

WEBINAR

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Competition law in the data economy - how will the evolving legal landscape affect data markets?

- 27 January 2023
- 10.00 – 11.30 CET

Introduction



Hans Graux
ICT Lawyer - Timelex

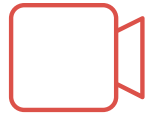


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Rules of the game



The webinar will be recorded



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Agenda

10.00 – 10.05	Opening and introduction to the panel – Hans Graux
10.05 – 10.20	Introduction to the subject – the importance of competition in the data economy – Hans Graux
10.20 – 10.45	Legal framework for the assessment of data issues in competition law – Paolo Tomassi
10.45 – 11.10	Background and ambitions of the Data Governance Act and the Data Act - Malte Beyer-Katzenberger
11.10 – 11.30	Q&A and panel discussions
11.25 – 11.30	Close of the webinar

Introduction to the subject and context - competition in the data economy

Hans Graux

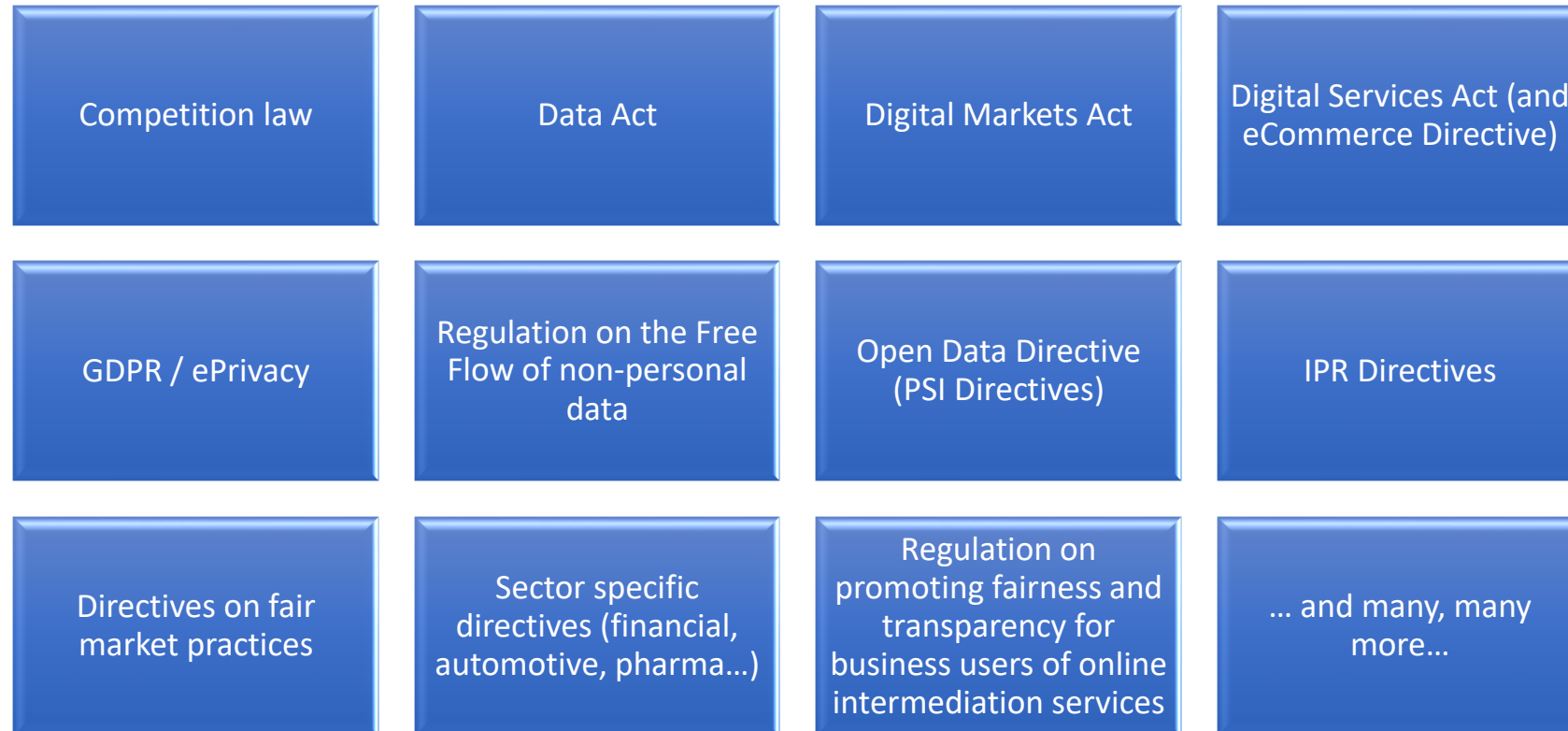
Introduction - competitiveness in EU data policy

- Fair competition in the internal market is a basic principle of the EU
- Data as the “new gold”!
- The data economy is growing continuously, but prone to network effects and ‘winner takes all’ market formation
- Dominant players may see an incentive to hoard data in order to capture the customer and the economic value:
 - By not sharing data at all
 - By applying unreasonable or unfair terms to data sharing agreements
- As a result, innovation and competition are negatively impacted

How is data competition shaped by existing legislation and policies?

