features among which are its dynamism and the common presence of some network effects. The combination of both aspects assumes that an indecisive action by the competition authorities¹⁴ may have important consequences in the competitive market environment.

Accordingly, by way of example, allowing certain mergers by a party that already boasts an important volume and variety of data may prevent an operator of smaller size from having the information necessary to experience network economies, and therefore it is unlikely that in the future it will be able to establish itself as an alternative to the operator that does have the information and experiences, at high velocity, the derivative positive impact of network effects.

Consequently, it is desirable – from a dynamic perspective of competition – to assess to what extent the integration would impede market access to economically viable alternatives, as well as the dependence in terms of data for the merged entity, which may eventually constitute a limit on innovation.

This type of risk concerns a problem of a structural nature (risks have a dual nature: structural/behavioural).

¹¹ Reference recorded by Maurice Stucke in an interview. 26 September 2016. *How Can Antitrust Be Used to Protect Competition in the Digital Marketplace?*

<https://promarket.org/digital-market-not-going-correct/>

Mr Pitofsky's statements were recorded initially in the Washington Post. Alec Klein, “A Hard Look at Media Mergers”, *Wash. Post*, 29 November 2000 (quoting Robert Pitofsky, FTC Chairman).

<https://www.washingtonpost.com/archive/business/2000/11/29/a-hard-look-at-media-mergers/d8380c2d-92ee-4b1b-8ffd-f43893ab0055/>

¹² *Big data: individual rights and smart enforcement*, speech at EDPS-BEUC, Joint Conference European Commission, Berlaymont, Brussels, 29 September 2016, Giovanni Buttarelli

https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Speeches/2016/16-09-29_Speech_EDPS_BEUC_BigData_EN.pdf

¹³ Letter from Senator Bernard Sanders dated 26 October 2016 <http://www.sanders.senate.gov/download/atandt-time-warner-letter?inline=file>

¹⁴ We should highlight the report “Competition Law and Data”, of 10 May 2016. *Autorité de la Concurrence* and *Bundeskartellamt*. <http://www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf>. This study led to two entries on the blog of the CNMC, 18 August 2016. José Rubio and Pedro Hinojo. Competition policy and big data (a French and German view) (I) <https://blog.cnmc.es/2016/08/18/competencia-y-big-data/>

Competition policy and *big data* (a French and German view) (II) 22 August 2016. José Rubio and Pedro Hinojo. <https://blog.cnmc.es/2016/08/22/la-politica-de-competencia-y-el-big-data-una-vision-francesa-y-alemana-ii/>. As part of the continuation to said joint study, the *Bundeskartellamt* issued a working paper on the market power of the platforms and networks. 09 June 2016.

https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/09_06_2016_ThinkTank.html



2.2.1 Structural risk: winner takes all

In this sense, it would be interesting to define the ownership of the data. If they are always owned by users, any operator could offer quality services to those who voluntarily grant it access to their own data¹⁵. In other words, the competitive advantage derived from the interaction with users would not depend on the capacity of its mass collection (as a result of important investments) but would depend on the ability to persuade the users to voluntarily cede their data.

In the same vein, there are those who uphold the right of users to obtain at all times a copy of all the information that an operator has collected about them:

“A right to obtain a copy of the stored data from the controller and the freedom to move it from one service provider to another, without hindrance.”¹⁶

“Under this proposed reform, individuals would be given the right to ‘switch electronically processed personal data from one firm to its rival through a “commonly used” electronic format’. This right of data portability is seen as a mere extension of the principle that it is ‘your’ data, not the controllers”.¹⁷

Also, the former Competition Commissioner, Joaquin Almunia, said that “one of the principles of the current data protection reform goes to the heart of competition policy [...] the ‘right to portability’”.¹⁸

Users could choose to cede all their historical data collected by Google to, for example, Bing. Thus, Bing could obtain the historical data sets so that its algorithm can learn with the same historical information. Note that it would be very difficult for Bing to obtain this information through alternative routes since users would not use it because its performance – precisely due to the lack of data – would be worse than Google’s.

Also in a similar sense, Telefónica¹⁹ announced²⁰ recently that it is working on a platform – operational in 2017 – that will allow users themselves to manage their own data, whereby operators who want to make use of it will pay for it. However, this is not the only business proposal in this line²¹.

In the same vein, Giovanni Buttarelli – current supervisor of data protection at European level (EDPS) – mentioned in a recent speech²² the concept of “personal data stores” as a concept to ensure control over personal data and praised the work done by the Japanese administration to promote decentralisation in the storage of information.

