

IS DATA “THE NEW OIL”? NON-PRICE EFFECTS OF MERGERS IN DATA-INTENSIVE INDUSTRIES



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CPI ANTITRUST CHRONICLE

January 2024

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In recent years, antitrust authorities and industry observers have called for closer scrutiny of the non-price effects of mergers in data-intensive industries. Many of the concerns expressed focus on businesses where the collection and use of proprietary data are a significant input to each of the merging parties' products and strategies, but the data do not themselves constitute the main product. Economic analysis of such mergers can reveal ways in which the combination of datasets may impact consumer welfare, either positively or negatively, beyond direct pricing concerns. Specific potential effects depend on such factors as the relative size and market positions of the merging companies; the degree to which the merged datasets are complementary; the ability of the data to improve product quality and personalization; the extent to which the data are unique or provide sustainable advantages for the parties; and the safeguards that can be put in place to preserve and protect data privacy.

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CPI Antitrust Chronicle January 2024

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In recent years, non-price effects have become of increasing interest in regulatory reviews of and litigation over proposed mergers. For example, according to a 2022 survey of U.S. litigators, 60 percent of the respondents reported that the U.S. Department of Justice (“DOJ”) had addressed traditional non-price effects in mergers the respondents were aware of within the previous two years. Similarly, 82 percent of respondents stated that the Federal Trade Commission (“FTC”) had also addressed traditional non-price effects in the deals the respondents had personally worked on in the previous two years.²

The relevance and potential complexity of accounting for non-price effects can be particularly salient in dynamic and/or data-intensive industries. Typically in these industries, data are seen as a crucial input to competing effectively, making data “the new oil” — a valuable asset that must be considered in many mergers and acquisitions.³

Although regulators in the United States and in Europe have historically taken different stances on the weight they give to the consumer welfare standard, they share a common challenge in determining how best to adapt traditional, established competition and economic analyses to the evolving and dynamic industries making up the new Digital Age.

Even when data are not the main product for one or both of the merging parties in a transaction in these industries, competition authorities often have raised questions about how a merger could affect the collection and use of proprietary data as a significant input to products and services. In particular, authorities have considered the extent to which data may provide the acquiring firm with unique information about consumer preferences and behavior. For example, such questions were raised by the European Commission (“EC”) surrounding Amazon’s proposed acquisition of iRobot.⁴ This question has also been raised when data are central to the firms’ business models, but the data or services are not directly overlapping, as in the FTC’s investigation of IQVIA’s acquisition of Lasso.⁵

Answering these types of questions requires an analysis of whether and how the combination of proprietary datasets might impact consumer welfare, either positively or negatively, beyond direct pricing effects. The presence or magnitude of specific non-price effects depends on such factors as the relative size and market positions of the merging companies; the degree to which the merged datasets are complementary; the ability of the data to improve product quality and personalization; the extent to which the data are unique or provide sustainable advantages for the parties; and the safeguards that can be put in place to preserve and protect data privacy.

Any of these factors may be present either in horizontal mergers between direct competitors, or in vertical mergers involving different links in the supply chain. In many cases, such transactions involve a large, established player (which may be operating in multiple different markets) and a smaller company, whether it’s a startup competing in the same space or a supplier that may also have contractual relationships with other direct competitors.

This article discusses three topics that antitrust authorities and industry observers have raised as concerns in recent years with respect to potential anticompetitive non-price effects of mergers in data-intensive industries. As this discussion will show, from an economic perspective, the impacts of these effects on consumer welfare and competition are typically ambiguous, and their evaluation requires case-specific, in-depth economic investigation that can provide “real-world evidence” over and above hypothetical speculation.

I. QUESTIONS RELATED TO POTENTIAL ENTRENCHMENT

Some antitrust authorities have voiced concerns that access to data for new consumers or additional competitor data may allow an incumbent’s position in the market to become entrenched. According to these views, businesses that may be described as digital platforms could take advantage of the indirect network effects driving their businesses and leverage the accumulated data to prevent other firms from competing effectively.

2 D. Daniel Sokol, Marissa Ginn, Robert Calzaretta, Jr. & Marcello Santana, *Antitrust Mergers and Regulatory Uncertainty*, 78 THE BUSINESS LAWYER 4 (2023).

3 Kiran Bhageshpur, *Data Is The New Oil – And That’s A Good Thing*, FORBES (Nov. 15, 2019), <https://www.forbes.com/sites/forbestechcouncil/2019/11/15/data-is-the-new-oil-and-thats-a-good-thing/?sh=79bf206e7304>.

4 Press Release, European Commission, Mergers: Commission clears acquisition of Fitbit by Google, subject to conditions (Dec. 17, 2020). https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2484.

5 Press Release, U.S. Federal Trade Commission, FTC Sues to Block IQVIA’s Acquisition of Propel Media to Prevent Increased Concentration in Health Care Programmatic Advertising (July 17, 2023). <https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-sues-block-iqvias-acquisition-propel-media-prevent-increased-concentration-health-care>.

