COMPETITION & ANTITRUST - EUROPEAN UNION

Competition and antitrust in the digital age

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While the digital economy offers abundant opportunities to customers and retailers alike, it also raises a number of competition concerns, including the impact on bricks-and-mortar businesses, the potential for abuse of market power by major digital platforms and the challenge of fostering online competition while preventing free riding. Competition authorities must evolve and adapt traditional antitrust principles and approaches to meet the challenges of the rapidly changing digital market.

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What impact has the rapidly changing digital market had on competition in your jurisdiction and how have legislators and competition authorities responded?

Digital markets are a priority under existing EU competition policy. The fast-paced nature of the market has posed challenges for competition authorities and legislatures alike. However, EU Competition Commissioner Margrethe Vestager has stressed that digitalisation does not require a complete overhaul of competition law or the creation of sector-specific rules, but rather adaptation to the features of digital markets. At the same time, according to the European Commission, fully reaping the benefits of the digital revolution necessitates a consistent regulatory framework. This is why turning the digital single market into a reality has been a European Commission priority since the start of its mandate in 2014.

Digital cartels?

The new digital ecosystem has thus seen the rise of new means of anti-competitive behaviour, transforming what have so far been traditional competition law infringements – for example:

- In *Eturas* (2016) – a case involving an alleged cartel between travel agencies in Lithuania – the European Court of Justice (ECJ) confirmed that price fixing can be achieved not only through human coordination, but also via automated means. In this case, the coordination took place through an e-commerce platform – the Eturas online travel booking system – which sent an electronic message proposing that each agency grant discounts capped at 3%. The ECJ ruled that a travel agency which understood the measure communicated and did not distance itself from it would be presumed to participate in a cartel, unless it could demonstrate that it objected to the communication or systematically set prices disregarding the rule.
- In a 2016 UK case, an online seller, Trod Limited, agreed with one of its competitors, GB Posters, not to undercut each other's prices for posters and frames sold on Amazon's UK website. The agreement was implemented by using automated re-pricing software, which the parties configured to give effect to the illegal cartel. Trod was fined a total of £163,371 by the UK national competition authority, while GB Posters received immunity for having reported the cartel.
- Advocate General Szpunar made a brief remark in the *Uber* case that use by competitors of the same algorithm to calculate prices is not in itself unlawful, but might give rise to hub-and-spoke conspiracy concerns. The case concerned whether Uber could be classified as an information services provider or transportation service. To reinforce the argument that Uber should be considered a transportation service, the advocate general noted that the alternative interpretation would classify Uber as a platform which calculated the fees for each of the notionally competing Uber drivers using the platform, so potentially raising competition law risks.

- In its contribution to an Organisation for Economic Cooperation and Development discussion on algorithms and collusion, Directorate General for Competition noted two principles underlying the treatment of algorithmic pricing:
    - illegal pricing offline is likely to remain illegal online; and
    - algorithms are under a company's control, thus a company remains liable for its actions.

The European Commission's findings in the e-commerce sector inquiry suggest that this will continue to be an important compliance area. The inquiry noted that the majority of retailers track competitors' prices, with more than two-thirds of those doing so via automated software programs. An overwhelming majority in fact adjust their own prices to those of competitors. In addition, the inquiry noted that collection by marketplaces or direct online sellers of their retailer's pricing information might require safeguards to avoid anti-competitive consequences.

Platforms' use of MFN clauses

With online platforms becoming increasingly popular, most-favoured-nation (MFN) clauses have increasingly captured the attention of both the European Commission and national competition authorities. So far, the focus has been on the markets for hotel accommodation and e-books.

- Between 2012 and 2015 the European Commission supervised the simultaneous actions of several national competition authorities (ie, Austria, France, Germany, Ireland, Italy, Sweden and the United Kingdom) which brought proceedings against hotel booking platforms (ie, Booking.com, HRS and Expedia) for imposing parity clauses on their hotel contractors. The clauses provided that online platforms would automatically benefit from:
    - the same rates and conditions as those granted to their competitors (wide MFN); or
    - those on the hotels' direct online channels (narrow MFN).

  Germany's national competition authority prohibited certain MFN clauses. The French, Italian, Swedish, Irish and UK national competition authorities accepted commitments. France and Austria legislated to prohibit online travel agents' price parity clauses.