¹⁵ That is, it would involve guaranteeing that the user has the possibility of choosing the option to preserve the privacy of his data, which would probably mean he would have to pay a monetary cost for the service or, on the contrary, expressly choose to “sell it” in exchange for enjoying a free service and/or receiving monetary compensation.

¹⁶ Pages 9 and 10. *Competition Law and Personal Data: Preliminary Thoughts on a Complex Issue*, Damien Geradin & Monika Kuschewsky. 12 February 2013. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2216088

¹⁷ Footnote 37, *Competition Law and Personal Data: Preliminary Thoughts on a Complex Issue*, Damien Geradin & Monika Kuschewsky. 12 February 2013.

¹⁸ J. Almunia, “Competition and personal data protection”, 26 November 2012. Speech 12/860.

¹⁹ Telephone operators also collect a wealth of information from their customers: <http://www.zeit.de/datenschutz/malte-spitz-data-retention> Zeit Online.

²⁰ http://economia.elpais.com/economia/2016/09/05/actualidad/1473067092_839315.html;
<http://www.lavanguardia.com/economia/20160905/41120275640/telefonica-clientes-cobren-empresas-datos.html>;
<http://www.xatakamovil.com/movistar/telefonica-prepara-una-plataforma-para-que-los-otts-recompensen-a-sus-clientes-por-acceder-a-sus-datos>

²¹ <http://handshake.uk.com/hs/index.html>

²² “Personal data stores will be one way of the individual reasserting her control over personal data, and we were impressed to learn of the work the Japanese administration is doing to promote such decentralisation of data storage.” *BIG DATA RIGHTS: LET’S GET TOGETHER*. 06 October 2016. Giovanni Buttarelli.
https://secure.edps.europa.eu/EDPSWEB/edps/site/mySite/Big_data_rights_Lets_get_together



Another possibility would be to oblige whoever collects information to offer an API (application programming interface) so that users can always access this information and offer it to competitors (increased compatibility). This is the interesting line of work pointed out by Nick Grossman in a recent interview²³ and which somehow matches the content of Article 20 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)²⁴.

Finally, reference has also been made to the possibility of creating platforms so that different operators possessing information may transfer it to a common market and the content thereof may be subsequently resold to other operators who need the information²⁵.

It is noteworthy that the various options agree that they limit the possibilities of exclusion by the operator who initially obtained the data and do not involve any cost²⁶ for the user to manage the data (either they have not left his sphere of control or he can access them through an API at a cost of 0). That is, all of them attempt to achieve the annulment of the costs of the change so that users can facilitate access to their history or reputation²⁷ for any new offeror, thereby enabling it to offer customised services based on the same information as that held by the previous service provider.

In case one of these options was in place, Mergers would be a little less problematic. Meanwhile, mergers consequences may be very significant so close attention must be paid to its analysis procedure.

Mergers constitute a mechanism for incorporating information from another operator at the heart of a company in a way that is structured and more stable. The most well-known technology companies have carried out various mergers that seem to have as their main motivation incorporating information. Particularly well-known are the mergers already executed between Google and Double Click²⁸ and Google and Waze.

The first allowed Google to gather information and technology to lead the capacity to obtain profitability from the most personalised or targeted ads. Both the Commission and the FTC cleared the operation. However, in the case of the FTC there was a dissenting opinion which stated that the network effects may not have been taken into account and that the barriers to entry that the operation produced (in the sense that no competitor could offer a service of the same quality) would mean that the advertisers did not have any alternative but to resort to the merged entity²⁹.

²³ *The Capital Forum*. 21 September 2016. Based on the conference call of 15 September 2016. <http://createsend.com/t/j-D5D60E8ACC6E3E1C>

²⁴ "To further strengthen the control over his or her own data, where the processing of personal data is carried out by automated means, the data subject should also be allowed to receive personal data concerning him or her which he or she has provided to a controller in a structured, commonly used, machine-readable and interoperable format, and to transmit it to another controller." http://ec.europa.eu/justice/data-protection/reform/files/regulation_oj_en.pdf

²⁵ *Creating a successful Internet of Things data marketplace*.

October 2016 Johannes Deichmann, Kersten Heineke, Thomas Reinbacher, and Dominik Wee <http://www.mckinsey.com/business-functions/digital-mckinsey/our-insights/creating-a-successful-internet-of-things-data-marketplace>

²⁶ The absence of cost is particularly relevant since there is a tendency to place a higher value on what you demand in order to lose something that you already own than that which you are willing to pay in order to recover it.

²⁷ Initiatives have appeared in this regard, such as "Traity", which facilitate the portability of users' reputation.