For example, in discussing its approval of Google’s acquisition of Fitbit, the EC noted: “Some market participants who consider that Google has already a significant presence in the digital healthcare sector, raised a concern that Google may obtain a competitive advantage in this sector by combining Google’s and Fitbit’s databases to such a degree that competitors would no longer be able to compete.” Ultimately, the EC “did not confirm such concerns because the digital healthcare sector is still nascent in Europe with many players active in this space. Moreover, Fitbit has a limited user community in the fast-growing smartwatch segment.”⁶

Even if such concerns are deemed valid, however, one may need to consider the extent to which potential competitive gains to the incumbent could be counterbalanced if the merging parties are able to use the additional data to improve the quality of their products or expand the market. In particular, consumers could benefit if complementarities in the data held by the merging parties lead to new product development, entry into new markets, or improvements in existing products.

This reasoning was reported to be behind Google’s 2019 acquisition of the restaurant-rating business Zagat, which had built a niche business on crowd-sourcing surveys that primarily served as a resource for so-called “foodies.” According to a Google blog post regarding the transaction, Google’s strategy was to pair Zagat’s capabilities with Google’s existing search and mapping functionality, with the goal of allowing Google to offer more relevant search results to a larger pool of users searching for restaurants than Zagat was able to target on its own.⁷

In addition, in some mergers service quality could be improved by aggregating previously separate datasets. For example, a merger between two hospital systems could improve the patient experience and even health outcomes if the merger of the systems allowed an individual’s confidential health information to be shared more easily and more securely among the expanded set of health care providers in the merged system.⁸ (See also the discussion of data privacy below.)

In the end, if a post-merger increase in market share is attributable solely or primarily to product enhancements that make them more popular with consumers, the net effect can be an increase in consumer surplus. Accurately assessing the net effect requires an in-depth and case-specific investigation of the underlying economic incentives and industry dynamics.

A. Questions of Data Privacy

For businesses where the primary commodity, service, or output is not data, data may still be considered an intermediate good from an economic perspective. Data can function as an input in the production process that increases the quality of the final good, for example, if more detailed data on consumer product or feature usage allows for a product that is better tailored to consumer preferences. In such circumstances, there may be links (or conflicts) between data privacy concerns, product quality, and market concentration.

Heterogeneous consumer preferences over different dimensions of product quality, including data privacy, can complicate the assessment of how the collection and use of data affect consumer welfare. Given this heterogeneity and the potential security gains from consolidation of data within a single organization, the assessment of the net effect on data privacy, security, and relative competitive effects in a merger may be further complicated.

For example, in 2019 the German Federal Cartel Office (“FCO”) used a novel theory of harm to bring charges against Facebook for allegedly “forcing” users to consent to Facebook aggregating data from apps it had acquired (Instagram and WhatsApp), as well as third-party data, to target online ads more effectively. The FCO claimed this was an abuse of Facebook’s dominant position in the German social media market, requiring users to surrender their data privacy if they wanted to use Facebook at all.⁹

⁶ *Supra*, Commission clears acquisition of Fitbit.

⁷ Marissa Mayer, *Google just got ZAGAT Rated!*, OFFICIAL GOOGLE BLOG (Sept. 8, 2011), <https://googleblog.blogspot.com/2011/09/google-just-got-zagat-rated.html>.

⁸ See for example Amalia R. Miller & Catherine E. Tucker, *Health information exchange, system size and information silos*, 33 J. HEALTH ECON., 28-42 (2014); Laura Derksen, Anita McGahan, & Leandro Pongeluppe, *Privacy at what cost? Using electronic medical records to recover lapsed patients into HIV care*, Presentation at the National Bureau of Economics’ the Economics of Privacy Conference (Mar. 31, 2022); Amalia R. Miller & Catherine E. Tucker, *Can health care information technology save babies?*, JOURNAL OF POLITICAL ECONOMY, 119(2), 289-324 (2011).

⁹ Germany to Facebook: Stop forcing users to share their data, AP NEWS (February 7, 2019), <https://apnews.com/article/ap-top-news-facebook-privacy-scandal--social-platforms-germany-north-america-04440c1ca08b4caf9da2f6e9bf0038d7>. The ruling by the German Federal Court of Justice agreeing with the FCO’s argument subsequently was upheld by the European Court of Justice. Facebook faces legal setback in EU court decision on data privacy and ads, AP NEWS (July 4, 2023), <https://apnews.com/article/facebook-data-privacy-targeted-ads-europe-c373e233f5335aec6966ca6660702310>.

However, two factors complicate an assessment of the impacts of data collection and usage on consumer welfare, as documented in a large academic literature.¹⁰ One factor is that consumers' preferences for privacy is heterogeneous and highly context dependent; a second is that consumers also have heterogeneous preferences for different dimensions of product quality that can be affected by the collection and usage of data.

