COMPETITION LAW IN THE DIGITAL AGE

MAY 2017

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COMPETITION AUTHORITIES GEARING UP TO FACE DIGITAL CHALLENGES

The digital economy is a hot topic for competition authorities, as is illustrated by our enforcement case tracker below (see Case tracker). The European Commission recently sunk its teeth into the rising use of pricing algorithms; possibly inspired by the UK CMA's and the US DoJ's recent sanctioning of companies for using pricing algorithms to implement cartels. However, the question is whether competition authorities will be able to tackle all possible unwanted effects of algorithms under the competition rules (see Cartels and Pricing Algorithms – The Next Frontier of Competition Law?).

The Commission's recent final report on the E-commerce sector inquiry confirms that the wide-scale use of such software may raise competition concerns. But that is not the only e-commerce related practice mentioned in the report that the Commission is worried about and more e-commerce related enforcement can be expected (see The European Commission's final report on the E-commerce sector inquiry).

The same applies to other undesired anti-competitive effects of the digital economy. Germany recently took legislative action to face the digital challenges by introducing new merger control thresholds. It is also contemplating the setting-up of a separate digital watchdog (See Fit for the Digital Future? The German Lawmaker's Response). Similar challenges arise with the rapid growth of e-commerce and the introduction of mobile payments (see E-payments and Competition Law).

Time will tell how other competition authorities will tackle these issues. But one thing is for sure: companies will face quite a number of new digital challenges soon.

THE EUROPEAN COMMISSION'S FINAL REPORT ON THE E-COMMERCE SECTOR INQUIRY

On 10 May 2017, the European Commission published its final report on the e-commerce sector inquiry, setting out the principal potential barriers to competition identified following an extensive fact gathering exercise. The findings summarised below largely follow the conclusions outlined in the Commission's preliminary report (see our earlier newsletter). Notably, the Commission does not call for the Vertical Block Exemption Regulation (VBER) to be reviewed prior to its expiry in May 2022. This final report will, however, serve as a springboard for further EU antitrust enforcement action.

1. Non-exempted contractual territorial restrictions

The final report re-iterates that "geo-blocking" measures (which range from blocking access to websites to simply refusing to deliver cross-border) based on unilateral decisions fall outside the scope of Article 101. It is only where geo-blocking results from an agreement or concerted practice between undertakings that Article 101 concerns will arise. Unilateral conduct by dominant undertakings may, however, still be caught by Article 102.

The Commission identifies the following contractual cross-border sales restrictions as contrary to the framework laid down in VBER:

- restriction of active sales by retailers outside a designated territory, when these other territories have not been exclusively allocated to other retailers or reserved for the supplier;
- restriction of passive sales; and
- restriction of authorised retailers within a selective distribution network from actively selling outside a limited group of customers.

A Commission proposal for a regulation addressing geo-blocking is currently being negotiated with the European Parliament and the Council. The Commission has also issued proposals for the modernisation of EU copyright rules aimed at facilitating access to digital content across borders.

2. Warning for brick and mortar requirements

The final report acknowledges that a brick and mortar requirement (under which resellers must operate at least one physical shop) can promote competition on distribution quality and/or brand image and that these clauses are generally covered by VBER. However, the Commission re-iterates its concerns that, in certain cases, such requirements are imposed to exclude pure online players. Contractual obligations to operate a brick and mortar shop with no evident link to efficiencies may therefore face further scrutiny under Article 101.

3. Restrictions to sell on online marketplaces

The final report finds that restrictions on the use of online marketplaces (e.g. Amazon, eBay) generally do not amount to an actual prohibition on selling online or restrict the effective use of the internet as a sales channel. Without prejudice to the preliminary ruling currently pending before the Court of Justice in Coty, the Commission therefore concludes that marketplace bans do not constitute hardcore restrictions within the meaning of VBER. However, the final report does not endorse these restrictions as generally compatible with EU competition rules, and emphasises that a case-by-case assessment is required.

