Recap of the 2nd CoRe Conference ‘Competition Policy and Online Markets: Key Cases, Trends and Perspectives’

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On 24 October 2018, the European Competition and Regulatory Law Review (CoRe), the Computer and Communications Industry Association (CCIA) and the Vrije Universiteit Brussel (VUB) held their second conference about the challenges of competition law policy in digital markets. During the fully booked conference some of the hottest cases and questions with regard to competition policy in digital markets were discussed by experts from practice and academia. This report brings you some of the key issues that were discussed at the conference.¹

I. No Need to Reinvent the Wheel – Just Learn How to Make It Turn Better

The event kicked off with an excellent keynote speech² by Jacques Steenbergen starting with a great quote describing the state of current practice in the digital economy, accurately pointing out that ‘none of us has seen it all, we have only seen the beginning’. Throughout the speech it was made clear that the growing popularity of e-commerce with consumers will bring about many domestic as well as cross border challenges to competition and society as a whole. Tackling the competition law issues does not require, however, reinventing competition law or adding additional concepts to the current framework, but rather revisiting their application and interpretation in a manner that is compatible with the digital economy. On the operational side, competition authorities should take perhaps a more pro-active and better coordinated approach so as to anticipate and prevent anti-competitive practices rather than waiting for them to occur before intervening. At the same time, it is also important that policy makers are willing to accept the need for regulation and take legislative actions, as competition law enforcement alone may not be suitable to tackle every problem.

The underlying theme of building on past lessons while being receptive to future developments conveyed by the keynote speech served to a great extent as the starting point for the following expert panels.

1. Panel 1: What Will Be the Main Future Challenges and Developments in Enforcing the Rules in the ‘Digital Economy’?

Chair: Marianela López-Galdos (CCIA)
Speakers: Jacques Steenbergen (Belgian Competition Authority), Maria Coppola (US Federal Trade Commission), Andrew Leyden (General Court of the European Union), Antonio Capobianco (OECD) and Ben van Rompuy (VUB and Leiden University)

Learning and improving: Competition authorities and courts should set up or at least engage actively in initiatives aimed at increasing the current knowledge and understanding of digital markets. This includes for example engaging with experts from the academia as recently done by the Commission, setting up public interviews such as the FTC hearings³


² See in this issue the event article based on that keynote: Jacques Steenbergen, ‘On Competition Policy and Online Markets’ (2019) 3(1) CoRe V.

as well as consulting vast studies covering multiple industries and jurisdictions as performed by the OECD.  

Consumer welfare and fairness benchmarks: Consumer welfare has always been and always will be part of the EU competition law analysis but it is by no means the only benchmark for evaluating the desirability of all business practices. By contrast fairness should not be perceived as having a comparable status in the context of the legal analysis but should be seen rather as a reason or explanation to express why investigations have been triggered in the first place.  

Market definition: Market definition is unlikely to be excluded from the competition law analysis given that it is often either a legal prerequisite when establishing dominance or a practical necessity when assessing the effects of suspicious practices. The simple fact that it needs to be applied in a ‘digital setting’ does not change this reality.  

2. Panel 2: Blockbuster Cases: Google Android – What to Make of It?  

Chair: Robert Klotz (Sheppard Mullin)  
Speakers: Brice Alibert (DG Competition), Torsten Koerber (University of Cologne), Alfonso Lamadrid (Garrigues), James Aitken (Freshfields Bruckhaus Deringer)  

As expected, the discussion of the Android case in the second panel of the day consisted of many (at times factual) points of debate concerning the key elements of the Commission’s decision. Reflecting on the impact of the decision, there was hardly any common ground to be found among the speakers.

Market definition: The scope of the relevant market in this case was far from clear-cut given the opposite views of the speakers. One of the main issues of debate was whether IOS (Apple) is part of the same relevant market with Android. Furthermore, there was also disagreement on how the relevant market for Android should be defined as it entails a multi-sided system. Should the market definition take into account only the consumer and the original equipment manufacturer’s (OEM) side or include other aspects as well – like advertisers. Beyond the market definition of the OS itself, the speakers could also not agree on whether Google was indeed dominant in the relevant market for Android app stores.

Effect of Google’s contracts and pre-installation: Perhaps the greatest point of disagreement involved the contractual relation between Google and the OEMs wishing to include Android. Here some of the addressed questions were: whether the possibility to have Android without Google Play was a realistic one; whether the pre-installation of Google apps in prominent places of the Android interface of smartphones had a detrimental effect on competition; whether the possibility to install third party apps in addition to the pre-installed Google apps allowed for competition based on consumer choice; whether the anti-forking agreements and the pre-installation obligation coupled with the bundling of Google’s apps were necessary for the recoupment and survival of Google’s business model.

