

# All eyes on you: competition and big data

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The ownership and usage of large quantities of data collected online from consumers (big data) is a particularly hot topic in the competition law community. The French and German competition authorities issued a joint report on competition law and data in May 2016. And the European Commission is currently requesting feedback on whether to introduce non-turnover related thresholds into EU merger control to ensure that big data mergers can be scrutinised. Competition Commissioner Vestager has warned that she will keep a close eye on how companies use data and many national authorities will do the same. Companies are therefore well advised to take the warning seriously and keep an eye on their approach to big data.

On 7 October 2016, the European Commission launched a public consultation on the functioning of the [EU Merger Regulation](#) with a particular focus on:

- i. the effectiveness of purely turnover-based thresholds in the EU Merger Regulation;
- ii. the treatment of cases that typically do not raise competition concerns; and
- iii. the referral mechanisms between member states and the Commission.

The Commission is exploring whether mergers should be notified by the parties if they do not reach the turnover thresholds but do meet a certain transaction or data set value. The suggested [complementation](#) of the current, purely turnover-based threshold with the transaction value or the value of target companies' datasets is of particular significance for certain industries. This is the case in industries where the acquired company may have achieved little turnover as yet, but hold commercially valuable data, or have a considerable market potential through innovation. As Competition Commissioner Vestager has [put](#) it, "Data could be an important factor in how a merger affects competition. A company might even buy up a rival just to get hold of its data, even though it hasn't yet managed to turn that data into money. "

Commissioner Vestager has [mentioned](#) that the Ministry will keep a close eye on how companies use data. Not only in terms of merger control, but also by checking compliance with the cartel prohibition. Even so, there is nothing wrong with data pooling by companies, provided that they play by the rules laid down in the [guidelines on horizontal cooperation](#).

It is not only the European Commission that is eyeing big data. Many national competition authority also have their eyes wide open. For instance, the French and German competition authorities published a [joint report](#) on competition law and data in May 2016. The report distinguishes a number of data-related anti-competitive practices. According to the report, the possible theories of harm are premised, for the most part, on a company's capacity to derive market power from its data collection or to

process activities for which two aspects are of particular relevance: (i) the scarcity of data or ease of replicability, and (ii) whether the scale / scope of data collection matters.

The French and German competition authorities have already acted on the messages in their joint report by [launching](#) a sector inquiry into data-related markets and strategies and conducting an investigation against Facebook into possible abuses of dominance in the social networks market with its specific terms of services on the use of user data. The German competition authority has also recently issued a [working paper](#) on the market power of online platforms and networks, discussing the factors to take into account when determining dominance in the digital economy. The Dutch competition authority has followed suit by launching a [market study](#) into online platforms that offer videos and movies, such as YouTube and Facebook, but also Dutch platforms such as NL-ziet and Dumpert.