

OECD-GVH RCC Newsletter

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Foreword

Dear Readers,

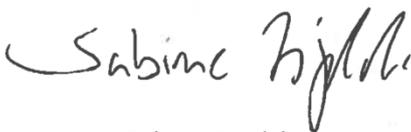
This Newsletter presents a wide range of topics. Particular emphasis is placed, however, on digital markets and e-commerce. We have contributions from Albania, Croatia, Romania, Russia, and Turkey, which look at this very popular topic from different perspectives. Another contribution summarises the OECD work in relation to competition issues arising in digital markets. A highly interesting article highlights the implementation of the competition chapter of the EU – Georgia Association agreement. Another contribution you should not miss reading comes from the Energy Community Secretariat (ECS). The ECS offers assistance in competition questions related to Energy Community legislation, an opportunity that is open to a large number of RCC beneficiaries.

For the next Newsletter, please send us articles on your experience with all issues related to competition and corruption. This can include public procurement, bid rigging and corruption; co-operation with anti-corruption bodies, but also corruption as it may affect a competition agency and the safeguards that have been established to fight and prevent it. The deadline for handing in contributions is 15 October 2018. Please inform us if you intend to make a submission, a short e-mail will do!

The “Literature Digest” at the end of this Newsletter introduces three very interesting articles on the digital age and e-commerce. It shall provide you with some inspiration for your reading list.

As always, you will also find summaries of the June 2018 OECD Competition Committee meetings, with links to all the documents you might find interesting. Use them to benefit from the work and experiences of peer competition authorities and from the work products of the OECD.

We are happy to receive your comments and contributions! If you wish to publish an article about your agency’s work, please contact Sabine Zigelski (OECD – sabine.zigelski@oecd.org) and Andrea Dalmay (RCC - dalmay.andrea@gvh.hu).



Sabine Zigelski
OECD



Miklós Juhász
President of the GVH

RCC programme 2018

February 23 – 24

Seminar on European Competition Law for National Judges: National Judges and Antitrust Damages Litigation

This seminar provided advanced knowledge and practice in the field of antitrust damage litigation. We discussed jurisdiction, disclosure of evidence and quantification of harm and the passing-on of overcharges. In addition, we covered issues such as joint and several liability, consensual settlements, limitation periods and the effects of national decisions. Experienced practitioners guided the participants through the topics, which were organised around a continued hypothetical exercise in order to provide national judges with an opportunity to analyse all of the main aspects of antitrust damage litigation in the context of a real situation.

The seminar received funding from the Training of National Judges Programme of the European Union.



March 06 – 08

Seminar on Cartel Detection Tools

We discussed sources of cartel detection and investigated the requirements of an effective leniency system. Which alternatives exist if leniency is not working in a country? These can include whistle-blower or anonymous informant systems, informant reward schemes, systematic screening and also market studies. Parallel pricing observations were discussed. Further sources of detection were dealt with, such as attentive public procurement officials and the systematic monitoring of e-procurement data. We introduced the OECD Guidelines for Fighting Bid Rigging in Public Procurement and looked at relevant case examples. Experts from OECD countries introduced their cases and exchanged experiences with the participants. Practical exercises complemented the discussions.



April 17 – 18

GVH Staff Training

Day 1 - Review of 2017 and Selected Competition Problems

After a review of the developments in EU competition law in 2017 we had a closer look at selected competition law topics. These topics included trends in consumer protection, vertical restraints in the online world, the implementation of the Damages Directive and algorithms and collusion. Experienced practitioners from competition authorities and academia discussed the topics with the GVH staff.

Day 2 – Trainings for Special Groups of Staff

In separate sessions we provided dedicated trainings and lectures for the merger section, the antitrust section, the economics section, the consumer protection section and the Competition Council of the GVH.



May 15 – 18

Introductory Level Seminar – Basic Concepts and Procedures in Competition Law for Young Authority Staff

This beginner level seminar gave young authority staff the chance to become more familiar with basic competition law concepts. We highlighted cartels, mergers and abuse of dominance and addressed basic legal and economic theories, as well as procedural requirements and the relevant case law. The international component of competition law enforcement was also presented. The participants had a chance to apply and deepen their knowledge in practical exercises and to become more familiar with new areas of competition law. Experienced practitioners from OECD countries shared their knowledge and engaged in a lively exchange with the participants.



June 19 – 21

Outside Seminar in Albania – Merger Control Investigations

Merger investigations require a complex skill set. In this seminar, we looked at theories of harm for merger cases, basic economic methods to be applied and effective merger remedies. At the same time we discussed effective procedures for merger investigations, investigation methods and exchanged experiences on the drafting of decisions. Merger control experts from OECD countries presented case studies and the participants practised their merger skills in hypothetical exercises.



October 02 – 04

RCC – FAS Seminar in Russia – Effective Cartel Enforcement

How can cartels be detected effectively and what are the first steps when a suspicion arises? We will look at leniency but also at pro-active detection tools such as the analysis of public procurement data. Next steps will involve covert market investigations and dawn raids and what kind of evidence to look for, as well as how to organise it in order to convince appeal courts. Lastly, we will also discuss the relevance of monetary fines. Experts from OECD countries, together with FAS experts, will present their best practices and insights and will address problems and questions raised by the participants.

November 16 – 17

Seminar on European Competition Law for National Judges on Competition Issues in the Digital Age

The seminar will provide the participants with specific knowledge and practice related to issues arising from new technologies' impact in the field of competition law. We will discuss the difficulties faced when applying the traditional criteria of market definition and market power to dynamic markets, merger issues such as innovation and the shaping of commitments in digital sectors, platforms and e-commerce, including vertical restraints in online distribution; and finally issues related to Article 102 TFEU including abusive practices and discriminatory behaviours, Standard Essential Patent ("SEP") and FRAND disputes. The seminar will be organised around hypothetical case exercises that will provide national judges with an opportunity to analyse major aspects that could be raised in antitrust litigation in the context of a real situation.

The seminar will receive funding from the Training of National Judges Programme of the European Union.

OECD Competition Committee Meetings, 4 – 8 June 2018

Working Party No. 2 on Competition and Regulation

Roundtable on Taxi and Ride-Hailing Markets¹

This roundtable discussed regulatory and competitive challenges raised by new companies and business models in the taxi, ride-sourcing and ride-sharing services. The debate is now moving towards the antitrust treatment of these new firms, the reform of the regulatory requirements applicable to traditional taxis (to enable them to compete with the new entrants), and the future business models that may arise to challenge the new incumbents (e.g. decentralised platforms). The discussion focused on alternative regulatory scenarios – such as diminishing the regulatory burden placed on the providers of traditional taxi services – which have been implemented or suggested in order to allow traditional service providers to compete with new entrants. The roundtable also explored the impact different business models may have on competition and regulation, and paid particular attention to the difference between centralised and decentralised platforms.

Working Party No. 3 on Co- operation and Enforcement

Roundtable on challenges and co-ordination of leniency programmes²

¹ <http://www.oecd.org/daf/competition/taxis-and-ride-sharing-services.htm>

Enforcement agencies and commentators have emphasised the importance of optimising the design and administration of leniency programmes, especially in multi-jurisdictional cases involving parallel applications in several jurisdictions, in order to ensure the continued effectiveness of such programmes.

Currently, many jurisdictions are in the process of assessing the effectiveness of their programmes, and are considering ways in which they can be improved, for example by increasing their attractiveness and strengthening co-operation with other agencies in cross-border cartel cases. Such initiatives involve looking at ways to increase the predictability and transparency of leniency programmes, enhancing the incentives for co-operation between undertakings and competition agencies, introducing immunity for individuals, and clarifying confidentiality issues relating to the submission of documents during the leniency process.

This Roundtable discussed, based on country experiences, the challenges that are faced when operating amnesty/leniency programmes, enforcement inefficiencies, and proposals for improvements.

Roundtable on designing and testing effective consumer-facing remedies³

The Roundtable discussed how competition authorities can design remedies to demand-side competition problems in mass consumer-

² <http://www.oecd.org/daf/competition/challenges-and-coordination-of-lenieny-programmes.htm>

³ <http://www.oecd.org/daf/competition/consumer-facing-remedies.htm>

facing markets, such as energy and retail banking markets. These remedies may be required to address poor market outcomes, including high prices or low service quality, that are not necessarily associated with structural concerns, such as barriers to entry. Demand-side factors, such as search and switching costs and behavioural biases, and other characteristics of consumer decision-making processes, may play a significant role.

Agencies have implemented a variety of remedies aimed at tackling these market failures. These include remedies aimed at: informing customers about the options available; developing tools, such as price comparison websites to help customers make a more informed choice; removing impediments to switching; or actively prompting customers to seek a better deal. In many of these cases, consumer protection authorities or sector regulators have been involved in the remedy design process.

Competition Committee

Roundtable on the Non-Price Effects of Mergers⁴

Mergers can have effects on numerous dimensions of competition other than price, including quality, variety, and innovation. The roundtable discussed the main types of non-price effects, the interaction of price and non-price effects, and the stages of a merger assessment in which non-price effects may be relevant (from market definition, to the competition assessment, the consideration of efficiencies, and the formulation of remedies).

With the increasing relevance of digital markets, and since competition in some digital markets does not primarily occur on the basis

⁴ <http://www.oecd.org/daf/competition/non-price-effects-of-mergers.htm>

of price, competition authorities may find themselves required to conduct assessments of non-price effects more frequently, without an easily available set of methodologies for doing so. In particular, the discussion explored the treatment of innovation effects, which have been a focus in several recent merger cases. The concept of privacy as a dimension of competition was discussed. More traditional non-price effects, including quality and variety, were also covered since the practical difficulties they present may be similar to those presented by innovation and privacy.

Roundtable on E-commerce and Competition⁵

The growth of e-commerce has changed not merely how consumers shop, but also the range of providers from which consumers can or are prepared to source products. Not only is it increasingly easy for consumers to search outside their immediate geographic area, but it has also become more straightforward to shop across national boundaries. Fears regarding potential market segmentation are therefore a notable concern within a number of agencies which have examined the issue of competition within the e-commerce sector.

Recent advocacy and enforcement work by some competition agencies has explored a number of competition related questions arising from the spread of electronic commerce. This roundtable covered issues ranging from changes in consumers' purchasing patterns and the implication this may have on the relationships between manufacturers and distributors, to competition effects of vertical contractual restrictions imposed in online sales and how

⁵ <http://www.oecd.org/daf/competition/e-commerce-implications-for-competition-policy.htm>

they should be assessed by competition agencies, to the relationship between online platforms and the content they distribute.

Hearing on Market Concentration⁶

The hearing explored whether and how market concentration is changing in different countries; it discussed the consequences of these changes; and it considered what might be driving these changes and how agencies might respond. Some of the questions recently articulated in the public sphere include: Is market concentration actually increasing? And if it is, by how much? And what can we conclude from this? Does increased concentration indicate increasing market power? What do other indicators of market power say, are we seeing lower output, higher mark-ups, and larger profits? And are these enduring? Moreover, what is driving any increase in market power that we do see? And how should competition agencies

respond? The hearing provided a timely opportunity to discuss and hear from a range of experts on these important questions.

