

Key Theories of Harm in Data Driven Markets



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15 October 2019

Big data and merger control

“Data is key in the digital economy. We must therefore carefully review transactions which lead to the acquisition of important sets of data, including potentially commercially sensitive ones, to ensure they do not restrict competition.”

Commissioner Margrethe Vestager in the press release for the *Apple/Shazam* approval, 6 September 2018

“[the Commission] don't just assume that holding a large amount of data lets you stop others competing. After all, it might not be difficult for other companies to get hold of the same data, by collecting it from their own users or even buying it in. Or the data we're talking about might not be all that important in order to compete.”

Commissioner Margrethe Vestager during her speech at EDPS-BEUC Conference on Big Data, Brussels, 29 September 2016

Investigations by the Commission involving Big Data concerns

- > Siemens / Alstom (2019)
- > Apple / Shazam (2018)
- > Bayer / Monsanto (2018)
- > Microsoft / LinkedIn (2016)
- > Verizon / Yahoo (2016)
- > Sanofi / Goggle (2016)
- > Facebook / WhatsApp (2014)
- > Publicis / Omnicom (2014)
- > Telefonica / Vodafone / Everything Everywhere / JV (2012)
- > Microsoft / Skype (2011)
- > Microsoft/ Yahoo! Search Business (2010)
- > Google / Double Click (2008)
- > TomTom/TeleAtlas (2008)



Many decisions, no intervention
driven by data concerns?

General v Merger Control concerns relating to Big Data

General	Merger Control
Privacy concerns	Market concentration
Bargaining power imbalance	Increased barriers to entry
Lack of transparency	Loss of competition
Information asymmetries	Foreclosure
Extent of consumer control	Significant competitive advantage

Horizontal Theories of Harm (merger cases)

*there are two main ways in which a merger may raise **horizontal issues** as a result of the combination, <...>, of two datasets previously held by two independent firms.*

- > First, the combination of two datasets post-merger may **increase the merged entity's market power** in a hypothetical market for the supply of this data or **increase barriers** to entry/expansion in the market for actual or potential competitors, which may need this data to operate on this market.*
- > Second, <...>, it may be that pre-merger the two companies were competing with each other on the basis of the data they controlled and this **competition would be eliminated** by the merger.*

Case M.8180 – Verizon / Yahoo, paragraphs 81 to 83

Non-horizontal Theories of Harm (merger cases)

- > Acquisition of data can lead to a **foreclosure** of competing providers of services in the downstream market; (*Apple / Shazam*)
- > Data as an **essential input** required to compete on the relevant market; (*Microsoft / LinkedIn; Telefónica / Vodafone / Everywhere JV*)
- > Data as a **source of market power** and/or a **significant competitive advantage**; (*Apple / Shazam; Bayer / Monsanto; Facebook / WhatsApp*)
- > **Tying and bundling** dataset with software solution to foreclose the competitors. (*Microsoft / LinkedIn*)

Theories of harm as discussed in the Reports

- > Concentration of data may result in **entry barriers** when new entrants are unable either to collect the data or to buy access to the same kind of data, in terms of volume and/or variety, as established companies;
- > A combination of different datasets could raise competition concerns if the combination of data makes it **impossible** for competitors **to replicate** the information extracted from it;
- > A merger of two companies which already hold strong market positions in separate upstream or downstream markets in producing and processing data can lead to **foreclosure** of other competitors;
- > In cases where availability of data makes a market conducive to coordination, this can exacerbate the impact of a merger or anti-competitive practice that **removes** some other important **constraint on coordination**.

When Big Data is not an issue?

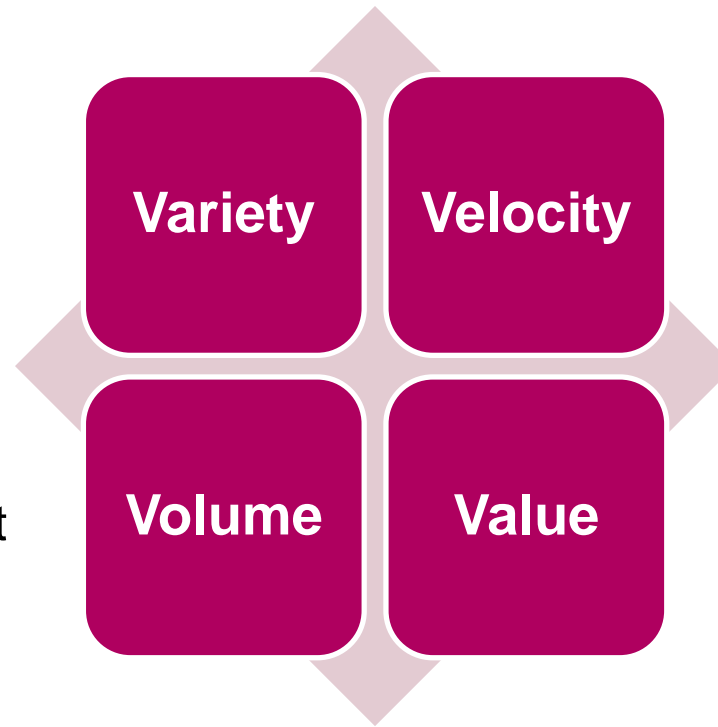
When assessing if acquisition of data might lead to competitive concerns consider the following:

- > Would the company be **able** to access and process the data?
 - > Technical limitations; Legal limitations (GDPR, data protection laws and other contractual restrictions)
- > Would the company have **incentives** to use that data?
 - > Negative response from the customers; profitability; evidence in the internal documents
- > What is the actual **impact** on the competition?
 - > Low market shares and sufficient competition/alternatives on the market post-transaction are good indications that impact on the competition is marginal.
- > Consider the **counterfactual** and **efficiencies** brought by the Transaction.

The four Vs

Key parameters that are increasingly used to assess the commercial and competitive relevance of large datasets:

- > Is data unique?
- > How quickly can data be generated by the competitors?
- > What is the size of the dataset that is acquired?
- > How important is this type of data to be competitive?



- > Data as an entry barrier for other products or innovation (Bayer/Monsanto)
- > Markets for making data available?
- > Ability to generate and use data