- Today's focus is on the interaction between:
 - Traditional competition law – Article 101 and 102 of the TFEU
 - Prohibition on agreements or practices that can effect “the prevention, restriction or distortion of competition within the internal market”
 - The proposed Data Act and the Data Governance Act
 - Stimulate business-to-business data sharing, by requiring some forms of data sharing, addressing unfair terms contractual related to data sharing, and facilitating switching of service providers
 - Facilitate voluntary data-sharing, by supporting data intermediaries that connect supply and demand, including through pooling of data

A slightly more complex picture...



Why a data package...?

- The data economy raises a few unique questions
 - What is the relevant market?
 - When is an economic operator dominant?
 - When is there an alternative to a data set in the market?
- Case law on competition in the data economy is limited. Is competition law sufficiently accessible, particularly for SMEs? Consider also the emergence of hyperscale providers.
- Economic meta-analysis suggests that current levels of competition are suboptimal
- Hence: the Data Act, and other components of EU data policy

Legal framework for the assessment of data issues in competition law

Paolo Tomassi

Legal Framework for the assessment of data issues in competition law

- **Art. 101 TFEU – Restrictive Agreements:**

1. Agreements which have as their object or effect the prevention, restriction or distortion of competition
2. Automatically void.
3. Exempted agreements – objective economic benefits that outweigh the negative effects of the restriction of competition

- **Art. 102 TFEU – Abuse of Dominant Position:**

Any abuse by one or more undertakings of a dominant position:

- (a) imposing unfair trading conditions;
- (b) limiting production, markets or technical development;
- (c) Discrimination (competitive disadvantage);
- (d) supplementary obligations.

Horizontal Guidelines – Chapter on Information Exchange

Case-Law of the Court of Justice (Eturas, Asnef-Equifax)

Relevance of Data for Competition Law

- [Competition Policy for the digital era - Final report \(2019\)](#)
- The role of data in the economy has dramatically grown in the last ten years.
- Different forms of data sharing and data pooling - Arrangements will frequently be efficient and socially desirable, but they can also be anti-competitive in other situations. Competition law should try to encourage the first type to provide legal clarity on this topic as fast as possible
- Dominant, data-rich firms may refuse to grant other firms access to data. Data access may be mandated under Article 102 TFEU.
- In some situations, competition law may limit a dominant company's access to data.
- Finally, access to data can be an issue in the context of merger control.

Concept of Data for Competition Law

- Diversity of the concept of data
- Case by case analysis
- In general, data can be considered as a **collection of facts/information that has been translated into a code** or a form that software can process and are therefore a **core input factor** for production processes, logistics, targeted marketing, smart products and services, as well as artificial intelligence
- Different types of data: raw data, pre-processed data, personal and non-personal data; individualized, pseudonymized and anonymized data; new and old data; etc.
- Different data sharing models (open data, data sharing, data pooling)

Data sharing agreements can be pro-competitive ...

- Enhance data access;
- Resolve data bottlenecks;
- Enable firms to develop new or better products or services or to train algorithms on a broader, more meaningful basis.
- Data pooling can also allow smaller players to replicate datasets that rival those of the digital giants).
- Already used in different sectors in Europe:
 - The insurance sector;
 - the agricultural sector;
 - the Internet of Things.

... but they can cause competition concerns

- Information exchange:
 - Data sharing agreements can be vehicles for exchanging commercially sensitive information such as costs or prices, therefore favouring collusion between competitors
- Barriers to entry – foreclosure:
 - the pooling of data could prevent third-parties access to data and create specific market entry barriers;
 - foreclosure concerns, in case of market power and access to data gives data holders/participants to the data pool a significant advantage

Data sharing in the context of other agreements vs. self-standing data sharing/pooling

- In cases where the data sharing/pooling takes place in the context of another (horizontal) cooperation agreement:
 - The effects are assessed in the context of the other agreement
 - The exchange does not exceed what is necessary to obtain other (horizontal) cooperation
 - Spill over effects
- If self-standing agreements:
 - Relevance of the aim of the data pooling (pro-competitive)
 - Efficiencies to be obtained

Type of Data matters

- Relevance of the “type” of data that is shared or pooled:
 - Strategic nature of the data
 - Historical, current or future data,
 - Contextual data
 - Aggregated data or individual-level data
 - The degree of granularity of the data collected
 - The technical measures put in place to limit and/or control how the data is being used

Access to Data

- With specific respect to the access issue, other elements to be taken into account:
 - Whether a company's ability to compete depends on its ability to access the pooled data
 - Whether the data is replicable or available from other sources
 - The level of concentration of the market and the market power of the participants to the data pool
 - duty to give access to others – in particular newcomers? on FRAND or similar terms?
 - Viceversa, access to data to be excluded when smaller competitors pool their data to gain a competitive advantage over larger competitors?

