THE BIG DATA RELEVANT MARKET

di Vicente Bagnoli (*) (**)

Abstract

Big Data can be understood as the ability to collect, process and analyze a large volume and a wide variety of data in sufficient length of time to obtain information that give the holder the capacity to establish business strategies. In some situations, Big Data can be characterized as an essential facility, providing its owner with market power and even a dominant position to unilaterally interfere in the functioning of the market. Big Data are notoriously identified by six V’s, namely: (i) volume; (ii) velocity; (iii) variety; (iv) value; (v) veracity; and (vi) validation. On the other hand, competition in the digital economy or markets has its own characteristics, which includes trends as winner takes it all, network effects, two-sided and multi-sided markets or platforms, fast-paced innovation and high sums of investment. Considering the digital economy and the constant changes imposed by technological innovation, the definition of the relevant market of Big Data, lato sensu, allows to understand the market structure and related issues to competition as mergers and acquisitions, market power, abuse of dominance, and therefore, to the consumer. However, Big Data relevant market cannot be defined in general, once for all. Looking at the “process” of Big Data, which starts with the capture of data and ends with the use of the information generated by those data, allows for a better understanding and a more refined definition of the relevant market(s). It follows that the Big Data relevant market can be segmented into three parts, where in fact the process of Big Data actually takes place, namely: (i) Big Data capture; (ii) Big Data storage; and (iii) Big Data analytics.

Keywords:
Big Data; Relevant Market; Competition Law; Digital Economy; Platforms.

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The Competition Law, or Antitrust on its origin, was born in the concern for fair competition across the abuses of market power in response to the capitalism of the XIX Century. The Law had its performance in industries such as oil, steel, railroads, and has been expanding its area of action over the years. However, although improvements have been made in the form of analyzing a vast variety of cases, its basis to prevent and repress abuses remains the Sherman Act of 1890 so far as the milestone of the Competition Law.

In this context, Big Data represents the new frontier in competitive matter, and demands a close and a cautious look on it to comprehend the role of Competition Law to assure at the same time the development of markets and technologies and to avoid the restraint of competition. If, on the one hand, Big Data can be extremely powerful as a competitive advantage, that provides faster responses and more efficient results for businesses, on the other hand, Big Data can be used as a cunning mechanism to restrict competition by practicing anti-competitive conducts, « including raising barriers to entry and foreclosing access to essential inputs » (1), and consolidating market dominance.

At the same time, Big Data can be understood as the ability to collect, process and analyze a large volume and a wide variety of data in sufficient length of time to obtain information that gives the holder the ability to establish business strategies and, in some situations, may amount to an essential facility, providing its owner with market power and even a dominant position allowing to unilaterally interfere with the functioning of the market. As appointed by the Autorité de la Concurrence and by the Bundeskartellamt, the following concerns can be identified in the case law: « First, the collection and exploitation of data may raise barriers to entry and be a source of market power (1). It may also reinforce market transparency, which may impact the functioning of the market (2). »

There are finally several types of data-related conducts of an undertaking that might raise competition concerns (3) » (2) as (i) mergers and acquisitions, (ii) exclusionary conducts such as refusal to access, discriminatory access to data, exclusive contracts, tied sales and cross-usage of datasets, (iii) data as a vehicle for price discrimination, and (iv) data, market power and privacy concerns.

In the Age of Big Data companies must constantly perform risk assessments to analyze how the use of Big Data can drive their decision making power, and, therefore, their activities in the markets. If, on the one hand, companies evaluate if the use of Big Data can give rise to objections of competitors for anti-competitive or unfair competition practices, on the other hand, companies know that Big Data can provide them with market power and also benefits consumer, « chief among them free user services (as a

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