Essential Facilities Doctrine in the data-driven economy

Alexandre de Streel
University of Namur/Namur Digital Institute, and CERRE

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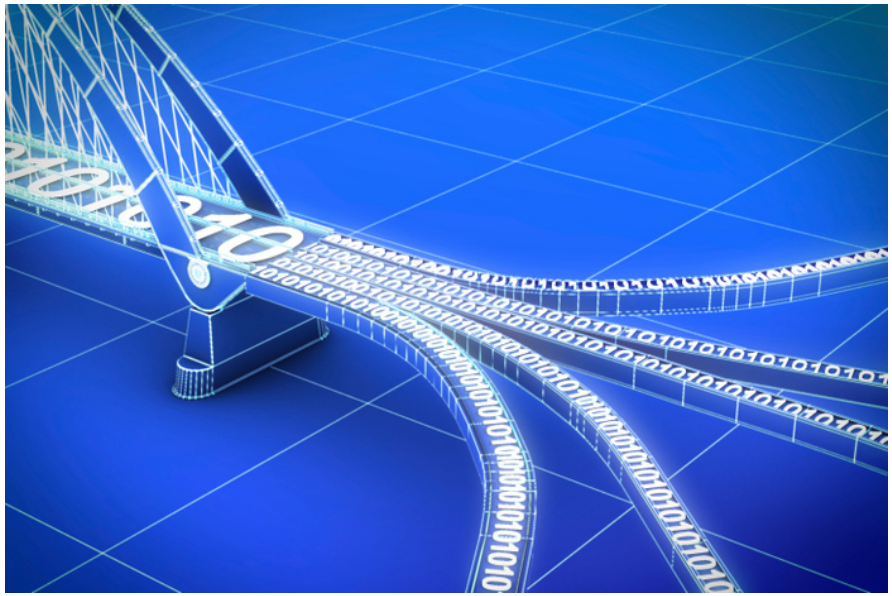
From one bridge to another



OUTLINE

1. Data: characteristics and role
2. Essential facilities doctrine
3. Essential Data
4. Other public policies
5. Conclusion

1. Data

Varian (2017)

1. Data: Main characteristics

- Non rival
  - Costs of collecting *and* sharing are smaller than for rival goods

- Can be made exclusive with appropriability tools
  - Technical: interoperability
  - Legal: general (IP, trade secret, database, data protection)and sector-specific data rules
  - Contractual: exclusivity clauses

1. Data: Production and Use

- Often produced by users
  - Costs mainly for collection, not generation

- Infrastructure for data-driven innovation (OECD, 2015)
  - New products
  - More personalised products
  - Benefits of sharing may be higher

Data: Collection

- Against free services
  - Costs of collection may be smaller for large firms because of economies of scale and network effects
- As by-products
  - Customers' lists
  - Users preferences and characteristics
- Web scraping
- Bought on the secondary market

2. Essential facilities doctrine: Incentives trade-off

- Principle of freedom to trade

- Benefits of compulsory access
  - Create more (short term) competition which may lead to
    - price competition (and decrease)
    - innovation competition (and increase)

- Costs of compulsory access
  - Decrease incentives to invest in the facility by
    - Entrants, which can rely on the dominant firm's facility
    - Dominant firm which fears free-riding
  - Costs of enforcement
    - Setting and monitoring access price and quality

Conditions for compulsory access

- Indispensability: Objective necessity of the input
  - No actual substitute
  - No potential substitute because of
    - Legal
    - Technical
    - Economic barriers for a competitor of the same size as the dominant firm (*Bronner*)
  - Lower threshold for termination than *de nuovo* refusal
  - Customers involvement should be taken into account (*IMS-Health*)

- Elimination of effective competition on the downstream market
  - Market may be hypothetical, pent-up demand suffices (*IMS-Health*)

Conditions for compulsory access

- Consumer harm
  - Prevent new products (*Magill*) or technological progress (*Microsoft*)

- Objective justification and efficiencies

- Lower threshold in cases of
  - Past special/exclusive rights or public financing
  - Regulation

Effects of compulsory access

- Setting access conditions
  - Prices: can be FRAND, not need to be precise (*Microsoft* II)
    - Should reflect investment risks but not market power
  - Quality
  - Interoperability, API

- Monitoring (continuously) those access conditions
  - Competition authority a regulator
  - Less a problem in EU than US

3. Application to data: Franco-German Report (2016)

These ECJ requirements would only be met, if it is demonstrated that the **data owned by the incumbent is truly unique** and that there is no possibility for the competitor to obtain the data that it needs to perform its services.

Improved data access may also **lessen incentives for rivals** to develop their own sources of data.

Finally, access to a company's data may raise **privacy concerns** as forced sharing of user data could violate privacy laws if companies exchange data without asking for consumer's consent before sharing their personal information with third companies with whom the consumer has no relationship

Application to data: Antitrust cases

- Abuse cases
  - *Magill*
  - TV programme lists can be indispensable

  - *Energy case in FR 2014/2017, Lottery case in BE 2015*
  - Data cross-subsidisation between monopolised and competitive services
  - Customers' lists were built thanks to monopoly and are not replicable

- Merger cases
  - *Google/DoubleClick* 2008, *Facebook/WhatsApp* 2014, *Microsoft/LinkedIn* 2016
  - Use of data for online advertising
  - Concentrations of users' data are not anti-competitive

Trade-offs of data sharing

- Benefits of compulsory access
  - May be high when create a level playing field for data-driven innovators

- Costs of compulsory access
  - Effects on incentive to collect may be limited when
    - Costs of collection is null or marginal
    - Data can be kept while being shared
  - Enforcement costs may be low when price is low and quality is easy to monitor

Conditions for data sharing

- Case-by-case analysis

- Indispensability
  - See the intensity of the appropriability means
  - Standard to assess potential competition should not be the size of the dominant firm
- Elimination of effective competition on the downstream market

- Consumer harm
  - Ex-ante proof of new product is more difficult with big data

- Efficiencies
  - Compliance with data protection law may be an objective justification
  - No capacity constrains

Effects of data sharing

- Setting access conditions
  - Priced at FRAND
  - Interoperability, API

- Monitoring (continuously) those access conditions

4. Other public policies

- Merger control: Assess the effects of data concentration
  - Market for data
  - Effects: horizontal, vertical, conglomerate

- Regulation: Increase data fluidity
  - General: for personal data (portability) and non-personal data
  - Sector-specific

- Open access for public data: Increase data availability

5. Conclusion

- Data
  - New infrastructure for innovation
  - Different characteristics than tangible assets which can make them more prone for compulsory access/sharing

- Essential facilities and data
  - Same costs/benefits analysis and incentives trade-offs
  - New market conditions
  - Adapted legal interpretation of the conditions
  - Always a case-by-case analysis

- Other public instrument may be more effective to maximise consumer welfare
  - Regulation to increase data fluidity
  - Open access for public data to increase data availability