- In June 2015 the European Commission opened a formal antitrust investigation into some of Amazon's e-books distribution agreements with publishers. The investigation focused on MFN clauses which allegedly granted Amazon the right to be informed of more favourable or alternative terms offered to its competitors, and/or the right to terms and conditions at least as good as those offered to its competitors. The European Commission took the view that these clauses make it more difficult for other e-book platforms to compete with Amazon, by reducing publishers' and competitors' ability and incentives to develop new and innovative e-books and alternative distribution services, while possibly limiting competition between different e-book distributors. In early May 2017, the European Commission accepted Amazon's commitments to no longer enforce or introduce these clauses in agreements. This was not the first time that the e-book sector was under scrutiny. In 2013 the European Commission investigated price parity clauses contained in contracts entered into between Apple and various publishers. This case also resulted in the parties offering commitments to remove price parity clauses from their contracts.

Data as an asset

Competition authorities have become sensitive to the growing importance of Big Data in today's economy. Vestager has emphasised that merely holding a large amount of data may not be problematic, but might need to be factored into the competition law assessment under merger control. Under exsting merger rules, the commission and national competition authorities examine mergers that meet certain turnover thresholds.

Following the *Google/DoubleClick* and *Facebook/WhatsApp* cases, several respondents (including the European Data Protection Supervisor) argued that the existing EU merger control regime should be updated to capture proposed concentrations or acquisitions of less established digital companies, which may hold significant quantities of personal data that have yet to be monetised.

The European Commission is examining whether a value-based threshold could be an appropriate proxy for identifying mergers with an EU dimension. The rationale is that the new threshold would

take into account both the future market capitalisation of an IT company and how data acts as a currency with which consumers pay for free services they receive via the Internet. A 'value of transaction' merger threshold has already been adopted in Germany and Austria.

At the same time, the final report of the e-commerce sector inquiry confirmed that competition concerns could arise with regard to data collection and usage. For example, exchanging competitively sensitive data between online marketplaces and third-party sellers or manufacturers with their own shops and retailers may be anti-competitive where the same companies are also direct competitors on a given set of products or services.

Tackling unjustified geo-blocking

With the global economy becoming digitalised at a rapid pace, the European Commission emphasised the need to ensure better access for consumers and businesses to digital goods and services across Europe. E-commerce in the European Union has grown steadily, with the percentage of people ordering goods or services online having grown from 30% in 2007 to 55% in 2016. One of the European Commission's primary goals is to tackle unjustified geo-blocking (ie, commercial practices that prevent online customers from accessing and purchasing a product or a service from a website based in another member state, or which automatically re-route them to a local site). Geo-blocking can also occur when trying to access or purchase online copyright-protected content from another member state.

The European Commission has proposed addressing geo-blocking in the European Union via legislative proposals and the competition law toolbox.

Legislative proposals

- Geo-blocking Regulation – this proposal aims to address the problem of customers being unable to buy products and services from traders located in a different member state, or being discriminated against in accessing prices compared to nationals or residents. The proposal defines specific situations where there can be no justified reason for geo-blocking or other forms of discrimination based on nationality, residence or location.
- Cross-border portability of online content – the European Commission has proposed a regulation that will allow consumers to access their online content subscriptions when they are temporarily outside their member state of residence. The European Parliament, the Council of the European Union and the European Commission reached an agreement on this proposal on May 18 2017.
- Reform of the Satellite and Cable Directive – this proposal aims to address potential consumer demand to access broadcasters' content in member states other than the state of origin, and foster the cross-border distribution of television and radio programmes online by facilitating rights clearance for broadcasters' online services. It also extends the system of compulsory collective management applicable to cable re-transmission to other equivalent digital re-transmissions (eg, internet protocol television).

Competition law

- E-commerce sector inquiry – the European Commission sector inquiry concluded that many retailers still do not sell cross-border for at least one of their product categories. Refusing delivery to customers in other member states and accepting payments from them are classified as the most prominent forms of geo-blocking. Intervention would be considered only if geo-blocking is the result of restrictions in bilateral agreements, not a unilateral business decision of a non-dominant company. In February 2017 the European Commission opened three separate investigations into holiday accommodation, video games and consumer electronics pricing practices that may be problematic under Article 101 of the Treaty on the Functioning of the European Union .
- Antitrust investigation in pay-TV services – this investigation is examining contractual provisions in licensing agreements between six US film studios (Disney, NBC Universal, Paramount Pictures, Sony, Twentieth Century Fox and Warner Bros) and Sky UK, which prevent Sky UK from providing its services across borders (eg, by refusing potential subscribers from other member states or blocking access to films through its online pay-TV services or through its satellite pay-TV services to consumers outside its licensed territory).