²⁸ Commission Decision of 11 March 2008. Comp/M.4731 Google / Double Click. http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf; Statement of the Fed. Trade Comm'n. Concerning Google/DoubleClick (Dec. 20, 2007), File No. 071-0170 at 12, https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf

²⁹ Commissioner Pamela Jones Harbour, Dissenting Statement in the matter of Google/DoubleClick, 20 December 2007. https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf



The merger between Google and Waze can also be explained by the acquisition of information. Waze, an Israeli company which users used to identify different aspects of traffic in real time, contained valuable information allowing Google to supplement its maps with real-time individualised input. The Office of Fair Trading³⁰ concluded that the operation would not reduce competition nor did the FTC³¹ consider that the acquisition entailed competition concerns.

Another merger that seems to be explained by the interest in obtaining information is that of Facebook and WhatsApp. Facebook was interested in obtaining all the information generated through WhatsApp in order to improve its ability to better target its ads. This vision seems to have been achieved. The business model of WhatsApp has been altered: (i) it has stopped experimenting with charging €1 for the application and (ii) its privacy policy has been amended to specifically allow the transfer of information to Facebook³².

The merger, therefore, has entailed a loss of options by the user. That is, where prior to the said merger two different models coexisted (WhatsApp – with greater data protection but with the requirement of an annual cash payment) and Facebook Messenger (less privacy protection but free) there is now just one (free service but with little privacy).

Consequently, for those users who valued their privacy at a monetary amount higher than the one requested by WhatsApp, with the merger they have seen their welfare decrease (decreased quality in terms of privacy). Note that they are unlikely to stop using a specific messaging service when their friends and family remain on it (traditional network effects).

In this sense, it is notable for example that, regarding the merger between WhatsApp and Facebook, the European Commission did not analyse the impact on privacy resulting from an increase in the concentration of data produced as a result of that acquisition.

“Any privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the transaction do not fall within the scope of EU competition law.”³³

“For the purposes of this decision, the Commission has analysed potential data concentration only to the extent that it is likely to strengthen Facebook's position in the online advertising market or in any sub-segments thereof. Any privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the Transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules.”³⁴

³⁰ 17 December 2013. Office of Fair Trading. *Completed acquisition by Motorola Mobility Holding (Google, Inc.) of Waze Mobile Limited*. ME/6167/13.

http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/shared_oft/mergers_ea02/2013/motorola.pdf

³¹ Engadget. 01 October 2013. <https://www.engadget.com/2013/10/01/ftc-will-not-challenge-google-waze-acquisition/>

³² 26 September 2016. <http://www.xataka.com/moviles/whatsapp-empieza-a-compartir-tu-numero-de-telefono-y-conexiones-con-facebook>.

The data protection authority in Hamburg has issued an administrative order to prevent this transfer of data. Press release. 27 September 2016. https://www.datenschutz-hamburg.de/fileadmin/user_upload/documents/Press_Release_2016-09-27_Administrative_Order_Facebook_WhatsApp.pdf. It was also reported in the news that the UK data protection authority allegedly said that it would investigate Facebook and WhatsApp. BBC News. 29 September 2016.

<http://www.bbc.com/news/technology-37512419>. Facebook: WhatsApp consummates its warning: either you accept the conditions or you cannot continue to use the service, *El País*. 27 September 2016

http://tecnologia.elpais.com/tecnologia/2016/09/27/actualidad/1474975944_468987.html#?ref=rss&format=simple&link=seguir Also, Commissioner Vestager said she requested information from these companies. 09 September 2016.

<http://www.bloomberg.com/news/articles/2016-09-09/facebook-grilled-by-eu-s-vestager-over-whatsapp-merger-u-turn> The Spanish Data Protection Agency is also investigating it. “Protección de Datos investiga a Whatsapp por su nueva política de privacidad”, *Sabemos Digital*. 05 October 2016. http://sabemos.es/2016/10/05/proteccion-datos-investiga-whatsapp-privacidad-facebook_27268/

³³ Press release: *Commission approves acquisition of WhatsApp by Facebook*. 03 October 2014. http://europa.eu/rapid/press-release_IP-14-1088_en.htm.

³⁴ Paragraph 164 of the Decision of 3 October 2014. Case No COMP/M.7217 - FACEBOOK/ WHATSAPP. http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf.

The facts described show that, if the competition authorities consider that privacy-related concerns do not fall within its scope, this approach cannot be resolved by a subsequent intervention by the agencies responsible for ensuring data protection. In this regard, it should be noted, for example, that the mergers are, where appropriate, only notified to the competition authorities and only they can impose structural conditions³⁵. Consequently, the assessment of a possible negative impact on the privacy of users as a result of such an operation can only be evaluated by the bodies responsible for the promotion and protection of competition and only they can make the merger conditional, for example, on the data of a service not being used by the purchaser.