Indication from the Court of Justice - Case C-238/05 - Asnef-Equifax

- Preliminary ruling 23 November 2006
- Register of information between financial institutions on the solvency of customers
- Cooperation between competitors in the form of an indirect exchange of credit information;
- No restriction by object => necessity to assess the effects;
- Relevance of the economic conditions on the relevant markets and the specific characteristics of the system concerned, such as, in particular, its purpose and the conditions of access to it and participation in it, as well as the type of information exchanged
- No restriction provided that (i) **the relevant markets are not highly concentrated**, (ii) **the system does not permit lenders to be identified** and (iii) the conditions of access and use by financial institutions are **not discriminatory**, in law or in fact.

Example ex Art. 101 - Insurance Ireland

- Case AT 40511 – 30 June 2022 – Trade association for the insurance sector in Ireland
- Conditions of access to the Insurance Link information exchange system
- the information included in Insurance Link necessarily covers a significant part of the relevant market
- Access was conditional on membership and criteria were not clear, transparent, objective, readily available and discriminatory
- Commitments (art. 9 reg. 1/2003):
 - Access to the data base independent from any membership to Insurance Ireland;
 - access criteria fair, objective, transparent and non-discriminatory (including non-Irish parties)
 - application procedure with a defined timeline and handled by an independent party;
 - a cost and usage based fee model;
 - criteria for becoming member of the Insurance Ireland association fair, objective, transparent and non-discriminatory.

Example ex Art. 102 - Amazon Marketplace

- Case AT.40462, 20 December 2022;
- Amazon's dual role as (i) marketplace and (ii) retailer in its marketplace;
- Access (as marketplace) to non-public business data of third party sellers as a competitive advantage (as retailer);
- Commitments (art. 9 Reg. 1/2003):
 - not to use non-public data relating to, or derived from, the independent sellers' activities on its marketplace, for its retail business;
 - not to use such data for the purposes of selling branded goods as well as its private label products.

Presentation of the background and ambitions of the Data Governance Act and the Data Act

Malte Beyer-Katzenberger

Analysis underlying the Data Strategy and the (proposed) legislative acts

- To leverage the potential of data in the age of Big Data and AI we need more usable data;
- In many scenarios, this would ideally imply re-using existing data, including data held by business → «data-sharing»;
- Voluntary «data-sharing» shall be the norm, compulsory «data sharing» (access and portability rights) shall be the exception;

Analysis underlying the Data Strategy and the (proposed) legislative acts

- Voluntary «data-sharing» suffers from transaction costs and lack of trust;
- Compulsory «data-sharing» by regulation needs economic impact assessment and consumes attention of the legislator;
- The proposed data legislation is about fostering innovation and ensuring competition.

First instalment: The Data Governance Act - support voluntary “data-sharing”

Facilitate voluntary “data-sharing” by supporting emerging novel data intermediaries that connect supply and demand, including through pooling of data:

- Data marketplaces,
- ecosystem orchestrators (Gaia-X data spaces);
- data “trusts”;
- Data cooperatives;
- “personal data stores” .

The Data Governance Act (Reg 2022/868) - support voluntary “data-sharing”

Increasing trust in those novel intermediaries by making them subject to strict rules preventing abuse of their structurally central position (avoiding the “platform problem” to reproduce:

- No own use of the data by the intermediary → needs a different economic model (subscription or transaction fees)
- Strict separation between the marketplace and any activity of the same operator on that marketplace.

Second instalment: The Data Act (COM(2022)68) - fluidifying the data economy through portability rights

- Cross-cutting legal question on rights on machine-generated data, present on all connected objects;
 - Data indispensable for an open-ended range of purposes starting with service and repair, but ultimately being open-ended to any use case that the user would like to have;
 - Focus on connected objects (“machine-generated data”);
 - Difference between an access right and a portability right;
 - Right for the user of a connected object to have access and port data generated by the use of such object to any party of its choice;
- Fostering digital innovation and solving existing competition issues;

Data Act (COM(2022)68) - fluidifying the cloud market through switchability

Prohibition to set technical, contractual and financial barriers to switching between cloud services (including portability of data, applications and other digital assets).

Questions & Answers

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