

On Competition Policy and Online Markets

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E-commerce is one of the more visible developments of the new economy. The calendar of conferences shows that the debate on its antitrust implications is more lively than ever. But the debate on the challenges of the new economy to antitrust policy can no longer be qualified as really new. Posner published already on antitrust in the new economy in 2001¹.

I. The Importance of E-Commerce

You will, I assume, be familiar with the results of the 2017 EU sector enquiry².

E-commerce makes it in the first place easier for consumers as well as businesses to buy cross border.

It gives therefore a major boost for the functioning of the internal market. But geographic restrictions such as geo-blocking also have an increased impact.

I may add that Comeos, the Belgian retailers association, published in 2017 a study^{3,4} on the quantitative significance of e-commerce in Belgium. It showed that 63% of the Belgian population and 74% of the Belgian online population bought new goods or services online in 2017⁵. The percentage varied from 64% of the participants aged between 55 and 70, to 81% aged between 15 and 34. But only 7% did it weekly and 35% monthly. 49% spend on average more than €100 per month and the monthly average in 2017 was €191. But only 32% replaced offline purchases. 47% considered time saving the main reason to shop on line, and only 35% mentioned lower prices. Only 20% mentioned that they bought already food online. And it may also be interesting to note

that 22% of purchases were made using mobile devices.

II. A Challenge to Decentralised Competition Law Enforcement

As not only virtually every market behaviour has a cross-border impact, but also every attempt at competition law enforcement, coherent decision making is, at least in the EU, more important than ever.

Unfortunately, achieving coherence and predictability also tends to be more difficult:

- Issues are new, or perceived to be new;
- Competition authorities and regulators struggle to understand the scope and impact of technological developments. But I am glad to add that these conferences do help;
- The Commission, and most of the national competition authorities, develop their views from case to case, and only issue guidelines once the case law has clarified some key issues;
- As it is unpredictable which authority will be the first to be confronted with new issues, and some decide more swiftly than others, it is equally unpredictable who will be the first to develop a case law that may not always prove to be a basis for consensus, as is illustrated by the *Booking.com* case;
- Without enhanced concertation and preferably ex ante guidance we risk confusion and significant disruption of the internal market. This prompted the European Competition Network (ECN) to adopt an early warning procedure which has intensified the exchange of experiences in ECN working groups, in the OECD Competition Committee, workgroups of the International Competition Network and countless conferences such as this one.

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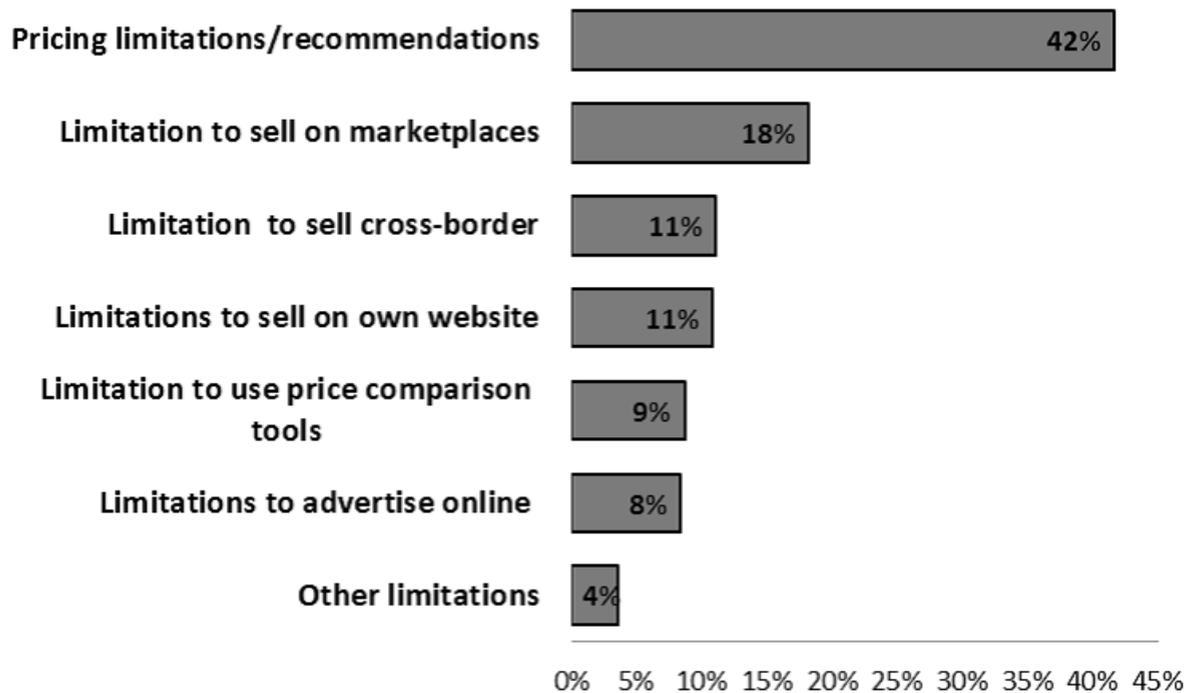
1 Richard A Posner, 'Antitrust in the new economy' (2001) 68(3) *Antitrust Law Journal* 925-943.

2 European Commission, 'Final report on the E-commerce Sector Inquiry' (10 May 2017) SWD(2017) 154 final <http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf> accessed 15 December 2018.

3 *ibid.*

4 Comeos, 'E-commerce Belgium 2017' <https://static.comeos.be/E-Commerce_Study_Comeos_2017_4.pdf> accessed 15 December 2018.

