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**The importance of big data in mergers:
the Facebook/WhatsApp merger**

SUMMARY: 1. Should antitrust worry about big data? – 2. The Facebook/Whatsapp merger.
– 3. Conclusion.

1. *Should antitrust worry about big data?*

The question whether and why antitrust institutions should worry about and deal with big data is not so easy to answer as it seems at a first glance.

The multiple definitions of the big data phenomenon that apply to different areas of law or economics do not make this task easier. The definition that better fits the antitrust reasoning is the one that describes big data as resources that firms use and process in order to achieve information.

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Those inputs are characterized by the so-called five “Vs”: Volume, because of the huge amount of data; Velocity, referring to the high speed and dynamicity of the whole process of data creation and collection; Variety, because of the diversity of the information, but also because of the different categories of personal and non-personal data existing; Veracity, referring to the quality of data collected, that can be good or bad indeed, and Value, to highlight how valuable those inputs are for companies.²

Even if apparently the most stunning characteristic of data is Volume, as 2.5 Exabytes of data are produced every day and the number is deemed to dramatically increase,³ the reason why big data are under a microscope is their Value.

Their value derives from the socioeconomic benefit that can be obtained from their use. Indeed, it is the potential economic and, to many extent, the social value, that ultimately motivates and justifies the accumulation, processing and use of data, and all the costs related. And also, this is the reason why big data have assumed the proportions of a new factor of production.⁴

In order to benefit the most from this phenomenon, companies like two-sided platforms started using data-driven business strategies that allow them to offer consumers free services in exchange of users’ personal data.

² Some definitions limit the number of Vs at 3: Volume, Velocity and Variety. In my opinion, Veracity and Value are essential for antitrust purposes, as the variability of quality and the pivotal role of data for companies is better underlined in this way. BOUTIN, CLEMENS, «Defining “big data” in antitrust», *Competition Policy International: Antitrust Chronicle 2017*, Summer 2017, Volume 1, Number 2, pp. 22-28; OECD, *Supporting Investment in Knowledge Capital, Growth and Innovation*, OECD Publishing, 2013, pp. 324 – 326; available at <http://dx.doi.org/10.1787/9789264193307-en>.

³ KHOSO, «How much data is produced every day?», 13 May 2016, accessible at <http://www.northeastern.edu/levelblog/2016/05/13/how-much-data-produced-every-day/#>: «The total amount of data in the world was 4.4 zettabytes in 2013. That is set to rise steeply to 44 zettabytes by 2020».

⁴ OECD, see supra note 1, page 325.

Indeed, firms can profit the most from this new phenomenon the more volume and diversity of high-quality data they have, the more rapidly they can collect and analyze the data sets, and the more they are able to use those data to extract information which is valuable by themselves and create more value for the company.

Assuming data's value depends on its volume, variety and velocity of collection and processing, firms already started the so called "battle over data"⁵ to seize the opportunity to acquire data-related advantages through data-driven strategies. A strategy to have access to a major quantity of data is acquiring companies owning large datasets, or merge with them. Over the last few years, indeed, multiple alleged data-based mergers took place and allowed firms to obtain a competitive advantage.⁶

With regard to the IT sector, for example, data may come into play in relation to mergers in two ways: as a competitive advantage of the merged entity, or, in the context of privacy, as a non-price parameter of competition in the market.⁷ So, acquisitions and mergers in the IT sector and, anyway, related to the digital economy, have the capacity to affect not only how people buy goods and services, but they can change the way people live, and the opportunities they have.⁸

⁵ STUCKE, GRUNES, «Debunking the Myths over Big Data and Antitrust», *The University of Tennessee Knoxville*, Research Paper 276, September 2015, available at <http://ssrn.com/abstract=2612562>.

⁶ Mergers thank to which firms acquired data-advantages, see STUCKE, GRUNES, *supra* note number 4, page 3. Among those mergers, it is possible to include Facebook/Whatsapp merger in 2014, Google/DoubleClick in 2007, Microsoft/Yahoo in 2010, TomTom/TeleAtlas in 2010. Also, in sectors related to data the numbers of merger or acquisitions increased from 55 in 2008, to 164 in 2012, see OECD, *Data-Driven Innovation: Big Data for Growth and Well-Being*, OECD Publishing, Paris, 2015, available at <http://dx.doi.org/10.1787/9789264229358-en>.

