The Data-Driven Economy. Remarks in the Light of Selected Issues in the Competition Law

Introduction

With the efforts to create a digital Europe, the significance and the development of state – of – the – art technologies substantially increases.¹ On 19 February 2020, the European Commission (hereinafter the EC, the Commission), published the European strategy pertaining to data,² which presupposes a novel and genuinely unprecedented approach to development.³ Data has begun to play a vital role in global, EU-wide, and domestic economies, as it constitutes “the driving force of economic development”.⁴ The data economy is thus a notion which

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¹ The implementation of the single digital market is comprehensively outlined in Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Digital Single Market Strategy for Europe, SWD 2015, 100 final, Brussels, 06.05.2015, Document 52015DC0192, COM, 2015, 192 final.
² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A European strategy for data, Brussels, 19.02.2020, Document 52020DC0066, COM, 2020 66 final, hereinafter as A European strategy for data.
³ In the EU strategy EUROPA 2020, the approach to development presupposed an economy based on knowledge and innovation, which was how intelligent development was envisioned. At present, the European strategy for data sets out a new approach to development, where the economy is data – driven. For the previous paradigm see Communication from the Commission EUROPE 2020 A strategy for smart, sustainable and inclusive growth, Brussels, 03.03.2010, Document 52010DC2020, COM, 2010, 2020 final, p. 11 ff.
⁴ A European strategy for data, p. 2 ff. Concerning the impact of data on economic development, see G. Koloch, K. Grobelna, K. Zakrzewska – Szlichtyng, B. Kamiński, D. Kaszyński, Intensywność wykorzystania danych w gospodarce a jej rozwój – analiza diagnostyczna.
describes the utilization of data potential in the private and public sectors, shared in order to achieve economic growth. This strategy is expected to be implemented across the EU Member States within the next 5 years. The European strategy for data represents a successive stage in the process of building the Digital Single Market. It was published simultaneously with the Communication of the Commission: Shaping Europe’s Digital Future and the White Paper on Artificial Intelligence – A European approach to excellence and trust. This conception, formulated by means of political acts which determine the goals and directions of development, should be reflected in the legislation. The adoption of the General Data Protection Regulation (GDPR), the regulation on the free flow of non-personal data, the cybersecurity act

7 Guidance on sharing private sector data, p. 1.
8 A European strategy for data, p. 1.
10 A European strategy for data, p.1 ff.
and the open data directive\textsuperscript{16} make up the legislative output to date, thanks to which the data economy may be shaped and pursued.\textsuperscript{17}

The adoption of a new approach to development entails a range of issues of a legal, economic and social nature that need to be examined and studied in greater detail. However, the scope of these issues is very broad indeed, which is why this paper focuses on the data economy as it relates to selected questions in competition law.\textsuperscript{18} Specifically, this includes observations regarding threats associated with the sharing of confidential business data, or data subject to intellectual property protection laws,\textsuperscript{19} between participants in the market economy, i.e. enterprises,\textsuperscript{20} as well as actions which restrict competition in the light of the new approach to development.

\textbf{Sharing Confidential Company Data in the Private Sector}

Exploiting the potential of data sharing in the private sector\textsuperscript{21} naturally links the data economy and competition law.\textsuperscript{22} In accordance with the


\textsuperscript{18} A European strategy for data, pp. 5 and 14.

\textsuperscript{19} Data Governance Act, p. 1, note 3.

\textsuperscript{20} Enterprises and consumers as participants of the market economy are discussed in K. Strzyczkowski, \textit{Prawo gospodarcze publiczne}, Warsaw 2011, p. 388.

\textsuperscript{21} A European strategy for data, p. 7.

\textsuperscript{22} Ibidem, p. 5 and 14. On the risk of potential breaches of the competition law, see Recital (29) of the Data Governance Act.
proposal for a EU data governance regulation [hereinafter the Data Governance Act] sharing data as part of the new approach to development also applies to data which is commercially confidential and regulated by intellectual property protection laws.\(^{23}\) This creates a risk of competition being restricted and enterprises potentially losing their competitive advantage\(^ {24}\) as well as – in the opinion of this author – the possibility of the freedom of economic activity being violated.