Hearing on Blockchain and Competition⁷

Blockchain technologies are receiving increased attention and are provoking a significant level of interest from businesses across a broad range of industries. As a consequence a number of OECD communities are looking at how this technological development can affect the legal and policy environment in which they operate. As part of the long-term theme of the Committee on Competition, Digitalisation and Innovation this session saw external experts introducing the Committee to blockchain technology and started to identify possible competition and regulatory law issues that this technology may give rise to.

⁶ <http://www.oecd.org/daf/competition/market-concentration.htm>

⁷ <http://www.oecd.org/daf/competition/blockchain-and-competition-policy.htm>

OECD Discussions on Digitalisation



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Introduction

Digitalisation has changed everything on a global scale, with new technologies and business models drastically altering a large number of markets. Substantial efficiencies are being generated, such as dynamic efficiency and productivity gains. On the other hand, digitalisation also raises concerns about anticompetitive conducts.

The digital economy and innovation was selected as a long-term theme for discussion at the OECD Competition Committee in 2016 and all work, including roundtables, hearings and other events, can be found [here](#). This article briefly summarises the discussions at the OECD on four themes: 'Disruptive Innovations', 'Big Data', 'Algorithms and Collusion' and 'the Use of Traditional Antitrust Enforcement Tools in Multi-Sided Markets'.

Disruptive Innovation

New technologies and business models can profoundly affect the functioning of existing industries. For instance, internet-based "sharing services" affect taxi and hotel markets. Innovations using new technologies or business models are called 'disruptive innovations'. The OECD discussed this in ['Disruptive Innovation and their Effect on](#)

[Competition'](#). The challenges for competition agencies can be summarised as follows:⁸

- Enforcement challenges
 - *Challenges in defining the relevant markets.*

Competition agencies may face difficulties when defining the relevant product and geographic markets due to the fast-moving characteristics of these markets/products and the need to undertake a complex analysis.

- *Challenges in evaluating the competitive effects of online platforms.*

Due to the prominent increase of online platforms, online transactions and online search options, traditional assessment methods may need revisiting as new competition issues are appearing on the radar screen of competition agencies.

- Advocacy challenges
 - *Difficulties in reacting swiftly.*

Disruptions may bring radical and generally unforeseen changes to the market requiring quick reactions from competition authorities.

- *Difficulties in finding the most effective way to advocate.*

It is very important and difficult for a competition agency to find the most effective way to address the possible anti-competitive consequences of the emergence of new technologies or new business models.

⁸Key findings from the hearing' might be useful for understanding the discussion.

[https://one.oecd.org/document/DAF/COMP/M\(2015\)1/ANN8/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP/M(2015)1/ANN8/FINAL/en/pdf)

- *Difficulties in striking the right balance between various policy interests.*

Striking the right balance between pro-competitive measures and consumer protection can be especially challenging to multi-functional agencies which are entrusted with enforcing competition law and consumer protection at the same time.

From an enforcement point of view, agencies shared their experiences and expertise at [the Global Forum on Competition 'The Impact of Disruptive Innovation on Competition Law Enforcement'](#). These key points emerged:⁹

- In markets prone to disruptive innovation, some incumbents may have strategies that are driven by efficiencies and improve welfare, while others may have strategies that are anti-competitive and hamper innovation. Examples from the taxi markets were given.
- Competition policy should be adapted to encourage disruptive innovation. Most jurisdictions are still unsure about how to assess disruptive innovation but some competition agencies already take into account dynamic considerations.
- Market definition is inherently complex and may pose some challenges in cases of disruptive innovation.
- As small, disruptive companies such as Instagram, when it was acquired by Facebook, do not have any or significant market turnover, jurisdictions might consider modifying the notification thresholds in merger control or introducing mechanisms to retroactively look at mergers that do not meet their thresholds.
- Competition law enforcement procedures and interventions should be fast,

⁹'Executive summary with key findings' and 'Detail summary of the discussion' might be useful. [https://one.oecd.org/document/DAF/COMP/GF\(2015\)15/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2015)15/FINAL/en/pdf)
[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF\(2015\)16/FINAL&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF(2015)16/FINAL&doclanguage=en)

transparent and tested in court whenever possible.

- Competition authorities can use non-enforcement tools (e.g. discussions at conferences, post-merger studies, and through dialogue with disruptors and other market players) in order to improve their understanding of emerging competition policy issues and to improve their methods of dealing with disruptive innovation.

It is also important to emphasise that regulation can facilitate disruptive innovation, but it can also pose obstacles to it. The OECD held discussions on regulatory frameworks in three specific areas: [financial markets](#), [legal services](#) and [land transport](#).

Big Data

The exponential growth of the digital economy has enabled the rise of business models based on the collection and processing of "Big Data". The OECD discussed Big Data and the challenges of adapting competition policy to the digital economy (['Big Data: Bringing Competition Policy to the Digital Era'](#))¹⁰

Big data does not systematically cause harm and can actually result in significant gains for consumers by generating substantial efficiency and productivity gains. However, in markets where Big Data is an important asset or input for business success, a concern may arise that the massive accumulation of personal information and intensive use of data analytics may enhance market power, lock-in consumers and raise barriers to entry. This may create incentives for companies to engage in anti-competitive practices, such as

¹⁰'Executive summary with key findings' and 'Detail summary of the discussion' might be useful. [https://one.oecd.org/document/DAF/COMP/M\(2016\)2/ANN4/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP/M(2016)2/ANN4/FINAL/en/pdf)
[https://one.oecd.org/document/DAF/COMP/M\(2016\)2/ANN2/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP/M(2016)2/ANN2/FINAL/en/pdf)

pre-emptive mergers, exclusionary conduct and even to collude in novel ways.

Traditional antitrust tools can be adapted and applied to tackle such data-related anti-competitive practices, by treating data in the same way as any other input. For instance, in merger control and exclusionary abuse cases, competition authorities may consider the risks of foreclosure and design remedies accordingly.

Before any intervention, competition authorities should examine on a case-by-case basis to what extent business performance depends on data control and data analytics. In particular, they should consider the following questions: in the relevant market, is data replicable? Can it be collected from other sources? What is the degree of substitutability between different datasets? How quickly do data become outdated? How much data would a potential entrant need to compete?

Algorithms and Collusion

There is a growing number of firms using computer algorithms to improve their pricing models, customise services and predict market trends, which could generate efficiencies. However, the widespread usage of algorithms could also result in anti-competitive effects by making it easier for firms to achieve and sustain collusion without any formal agreement or human interaction.

The OECD held a roundtable on *'Algorithms and Collusion'* in 2017 and discussed some of the challenges raised by algorithms.¹¹

Regardless of the means used by companies, there is a concern that algorithms make collusive outcomes easier to sustain and more

¹¹ OECD Background paper might be useful. <http://www.oecd.org/daf/competition/Algorithms-and-collusion-competition-policy-in-the-digital-age.pdf>

likely to be observed in digital markets - and competition law enforcers should be aware of the risk.

Competition agencies might face several challenges: how to detect tacit collusion caused by algorithms, how to apply the notion of agreement in competition law to algorithmic collusion and how to draw a clear line on whether antitrust liability can be established when pricing decisions are made by a machine using an algorithm rather than by human beings.

Competition agencies may approach algorithmic collusion in various ways:

- Market studies and market investigation
Market studies (or sector inquiries) may support agencies' efforts to understand the market characteristics that can lead to collusive outcomes.
- Ex ante merger control
Competition agencies may establish a system capable of preventing tacit collusion, through the enforcement of merger control rules in markets with algorithmic activities, which would allow agencies to assess the risk of future coordination.
- Commitment and possible remedies
Competition law enforcers could make tacit collusion harder to sustain through a behavioural approach, such as the use of remedies to introduce special compliance or monitoring programmes or the introduction of auditing mechanisms for algorithms, which could guarantee that algorithms are programmed in a way to steer clear of any competition concerns.

The Use of Traditional Antitrust Enforcement Tools in Multi-Sided Markets

The platform business model is one of the business models that has emerged in digital markets. A firm can act as a platform and sell

different products to different groups of consumers. In this situation, cross-platform network externality, which means that the demand from one group of customers depends on the demand from the other groups, is one of the characters. Competition agencies face an important question on this multi-sided market: are the tools traditionally used to define markets, and to assess market power, exclusionary conduct, vertical restraints, or efficiencies, sufficient to address these questions in the context of multi-sided markets?

The OECD held a hearing to look into the question ([“Rethinking the use of traditional antitrust enforcement tools in multi-sided markets”](#)) and it can be briefly summarised as follows:¹²

- **Market definition**
When competition agencies define markets, they should first decide how many markets need defining and then define the scope of the markets. The framework of the hypothetical monopolist test can still be used in multi-sided markets.
- **Market power**
Cross-platform network effects in multi-sided markets can magnify the competitive constraints, so tools that seek to measure market power or changes in market power by looking at consumer responsiveness, need to ensure that they collect or estimate all the relevant elasticities and diversion ratios.
- **Exclusionary conduct**
Multi-sided platforms may require more scrutiny from antitrust authorities than one-sided markets and should certainly

not be treated more leniently since they may provide particularly fertile ground for exclusionary behaviour.

- **Efficiencies**
As with competitive effects, there is a risk that efficiencies generated on another side of the market will be missed if the multi-sided nature of the platform is not recognised. Efficiencies or anticompetitive effects on other sides of the market will be relevant whenever cross-platform network effects are significant.
- **Vertical restraints**
The broad framework of inquiry for assessing the effects of vertical restraints remains applicable in a multi-sided market setting. However, agreements in multi-sided markets may require more scrutiny from agencies than similar agreements in one-sided markets and should certainly not be treated more leniently.

Closing Remark

Digitalisation is bringing about changes on a global scale. While often pro-competitive, it can also raise concerns about anticompetitive conducts and challenges for competition agencies. Traditional antitrust enforcement tools can be applicable to these anticompetitive concerns but may need to be developed further. It is important that agencies continue to discuss and share experiences relating to these concerns and the challenges they face, and the OECD is one of the best places to do so, both for OECD member countries and non-member countries.

¹² A paper by the OECD might be useful. [https://one.oecd.org/document/DAF/COMP/WD\(2017\)55/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2017)55/en/pdf)

Algorithms 101*



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As commercial strategies become increasingly influenced by mass data collection and high-powered information analytics (e.g. machine / deep learning), businesses are capable of faster and more efficient decision-making. Consequently, Ezrachi and Stucke consider that, ‘the law’s moral fabric’ and scope of prevention might lose ground. In this regard, algorithmic game-theoretic models are in the position to rule future business interaction¹³, handle the prisoner’s dilemma in a better way and set the scene for more stable and less overt forms of collusion.¹⁴ Against this background, the OECD, in its recent Background Note, defined four types of competition-relevant algorithmic functions: monitoring, fostering parallel conduct, signaling and self-learning.¹⁵

*The views expressed in this paper are personal and do not necessarily represent the Romanian Competition Council’s views. This paper borrows extracts from my article entitled ‘[Digital markets and pricing algorithms — a dynamic approach towards horizontal competition](#)’, which was first published in the European Competition Law Review, Issue 1/2018, pp. 37-45.

¹³ [Maurice E. Stucke, Ariel Ezrachi, ‘Artificial Intelligence & Collusion: When Computers Inhibit Competition’ \(2015\), Oxford Legal Studies Research Paper No. 18/2015](#), p. 38.

