Apple/Shazam: Big Data, Big Tech and M&A – what's the big deal?

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The European Commission's decision

Is Big Data a 'friend' or a 'foe' to consumers? Do the current EU merger control rules work for 'Big Tech' deals? The European Commission's announcement that it has approved Apple's $400 million acquisition of Shazam provides a timely snapshot of some of the key questions facing competition authorities analysing Big Tech deals in Europe.

Apple's proposed acquisition of Shazam, the UK-based music company, was originally notified to the Austrian competition authority. Though the deal did not meet the EU notification thresholds, it was 'referred up' to be reviewed by the Commission in February 2018 after it accepted a request from the Austrian authority.[1] Despite setting out preliminary competition concerns and opening an in-depth (Phase II) investigation into the deal, the Commission unconditionally cleared the acquisition on 6 September 2018. It concluded that:

- Apple could not foreclose competitors of Apple Music, its digital music streaming service, through access to Shazam's commercially sensitive data on users of rival services;
- access to Shazam's data does not give Apple Music a unique advantage – the data is not unique and competitors can access similar data; and
- an attempt to restrict competitors' access to the Shazam app would not shut out Apple Music's competitors given the limited importance of Shazam as an 'entry point' for users of music streaming services.

Big Data – when is it a concern for mergers?

The potential benefits of access to Big Data are well known. It can enable companies to rapidly analyse large volumes of information to better tailor their products and marketing to consumer preferences, identify new trends/needs, monitor business performance and find ways to reduce their costs. This can

[1] The EU Merger Regulation (EUMR) allows Member States to request that the Commission examine a merger that does not meet the EUMR jurisdictional thresholds but affects trade within the Single Market and threatens to significantly affect competition within the territory of the Member State(s) making the request. See Article 22 of Council Reg. (EC) 139/2004 (OJ 2004 L24/1, 29.1.2004).

drive innovation and lower prices for consumers. For these reasons, M&A that increases a company's access to data can have pro-competitive effects.

However, the Commission also sees risks from a competition perspective. Margrethe Vestager, the EU's Competition Commissioner, said in the press release for the *Apple/Shazam* approval that "*data is key in the digital economy. We must therefore carefully review transactions which lead to the acquisition of important sets of data, including potentially commercially sensitive ones, to ensure they do not restrict competition*".

The Commission's initial concern in *Apple/Shazam* was that combining the parties' datasets could give rise to vertical input foreclosure. Under this theory, the merged entity might restrict competitors' access to the data collected by Shazam on the songs searched for by its users. If this data is an 'important input' then Apple Music's downstream competitors may find it harder to compete and bring innovation to the market without it.[2] The initial concern was that Shazam's data may help to identify its users' preferences, making it easier for Apple Music to promote new music to its users and giving it a crucial edge. However, the Commission concluded that rivals will continue to have access to a large amount of similar data so access to Shazam's data would not give Apple a unique advantage.

Apple/Shazam is another example of the Commission looking closely at deals involving Big Data. European authorities' concern is also signalled by comments from the head of the UK Competition and Markets Authority that the UK authority's thinking in approving Facebook's acquisition of Instagram in 2012 was "naïve".[3] However, despite this close focus, the Commission approved *Apple/Shazam* as well as *Facebook/WhatsApp*, *Microsoft/LinkedIn* and *Verizon/Yahoo* without finding any Big Data concerns.[4] The key reason may be that datasets, while commercially valuable, are often not unique and can be replicated. Moreover, the very same characteristics that can be presented as a cause for concern can also drive pro-competitive effects – unique datasets can benefit consumers through product improvements and efficiencies.

Big Tech – what is the big deal with small deals?

There is a long-standing practice of Big Tech companies acquiring smaller players. In this sector it is common to offer a 'free' service to build scale and collect data, meaning a target may have modest revenues but be highly valuable and have strong monetisation potential.[5] Competition authorities may worry that these targets have the potential to develop into competitors or significant platforms / suppliers. There is a concern that the EU merger notification thresholds, which are based on turnover, may not always catch 'small' deals of competitive significance in the digital economy.

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[2] See further the European Commission's Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C265, 18.10.2008), paras. 31 and 34.

[3] Speech by Andrea Coscelli at Fordham Conference on International Antitrust Law and Policy, New York, 7 September 2018.

[4] Case COMP/M.7217 – *Facebook/Whatsapp*, Commission decision of 3 October 2014; Case COMP/M.8124 – *Microsoft/LinkedIn*, Commission decision of 6 December 2016; Case COMP/M.8180 – *Verizon/Yahoo*, Commission decision of 21 December 2016.

[5] For example, although WhatsApp had over 600 million users worldwide when it was acquired by Facebook for $19 billion, WhatsApp's revenues in 2013 were not high enough for the deal to meet the EU notification thresholds. The Commission has in recent years been considering amendments to the EU merger notification thresholds, most notably the introduction of a 'deal size' threshold. Germany and Austria have already amended their jurisdictional thresholds to include a 'deal value' element.

Apple/Shazam again puts the spotlight on the EU merger referral systems for Big Tech acquisitions. Like *Facebook/WhatsApp*, which was also referred to the Commission, the Shazam acquisition did not meet the EU thresholds. Moreover, at only $400 million, the deal value was modest. However, the *Apple/Shazam* deal was referred up to the Commission, which concluded it was best placed to assess its potential cross-border effects in the EEA. Companies in the digital sector should carefully consider notification strategy for deals with an EU-wide impact. A referral gives the consistency and convenience of a single review in Europe under the "one-stop-shop" principle. *Apple/Shazam* also shows that proactively requesting a referral at the outset could also mitigate the risk of a delay to the timeline from a competition authority requesting a referral after the deal is notified at national level.

The way forward

The *Apple/Shazam* experience shows that Big Tech acquisitions are front-of-mind for European authorities and that the analysis of Big Data deals is evolving. Big Data deals can be complex – the reason that it is argued that they may cause harm (the unique and commercially advantageous nature of the data being acquired) is also often the same reason they can have pro-competitive effects. *Apple/Shazam* is also one of a growing number of data-heavy mergers that have been cleared with no or only limited remedies. In Big Tech transactions, it is easy to identify potential theories of harm, but context and evidence is key. Companies in the sector would be well-advised to consider the data implications of a deal, in particular in light of the transaction rationale and internal documents.

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