Here, the principal deliberations set out with Art. 11(1) and (3–6) of the Act on Combating Unfair Competition of 16 April 1993 [hereinafter the CUC], pursuant to which the disclosure, use or obtaining of information which is confidential to the enterprise constitutes an act of unfair competition.\(^ {25}\) The aforementioned statute is intended to protect this-

\(^{23}\) Data Governance Act, p. 1, note 3.
\(^{24}\) Recital (29) of the Data Governance Act and A European strategy for data, p. 7.
\(^{25}\) Art. 11(1) of the Act on Combating Unfair Competition of 16 April 1993, Journal of Laws of 2020, item 1913. Hereinafter: CUC. See also Art. 11(3) CUC: “Obtaining confidential enterprise information constitutes an act of unfair competition, in particular when this occurs without the consent of the entity entitled to use or dispose of the information, and results from the unlawful access, appropriation, or duplication of documents, objects, materials, substances, or digital files which encompass that information or enable inferences about their content”; Art. 11(4) CUC: “Use or disclosure of confidential information of an enterprise constitutes an act of unfair competition, in particular when this occurs without the consent of the entity entitled to use or dispose of the information, and violates the obligations to restrict its use or disclosure arising under the statute, legal transaction or other act, or when it has been effected by a person who obtained the information by committing an act of unfair competition”; Art. 11(5) CUC: “Disclosure, use, or obtaining information which is confidential to the enterprise constitutes an act of unfair competition also when at the moment of its disclosure, use or obtaining a person had the knowledge or, maintaining due diligence, could have the knowledge that the information had been obtained directly or indirectly from one who had used or disclosed it in the circumstances specified in Section 4”; and Art. 11(6) CUC: “Use of confidential information of an enterprise which consists in producing, offering, marketing, as well as inbound or outbound movement and storage of goods for that purpose constitutes an act of unfair competition, if a person who performed the act in question had the knowledge or, maintaining due diligence, could have the knowledge that the properties of the goods, including aesthetic and functional properties, their manufacturing or selling process have been to a substantial extent formulated as a result of the act referred to in Section 1, effected in the circumstances specified in Section 4.” See also Directive EU 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know – how and business information against their unlawful acquisition, use and disclosure, Official Journal of the European Union of 15.06.2016, L 157/1, Document 32016L0943.
kind of information. Assets and resources are what determines the competitive advantage of enterprises, while their confidentiality is one of the crucial elements of that advantage. Sharing such data creates a risk of the potential restriction of competition as well as potential loss of the advantage if the law-sector-specific and competition related provisions – is not adequately aligned with the needs of the data-driven economy.

Given the above, this author undertakes a somewhat broader analysis. It needs to be noted that there is a notion in jurisprudence according to which the freedom of economic activity, ensured under Articles 20 and 22 of the Polish Constitution not only spans the freedom to engage in, conduct, and terminate economic activity, but also covers free competition. It seems legitimate, therefore, to conclude that a potential limitation of competition due to sharing the confidential data of an enterprise may result in a violation of the freedom of economic activity. This approach may be inferred from the rationale to the judgment of the Constitutional Tribunal of 19 January 2010, file no. SK 35/08 which,

26 D. Grego – Planer, Potencjał konkurencyjny ukrytych liderów polskiej gospodarki, Toruń 2016, p. 63. Regarding assets and resources see also M. J. Stankiewicz, Konkurencyjność przedsiębiorstwa. Budowanie konkurencyjności przedsiębiorstwa w warunkach globalizacji, Toruń 2002, p. 22 ff. Also, data constitutes a resource required to manufacture goods or/and provide services; see A European strategy for data, p. 2 ff.


28 Certain Member States have already begun adjusting their legislation. One of the examples is the “(…)Finnish law on secondary use of health and social data, creating a data permit authority”; see A European strategy for data, p. 6 see also note 15.

29 Ibidem, p. 6 see also note 16.


invoking the jurisprudence in the domain of public economic law, states as follows: “The essence of conducting economic activity, construed as a public subjective right, is the freedom of a private – law entity to engage in and carry out such an activity. Both public authorities and other legal entities are charged with the obligation to refrain from intervening – whether through legal or factual actions – in the sphere of free economy. An entity exercising their freedom makes fundamental decisions in several areas. In particular, they decide about: (...) the methods and the scope of conducting the activity, including activity in the fields of: (...) competition (...)

