



Does access to data require a new approach in antitrust aftermarket cases?

By José Rivas and Bróna Heenan

In an era where data is the new "oil" turning the wheels of the digital economy, antitrust law may need to take a new approach in order to harness the flow of this most valuable commodity.

The issue of access to data is always sensitive, but more so in the world of aftermarkets, in which access to data produced by a machine may be essential in order to supply spare parts or services needed to maintain expensive pieces of equipment. In a number of different sectors, traditional antitrust law is being disrupted by issues surrounding digitisation and access to data.

Aftermarkets and precedents

Aftermarkets are markets for the supply of products or services needed for (or in connection with) a long-lasting piece of equipment that has already been acquired and needs complementary products (spare parts or consumables), or services (diagnostics, maintenance and support, software upgrades, updates, bug fixes and patches), to keep it in good working order. The equipment is known as the "primary product" and its market is called the "primary market". The complementary products or services are known as "secondary products or services" and their markets are known as "secondary markets" or "aftermarkets".

To date, aftermarkets have received little attention in the decisional practice of the European Commission's DG Competition [1]. Precedent cases on aftermarkets are scarce and very few of recent vintage. In total, there are three Commission settlement decisions [2] and a further five aftermarket cases that have come before EU courts somewhat circuitously (through appeals from Commission complaint rejections)[3]. Not a single aftermarket case confirming that the competition rules have been infringed has been adopted by the Commission [4].

Report of the Three Wise-Men (...well, two men and one woman)

Although none of the above cases relate specifically to data, a recent EU commissioned Report addressed this subject among the future challenges of digitisation for competition policy.

In March 2018, EU Competition Czar Margrethe Vestager had commissioned an external report from three academics with complementary backgrounds in the digital sector [5]. Their long-awaited Report, published in April 2019, aimed to identify implications for competition policy wrought by technological changes affecting markets and consumers. Among other conclusions, the Report stressed that access to data rights may need to be revitalised when it comes to competition law analysis.

Economic relevance of aftermarkets

The economic relevance and profitability of aftermarkets such as maintenance and support can be high, notably in sectors of complex technical equipment. In some cases, consumables servicing and maintenance during the lifetime of a piece of equipment may outweigh its original cost.

Secondary markets are often served by so-called Third Party Maintainers (TPMs), Independent Service Organisations (ISOs) or Maintenance, Repair and Overhaulers (MROs) who compete, or attempt to compete, with Original Equipment Manufacturers (OEMs) also present in the aftermarkets. These third parties sometimes accuse the original manufacturers of having a stronghold (abuse of dominant position) over the aftermarkets.

An allegation of antitrust violation is a sufficiently serious cause for concern but to this also needs to be added that gains in secondary markets are frequently used by OEMs as a means to recoup investments in the primary market such as R&D or to compensate for the (low) price charged for the primary product. If, for antitrust reasons, additional revenues cannot be gleaned in the aftermarket, the entire business model of certain OEMs may be jeopardised.

Antitrust basics of aftermarkets

When dealing with aftermarkets, the interplay between the definition of the relevant market and dominance is more complex than in standard markets. Economists have clarified that when attempting to establish dominance in an aftermarket, attention must be paid not only to the conditions of competition in the aftermarket but also to (i) the conditions of competition in the primary market, and (ii) to links between the primary and the secondary markets.

For example, a very high market share in a secondary market (for example, the OEM's share of the provision of maintenance for a mainframe computer) may not result in dominance in a situation where an increase in maintenance costs would alter the purchasing patterns for the choice of mainframe, within a reasonable period of time. Put differently, the threat of customers switching mainframes could constrain behaviour on the maintenance market. This situation could mitigate or even exclude dominance, despite high market share on the maintenance services market [6]. As anyone with a home printer will attest, ink cartridges are a factor to be taken into account when buying a printer. If these costs are taken into account at the outset, the printer and consumables may form a system which competes with other branded systems rather than the ink cartridges for a certain brand being considered as a separate relevant (brand-specific) market. To give a seminal example, the Chrysler automobile manufacturer cannot reap monopoly profits simply by charging US\$ 10,000 for replacement of its transmissions. The word would quickly get out and no one would buy Chrysler vehicles anymore [7].

Even when the primary market is competitive, consideration of aftermarkets is a valid antitrust concern. Competition concerns are not only focused on exploitative abuses (e.g. excessive prices of the suppliers), but revolve around potential inefficiencies as a result of exclusionary abuses consisting in the exclusion of more efficient providers of secondary goods or services.

For those cases where access to data is indispensable [8] to compete, the EU Expert Group Report identified several ways to establish a level playing field [9]. Of particular relevance to the topic of aftermarket, the Report recommended updating the traditional competition law analysis of aftermarket, which in its current form does not take into account the specificities of data [10].

