

EU Advanced competition law

Competition Law in the Digital Sphere: Big Data, Innovation & Artificial Intelligence

Alec Burnside, Dechert
Carel Maske, Microsoft

24 November 2020



Big data, AI, ML... what is the link?

Big data



Volume

- Global data volume: 33ZB (2018)
- 530% expected increase by 2025



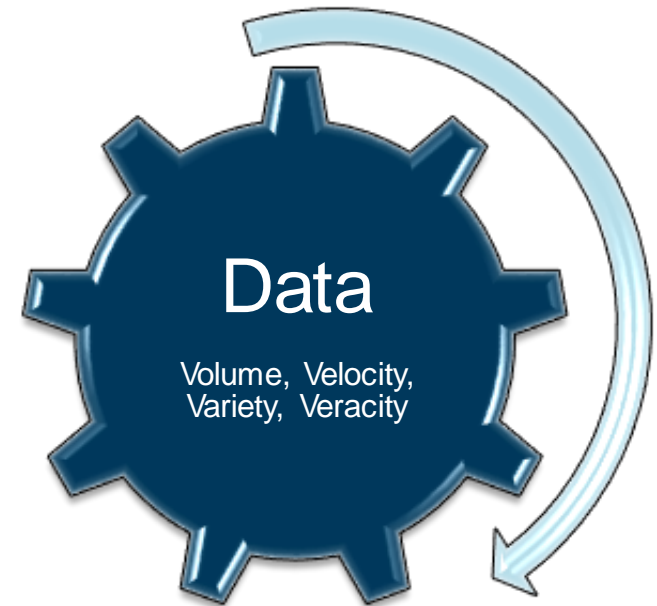
Velocity - speed at which data is generated and transferred