Zero-pricing, fragmentation and innovation: The announcement made by Google that it will have to introduce a paid model for Android following the Commission’s decision in this case was of course not left out of the discussion. The question in this matter focused on whether such a payment obligation may indeed be detrimental for consumers in the long run. In other words, would consumers get the same for more money or will competitors have a better change to enter the market and offer alternatives to the Google suit for a competitive price. Finally the relation between fragmentation (Google forks) and innovation was also addressed and the speakers once again held opposite views with regard to role that Android forks may have on innovation and competition. The Commission considers forks the most credible alternative to Google’s Android version, whereas
Google’s supporters maintained that such forks hamper the development of compatible apps and software updates thus undermining the image of Android OS as a whole.6

II. Learn From the Past and Plan Ahead

Following the first two panels Bill Kovacic delivered yet another great speech on the enormous number of lessons that can be learned from the past when taking up cases in the digital economy, as well as in other areas, in the future. One of the most important points made in this speech was the need for competition authorities to have a clear action plan when taking on cases. Competition authorities should be clear when identifying in each case:
• what the problem is;
• whether it is a general problem or one related to a specific collection of facts or companies;
• what is the expected and desired outcome of the remedy;
• if the competition law remedy does not lead to a satisfactory outcome regulation should perhaps be considered.

Finally, looking back on the most contested break-up cases in the history of US antitrust, the public was reminded that realizing the true value of those decisions has taken us years. It is only now, approximately 30-50 years later, that the previously most ridiculed and debated interventions are perceived as success stories that have changed the state of competition and innovation for past and future generations. One cannot help but wonder if the same will be said about the current cases against Google, Amazon and Facebook will follow a similar pattern.

Marketplace bans after Coty: The discussions around Coty were as expected the centre of gravity of the third panel, in which the future implications of the case were examined. Several questions remain yet to be answered in practice in this regard: (i) what is luxury and who determines it?, (ii) does Coty cover only luxury products or also branded one?, (iii) can a marketplace ban be legal in one member state and hardcore restriction in another due to more reliance on such platforms?, (iv) should the gravity of the marketplace ban be assessed in combination with other restrictions in a distribution setting?

Algorithmic pricing: The E-commerce inquiry has identified a great deal of reliance on automated pricing and price-monitoring software, however, the use of such tools is, generally speaking, legal. Undertakings are allowed to adapt intelligently to the conditions of the market even if this leads to a de facto state of parallel pricing. The risk of dynamic and individualised pricing is real as companies are capable of pursuing such strategies, however, the negative public opinion in this matter prevents them from implementing this kind of pricing system. By contrast, algorithmic cartels are at the moment a more theoretical than practical issue.7

2. Panel 4: The Role of Data and Data Protection in Competition Enforcement?

Chair: Evelina Kurgonite (Samsung)
Speakers: Mariateresa Maggiolino (Università Bocconi), Kristina Nordlander (Sidley Austin), Nico van Eijk (University of Amsterdam), Agustin Reyna (BEUC European Consumer Organisation)

Data and market power or price: The use of data as a substitute for price in competition law assessments

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was regarded as unfit due to the different nature of data, namely being non-rivalrous and non-exclusive. Similarly, having a great amount of data does not automatically mean that a company has great market power as the value of data lies not only in its quantity but also in the quality aspects of it and of course in the ability to use it intelligently.

*Enforcement of competition law and data:* Data is already regulated in many other national and European legal frameworks, which may be the more suitable legal basis for dealing with misuses of data. It was pointed out in the panel that data can play a limited role in the assessment to the extent that it clarifies and complements the nature of the investigated practices. Beyond this there is no need for competition law to intervene in matters that are already covered by other separate legal frameworks and certainly not need to create a sub-practice of competition law dedicated specifically to data related matters. Instead, enforcement agencies and policy makers should first make use of the existing tools and evaluate their combined effectiveness before considering the introduction of new practices or regulation.

**III. Final Note**

Looking back on these topics and attendance it can be said the conference was successful giving both speakers and audience sufficient food for thought for the coming time. Hopefully many of you that could not make to this event will join us next time in 2019 as the conference is establishing itself as an annual fixture in the EU competition law calendar.