

EU Competition Law, Data Protection and Online Platforms

Data as Essential Facility

Inge Graef



Wolters Kluwer

Table of Contents

Acknowledgements	xi
CHAPTER 1	
Introduction	1
1.1 Background	1
1.2 Focus of the Book	2
1.3 Structure and Methodology	3
PART I	
Competition and Innovation on Online Platforms	7
CHAPTER 2	
Business Models and Economic Characteristics of Online Platforms	9
2.1 Introduction	9
2.2 Describing the Online Intermediary Environment	9
2.2.1 Search Engines	10
2.2.2 Social Networks	12
2.2.3 E-commerce Platforms	16
2.3 Multi-sided Businesses	18
2.3.1 Multi-sidedness in General	18
2.3.2 Establishing a Multi-sided Business	25
2.3.3 Multi-sided Nature of Online Platforms	27
2.4 Network Economy Characteristics of Online Platforms	32
2.4.1 Economies of Scale	32
2.4.2 Network Effects	33
2.4.3 Switching Costs and Lock-In	40
2.4.4 Barriers to Entry	47
2.5 Conclusion	53

Table of Contents

CHAPTER 3	
Evaluating the Link Between Competition and Innovation	55
3.1 Introduction	55
3.2 Measuring Competition and Innovation	56
3.2.1 Indicators of Competition	56
3.2.2 Indicators of Innovation	57
3.2.3 Reliability of the Indicators	59
3.3 Economic Theory and Empirical Evidence on the Relationship Between Competition and Innovation	59
3.3.1 Schumpeter	60
3.3.2 Arrow	61
3.3.3 Aghion	63
3.3.4 Appraisal	64
3.4 Different Types of Innovation	68
3.4.1 Disruptive versus Sustaining Innovation	68
3.4.2 Appraisal	71
3.5 Conclusion	74
CHAPTER 4	
Market Definition and Dominance on Online Platforms	77
4.1 Introduction	77
4.2 Market Definition of Multi-sided Businesses	78
4.2.1 An Approach for Market Definition of Multi-sided Platforms	79
4.2.2 Relevant Product Market for the User Side	87
4.2.3 Relevant Product Market for the Advertiser Side	93
4.2.4 Relevant Geographic Market for Online Platforms	99
4.2.5 Economic Tools for Market Definition on Multi-sided Platforms	100
4.3 Market Definition in New Economy Industries	103
4.3.1 US Initiative Towards a Framework for Innovation in Competition Analysis	104
4.3.2 EU Approach Towards Innovation in Competition Enforcement	106
4.4 Assessing Dominance on Online Platforms	111
4.4.1 Room for Competition in Markets in Which Multi-sided Businesses Operate	111
4.4.2 Establishing Dominance of Online Platform Providers	114
4.4.3 From Market Shares to Potential Competition?	117
4.5 Conclusion	120
PART II	
Data as Essential Facility	123
CHAPTER 5	
Setting the Scene	125
5.1 Introduction	125
5.2 Role of Data in the Digital Economy	126

5.3	Protection of User Data under Data Protection and Intellectual Property Regimes	132
5.3.1	Protection of Personal Data under the European Data Protection Regime	133
5.3.2	Copyright and Sui Generis Database Protection for User Data	134
5.3.3	Trade Secret Protection for Datasets	141
5.4	Potential Competition Problems Involving Access to Data and Online Platforms	143
5.4.1	Data Portability	144
5.4.2	Interoperability of Online Platforms	148
5.4.3	Refusals to Give Competitors Access to User Data	152
5.5	Conclusion	154
CHAPTER 6		
	Normative Analysis of the Essential Facilities Doctrine	155
6.1	Introduction	155
6.2	Unravelling the Legal Standards for Refusals to Deal in the United States and the European Union	156
6.2.1	Development of the Essential Facilities Doctrine in the United States	157
6.2.2	Development of the Essential Facilities Doctrine in the European Union	163
6.2.3	Comparison Between the US and EU Standards Applicable to Refusals to Deal	173
6.3	Influence of American and European Schools of Economic Thought on the Development of the Essential Facilities Doctrine	174
6.4	Economic Trade-Off in Essential Facilities Cases	179
6.5	Need for a More Coherent Application of the Essential Facilities Doctrine	182
6.6	Principles Underlying the Proposed Framework	184
6.6.1	Balance Between Competition in and for the Market Is Established over Time	185
6.6.2	Competition Enforcement Can Only Restore the Process of Competition in the Market	186
6.6.3	Market Specifics Are Instrumental in Determining Whether a Competition Law Intervention Is Appropriate	190
6.7	Role of Intellectual Property and Trade Secret Law	193
6.7.1	Analysing Refusals to License in the Light of the Interface Between Competition and Intellectual Property Law	193
6.7.2	Limits of the New Product Condition	196
6.7.3	Do Intellectual Property Rights and Trade Secrets Require a Different Treatment under the Essential Facilities Doctrine?	201
6.8	A Proposed Framework for the Application of the Essential Facilities Doctrine	209