Ensuring fair and innovation-friendly platform economy

Complementing enforcement action under competition law, the European Commission is conducting a fact-finding exercise on platform-to-business trading practices. Concerns relate to platforms favouring their own products or services, discriminating between suppliers and sellers and restricting access to and the use of personal and non-personal data. The absence of transparency and redress mechanisms are additional matters raised by stakeholders. The European Commission aims to propose legislation by the end of 2017 to address unfair contractual clauses and trading practices identified in business-to-business relationships.

In terms of market definition, are online services considered to be in the same market as traditional services in your jurisdiction? What impact has this had on competition?

Market definition constitutes the point of departure for an analysis of competitive forces. According to the applicable legal test, the delineation of the relevant market is in essence a matter of substitutability. If traditional and online services can be regarded by consumers as substitutable due to their characteristics or price, they fall within the same product market. Demand substitutability generally consists of the strongest competitive constraint exercised on firms and is considered to carry the heaviest weight in the determination of the relevant market.

The key question is whether a supplier of a traditional service should introduce a 5% to 10% price increase and whether enough customers would be inclined to switch to online (and *vice versa*), making the price rise unprofitable. An affirmative answer may suggest that the market encompasses both traditional and online services.

The question of whether online and offline services are part of the same product market has already been dealt with by the European Commission in a plethora of merger cases. However, no uniform guidance is provided, as the answer is dependent on the service under consideration.

Travel agency services

In *Dnata/Stella*, *American Express Company/Qatar Holding/GBT*, *Axa/Permira/Opodo/Go Voyages/Edreams* and *Thomas Cook/Travel Business of co-operative group/Travel Business of Midlands Society*, while leaving the precise market definition open, the European Commission considered a possible sub-segmentation of the market for the distribution of leisure travel agency services into offline travel agencies (package and independent holidays) and online travel agencies (package and independent holidays and leisure flights).

Payments

- Mobile payments versus existing offline payments – in *Telefonica UK/Vodafone UK/Everything Everywhere/JV*, the European Commission examined whether the retail distribution of mobile wallet services (including both offline and online mobile payments) constitutes a separate market from existing offline payment services (near field communication (NFC) enabled credit and debit cards and traditional means of payment, such as credit, debit cards and cash). While it considered that mobile payments are likely to continue to coexist in the foreseeable future with non-mobile means of payment, including NFC and non-NFC-enabled credit and debit cards, the European Commission ultimately left the question open.
- Mobile payments versus existing online payments – in *Telefonica UK/Vodafone UK/Everything Everywhere/JV*, the European Commission further considered that the retail distribution of mobile wallet services (including both offline and online mobile payments) may constitute a market separate from existing online payment services (through credit cards, debit cards and PayPal, online on a static personal computer, tablet or mobile handset). However, the commission once again left the question open.
- Offline versus online mobile wallet services – in the same vein, the European Commission noted in *Telefonica UK/Vodafone UK/Everything Everywhere/JV* that online (eg, Google Wallet) and offline (via NFC-enabled mobile devices) mobile payments are unlikely to be part of the same relevant product market.

In *BNP Paribas Fortis/Belgacom/Belgian Mobile Wallet*, the European Commission equally left the

definition of these potential markets open, primarily due to the rapidly evolving payment landscape which sees new innovative technologies and platforms being developed.

Sale of books

Books are sold to final consumers through a wide range of different channels, including independent book stores, book chains, hypermarkets, book clubs, the Internet, mail orders, credit sales and telemarketing. In *Ahold/Flevo* and *Lagardère/Natexis/VUP*, the European Commission segmented offline and online sales channels, identifying the existence of a distinct 'distant sale' segment within the market for the sale of books to final consumers, comprising book clubs, mail orders and online sales. In *Bertelsmann/Kooperative Förbundet/Bol Nordic*, the European Commission further considered a narrower market for the online sales of books.

However, in *Egmont/Bonnier* the European Commission departed from this direction and identified a single market for all book sales to final consumers, given that the market investigation (covering the Danish market) did not bring forward any element on the basis of which a separate distant sale market might be identified.

Looking further at the upstream market for the acquisition of publishing rights, the market investigation in *Bertelsmann/Pearson/Penguin Random House* revealed strong indications that publishing rights for English language print books and e-books belong to the same product market, as in the majority of cases publishers seem to acquire both rights. On the contrary, results were mixed with regard to the acquisition of publishing rights for audiobooks.

Retail distribution

Although having left open the question of whether all retail sales channels form one product market, the European Commission's investigation in *Otto/Primondo Assets* revealed that the more standardised products within a product category are, the more likely it is that bricks-and-mortar and distance selling (ie, home shopping) could belong to the same relevant product market. This was mainly attributed to the fact that:

- there is a degree of interrelation between the two channels, depending on the product category, in the sense that customers do not necessarily purchase goods in the channel that they first consulted; and
- both channels serve different customers' needs and thus have different advantages and disadvantages from a customer's viewpoint, rendering them complementary rather than substitutable.

