

INTERNATIONAL COMPETITION LAW SERIES

# EU Competition Law, Data Protection and Online Platforms

Data as Essential Facility

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Inge Graef



Wolters Kluwer

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# EU Competition Law, Data Protection and Online Platforms

## International Competition Law Series

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## CHAPTER 1

# Introduction

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### 1.1 BACKGROUND

The digital economy has brought about new market developments which have impacted society as a whole. Online services bring many benefits to consumers in the form of new types of social interaction and other innovative functionalities. At the same time, the use of digital processes has enabled market players to increase their productivity, resulting into lower prices and intensified competition in many sectors. The advent of the digital economy also transformed commercial behaviour and led to new business models. While digitalisation continues to contribute to a dynamic evolution of markets and competition, concerns are increasingly being raised about the alleged powerful market positions of a number of key players.<sup>1</sup>

The significance of data for digital markets and digital business models plays a key role in this regard. Innovative products and services are increasingly being offered online which enables providers to collect information about the profile, behaviour and interests of users. The knowledge that can be extracted from this data forms the basis for the competitiveness and growth of individual players in digital markets. Datasets built on the basis of the information that individuals disclose when using online services have become an economic asset in the digital economy.<sup>2</sup> In general, the increasing collection and use of data has positive welfare effects. The greater knowledge about the interests of users may lead to better quality of services and enable companies to cut costs, for example, because of more precise advertisement targeting possibilities. However, the increased collection and use of data can also result in

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1. MONOPOLKOMMISSION, 'Competition policy: The challenge of digital markets', Special report No. 68, July 2015, par. S3 and S4, available at [http://www.monopolkommission.de/images/PDF/SG/s68\\_fulltext\\_eng.pdf](http://www.monopolkommission.de/images/PDF/SG/s68_fulltext_eng.pdf).
  2. WORLD ECONOMIC FORUM, 'Personal Data: The Emergence of a New Asset Class', January 2011, available at [http://www3.weforum.org/docs/WEF\\_ITTC\\_PersonalDataNewAsset\\_Report\\_2011.pdf](http://www3.weforum.org/docs/WEF_ITTC_PersonalDataNewAsset_Report_2011.pdf).

negative welfare effects. In particular, having control over and being able to analyse large volumes of data may form a source of power for incumbent market players.<sup>3</sup>

It is instructive to note that as early as 2010 Tim Berners-Lee, known as the inventor of the world wide web, identified several trends which in his view threaten the internet as we know it. One of the referred threats concerns the walling off by large social networking sites of information posted by users from the rest of the web. By assembling information disclosed by users into databases and reusing the information to provide value-added services only within their own sites, providers create closed silos which may, in the view of Berners-Lee, lead to the fragmentation of the web and threaten its existence as a single, universal information space.<sup>4</sup> Such developments also raise questions about the role of competition law in addressing potential forms of abuse of dominance relating to data. In this regard, the Competition Commissioner recognised in a January 2016 speech that there is scope for competition enforcement in cases where only a few companies control the data needed to satisfy customers and cut costs because this could give them the power to drive their rivals out of the market.<sup>5</sup>

## 1.2 FOCUS OF THE BOOK

Against this background, the book explores how existing competition tools and concepts can be applied to data-related competition concerns in digital markets. The key focus of the book is on potential refusals of dominant firms to give access to data on online platforms such as search engines, social networks and e-commerce platforms. Even though the analysis may also be applicable to other online services, particular attention is paid to the three latter types of online platforms because of the importance of data for their business models and the fact that they are commonly referred to as 'gatekeepers' of the internet. In line with its significance in the digital economy, data is becoming a necessary input of production for a variety of products and services competing with or complementary to the services offered by incumbent providers of online search engines, social networks and e-commerce platforms. By refusing to share information with potential competitors or new entrants, incumbents may limit effective competition to the detriment of consumers.

In this context, the question rises whether the denial of a dominant firm to grant competitors access to its dataset could constitute a refusal to deal under Article 102 of the Treaty on the Functioning of the European Union (TFEU)<sup>6</sup> and lead to competition law liability under the so-called essential facilities doctrine. This doctrine attacks a particular form of exclusionary anticompetitive conduct by which a dominant

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3. MONOPOLKOMMISSION, 'Competition policy: The challenge of digital markets', Special report No. 68, July 2015, par. S3 and S10.
  4. T. BERNERS-LEE, 'Long Live the Web: A Call for Continued Open Standards and Neutrality', *Scientific American* December 2010, vol. 303, no. 6, (80).
  5. Speech of Competition Commissioner Vestager, 'Competition in a big data world', DLD 16 Munich, 17 January 2016, available at [https://ec.europa.eu/commission/2014-2019/vestager/announcements/competition-big-data-world\\_en](https://ec.europa.eu/commission/2014-2019/vestager/announcements/competition-big-data-world_en).
  6. Consolidated version of the TFEU [2012] OJ C 326/47.

undertaking refuses to give access to a type of infrastructure or other form of facility to which rivals need access in order to be able to compete.