Variety – plethora of data types

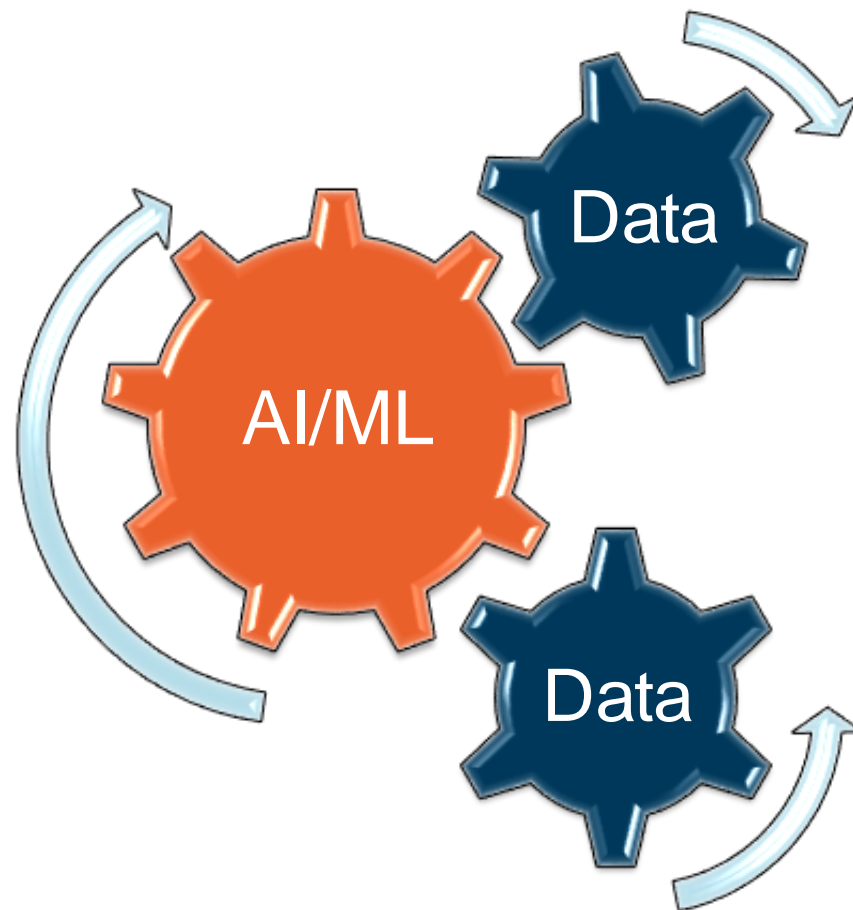


Veracity – quality and accuracy



Data – a key input for artificial intelligence

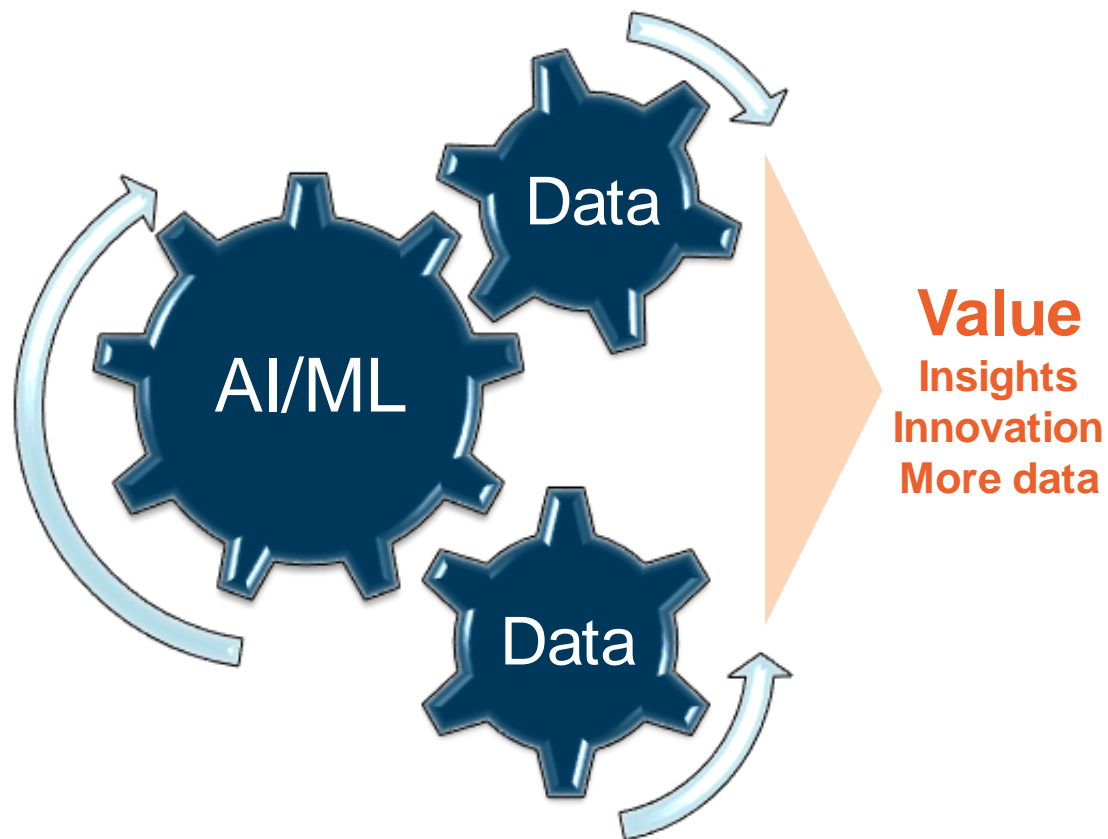
- Data is necessary to train AI and ML algorithms
- AI and ML require access to data in the broad term, including e.g. metadata, to be able to make sense of data and process them
- Structured vs unstructured data
- Interoperability/Portability
- Data access/Data sharing



