

Big Data & Competition law

Alec Burnside

20 October 2020

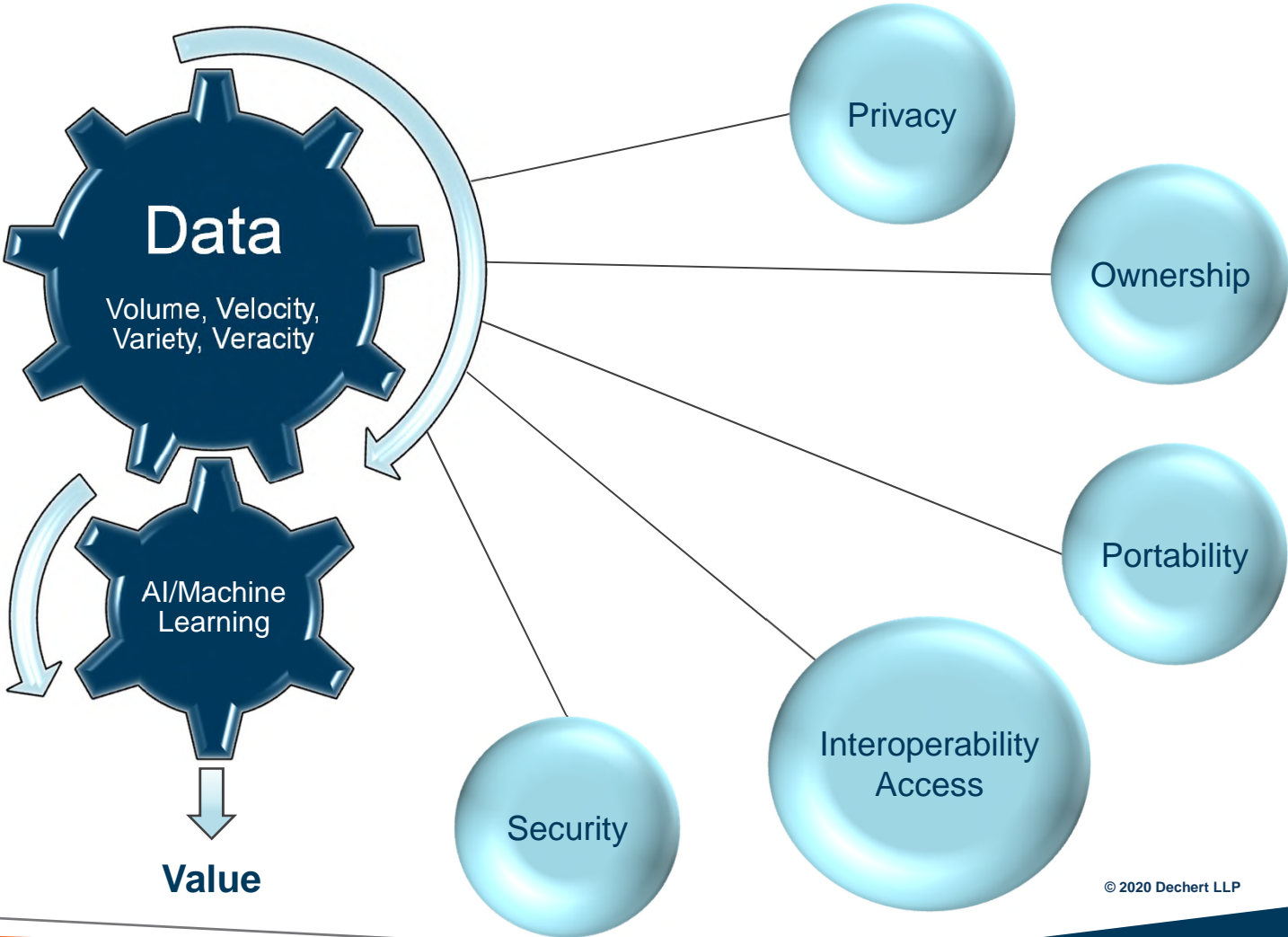
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Big data



