

EU-Merger Control & Big Data: On Data-specific Theories of Harm

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Abstract

The Commission's practice on data-related mergers has been focused on whether the accumulation of data may lead to the merged entity having control over exclusive information deemed to be a key input to compete in the market. Yet, due to the ubiquitous and non-rival nature of data, together with the alleged dynamisms in the data-driven markets, it has mostly found no concerns. However, a concern may arise when the accumulation of data from several sources leads to an advantage that competitors will no longer be able to match. This could be the case of a merger involving a tech-giant structured as a digital conglomerate, whose raison d'être is the continuous expansion of its network of businesses from which it collects valuable data. If this expansion reaches a critical level, the impact on competition - both static and dynamic- can be negative. We call this theory of harm relative market foreclosure: a scenario where competitors still have access to the relevant input, but the entry barriers raised by the data aggregation discourage sector-specific innovation and increase the incumbent's ability to engage in foreclosure strategies. We develop this theory in the light of the EU merger case law on conglomerates and the SIEIC test.

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