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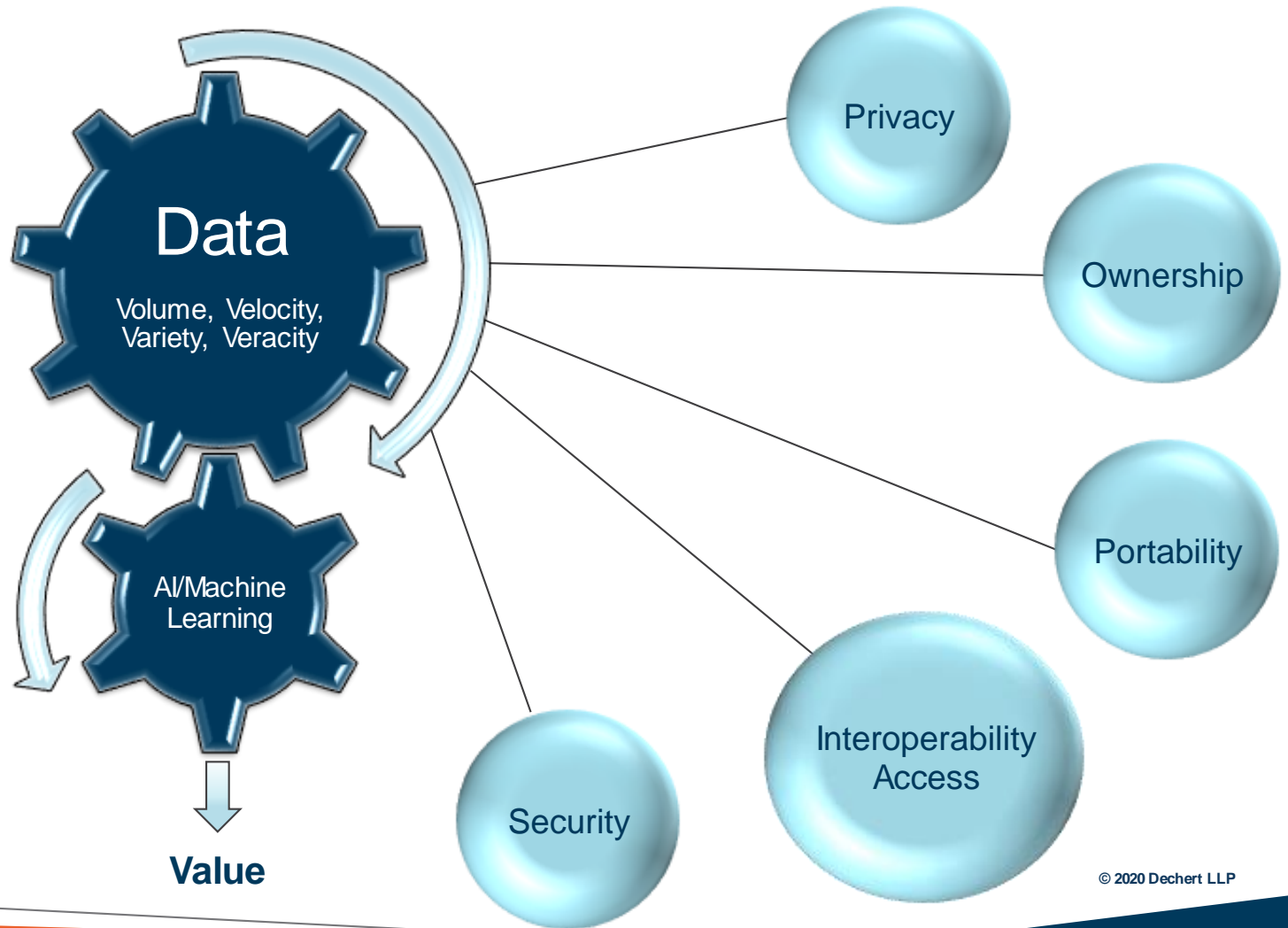
Data and AI are at the heart of digital innovation

- Data and AI/ML drive innovation in all industries
- Combination of datasets + AI algorithms generates exponential insights (same methodology used in elections polls or clinical trials)