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Big... and growing

Projected figures 2025



530%

increase of global
data volume

From 33 zettabytes
in 2018 to 175
zettabytes



**€829
billion**

value of data
economy in the
EU27

From €301 billion
(2.4% of EU GDP)
in 2018



**10.9
million**

data
professionals in
the EU27

From 5.7 million in
2018



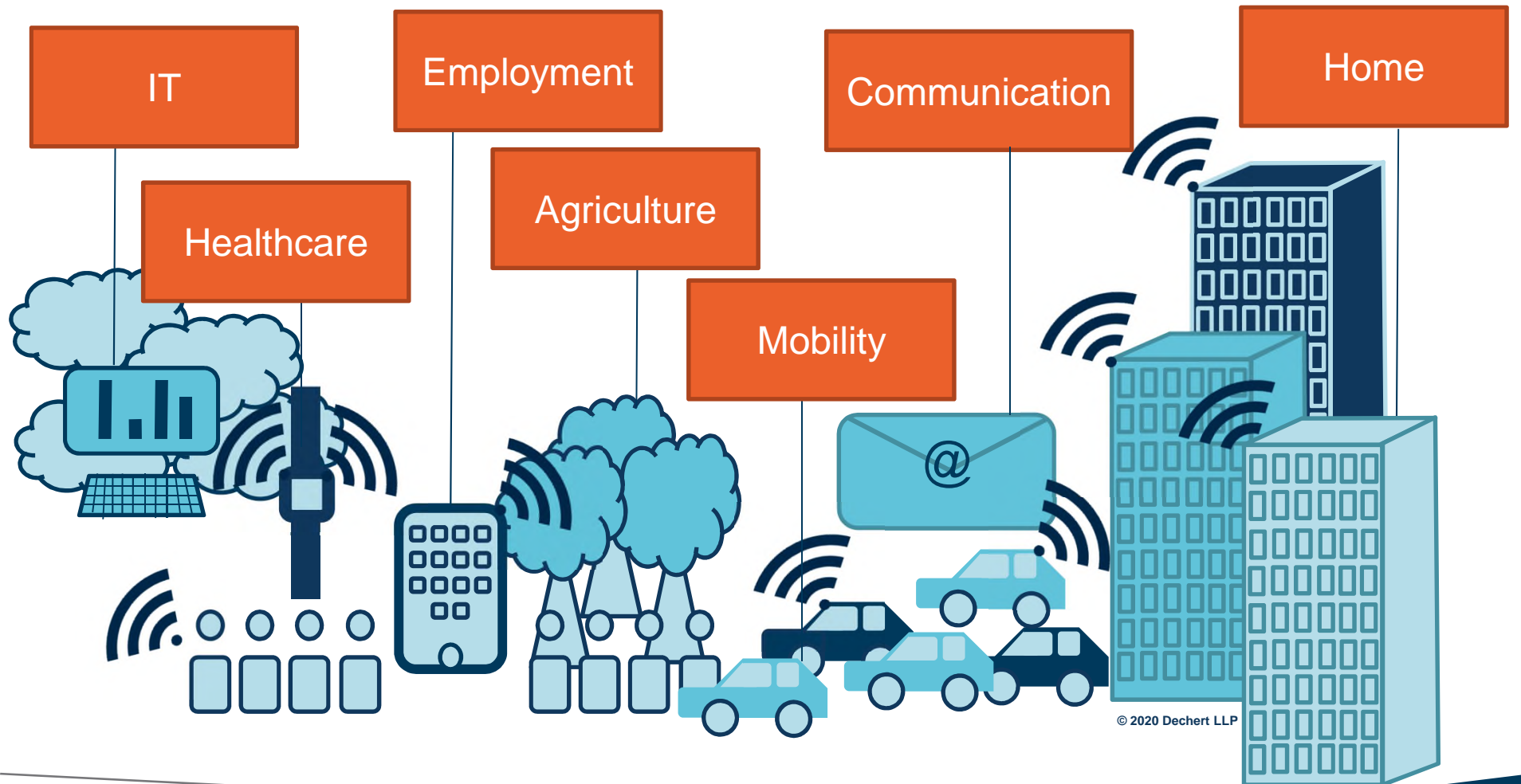
65%

Percentage of EU
population with
basic digital skills

From 57% in 2018

Source: European Commission

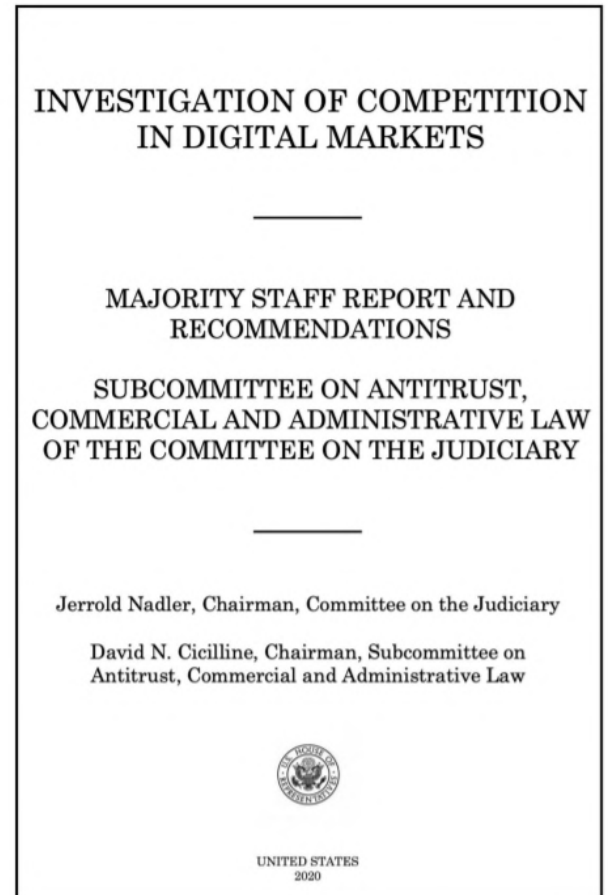
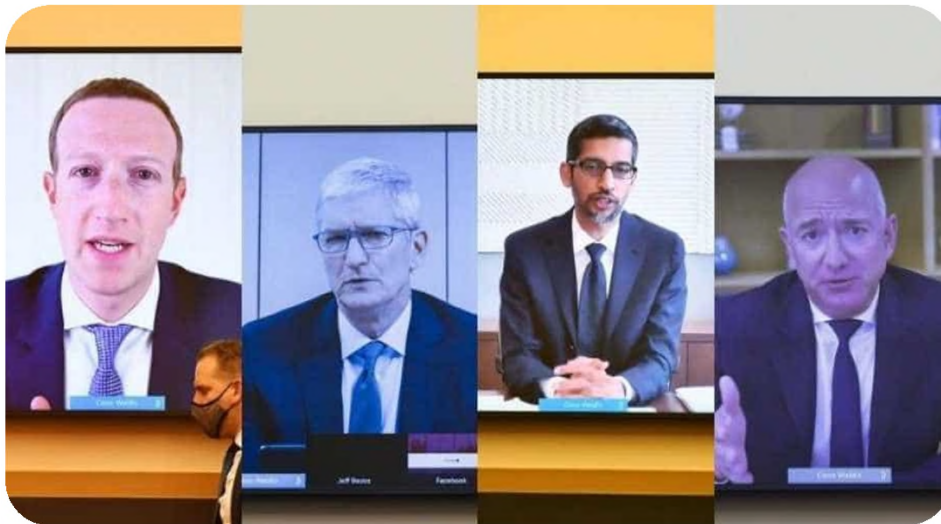
Big data – a driver of innovation



Storm brewing in the US?

