Big data and competition law

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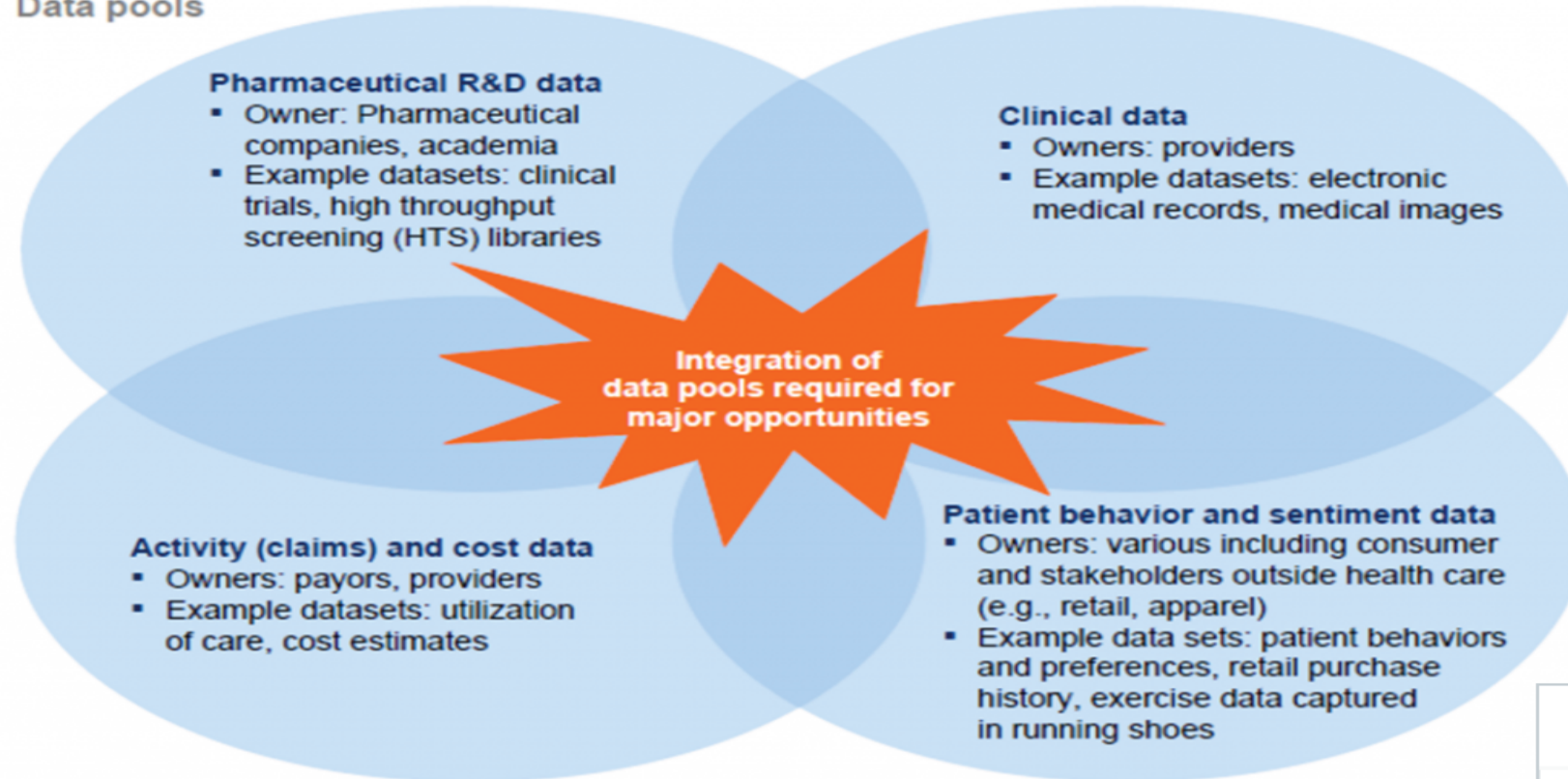LEAR conference, Rome, 25-26 June 2015

Introduction

- Big data is recognized as an important issue by many competition authorities.

- Yet, there are few competition cases that have access to data or treatment of data at their core.

- The big data and antitrust literature is also quite poor. This is especially true on the legal side.

- There is therefore relatively little to draw from if you are interested in the competition law issues raised by big data.

- Against this background, the (modest) goal in this presentation is to identify some key competition law issues raised by big data.

