DATA PORTABILITY AND BIG DATA ANALYTICS.
NEW COMPETITION POLICY CHALLENGES

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Abstract

On the one hand, information has increasingly become an important input factor for the digital economy and for business models based on big data analytics. On the other hand, information serves as one of the key points of reference in the relations between competition law and data protection law. However, the question who does control and own the processed data to which extent has not been clearly analyzed so far in the relevant fields of law; in addition, such uncertainty has also contributed to the vagueness of the data portability concept. This contribution takes the complex legal and economic situation (and insofar the fragmented normative framework) as an opportunity to analyze the tensions between big data analytics, competition law and data protection legislation. Even though the general effect of a special (independent) right to data portability, as contained in article 20 of the EU General Data Protection Regulation, can be seen as a certain progress, pitfalls are not excluded and future improvements should be considered. In accordance with these findings, possible regulatory options, in particular in the fields of data protection and consumer protection law, are discussed.

Keywords:
Big data, data portability, digital markets, competition law, privacy.

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K21 — Antitrust Law, L 40.


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1. Introduction

Information-related topics have always been of relevance for competition law. Information corresponds to a value and as a consequence is subject to business transactions leading to a continuous growth of the information and IT industries; furthermore, access to information (such as interface information or substantive data not protected by business secrets) has a competitive impact (1). The digitalization is additionally changing commercial behavior and contributes to a dynamic evolution of the markets.

More recently, markets have not only been redesigned by the digitalization of the infrastructure but also by new techniques related to the data as such, namely the data collection, processing, use, and storage. At the forefront, big data analytics, being defined as « high-volume, high-velocity and/or high-variety information assets that demand cost-effective, innovative forms of information processing that enable enhanced insight, decision making, and process automation » (2), has become a key driver of the economy.

Controlling and being able to analyze large volumes of data is « a crucial competitive advantage, particularly as such data are frequently in the exclusive possession of individual companies » (3). Online undertakings using this new kind of technology are able to deduce specific information about the behavior, preferences and possible interest of the platform users and to generate economic benefits by optimizing their business models and adapting their product range to the customers’ needs or by providing their knowledge to third parties (e.g. for purposes of personalized advertising). The importance of big data analytics is now exponentially increasing in view of the fact that their potential is estimated at several billion Euro per year. Without any doubt, data is the oil of the information society (4).

The very promising societal and economic benefits of big data analytics, however, can only be realized if adequate regulations are implemented leading to an appropriate execution of such activities. For the time being, a corresponding general system does not exist; rather, the legal framework applicable to big data analytics is both quite fragmented and largely outdated (5); this assessment is particularly true for big data in a competition law perspective.

(3) Monopolkommission, Wettbewerbspolitik: Herausforderung digitale Märkte, Sondergutachten der Monopolkommission gemäß § 44 Abs. 1 Satz 4 GWB, Baden-Baden, Nomos, 2015, p. 201.