

Data Collaboration, Pooling and Hoarding under Competition Law

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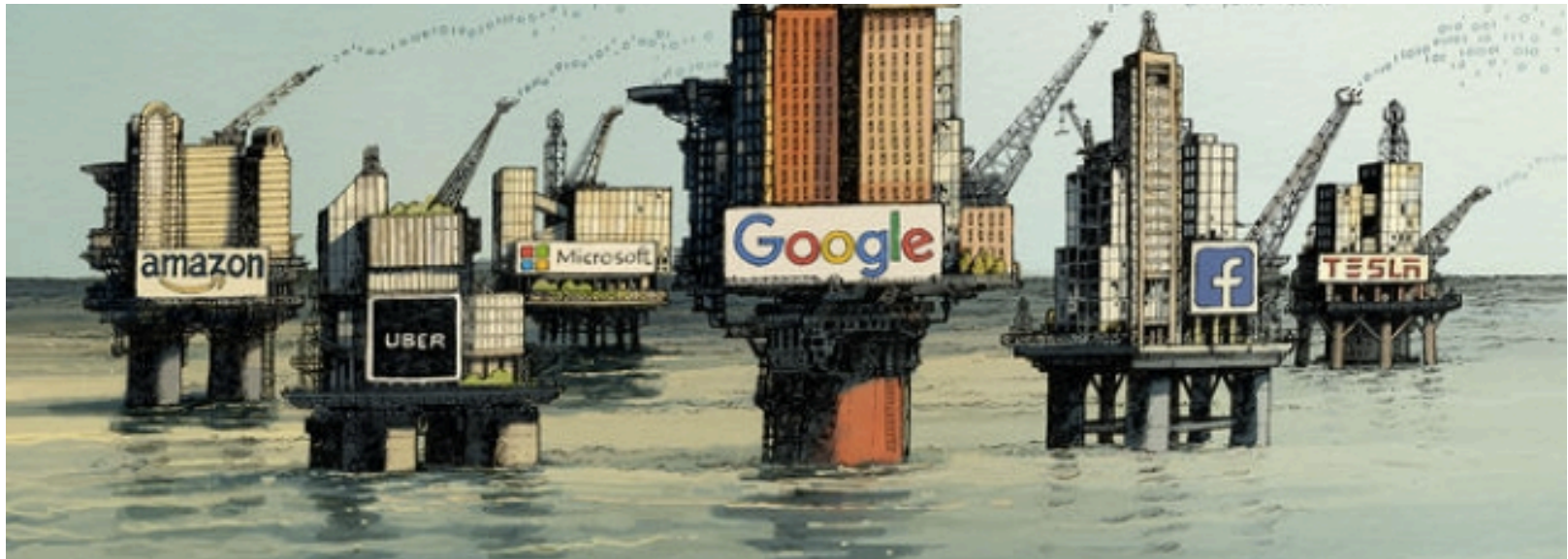
Agenda

- 💧 Business conduct in the Digital Economy
- 💧 The Application of Competition Law vis-à-vis data pools
- 💧 Conclusion

The data, the information (as such), irrespectively how private and how valuable, is not currently covered by property right. However, the infrastructure or ecosystem is covered



