Regulating Access and Transfer of Data

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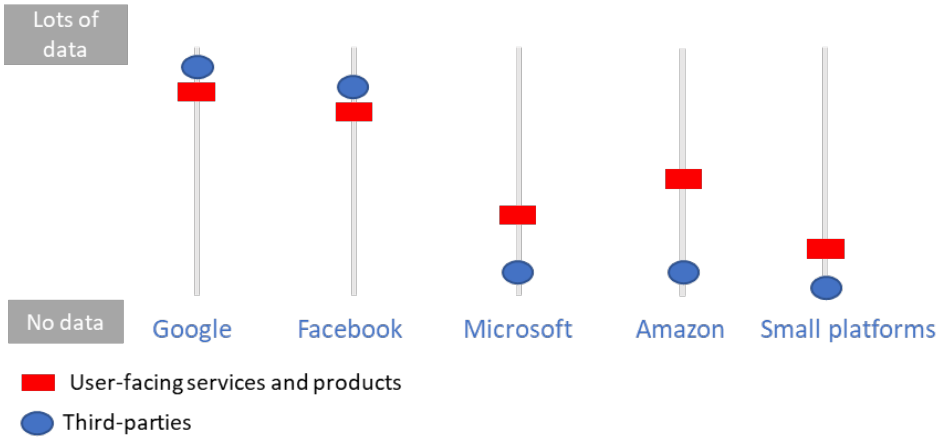
”Market failures” in the data-driven market?

- Leading intermediates, collect vast amounts of data, and have access and the right to use to other firms’ data. Access and the right to use that data would under certain situations give these firms much leverage in knowledge.



Source: CMA, Comscore MMX Multi-Platform, Total Digital Population, Desktop aged 6+, Mobile aged 13+, February 2020, UK.
Notes: Top 1000 properties account for 83% of total user time spent online.

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Competition Law

- Right to access and transfer data for business users under the current competition law case law regime - difficult
- In reference to the data-driven economy, competition law is catching up, yet still [allegedly] primarily a sophisticated tool to address certain inefficiencies in highly core service driven old economy firms.
- We see several investigations being launched, decided and appealed. Yet, there are claims that competition Law takes too much time… is too complicated, etc.

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Obligations regarding access and portability in the DMA, Arts 5 and 6

Art 6(2.) **refrain from using, in competition with business users, any data not publicly available, which is generated or provided by those business users** in the context of their use of the relevant core platform services […]

Art 6(9.) provide end users and third parties authorised by an end user, upon their request and free of charge, with **effective portability of data provided by the end user** or generated through the activity of the end user in the context of the use of the relevant core platform service […];

Art 6(10.) **provide business users** and third parties authorised by a business user, upon their request, **free of charge, with effective, high-quality, continuous and real-time access and use of aggregated and nonaggregated data**, including personal data, that is provided for or generated in the context of the use of the relevant core platform services […]; **for personal data**, […] **when the end user opts in by giving consent**

Access and Transfer in the Proposed Data Act

- Article 3 states that ”products shall be designed and manufactured, and related services shall be provided, in such a manner that **data generated by their use** are, by default, easily, securely and, where relevant and appropriate, **directly accessible to the user”**.
- The obligation is accompanied with a new inalienable and possibly countervailing right of the users to access and transfer (copy) the (raw) data that they have generated through their IoT devices (Articles 4 and 5).
  - “Where data cannot be directly accessed by the user from the product, the data holder shall make available to the user the data generated by its use of a product or related service without undue delay, free of charge and, where applicable, continuously and in real-time.”
- Gatekeepers are excluded from to be the transferee of data, while SMEs are excluded from the obligations
- ***Obs!*** There are access and transfer right to data under the Cloud rules, i.e. Artiles 23 er seq.

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Some points of concern – in reference to access and transfer of data

- Are we dealing with rights – not obligations? A question of direct effect and private action
- Limits to the transfer possibilities:
- Intellectual property law limitations: TPMs, database rights and trade-secret legislation, while we have embryos to access rights in rules regarding reverse-engineering and data-mining.
  - The new recital 70 DMA stipulates that the gatekeeper should not be allowed to use ”unjustified technical protection measures”, or “unlawfully claiming” a copyright on APIs.
  - Article 35 Data Act
- GDPR is a ”show stopper”
- FRAND liability system

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Thanks!

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