4. Restriction on price comparison tools

The final report finds that absolute bans on price comparison tools (which are not linked to quality criteria), potentially restrict the effective use of the internet as a sales channel and could amount to a hardcore restriction under VBER. This reasoning appears to be in line with the Bunderkartellamt's infringement decision relating to Asics, recently upheld by the Düsseldorf Higher Regional Court.

5. "Most favoured nation" or "parity" clauses

The final report confirms the Commission's preliminary conclusion that parity clauses in vertical agreements are covered by VBER, provided the parties' market shares do not exceed 30%. Where market shares exceed 30%, a case-by-case assessment will be required, as their use may for example be justified by a need to recoup investments and avoid free-riding.

6. Dual pricing

According to the final report, pricing practices under which manufacturers set two different wholesale prices for the same product to a hybrid retailer (depending on whether the product is to be resold via the retailer's online or offline channels) constitutes a hardcore restriction under VBER. However, there could be efficiency justifications for such dual pricing, such as addressing free-riding between online and offline retail channels. This creates an interesting opening for the many suppliers and brick and mortar retailers that are confronted with such free-riding and could be worthwhile further exploring.

7. Data exchange

While data-related issues were not a point of focus of the sector inquiry, the final report acknowledges the increasing importance of 'big data' (see our earlier newsletter). In particular, the Commission identifies exchanges of competitively sensitive data (such as pricing information or inventory levels) as a potential competition concern in situations where the relevant companies are direct competitors.

CARTELS AND PRICING ALGORITHMS – THE NEXT FRONTIER OF COMPETITION LAW?

"we will not tolerate anticompetitive conduct, whether it occurs in a smoke-filled room or over the Internet using complex pricing algorithm"' – Bill Baer, Assistant Attorney General US DoJ, 6 April 2015

"as competition enforcers, I think we need to make it very clear that companies can't escape responsibility for collusion by hiding behind a computer program" – Margrethe Vestager, EU Competition Commissioner, 16 March 2017

As widespread internet selling has increased market transparency, pricing algorithms have become, in many markets, an indispensable tool enabling companies to price their products to reflect both consumer and competitor behaviour.

The rise of these pricing algorithms has also been reflected in recent competition case law, with the UK CMA fining Trod (GB Eye received immunity) and the US DoJ bringing a case against Topkins for agreeing on the use of pricing algorithms to implement their cartels. The European Commission is also currently investigating whether certain consumer electronics manufacturers may have participated in a cartel in which pricing software was used to adapt to the prices of leading competitors.

Academics and regulators anticipate that (in future) pricing algorithms will have the potential to enable anti-competitive outcomes not only where a company actively seeks to 'rig the system' by manipulating the algorithm (as in the cases of Trod, GB Eye and Topkins), but also where no such explicitly anti-competitive behaviour exists and instead competing algorithms (through their deep learning and/or increased visibility of the market) determine that tacit collusion will lead to the best possible outcome for each of the competing parties.

The ramifications of this are significant, as not only are today's antitrust laws unlikely to cover these type of actions, but the near instantaneous ability of such algorithms to monitor and react to competitor and consumer behaviour means that the size and nature of markets in which this tacit collusion could effectively occur would potentially become much wider.

With competition authorities and regulators taking an increased interest in the use of such pricing software, antitrust laws may need to be modified to address the new landscape. Authorities might, for example, also change their approach to mergers in markets which are characterised by the widespread use of pricing algorithms, for example by assuming that market transparency is sufficient for a finding of coordinated effects.

Such modifications could also include a requirement for companies to monitor the effects of their pricing algorithms on a regular basis and correct supra-competitive prices, as well as introducing a rebuttable presumption of knowledge of the pricing effects of the algorithms. Indeed, a senior EC official recently suggested that "to stay on the safe side of the law, [a company] should have programmed the software to prevent collusion in the first place", which might suggest an even higher threshold of responsibility for companies.[1]

[1] Johannes Laitenberger, DG Competition, at Maltese Presidency of the EU - Competition Day, in Valetta, 24 April 2017

FIT FOR THE DIGITAL FUTURE? THE GERMAN LAWMAKER'S RESPONSE

Does the digital economy require special treatment by competition law makers and regulators? Although still up for debate, many aspects seem to point in this direction: the importance of social media and big data, the influence of search and pricing algorithms, politicians and consumer protection organisations asking for enhanced scrutiny of large internet corporations; to only name a few subjects currently resonating in the media. Now the German lawmaker has given its response: it is a clear yes.