¹⁴ The New York Times, ‘When Bots Collude’ (2015) <<http://www.newyorker.com/business/currency/when-bots-collude>>

accessed on 24 January 2017.

¹⁵ [OECD, ‘Algorithms and Collusion - Background Note by the Secretariat’, 9 June 2017, DAF/COMP\(2017\)4](#), p. 32.

It is important to state that, so far, antitrust assessments have always relied on the degree of plausibility of unlawful behaviour, rather than on its inevitability; according to Salcedo¹⁶, possible antitrust behaviour may occur when firms observe each other’s prices or sales. For this reason, due to changes in market structure (e.g. increase in transparency and high frequency trading), industry-wide presence of algorithms could also expose less concentrated markets to the ‘oligopoly problem’.¹⁷ This happens by reaching an equilibrium where collusion / conscious parallelism become more than plausible. Two case scenarios can have similar outcomes (i.e. higher prices to the detriment of consumers): collusive behaviour that is consciously facilitated by the use of algorithms to provide the colluding parties with greater stability and effective punishment means; while the second would be an anti-trust risk-free innovation-fostered outcome, where ‘similar pricing is not the result of fierce competition, nor the result of cartel activity, but rather the result of tacit collusion’ and where undertakings have weaved interdependent pricing features into the algorithm.¹⁸ Furthermore, as electronic shelf labelling¹⁹ becomes more and more popular

¹⁶ OECD, ‘Algorithms and Collusion’ – OECD presentation (2017), seen at:

<http://www.oecd.org/competition/algorithms-and-collusion.htm>

seen on 20 August 2017.

¹⁷ [OECD, ‘Algorithms and Collusion- Background Note by the Secretariat’ \(2017\)](#), p. 34.

¹⁸ [Ariel Ezrachi, Maurice E. Stucke, ‘Two Artificial Neural Networks Meet in an Online Hub and Change the Future \(of Competition, Market Dynamics and Society\)’](#), [Oxford Legal Studies Research Paper No. 24/2017](#), p. 8.

¹⁹ Electronic shelf labelling (ESL) is an ICT system employed by traditional/brick and mortar sellers, which is primarily used to electronically display prices. Furthermore, by benefitting from a

among ‘brick-and-mortar’ retailers, a spillover effect from online can be easily inferred.²⁰

By exploiting price transparency and streamlining decisions, algorithms can reach new antitrust dimensions and help initiate, implement or consolidate a cartel; whether undertakings use the same third party automated technology-aided pricing²¹, jointly engage with a platform using computer-determined pricing²² or design a deep learning price algorithm capable of interacting and colluding with a competitor’s software, the effects are similar.²³

communication network, prices are automatically updated in line with the change rate decided by a person or a pricing algorithm (in this second case, the interaction taking place between automation and pricing policy creates additional risks for competition).

²⁰ [OECD, ‘Algorithms and Collusion - Note from the European Union’, 14 June 2017, DAF/COMP/WD\(2017\)12](#), p. 3.

²¹ For example, ‘Appeale empowers Amazon sellers with strategic automated repricing and critical insight, elevating their ability to outsmart and dominate the competitive landscape.’

²² [Maurice E. Stucke, Ariel Ezrachi, ‘Artificial Intelligence & Collusion: When Computers Inhibit Competition’ \(2015\)](#), p. 8.

²³ In this regard and depending on the complexity of the algorithmic design, economic theory has proposed two models, namely the *Predictable Agent* and the *Autonomous Machine*. While the first one comes as a tool for strengthening conscious parallelism (i.e. undertakings being aware of other similar machines used by competitors), hence bordering with possible antitrust behaviour; exemplifying, industry-wide standardised algorithms could best explain this scenario. The second context implies more computing autonomy. In this case, deep-learning functions determine the way to optimize profit (e.g. pricing software belonging to different undertakings understanding each other and reacting in a way that generates a collusive outcome). For more discussions on this topic please see: [Maurice E. Stucke, Ariel Ezrachi, ‘Artificial Intelligence & Collusion: When Computers Inhibit Competition’ \(2015\)](#) pp. 8-9.

For example, instead of engaging in price announcements which are to impact the market within days or weeks and which are to be followed after reasonable periods of times, an algorithmic price leader has the potential of engaging all parties within seconds.²⁴ Moreover, ‘when retaliation lag tends to zero, collusion can always be sustained [...] as the payoff for a deviation becomes zero’.²⁵

While the general rule is that price transparency benefits consumers by diminishing search costs, fostering more informed decisions (e.g. prohibitions on the advertising of discounts have been considered to be illegal)²⁶ or lowering prices, such efficiencies are not always taking place in e-commerce. For example, when analysing specific digital economy features, EU²⁷ and US²⁸ authorities identified transparency as a facilitating factor for collusion, with the

²⁴ [Ariel Ezrachi, Maurice E. Stucke, ‘Artificial Neural Networks Meet in an Online Hub and Change the Future \(of Competition, Market Dynamics and Society\)’ \(2017\)](#), p. 12.

²⁵ [OECD, ‘Algorithms and Collusion’ – OECD presentation \(2017\)](#).

²⁶ [Maurice E. Stucke, Ariel Ezrachi, ‘Artificial Intelligence & Collusion: When Computers Inhibit Competition’ \(2015\)](#), pp. 26-27. The examples relate to cases from the USA; in the *Virginia Board of Funeral Directors & Embalmers* decision (FTC 041-0014), it was considered that a ‘board’s prohibition on licensed [...] advertising discounts deprived consumers of truthful information’. In the same line of reasoning, the *Arizona Automobile Dealers Association* (FTC C-3497) case revealed that a trade association illegally decided ‘to restrict non-deceptive comparative and discount advertising and advertisements concerning the terms and availability of consumer credit.’

²⁷ [Ariel Ezrachi, Maurice E. Stucke, ‘Two Artificial Neural Networks Meet in an Online Hub and Change the Future \(of Competition, Market Dynamics and Society\)’ \(2017\)](#), p. 13-14.

²⁸ David J Lynch, ‘Policing the digital cartels’, *Financial Times* (2017)

<<https://www.ft.com/content/9de9fb80-cd23-11e6-864f-20dcb35ced2>>

accessed on 12 January 2017.

potential of also increasing the internal stability of a cartel (i.e. easier monitoring). In addition, by drawing its conclusions from a financial markets manipulation case, the OECD found the velocity at which interaction takes place to be a 'first tier element' in fostering coordination.²⁹

To this extent, the change in competition paradigm becomes obvious. Another example relates to the possibility of integrating horizontal and vertical agreements. By using contract terms that help coordination and block entry³⁰ (e.g. most favoured nation / resale price maintenance clauses), new practices involving digital platforms (i.e. *E-Books*³¹ and *Eturas*³² cases) have created causal links between the vertical and horizontal dimensions of the illegal practice.³³ While the two cases do not directly involve a digital function for setting prices, the judges in the *Eturas* case emphasised the role played by a platform discount limitation system in facilitating price collusion. As emphasised by Mehra, pricing algorithms can have the exact same role as downstream wide formal RPM or MFN clauses have on assuring the internal stability of an upstream price fixing cartel.³⁴

²⁹ [OECD, 'Algorithms and Collusion- Background Note by the Secretariat' \(2017\)](#), p. 21.

³⁰ Fiona Scott Morton, 'Disruptive Innovation and Merger Control' 22nd Annual EU Competition Law and Policy Workshop, EUI, Fiesole, 2 June 2017.

³¹ [Case COMP/39.847 — E-BOOKS, Commission Decision of 12 December 2012 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement, OJ 73/17.](#)

³² [CJUE, Case C-74/14, *Eturas and Others*, \[2016\] ECLI:EU:C:2016:42.](#)

³³ Mario Siragusa, 'Concurrence dynamique et droit de la concurrence' (2016), *Concurrences* No. 3/2016, p. 11.

³⁴ [Salil K. Mehra, 'Antitrust and the Robo-Seller: Competition in the Time of Algorithms' \(2015\), *Minnesota Law Review*, Vol. 100 \(2015\), p. 1350.](#)

Likewise, automation has not only impacted the collusion risk assessment matrix but it has also fostered a debate about the way liability can or should be allocated in cases involving pricing algorithms.

As a matter of principle 'competition law does not prohibit collusive outcomes but only the means to achieve collusion'.³⁵ Correspondingly, the new challenges reopened the debate about legal formalism and whether or not proving 'concurrence of wills' (i.e. independent of its intensity) is distinct from the question of consumers being harmed.³⁶ From an economic policy perspective, collusion occurring through conscious parallelism has an overall similar result as a cartel.³⁷ As stated in economic theory, 'successful interdependent coordination [...] leads to [...] the same economic consequences regardless of the particular manner of interaction'.³⁸ As a result, by proposing a new test, economists pleaded for less legal formalism³⁹ and considered the 'reliance on communications for defining agreement and determining liability' to be 'unconnected with the modern theory of oligopoly'.⁴⁰

Traditionally, 'the focal point for intervention is the presence of [...] a concurrence of wills' taking place between the companies'

³⁵ [OECD, 'Algorithms and Collusion' — OECD presentation \(2017\).](#)

³⁶ [Salil K. Mehra, 'US v. Topkins: can price fixing be based on algorithms?' *Journal of European Competition Law & Practice*, 2016, Vol. 7, No. 7 \(2016\), p. 472.](#)

³⁷ [OECD, 'Algorithms and Collusion- Background Note by the Secretariat' \(2017\)](#), p. 17.

³⁸ *Ibid.* p. 36.

³⁹ [Salil K. Mehra, 'US v. Topkins: can price fixing be based on algorithms?' \(2016\)](#), p. 472.

⁴⁰ [Salil K. Mehra, 'Antitrust and the Robo-Seller: Competition in the Time of Algorithms' \(2015\)](#), p. 1342.

agents.⁴¹ To this extent, the EU standard for basic rules of evidence does not provide for a technical restriction implemented on a platform (i.e. by its administrator) to suffice as a competition law infringement;⁴² in any case, an explicit agreement or any other ‘sense of mutual commitment’, taking place at the expense of competition and implying the ‘meeting of the minds’, has to be proven.⁴³

However, it remains to be seen how current competition law concepts (i.e. ‘agreement’, ‘concerted practice’, ‘concurrence of wills’, ‘meeting of the minds’, and ‘coordination’) will be applied to interactions that will not necessarily involve human will or where it shall be impossible to demonstrate such a volitional feature.

⁴¹ [Maurice E. Stucke, Ariel Ezrachi, ‘Artificial Intelligence & Collusion: When Computers Inhibit Competition’ \(2015\)](#), p. 7.

⁴² [Andreas Heinemann, Aleksandra Gebicka, ‘Can Computers Form Cartels? About the Need for European Institutions to Revise the Concertation Doctrine in the Information Age’ Journal of European Competition Law & Practice, 2016, Vol. 7, No. 7](#), p. 439-440.

⁴³ [Catalin S. Rusu, ‘Euras: Of Concerted Practices, Tacit Approval, and the Presumption of Innocence’, Journal of European Competition Law & Practice, 2016, Vol. 7, No. 6](#), p. 397.