The main research question addressed in the book revolves around the issue of whether and to what extent data may constitute an essential facility. While scholars have pointed to the probability of competitors asking access to data stored on online platforms,<sup>7</sup> it is not clear how an obligation of dominant firms to give access to the data on their platforms would fit with earlier decisions and judgments. The essential facilities doctrine has already been applied to physical infrastructures including ports and tunnels as well as to intangible assets protected by intellectual property rights. Because of the particular nature of data collected by providers of online platforms and the new business models that are employed, potential refusals to share data give rise to new competition concerns and may require a different analysis under the essential facilities doctrine.

The focus on the issue of when refusals to give access to data may constitute abusive behaviour under Article 102 TFEU also enables an analysis of how existing competition tools for market definition and assessment of dominance can be applied to online platforms. In addition, the imposition of a duty to share data with competitors raises questions about the interaction of competition law with data protection legislation considering that the information collected by providers of online platforms may also include personal data of individuals. So even though the book mainly deals with the specific question of how the essential facilities doctrine should be applied to data, a broader analysis of other related issues is required in order to give an adequate answer to the research question. This ensures that the findings have a wider relevance beyond the reach of the essential facilities doctrine and also allow for more general conclusions about how competition law can be adequately applied to new developments in digital markets.

### 1.3 STRUCTURE AND METHODOLOGY

The book consists of three self-standing parts which each have a different angle and approach. Part I outlines the economic characteristics of search engines, social networks and e-commerce platforms, including their multi-sided nature, with the aim of analysing how relevant markets can be defined and dominance can be assessed of providers of online platforms. A law and economics methodology is used to this end. Findings from economic literature about multi-sided businesses are integrated into the analysis of how existing competition tools can be applied to online platforms. In this regard, guidance is taken from previous decisions of the European Commission and judgments of the EU Courts as well as, to a more limited extent, from relevant cases in other jurisdictions. Attention is also paid to economic literature examining the

7. D.S. EVANS, 'Antitrust Issues Raised by the Emerging Global Internet Economy', *Northwestern University Law Review Colloquy* 2008, vol. 102, (285), p. 304; C.S. Yoo, 'When Antitrust Met Facebook', *George Mason Law Review* 2012, vol. 19, no. 5, (1147), pp. 1154-1158; S.W. WALLER, 'Antitrust and Social Networking', *North Carolina Law Review* 2012, vol. 90, no. 5, (1771), pp. 1799-1800.



relationship between competition and innovation, and to business literature which distinguishes between different types of competition and innovation. Findings from the business literature form the basis for the normative analysis of the essential facilities doctrine in Part II.

Part II revolves around the application of the essential facilities doctrine to data. Next to refusals to deal, two other potential competition problems involving access to data and online platforms can be identified, namely restrictions on data portability and interoperability as imposed by providers of online platforms. Before engaging in an in-depth analysis of the essential facilities doctrine, attention is paid to these possible competition issues as well as to the question of whether user data as collected by providers of online platforms can be protected under data protection and intellectual property regimes. Even though the analysis mainly focuses on EU competition law, the development of the essential facilities doctrine under US antitrust law<sup>8</sup> is also discussed because the concept originated at that side of the Atlantic. In this regard, relevant EU and US decision-making practice, case law, policy documents and literature are studied. In addition, by building on the findings from the business literature analysed in Part I, the trade-off between different economic interests to be made in refusal to deal cases is discussed. While this trade-off remains a choice between two valid policy options (i.e., to intervene or not to intervene), a need for a more coherent application of the essential facilities doctrine that is in line with the underlying economics can be identified. To this end, insights are drawn from the economic trade-off which form the principles on which a proposed framework for the application of the essential facilities doctrine is built. Afterwards, it is analysed how the essential facilities doctrine can be applied to potential refusals of dominant firms to give access to data on online platforms. In that context, regard is also had to the role of data as a competitive advantage or entry barrier in digital markets and to market definition and dominance with respect to data.

Because the data to be shared by a dominant provider of an online platform may also include personal data, possible limitations that data protection legislation puts to the imposition of a duty to deal under competition law also have to be assessed. In addition, dominant firms may rely on their obligations under data protection law as an objective justification for refusing to supply data to competitors. Against this background, the role of data protection interests in competition enforcement is explored in Part III. In particular, it is analysed to what extent data protection may constitute a non-price parameter of competition. Furthermore, the more controversial issue of whether competition enforcement can be used to promote data protection interests is examined. To this end, the inherent limitations of competition enforcement as a body of law mainly concerned with economic efficiency are outlined, while also providing suggestions for better aligning the enforcement of the two regimes in the context of merger and abuse of dominance cases. A doctrinal legal research methodology is applied in Part III relying on an analysis of relevant EU legislation, policy documents, case law and literature in the field of data protection and competition law.

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8. While the term ‘antitrust’ is mostly used in the US, it is more common to refer to ‘competition’ in the EU. In this book, both terms are used interchangeably.