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LET'S GET DIGITAL: COMPETITION AUTHORITIES SET THEIR MINDS TO BIG DATA AND ONLINE RPM

Let's get digital: Competition authorities set their minds to Big Data and online RPM

Online resale price maintenance has been put high on the enforcement list, with more and more EU competition authorities lashing out at companies involved in these pricing practices. The ownership and use of large quantities of data collected online from consumers ("Big Data") is also a particularly hot topic:

- The European Data Protection Supervisor's [Preliminary Opinion](#) of March 2014 indicated that competition concerns could arise if access to Big Data could constitute an "essential facility" for access to certain digital markets.
- As part of its ongoing [assessment](#) of online platforms, the European Commission published a [Staff Working Document](#) in May 2016, which noted that some online platforms are able to take advantage of Big Data due to economies of scale and scope. A [Communication](#) to the European Parliament and others identified potential barriers arising from access to data as an area for further investigation by the European Commission.
- Ownership of Big Data is also being considered by national competition authorities. In May 2016, the French and German competition authorities published a [joint study](#) which discussed potential competition concerns related to Big Data as an "essential facility" (for more: see [below](#)). The UK [CMA](#), on the other hand, has expressed doubts about whether the essential facilities doctrine can be applied in the context of online platforms.

A GATEWAY TO DIGITAL MARKETS: BIG DATA AS AN ESSENTIAL FACILITY

Platform providers use data collected from online consumers to optimise the services they provide to users. For example, a search platform uses the data it has collected to ensure that the most relevant search results for a particular user are displayed. If those “Big Data” databases are considered an “essential facility”, a dominant platform provider that restricts third-party access to its databases could be classed as abusing its position of dominance.

Previous case law (most notably, [Oscar Bronner](#) and [IMS Health](#)) narrowly defines the circumstances where an “essential facility” will exist. To establish Big Data as an “essential facility”, an authority will need to show that access to a particular database is indispensable for others to compete effectively on one or more downstream markets as:

- there is no actual or potential substitute for that database, and
- there are technical, legal or economic obstacles that make it impossible, or at least unreasonably difficult, for competitors to create alternative databases.

If the characterisation of Big Data as an “essential facility” gains traction, the authorities could address concerns by limiting data retention by data holders or requiring that Big Data be made available to third parties via licence. Increased availability of data should stimulate downstream competition by encouraging new entrants and enabling competitors without their own datasets to compete more effectively.

However, this type of intervention could adversely affect investment and innovation in data collection, which could in turn negatively impact the quality of free online services available to consumers. It is also debatable to what extent Big Data excludes competitors in practice. The number of actual or potential sources of data is high. There are also many examples of innovative new entrants becoming major online platforms (and therefore also sources of Big Data) in a relatively short time. This ease of entry raises questions about the real ability of Big Data owners to leverage their position.

The pathway to establishing Big Data as an “essential facility” looks set to be a controversial.

JOINT STUDY ON BIG DATA

In May 2016, the French and German competition authorities published a [joint report](#) on competition law and data in which they analysed the implications and challenges for competition authorities resulting from data collection in the digital economy and other industries. The report distinguishes a number of data-related anti-competitive practices. According to the report, the possible theories of harm are premised, for the most part, on the capacity for a company to derive market power from its data collection or processing activities. Two aspects of particular relevance are: (i) the scarcity of data or ease of replicability and (ii) whether the scale / scope of data collection matters.

The following data-related anti-competitive practices are mentioned:

a. Mergers and acquisitions:

to obtain better data access, companies may wish to acquire other companies that own large datasets. The report forewarns competition authorities about the risk of anti-competitive outcomes from such M&A activity. For example, a merger between an established company and a relative newcomer may not appear problematic when considered from the perspective of the existing market structure due to the newcomer's low market shares. However, the same merger may have a very different impact in data-related markets - in these markets, the merger could lead to differentiated data access and increased data concentration if the newcomer has access to a large database. The report warns that competition authorities need to take account of the potentially anti-competitive advantages that such combinations could give the merged entity over its rivals.

b. Exclusionary conduct:

according to the report, the following data-related actions could weaken competition and exclude competitors, especially when conducted by dominant firms:

- **Refusal to access:**

as mentioned above, refusing access to data could be anti-competitive if the data can be considered an essential facility. The report acknowledges the difficulty of being able to class databases as falling within the definition of an essential facility, and also goes on to note that requiring access to a company's "essential facility" data may raise privacy concerns as forced sharing of user data may breach privacy laws.

- **Discriminatory data access:**

refusing access to data can also be considered anti-competitive if done on discriminatory grounds. For instance, vertical integration can lead to discriminatory access to strategic information and thus restrict competition.

- **Exclusive contracts:**

exclusivity provisions may prevent competitors from accessing data or limit the opportunities they have to obtain similar data by making it more difficult for consumers to adopt their technologies or platforms.

- **Tied sales and cross-use of datasets:**

data collected in one market could be used by a company to develop or increase its market power in another market in an anti-competitive way. For example, former monopoly providers of public services could use the data which they have access to in the context of those services to then tailor-make offers to consumers in adjacent markets.

c. Data as a vehicle for price discrimination:

data collection may facilitate price discrimination. A company collecting data about its customers gains a better insight into the willingness of its customers to pay for a given product or service. If a company holds a position of dominance, it could use this information to set different prices for different customer groups.

d. Data, market power and privacy concerns:

whilst recognising that privacy concerns are not, in and of themselves, within the scope of intervention of competition authorities, the report concludes that those authorities may nonetheless be justified in considering such policies if they are implemented by a dominant company for which data serves as a main input of its products or services. In such circumstances, there may be a close link between the dominance of the company, its data collection processes and the level of competition on the relevant markets.