Nonetheless, it should not be ignored that, in terms of price, users will obtain greater welfare (they no longer pay any amount for the use of WhatsApp) and that less privacy may even positively affect some of the qualitative factors³⁶. It is considered inappropriate not to consider also the issue of privacy (possible downgrade in quality) as well as a lower possibility of choice (less variety of “relevant” operators³⁷ with different offerings). That is, although perhaps the qualitative effects are more easily quantifiable (e.g. higher conversion rate of the ads), the qualitative effect should also be weighed (the eventual degradation in terms of privacy).

As has been pointed out, there may be a paradox because less privacy can at the same time mean less quality in terms of “intimacy”, but the information obtained from each user as explained could yield a better service that is more personalised to the given user. In any case, it should be for the consumer or user to choose the privacy level, even knowing that a high level of privacy can lead to a relatively worse service³⁸.

This paradox does not arise when the data collected are not required for the service provided. Therefore, a clear recommendation accurately made by the data protection authorities is to minimise the volume of data collected³⁹.

³⁵ “Competition enforcement has been so effective not only because of the level of the fines but also because it disrupts how companies and organisations behave”. P. 15. *Opinion 8/2016 EDPS Opinion on coherent enforcement of fundamental rights in the age of big data*. 23 September 2016. European Data Protection Supervisor (EDPS). https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Events/16-09-23_BigData_opinion_EN.pdf

³⁶ For example, in the field of medicine, it is clear that less privacy can provide solutions more appropriate to each specific profile. “Project Hanover: ¿es el *big data* la esperanza contra el cáncer?” 29 September 2016. *El País*. http://tecnologia.elpais.com/tecnologia/2016/09/23/actualidad/1474647362_976680.html#?ref=rss&format=simple&link=guid 6es Jornades TIC Salut i Social 2016. El Repte de la Salut i el Benestar en la Societat Digital. 30 September 2016. Minute 44:50 seconds. Statement by Javi Creus *We know that data heal*. https://www.youtube.com/watch?v=MonYWFoW2_g; “The data released through the Open Data Initiative is being used to improve public health, energy efficiency, traffic flow, and even drought management. It is pioneering precision medicine for individual patients and making hospitals work better. There are apps created from the data that are helping families looking for colleges and consumers who want to avoid unhygienic restaurants”. Remarks of Commissioner Terrell McSweeney. *BIG DATA: INDIVIDUAL RIGHTS AND SMART ENFORCEMENT* European Data Protection Supervisor-BEUC Joint Conference Brussels, Belgium, 29 September 2016. P. 3 https://www.ftc.gov/system/files/documents/public_statements/987103/mcsweeney_-_euro_data_protection_conf_9-29-16.pdf

³⁷ The costs of switching in a service with strong network effects can be substantial. In other words, if all my acquaintances use a particular messaging service it is hard for me “to be able” to switch to another given my privacy preferences.

³⁸ The European Data Protection Supervisor (EDPS) has also recommended exploring the possibility of creating a web space where users can interact without being monitored. “We also recommend that the EU institutions with external experts explore the creation of a common area, a space on the web where, in line with the Charter, individuals are able to interact without being tracked”. *Opinion 8/2016 EDPS Opinion on coherent enforcement of fundamental rights in the age of big data*. 23 September 2016. European Data Protection Supervisor (EDPS). https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Events/16-09-23_BigData_opinion_EN.pdf

³⁹ “Data protection authorities need to enforce data minimisation, which requires personal information only to be processed where adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed.” P. 7. *Opinion 8/2016 EDPS Opinion on coherent enforcement of fundamental rights in the age of big data*. 23 September 2016. European Data Protection Supervisor (EDPS). https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Events/16-09-23_BigData_opinion_EN.pdf



The difficulties in assessing this type of merger are not limited to establishing the issues subject to analysis. It is also a challenge to rethink the classical notion of defining the relevant market affected.

In the acquisition of Nest (domestic smart thermostats) by Google, which was approved in the early stage by the FTC⁴⁰, one of the controversial issues is what market would be affected by that operation.

It seems unlikely that through this acquisition Google was showing an interest in becoming a supplier of thermostats. Rather, the purpose of the operation was to obtain the information collected by these devices in order to improve the ability to put together a user profile and thus improve its ability to offer potential advertisers greater certainty that their ads would reach the users they are most interested in them reaching.

Consequently, the determination of the relevant market – as it is linked to the data – seems to have no obvious physical relationship. And therefore, far from being able to define it in the scope of thermostats, a broader view is appropriate. In other words, the data transcend market configurations more linked to physical elements.

