Editorial

Trust and Antitrust in the Brave New Digital World

Whether EU competition analysis should incorporate non-competition, public interest concerns is a long-standing debate, and one that continuously resurfaces. Its thematic focus, however, changes over time. Once social protection, cultural diversity or environmental protection considerations were at the heart of this debate. Today, these concerns are seemingly overshadowed by worries about how our personal data is being collected and used by Internet companies.

In 2014, the European Data Protection Supervisor, the European data protection authority tasked with monitoring and advising the EU institutions on data protection matters, initiated a discussion about the need for a more holistic approach to the enforcement of EU rules on data protection, competition, and consumer protection. Since then, the question whether EU competition law should incorporate data protection and privacy considerations became a hot-button issue, reflected in a growing number of publications, speeches, and panel discussions at conferences devoted to the topic. And given the widespread outrage and attention surrounding the recent Cambridge Analytica data scandal, concerns about the issue are unlikely to subside anytime soon.

The European Commission and various national competition authorities have recognized that data use policies might constitute a non-price competition parameter. As such, privacy harm to consumers could constitute a reduction in the quality of a product or service, which can be accounted for in standard competition law analysis. Yet the prevailing view seems to be that privacy related concerns, as such, do not fall within the scope of EU competition law.

To date, the German Bundeskartellamt's Facebook investigation remains the only example of a competition case where the substantive competition law assessment incorporates standalone privacy considerations. In December 2017, the Bundeskartellamt informed Facebook of its preliminary view that it abused its dominant position on the German market for social networks by imposing unfair terms and conditions on its users with regard to data generated by third-party websites (ie services owned by Facebook such as WhatsApp and Instagram or websites with a Facebook plug-in).¹ The imposition of unfair trading conditions by dominant undertakings is a well-recognized form of exploitative abuse. It is, however, hardly enforced since in most cases it is extremely difficult to determine which trading conditions would prevail in a competitive situation. The balancing of the interests of the dominant undertaking and of the users

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1 Bundeskartellamt, 'Preliminary assessment in Facebook proceeding: Facebook's collection and use of data from third-party sources is abusive' (Press release, 19 December 2017) <http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/19_12_2017_Facebook.html> accessed 26 March 2018.

as contractual parties, leads the Bundeskartellamt to the preliminary conclusion that Facebook's privacy policies, which violate European data protection rules, are unjustified and an expression of market power. Under competitive conditions, it argues, users would only accept terms and conditions that encroach less on their fundamental rights.

From the vantage point of German competition law, the Bundeskartellamt's seemingly novel approach is in fact not altogether new. It is established case law of the German courts that the imposition of unlawful contractual provisions can (at the same time) constitute an exploitative abuse within the meaning of §19(1) of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, GWB), the national equivalent of Article 102(a) TFEU, in so far as the company can impose those provision but for its dominance or superior market power. These cases involved violations of competition-related provisions, such as those of the law on unfair commercial practices. It remains unclear to what extent the violation of the law must be adequately linked to competition.² Yet in the *Pechstein* case, the same reasoning was followed to assess whether the International Skating Union had abused its dominant position by imposing a mandatory arbitration clause on athletes. Here, the violation of competition-neutral fundamental rights, and in particular the right to a fair trial, was also at stake.³ The abuse was eventually dismissed by the Federal Court of Justice because it found, contrary to the lower court, that the Court of Arbitration for Sport represents an independent and neutral instance. The Court, however, confirmed that in the application of §19 GWB fundamental rights must be taken into account and limited in such a way as to ensure that they as effective as possible for all parties concerned.

It is telling that the Bundeskartellamt's preliminary assessment relies on German competition law without parallel application of Article 102 TFEU. It thus seemingly invokes the carve-out to the general convergence rule contained in Regulation 1/2003. Yet in theory, it would be possible to emulate the German approach under Article 102(a) TFEU. Data protection law could similarly function as a competitive benchmark: if business terms imposed by an undertaking in a dominant position are unlawful, they certainly can be considered 'unfair' (assuming a link exists between the use of these conditions and the undertaking's dominant position). The same ambiguities surrounding the question whether the application of Article 102(a) TFEU would require proof of harm to competition could be exploited. The real question is, however, whether EU competition law enforcers should go down that road. If problems originate from a limited effectiveness of enforcement of the data protection rules, addressing those problems would be the first-best solution - and one that would not curtail strong enforcement to dominant undertakings alone.

2 See eg the position taken by the German Monopolies Commission in its Special Report No 68 'Competition policy: the challenge of digital markets' (2015) paras 518-523 <http://www.monopolkommission.de/images/PDF/SG/s68_fulltext_eng.pdf> accessed 26 March 2018.

3 Antoine Duval and Ben Van Rompuy, 'Protecting athletes' right to fair trial through EU competition law: the Pechstein case' in Christophe Paulussen et al (eds), *Fundamental Rights in International and European Law: Public and Private Law Perspectives* (TMC Asser Press 2006) 245-278.

In *The 2017 Facebook Saga: A Competition, Consumer and Data Protection Story*, Christophe Carugati continues the debate by stressing the need for collaboration between competition, consumers and data protection authorities. Competition law challenges arising from the digital world, and in particular the rise of online merchants, are also at the heart of two other contributions in this issue. Niccolo Colombo examines whether the interaction between Big Data and Artificial Intelligence calls for new competition law principles. And in *Anti-Competitive Effects of Vertical Restraints: EU Guidelines and Impact on Online Distribution Networks*, Zia Akhtar scrutinizes common legal presumptions towards vertical restrictions in EU and US antitrust law with a particular focus on online distribution networks.

As always, the reports section of this issue keeps you abreast of important competition law and regulatory law developments at the national level – in this edition, with updates from Austria, Finland and Norway. We also have three case notes commenting on recent Court of Justice’s judgments in the field of EU competition law: C-230/16 *Coty Germany*, C-248/16 *Austria Asphalt*, and C-547/16 *Gasorba*.

We are also excited to announce the launch of the official blog of CoRe, which you can now access and subscribe to at <<http://coreblog.lexxion.eu>>. The CoRe Blog is a new interactive forum for timely discussion of the latest developments in EU competition law and its interplay with regulatory law. The platform also features an expanding reference database – the Case Digest – of competition law cases of the EU courts. Check it out and let’s talk competition law!

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