Big Data and Competition Law

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Issues to address

- Are current competition tools sufficient to address "big data"?

- How should markets involving big data be defined?

- Should privacy concerns related to big data be incorporated into competition analysis?

- Is big data a barrier to entry?

Are current competition tools sufficient to address "big data"?

- Markets involving big data may present complexities:
  - Network effects
  - Scale economies
  - Free services
  - Privacy concerns

- None of these are new challenges. We already have competition tools to address them (to the extent relevant).

- Competition agencies have investigated markets involving big data for many years:
  - Dwight's EnergyData/Petroleum Information Corporation (FTC 1996) – Sale or licensing of well data
  - Automatic Data Processing/AutoInfo (FTC 1997) – Salvage yard inventory data
  - Thomson/Reuters (EC & DOJ 2008) – Fundamentals data and earnings estimates data
  - Google/DoubleClick (EC & FTC 2008) – Online advertising

How should markets involving big data be defined?

- Standard market definition principles apply, including the hypothetical monopolist test.

- Competition agencies have considerable experience defining markets based on data that is bought and sold, including:
  - CCC/Mitchell (FTC 2009) – Auto repair data
  - Dun & Bradstreet/QED (FTC 2010) – Educational marketing data
  - Deutsche Börse/NYSE Euronext (DOJ 2011) – Real-time equity data
  - CoreLogic/DataQuick (FTC 2014) – National assessor and recorder bulk data

- Data used as an input to another product cannot constitute a relevant product market.

Should privacy concerns related to big data be incorporated into competition analysis?

- Under U.S. and EU law, traditional consumer protection considerations such as privacy may not be considered in competition investigations.
  - "I don't think we need to look to competition enforcement to fix privacy problems." – Margrethe Vestager (EC)
  - "[I]t is important, however, that we make sure that, if we identify issues, they are truly competition issues, rather than what might amount to just a privacy question." – Edith Ramirez (FTC)
  - "Despite calls to use the merger review process to improvement privacy protections for consumers, the FTC continues to examine competition and consumer protection issues separately" – Deborah Feinstein (FTC)

- This approach rests on sensible policy grounds
  - Privacy is difficult to quantify compared to traditional antitrust factors like price and output.
  - Consumers have mixed views about the optimum level of privacy.
  - In an enforcement system based on both antitrust and privacy considerations (or other non-competition considerations), there will be frequent tensions between the two modes of analysis.
  - Competition remedies are not well suited to address privacy concerns.

Is big data a barrier to entry?

- When data itself is the product and a complete dataset is needed to offer services to customers, data may constitute a significant barrier to entry.

- Competition agencies and courts have concluded that data-related entry barriers may exist for the sale of data that cannot be sourced from consumers or big data marketplaces.

  - CCC/Mitchell (2009) – Court found database for estimating cost to repair damaged cars was a barrier to entry because a competitor would have to generate parts list and service time data for every type of car going back several years, which was estimated to require thousands of mechanic hours.

  - CoreLogic/DataQuick (FTC 2014) – FTC found that there were significant entry barriers to enter the bulk assessor and recorder data licensing business because "a firm must have several years of national historical data and an ability to provide go-forward national data. . . . It would be cost-prohibitive for a potential entrant to collect the necessary on-going and historical data."

Is big data a barrier to entry?

- But experience to date suggests that online user data is not likely to generate a durable advantage.
    - There are many other ways to improve online services.
    - No online company has a monopoly on user data. There are countless firms with extensive customer data.
    - Multi-homing is common, and switching costs are low (usually zero).
    - Any data-related advantages depend less on the quantity of data and more on the insights that a firm derives from it.
    - Most user data exhibits diminishing returns to scale, and quickly becomes stale.
    - History has shown that a firm can quickly outperform competitors that have much more data by offering a better product or service.

- Agencies have yet to find user data to be a barrier to entry for online services. For example:
    - Google/DoubleClick (FTC) – "[N]either the data available to Google, nor the data available to DoubleClick, constitutes an essential input to a successful online advertising product."
    - Facebook/WhatsApp (EC) – "There are currently a significant number of market participants that collect user data along-side Facebook"