(III) REGULATORY CHANGES REGARDING MERGER CONTROL

The current environment undoubtedly presents new challenges⁴¹ and the question is whether the authorities now have appropriate tools to respond effectively to them.

3.1 Thresholds

The Competition Act and Regulation 139/2014 at European level contain certain limits on market share and business volume below which it is assumed that mergers are not likely to distort competition and, therefore, should not even be subject to notification to the competition authorities.

The Spanish Competition Act (Law 15/2007) takes into account both the undertakings turnovers and their market share.

3.1.1 Data

As stated by Ms Vestager “a company might even buy up a rival just to get hold of its data, even though it hasn’t yet managed to turn that data into money”⁴².

In light of the current limits, this type of operation would not even have to be notified, even if it presented significant implications in terms of competition. For this reason, Ms Vestager pointed out that “we are therefore exploring whether we need to start

⁴⁰ 04 February 2014. <https://www.ftc.gov/enforcement/premerger-notification-program/early-termination-notice/20140457>

⁴¹ An assessment that is shared by the OECD which will address these challenges (big data and competition) at the next meeting to be held in Paris from 28 November to 2 December. By way of background, the Secretariat of the OECD has prepared some interesting notes. *BIG DATA: BRINGING COMPETITION POLICY TO THE DIGITAL ERA*. 27 October 2016.

[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP\(2016\)14&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2016)14&docLanguage=En). Also in relation to these challenges

https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/09_06_2016_ThinkTank.html

⁴² “Data could be an important factor in how a merger affects competition” said Ms Vestager. “A company might even buy up a rival just to get hold of its data, even though it hasn’t yet managed to turn that data into money”.

European Commission may consider customer data concerns in mergers. 29 September 2016. *Financial Times*.

<https://www.ft.com/content/415351b8-3ec6-3d1e-9677-ff0e54cc9101>



looking at mergers with valuable data involved, even though the company that owns it doesn't have a large turnover.”⁴³ Furthermore, the European Data Protection Supervisor had recommended “updating the rules on how authorities apply merger controls better to protect online privacy, personal information and freedom of expression”⁴⁴.

So as suggested by Ms. Vestager, there are doubts concerning whether notification thresholds are effective insofar as they rest exclusively on monetary turnover.

In this sense, there may be companies with great potential (for example, in the pharmaceutical or technological sector) that have stores of very relevant assets (drug patents not yet marketed or a multitude of still untapped information) but which have not yet found a reflection in their cash income.

Improper operation of the thresholds is merely a consequence of the lower correlation between monetary income and importance as a result of the intrinsic value of the information. All this leads us to reflect on the desirability of revising the competition rules in order to cover those business merger operations in which there is no correlation between income levels (essentially those of the acquiree) and the economic importance of the operation.

At the time it was acquired by Facebook, WhatsApp did not have high levels of turnover – it did not exceed the thresholds – although the operation was very significant⁴⁵ (valued at \$19 billion). Operators such as LinkedIn⁴⁶, Wallapop or Waze, to name a few examples, can also have large stores of information without presenting high levels of turnover.

3.1.2 Embryonic operations

The desirability of this review becomes greater if one takes into account that an increasing number of mergers may occur at an early stage of the journey of the absorbed entity (and, therefore, that the acquiree does not have a level of income that exceeds the thresholds required to notify of the merger).

This circumstance (mergers in initial stages of development of a business project) is due to the detection capabilities enjoyed by some operators in relation to initiatives with an interesting potential (competitive radar). Thus, the operator that manages a platform has valuable information regarding initiatives that arouse the most interest among users.

⁴³ “We are therefore exploring whether we need to start looking at mergers with valuable data involved, even though the company that owns it doesn't have a large turnover.” *European Commission may consider customer data concerns in mergers*. 29 September 2016. *Financial Times*. <https://www.ft.com/content/415351b8-3ec6-3d1e-9677-ff0e54cc9101>

⁴⁴ “Finally, we recommend updating the rules on how authorities apply merger controls better to protect online privacy, personal information and freedom of expression”. P. 3 *Opinion 8/2016 EDPS Opinion on coherent enforcement of fundamental rights in the age of big data*. 23 September 2016. European Data Protection Supervisor (EDPS). https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Events/16-09-23_BigData_opinion_EN.pdf

⁴⁵ “The Transaction does not have a Union dimension within the meaning of Article 1(2) or Article 1(3) of the Merger Regulation as the EU turnover of one of the Parties (WhatsApp) amounted to only EUR [...] in 2013”. Page 1 of the Decision of 3 October 2014. Case No COMP/M.7217 - FACEBOOK/ WHATSAPP. http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf

⁴⁶ In this interesting conference in Brussels on 3 October 2016, Damien Neven noted at 1:15:55 that perhaps LinkedIn does not have a turnover that would permit the review by the European competition authorities, as it does not exceed the legal thresholds established for this purpose. “Big data, digital platforms and market competition”. <http://bruegel.org/events/big-data-digital-platforms-and-market-competition/>



Imagine, for example, that Google, which operates the online app store Google Play, notes that a traffic information app is experiencing growing success in terms of users⁴⁷. And, in light of this initial success, it may eventually choose to purchase it.