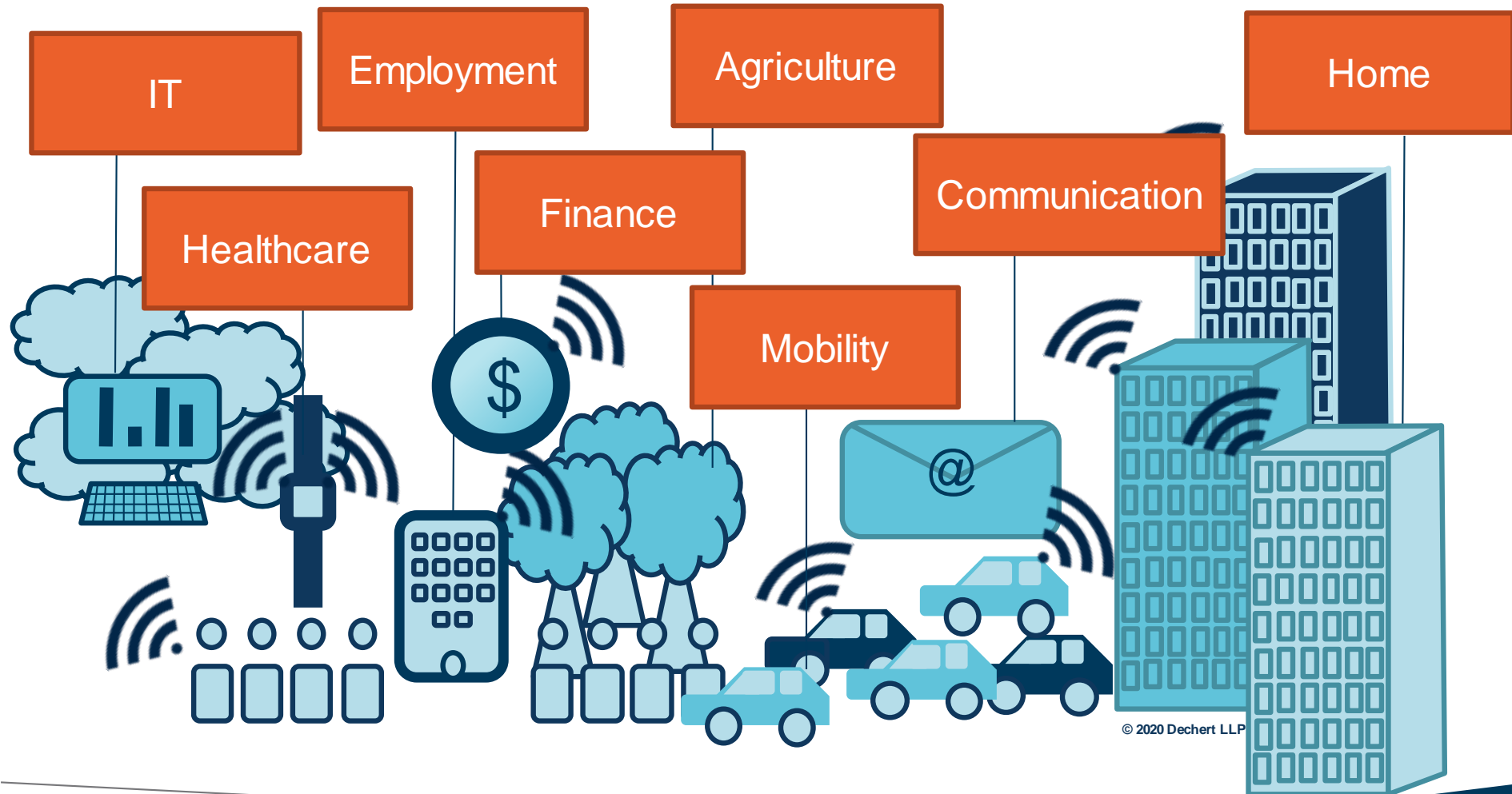
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Not only a competition issue



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Big data is everywhere



What can we do?

December 14, 2020

Digital inquiries – global soul-searching



More soul-searching – Latest reports/inquiries

- US House report
- CMA market study
- EC IoT sector inquiry
- Industry data sharing



