

Data, a commodity of trade in the new world order? Or not...

2 December 2020 5 min read

By Ahmore Burger-Smidt, Director and Head of Data Privacy Practice and member of the Competition Law Practice; and Dale Adams, Candidate Legal Practitioner and Associate

Introduction

In recent years, data privacy has been the subject of attention in competition discussions, particularly in mergers involving data driven industries. There has been an emerging suggestion that competition authorities may need to turn their attention towards transactions where large scale data accumulation occurs post-merger. The recent examples of such mergers include those of *Facebook/WhatsApp* and *Microsoft/LinkedIn*,^[1] where the European Commission (“EC”) held that data privacy constitutes a key parameter of non-price competition in the market for consumer communications and for professional social networks.

However, in *Apple/Shazam*^[2] the EU seemed to have retrograded and found that there will not be a significant impact to effective competition where a major provider of music streaming services acquires a leading application for automatic music recognition, particularly concerning the data privacy concerns arising from such a merger. This decision constitutes an important addition to the series of EU merger cases involving the acquisitions of large chunks of customers’ personal data.

The Apple/Shazam Decision

On 14 March 2018, the EC received a merger notification of a transaction that would result in the acquisition of Shazam by Apple. The protagonists of this transaction do not need an introduction, however, for completeness sake a brief introduction is apposite. Shazam provides music recognition services through a mobile application (“**App**”) whereas Apple designs, manufactures and sells computers, mobile communication and media devices.

On 23 April 2018, the EC opened an in-depth investigation of Apple’s acquisition of Shazam in order to determine, amongst others, whether access to Shazam’s data post-merger might enable Apple to have a competitive edge over its competitors, and in the words of Commissioner Vestager, –

“Our investigation aims to ensure that music fans will continue to enjoy attractive music streaming offers and won’t face less choice as a result of this proposed merger.”^[3] [Emphasis added]

However, on 6 September 2018, the EC concluded its investigation and issued an unconditional clearance finding that the transaction would not significantly impede effective competition.

On a holistic reading of the decision, the EC examines the digital music industry, digital music streaming services, automatic content recognition and the role played by user data in generating insights, product development and targeted advertising.^[4]

In relation to the non-horizontal effects arising from the merger, the EC considered the potential foreclosure of competitors in the service of digital music streaming due to the acquisition of commercially sensitive information of Shazam by Apple. In particular, the main theory of harm considered by EC concerned the possibility that Apple would take advantage post-transaction of the information acquired by Shazam including via its current API integration with Spotify (a competitor of Apple Music) to derive commercially sensitive information.^[5]

In coming to its decision, the EC found that:

- Shazam’s data is not unique and therefore would not confer a significant “data advantage” to Apple post-merger. The integration of Shazam’s and Apple’s datasets does not confer an advantage to the merged entity and Apple’s competitors will still have the opportunity to access and use similar databases;

- As Shazam has a very limited market power and limited importance as an entry to music streaming services, post-transaction Apple would not be able to shut out competing providers of digital music streaming services by restricting access to the Shazam app; and
- The access to Shazam's data post-merger would not increase Apple's ability to target music listeners and any conduct aimed at making customers switch to Apple music would only have a negligible impact.

Following the clearance of the merger, Commissioner Vestager stated 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. After thoroughly analysing Shazam's user and music data, we found that their acquisition by Apple would not reduce competition in the digital music streaming market."^[6]

Analysis and Conclusion

We have previously written on the way in which [competition and data privacy overlap in merger transactions](#) and the decision of the EU in *Apple/Shazam* appears to be reminiscent of the approach adopted by Competition Authorities in a previous decision involving aspects of data privacy, that data, as a non-price factor, ought to be considered in the merger analysis of transactions involving data driven entities.

The *Apple/Shazam* merger illustrates the ever increasing recognition and importance of acquisition of data driven entities.^[7] Albeit these entities may not have a high turnover, a traditional requirement for merger notification, these entities certainly have valuable data which ought not to be overlooked by the Competition Authorities.

Within the South African context, the position remains fluid and it remains to be seen how the competition authorities will grapple the above issues in attempt to establish judicial certainty.

[1] F Costa-Cabral and O Lynskey 'Family ties: the intersection between data protection and competition in EU law' (2017) 1 *Common Market Law Review*, 54.

[2] Case no: COMP/M.8788- Apple/Shazam, Commission decision of 6/9/2018, available at http://ec.europa.eu/competition/mergers/cases/decisions/m8788_1279_3.pdf.

[3] Statement by Commissioner Margrethe Vestager in a press release of the EC, dated 23 April 2018 available at https://ec.europa.eu/commission/presscorner/detail/en/ip_18_3505, accessed on 13 September 2020.

[4] N Zingales *"Apple/Shazam: Data is power, but not a problem here"* (2018) available at <https://www.competitionpolicyinternational.com/appleshazam-data-is-power-but-not-a-problem-here/>, accessed on 13 September 2020.

[5] *Ibid.*

[6] Statement by Commissioner Margrethe Vestager in a press release of the EC, dated 6 September 2018 available at https://ec.europa.eu/commission/presscorner/detail/en/IP_18_5662, accessed on 13 September 2020.

[7] S Smith and M Hunt "Big data? No antitrust problem for Apple/Shazam" available at <https://www.lexology.com/library/detail.aspx?g=b3ef6417-534e-408c-af89-1905bfd717ca>, accessed on 13 September 2020.



Ahmore Burger-Smidt

Head of Regulatory

[View Profile](#)