⁷ OCELLO, SJÖDIN, SUBOCS, «What's Up with Merger Control in the Digital Sector? Lessons from the Facebook/WhatsApp EU merger case», *Competition merger brief* 1, 2015, pp. 1 – 7, available at ec.europa.eu/competition/publications/.../cmb2015_001_en.pdf.

⁸ VESTAGER, «Refining the EU merger control system», *Studienvereinigung Kartellrecht*, Brussels, 10 March 2016, available at: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/refining-eu-merger-control-system_en.

For the competitive advantage to be maintained, authors hypothesized that companies could have incentives to implement anticompetitive strategies in order to prevent rivals from accessing data, limit third parties sharing of data, make data portability hard, and increasingly violate users' privacy to steal more information and make the economic dominance stronger.⁹

A significant example of an alleged data-based merger case is Facebook/Whatsapp, that have been considered by the European Commission in 2014.

2. *The Facebook/Whatsapp merger*

In 2014 the company from Menlo Park decided to acquire control of WhatsApp Inc. giving rise to what is defined as a concentration by art. 3(1)(b) of the Merger Regulation.

The Facebook/Whatsapp merger attracted considerable media attention due to both the parties involved in the transaction, both the price of USD 19 billion paid for a digital communication company with revenues of about ten million euros. Those elements invited doubt that not always it is the turnover that makes a company an attractive merger partner, but there can be another possible "real reason" for the merger, i.e. in this case the use of WhatsApp users' data by Facebook.

⁹ STUCKE, GRUNES, see *supra* note number 4; NEWMAN, «Search, Antitrust and the Economics of the Control of User Data», *Yale Journal on Regulation*, 30, 3, 2014, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2309547; ALMUNIA, «Competition and personal data protection», speech at the Privacy Platform event: Competition and Privacy in Markets of Data, Brussels, 26 November 2012, available at http://europa.eu/rapid/press-release_SPEECH-12-860_en.htm

The European Commission, as per art. 2 of the Merger Regulation, appraised the merger and, on October 3rd, 2014, approved the acquisition according to art. 6 (1)(b) of the Merger Regulation.¹⁰

With regard to the data-related part of the assessment, the Commission observed that Facebook operates providing online targeted advertising services thanks to the analysis of user's data, while WhatsApp does not collect data valuable for advertising purposes.¹¹ The EU Commission, then, examined whether, after the merger, Facebook could have been able to collect data of WhatsApp users with the aim of make targeted advertising more accurate.

The conclusion, based also on the statement made by Facebook that such a collection of data would have been technically unfeasible and that WhatsApp policy about user's data would not have been changed,¹² was that the transaction would not raise competition concerns, as large amounts of data would have been therefore available to competitors.¹³ The Commission, as a consequence, declared the merger compatible with the internal market.

As someone predicted, and following the model described above, in 2016 WhatsApp changed its Terms & Conditions adding the pre set-up option of sharing users' data with Facebook with the aim of profiling users with commercial and advertising purposes. In fact, in

¹⁰ Case M.7217 – FACEBOOK/WHATSAPP, 3 October 2014.

¹¹ WhatsApp, at that time, was not collecting user's data. As it will be said afterwards, its policy has changed.

¹² Case M.7217 – FACEBOOK/WHATSAPP, 3 October 2014, par. 138: «[Facebook] submitted that integration between WhatsApp and Facebook would pose significant technical difficulties»; par. 182: «Facebook has publicly made it clear that it has no current plans to modify WhatsApp's collection and use of user data»; note 103: «After the announcement of the Transaction, WhatsApp's CEO Jan Koum stated on WhatsApp's blog that "[r]espect for [users'] privacy is coded into our DNA, and we built WhatsApp around the goal of knowing as little about [users] as possible." He added that "[i]f partnering with Facebook meant that we had to change our values, we wouldn't have done it." See <http://blog.whatsapp.com/529/Setting-the-record-straight>».