Competition Dilemmas in the Digital Age: Bricks or Clicks



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The rampant growth of interest in online marketplaces and e-commerce has led to increased interest by competition agencies in the ways in which online platforms and stores operate. Online trade cannot be trivialised anymore in the conventional analysis of vertical agreements, as the rapid growth of e-commerce over the last few years has had a significant impact on undertakings' distribution strategies and consumer behaviour. This transformation process is challenging for both the undertakings and competition agencies.

The Croatian Competition Agency (hereinafter 'CCA') has dealt with two antitrust cases concerning e-commerce.

In 2014 the CCA opened an ex-officio proceeding against the undertaking Gorenje Zagreb d.o.o (hereinafter 'Gorenje').⁴⁴ The infringement proceeding was initiated following a preliminary market investigation in which there had been indications of a possible restriction of passive sales in terms of the rebate and pricing policy and the criteria applied under the standard agreements entered into between Gorenje and undertakings engaged in online sales, as compared to the terms and criteria applicable in the agreements entered into with traditional brick and mortar shops.

⁴⁴ <http://www.aztn.hr/ea/wp-content/uploads/2017/03/UP-I-034-032013-01035.pdf>

Gorenje commented on its business policy and explained that its e-commerce business, like the sale of all household appliances in Croatia via e-commerce, was rather slow and limited in scope, and that it accounted for less than 5% of its overall sales in 2013. In Gorenje's opinion, the fact that less than 5% of its overall sales took place online was to an extent due to the specific nature of these products, for example their technical features. In addition, there are indications that consumers still prefer to buy these rather expensive products, such as white goods and small household appliances, in traditional retail stores.

Furthermore, Gorenje also referred to EU law, particularly case *C-439/09 Pierre Fabre Cosmetique*⁴⁵. It claimed that not all the restrictions in question were hard-core restrictions and that some of them were in line with the Guidelines on Vertical Restraints (hereinafter 'Guidelines')⁴⁶. According to paragraph 54 of the Guidelines a supplier may require quality standards for the use of an internet site to resell its goods, and may, for example, require that its distributors have one or more brick and mortar shops or showrooms as a condition for becoming a member of its distribution system.

Gorenje also identified three exceptions from the hard-core restriction set out in Regulation (EU) No 330/2010: "All three exceptions allow for the restriction of both active and passive sales. Under the first exception, it is permissible to restrict a wholesaler from selling to end users, which allows a supplier to keep the wholesale and retail level of trade

⁴⁵ <http://curia.europa.eu/juris/celex.jsf?celex=62009CJ0439&lang1=en&type=TXT&ancre=>

⁴⁶ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:130:0001:0046:EN:PDF>

separate. However, that exception does not exclude the possibility that the wholesaler can sell to certain end users, such as bigger end users, while not allowing sales to (all) other end users. The second exception allows a supplier to restrict an appointed distributor in a selective distribution system from selling, at any level of trade, to unauthorised distributors located in any territory where the system is currently operated or where the supplier does not yet sell the contract products (referred to as 'the territory reserved by the supplier to operate that system' in Article 4(b) (iii) of the Regulation (EU) No 330/2010). The third exception allows a supplier to restrict a buyer of components, to whom the components are supplied for incorporation, from reselling them to competitors of the supplier."⁴⁷ In the view of Gorenje, these provisions make it clear that no third party can call on its right to sell on the internet and that certain restrictions may be imposed when e-trade is involved. Gorenje highlighted that its attitude towards internet sales was not a restrictive one; on the contrary, it suggested that internet sales may have a positive effect on its operation.

In the course of the proceeding the CCA established that the restriction of online sales was limited to only one part of the Gorenje product range called Gorenje Plus Products – comprised of high-quality and high-tech products that are sold in showrooms and by exclusive kitchen suppliers. These products have not been sold on the internet by Gorenje itself, and logically enough, it has not entered into agreements with any other operators to enable them to sell them online. Thus, in this

⁴⁷ Article 4 (b) of the Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices;

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R0330&from=EN>

specific case it was unlikely that provisions regulating prohibited agreements would be violated.

However, it must be noted, that within the same infringement proceeding the CCA held that Gorenje had entered into a prohibited agreement containing directly or indirectly restrictive provisions on resale price maintenance (RPM) for white goods and small household appliances of the Gorenje brand. Gorenje was fined for this infringement and the CCA's decision was not appealed. The CCA imposed a fine of more than HRK 1.5 million on Gorenje for the infringement.

In 2016 the CCA opened an infringement proceeding against BSH kućanski aparati d.o.o. Zagreb ⁴⁸ (hereinafter BSH) in order to establish whether certain provisions of the standard rebate agreements that the undertaking concluded with its buyers (distributors) that sold electrical household appliances in brick and mortar shops or so-called hybrid-traders, represented a prohibited agreement in line with Article 8 of the Competition Act, and whether it placed those buyers of BSH products that sold the products exclusively online in an unfavourable position.

Within the meaning of paragraph 52 (c) of the Guidelines on Vertical Restraints, a supplier may impose certain conditions on a distributor selling its product on the internet, such as relating to the visual of the website or the setting up of a brick and mortar store within a certain period of time; however, it does not permit "dual pricing" which is considered a hard-core restriction.

Specifically, when the CCA examined the contracts that BSH had concluded with traders

⁴⁸ <http://www.aztn.hr/ea/wp-content/uploads/2018/03/UPI-034-032016-01008.pdf>

that were engaged in both online and brick and mortar trade at the same time (hybrid traders), it found that there was no dual pricing involved. If this had been the case, BSH would have given lower rebates for all the products that were sold online; in other words, lower rebates would not have been granted exclusively to the undertakings selling online but also to the hybrid traders selling both online and “offline”. In addition, BSH did not refer to the volume of the products sold online but explained how it granted off-invoice rebates to online household appliances distributors, whereas all other partners that provided showroom presentations and pre-sales services linked with the products concerned were eligible for a certain share of additional rebates for the services they provided for end users. This difference was partially levelled by the bonus system that to a certain extent favoured the exclusive online traders.

BHS changed its 2017 Rebate Scheme by revoking the special rebate for exclusive online traders. In short, the new rebate scheme allows for equal rebates regardless of whether the trader is engaged solely in internet trade, or brick and mortar selling or a combination of these (hybrid traders).

Despite the fact that the data collected in the preliminary market investigation provided sufficient indications to open an infringement proceeding it was established in the course of the proceeding that BSH did not implement dual pricing practices, which are considered a hard-core restriction. It was also established that no apparent harm was inflicted on end consumers in terms of prices, given the fact that at that time the internet stores applied more or less equal or lower prices for electrical household appliances supplied by BSH than traditional brick and mortar shops and hybrid traders. Therefore, the CCA terminated the proceeding.

A proper understanding of digitalisation and e-commerce and their impact on distribution and competition in markets is a must. However, there is a considerable divergence among various jurisdictions about the range of practices that should be regarded as anti-competitive. As digitalisation progresses, the number of authorities involved in e-commerce enforcement grows, and the number of such cases increases, the current legal framework may prove insufficient or inefficient in the future.

Competition Restraints in Online Markets: The Case for Turkey*



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Introduction

The rise of the Internet has profoundly changed the competitive landscape in many sectors. The digitalisation process has brought about important opportunities for increasing efficiency in doing business and promoting new markets, allowing for the entry of new economic agents into markets, thereby delivering benefits and efficiencies that may increase social welfare. However, these merits do not come about automatically, with the result that the digitalisation process may raise competition concerns due to certain characteristics inherent to digital markets.⁴⁹

Digitalisation along with the associated technologies have enabled companies to accumulate and analyse big data sets that reveal many determinants of consumer demand and competitors' courses of action. The advantages that digitalisation brings for businesses, along with the consumer demand favouring it, have also transformed previously employed business models. Traditional business models are today being replaced by business models based on data and the internet. Companies' increased capabilities for

monitoring and analysing data via algorithms, on the one hand pave the way for a better match with consumer demand, while on the other hand increase the risk for algorithmic collusion, the softening of competition throughout the supply chain, market tipping and monopolisation. Consequently, competition concerns arising from digital transformation are increasing in all enforcement areas of competition law. The rise of the digital economy, along with its multifaceted appearance, have placed data-driven competition at the heart of antitrust debates and placed it as the number one agenda item and priority for competition enforcers.

There is currently a highly controversial debate surrounding whether traditional competition law rules and regulations need to be revised in order to cope with the expressed concerns, given the fact that not only market evolution but also enforcement are in their early stages. This means that presently competition authorities' interventions in digital markets are cautious and to a great extent guided by traditional competition rules with the use of traditional tools. Furthermore, the critical role that innovation plays in these markets makes it even more important that a balance is struck between intervention and maintaining incentives to innovate, which also justifies a cautious approach.

The Turkish Competition Authority (TCA) is responsible for enforcing competition rules and engaging in competition advocacy activities to promote competition in Turkey. The Turkish Competition Act (Act. No. 4054 on the Protection of Competition) is to a great extent in line with EU competition law and

*The views and opinions expressed in this article are those of the author and do not necessarily reflect those of the Turkish Competition Authority.

⁴⁹COFECE (2018), "Rethinking Competition in the Digital Economy", p. 15.

regulations, with the result that its case law also closely follows EU case law. The TCA is also among those enforcers, which prefer to take a cautious approach when assessing digital markets that are still under development. According to market studies, digital markets bring about many benefits for consumers and businesses in Turkey, and consumer demand is evolving in favour of online markets, with the result that digital markets have plenty of room for improvement.⁵⁰

Up until now, Turkish competition case law concerning online markets has mainly dealt with exclusionary conduct allegations through the use of most favoured nation (MFN) clauses by dominant online platforms and with vertical restrictions in the form of online sales restrictions employed by suppliers. The former group of allegations are dealt with under either Article 4⁵¹ or 6⁵² of the Competition Act (Act No. 4054 on the Protection of Competition), whereas the latter group only fall under Article 4 of the Competition Act.

I. The Use of MFN Clauses by Online Platforms

The most prominent cases in which online platforms were alleged to have excluded rivals and restricted competition were *Yemek Sepeti*⁵³ and *Booking.com*⁵⁴. These two cases

⁵⁰ <http://eticaretmag.com/turkiye-e-ticaret-perakende-pazar-buyuklugu-infografik/>

⁵¹ Article 4 of the Competition Act prohibits anti-competitive agreements between undertakings. The Article is closely modelled on Article 101 of the Treaty on the Functioning of the European Union

⁵² Article 6 of the Competition Act prohibits abuse of dominance. The Article is closely modelled on Article 102 of the Treaty on the Functioning of the European Union

⁵³ The TCA's decision dated 09.06.2016 and numbered 16-20/347-156

⁵⁴ The TCA's decision dated 05.01.2017 and numbered 17-01/12-4

were quite similar, not merely in relation to the characteristics of the concerned undertakings, but also in relation to the practices that were investigated. That is, these investigations dealt with the use of MFN clauses by *Yemek Sepeti* and *Booking.com*, which are the leading online platforms in their sectors: online food ordering and online accommodation booking, respectively. The main difference between the investigations is that *Yemek Sepeti* was conducted under Article 6 of the Competition Act, while *Booking.com* was conducted under Article 4.