We might consider that these operations should be validated insofar as the acquired operator does not represent a competitive threat (probably due to the state of development of the initiative). However, this line of reasoning would mean that it would be increasingly difficult for potential acquirers to represent a threat to the acquirer, which would have an increasingly greater size and capacity. It would therefore be important to determine at what point an operator becomes dominant and, therefore, can abuse its position in quantitative and qualitative terms, as well as to what extent the operation increases barriers to market entry (to be able to compete effectively), regardless of the real threat that the acquired operator could represent.

3.1.3 Alternative indicators

Based on the above, it would be necessary to reconsider the use of the amount of revenue as the only element to determine the importance of a given merger.

The notion of significant potential market (either on the basis of patents or user information) could be captured by the economic value that the parties themselves attach to the operation⁴⁸. Consequently, the economic value of the transaction could be a good indicator of its importance to the extent that in principle it reflects the importance that the parties themselves attach to it.

However, taking into account this factor creates a major problem, since this value is set by the parties and, in order to avoid merger control, they could try, through complex payment structures⁴⁹, to present an image of an operation that has a lower economic value than it would have in reality.

Additionally, the real economic value of a merger that occurs at an early stage of the life cycle of the acquired operator may also not exceed the monetary threshold that could possibly be set to trigger the obligation to notify the operation to the competition authorities.

Therefore, even taking into account the possible inclusion of the price factor of the merger as a notification threshold, this measure may not be enough.

Finally, the risks that an operation will impact the competition are greater the larger the acquirer is (in addition, its ability to detect an “interesting” competing operator may mean that the operation does not present a high transaction price). Thus, it might be desirable to analyse the possibility that those operators who have achieved a significant market share (in any of the markets in which they operate) have a duty to notify all acquisitions they make⁵⁰.

⁴⁷ Note that Google can also observe this trend through interactions it receives through its browser.

⁴⁸ “Under current EU Merger Regulation thresholds, acquisitions of target companies that do not yet generate significant turnover but that have a high market potential, which may be reflected in a high purchase price, do not have to be notified to the Commission. This can happen, in particular, in the digital services sector”.

Mergers: Commission seeks feedback on certain aspects of EU merger control.

07 October 2016. http://europa.eu/rapid/press-release_IP-16-3337_en.htm;

⁴⁹ *LBOs and the Size of Transaction Test*. 06 October 2016. FTC. <https://www.ftc.gov/news-events/blogs/competition-matters/2016/10/lbos-size-transaction-test>

⁵⁰ The Spanish Competition Act already combines factors related to market share and, reaching a certain point (50% ex art. 8.1 a) *in fine*), the merger must be notified irrespective of whether the turnover of the acquired company does not exceed €10 million.



(IV) MODUS OPERANDI CHANGES REGARDING MERGER CONTROL

4.1 The definition of the relevant markets

The first hurdle faced by competition authorities when they are required to analyse a merger in which the “information” component is very significant⁵¹, is to define the relevant market.

In operations of this kind, as shown by the example of the transaction between Google and Nest, the data/information transcend physical markets. That is, it is probable that identifying “thermostats” as a relevant market in the context of that operation would not have been successful.

Data or information have a very particular feature that explains this great difficulty in categorisation. As noted by Hal Varian⁵², Chief Economist of Google, technology and data can be applied to various purposes⁵³.

Unlike a furniture factory that cannot easily be allocated to clothing manufacture, data can easily be put to new uses with relative ease.

For example, Facebook, which in principle is a social network, has started using its infrastructure and most likely the data it stores in order to create a platform for the sale of items (thus beginning to compete with operators that are not a social network such as eBay or Wallapop)⁵⁴.

Facebook is also entering⁵⁵ the market for work applications through Workplace⁵⁶, thus competing with Slack or Microsoft, which in addition to its office pack would seem to be very interested in this segment, as demonstrated by the acquisition of LinkedIn.

The inability to foresee the use of the data makes it difficult to determine the market potentially affected by a merger. Consequently, two options emerge: first, conceptualising a generic information-data market. Notwithstanding this alternative, while it minimises categorisation errors, it seems too vague, as it does not allow the competition authorities to assess any problems resulting from a merger.