The research shows that, since different consumers will place different values on the use of their personal data, they consequently make different choices when they pick products and services to buy, as well as different choices in deciding how much (and what kind of) data to share, depending on the context. In these studies, the factors consumers considered included variously the type of data involved, perceptions of the level of security for the industry or company, and the individual consumer's willingness to make tradeoffs between privacy and utility — that is, their perception of whether what they receive in return is worth providing personal data.¹¹

Also of relevance for the assessment of whether and how mergers could affect consumer welfare by affecting data privacy, some studies have indicated that larger firms can be better than smaller ones or startups at preserving consumer privacy. For one thing, established firms typically have much more to lose from failing to protect their users' data, while they also often have the experience and resources to protect their users' data effectively.

In addition, keeping user data within a large, integrated network, such as a combined hospital system,¹² can reduce the risk of data breaches that may be caused by sharing information externally between unrelated parties. Moreover, internal sharing of data can, depending on the context, be associated with fewer frictions and improve the overall customer experience.

In the end, the complex interplay of heterogeneous consumer preferences over privacy and different dimensions of product quality, as well as the merging parties' market positions and the competitive forces under which they operate, require an in-depth economic analysis on a case-by-case basis to assess the role of potential data privacy concerns in the context of potential merger effects.

B. Questions of Potential Foreclosure from Data Inputs

In certain cases, regulators have investigated whether merging parties could foreclose competitors from important data inputs provided by one of the parties. For example, in 2022 the DOJ challenged the proposed vertical merger of Change Healthcare, a health care data and technology solutions provider, with UnitedHealth Group, the largest health carrier in the United States.

The concern was that first-pass editing technology, which was deemed a critical input used by Change Healthcare to efficiently process health insurance claims, could be used to enhance the combined entity's own health plan offerings and disadvantage other health plan rivals.

In his ruling allowing the merger to go through, Judge Carl J. Nichols stated that the Court's "judgment must be informed by real-world evidence that the specific merger under review is likely to substantially lessen competition. . . ."¹³ After considering expert testimony on the vertical economic and competitive ramifications of the merger, Judge Nichols concluded:

The evidence adduced at trial established that, for it to be likely that the proposed acquisition would substantially lessen competition, United would have to uproot its entire business strategy and corporate culture; intentionally violate or repeal longstanding firewall policies; flout existing contractual commitments; and sacrifice significant financial and reputational interests. The Government has failed to show that United's post-merger incentives will lead it to take such extreme actions. Nor has the Government put forward real-world evidence that United's rivals are likely to innovate less out of fear that United will poach their data.¹⁴

The *UnitedHealth/Change* case underscores the importance of understanding the business incentives driving the proposed combination, over and above any consideration of hypotheticals. The ability to foreclose competition in a proposed merger will depend on the relevant

10 See for example Olga Kozlova Guglielmi, Philipp Tillmann & Catherine Tucker, *The Interplay of Consumer Privacy, Competition, and Regulation*, in RESEARCH HANDBOOK ON COMPETITION LAW AND DATA PRIVACY (Maria Ioannidou & Deni Mantzari eds., forthcoming).

11 *Ibid.*

12 *Supra*, Miller & Tucker (2014).

13 *United States v. UnitedHealth Group Inc.*, 630 F. Supp. 3d 118 (D.D.C. 2022). <https://www.justice.gov/atr/case/us-et-al-v-unitedhealth-group-inc-and-change-healthcare-inc> (redacted). Two of the authors of this article, Emily Cotton and Philipp Tillmann, were members of the Analysis Group team that provided research and analytical support to Professor Tucker.

14 *Ibid.*

factors specific to the case, such as the extent to which alternative inputs are available on the market, the profit implications of foreclosure for the merged entity, or any potentially procompetitive improvements in new products that could be offered by the merged entity due to the merged data.

Another example is the *Google/Fitbit* merger, where the EC originally voiced the concern that post-merger, Google could restrict the access competitors in the market for digital health care have via Fitbit's web API. In an effort to address this potential concern, Google offered to commit to offer software applications free access to users' health and fitness data.¹⁵

II. CONCLUSION

The large number of mergers and acquisitions in industries that provide data, rely upon data, or create substantial data on consumers, particularly in digital industries, has raised questions of whether the traditional focus on price as a measure of consumer welfare is sufficient to assess the competitive implications of these mergers. The potential for non-price effects from a merger may be particularly central in digital industries because consumers often do not pay a monetary price for the digital services they use. Moreover, the ever-growing amount of data being collected and used in these industries has given rise to relatively new theories of harm raised by antitrust authorities and industry observers for industries in which data play a central role.

With this backdrop, it is not surprising that non-price effects, such as competitive entrenchment, data privacy, and potential foreclosure of key inputs, have played a prominent role in regulatory investigations of potential acquisitions in the United States and in Europe. From an economic perspective, the net effect of consolidation on consumer welfare in such contexts is typically ambiguous and its evaluation requires case-specific and in-depth economic investigations. Examples of investigations and subsequent outcomes in the United States and in Europe highlight the need to consider not only the potential adverse competitive effects, but the potential gains in quality, data security and privacy, and production efficiencies from these mergers.



¹⁵ *Supra*, Commission clears acquisition of Fitbit.

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