The investigations highlighted the two-sided nature of the markets and built the theory of harm accordingly. The relevant market definition was the first stage where two-sidedness was taken into account. The relevant markets relying on a substitutability analysis which focused on consumers' perspectives and the platforms being the intermediary in the transaction were defined as "online food ordering platform services" for *Yemek Sepeti* and "online accommodation booking platform services" for *Booking.com*. Therefore, not only offline counterparts such as call centres, but also the restaurants'/hotels' websites were not included in the relevant market.

In both cases, even though they followed different paths -*Yemek Sepeti* being an Article 6 case and *Booking.com* being an Article 4 case – the market power of the platforms was investigated in order to determine potentially restrictive and exclusionary effects. Both *Yemek Sepeti* and *Booking.com* were found to have relatively high market shares. In addition to market shares, other determinants of market power were also investigated. The prominent source of market power in this regard was based on the two-sided market

theory. The indirect network effects⁵⁵ were argued to be high and to facilitate the first mover advantage and were therefore found to amount to an important entry barrier. The decisions found that in order for a rival platform to enter the market, it should be able to build a sufficient base on each side of the platform. To attract consumers, the rivals should be able to offer better terms and conditions at first, which would in turn attract more members on the other side. The use of MFN clauses was found to eliminate this possibility. Consequently, the use of MFN clauses by dominant platforms was found to be restrictive and exclusionary, and therefore anti-competitive. The documents retrieved from on-the-spot inspections and the analysis conducted revealed that the online nature of the businesses eased the tracking of rivals' prices, terms and conditions, which in turn facilitated the punishment mechanisms (such as suspending membership or the automatic matching of the rivals' terms), thereby further aggravating the restrictive effects.

The investigations established that both undertakings had infringed the Competition Act and they were required to end the use of MFN clauses in their agreements.

II. Online Sale Restrictions by Suppliers

The rise of the internet as a new channel for distribution has created tension in the supplier-distributor relations concerning the restriction of online sales. Suppliers, by relying on arguments such as the prevention of free-riding and the protection of brand image, may want to restrict online sales in order to have stricter control over their distribution

⁵⁵The indirect network effects occur when the value obtained by one group of customers (customers on one side of the platform) increases with the number of customers (or, more generally, with demand) of the other group (the customers on the other side of the platform)

network. However, from a competition law perspective, this restriction may lead to consumer harm, since the internet as a new channel for purchasing goods and services is delivering enormous benefits such as extended choice and lower prices. The debate regarding online sales restrictions is mainly about finding the right balance between the legitimate interests of suppliers and consumers, as mentioned above.

Restraints in agreements between undertakings at different levels of the distribution chain, such as between a supplier and its dealers are called vertical restraints. Vertical restraints are regulated under Article 4 of the Competition Act, and as the main secondary legislation, the Block Exemption Communiqué No. 2002/2 on Vertical Agreements (Communiqué No. 2002/2) provides the exemption principles for vertical restraints. The TCA also issued Guidelines on Vertical Agreements (Guidelines) to clarify the specifics of the Communiqué No. 2002/2.⁵⁶

The TCA has recently revised the Guidelines to include and clarify its standpoint concerning online sales and MFN clauses as these topics began to surface in vertical relations along with the rapid increase in e-commerce. The revision process almost took two years and a revised version of the Guidelines was published on 30 March 2018. The revision made it clear that the TCA has acknowledged the contributions of the internet to consumer welfare and the necessity to find the right balance between ensuring the preservation of these benefits and suppliers' commercial interests.

The decision to revise the Guidelines also seems to signal a change in the approach of the Authority towards online sales. As will be

⁵⁶The TCA's vertical agreements regime is also to a large extent parallel with the EU's system.

stated below, the analysis of the case law prior to the revision decision revealed that the approach towards online sales restrictions was rather permissive. On the other hand, the recent cases tend to place more emphasis on the contributions of internet sales and adopt a more rigid attitude towards online sales bans by suppliers.

The online sales restriction has been regarded as a passive sales restriction as stated in the Guidelines. According to Communiqué No. 2002/2, passive sale restrictions can benefit from the exemption granted by the Communiqué only under very specific circumstances, which are set out in Communiqué Article 4 as: *“(i) Provided that it does not cover the sales to be made by customers of the purchaser, restriction of active sales to an exclusive region or exclusive group of customers assigned to it or to a purchaser, (ii) Restriction of sales of the purchaser operating at the wholesale level in relation to end users, (iii) Restriction of the performance of sale by the members of a selective distribution system to unauthorised distributors, (iv) In case there exist parts supplied with a view to combining them, restriction of the purchaser's selling them to competitors of the provider who holds the position of a producer.”*

When case law is considered, the restriction of online sales generally surfaces as an issue within a selective distribution system, which is not an exception listed above. So agreements that contain online sales restrictions for the members of the distribution system fall outside the block exemption regulation. For instance in *Yataş*,⁵⁷ the restriction on distributors' online sales was considered as an explicit limitation, which prevented the agreement from benefitting from the

⁵⁷ The TCA's decision dated 23.09.2010 and numbered 10-60/1251-469

exemption granted by Communiqué No. 2002/2. Likewise in *Antis*⁵⁸, the online sales ban for the members of the selective distribution system is the reason that the agreement could not benefit from the block exemption. Individual exemption analyses were then carried out in both cases, but yielded different conclusions. In *Yataş*, the total restriction of the online sale of the *Tempur* brand of mattresses was justified under the premise of protecting brand image and preventing free-riding. These arguments were set aside by the evaluations of the Authority, which adopted a similar approach as the European Commission. It was held that the abovementioned legitimate interests of the supplier could be attained by less restrictive measures such as by requiring quality measures for internet sales, with the consequence that the absolute ban on online sales violated Article 4 of the Competition Act. However, in *Antis* where the products to be sold via *Antis*'s selective distribution system belonged to the *Dermatologica* brand of professional cosmetic products, the absolute online sales ban was considered legitimate and an individual exemption was provided. It was held that the vital importance of keeping consumers informed about the choice and usage of products sold by a specialised salesperson in a selective distribution system also constituted an objective justification for online sales restrictions. The guidance of a salesperson was considered necessary for ensuring that consumers were fully informed and did not make faulty choices, which in turn would enable *Antis* to protect its brand image.

On the other hand, the recent cases on online sales restrictions tend to focus more on the benefits of the internet and adopt a stricter approach towards absolute internet bans.

⁵⁸ The TCA's decision dated 24.10.2013 and numbered 13-59/831-353

*BHS*⁵⁹ and *Jotun*⁶⁰ are the most prominent recent decisions in this respect. In both decisions, the importance of the internet with respect to lowering search costs for consumers and enhancing the possibilities of firms to reach consumers were indicated. The European Commission's e-commerce sector inquiry report's⁶¹ general findings were shared along with the Commission's opinion, that *the dealers' right to make online sales should not be restricted*. The approach of the Commission as outlined in the Guidelines on Vertical restraints was summarised in the decisions and also references from the recent landmark cases (*Pierre Fabre*⁶² and *Coty*⁶³) of the Court of Justice of the European Union (CJEU) were included. The TCA noted that *Pierre Fabre's* (a cosmetic and personal care products supplier) defence of an online sales ban by relying on brand image and the requirement of a specialised salesperson's recommendation were rejected by the CJEU, which considered the absolute ban on online sales as a restriction by object. With respect to *Coty*, the TCA indicated that the online sale restriction was limited to sales through third-party platforms and therefore not an absolute ban. The approach employed in the TCA's decisions with respect to absolute online sales was similar to that of the CJEU's, which is quite different than the approach employed in *Antis*. As indicated above, in *Antis* an individual exemption was provided for the online sale ban even though the case is quite

similar to *Pierre Fabre*. Even though this approach is quite new and inferred from a few decisions, it seems to be permanent as it is also reflected in the revised Guidelines, which as a result of the abovementioned amendments have become closer to those of the European Commission.

Conclusion

The internet and digitalisation are providing undeniable efficiencies for consumers and businesses but are not free of competition concerns. As in the famous saying *every pro has its own con*. The TCA appears to be adopting a cautious approach towards the competition concerns brought by the internet and digitalisation in order to preserve the benefits attached. It closely follows the decisions of other Competition Authorities and the judgments of the Courts as reflected in its decisions. The cases concerning restraints in online markets are increasing in number as online markets are flourishing. It may be too soon to talk about an established case-law, but the analysis of cases has revealed that the legal framework is getting stronger with new decisions and legislative works.

⁵⁹ The TCA's decision dated 22.08.2017 and numbered 17-27/454-195

⁶⁰ The TCA's decision dated 15.02.2018 and numbered 18-05/74-40

⁶¹ The EU Commission's Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf

⁶² Case C-439/09 *Pierre Fabre Dermo- Cosmetique SAS*, Judgment of 13 October 2011

⁶³ Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH*.

Specific Aspects of Establishing a Dominant Position in the Digital Economy



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A dominant position is one of the central categories of competition law and includes a set of characteristics of a company with market power. The concept of the dominant position and the procedure for determining it are determined in the Federal Law No. 135-FZ of July 26, 2006 "On Protection of Competition" and in the Procedure for Analysing the State of Competition in a Commodity Market.⁶⁴ For a long time the approach to establishing a dominant position by the antimonopoly authority was stable.

This changes, however, in the light of the digital economy. In the Russian Federation, the digital economy is viewed as a prerequisite for economic growth, competitiveness and improving the quality of life of citizens.⁶⁵

So far all digital enforcement cases affected digital markets. However, all industries are

⁶⁴ Introduced by FAS Russia Order № 220 of 28.04.2010.

⁶⁵ Accordingly, this issue is given special attention. On May 9, 2017, the Presidential Decree No. 203 "On the 2017-2030 Strategy for Development of the Information Society in the Russian Federation" was adopted and with it regulatory acts; for example, RF Government Directive №1632-p of 28.07.2017 «On approval of the programme «Digital economy of the Russian Federation»

potentially subject to changes and digital transformation.

For example, metallurgy enterprises are already involved in industry changes 4.0. Severstal launched an online store of metal products: with the help of IT tools it is possible to optimise production, shipment and transportation.⁶⁶ The Magnitogorsk Iron and Steel Works signed an agreement on cooperation in 3D printing of complex parts and components of technological equipment; solving production problems by processing large volumes of data (BigData), etc.⁶⁷

Along with the expected benefits for society and the State as a whole, the digital economy embodies new challenges also for competition law enforcement.

A first step towards preserving the effectiveness of the competition policy in light of the digital developments has already been taken: at the end of March 2018, draft amendments to the Federal Law "On Protection of Competition" were published.⁶⁸ The so-called "fifth antimonopoly package" provides for the introduction of some new concepts: network effects, price algorithms, and trustees.

The draft also provides for changes in the merger control procedure. The deadline for a merger investigation can be suspended for no more than nine months, when it is required to

⁶⁶ «Severstal» internet site, 13.04.2017 press release: <http://www.severstal.com/rus/media/news/document20358.phtml>.

⁶⁷ «MMK» internet site, 17.10.2017 press release: http://mmk.ru/press_center/72045/.

⁶⁸ On amendments to Federal Law «On protection of competition» and other legislative acts of the Russian Federation: <http://regulation.gov.ru/projects#npa=79428>.

conduct an in-depth analysis (in the current legislation, there is no possibility of suspension, the deadline for a review, including market analysis, is 3 months). It will also be possible to involve an expert in the examination of the application.