Effective competition is characterized by competing – a rivalry of enterprises (on equal terms) and striving to produce and then supply the consumer with products or/and services of the best possible quality and at the most advantageous prices. Consequently, sharing data that is “(...) vital for competition (...)” enables enterprises to gain knowledge concerning market strategies of their actual or potential competitors (...) including information relating to future prices, production costs, quantities and volumes, turnover, sale, or capacities” will, in the opinion of this author, affect the resources which have an impact on the competitiveness of an enterprise. Again, this may lead to potential restriction of competition and, in the broad sense, a potential violation of economic freedom. It may be argued that

33 Rationale to the Judgment of the CT of 19 January 2010, SK 35/08., p. 10.
36 Recital 29 of the Data Governance Act.
38 On the potential restriction of competition in connection with the sharing competitively sensitive data, see Recital 29 of the Data Governance Act.
data will be shared in the public interest\textsuperscript{39} while respecting the private interests of the entrepreneurs.\textsuperscript{40} However, the counter argument to this is that, due to hypothetically detrimental phenomena which inhibit competition and infringe the liberty of economic activity, the balance between public interest and the interests of the entrepreneurs will be undermined.\textsuperscript{41}

At this point, it may be briefly noted that data sharing among enterprises will influence the parameters of competition.\textsuperscript{42} Based on the Data Governance Act, which sets forth that: “(...) data – based products and services developed in one Member State may need to be customised to suit the preferences of customers in another Member State (...). As such, data needs to be able to flow easily through EU – wide and cross – sector value chains (...),”\textsuperscript{43} it may be inferred that implementation of the new approach to development will promote increased quality of products and/or services.\textsuperscript{44} The data used by businesses\textsuperscript{45} will reflect the needs of the market\textsuperscript{46} and therefore be a “vehicle of information”

\textsuperscript{39} A European strategy for data, p. 6, 21.
\textsuperscript{40} Ibidem, p. 13 note 39 and p. 18.
\textsuperscript{43} Data Governance Act, p. 3.
\textsuperscript{44} For instance, Finland saw an increase in the quality of healthcare. In that respect, see also: \textit{Intensywność wykorzystania danych}...
\textsuperscript{45} Sectors in which data access applies are outlined in Data Governance Act, p. 2.
\textsuperscript{46} \textit{Intensywność wykorzystania danych}...

and at the same time a “key” to satisfying social and economic demand. Although this paper does not delve into the issue, it is still worth noting (referring briefly to product quality) that this is a compelling area for further, detailed jurisprudential studies.

The Data Economy and the Potential Risk of Monopolies, Oligopolies and Collusion Between Enterprises

The data economy involves the wide application of state-of-the-art technologies, which is why the new approach to development necessitates appropriate conditions in which the approach can be implemented (e.g. the introduction of adequate safeguards to protect data, cloud services or quantum computations). On the other hand, modern technologies may cause monopolies and oligopolies to emerge, therefore actions to foster an economy which efficiently utilizes data can indeed entail potential risks in that respect. Nonetheless, the above market types are formed in connection with the digital infrastructure required to implement the new approach and assure conditions for the subse-

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47 Intensywność wykorzystania danych…
51 By way of analogy to A. Jurkowska – Gomułka, see Polityka elektromobilności i polityka konkurencji: korelacje, in: Prawne i ekonomiczne aspekty rozwoju elektromobilności, ed. K. Kokocińska, J. Kola, Monografie Prawnicze, Warsaw 2019, pp. 19–38 and M. Ja-colik, Rozwój elektromobilności w Polsce w kontekście wybranych zagadnień prawa konkurencji, „Zeszyt Studencki Kół Naukowych Wydziału Prawa i Administracji UAM”, No. 9, Poznań 2019, pp. 69–82. Furthermore, the potential emergence of monopolies and oligopolies may be deduced from the questions asked in the Draft Report on a European strategy for data, namely: “Who will this trend benefit? Will the data create opportunities for companies of all shapes and sizes, or will data be concentrated in the hands of a few technological giants?”; see Draft Report on a European strategy for data p. 9.
quent functioning of data – driven economy, but it does not occur as a result of sharing a specific range and category of data (although it is possible for monopolies and oligopolies to be established in this case as well). This appears to follow from the assertions made in Przemysl+, a study prepared by the Ministry of Digital Affairs, in which “the data – driven economy is the next, fourth stage of digital development (…). (…) a race in which the future shape of the data economy is at stake gathers pace, with (…) major technological concerns, (…) economic blocs (…) as actively involved participants.”

