

Big Data and Competition Law

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Abstract

The extensive use of big data is one of the key characteristics of the digital economy. As firms gain a significant competitive advantage through the collection and analysis of personal data, new challenges are presented for competition policy in the digital era. With regard to data-related antitrust issues, there are two major theories of harm: first, the privacy concern posed by the use of big data raises the question of whether competition law is the appropriate institutional choice. While having become the main approach adopted in data protection regulations, “notice and choice” fails to provide consumers with more desirable options: consumers cannot make meaningful choices based on the vague and ambiguous language in privacy policies. Although the optimal level of privacy protection remains highly subjective, some academics believe that privacy protection can serve as a non-price parameter that can be enhanced by promoting competition. Second, commentators hold different views on whether the competitive advantage created by big data can be a source of market power and thus possibly lessen competition. Some commentators believe that the fast-moving nature of digital markets reduces the risk of concentration. However, the empirical evidence suggests that the market structure of digital markets fueled by big data tends to tip and that this kind of dominance is persistent. It is rather unrealistic to adhere to a traditional understanding of digital competition derived from Schumpeterian “creative destruction”. In addition, the scarcity of unique datasets can create significant entry barriers. Although some commentators claim that data is non-rival and ubiquitous and reject the possibility of any antitrust concern, specific datasets cannot be acquired from data brokers or other sources. Moreover, the economies of scale and scope of data entrench the dominant position of data-rich firms, which in turn increases first-mover advantage. This article discusses these issues and explores how to modify current competition analysis to address data-related anti-competitive conduct.

Keywords: Big Data, Competition Law, Privacy, Barrier to Entry, Digital Economy.