Online platforms and digital advertising

Market study final report
1 July 2020



European Commission - Press release



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

Brussels, 16 July 2020

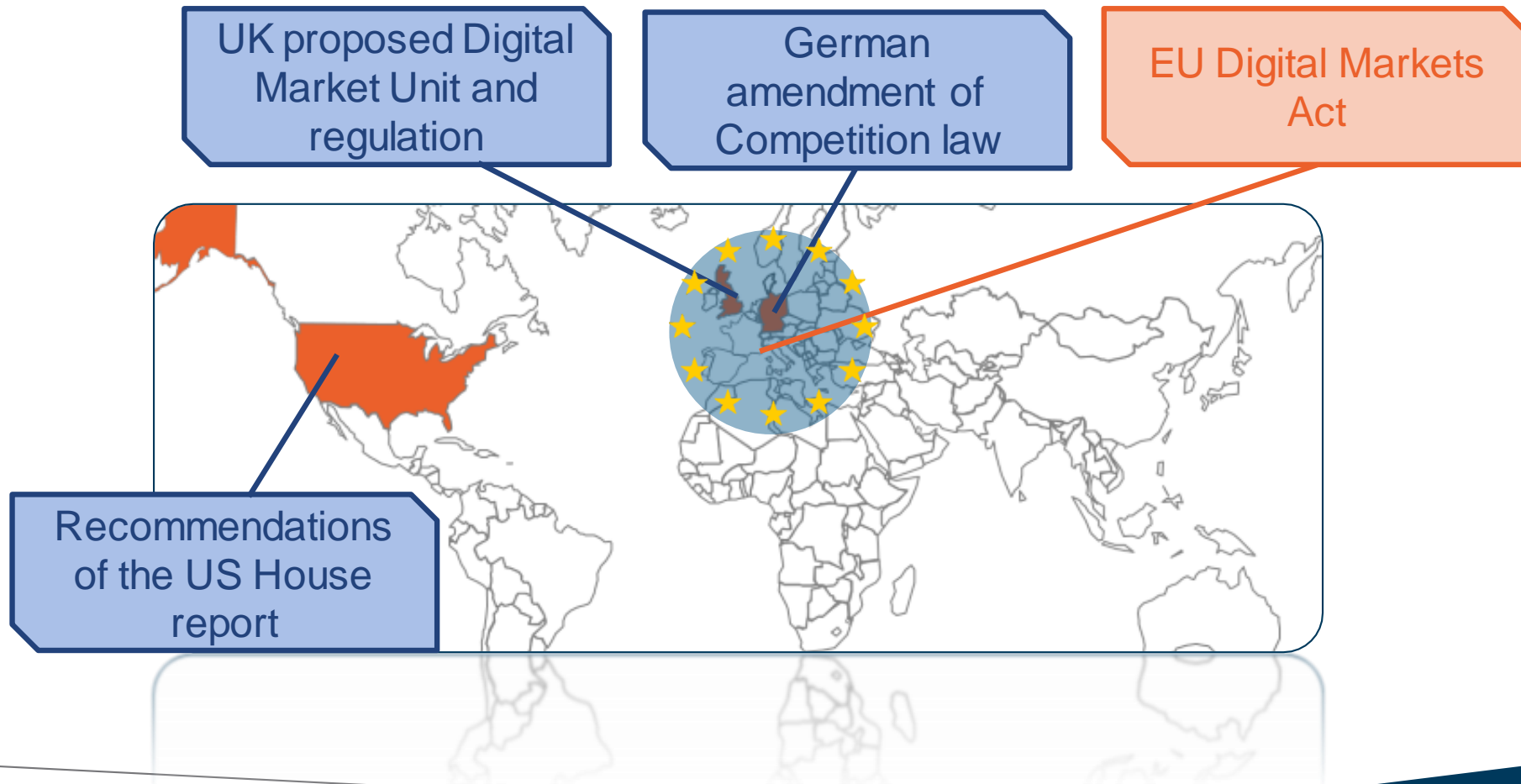
The European Commission today launched an antitrust competition inquiry into the sector of Internet of Things (IoT) for consumer-related products and services in the European Union.

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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Regulation and/or a re-boot of antitrust, e.g.



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



INVESTIGATION OF COMPETITION IN DIGITAL MARKETS

MAJORITY STAFF REPORT AND RECOMMENDATIONS

SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY

Jerrold Nadler, Chairman, Committee on the Judiciary

David N. Cicilline, Chairman, Subcommittee on
Antitrust, Commercial and Administrative Law

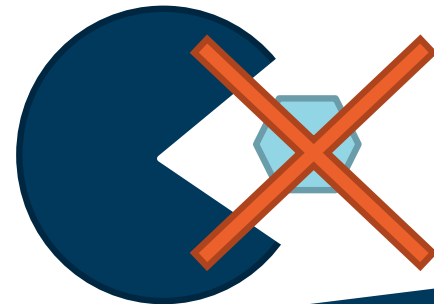
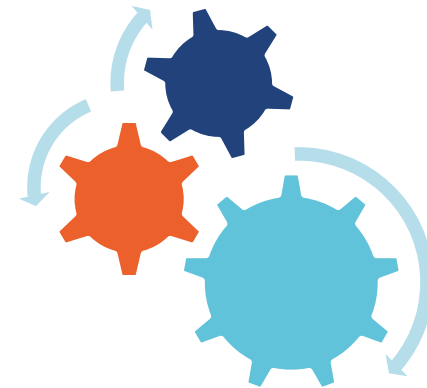