Reform of the German Act against Restraints of Competition

On March 31, 2017, the German Parliament signed off on new provisions for the German Act against Restraints of Competition (GWB). Some of these modifications directly address the digital economy and, more specifically the regulator's concerns following the Facebook/WhatsApp acquisition in 2014. The new legislation provides the Bundeskartellamt with new tools to make it fit for the digital future including new merger control thresholds, which facilitate the review of acquisitions of startup companies, and new ways to assess market power in platform markets.

New Merger Control Thresholds

The new thresholds will capture transactions involving parties with combined worldwide turnover of EUR 500 million, provided one of the parties involved has domestic turnover of EUR 25 million and the transaction value exceeds EUR 400 million and the target has significant activities in Germany (i.e., the need for a second party to have domestic turnover of EUR 5 million then does not apply).
Although not formally limited to acquisitions of tech companies and digital startups, the lawmaker expressly modelled the threshold to capture transactions such as Facebook/WhatsApp, which would have escaped German merger control. While WhatsApp is Germany's favourite messenger application, it did not generate revenues of more than EUR 5 million in Germany at the time of the transaction.

Market Power on Digital and Platform Markets

Pursuing the rationale of the new merger control thresholds, digital or other services can now be considered a relevant "market" even if users do not pay in money, but rather "pay" with their personal data. Aligning German law with the European Commission's case practice; the lawmaker confirmed that competition law provisions are applicable to social media, online search or comparison machines and other online services even where they are offered "for free".

The new legislation also makes clear that an assessment of market power needs to consider direct and indirect network effects, single- and multi-homing behaviour, access to competitively relevant data and innovation. In preparing this list of factors the lawmaker picked up many of the views published by the Bundeskartellamt's own digital task force June 2016 working paper *Market Power of Platforms* and Networks.

Data Protection and a New Digital Watchdog?

The German government's plans to boost its digital fitness go beyond the introduction of the Bundeskartellamt's new tools. In its March 2017 White Paper on Digital Platforms, the Federal Ministry for Economic Affairs and Energy announced its intention to create a new digital watchdog. Designed as a "think tank" which will "close the digital policy gap at the interface of politics, economy and society", it is supposed to complement enforcement activities of the Bundeskartellamt and its sister agency, the Bundesnetzagentur, by focusing on subjects such as net neutrality, the shared economy, cloud-computing, open data, and M2M (machine to machine).

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E-PAYMENTS AND COMPETITION LAW

CASE TRACKER

The new watchdog may also develop enforcement capacities in the field of consumer protection and protection against unfair competition. In the meantime, consumer organisations are pursuing their watchdog role. The *Verbraucherzentrale Bundesverband (vzbv)* sued WhatsApp in a Berlin Court in January 2017, accusing WhatsApp of illegally collecting and transferring user data between different platforms, notably to Facebook's social network. Following the change of WhatsApp's terms of use in August 2016, vzbv criticized WhatsApp's sharing of data (including phone numbers) with Facebook even for users without a Facebook account. As WhatsApp refused to agree to a cease-and-desist-declaration, vzbv went to court and is now also claiming that the data transferred within the Facebook group since WhatsApp changed its terms of use needs to be deleted.

This data sharing between Facebook and WhatsApp has also become the subject of an investigation by the European Commission. In its statement of objections to Facebook of December 2016, the European Commission alleges that Facebook provided incorrect or misleading information to the Commission in the course of its 2014 review of the Facebook / WhatsApp merger. If the allegations are substantiated, Facebook faces considerable fines for its breach of the Commission's procedural rules.