The emergence of a monopolistic market is likely to be observed in two stages. Technologically advanced enterprises may rise to be leaders in the process of implementing the new approach to development. Hypothetically, this creates a situation where rules and conditions – governing the use of digital infrastructure, for instance – can be dictated and actually made binding. Consequently, an advantage is achieved over businesses with inferior capital already in the initial phase of implementation. It is evident that only large technological companies can afford to become involved in developing the data – driven economy (unlike SMEs). Mechanisms which jeopardize free competition, such as monopolies can also materialize at a later stage, when the data economy has already begun to function. Businesses with considerable capital have the ability to employ highly advanced technologies to carry out data –

53 On the required digital infrastructure see Shaping Europe’s digital future, pp. 1–6.
54 M. Borowik, L. Maśniak, R. Kroplewski, H. Romaniec, Przemysl+, p. 7.
55 At present, solutions such as cloud services enjoy little popularity in Europe. On data – related infrastructure and technologies see: A European strategy for data, p. 9 ff.
56 Conclusion derived from the description of unequal standing on the market; see A European strategy for data, p. 8.
57 Research into new technologies is an option available exclusively to businesses with substantial financial resources; see M.K. Kolasiński, op. cit., p. 549.
58 Ibidem. Also concluded from the description of unequal position on the market; see A European strategy for data, p. 8.
59 Monopolization and cartelization are defined as threats to the mechanisms of free competition; see K. Strzyczkowski, op. cit., p. 382.
based operations\textsuperscript{60} while relying on big data solutions or business analytics methods.\textsuperscript{61} Consequently, data sharing can be taken advantage of in a more efficacious fashion.\textsuperscript{62}

Oligopolistic markets promote cartel collusion;\textsuperscript{63} thus, hypothetically, technological giants may potentially be inclined to enter into such agreements, for instance with regard to terms and conditions/prices of access to cloud services.

Briefly recapitulating the above, while the status of a monopolistic or dominant enterprise is not prohibited, a prescription is imposed on such conduct or operations of a monopolistic business which violate competition law.\textsuperscript{64} Thus, it is contrary to the provisions of the Competition and Consumer Protection Act of 16 February 2007 [hereinafter CCPA]\textsuperscript{65} to engage in any practices which interfere with competition, such as abuse of dominant position\textsuperscript{66} and any collusion between enterprises.\textsuperscript{67}

However, businesses may agree on an arrangement which “contributes to the improved production and distribution of goods” or to “technological or economic progress”, and those constitute exceptions from the general prohibition set forth in Art. 6(1)CCPA.\textsuperscript{68} Such agreements may be arrived at as

\begin{itemize}
    \item \textsuperscript{60} A European strategy for data, p. 8.
    \item \textsuperscript{61} Intensywność wykorzystania danych…
    \item \textsuperscript{62} Ibidem, p. 90.
    \item \textsuperscript{63} M.K. Kolasiński, op. cit., p. 547.
    \item \textsuperscript{64} Office of Competition and Consumer Protection, Polityka ochrony konkurencji i konsumentów, Warsaw 2015, p. 35 ff.
    \item \textsuperscript{65} Competition and Consumer Protection Act of 16 February 2007, Journal of Laws of 2021, item 275, hereinafter as CCPA
    \item \textsuperscript{67} Art. 6 CCPA, Art. 101(1)TFEU. On the impact of horizontal cooperation agreements on the parameters of competition see the Guidelines on horizontal co-operation agreements.
\end{itemize}
part of the efforts contributing to the data-driven economy. For instance, within the framework of the single European health data space, this may involve the creation of digital infrastructure to gather and process data for future medical research or pharmacovigilance. Also, one may aim to develop an application to monitor health or support a patient’s compliance with their dosing regimens. The general prohibition on agreements of this kind is suspended to allow for benefits that might not be achieved otherwise, such as the aforementioned contribution to technological progress, and the enhanced production/distribution of goods, in other words the pursuit of general economic goals and ensuring welfare to the consumers. It is conceivable that the requirements specified in Art. 8(1) CCPA are likely to be satisfied in connection with actions undertaken to implement the new approach and, ultimately, to function in a genuine data economy.