The French and German competition authorities appear to be acting on the messages in their joint report by respectively [announcing](#) a sector inquiry into data-related markets and strategies, and launching an investigation against Facebook into possible abuses of dominance in the market for social networks with its specific terms of services on the use of user data. In addition, the German competition authority recently issued a [working paper](#) on the market power of online platforms and networks discussing the factors to take into account when determining dominance in the digital economy.

EU COMPETITION AUTHORITIES TIGHTEN THE SCREWS ON (ONLINE) RESALE PRICE MAINTENANCE

The seemingly slumbering enforcement of resale price maintenance in some parts of Europe has flared up lately with almost every competition authority lashing out at companies involved in these pricing practices. More and more of the EU's national competition authorities are taking a hard line on this issue, regarding resale price maintenance as per se illegal or an object infringement. In other words, finding breach without the need to demonstrate any appreciable effect on competition. The number of online resale price maintenance enforcement cases is also increasing.

Looking at the last three years, the Austrians are the European champion when it comes to number of fines imposed (33 out of 87 in the EU in total). Germany wins looking at the monetary value of the fines (EUR 90.5 million out of approximately EUR 471 million in the EU in total). While traditionally promoting a liberal rule of reason-like approach towards resale price maintenance, even the UK CMA jumped on the online resale price maintenance bandwagon recently, imposing a fine of just over EUR 1 million on the supplier of bathroom fittings. Only the Dutch ACM has so far refrained from fining resale price maintenance and is sticking to its effects-based approach. This wave of resale price maintenance cases is fuelled by leniency requests made possible in some EU countries such as Austria, Romania and Sweden, as well as by the willingness of companies to settle early with the authorities, avoiding a drawn-out public debate on their illegal commercial practices. Most countries do not allow leniency in vertical cases yet, but the possibility of early settlement with resale price maintenance violators goes a long way.

CASE TRACKER: POLICY AND CASE DEVELOPMENTS IN ONLINE DISTRIBUTION

POLICY DEVELOPMENTS

- (EU) [Digital Single Market](#)
On 23 May 2016, the European Commission ("EC") released the Digital Progress Report, assessing five different aspects of e-commerce across the EU (connectivity, human capital, use of internet, integration of digital technology and digital public services). The Commissioner for the Digital Economy and Society [announced](#) that the EC was preparing guidance for Member States to help improve digital performance, contributing to the creation of a Digital Single Market.
- (EU) [Data ownership and access](#)
The EC announced on 24 May 2016 that it will tender a EUR 40,000 contract to draft a legal study on ownership and access to data. The study will examine the role of competition law and set out the difficulties businesses face as a result of differing data legislation across sectors and Member States. The study will also highlight any gaps in current data legislation, considering whether contractual arrangements can effectively manage data rights or whether further legislation is required.
- (EU) [Geo-blocking](#)
As part of a series of measures to boost online commerce, the EC proposed legislation regulating geo-blocking on 25 May 2016. The proposed regulation prohibits: blocking access to websites and other online interfaces, the re-routing of customers according to location, and the discrimination of customers in various scenarios. It also voids passive sale agreements imposed on traders in violation of the regulation.
- (EU) [Online Platforms](#)
On 25 May 2016, the EC published a paper outlining its overall assessment of online platforms stance, including the opportunities and challenges they present.

RELEVANT CASES

Online sales bans:

restriction on selling products/services online

- (UK) [Sports & entertainment merchandise](#)
On 29 April 2016 the UK Competition and Markets Authority announced its decision to proceed with an investigation into suspected anti-competitive arrangements relating to UK online sales of licensed sport and entertainment merchandise.
 - (Germany) [Coty](#)
A Frankfurt appeal court has referred the case to the ECJ for clarification on whether Coty's selective distribution system breaks antitrust law by restricting sales on Amazon's online marketplace.
- #### MFNs/Price Parity Clauses:
- guarantee to an online platform that supplier will treat the platform as favourably as the supplier's most favoured customer*
- #### Hotel Bookings
- (Germany) [Booking.com](#)
On 9 May 2016, the Higher Regional Court in Dusseldorf denied Booking.com's request to put on hold a 2015 decision by the *Bundeskartellamt* which ruled that Booking.com's best price clauses in contracts with hotels were anti-competitive.
 - (Italy) [Expedia](#)
The *Autorità Garante della Concorrenza e del Mercato* decided to close its case after Expedia unilaterally opted to remove certain clauses in contracts with hotels last July.

CASE TRACKER: POLICY AND CASE DEVELOPMENTS IN ONLINE DISTRIBUTION

Geo-blocking:

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

 (EU) [Pay-TV](#)

On 22 April 2016, the EC invited comments on commitments offered by Paramount Pictures to address competition concerns relating to contractual clauses preventing the cross-border provision of Pay-TV services.

Dual pricing:

charging different prices for the same product/service when sold online than in a physical shop

 (UK) [Fridge and bathroom suppliers](#)

On 10 May 2016, the CMA issued an infringement decision fining Ultra Finishing Ltd over £750k for breaching competition laws by preventing retailers from discounting online prices

COMPETITION LAW IN THE DIGITAL AGE

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