E-PAYMENTS AND COMPETITION LAW

The rapid growth of e-commerce and the introduction of mobile payments have completely changed the dynamics of the payment sector industry in recent years. The Directive *on EU-wide Payment Services in the internal market* ("**PSD 2**") aims to create an integrated internal market for electronic payments. Its entry into force, in January 2018, will bring sweeping changes to the industry: it will allow third-party payment service providers to access customer accounts and obtain information about them.

A core aim of these reforms is to enable new players to join the payment services market; increasing competition & choice and lowering prices for consumers. Thus, not only banks but also international card schemes, telecom operators, Fintechs and BigTechs such as Facebook, Apple, Google or Amazon will compete for a portion of the electronic payments cake.

However, PSD 2 also imposes strict security requirements for electronic payments and the protection of consumers' financial data. The balance between the need to ensure protection of such data and avoid the misuse of the information, and the obligation to grant third parties access to the data, may not be easy to achieve. Competition authorities have recognised that innovation in this area may only be achieved by active market players cooperating with each other (see for example the EPC case). However, compatibility of those initiatives with competition laws should be carefully assessed since it may involve contacts between, at least potential, competitors. Therefore, this cooperation should comply with Article 101 in order to ensure a balance between both adverse effects on competition and pro-competitive effects. In particular, the indispensability of any restrictions included therein as well as the potential restrictive effects of the agreement.

In this regard, the expansion to date of e-payment systems has only been possible thanks to agreements between financial institutions and/or telecom companies. For example, the joint venture agreements regarding the development of mobile wallets (such as *Everything Everywhere* in the UK and the JV jointly created by Belgacom and BNP Paribas in Belgium) were subject to merger control review by the European Commission. Although these JVs were both cleared unconditionally at Phase 1, the European Commission looked closely at potential foreclosure effects that could result from these JVs and whether alternative players remain active in the market. Other banking industry initiatives to create mobile payment platforms or ensure interoperability between different platforms were subject to the general rules regarding cooperation between competitors but not a merger control review. To date, neither the European Commission nor any Member State national competition authority has raised competition concerns regarding such initiatives but it cannot be excluded that they may be considered in the future.

Competition laws and e-payments regulations are also likely to interact regarding access to infrastructure that could be considered essential to develop new services. A clear example of this are the claims made by financial entities in several jurisdictions regarding the conditions imposed by Apple for the ApplePay service and the limited access to the iPhone's NFC functionality and the negative decision issued by the ACCC regarding the application made by four Australian banks to jointly negotiate with Apple regarding Apple Pay or the claims submitted before the Swiss and South Korean Competition Authorities. Financial entities have claimed that such restrictions are likely to reduce the potential for innovation in mobile wallets and mobile payments and have invoked competition law arguments to sustain their claims.

CASE TRACKER: OVERVIEW OF PENDING AND RECENT RELEVANT ONLINE DISTRIBUTION CASES

Online sales bans:
restriction on selling products/services online

- (EU) Google
  (July 2016, ongoing investigation)
- (EU) Consumer electronics
  (December 2013 Inspections)
  - UPDATE: (EU) Asus
    (February 2017, Opening of proceedings)
  - UPDATE: (EU) Pioneer
    (February 2017, Opening of proceedings)
  - UPDATE: (EU) Philips
    (February 2017, Opening of proceedings)
  - UPDATE: (EU) Denon & Marantz
    (February 2017, Opening of proceedings)
- (F) Bang & Olufsen
  (March 2014 Paris Court of Appeal judgment)
- (PL) Roland Polska
  (May-June 2016, Poland Court of Appeal judgment)
- (UK) Sports & entertainment merchandise
  (August 2016 Infringement decision)
- (UK) Ping Europe Limited
  (August 2016, Statement of objections)
- (UK) Trod / GB eye
  (August 2016, Infringement decision)
  - UPDATE: (UK) Trod / GB eye
    (December 2016, Director Disqualification)

Resale price maintenance:
obligation to use fixed or minimum resale prices

- (D) Portable navigation devices
  (May 2015, Infringement decision)
- (D) CIBA Vision
  (December 2009, Infringement decision)
- (I) Enervit
  (July 2014, Commitments)
- (UK) Ultra Finishing
  (May 2016, Infringement decision)
- (UK) ITW
  (May 2016, Infringement decision)
- (UK) Mobility Scooters
  (October 2014, Infringement decision)

