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ANTITRUST ISSUES TO WATCH OUT FOR WITH BIG DATA SETS

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Presenters



Christina Renner



Andrew J. Gray IV

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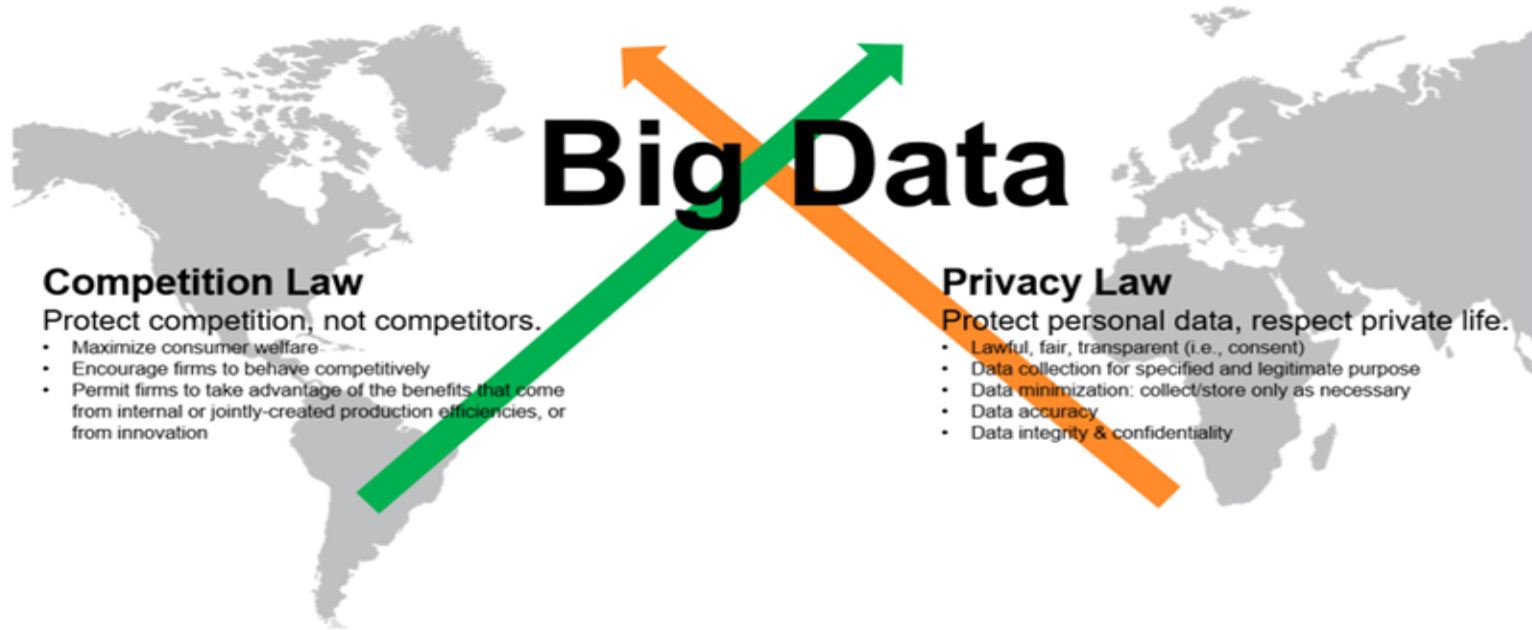
Background

- EU competition authorities currently prioritize focus on the enforcement of antitrust law in the digital economy.
 - EU Commission’s e-commerce sector inquiry (2017)
 - Special Advisor Report for the Commissioner for Competition “Competition policy for the digital era” (2019)
 - Ongoing consultation on new Competition Tool (NCT) and Reform of the Digital Services Act (DSA)
- Germany and France have been the most proactive authorities
 - Joint declarations
 - Active enforcement practice
- Recent UK proposals

Crossroads between privacy and antitrust

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The crossroads



The very basis of it all



“Data is the new currency.”

Margrethe Vestager,
EU Commissioner for Competition

Antitrust issues in data aggregation and handling

- The starting point: Determining the value of data: freshness, granularity, uniqueness, velocity?
- The concern: Creating or consolidating an insurmountable data advantage
 - Mass aggregation of personal data provides a unique and irreplicable “competitive edge”
 - Use of data across business purposes leverages this unique competitive advantage

The big question



Isn't this what competition is about ?