UNITED STATES
2020

Subcommittee 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



Subcommittee recommendations 2

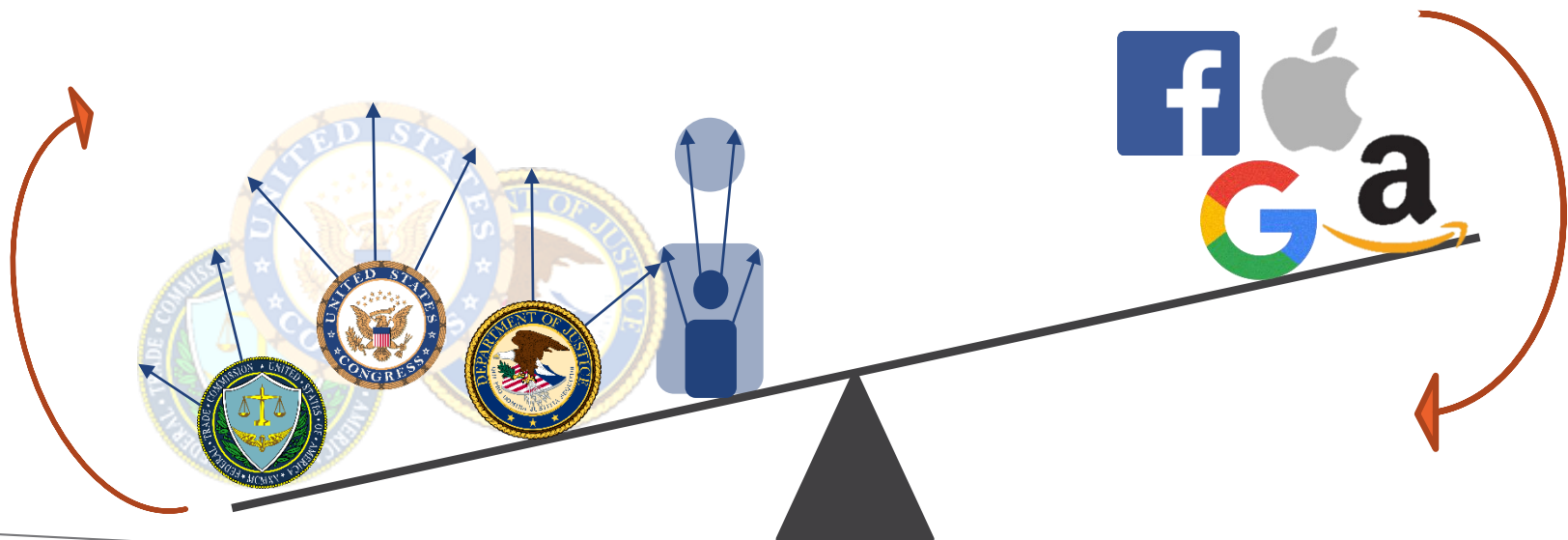
Strengthening the Antitrust Laws

- 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.

Subcommittee 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.



EU Digital Markets Act

- Proposal expected 9 December
- Gatekeeper regulation – clear list of dos and don'ts, e.g.
 - unfair self-preferencing?
 - misuse of data?
- New competition tool: market investigation framework
 - investigate structural problems in digital markets - and others?
 - intervene to protect competition and contestability?

“So to keep our markets fair and open to competition, it’s vital that we have the right toolkit in place. And that’s what the second set of rules we’re proposing – what we call the Digital Markets Act – is for.”

M. Vestager, 29 October 2020

German Digitisation Act

- “Competition law plus” in new section 19A
- Hybrid between case-by-case analysis and ex-ante regulation
- Significant cross-market relevance

09.09.2020 **PRESS RELEASE** [Competition policy](#)

Altmaier: With the GWB Digitization Act, we are creating new competition rules for large Internet companies and relieving the burden on medium-sized companies

Antitrust and data sharing

- Data sharing: pro or anti-competitive?
- Covid-19 cooperation examples
- Increasing openness to data sharing - Single market for data, including the creation of common European data spaces in crucial sectors and domains of public interest



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

Dominance – New data-related conducts

- Amazon – First big data case?

Press release | 10 November 2020 | Brussels

Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices

- Other on-going investigations at national level, e.g.



Investigation opened against Google for an alleged abuse of dominant position in the Italian market for display advertising

The Authority questions the discriminatory use of the huge amount of data collected through its various applications, preventing rivals from competing effectively as well as adversely affecting consumers.