Ultimately, the competitive pressure exerted by home shopping and by bricks-and-mortar shops on each other was considered on a member state and sector (non-food retail) level.

What types of conduct constitute abuse of dominance in the online space and what practices are most likely to catch out unwary online players?

Common online business practices may attract abuse claims when engaged in by an allegedly dominant company. Competing to integrate new services or features may draw allegations of tying. Online operators' efforts to gain greater reach through free or 'freemium' models may be allegedly predatory. The race to secure the best online real estate, to leverage a unique set of big data or secure a prime position to offer services to a well-used website's audience may also result in allegations of foreclosure.

- Pre-installation or service integration as a form of product tying – an online player may leverage its market power in one market to foreclose competition in a separate market. In 2009 the European Commission fined Microsoft for tying its Internet Explorer web browser to its Windows operating system. Users could not obtain Windows without also obtaining Internet Explorer. Alternative web browsers could be installed only in addition to Internet Explorer, which would rarely happen because of user inertia. The European Commission is investigating allegations that Google leverages its market power in the market of operating systems by requiring manufacturers to whom it supplies its Android operating system to also pre-install other Google services (eg, Google Chrome).
- Exclusivity obligations in agreements with third parties – this may involve exclusive rights for

an online player with market power to advertise on popular platforms or offer services to popular platforms. In the context of an ongoing investigation against Google, the European Commission is investigating allegations that Google does not allow third-party websites on which Google places ads to also source ads from Google's competitors. The European Commission is also concerned that Google requires third-party websites to reserve the most prominent spaces for Google ads and obtain Google's approval before displaying ads from Google's competitors.

- (Constructive) refusals to deal – where an online player is vertically integrated and has some sort of gatekeeper position in the upstream market, there may be concerns that it uses that position to foreclose competitors' access to users in the downstream market. In 2013 the European Commission investigated a number of large telecommunications operators that provide both internet connectivity with other networks at the wholesale level and internet access services to end users. The European Commission was concerned that the operators charged excessive fees to interconnect with other networks at the wholesale level, which could have the effect of providing an unfair advantage to the operators' own proprietary content services delivered to end users. In addition, the European Commission recently fined Google because it allegedly used algorithms that systematically favoured its own comparison shopping service over those of competitors by giving it top ranking in Google's general search results. In 2017 a UK judge ruled in favour of Google regarding similar complaints made by Streetmap. Streetmap alleged that Google abused its dominant position by prominently placing a clickable image from Google Maps at the top of the search results, whereas the services of Google's competitors appear in the form of links.
- Predatory pricing by means of free products – the emergence of new business models in two-sided markets means that products may be provided to users free of payment. Such free provision may be counterbalanced by data collection and income received from advertisers or by purchases of product versions that offer more functionalities. There have been complaints that the free provision of products amounts to predatory pricing. In 2012 Bottin Cartographes argued before a Paris court that Google abused its alleged dominant position by zero-pricing the Google Maps application program interface. The court sided with Bottin Cartographes, but the judgment was reversed at a higher instance.
- Data collection to lock users in and foreclose competitors – users share data with online players as they use their products. This helps online players to further personalise products. There is a concern that if online players do not share the data that they collect with competitors, users will be less willing to switch between competing products. The German national competition authority is considering this issue in its ongoing investigation against Facebook's alleged abuse of dominant position through the terms and conditions on the use of user data.

What steps are competition authorities in your jurisdiction taking to prevent online retailers and service providers from free riding on the investments of bricks-and-mortar retailers and service providers?

EU competition policy encourages online sales as a means of completing the EU single market. Suppliers must not restrict retailers from advertising or selling products online.

This raises free-riding concerns. Bricks-and-mortar retailers complain that customers benefit from their pre-sale services, but then purchase the products from online retailers. In turn, suppliers are concerned that free-riding may disincentivise bricks-and-mortar retailers from investing in high-quality services (eg, by retaining qualified and trained personnel).

Suppliers find it difficult to address free-riding concerns by bricks-and-mortar retailers. In 2016 Ultra Finishing – a bathroom-fittings manufacturer – was fined almost £800,000 for resale price maintenance in the United Kingdom. Offline retailers warned Ultra Finishing that they would no longer promote its brand because of internet retail outlets butchering prices to the point where it was impossible to compete. In response, Ultra Finishing adopted an 'e-tail' policy recommending online prices not to go 25% below recommended resale prices. The UK national competition authority found that, in reality, this was far from a recommendation. Ultra Finishing monitored online retailers' pricing daily and key accounts reported 'idiot sellers'. Online retailers disregarding the recommendation faced reduced discounts, were prevented from using product images and mere refused orders.