Blurring the borders between antitrust and consumer/privacy protection

- Initial scope of EU investigations: recourse to traditional theories of harm in network industries: “platform power”
- The bridge to privacy rules: “unfair trading practices”
- Germany’s FCO’s controversial approach: violation of data protection *consent rules* as benchmark for abuse of a dominant position – BUT: challenged under appeal
- Recent EU investigations cover privacy law territory with the antitrust rule set: *How* is data gathered, pooled, processed, used and monetized: “data power”

Data set aggregation and data handling as a matter for antitrust

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An Evolving European Perspective

1. Use of data by hybrid platforms: Crossing the line?
2. Vertical data integration: Leveraging upstream power on downstream markets
3. Data aggregation (part 1): Is this an antitrust issue?
4. Data aggregation (part 2): Remedies proposed against “data market power”
5. Merger control: The spectre of innovation buy-out

An Evolving European Perspective

- ➔ 1. Use of data by hybrid platforms: Crossing the line?

What if there is no natural monopoly?

- Issue: Use of data from one platform business for the other platform business, to the alleged detriment of rivals only active on one side of the business.
- “Old wine in new bottles”: a theory of harm from the times of the utilities...
-but not quite: Is there a conflict of interest?

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➔ 2. Vertical data integration: Leveraging upstream power on downstream markets

What if there is no essential facility?

- Issue: Extending the position of the platform into new markets by allegedly giving preferential treatment of the platform to own services in those markets
- Acting as “player and referee”
- When is the platform or service “essential to compete”?
- The notion of “gatekeeper” or “structuring undertaking”

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➔ 3. Data aggregation (part 1): Is this an antitrust issue?

Blurring the borders between antitrust and consumer/privacy protection

- Issue: Alleged aggregation of personal data w/o prior consent by the consumer
- EU Commission: “*private businesses, public responsibilities*”
- German FCO: violation of data protection rules is the benchmark for a non-price abuse of a dominant position = unfair trading practice

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➔ 4. Data aggregation (part 2): Remedies proposed against “data market power”

Behavioural remedies are the preferred option – ex ante regulation looming at the horizon

- Limiting (mandatory) data collection on grounds of antitrust or privacy
- Imposing fair access to data (against remuneration)
- Imposing portability of data for customers
- Imposing interoperability between different platforms and data bases
- Ex ante regulation?

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➔ 5. Merger control: The spectre of innovation buy-out

European merger regimes in full (r)evolution

- Mergers between physical and digital sides of the business get special attention
- Value thresholds capture start-up acquisitions (“killer acquisitions”)
- Mandatory notification obligations for a set of major digital players
- Risk of *ex post* merger control for pre-defined players and deal structures

New powers for antitrust authorities ?

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Cross-cutting topics across reform proposals

- A sliding evolution of core notions of antitrust
 - from “dominance” to “key competitive edge”
 - from “essential facility” to “gatekeepers” and “referees”
- A greater availability but also enforcement of interim measures
- A gradual reversal of the burden of proof
- A shift to *ex ante* control mechanisms

And what does the EU do?

- Expanding the scope of investigations: from platform power to data power
- Interim measures
- Multi-instrument and multi-sector approach
- No change of merger thresholds
- Plans for *ex ante* regulation (New Competition Tool)
- Plans for “Gatekeeper” law (Digital Services Act)
- Reversal of burden of proof?

Best practices

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Recommendations

- Check consent, accessibility and transparency requirements
- Documentation of procedures
- Fairness check: Is there a proper balancing of interests ?
- Antitrust sanity check: If the conduct involved some other input (besides data), would antitrust law care about it?

Biography



Andrew J. Gray IV

Silicon Valley

+1.650.843.7575

andrew.gray@morganlewis.com

Serving as the leader of Morgan Lewis's semiconductor practice and as a member of the firm's fintech and technology practices, Andrew J. Gray IV concentrates his practice on intellectual property (IP) litigation and prosecution and on strategic IP counseling. Andrew advises both established companies and startups on Blockchain, cryptocurrency, computer, and Internet law issues, financing and transactional matters that involve technology firms, and the sale and licensing of technology. He represents clients in patent, trademark, copyright, and trade secret cases before state and federal trial and appellate courts throughout the United States, before the US Patent and Trademark Office's Patent Trial and Appeal Board, and before the US International Trade Commission.