A prime example of this is where an original equipment manufacturer (the OEM) controls access to the data produced by a particular piece of equipment. The possibility to exclude others from accessing this data may have the effect of the OEM locking the user into the aftermarket services of the OEM. In cases where data on parts usage enables a more cost effective maintenance service, the owner of the equipment may be (economically) prevented from switching to a different service provider if it is impossible to have access to certain data (so-called "data-driven lock-ins") [11].

"...in the data economy the aftermarket doctrine may need an update, and may be up for revival" [12].

A revival of aftermarket antitrust analysis for data?

Any antitrust case is factually specific, but this is particularly so as regards data since this commodity may come in many different shapes and forms. Data access scenarios are similarly diverse.

Personal data subject to the General Data Protection Regulation (GDPR) is less likely to be relevant to competition considerations, precisely because GDPR legislation mandates the portability of such data [13]. However there is no current EU legal obligation mandating a right to port non-personal data [14]; nor are there requirements to deal with data that is continuously being produced. Where the OEM enjoys some degree of market power (even just bilaterally), the bargaining power of the buyer may not be sufficient. Access to such data is generally commercially negotiated but in certain circumstances, the economic reality may be that no meaningful "negotiation" actually takes place. If certain types of data were to be considered as an essential facility, this could, in turn lead to a duty to licence all-comers on FRAND terms [15].

A market player wishing to provide aftermarket services may also require access to non- personal aggregate data from emanating from a particular piece of equipment (such as a medical instrument) or vehicle (truck, car, airline, rail carrier, ship). For example, a TPE or MRO provider may wish to access sensor data from all aircraft of the same type in order to perform predictive maintenance [16]. This MRO provider may either offer aftermarket services that are complementary to the initial purchase of the aircraft/engine from the OEM or may offer aftermarket services that compete with the aftermarket services of the OEM (more likely the latter). Data-driven lock-ins can result in a competitive disadvantage not only in aftermarkets, but also in the primary markets. An independent MRO may find it difficult to offer services on new generation equipment (such as engines) without access to certain critical OEM data. This may result in competitors having less information on which to base their offers at the time of acquisition/ replacement of the primary product. The contestability of the supplier of the primary product is reduced [17]. Restraining access to data could be used as a means of supporting a push into aftermarkets.

This particular conundrum means that the protection of non-personal machine generated data generally rests on getting the contract drafting right. Companies need to appreciate that in some instances sharing data may result in greater returns than keeping the data to oneself and that, depending on the particular market and the relationship between the parties (vertical/horizontal/hybrid), some level of competition analysis may be essential.

Ownership/rights in data

Who owns the data, and who can do what with it? Legally, no one can “own” it; the concept of data ownership doesn’t exist in law. What does exist is the possibility to protect the value created in the analysis or presentation of that data. Intellectual property rights including trade secrets offer some protection, as do confidentiality/proprietary laws, but do not confer ownership of the data itself. The key to control lies in the contractual relationship. It is only really through contracts that a business can legally manage data access and use.

With the rise in the value of data, it is vital to legislate properly for rights in data [18]. This is also the position with regard to product and service agreements between different trading parties. Intellectual property and confidentiality provisions do not normally address who has the right to manage and exploit the data.

Although not legally binding, the Commission has provided some key principles which should be respected in data-related contractual agreements. It remains to be seen whether these principles will dictate DG Competition's antitrust enforcement in this area. In any event, those responsible for contract drafting are well advised to respect the following principles [19]:

- Identify, in a transparent and understandable manner, the parties that will have access to the data generated, the type of such data and at which level of detail, as well as the purpose for using such data;
- Recognise that where data is generated as a by-product of a product or service, several parties have contributed to creating the data;
- Protect both the commercial interests and secrets of data holders and data users;
- Ensure undistorted competition when exchanging commercially sensitive data; and
- Minimise data lock-ins by enabling data portability as much as possible.

With all industries keen to see benefits from the advantages of superior technology, market players need to better understand and manage access to the precious commodity that is data in this new digital world.

[1] See chapter "10: Aftermarkets" of DG Competition discussion paper on the application of Article [102] of the Treaty to exclusionary abuses.

[2] Novo Nordisk case (1996) See XXVIth Report on Competition Policy (1996), §62, available at http://ec.europa.eu/competition/publications/annual_report/1996/en.pdf; the Digital case (1997), Press Release IP/97/868 of 10 October 1997; and the IBM Mainframes Maintenance, Commission Decision of 13 December 2011 in Case 39.692.