One of the main tasks of the law enforcer is to determine dominance in the digital economy. Will approaches to market definition need to change? What are the factors that reflect the market power of a company?

The concept of a dominant position is defined in Article 5 of the Federal Law "On Protection of Competition". Accordingly, a company is considered dominant if it has the ability to exert a decisive influence on the general conditions of sale of products on the market. The competition law⁶⁹ defines this criterion mainly as a qualitative one. The law also provides for a quantitative criterion of dominance - the market share of a particular product: a company cannot be recognized as dominant if its market share is less than 35%.

The procedure for conducting the analysis foresees a number of clear stages. As an initial step, the time horizon for the assessment is determined.

In digital markets, more emphasis needs to be placed on prospective analysis than on the examination of market conditions in the past, taking into account all known factors that can influence the competitive conditions.

One factor may be the analysis of potential competitors, who have not yet taken their place in the market, but the "innovative

⁶⁹ Galimkhanova N.F. Legal characterisation of the institute of dominant position of an undertaking on a product market:
<https://cyberleninka.ru/article/v/pravovaya-harakteristika-instituta-dominiruyuschego-polozheniya-hozyaystvuyuschego-subekta-na-tovarnom-rynke>

threats" that they pose need to be taken into account⁷⁰.

The most important issue is the definition of the market itself - the establishment of its scope. First, the product or group of mutually substitutable products (product boundaries) and the territory within which this product can be acquired (geographical boundaries) are determined.

Likely factors that will influence the market definition in digital markets have multidirectional trends.⁷¹ On one hand, markets are found to be expanding. Experts talk about reducing the barriers between markets and industries: the times of change motivate companies to search for new ideas outside their own industries.⁷² Price Waterhouse Coopers provides the following example: in the future, healthcare companies will produce microorganisms by way of bioengineering that will release gas from coal seams making hydraulic fracturing unnecessary.⁷³ In the light of these predictions, it is important for the regulator to consider the multiplier effect of mergers of

⁷⁰ Antimonopoly regulation in the digital era. How to protect competition under conditions of globalisation and forth industrial revolution. Edited by A.Yu. Tsarikovsky, A.Yu. Ivanov, E.A. Voynikanis, 2018.

⁷¹ Antimonopoly regulation in the digital era. How to protect competition under conditions of globalisation and forth industrial revolution. Edited by A.Yu. Tsarikovsky, A.Yu. Ivanov, E.A. Voynikanis, 2018.

⁷² See e.g. PricewaterhouseCoopers study «Future of industries: destroying barriers»,
<https://www.pwc.ru/ru/publications/the-future-of-industries-rus.pdf>;

World of illusion: five main myths of the digital economy. Svetlana Balanova:
<http://www.forbes.ru/kompanii/350323-illyuzorny-mir-pyat-glavnyh-mifov-cifrovoy-ekonomiki>.

⁷³ PriceWaterhouseCoopers «Fututre of industries: destroying barriers»:
<https://www.pwc.ru/ru/publications/the-future-of-industries-rus.pdf>.

companies that are active in different sectors of the economy when assessing the permissibility of transactions.

On the other hand, there is an opposite trend - to personalise a product, and to create unique products. These developments point toward a narrowing of the product market boundaries.

As to geographic market definition, globalisation is the main trend. Due to the development of internet commerce technology (for example 3-D printing), the consumer is no longer bound to the nearest seller as a means of saving on transportation costs.

However, each case needs to be assessed on an individual basis. Andrei Tsyganov, deputy head of the FAS Russia, summarized the position of the regulator in the Google⁷⁴ case as follows: the markets, even if they were initially identified as global due to the nature of information and communication technology products, were in the course of the investigative procedure defined as national. This was due to the specific manner of consumption of products in particular markets and the reaction of consumers to these features.⁷⁵

⁷⁴Background info: In September 2015 FAS Russia determined that Google has infringed Art. 10 part 1 of FL «On protection of Competition». The violation was reflected in the actions of the company that led to a virtual prohibition of pre-installation of competing applications of other developers; furthermore the infringement included provision of the GooglePlay applications store to its client producers of mobile phones and gadgets intended for sale in Russia under conditions of obligatory pre-installation along with GooglePlay certain other applications of the company, their placement in visible parts of the screen and obligatory installation of Google search engine «by default»

⁷⁵FAS Russia site: FAS Russia provided OECD colleagues with a way of determining geographical

Another important topic in the practice of antimonopoly authorities is the analysis of the role of digital platforms (two-sided markets).

FAS Russia recently considered the merger transaction between Yandex and Uber. Both companies operate in the market of taxi services; consumers have access to ordering taxis through smartphone applications.

If you compare the company's business models with traditional taxi services, one could easily draw the conclusion that the companies operate in two different markets. However, if you look at the economic reality, the conclusion will be different: taxi ordering platforms and traditional taxi services operate on the same market, and they exercise competitive pressure on each other.

This is the approach taken by the FAS Russia in its consideration of that transaction. The product market was defined as the provision of information services for taxi drivers and passengers, and the geographical market as the whole Russian Federation.⁷⁶

Another challenge, next to market definition, is the determination of criteria for dominance on digital markets. Traditionally, a dominant position is identified with the company's share in the market. This requires calculations of market volumes, preferably in monetary terms. This is however rather difficult to do on certain digital markets, as goods are not physically traded on the market and are not monetised (for example, mobile applications for ordering taxis are used by consumers for free). In addition, there is no official statistical information with respect to digital products that would allow determining the volume of trade.

markets on the basis of the Google case example: https://fas.gov.ru/news/2534/export_to_file.pdf.

⁷⁶FAS Russia site: <https://fas.gov.ru/news/23389>.

The digital economy also allows for market power without a significant market share, for example for information platforms.⁷⁷ Digital platforms create network effects, increasing the value of the product for a particular consumer with an increase in the number of other consumers of this product. The platform generates benefits for consumers, but at the same time, network effects act as a barrier to entry for competitors into the market.

Another factor to be taken into account when assessing market power are the databases a company has at its disposal. Information is a key resource in the modern world. It is impossible to disagree with the position of the judge of the Constitutional Court of the Russian Federation Gadis Gajiyev: "Big data is a new kind of capital, which has a huge value. And they are part of the structure of the economy. The cost of traditional capital is determined in accordance with Marx, and that of digital capital - by the number of users."⁷⁸

Problems related to market definition have not yet been unambiguously resolved and will continue to be discussed and analysed both by antimonopoly bodies and representatives of the academic community. The main conclusions and recommendations at this stage are as follows:⁷⁹

The very nature of competition is changing.

In the digital economy, along with price competition, innovation competition is no less important.

⁷⁷ See e.g. Analytical centre under the aegis of the RF Government. Bulletin on the development of competition. September 2016. Antimonopoly regulation of two-sided markets: determining the issues:

<http://ac.gov.ru/files/publication/a/10203.pdf>

⁷⁸ FAS Russia site: <https://fas.gov.ru/news/23451>.

⁷⁹ Antimonopoly regulation in the digital era. How to protect competition under conditions of globalisation and forth industrial revolution. Edited by A.Yu. Tsarikovsky, A.Yu. Ivanov, E.A. Voynikanis, 2018.

Prospective market analysis comes to the fore.

Reducing the role of the quantitative criterion of dominance. The market share does not reflect the market power of the company, market analysis needs to focus on qualitative criteria: entry barriers, the availability of alternative ways for access to end users (including the availability of measures aimed at retaining end users), network effects, the level of innovation used in technologies and services - all these factors deserve special attention from the regulator.

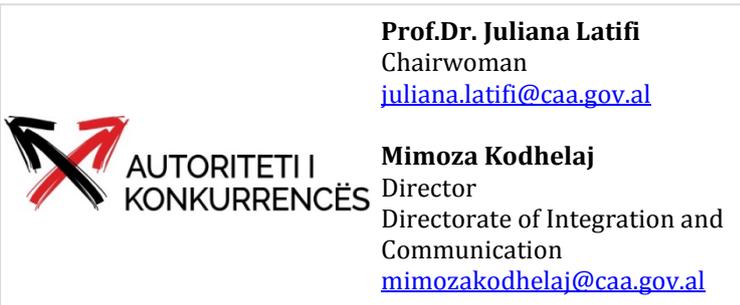
Information is a key resource. In determining a dominant position, access to and use of data by a business entity for the implementation of its business strategy and obtaining competitive advantages should be taken into account.

The proposed approaches are based on actual cases and, for the reasons stated, will undoubtedly be supplemented. Nevertheless, in the opinion of the authors of this article, the existing experience should be used as efficiently as possible, reflecting the methodological recommendations for conducting market analysis.

The absence of a toolkit adapted to the conditions of the digital economy should in no way allow to limit or eliminate competition. So, in a case that does not allow the antimonopoly body to establish a dominant position, an alternative approach could be applied under Russian competition law: the prohibition of anti-competitive behaviour on the part of "non-dominant" companies through provisions regulating unfair competition.⁸⁰

⁸⁰ Antimonopoly regulation in the digital era. How to protect competition under conditions of globalisation and forth industrial revolution. Edited by A.Yu. Tsarikovsky, A.Yu. Ivanov, E.A. Voynikanis, 2018.

Competition Advocacy Experience of the Albanian Competition Authority



I. Introduction

Today the online and digital economy is thriving and undertakings are increasingly aware of anticompetitive conducts. Consequently, one of the main challenges of competition enforcement across the world is to maintain a pro-active role.

Competition advocacy, as defined by the International Competition Network (ICN),⁸¹ refers to those activities undertaken by a Competition Authority that promote a competitive environment by means of non-enforcement mechanisms, mainly through its relationships with public agencies and by increasing public awareness of the benefits of competition.

The [Global Competitiveness Index \(GCI\)](#) of 2017 ranked the Albanian economy 75th, up from the 80th position in 2016, before other countries of the region like Serbia, Montenegro and Bosnia and Herzegovina. The Albanian economy is recovering from an insufficient production capacity and so far in 2018 is showing a promising revival. This progress, however, could be slowed down by competition restraints. These could appear in the form of monopolistic positions, high market concentration or any other situation

⁸¹ <http://www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf>

affecting competition adversely. The Albanian Competition Authority (ACA) makes strong efforts to be an active player, and aims to identify and to prevent possible competition infringements.

II. Advocacy in 2017

In 2017, the ACA redesigned its strategy to foster international co-operation and to enhance competition advocacy within the country. In order to promote to undertakings the benefits associated with playing fairly where competition is concerned, to raise consumer awareness of welfare reducing competition violations and to educate new generations in competition culture, the ACA undertook a number of different actions.

2.1 International Competition Conference

The ACA, in cooperation with the United Nations Development Programme (UNDP), organised the International Conference “13 years of experience in Competition Policy in Albania: aspects from law; economy and business; learning-by-doing; and international co-operation” on 11-12 December 2017 at the Tirana International Hotel. Many representatives from regional and European competition authorities, international organisations such as the EU, OECD, UNCTAD, ECS, and representatives from Albanian institutions and regulatory bodies participated in the conference. Invited foreign lecturers emphasised that in order for markets to perform better through competition the rule of law needs to be enforced, as this can ensure the creation and maintenance of free markets, independent courts and the protection of property rights, which will attract private, foreign and local investments to create new jobs.