US Subcommittee on Antitrust Investigation of competition in digital market

- Investigation launched on 3 June 2019
- 6 hearings, including of Big tech CEOs
- 450-page report published on 7 October 2020



Recommendations 1

Restoring Competition in the Digital Economy

- Structural separations;
- Non-discrimination requirements;
- Interoperability and data portability;
- Presumptive prohibition against future mergers and acquisitions;
- Safe harbour for news publishers; and
- Prohibitions on abuses of superior bargaining power



Recommendations 2

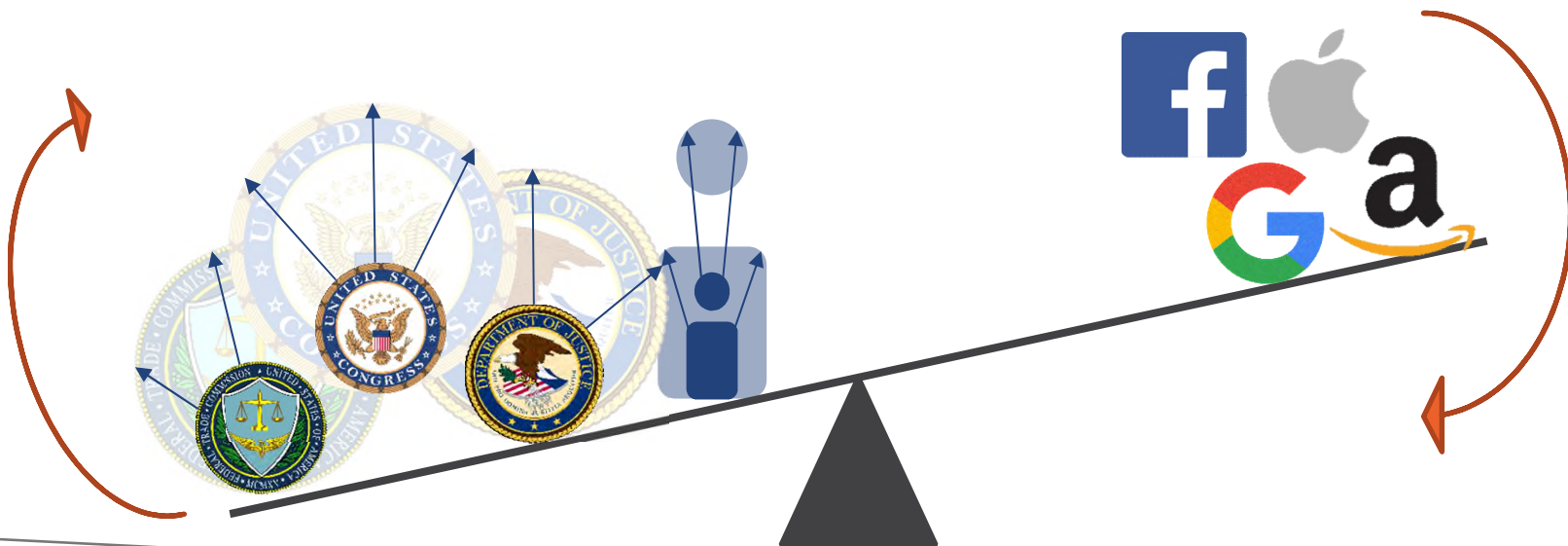
Strengthening the Antitrust Laws

- Reasserting the anti-monopoly goals of the antitrust laws and their centrality to ensuring a healthy and vibrant democracy;
- Strengthening Section 7 of the Clayton Act, including through restoring presumptions and bright-line rules, restoring the incipency standard and protecting nascent competitors, and strengthening the law on vertical mergers;
- Strengthening Section 2 of the Sherman Act, including by introducing a prohibition on abuse of dominance and clarifying **prohibitions on monopoly leveraging, predatory pricing, denial of essential facilities, refusals to deal, tying, and anticompetitive self-preferencing and product design**; and
- Taking additional measures to strengthen overall enforcement, including through overriding problematic precedents in the case law.

Recommendations 3

Reviving Antitrust Enforcement

- Restoring robust congressional oversight of the antitrust laws and their enforcement;
- Restoring the federal antitrust agencies to full strength; and
- Strengthening private enforcement.



Upcoming Antitrust cases – First Google...