[3] Rejection Letter of 22 September 1999 in Case No IV/34.330 – Pelikan/Kyocera; Rejection letter of 7 January 1999 in case IV/E 2/36.431 – Info-Lab/Ricoh; Rejection of complaint of 20 May 2009 in case COMP/C-3/39.391 EFIM; Luxury Watches (2007/2014) T-712/14 and C-3/18P; Rejection of a complaint of 9 October 2015 Contact Software AT.39846 CONTACT/Dassault & PTC, Judgment of the General Court of 14 September 2017 in Care T-751/15, EU: T:2017:602; European Federation of Ink and Ink Cartridge Manufacturers (EFIM) v European Commission, Case T-296/09, EU: T:2011:693, confirmed by the Court of Justice Case on 19 September 2019, EFIM v Commission, Case C-56/12 P, ECLI:EU:C:2013:575.

[4] On January 31, 2018 the Italian Competition Authority ("AGCM") opened an in-depth investigation to assess the alleged anti-competitive conduct (Article 102 TFEU) of three OEM manufacturers (i.e., GE, Siemens and Philips) in the supply of diagnostic imaging equipment that may hinder the entry and permanence of independent manufacturers in the market. The AGCM had earlier concluded that three lift manufacturers had breached Article 3, para. 1, letter b) of Law No. 287/90 (equivalent to Article 102 TFEU) in Otis-Kone Italia-Schindler case (A256), Decision No. 8272 on 11 May 2000. According to the AGCM, the anti-competitive conduct carried out by Otis S.p.A., Kone Italia S.p.A. and Schindler S.p.A., was the refusal and/or the unjustified delay in supplying original spare parts necessary for the maintenance activity of the lifts (the core business of the three companies) to independent operators.

[5] Heike Schweitzer (Professor of Law in Berlin), Jacques Crémer (Professor of Economics in Toulouse) and Yves-Alexandre de Montjoye (Assistant Professor of Data Science in London)

[6] Competition issues in aftermarkets - Note from the European Union, OECD DAF/COMP/WD (2017)3, 21-23 June 2017, page 4.

[7] This example is taken from "The Antitrust Enterprise, principle and execution" by Herbert Hovenkamp, page 98.

[8] Of course, the term "indispensable" needs to be read in an antitrust context. In Contact Software (ibid footnote 3) the General Court agreed with the Commission's findings that direct access to interface information was not indispensable to be active on the product data management software market. This was due to the fact that end customers were themselves able to acquire interface information on Dassault's and Parametric's computer aided design (CAD) software through a licence. The Court emphasised the existence of a distinction between the direct supply of licences to competitors and the supply of licenses to end customers, and concluded that only the latter was indispensable to enable effective competition on the market. So, the fact that information regarding the interface interoperability was available to end customers meant that the first condition for an infringement of Article 102 TFEU was not met.

[9] These areas include: data interoperability and full data portability (beyond the current GDPR framework) through regulation of enforcement actions facilitating multi-homing and switching; data sharing and data pooling arrangements which can be both pro- and anti-competitive. The Report considers it appropriate for the Commission to assess different types of data pooling arrangements and provide more guidance regarding the competition issues associated with these; when access to data is held by a dominant platform and is essential to compete in the broader ecosystem of the data controllers, consideration should be given whether it is preferable to rely on Article 102 TFEU or via EU legislation. The Report considers that regulation might be more suitable where continuous access requirements or monitoring is required.

[10] See page 10 of the Report.

[11] See page 88 of the Report.

[12] See page 90 of the Report.

[13] Article 20, General Data Protection Regulation (EU) 2016/679 OJ L 119, 04.05.2016; cor. OJ L 127, 23.5.2018.

[14] Regulation (EU) 2018/1807 of the European Parliament and Council of 14 November 2018 (Free Flow of Non-Personal Data in the EU Regulation) introduces a prohibition against data localization requirements unless justified on the grounds of public security, Article 4(1) (OJEU L303/68, 28.11.2018). Date of application 29 May 2019. It supports the development of self-regulatory codes of conduct at EU level based on principles of transparency, interoperability and taking account of open standards (Article 6(1)) aimed at making switching between service providers and data porting easier with vendor lock-in being considered an unacceptable business practice. Commission Guidance COM (2019) 250 final dated 29 May 2019.

[15] See page 75 of the Report.

[16] See page 75 of the Report.

[17] See page 90 of the Report.

[18] This does not seem to be the same for other sectors, notably, "connected cars". See "Data governance regimes in the digital economy; the example of connected cars" by W. Kerber and J.S. Frank (2017).

[19] Communication from the Commission "Towards a common European data space" Brussels, 25.4.2018, COM (2018) 232 final.

The authors

Jose Rivas

Partner

Tel: +32 2 282 6093

jose.rivas@twobirds.com



Bróna Heenan

Associate

Tel: +32 2 282 6005

brona.heenan@twobirds.com



[twobirds.com](https://www.twobirds.com)

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