Merger control – take data-related effects into account

- Data-related issues expected to become more frequent in merger control as data progressively infuse all industries
- Need to better account for data-related effects
 - Data as an input

“The Commission has preliminary concerns that following the proposed transaction, competitors in consolidated real-time datafeeds and desktop services could be shut out from accessing LSEG’s input data”

LSEG/Refinitiv, Opening of Phase II

- Data as the source of market power

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 – take data-related effects into account

- Navigating the dividing line between protecting freedom to innovate, versus ensuring a level playing field
- Daring to follow expert reports?
- Overcoming the fear of over-enforcement

“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

New ways to remedy “data-related” conducts

- Google shopping remedies – Are they working?
- Need for true deterrent effect
- Use of restorative remedies

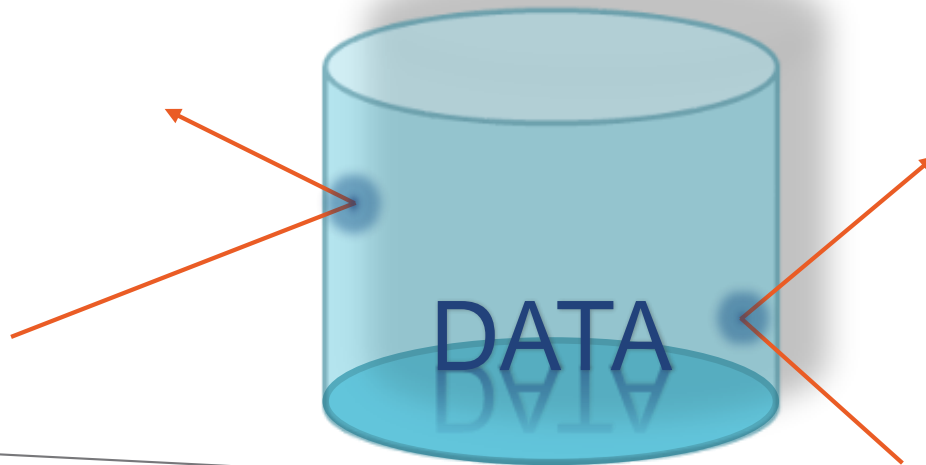
“It’s been clear for many decades that we have the power to impose what you might call “restorative remedies” – **ordering companies to take positive action to undo the damage that they’ve done to competition**. In their report, the special advisers urged us to make use of these remedies – and we’ll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

M. Vestager, ASCOLA Annual Conference, 26 June 2020

New ways to remedy data-related harm

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



Is data access the solution?

- Not as easy as it seems
- Access yes, but to what (different data types, metadata, ...)?
- Access yes, but how (technical questions)?
- Avoiding weaponisation of privacy

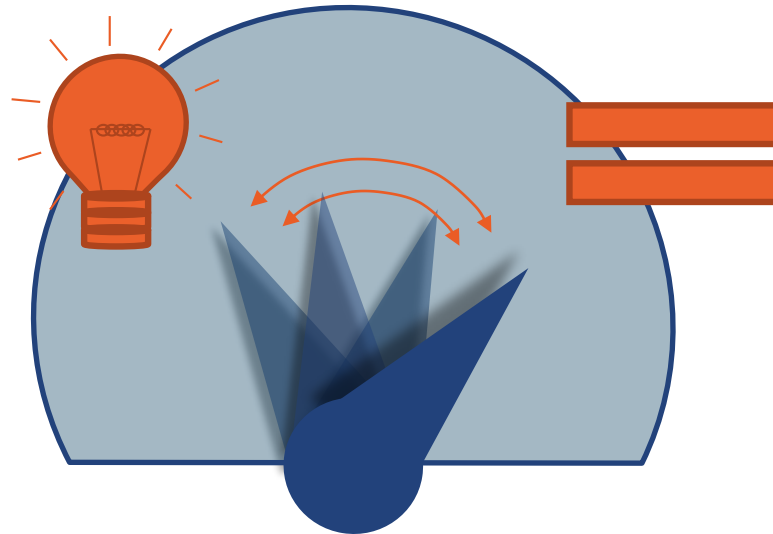
Online platforms and digital advertising

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.

Innovation and competition: friends or foes?

- Competition in the market versus competition for the market
- Can the market correct itself through innovation, or is competition enforcement needed to ensure all can innovate?
- Killer acquisitions



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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