THE WALL STREET JOURNAL. By [John D. McKinnon](#) and [Brent Kendall](#)
Sept. 24, 2020 7:47 am ET

POLITICS

Google Antitrust Suit Looms Over Issues of Search Dominance, Advertising

Justice Department, states say they want to move quickly, but partisan, legal differences may complicate potential case

POLITICO By LEAH NYLEN
10/02/2020 07:01 PM EDT

Trump administration to launch antitrust suit against Google as soon as next week

The Justice Department and state prosecutors spoke Friday afternoon to go over the proposed antitrust suit.

POLITICO By LEAH NYLEN
10/10/2020 07:00 AM EDT

Feds may target Google's Chrome browser for breakup

Prosecutors for the Justice Department and state attorney general offices are discussing ways of curbing the search giant's market power as they prepare to sue the company.

Meanwhile in Europe...

A change in enforcement?

The shift to a data driven economy we are currently experiencing will also need a **shift in how we look at markets and in particular consumer harm**, which in data driven markets does not necessarily manifest itself in price increases but in less choice and innovation.

M. Vestager, Submission to the US Subcommittee, 2020

[D]igitisation is making it harder to keep competition working the way that it should. [...] One thing that's clear from all that is that there's no one, simple solution. We need a mix of approaches. That includes new regulations, and new competition powers. But it also means making full use of the ones we already have.

M. Vestager, ASCOLA Annual Conference, 26 June 2020

More sector inquiries?



European Commission - Press release



Antitrust: Commission launches sector inquiry into the consumer Internet of Things (IoT)

Brussels, 16 July 2020

The European Commission today launched an antitrust competition inquiry into the sector of Internet of Things (IoT) for consumer-related products and services in the European Union.

The sector inquiry will focus on consumer-related products and services that are connected to a network and can be controlled at a distance, for example via a voice assistant or mobile device. These include smart home appliances and wearable devices. Knowledge about the market gained through the inquiry will contribute to the Commission's enforcement of competition law in this sector.

Executive Vice-President Margrethe **Vestager**, in charge of competition policy, said: "*The consumer Internet of Things is expected to grow significantly in the coming years and become commonplace in the daily lives of European consumers. Imagine a smart fridge making your grocery list, you pulling up that grocery list onto your smart device and order a delivery from a shop that sends the groceries to your door that unlocks automatically with a word. The possibilities seem endless. But access to large amounts of user data appears to be the key for success in this sector, so we have to make sure that market players are not using their control over such data to distort competition, or otherwise close off these markets for competitors. This sector inquiry will help us better understand the nature and likely*

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With markets shifting and new technologies emerging, it is likely we will be doing more sector inquiries in the near future.

M. Vestager, Oct. 2020

Merger Control: sufficiently forward-looking?

- Past examples of Google/DoubleClick and Facebook/WhatsApp warrant caution
- Type 1 vs Type 2 errors?

“In merger control, I think one of the things we’re going to have to see is competition authorities being willing to undertake more decisions under uncertainty and to not go for the default bias... which is, ‘this is all very uncertain, we’ll just let this merger through’. This seems to me to be the wrong answer”

M. Walker, CMA, Oct. 2020

- On-going EU merger investigations with data questions: Google/Fitbit, LSEG/Refinitiv, etc.

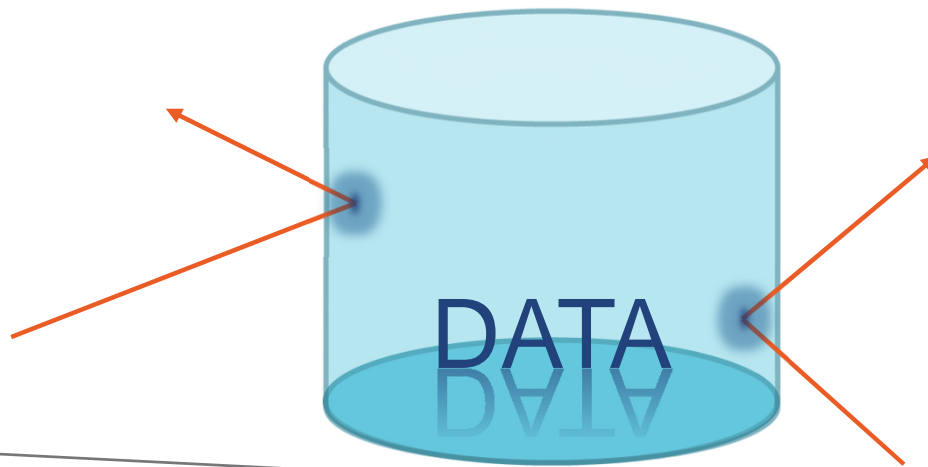
Our investigation aims to ensure that control by Google over data collected through wearable devices as a result of the transaction does not distort competition.