Silos, plagued by data-driven business models, network effect and tipping



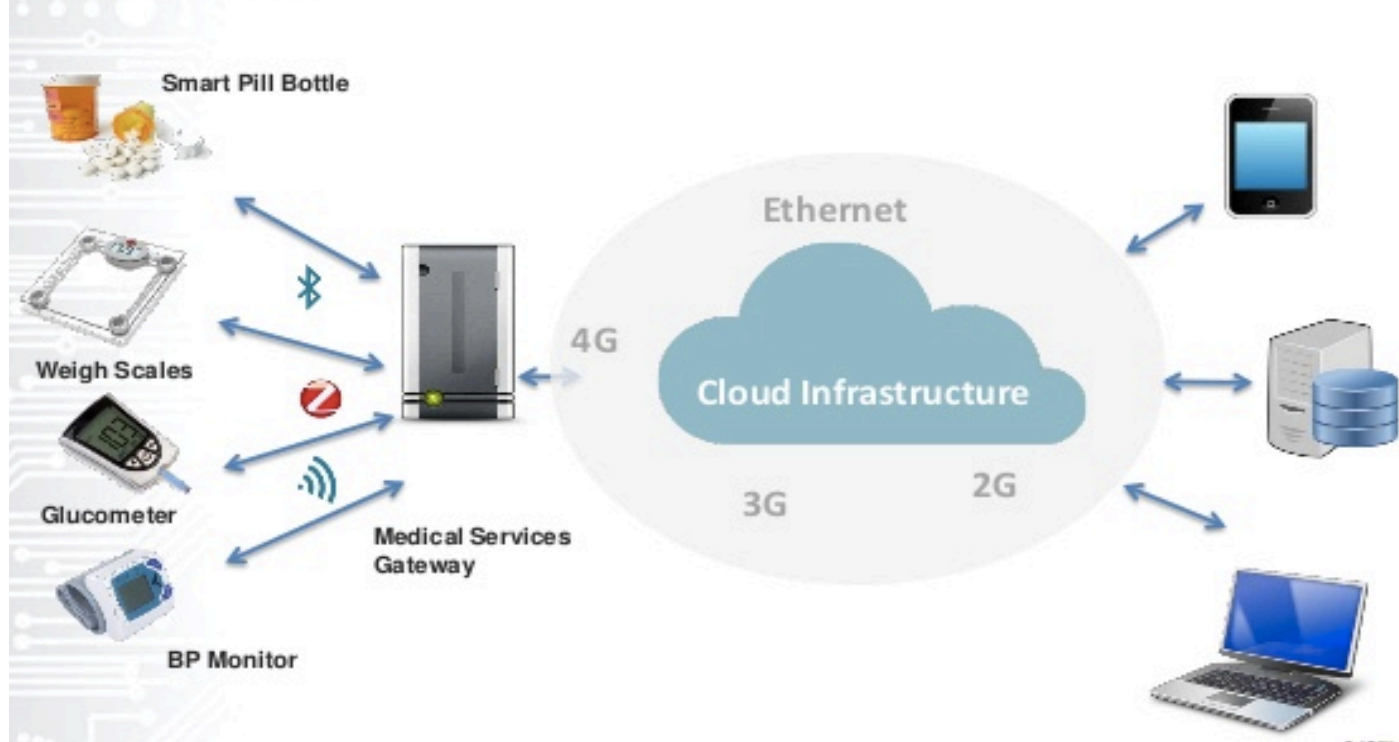
The Economist , June 2017

Business conduct by Platform and Cloud Providers

- ◆ There is also a twist to the discrimination features of the clouds and in reference to data. It is not uncommon that even though the Cloud user has access to its own data in the Cloud, the Cloud provider have access to not only to that data but also to all other data in the Cloud, plus its own data.
- ◆ The use of wide non-assertion clauses in the Cloud access agreements. The cloud users need to agree not to utilize their intellectual property portfolio vis-à-vis the e-platform ecosystem or the firms connected to the e-ecosystem in question.

IoT and its Infrastructure, i.e. DATA ecosystem, disruptive technology

- IOT infrastructure consists of - Terminal devices, Communication and Cloud infrastructure



Data Pooling

- ◆ 'Brick-and mortar' firms enter into agreement on merging their personal and non-personal data into pools for them and possibly others to access and utilize.
 - ◆ One way to solve the issue of too few firms holding too much data, would be to allow and, perhaps, even encourage data pooling.
 - ◆ It might be necessary to aggregate, in certain markets or industries, as much data as possible, because this would increase the quality of the results of data analytics. This, is, for example, a topic in regard to health data but can also be relevant in regard to traffic data, and in other contexts.
 - ◆ Problems with as "data fragmentation" or "data aggregation"

Data Pooling

- ◆ New system leaders for Industrial Internet or IoT may be created
- ◆ Barriers to entry may be erected through data pooling, and collusion may be facilitated.
 - ◆ Should there be a fee or royalty to be paid to access the pool, that would imply a horizontal agreement between the founders of the pool
 - ◆ Moreover, pricing algorithms may be connected to data pools, and that may cause collusive conduct, e.g. hub-and spoke, pricing discrimination and excessive pricing. Signalling may occur under a pool.
 - ◆ Data protection rules may be violated, that in turn may cause the antitrust rules to be triggered.
- ◆ Exclusion of a competitor, potential competitor, or third parties

The Application of Competition Law

Article 101 TFEU



Data Pooling

- ◆ Commissioner M. Vestager seem to purport that data pooling has it benefits.
 - ◆ “bigger is better”, combining companies’ data into a single, big pool might give you insights that you couldn't get from each one on its own.
- ◆ EU Commission Report ‘Competition policy for the digital era’ from April 2019
 - ◆ A positive tone, and a call for more research to be conducted.

Data Pooling, Article 101 TFEU

- ◆ Article 101 TFEU
 - ◆ Agreement to share data
 - ◆ Pricing
 - ◆ *John Deere, Wood pulp, Asnef-Equifax*
 - ◆ Facilitators
 - ◆ *Eturas, AC Treuhand*

Data Pooling, Article 101 TFEU

- ◆ Agreements not to share
 - ◆ Commission investigation of banks, obligation to share based on law (PSD II)
- ◆ Pooling in breach of DP Laws?
 - ◆ German Facebook decision
- ◆ Insurance companies data collaborations?
 - ◆ Used to be block exempted

Data Pooling, need of guidance

- ◆ Patent pools?
- ◆ Generally, and looking specific at information exchange, R&D collaboration and standard-setting, pooling of data may fall under several categories of collaborations.



Data Pooling

- ◆ Indeed, R&D collaborations and pre-market standard-setting might be more similar to data pooling than pooling intellectual property rights.
- ◆ Technology pools often only include non-competing patents and are devices to collect royalties, where the technology has already been defined in the standard-setting agreements.
- ◆ Moreover, data is not covered by property. It is non-exclusive and non-rivalrous. Indeed, data pooling is more akin to agreement on information sharing regarding the future use of the product or the technology, without actually agreeing on the future technology or service.

Data Pooling

- ◆ The firms, agreeing on pooling data, need to define the market, industry, to be monitored, and the technology to be used for collecting and storing data, and also how the data will be used in the future. Given the magnitude of ways to store and use data, this might indeed be a grand effort. And, possibly in reference to what the firms agree on here, a competition authority may have innovation competition concerns.
- ◆ Market power is usually not a concern, safe harbours should apply anyway

Data Pooling and system leaders

- ◆ The duty to give access should be proportional to the pool's market power, i.e. a group of smaller players pooling their data to gain a competitive advantage should not be forced to give their pooled data to a much larger player.
- ◆ Covenants requiring the parties to share all data in a defined area are, usually, benign
- ◆ Data access issue may be similar to the data access issues that arise in connection with dominant firms under Article 102 TFEU

Data pools should be promoted...

Björn Lundqvist, "Competition and Data Pools", 2018 Journal of European Consumer and Market Law 146

*Björn Lundqvist, Data Collaboration, Pooling and Hoarding under Competition Law (2018). Faculty of Law, Stockholm University Research Paper No. 61. Available at SSRN:
<https://ssrn.com/abstract=3278578>*

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