MFNs/Price Parity Clauses:
guarantee to an online platform that supplier will treat the platform as favourably as the supplier's most-favoured-customer

- (EU) Amazon e-books
  (Jun 2015 Opening of proceedings)
  - UPDATE: (EU) Amazon e-books
    (December 2016, Opening of proceedings)
  - UPDATE: (EU) Amazon e-books
    (January 2017, Market Test Notice Art. 27(4))
  - UPDATE: (EU) Amazon e-books
    (January 2017, Proposed Commitments)
  - UPDATE: (EU) Amazon e-books
    (May 2017, Commitments accepted)
- (EU) E-books
  (July 2013 Commitments)

CASE TRACKER: OVERVIEW OF PENDING AND RECENT RELEVANT ONLINE DISTRIBUTION CASES

Hotel bookings:

- (D) HRS
  (January 2015 Düsseldorf Higher Regional Court judgment)
- (D) booking.com
  (Dec 2015 Infringement decision)
- (F) booking.com
  (Apr 2015 Commitments)
  - UPDATE: (F) booking.com
    (October 2015, Decision Court of Appeal Paris)
  - UPDATE: (F) booking.com
    (November 2016, Decision Business Court Paris)
  - UPDATE: (F) booking.com
    (February 2017, Assessment of commitments made by booking.com)
- (I) booking.com
  (Apr 2015 Commitments)
- (SE) booking.com
  (Apr 2015 Commitments)

NEW:

- (EU) Holiday Pricing
  (February 2017, Opening of proceedings)
- (EU) Report on ECN monitoring exercise in the online hotel booking sector
  (April 2017)

Geo-blocking:
preventing online cross-border shoppers from purchasing consumer goods or accessing digital content services

- (EU) Pay-TV
  (April 2016, Commitments)
- (EU) Video games
  (March 2016, Investigation)
  - UPDATE: (EU) Capcom
    (February 2017, Opening of proceedings)
  - UPDATE: (EU) Bandai Namco
    (February 2017, Opening of proceedings)
  - UPDATE: (EU) Focus Home
    (February 2017, Opening of proceedings)
  - UPDATE: (EU) Koch Media
    (February 2017, Opening of proceedings)
  - UPDATE: (EU) Zenimax
    (February 2017, Opening of proceedings)

Dual pricing:
charging different prices for the same product/service when sold online.

- (D) LEGO
  (July 2016, Commitments)
- (D) Gardena
  (November 2013, Commitments)
- (D) Bosch Siemens Hausgeräte
  (December 2013, Commitments)
- (D) Bathroom fittings
  (December 2011, Commitments)
- (UK) Fridge and bathroom suppliers
  (May 2016, Infringement decision)

CASE TRACKER: OVERVIEW OF PENDING AND RECENT RELEVANT ONLINE DISTRIBUTION CASES

Third party platform ban:
restriction on using third-party online market places

- (D) Adidas
  (July 2015, Commitments)
- (D) Sennheiser
  (December 2013, Commitments)
- (D) Asics
  (August 2015, Infringement decision)
  - UPDATE: (D) Asics
    (April 2017, Higher Regional Court of Düsseldorf)
- (D) Deuter
  (December 2015, Frankfurt Higher Regional Court, appeal pending)
- (D) Coty
  (April 2016, request for a preliminary ruling)
  - UPDATE: (EU) Coty
    (March 2017, Hearing)
- (F) Caudalie
  (February 2016, Paris Court of Appeal judgment)
- (F) Adidas
  (November 2015, Commitments)
- (F) Samsung & Amazon
  (November 2015, request for a preliminary ruling)
  - UPDATE: (EU) Samsung & Amazon
    (December 2016, preliminary ruling)
- (NL) Shure Distribution Benelux
  (May 2016, Gelderland district court ruling)

(NEW:
UK) BMW
(January 2017, BMW changes policy)

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