Google/Fitbit, Press release, 4 August 2020

Merger control: new remedies?

These cases also raise specific questions for merger control when it comes to the need to ensure effective and appropriate remedies, especially as regards the risks of data accumulation in some already concentrated markets. Traditional divestitures may not always be conceivable to address such issues, hence the need to reflect on whether alternatives - such as data silos ensuring strict limitations on data usage, or alternatively, data access by third parties - could be operational and effective.

M. Vestager, Submission to the US Subcommittee, 2020



Data agreements: navigating a thin line?

Data pooling and data sharing will also become increasingly important to keep European businesses at the forefront of innovation, for example in areas like artificial intelligence. And when smaller rivals share information, they stand a better chance to challenge and compete with a market leader. At the same time, we can't allow such cooperation to become a cover for cartels.

M. Vestager, Competition Day, Sept. 2020

- Review of the Horizontal Guidelines
- Specific rules for “sustainable” data sharing?
- Upcoming consultation on the single market for data, including the creation of common European data spaces in crucial sectors and domains of public interest

Dominance: is the Big Data case coming?

Press release | 17 July 2019 | Brussels

Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon

Press release | 16 June 2020 | Brussels

Antitrust: Commission opens investigations into Apple's App Store rules

The lack of options available to Facebook users does not only affect their personal autonomy and the exercise of their right to informational self-determination also protected by the GDPR. In light of the considerable barriers existing for network users who would like to switch providers (“lock-in effects”), **this lack of options also exploits users in a manner which is relevant under competition law** since due to Facebook’s dominant position competition is no longer able to effectively exercise its controlling function.

German Federal Court of Justice, June 2020

Dominance: a new era of interim measures?

Press release | 16 October 2019 | Brussels

Antitrust: Commission imposes interim measures on Broadcom in TV and modem chipset markets

It's when markets are moving rapidly that interim measures matter most.

They can prevent irreparable harm to competition during the time it takes to reach the final decision. They do something else too. They create the right incentives for companies to work with enforcers towards reaching commitments.

M. Vestager, Oct. 2020

Dominance: use of restorative remedies?

“It’s been clear for many decades that we have the power to impose what you might call “restorative remedies” – ordering companies to take positive action to undo the damage that they’ve done to competition. In their report, the special advisers urged us to make use of these remedies – and we’ll do just that, whenever we find that it’s the right thing to do.”

M. Vestager, ASCOLA Annual Conference, 26 June 2020

Competition and privacy: weaponisation of privacy



Online platforms and digital advertising

Market study final report
1 July 2020

Our concern is that such platforms have an incentive to interpret data protection regulation in a way that entrenches their own competitive advantage, including by denying third parties access to data that is necessary for targeting, attribution, verification and fee or price assessment while preserving their right to use this data within their walled gardens.

“Now it seems some dominant players are using [data privacy] regulation as a strategic barrier to entry to not share data - which is parameter of competition”

Cani Fernandez, CNMC, Oct. 2020

More calls for regulation

Digital Services Act and New Competition Tool

- DSA package
 - Ex-ante regulation of large digital platforms acting as gatekeepers
 - Harmonised responsibilities and increased oversight
- New Competition tool
 - Investigative powers for markets with structural competition problems
 - Intervention powers to remedy these issues
- Rolled-into one?

We're working on a new legislative proposal focussed on digital markets, which would feature two complementary pillars, a combination of ex ante regulation and case-by-case enforcement. The regulation side will be targeted at a small number of large digital gatekeepers, setting out a clear list of dos and don'ts. Yes, you should make certain data accessible to platform users. No, you should not engage in proven forms of harmful self-preferencing. The case-by-case enforcement side would allow us to investigate digital markets and intervene, including by imposing remedies, where we identify structural market issues or failures.