¹³ In its reasoning, the Commission pointed out that the merging entity would not have incentives in integrating with WhatsApp because it would represent a business risk as users could switch to competing communication apps.

its Privacy Policy, under the section “affiliated companies”, the company states: «Facebook and the other companies in the Facebook family also may use information from us to improve your experiences within their services such as making product suggestions (for example, of friends or connections, or of interesting content) and showing relevant offers and ads».¹⁴

This conduct has been taken into consideration by the Italian Competition Agency, AGCM, as WhatsApp introduced the new clause essentially without making users understand that they could use the app even denying this consent.¹⁵

The decision by AGCM is pivotal in order to understand the data strategy underlying the merger. Indeed, during the investigation phase, Facebook declared to the Agency that data that the company would have collected from WhatsApp would have been those related to telephone numbers, some information about the devices, the last access to the platform and the date of registration into the app. The purposes of the collection, as per Facebook’s declaration, are advertising and product improvement and would generate revenues directly to Facebook itself.¹⁶ The agency concluded that data of WhatsApp users would assume, therefore, economic importance as their sharing would allow Facebook to improve its advertising activity and would help WhatsApp to predict to what extent, on services based on data, it could receive financial compensation.¹⁷ On the basis of the results of the investigation, the

¹⁴ WhatsApp Terms & Conditions, available at <https://www.whatsapp.com/legal/?l=en#terms-of-service>.

¹⁵ The notice sent users literally stated that, in case the user would not accept the new T&C, he would have been interrupting using WhatsApp, see AGCM, PS10601, provvedimento n. 26597, WhatsApp – Trasferimento dati a Facebook, 11 may 2017, available at <http://www.agcm.it/consumatore--delibere/consumatore-provvedimenti/open/C12560D000291394/A94F4894B38FA7D7C12581220024AE63.html>.

¹⁶ AGCM, PS10601, provvedimento n. 26597, WhatsApp – Trasferimento dati a Facebook, 11 may 2017, 25 – 31.

¹⁷ AGCM, PS10601, provvedimento n. 26597, WhatsApp – Trasferimento dati a Facebook, 11 may 2017, 29.

AGCM concluded that conduct related to the consent constituted a case of unfair commercial practice. As a consequence, the Agency inflicted Facebook a fine of four million of Euros.

The conduct of Facebook did not pass unnoticed to the European Commission. Therefore, the Commission found out that, in spite of Facebook's statements during the merger review process, the technical possibility of automatically matching Facebook and WhatsApp users' identities already existed at the moment of the merger, and that Facebook staff were aware of such a possibility.¹⁸

Those facts represent an evidence of the real motivation that made Facebook acquire WhatsApp, and pay such an amount of money, as well.

Apart from the side elements, the case is exemplifying that the possible data-driven strategy of mergers is not just an unreasonable concern arose by sporadic authors, but is what can actually happen.

The case also shows many issues with regard to mergers linked to big data. Indeed, in data-related markets, as already briefly pointed out, mergers could result in differentiated data access and in increasing the concentration of data in a certain market if the company resulting from the merger has access to a large database. Competition authorities may have to evaluate the advantages the new entity will have by combining different sets of data, assuming that a combination of different data sets could raise competition concerns if the combination of them makes it impossible for competitors to replicate the information extracted from them.¹⁹

One of the issues that can be inferred by the decision of the European Commission is that there is no certainty about the possibility of considering the existence of a personal data mar-

¹⁸ European Commission – press release, «Mergers: Commission fines Facebook €110 million for providing misleading information about WhatsApp takeover», Brussels, 18 May 2017, available at http://europa.eu/rapid/press-release_IP-17-1369_en.htm.

¹⁹ FRENCH AUTORITÉ DE LA CONCURRENCE, GERMAN BUNDESKARTELLAMT, «Competition Law and Data», 10th May 2016, available at <http://www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf>.

ket, unless a company specifically sales data to third parties. Cases where data is merely an input are different from cases where data is the product that is sold to clients. Some authors suggested that data collection should form its own product market for the purpose of anti-trust analysis,²⁰ but the delimitation of such a market would be almost impossible to define.²¹ Taking into account the online advertisement sector, data itself is not a product in the sale of online advertising, rather advertising services are the relevant product. Data is only used as an input to better execute the service, and it is not sold as a product to consumers at all.