Biography



Christina Renner

Brussels

+32.2.507.7524

christina.renner@morganlewis.com

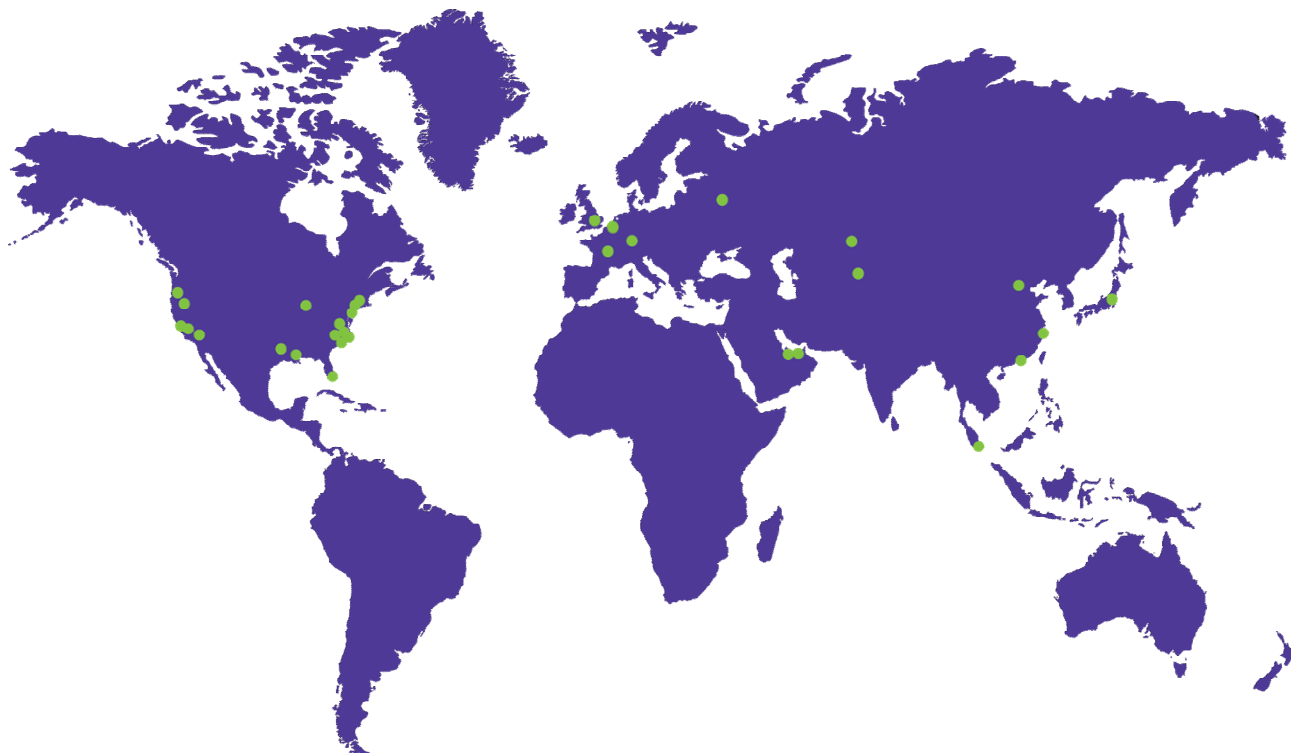
Christina Renner concentrates her practice on European Union and German merger control, competition, and antitrust law, with experience in cartels and general behavioral matters, abuse of dominance, and EU state aid laws. Christina regularly advises clients concerning mergers reviewed by the European Commission and the German Federal Cartel Office, as well as the French, Austrian, and Belgian competition authorities. She has experience handling multi-jurisdictional filings for a variety of clients and regularly advises on complex competition compliance matters. Her regulatory practice focuses on network industries, in particular, telecommunications, and the evolving digital tech space.

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