There are indications that there is a growing understanding among enforcers of the need to ensure that physical shops can survive as e-commerce booms. In the EU-wide sector inquiry into e-commerce, aimed at gathering evidence on potential barriers to competition in the online space, the European Commission identified a number of business practices that may limit online sales. But it also acknowledged the legitimacy of free-riding concerns by bricks-and-mortar retailers. Recent public statements made by Vestager also indicate that a shift in attitude may be underway.

As it stands, EU competition rules allow suppliers to take the following steps, among other things, in order to address free-riding concerns and restore the incentives of bricks-and-mortar retailers to increase sales efforts:

- support the sales efforts of a bricks-and-mortar retailer by means of a fixed-fee payment or an additional discount to a bricks-and-mortar retailer to support specific marketing efforts (eg, targeted, in-store or on-site promotions);
- require that retailers sell the products from specific locations or addresses;
- require that retailers sell a certain amount (whether in volume or value) of products via bricks-and-mortar stores;
- set quality standards for online sales that are equivalent to the quality standards imposed for sales in bricks-and-mortar shops (eg, require the online retailer to provide after-sales services);
- exclusively allocate a territory or customer group to a specific retailer – other retailers (including in the online space) may not actively solicit orders from customers residing in that territory or belonging to that customer group. Exceptionally, where establishing a new brand or an existing brand in a new market requires substantial (sunk) investments by the exclusive retailer, the supplier may also require other retailers not to respond to unsolicited requests from customers residing in that territory or belonging to that customer group during the first two years of sale of the products;
- set up a selective distribution system which limits sales of the products to retailers that meet certain criteria, including a requirement for authorised retailers to run at least one bricks-and-mortar shop; and
- charge different prices to hybrid retailers on the one hand and pure online retailers on the other in the absence of dominance – price differentiation is allowed so long as it does not amount to dual pricing (ie, charging different prices to the same retailer, depending on whether the product is sold online or offline).

How can competition authorities best ensure that these steps do not hinder innovation or consumer choice and promote the continued evolution of online services?

EU competition authorities closely examine online sales restrictions imposed by suppliers. Among other things, a supplier may not:

- limit a retailer's ability to advertise or sell online;
- limit the quantity of online sales made by a retailer;
- charge a retailer a higher price for products intended to be resold online than for products intended to be resold offline; and
- restrict the territories or customer groups to which the retailer sells the products online.

Exceptionally, a retailer's ability to actively solicit orders from customers online (eg, by sending out emails or using territory-based banners on third-party websites) may be limited, where those customers reside in territories or belong to customer groups which are exclusively allocated to another retailer. However, in practice, online sales are generally considered to be a passive response by retailers to unsolicited orders placed by customers and cannot therefore be restricted.

There is a risk that EU competition authorities adopt an overly restrictive approach to online sales restrictions, which can have a straightjacket effect on brand owners. It may impede the adjustment of their commercial practices (eg, regarding product presentation and quality) to a retail environment that is changing rapidly, and inhibit them from addressing legitimate concerns (eg, free riding).

There have already been instances where this has happened at the national competition authority level:

- The German national competition authority took the position that restrictions on the use of third-party platforms for online sales may amount to a *per se* infringement of competition. In its final report on the EU-wide sector inquiry into e-commerce, the European Commission took a different position, stating that a restriction on the use of third-party platforms does not necessarily mean an outright prohibition of online sales. Rather, a case-by-case assessment is required. The issue is pending before the ECJ for a preliminary reference ruling in *Coty*.
- The German national competition authority required suppliers to apply the same rebates to bricks-and-mortar distributors as to online distributors (ie, not to make distinctions between different forms of distribution). In its final report on the EU-wide sector inquiry into e-commerce, the European Commission clarified that, whereas a supplier may not charge different prices to the same retailer depending on whether the product is sold online or offline, a supplier may set different (wholesale) prices for the same product to different retailers.

In order to ensure a high level of innovation and consumer choice and promote the continued evolution of online services, EU competition authorities should avoid adopting a hardline approach to online sales restrictions. Moreover, EU competition authorities should coordinate more with one another. Following its EU-wide sector inquiry into e-commerce, the European Commission has vowed to broaden the dialogue with national competition authorities within the European competition network in order to contribute to a consistent application of the EU competition rules as regards e-commerce-related business practices.

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