From this point of view, there is no competition between providers for the actual sale of data, and no substitution. As such, under current antitrust law, no relevant market can be defined for the collection of consumer data in cases like Facebook/WhatsApp one, where neither party did provide data to third parties.

In addition, another peculiar element of data-related mergers is that the assessment of the data advantage must be carried out taking into consideration features that are felt the most in online markets, like network effects, multi-homing, and market dynamics. Those features, in facts, are relevant to determine, at first, the existence of a data market, and secondly, to determine whether data contributes to the strengthening of that power.

3. Conclusion

Still, no answer to the initial question whether and why antitrust professionals should worry about and deal with big data is found. The Facebook/WhatsApp merger is an example

²⁰ HARBOUR, KOSLOV, «Section 2 in a Web 2.0 World: An Expanded Vision of Relevant Product Markets», *Antitrust Law Journal* 76, pp. 769 - 797, available at <http://www.nortonrosefulbright.com/files/us/images/publications/20100816Section2InWebWorld.pdf>.

²¹ SOKOL, COMERFORD, «Does Antitrust Have a Role to Play in Regulating Big Data?», 2016 in R. D. BLAIR, D. D. SOKOL, *Cambridge Handbook of Antitrust, Intellectual Property and High Tech*, Cambridge University Press, Forthcoming, Available at: <https://ssrn.com/abstract=2723693>.

of what actually companies do in order to acquire the major amount of data possible; but, is it true that firms collecting as many data as possible have a competitive advantage over rivals that do not have access to the same data? And again, can big data as such be deemed to be the key of a company success?

It's not data as such, rather the resources, be they material or financial, that a company invests in developing the analytics necessary to draw reliable and grounded inferences out of those data that makes the difference.²² As a consequence, firms succeed in developing better products or services when they make data meaningful using analytical tools. In addition, the ongoing digitalization of the economy and increment of connected devices are said to have incredibly increased the amount of data that can be collected, disseminating the idea that data is everywhere.²³ But, again, that amount of data is only relevant if data are accessible, or substitutable.

Furthermore, professionals and scholars do not agree about the competitive significance of big data, as some of them consider data as ubiquitous and widely available, while others dissent.²⁴ The uncertainties related to big data do not only pertain to their characteristics and competitive relevance, but to their social benefits too, as unprecedented consumer and social benefits have been realized, like the provision of free services, the improvement and refinement of product and services that can be personalized.²⁵ Realizing the existence of so many peculiarities related to the big data phenomenon makes it clear that it is not possible to mere-

²² COLANGELO, MAGGIOLINO, «Big Data as Misleading Facilities», *Bocconi Legal Studies Research Paper*, available at: <https://ssrn.com/abstract=2978465>.

²³ Or “data are everywhere”, like some scholars would say, retaining data plural. See COLANGELO, MAGGIOLINO, *op. cit.* number 22, p. 3.

²⁴ STUCKE, GRUNES, «Debunking the Myths Over Big Data and Antitrust», *CPI Antitrust Chronicle*, May 2015, University of Tennessee Legal Studies Research Paper No. 276, available at <https://ssrn.com/abstract=2612562>.

²⁵ SOKOL, COMERFORD, *Does Antitrust Have A Role to Play in Regulating Big Data?*, in R. D. Blair, D. D. Sokol, *op. cit.*

ly talk about big data in general, because there are many kinds of data. And different kinds of data deserve different approaches.

Up to day, no specific regulation for big data is present, except for the privacy regulation, and it would be useless or maybe dangerous to create some fixed rules for a phenomenon that has just arose and it is dynamic and diverse. Instead of creating a new king of merger control specifically for data related ones, as the European Commissioner for Competition Vestager suggested,²⁶ the pivotal element remains the supply of information from companies, that allow a thorough analysis about risks and benefits linked to the data, without dramatically change any rule.

²⁶ VESTAGER, see *supra* note 7.