Data as a key competitive advantage

- This is clear in two-sided business models
  - Data is essential on both sides: the free side to improve the quality of the service (e.g., search), but also the paying side to improve the targeting (e.g., search advertising).
- But it is also clear in models that are not necessarily two-sided where big data can be used to:
  - Improve the quality of product/service (identify what consumers like/dislike)
  - Improve supply chains (consumer data may allow you to determine how to allocate shelf space)
  - Develop new services (consumer data may point to gaps in your offering)
  - Save costs, reduce waste (patients data may be used to check whether they take their medicine and whether the medicines work)
  - Develop/capture after sales markets (data on drivers/cars may be an opportunity to sell them repair services)
- There is nothing wrong with development/maintaining/expanding a competitive advantage, except when it is linked to an anticompetitive conduct

Data pools in the pharmaceutical industry

Data pools

Pharmaceutical R&D data
- Owner: Pharmaceutical companies, academia
- Example datasets: clinical trials, high throughput screening (HTS) libraries

Clinical data
- Owners: providers
- Example datasets: electronic medical records, medical images

Integration of data pools required for major opportunities

Activity (claims) and cost data
- Owners: payors, providers
- Example datasets: utilization of care, cost estimates

Patient behavior and sentiment data
- Owners: various including consumer and stakeholders outside health care (e.g., retail, apparel)
- Example data sets: patient behaviors and preferences, retail purchase history, exercise data captured in running shoes

SOURCE: McKinsey Global Institute analysis

Example of data-related competition law problems (1)

- Exclusive agreements designed to collect data/deprive competitors from it.
  - Complaints that Google relied on exclusive intermediation with publishers /distribution agreements software makers to acquire data/block rivals from acquiring data
- Exclusive access to unique source of data to boost after sale services
  - Current fight between car manufacturers and independent repair sector to know who should have access to driver/car data generated by in-vehicle telematics platform (ecall).
- Lock-in consumers/suppliers by refusing data portability
  - The data you provide to online service providers is valuable to them, but also to customers. It may be used to lock customers in.
  - With online rating systems, you could also lock-in suppliers (e.g., Uber drivers)

Example of data-related competition law problems (2)

- Planning a merger that will allow to increase data collection
  - What if mergers will enhance ability of companies who hold large data volumes to collect even more data?
  - In *Google/DoubleClick*, the Commission considered the effect of the increase in the amount of personal data obtained by the merged entity.
    - It found that "the combination of information on search behaviour and web-browsing behaviour would not give a competitive advantage … that could not be replicated …".
  - In *Facebook/WhatsApp,* the Commission looked at whether Facebook could use WhatsApp as a potential source of user data for improving the targeting of its ads.
    - It found that the transaction would not raise competition concerns because after the merger, there will continue to be a large amount of internet user data are available for advertising purposes not within Facebook's exclusive control.

Key issues for competition law (1)

- Market definition
  - Are there data markets?
    - Most likely yes if data is traded.
  - What is the scope of these markets? How narrowly/broadly should they be defined?
  - What is the degree of substitutability between different types of data
    - Is search data comparable to social networks data?
    - How do you assess substitutability?
- How do you measure dominance on a data market?
  - Market shares? Ability to collect data? To treat data?
- Should access to data be taken into account when assessing dominance on other markets?
  - Would seem logical if data is a critical input. Commission has considered data as an input in a number of potential markets most recently in *Facebook/WhatsApp* (2014)
  - Barrier to entry?

Key issues for competition law? (2)

- Is data an essential input/facility?
  - Is the data in question widely available? Are they substitutes?
  - Will absence of access harm competition on a downstream market?
  - Will an obligation to share harm incentives to invest?
- Are problems more likely to occur in case of vertical integration?
  - Yes, see for instance the case of supermarkets using scanning data to promote its own brands.
- Is data portability a regulatory or a competition law issue?
  - How do you determine when it is necessary to maintain/allow competition?
  - What if what matters is not the data, but the way in which it has been collected/treated?
  - Should reputation ratings be portable?

Key issues for competition law? (3)

- When personal data is involved, should privacy considerations be taken into account?

  - In *Afnex-Equifax*, the CJEU made clear that "*any possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law* […]".

  - In *Facebook/WhatsApp*, the Commission indicated that, in merger review, "[a]*ny privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the transaction do not fall within the scope of EU competition law*"

- Should a special competition law approach be pursued in data-related cases?

  - Why so?

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