It appears to be insufficient to conceptualise the market, affected by the acquisition of WhatsApp by Facebook, as only a data market, because it is too broad and does not allow the identification of the potential effects. For example, the market actually affected (social networks? purchases? digital services to corporations?).

The second option would require the notifiers to outline the actual use they will give to the information collected as a result of the merger. This would have at least three positive effects: (i) define the area affected and therefore the potential impact in terms of competition, (ii) prevent the “accumulation of data without a clear purpose” (it has already been indicated that the accumulation of information without a specific purpose only produces a reduction in privacy without leading, at least initially, to a better product or service), and (iii) be consistent

⁵¹ In this type of merger it is likely that the acquisition apparently seems not to present competition problems as it does not directly acquire a competitor. e.g. Google acquired Nest. However, this appearance is not sufficient to conclude the absence of competition issues.

⁵² *Big data, digital platforms and market competition*. <http://bruegel.org/events/big-data-digital-platforms-and-market-competition/>. 03 October 2016. Bruegel.

⁵³ *Repurpose of Technology*

⁵⁴ 03 October 2016. <https://techcrunch.com/2016/10/03/facebook-marketplace-2/>

⁵⁵ 10 October 2016. “Workplace, la herramienta de Facebook para el trabajo” [Workplace, the Facebook tool for work] | Technology | EL PAÍS http://tecnologia.elpais.com/tecnologia/2016/10/10/actualidad/1476087975_448581.html

⁵⁶ <https://workplace.fb.com/>



with the data protection regulations that make multiple references to the purpose/use/destination of the data obtained as a further limit on their use.

This possibility (necessity that the notifying parties outline the area in which they will make use of the information resulting from the acquisition) presents at least three complications: (i) it is very significant strategic information for the operators; (ii) it limits their freedom of operation (changing their business purpose) – although, as noted, this limitation is already imposed by data protection regulations – and (iii) it is a difficult element for the regulators to control.

In any case, the definition of the relevant markets in mergers characterised by the importance of the data is an unresolved problematic issue that will require an urgent and profound reflection. Preliminary attempts have been made to tackle this issue by noting as a possible solution that operators should outline the subsequent use of the data collected as a result of the merger.

Finally, it should be noted that mechanisms that traditionally could facilitate the definition of the relevant market, such as the *small but significant and non-transitory increase in price* (SSNIP) test, have become ineffective, since they are not useful in these cases.

4.2 An all-inclusive vision

An additional difficulty for competition authorities is reviewing a single merger from all the angles in which competition concerns may arise. These different views shall include at least the following⁵⁷:

- (i) the impact on each side of the two-sided market;
- (ii) the degrading of quality on the free side (including the privacy protections on the data collected and its uses);

One of the main challenges that the new economic environment raises for the competition authorities is to assess and quantify quality as a parameter that significantly affects the welfare of consumers and users. Aware of this challenge, in 2013 the OECD made public a document on this issue⁵⁸ and more recently it has published an interesting study which explores the adaptation of the *small but significant and non-transitory increase in price* (SSNIP) in terms of quality (privacy) subject to compliance with certain conditions to examine mergers between operators which base their business model on the revenue from advertisers⁵⁹. That is, it would be desirable for competition authorities to be able also to quantify qualitative parameters in order that they can incorporate them into their considerations without making them subjective.

- (iii) information acquired as a result of the operation helps the operator achieve or maintain its power in any market; and
- (iv) the increase to maintain barriers to entry in the market directly affected or in other markets.

⁵⁷ "(i) the merger's impact on each side of the multi-sided platform (both on advertisers and Twitter users), (ii) whether the merger increases the likelihood of the firm degrading quality on the free side (including the privacy protections on the data collected and its uses), (iii) whether the data from the acquired or acquiring entity helps the firm attain or maintain its power in any market, and (iv) whether the merger increases entry barriers in the social network market or other markets."

Description by Maurice Stucke regarding a possible acquisition of Twitter by Google. 26 September 2016. *How Can Antitrust Be Used to Protect Competition in the Digital Marketplace?*

<https://promarket.org/digital-market-not-going-correct/>

⁵⁸ OECD Policy Roundtables: *The Role and Measurement of in Competition Analysis*, 28 October 2013,

<http://www.oecd.org/competition/Quality-in-competition-analysis-2013.pdf>,

⁵⁹ *Online services and the analysis of competitive merger effects in privacy protections and other quality dimensions*. Keith Waehrer. Bates White, LLC. 08 July 2016. <http://waehrer.net/Merger%20effects%20in%20privacy%20protections.pdf>



4.3 Analysis period

Similarly, the scrutiny of an operation is always implicitly forward looking in the sense that it should attempt to perceive the future risks it may pose for competition.