During the conference, the ACA's activity was discussed. As an independent public institution in its 13th year of establishment, its activity has been focused, in particular, on the most sensitive sectors of the economy, such as fuel, gas, mobile services markets, insurance markets, agricultural markets, the banking sector, as well as public procurement. The ACA aims to protect weak consumers from cartels, protect small farmers and businesses from abuse by dominant buyers and suppliers and to control mergers. In light of the challenges of the future EU accession process and an increasingly global economy, the need for a vigorous enforcement of antitrust rules and principles by the ACA requires it to be even more proactive and to also enhance international co-operation.

- Roundtables

In order to promote competition advocacy, the ACA has held several roundtables with the business community. In October - December 2017, three roundtables were organised in the cities of Elbasan, Fier and Durrës. Under the headline 'Contribution of the Competition Authority to the Sustainable Development of Businesses', two documents were presented: 'The Leniency Program' and 'Compatibility with competition rules'⁸². The Leniency Program has been in force since 2015⁸³ but no applications have been submitted so far. Compatibility with competition rules is a recent compilation aimed at raising the awareness of the business community to the rules of competition, as well as

⁸² http://caa.gov.al/uploads/publications/Programi_i_prpuethshmrir_red.compressed.pdf

⁸³ Competition Decision No. 382 dated 17.11.2015 'On the approval of the leniency program' <http://caa.gov.al/decisions/read/id/587>

the necessity to co-operate with the Albanian Competition Authority.

- Publications

The ACA has produced a list of publications on competition enforcement in the areas of abuses of dominant positions, merger assessment, prohibited agreements and bid-rigging, advocacy and Regulatory Impact Assessment Rules (RIA). These publications are distributed during different events that the ACA organises with universities and academic bodies, law firms, business communities and other institutions.

- Approval of new regulation on categories of technology transfer agreements

New technologies can definitely make markets more effective and productive, but related agreements between undertakings need to be in accordance with the laws in force. Competition laws need to keep up with the digital era. The ACA is doing its best to stay up to date and to sometimes even precede market changes through its secondary legislation. Although the ACA has not dealt with any case relating to digitalised markets, it adopted a new regulation in 2017⁸⁴ on the categories of technology transfer agreements that is fully in line with the same regulation of the European Union⁸⁵. Technology transfer agreements concern the licensing of technology rights. Such

⁸⁴ http://caa.gov.al/uploads/publications/Vendim_nr.489_dt.20.12.2017.pdf

⁸⁵ Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements

agreements will usually improve economic efficiency and be pro-competitive, as they can reduce the duplication of research and development, strengthen the incentive for the initial research and development, spur incremental innovation, facilitate diffusion and generate more product market competition.

III. New advocacy approach foreseen in 2018

For 2018, following the most welcome announcement by the European Commission on the opening of accession negotiations with Albania, the Albanian Competition Authority is elaborating a new advocacy plan. The new plan will include the adoption of best practices advocacy toolkits from other EU member states and international experiences from the region and well established organisations such as the ICN, UNCTAD and OECD.

In response to an increasing number of merger control cases in Albania over the last few years⁸⁶, the ACA plans a new publication in 2018 with an updated collection of guidelines regarding merger assessment based on best practices within the European Union.

As the digital economy may make it increasingly difficult to find direct evidence of communication between competitors in cartel agreements and bid-rigging procedures, cartel screenings tools have been developed. The

ACA will continue to rigorously follow best practices in its daily work on detecting and investigating prohibited agreements.

With regard to abuse of dominant positions, in relation to which the ACA faces a significant number of appeals in court, the ACA plans to publish a new collection of legal provisions and case law from European courts detailing the legal standpoints used by competition authorities and why certain cases failed in 2018. This document shall provide the ACA staff with the relevant experience and with references when dealing with complicated infringements in abuse of dominant position cases.

IV. Conclusion

We believe that the new approach of the ACA's advocacy plan and the planned publications will improve markets and have a positive impact on businesses and consumers. Even though there has not been a large number of cases or concerns related to digital topics as of yet, the trends of global markets will spill into national markets. This will lead to the adoption of new technologies by the undertakings, new start-ups, and an interest in merging with other partners in order to increase market shares, and so on. It is vital that the ACA stays vigilant and on top of developments in order to safeguard the effective protection of competition in all markets.

⁸⁶ http://caa.gov.al/uploads/publications/Raporti_Vjetor_2017_-_Permbledhje_Ekzekutive_s.pdf

Development of Competition as a Priority of State Economic Policy in Russia



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In recent years, the economy has been facing economic challenges of a global nature. Structural changes in the economy are occurring more rapidly and are affecting to a greater degree all processes, including political and social. Moreover, the development of digital technologies and the growing role of innovation have changed the economic picture of the world, erasing the geographical boundaries of product markets, disrupting established economic ties and creating completely new markets (information technology) and completely new structural ties, typically of a global multilateral nature, that affect related industries and business sectors.

A completely new understanding of economic processes and market structures can be attributed to the emergence and significant growth of the influence of digital platforms that bring together large numbers of producers, sellers of goods and buyers in a significant number of commodity markets through the interconnection of mobile devices and the aggregation of information (databases).

Another important factor that determines the characteristics of the economy at its present stage, and directly related to digitalisation, is the increased importance of intellectual property.

Consequently, negative factors affecting the economy that may actually restrain the development of competition and economic growth must be overcome. The development of competition is a crucial factor in driving economic growth. And it is quite obvious that this resource is currently being used inefficiently in Russia.

The development of the basic prerequisites of a market economy and a modern economic system in Russia has for more than 27 years been inextricably linked with the development of competition. At different stages, programme documents were adopted at various levels that defined the goals and objectives of the state policy in the area of competition.

On December 21 2017, the President of the Russian Federation signed into force Decree No. 618 "On the main directions of state policy for the development of competition". The signing of the Decree is, in fact, a new milestone not only of antimonopoly regulation, but also of the economic policy of the state as a whole.

The presidential decree is a direct continuation of the Constitution of the Russian Federation, which guarantees competition support and sets a prohibition for economic activity aimed at monopolisation and unfair competition. Thus, competition is recognised as the basic foundation for civil law relationships, the functioning of product markets and the market economy as such.

Of fundamental importance is the provision of the Decree that determines that the active promotion of competition in the Russian Federation is a priority area for the activities of the President of the Russian Federation, the

Government of the Russian Federation, other government bodies and local self-government bodies, and which stipulates that it is unacceptable to introduce and (or) maintain discriminatory conditions in respect of particular types of economic activity, production and turnover of particular types of goods, the provision of particular types of services, except for situations stipulated by federal laws, legal acts of the President of the Russian Federation, or legal acts of the Government of the Russian Federation.

The establishment of such a basic principle of activity for all authorities provides the basis for an appropriate assessment of their activities and decisions, including legal acts, as regards their compliance with the goals, objectives and principles of competition policy. Failure to comply with this basic principle can and should be regarded as being in direct contradiction to state interests.

No less important is the specification in paragraph 2 of the Decree of the President of the Russian Federation of the objectives of improving the state policy for the development of competition, which include:

- a) raising the level of customer satisfaction by expanding the range of goods, works, services, improving their quality and reducing prices;
- b) an increase of economic efficiency and competitiveness of economic entities,

including by ensuring equal access to goods and services of natural monopoly entities and public services necessary for conducting business activities, stimulating innovation of economic entities, increasing the share of knowledge-intensive (high-tech) goods and services in production, development of markets for high-tech products;

- c) stable growth and development of a multisector economy, development of technologies, reduction of costs throughout the national economy, reduction of social tensions in society, providing for national security interests.

The interlinkage and balance of such interests are provided for through fair economic competition, which at the same time provides for the very possibility of the existence and development of competition. This peculiar "virtuous circle" underlies the progressive economic development of market relations.

The implementation of the above principles and objectives of the state policy as regards the development of competition, as they are defined in the Decree, should become a common task of all government bodies and civil society institutions, as well as a guarantee of the effectiveness of state policy on the development of competition and economic growth under current conditions.

Implementation of the Competition Chapter of the EU-Georgia Association Agreement – the Continued Progress*



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Opening remarks

The transformative power of the European Union, especially in its neighbourhood, cannot be overstated. Unsurprisingly, the EU-Georgia Association Agreement⁸⁷ led to “clear progress in Georgia's reform agenda”.⁸⁸ The creation of the Deep and Comprehensive Free Trade Area (DCFTA) inspired the substantial refinement of major policy areas, including antitrust. The DCFTA set Georgian competition policy on the right and stable track of development.

The sporadic pre-DCFTA history of Georgian antitrust law will not be covered in this article. It is suffice to say that since the signature of the Partnership and Cooperation Agreement in 1996, the EU has supported the formation

**The opinions expressed in this article are the author's own and do not necessarily reflect those of her employer.*

⁸⁷ Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, 30.8.2014, L 261. Available at: [http://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:22014A0830\(02\)](http://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:22014A0830(02)) (unless otherwise indicated, all online materials were accessed on 30.04.2018).

⁸⁸ Statement of High Representative of the Union for Foreign Affairs and Security Policy / Vice-President of the Commission Federica Mogherini in the European Commission's press release IP/17/4462, *EU Report: Georgia successfully delivering on its reform commitments*, available at: http://europa.eu/rapid/press-release_IP-17-4462_en.htm.

and development of a modern competition policy in Georgia⁸⁹. Antitrust has remained an integral part of the EU-Georgia cooperation agenda ever since. As of 2014, and as a direct consequence of the EU-Georgia Association Agreement, Georgian competition legislation became more closely approximated to EU rules, constituting “one of the most important legal developments of recent years”⁹⁰.

Chapter 10 of the EU-Georgia DCFTA strives to achieve free and undistorted competition in the trade relations between the parties. In particular, it calls for comprehensive competition laws, effectively addressing anti-competitive agreements and concerted practices, as well as anti-competitive unilateral conduct of dominant enterprises and effective control of concentrations to avoid significant impediments to effective competition.⁹¹ Although articles 203-209 do not specifically address state aid, Article 206 aims to ensure transparency in the area of subsidies, as defined in the SCM Agreement.⁹²

The implementation of the DCFTA is monitored by the EU-Georgia Association Council (highest political level) and the

⁸⁹ Articles 43 and 44 of the EU-Georgia Partnership and Cooperation Agreement of 22 April 1996. Available at: http://trade.ec.europa.eu/doclib/docs/2004/july/tradoc_116755.pdf.

⁹⁰ Zurab Gvelesiani, *Georgia's First Steps in Competition Law Enforcement: The Role and Perspectives of the Private Enforcement Mechanism*, Yearbook of Antitrust and Regulatory Studies, Vol. 2015, 8(12), p. 235; available at: www.yars.wz.uw.edu.pl.

⁹¹ Article 204 of the DCFTA.

⁹² Article 1 of the WTO Agreement on Subsidies and Countervailing Measures. Available at: https://www.wto.org/english/docs_e/legal_e/24-scm.pdf.