**Conclusions**

The data-driven economy offers tremendous opportunities for the EU and domestic economies. At the same time, there are a number of risks and negative outcomes involved. These include the sharing of company confidential data as well as information which is subject to intellectual property protection laws and the potential loss of competitive

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70 On the single European space for health data, see A European strategy for data, pp. 29–30.
71 On the use of shared health data and related applications, see the Guidance on the Regulation on non-personal data, p. 10.
72 Art. 8 (3)(1) CCPA and Office of Competition and Consumer Protection, op. cit., p. 32.
75 Art. 8(1) CCPA.
76 See also M. Borowik, L. Maśniak, R. Kroplewski, H. Romaniec, Przemysł..., p. 5.
77 See G. Koloch, K. Grobelna, K. Zakrzewska – Szlichtyng, B. Kamiński, D. Kaszyński Intensywność wykorzystania danych w gospodarce a jej rozwój – analiza diagnostyczna...
advantage for certain enterprises. Also, there may be foreseeable violations of the freedom of economic activity – the cornerstone of the social market economy which in its turn is a mainstay of the economic system in the Republic of Poland.\(^{78}\) To the furthest extent possible, the legal system should ensure the elimination of the potential threats arising from the implementation of the new approach to the development and subsequent functioning in the realities of an economy which efficiently utilizes data, by means of adjusting sectoral regulations and the competition law.\(^{79}\) The risk of establishing monopolies and oligopolies may result in hypothetically detrimental outcomes in the development of an economy that makes effective use of data. However, the circumstances laid down as exceptions from the prohibition of collusion, which qualify as admissible under the CCPA, may actually promote that development.

At this point, another question may be posed. The discussed transformation is no doubt an opportunity for the economy\(^{80}\), but it remains to be resolved whether this applies to all businesses or only the SMEs, the “weaker” players in the market economy, especially given the vision which accommodates the needs of the SMEs in particular.\(^{81}\)

**References**


\(^{78}\) Art. 20 CRP.

\(^{79}\) Legislative adjustments have already been undertaken by some Member States. For instance French Digital Republic Brill allowing the public sector to access certain private sector data of general interest, or the Finnish Forest Act obliging forest owners to share information related to the management of the forest with the public sector. Discussions on adapting the competition rules to make them better equipped for the data economy are for example ongoing in Germany. See A European strategy for data, p. 6 notes 14 and 16.

\(^{80}\) Ibidem, p. 4 ff.


Kokocińska K., *Współdziałanie podmiotów władzy publicznej na rzecz rozwoju*, „Ruch prawniczy, ekonomiczny i socjologiczny” 2015, no. 3.


Rationale to the Judgment of the Constitutional Tribunal of 19 January 2010, SK 35/08.


SUMMARY

The Data – Driven Economy – Remarks in the Light of Selected Issues in the Competition Law

Data has begun to play a vital role in global, EU-wide and domestic economies. On 19 February 2020, the European Commission published the EU’s strategy for data, which outlines a new and unprecedented approach to development. The vision thus described – a data-driven economy – is to be implemented within the next five years. However, this broad undertaking gives rise to a number of legal, economic and social issues which deserve to be more thoroughly examined.

In this paper, the author considers how the data economy relates to aspects of competition law, including threats associated with the sharing of confidential company data, and information protected under intellectual property laws, among the participants of the market economy, i.e. businesses. Also, observations are made concerning the hypothetical emergence of monopolies and oligopolies, as well as collusive agreements between enterprises on the grounds of the new approach to development.

Keywords: Data-driven economy, data economy, competition law, company confidentiality, freedom of economic activity, practices restricting competition

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