M. Vestager, Fordham Competition Conference, Oct. 2020

Recent support from France and the Netherlands



Considerations of France and the Netherlands regarding intervention on platforms with a gatekeeper position

This discussion document elaborates on the issue of intervention on “large digital platforms with significant network effects acting as gatekeepers” (also referred to as “structuring platforms”), namely why, when, how a new framework of regulation could be used. Its purpose is to bring further input to both consultations launched by the European Commission regarding first ex ante intervention for platforms acting as gatekeepers as part of the DSA Package and second the New Competition Tool (NCT) insofar as it applies to digital markets. We naturally welcome further in-depth discussions with experts, the European Commission, and other Member States about this issue.

Why is intervention needed?

Admittedly, platforms continue to provide entrepreneurs and consumers with a large number of benefits. However, such benefits may be diminished if the market position of some platforms becomes entrenched up to the point where competitors cannot challenge their market power anymore (see below). The terms ‘structuring platforms’ is used hereafter to designate the gatekeeping position of such platforms. As a result, small, innovative platforms may be impeded from entering the market or compelled to withdraw from it. Also, consumers and business users may become dependent on a platform and subject to unfair terms or behaviour. This may ultimately lead to a significant lack of competition as well as broader market failures stemming from users’ inability to shop around on the market and pick the terms and conditions which they favour. Let alone this negative impact on freedom of choice, these outcomes may cause major harm regarding innovation, price and quality.

National level: regulation spree?

A few examples:

- Specific regulation
 - **Germany** new Draft Bill for the Reform of the German Competition Act would impose stricter rules on Undertakings of Paramount Significance and Undertakings with Relative or Superior Market Power
- Specific regulator
 - **UK** proposed Digital Market Unit with the ability to enforce a code of conduct, as well as fines and pro-competitive interventions against platforms with *Strategic Market Status*
- Mandatory notification of all acquisitions
 - Considered in the pending **French** Regulation but deleted in the latest version of the text

Alec Burnside

Brussels/London Offices



Partner

Alec Burnside

alec.burnside@dechert.com

+32 2 535 54 33 / +44 20 7184 7444

Alec Burnside practices in the area of EU competition law, with a particular focus on covering merger clearances, state aid, cartel defense, abuse of dominance, and damages litigation.

Over the past three decades, Mr. Burnside has played a key role in cases for leading corporations, global industries and governments on issues arising across a broad spectrum of industries, including consumer products, energy and natural resources, financial services, manufacturing, military, pharmaceuticals, technology, telecoms, and transport and logistics. In particular, Mr. Burnside represents **a number of complainants in the Google investigations by the EU Commission.**

Currently he is particularly invested in the themes around **Big Data and the tech industry**, as well as antitrust and sustainability, focusing also on the new EU FDI regulation.

He co-authors the Dechert Antitrust Merger Investigation Timing Tracker (DAMITT), which is the leading source of analysis for significant U.S. and EU antitrust merger investigation and litigation trends. Further, Mr. Burnside is one of the firm's leading authorities on **Brexit**, helping to shape strategy and provide critical guidance to clients.

Awards/Recognitions

Clients noted Mr. Burnside as "one of the icons of the competition Bar in Brussels" because of his "strong analytical skills and intellectual curiosity." (*Chambers Global 2018*)

Mr. Burnside has been recognized and recommended over many years as a leading lawyer for competition law in publications such as *Chambers Global*, *Chambers Europe*, *Legal 500 EMEA*, *Global Competition Review*, *International Financial Law Review*, and *Best Lawyers in Belgium*. He was named a "thought leader" in competition by *Who's Who Legal* in 2018 and 2019.

Education

University of Cambridge, Downing College, 1982

College of Law, London, 1983

Institut d'Etudes Européennes, Brussels, 1984

Bar Admissions/Qualifications

Brussels

England and Wales

Languages

English

German

French

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