Consequently, it would be interesting for competition authorities to examine *a posteriori* the effects of the merger in order to learn from them. That is, to what extent they were able to foresee the effects on competition that ultimately occurred and whether the decisions adopted (validate the operation, impose conditions or prevent it) were appropriate. It would involve methodologically incorporating this revision in order to learn from the actions taken and improve future decisions.

The data protection supervisor at European level made a pronouncement in this sense when claiming that the merger between Facebook and WhatsApp, and Google and DoubleClick must be learned from. In particular, it said that in its opinion the competition authorities should have had a more long-term analysis⁶⁰.

Note that the review would also occur in relation to those concentrations cleared by the competition authorities, which would make it possible to detect any costs of the non-intervention. It is evident that non-intervention can have significant costs for competition that will most likely not be recouped by the free operation of the market (in this sense it is fitting to consider phenomena such as those relating to the network effects).

4.4 Possibility of inversion of the burden of proof

From the foregoing, the difficulty faced by competition authorities in this area (mergers based on data) is clear. This difficulty has led people – such as Acting Assistant Attorney General Hesse – to suggest the possibility of inverting the burden of proof in relation to such operations, so that it is the operators who must prove the public interest of the operation and not the consumers or regulators. The data protection supervisor at European level echoed this view⁶¹.

It is clear that this possibility is at the extreme of refusing a merger if the parties cannot adequately justify the efficiencies arising therefrom. In other words, it is a transition from the current position of considering by default that only when mergers present serious competition concerns should they be questioned towards a new approach based on the understanding that only if operators show that the operation is aligned with the public interest may it be permitted to materialise. In any case, the opinion transcribed above (inversion of the burden of proof) is a line of thought on which to reflect.

⁶⁰ “We have to learn from the Facebook/WhatsApp and Google/DoubleClick mergers. I argue that, yes, the competition authorities could have been more longer term in their assessment of potential effects on consumer welfare”. *Big data: individual rights and smart enforcement*, speech at the EDPS-BEUC Joint Conference European Commission, Berlaymont, Brussels, 29 September 2016, Giovanni Buttarelli.
https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Speeches/2016/16-09-29_Speech_EDPS_BEUC_BigData_EN.pdf

⁶¹ “And as Assistant Attorney General Hesse suggested, the burden of proof for big data mergers should be on the merging parties to demonstrate the public interest, the burden should not be on the consumer or the regulator.” *Big data: individual rights and smart enforcement*, speech at the EDPS-BEUC Joint Conference European Commission, Berlaymont, Brussels, 29 September 2016, Giovanni Buttarelli.
https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Speeches/2016/16-09-29_Speech_EDPS_BEUC_BigData_EN.pdf



(V) CONCLUSIONS

The data (interactions) can generate an irreplicable advantage. For this reason, more and more mergers are explained on the basis of obtaining information (they generate a substantial competitive advantage also derived from the exclusion of competitors from having the same information). And for this reason, more and more markets are demonstrating an uncompetitive structure (with very dominant operators) with the risks that this entails. It is recommended in this sense exploring the possibility of guaranteeing the user's ownership of all the information that has been collected from him so that he can control who has access to it, which in turn could facilitate access to the market by new operators (they could have the entire history of the interactions of a user if the latter so authorises it).

The foregoing makes it imperative that the competition authorities expand their vision (including various aspects of the price) and maintain a more careful and vigorous attitude and mergers.

The “new” modus operandi of the competition authorities could be expressed among other things in (i) reconsidering how to define the **relevant markets**, (ii) a new method for assessing operations involving an **all-encompassing view of all the potential harmful effects** thereof (impact on both sides of the platform, probability of **quality degradation – also privacy-**, impact on the market power of the contracting parties and possible increase in entry barriers), (iii) to **look back at the effects of past merger decisions** and (iv) **exploring the possibility to reconfigure the burden of proof** so that **only when the merging parties succeeded in alleging the efficiencies** deriving from such operation, it would be **cleared**.

The **main regulatory aspect it is believed should be subject to change** as regards to competition merger would be the **thresholds** of the mergers as they do not capture the importance of those mergers with low turnover. As **an alternative**, it is suggested the possibility to make use of the **acquisition price**, but also pointed out the **possibility** that parties would try to **disguise the real value** of the operation in order not to be subject to the merger control. In some cases, when the acquired party is still relatively small the operation may not even have significant price, but still be relevant in terms of competition; since it is considered that big operators are best suited to detect potential threats at an early stage, **it has been pointed out the possibility that all operations carried out by those big operators should be notified** and so controlled.