Big data may become big antitrust concern

Antitrust Alert

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Big data is transforming business, and increasingly, it is becoming a subject of concern for antitrust authorities. So far, much of the focus has come from European regulators, who are beginning to consider the role of big data in mergers and competition more broadly.

To date, US regulators have demonstrated less concern. But even so, US companies should carefully consider the antitrust implications of their collection and use of big data. The regulatory landscape is developing quickly, and in coming years, antitrust and competition enforcement may be a significant regulatory concern for businesses that rely on big data.

"You can't manage what you don't measure." So goes the axiom that lies at the heart of the big data revolution. Thanks to advancements like the growth of cloud computing, companies in a wide range of industries are collecting and analyzing multiple streams of data, both endogenous and exogenous to their organization, in ways that were unimaginable just a few years ago. Because of this, companies can develop far deeper and more nuanced knowledge about their business, and translate that knowledge into more informed decision making.

Despite the opportunities presented by big data, there are also significant regulatory risks. Privacy and security are challenges that have garnered significant attention. However, companies utilizing big data must also be aware of antitrust risk. The extent of that risk depends on the characteristics of the data, the ways in which a particular
company uses it and the geographies in which the company operates.

Recent academic literature has begun to develop a helpful framework for analyzing whether a particular company's big data poses antitrust risk. Scholars have observed that big data can pose a potential barrier to entry, as well as a mechanism for creating or maintaining market power. On the other hand, the literature also suggests that in some cases big data is both infinitely available and of fleeting value, and therefore not prone to competition problems.

To analyze the potential competitive effects of a particular organization's data, practitioners should consider four characteristics: volume, variety, velocity and veracity. Furthermore, practitioners should be mindful that the value of an organization's big data is driven as much by the organization's ability to process that data as it is by the characteristics of the data itself.

Importantly, the antitrust implications of big data are more than just an academic issue. French, German and UK authorities have all conducted recent inquiries into the competitive effects of big data. Most notably, in 2016, the French Competition Authority and German Federal Cartel Office published a report on the interplay among big data, market power and competition law. The report expressed concerns regarding data concentration and the potential for anti-competitive effects in markets where big data is used, as well as in related markets.

These concerns have been reflected in recent merger reviews. In reviewing the merger of Facebook Inc. and WhatsApp, the European Commission investigated whether Facebook could strengthen its position in online advertising by placing ads on the WhatsApp platform, or by leveraging WhatsApp's user data to improve advertising on the Facebook platform. Interestingly, the commission also considered potential network effects as a result of the transaction. Ultimately, however, the commission found that there was no barrier to entry because "there are currently a significant number of market participants that collect data alongside Facebook."

The commission took a similar approach in reviewing the Microsoft Corp.-LinkedIn Corp. merger. It considered whether the post-merger combination of data may increase Microsoft's market power, or increase barriers to entry. The commission approved the transaction, observing that there would continue to be a significant amount of data available in the market outside of Microsoft's control.

It is also becoming clear that, for companies with a dominant market position, big data may pose an enforcement risk in Europe. Germany's Federal Cartel Office recently undertook an investigation of whether Facebook abused its market power by requiring users to agree to its terms and conditions, which allow the company to collect valuable big data. The investigation's findings are due to be released before year end and will likely serve as a guidepost for companies with substantial market power utilizing big data. In the meantime, such companies should be aware that their collection of data may be viewed as an exercise, and potentially abuse, of their market power.

On the whole, US antitrust agencies have demonstrated less concern over big data than their European counterparts. The Federal Trade Commission recently approved a number of mergers with significant big data components, despite commentators expressing concerns over potential issues with post-merger combinations of data.

This is not to say, however, that big data will never present US antitrust issues. Former FTC Chairwoman Edith Ramirez stated recently that the competition implications of big data "depend on the particular set of facts, including the specific market at issue." There are some examples of the FTC scrutinizing proposed transactions involving big data where the commission has seen potential risks to innovation. And mergers that would result in a concentration of niche data that is not easily gathered from other sources, or in a concentration in the ability to meaningfully analyze data in a particular market, may attract scrutiny.

Similarly, although US regulators may be less likely than their European counterparts to use the antitrust laws to police privacy issues, the German Federal Cartel Office's Facebook investigation demonstrates that there will not always be a bright-line distinction between the two issues.

Ultimately, companies should avoid the temptation to think that their use of big data as an asset is necessarily
different from their use of more traditional assets. In planning strategic transactions, and in leveraging big data in the marketplace, companies must be aware of the characteristics of their specific data − including their capabilities to analyze that data − in relation to the markets in which they operate. As with other assets, if a particular use of big data might be perceived as having anti-competitive exclusionary effects, companies must be prepared to justify their conduct to antitrust authorities.

Find out more about this rapidly developing area of law by contacting either of the authors.

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