5 Extrapolation.



Graph 1. Proportion of Retailers with Contractual Restrictions, Per Type of Restriction

Source: European Commission, 'Final report on the E-commerce Sector Inquiry' (10 May 2017) SWD(2017) 154 final <http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf> accessed 15 December 2018

Decision making should not only be coherent, but also swift for competition authorities to be relevant on online markets. Regardless whether you think regulation can adapt more rapidly to change than competition cases can hope to give it direction or not, both instruments tend to be too slow to respond to the needs and certainly the expectations of stakeholders.

Competition authorities and regulators need to speed up their working methods without losing sight of quality in the due process and output.

III. The Meaning of a Challenge to Enforcement

A challenge to enforcement means that we need to rethink the way we interpret concepts and apply tools, but that does not imply that we need new concepts

I am not convinced that we need new tests, principles or concepts. But we need to apply existing con-

cepts to new sets of facts. And the identification of the relevant facts may require new tools.

For instance:

- E-commerce transactions are assimilated with passive sales under paragraph 52 of the 2010 Guidelines. Does that mean that all restrictions of the ability to purchase on websites, ie of passive sales, are hard core and by object? A prohibition to sell on line: yes (the 2011 *Fabre* case⁶); a prohibition to sell on third party platform: no in case of luxury product (the 2017 *Coty* case⁷); but what is a luxury product? And quid for other considerations than the preservation of a luxury image: the debate goes on. I am sure also today!
- Hard core restriction rules such as the prohibition of resale price maintenance (RPM) clauses apply

6 Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la Concurrence, Ministre de l'Économie, de l'Industrie et de l'Emploi* [2011] ECLI:EU:C:2011:649.

7 Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* [2017] ECLI:EU:C:2017:941.

to online as they do to offline businesses, ie as restrictions by object: see the four recent decisions on RPM on online markets⁸. In these decisions, the Commission focused on the supplier, and that may well signal a tendency given the difference in burden of proof between a hard core restriction and other types of restrictions of competition that may fall short of a price fixing.

The increased emphasis on fairness is not in contradiction with the aim at (economic) efficiency. It is not efficient to be unfair because such policy will lack legitimacy and prove to be unsustainable. And it is equally unfair to a range of stakeholders to be inefficient.

The fairness debate is in my opinion not a reason to throttle back on the more economic approach – but we may need a different kind of economics to supplement the more econometric approach. I do think that we need more behavioural economics and that behavioural economics must develop beyond the anecdotal.

And we should also bear in mind that the Court never really endorsed an exclusive focus on consumer welfare⁹. The Commission also referred in its notice on priorities for the enforcement of Article

102 TFEU to the protection of the competitive process¹⁰.

IV. Competition Law and Regulation Can Be Partners – But Online Markets Are Also a Challenge to (National) Regulation

Competition law and regulation have sometimes been seen as incompatible competitors. But already in the period of liberalisation of the telecom markets between 1995 and 2000¹¹, competition law cases such as the 1996 *Atlas*¹² and 1997 *Unisource*¹³ decisions have been used as a laboratory for future regulation, and competition law allowed later the enforcement of regulatory principles against undertakings.

Some challenges of the digital economy can be addressed more effectively by regulation, if only because regulations apply *erga omnes*. See eg the rules on geo-blocking, roaming and interchange fees.

However, to the extent that, eg a Member State, wishes to impose specific regulatory guarantees on a given geographic market, the enforcement of such rules may prove almost impossible without jeopardising a broader range of free movement principles than the ‘traditional’ application of a ‘cassis de Dijon’ type approach. Regulation of online markets requires therefore EU regulation (as is the case for geo-blocking and interchange fees).

V. Dealing with Online Markets – Opportunities to Strengthen the Legitimacy of Competition Authorities

We should not be blind for the links between the issues discussed in this conference and the challenge to our societies, and in particular to competition authorities, from populist and other extremist political tendencies, basically fuelled by the fear for change.

Competition is seen as benefiting the privileged at the expense of all who are less productive, and who cannot cope with the stress of ever accelerating change and successive restructurings,

It is therefore very important that we show a response to the digital challenge. Understanding the impact of technology is a challenge, but showing that

8 Commission decisions of 24 July 2018 concerning Asus, Denon & Marantz, Philips and Pioneer; see European Commission, ‘Antitrust: Commission fines four consumer electronics manufacturers for fixing online resale prices’ (Press release, 24 July 2018) IP/18/4601 <http://europa.eu/rapid/press-release_IP-18-4601_en.htm> accessed 15 December 2018.

9 See eg Case C-501/06P *GlaxoSmithKline* [2009] ECLI:EU:C:2009:610, para 63: ‘First of all, there is nothing in that provision to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object. Secondly, it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, Article 81 EC aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price’. See however for the General Court: Joined Cases T-213/01 and T-214/01 *Österreichische Postsparkasse AG and Bank für Arbeit und Wirtschaft AG v Commission of the European Communities* [2006] ECLI:EU:T:2006:151.

10 Communication from the Commission, Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (2009/C 45/02).

11 *Phoenix/GlobalOne* (Case IV/35.617) Commission Decision of 17 July 1996; and *Unisource* (Case IV/35.830) Commission Decision of 29 October 1997.

12 *Atlas* (Case IV/35.337) Commission Decision of 17 July 1996.

13 *Unisource* (n 11).

competition law can help citizens to regain control over daily choices is an opportunity. I see it in this context as extremely welcome that Commissioner Vestager helps to refocus the fairness debate by insisting that not competition but lack of competition

is unfair to consumers, start-ups, SMEs and all who risk becoming the victim of cartels and abuse of dominance. That competition is not about losing control over one's life, but protecting the right to choose and giving it back when necessary.