Table of Contents

6.8.1	Market Definition and Dominance in Essential Facilities Cases	210
6.8.2	Absolute Refusals to Supply	216
6.8.2.1	Indispensability	216
6.8.2.2	Exclusion of All Effective Competition on the Downstream Market	220
6.8.2.3	Prevention of the Introduction of a New Product	223
6.8.2.4	Absence of an Objective Justification	229
6.8.3	Disruptions of Supply	235
6.8.4	Discriminatory Refusals to Supply	242
6.9	Conclusion	245
CHAPTER 7		
	Application of the Essential Facilities Doctrine to Data	249
7.1	Introduction	249
7.2	Data as a Competitive Advantage	249
7.3	Scenarios with Regard to Access to Data	256
7.4	Market Definition in Essential Facilities Cases Relating to Data	259
7.5	Market Power with Regard to Data	265
7.6	Characteristics Which Set Data Apart from Other Assets Previously Being Considered under the Essential Facilities Doctrine	267
7.7	Abusive Nature of Refusals to Give Access to Data on Online Platforms	269
7.7.1	Indispensability of Data	270
7.7.2	Exclusion of All Effective Competition on the Downstream Market	273
7.7.3	Prevention of the Introduction of a New Product	274
7.7.4	Absence of an Objective Justification	276
7.8	Conditions under Which Access to Data Should Be Granted	277
7.9	Conclusion	279
PART III		
	Data Protection Interests in Competition Enforcement	281
CHAPTER 8		
	How Data Protection Has Become Relevant to Competition Enforcement	283
8.1	Introduction	283
8.2	Disentangling Data Protection and Privacy	283
8.3	Rise of Attention for Data Protection in Competition Enforcement	287
8.4	Conclusion	292
CHAPTER 9		
	Identifying the Interaction Between Competition and Data Protection Law	293
9.1	Introduction	293
9.2	Key Data Protection Principles and Their Enforcement in Relation to Competition Law	293
9.2.1	From Consent and Purpose Limitation to Substitutability	294

9.2.2	Comparing the Enforcement Mechanisms of EU Data Protection and Competition Law	297
9.3	Effect of Data Protection Regulation on Competition	302
9.4	Data Protection as a Non-price Parameter of Competition	306
9.5	Potential Conflicts Between Competition and Data Protection Law	315
9.6	Conclusion	322
CHAPTER 10		
	<i>Data Protection as a Non-efficiency Concern in Competition Policy</i>	325
10.1	Introduction	325
10.2	Exploring the Objectives of EU Competition Law in Current Decision-Making Practice and Case Law	326
10.2.1	Article 101 TFEU	326
10.2.2	Merger Review	327
10.2.3	Article 102 TFEU	329
10.2.4	Consumer Welfare Standard	330
10.3	Examining the Scope for Data Protection Interests in EU Competition Policy	332
10.3.1	Comparing the Objectives of EU Competition and Data Protection Law	332
10.3.2	Weighing Pros and Cons of Integrating Data Protection Interests in EU Competition Policy	335
10.3.3	Three-Layer Approach Towards the Integration of Data Protection Interests in EU Competition Policy	337
10.3.3.1	Protection of Economic Efficiency Also Furthers Data Protection Interests	338
10.3.3.2	Going beyond Protecting Economic Efficiency?	339
10.3.3.3	Negative Duty to Respect the Right to Data Protection	340
10.3.3.4	Positive Duty to Promote the Application of the Right to Data Protection	343
10.4	Data Protection Interests in Merger Review	345
10.4.1	Assessing Data-Related Competition Concerns in Merger Cases	345
10.4.2	Scenario 1: The Merger Does Not Significantly Impede Effective Competition	349
10.4.3	Scenario 2: The Merger Significantly Impedes Effective Competition	352
10.5	Data Protection Interests and Abuse of Dominance	355
10.6	Conclusion	361
CHAPTER 11		
	Conclusion	365
11.1	Threefold Relevance of Data for Competition Policy	365
11.2	Two General Observations	366
11.3	Summarising the Results from the Analysis in Part I	366
11.4	Summarising the Results from the Analysis in Part II	368

Table of Contents

11.5 Summarising the Results from the Analysis in Part III	372
11.6 Outlook	375
Bibliography	377
Table of Cases	407
Table of Legislation	415
Index	419