Association Committee in Trade Configuration. The latest Association Implementation Report stated that “Georgia continues to progress with the approximation to the provisions of the DCFTA on competition”⁹³. It is, however, acknowledged, that “areas such as competition ... need a bigger focus”.⁹⁴

This article focuses on key post-DCFTA developments in Georgian competition policy. In particular, it outlines a number of shortcomings of the current legal framework and provides recommendations for their improvement. The article concentrates on “core competition provisions” and does not cover issues related to state aid⁹⁵, unfair competition⁹⁶ or the control of the competitive effects of the actions of state authorities⁹⁷.

How can Georgian Law on Competition be improved?

The Law on Competition (“the Law”) is the first Georgian antitrust statute that is broadly compliant with EU competition principles and it provides a solid basis for further development. However, the Law leaves significant scope for improvement, both from a procedural and a substantive point of view.

⁹³ European Commission, High Representative of the Union for Foreign Affairs and Security Policy, Joint Staff Working Document - Association Implementation Report on Georgia, 9.11.2017, SWD(2017) 371 final; p. 9; available at: https://eeas.europa.eu/sites/eeas/files/association_implementation_report_on_georgia.pdf.

⁹⁴ European Parliament, “The state of implementation of the associations and free trade agreements with Ukraine, Georgia and Moldova with a particular focus on Ukraine and systemic analysis of key sectors”, 2017, available at: http://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_STU%282017%29603836.

⁹⁵ Article 3 (R) and Articles 12-14 of the Law on Competition.

⁹⁶ Article 11³ of the Law on Competition.

⁹⁷ Article 10 of the Law on Competition.

Admissibility of applications and complaints – Article 23 of the Law places a heavy burden on the Georgian Competition Agency (GCA). The GCA is obliged to formally follow-up on every application and/or complaint alleging a violation of the Law. This places a disproportionate burden on the authority and should be rectified. Although the GCA has attempted to establish an EU-like discretion in terms of admissibility⁹⁸, the legislator is best placed to make the formal follow-up of applications and complaints optional, rather than mandatory.

The GCA’s (lack of) powers to gather evidence

- Article 18 of the Law enumerates the competences of the GCA. It enables the GCA to request information from undertakings, on the condition that they are “interested parties” for the purposes of Georgian administrative law. Although somewhat limiting, the latter condition could arguably be overcome through the use of wide interpretation. What is more troubling, and irremediable via the use of interpretative tools, is this provision: “If no documentation related to the case is received, for the purpose of investigation, submit to the court the solicitation on submission of the relevant documentation by the economic agent”⁹⁹. Although the GCA has the power to impose penalties on undertakings for a failure to submit the requested information¹⁰⁰, the amount of such penalties is limited (from 1000 to 3000 Georgian Lari¹⁰¹) which effectively means that the GCA has to use the court system to oblige the undertakings to produce relevant documents. Furthermore, the GCA is only able to request oral explanations insofar

⁹⁸ See, e.g. The Order of the Chairman N246 of 28 December 2016 and the decisions cited therein; available at:

<http://competition.ge/ge/page4.php?b=496>.

⁹⁹ Article 18(1)(c) of the Law on Competition.

¹⁰⁰ Article 32 of the Law on Competition.

¹⁰¹ Approximately - EUR 335 to EUR 1000.

as the case has been initiated on the basis of a *complaint*¹⁰² (as opposed to on the GCA's own initiative).

The situation is even more difficult when it comes to on-site inspections. According to Article 25(8) the GCA is obliged to request the court's permission before conducting an unannounced inspection and four stringent conditions¹⁰³ need to be met. In addition, specific procedural rules are unclear and subject to divergent interpretations.¹⁰⁴

The first decision of the Supreme Court of Georgia¹⁰⁵ concerning a case decided under the Law on Competition¹⁰⁶ set high evidentiary standards in the field of antitrust. While finding the GCA's appeal to the lower court's decision¹⁰⁷ inadmissible, the Supreme

¹⁰²Article 18(1)(d) of the Law on Competition.

¹⁰³Article 25(8) of the Law on Competition lists the following conditions: a) Required information and documents cannot be obtained by the means of information requests; b) There is a danger of destruction and/or concealment of the information related to the case; c) Parties fail to comply with the obligation of providing information and documents; d) Visual inspection of the material assets is required.

¹⁰⁴For a detailed discussion on this issue, see: Zurab Gvelesiani, *The First Cartel Discovered on the Georgian Market, Case Comment to the Decision of 14 July 2015 on the Car Fuel Commodity Market (Order No 81 of the Chairman of the Georgian Competition Agency)*, *Yearbook of Antitrust and Regulatory Studies*, VOL. 2016, 9(13), pp. 176-177. Available at: www.yars.wz.uw.edu.pl.

¹⁰⁵Decision BS-500-497(k-17) of the Administrative Chamber of the Supreme Court of Georgia of 14 July 2017.

¹⁰⁶Order No 81 of the Chairman of the Georgian Competition Agency - Decision of 14 July 2015 on an infringement of the Law on Competition in the Car Fuel Commodity Market. Available in Georgian language at:

<http://competition.ge/images/upload/%E1%83%91%E1%83%A0%E1%83%AB%E1%83%90%E1%83%9C%E1%83%94%E1%83%91%E1%83%90%2081.pdf>.

¹⁰⁷The Decision of 27 April 2017 of the Administrative Chamber of Tbilisi Court of Appeals, *Company X v. Competition Agency of Georgia*.

Court reiterated the obligation of the Agency to base its decisions on a "comprehensive, full and objective" evaluation of complete and convincing evidence.¹⁰⁸ In the light of the foregoing, it is submitted that the Georgian legislator should, as a matter of priority, eliminate the procedural inefficiencies discussed above to facilitate the enforcement of the Law.

Anti-competitive agreements – Article 7 of the Law is modelled on the wording of Article 101 TFEU. However, it does not explicitly mention decisions of associations of undertakings. Furthermore, its subparagraph "f"¹⁰⁹ concerning bid-rigging is vague; it also overlaps with Article 195¹ of the Georgian Criminal Code, leading to confusion regarding the respective competences of the GCA and the Prosecutor's Office. In addition, exemptions provided in Articles 8 and 9 of the Law seem unduly restrictive. Firstly, the conduct excluded from the *de minimis* rule is defined in a formalistic rather than functional way.¹¹⁰ Secondly, Article 9 (Georgian equivalent of Article 101(3) TFEU) specifies that only the conduct listed in the relevant government regulation¹¹¹ complies with the

¹⁰⁸See, *Supra*, note 19.

¹⁰⁹"Setting agreed terms of tender (in order to ensure a material gain or an advantage for the concerted economic agents or other parties participating in the procurements), which cause substantial damage to the legal interests of the purchasing organisation".

¹¹⁰Article 8(2) of the Law on Competition states: "The provisions set forth in the first paragraph of the present Article do not apply to the cases stipulated by subparagraphs "a", "c" and "f" of the first paragraph of Article 7 of the present law." This can be problematic as it excludes not only specific "hardcore" violations, but also any conduct falling under those three subparagraphs, from the possibility of benefitting from the *de minimis* exemptions.

¹¹¹Regulation No 526 of the Government of Georgia of 1 September 2014 *On Exemptions from*

conditions for exemption. As a result, certain pro-competitive conduct not directly provided for in the latter text will not benefit from the “efficiency defence”. This could be remedied by removing the exhaustive character of the regulation.

Abuse of a dominant position – Article 6 of the Law is a near-literal equivalent of Article 102 TFEU. However, Article 6 does not contain any indication of possible defences for *prima facie* abusive conduct. While the Court of Justice of the EU developed the notion of “objective justification”¹¹² for abuse of dominance, Georgian courts operate in the Civil Law system and will be constrained by the text of the law. Although the GCA considered the (absence of) objective justification in its decision of 21 April 2017 in the *Poti Port* case¹¹³, the possibility of a divergent interpretation by the courts (especially, in the context of private enforcement) cannot be ruled out. Thus, the Georgian legislator would contribute to legal certainty by clarifying this aspect and providing an explicit provision to that effect.

Concentrations – both the formal and substantive rules on concentrations necessitate clarification. The definitions of “interdependent persons”¹¹⁴ and of the notion

the Prohibition on Competition Restricting Agreements, available at:

<http://competition.ge/en/page2.php?p=4&m=199>.

¹¹²Case 27/76 *United Brands v Commission* [1978] ECR 207, paragraph 184; Case T-30/89 *Hilti v Commission* [1991] ECR II-1439, paragraphs 102-119; Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331, paragraphs 69 and 86.

¹¹³Order N04/91 of 21 April 2017 of the Chairman of the Agency, summary available at: <http://competition.ge/en/page4.php?b=571>.

See also: Nino Kobadze, *Black Sea Port in Georgia Scrutinised by the Georgian Competition Authority Relying upon EU Case Law as Plans for Expansion Rejected*, *Journal of European Competition Law & Practice*, 2018, Vol. 9, No. 3, pp. 176-182.

¹¹⁴Article 3(k) of the Law on Competition.

of “control”¹¹⁵ seem unclear and incoherent, as does the notion of “concentration”.¹¹⁶ Furthermore, the Law provides for very short time-limits (a maximum of 1 month and 2 weeks)¹¹⁷ for merger review, and does not provide for the possibility to “stop the clock”. Such time constraints increase the risk that merger review will be ineffective. In terms of the substantive test for the evaluation of the competitive effects of concentrations (Article 11(5) of the Law) Georgia adheres to the dominance test, despite its recognised shortcomings.¹¹⁸ Furthermore, Georgian merger control is binary (approval or prohibition) and does not allow for commitments. Finally, the Law does not foresee sanctions for gun-jumping or unlawful concentrations. One way of remedying these shortcomings would be aligning Georgian legislation with the EU rules.

Sectoral regulation and competition law – perhaps the greatest challenge for Georgia’s continued compliance with the Competition Chapter of the DCFTA is the variable geometry of competition rules in regulated sectors.

¹¹⁵Article 3(L) of the Law on Competition.

¹¹⁶Subparagraph (b) of Article 11(1) provides that a concentration can arise, inter alia, through the “acquisition of direct or indirect control over an economic agent or any part of its business through the purchase of securities or asset shares, via an agreement or otherwise by a person already controlling at least one economic agent”. The latter requirement leaves the GCA in limbo when the acquirer of control is an undertaking that does not control any other (and unrelated to the concentration) undertaking. At the same time, Subparagraph (c) of Article 11(1) qualifies “participation of one and the same person in the management boards of different economic agents” as a concentration, however, in practice, “participation in management” might not always equate with actual control of an undertaking.

¹¹⁷Article 11¹(3) of the Law on Competition.

¹¹⁸See, e.g. Alison Jones, Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials*, (Sixth Edition), Oxford University Press, 2016, pp. 1131-1133.

While some regulated sectors are directly excluded from the material scope of the Law on Competition¹¹⁹, others (e.g. energy, telecommunication, banking, etc.) are in principle subject to the Law but not to the powers of the GCA. Chapter VI of the Law provides guidance on the cooperation between the GCA and the sector regulators, however, the applicable antitrust regime remains unclear and jeopardises proper competition enforcement in these key sectors of the economy.

The Way Forward

Notwithstanding the shortcomings of the Law on Competition, after four years of existence, the GCA has proved to be a prudent authority, constantly striving to establish and follow sensible policies and expand competition culture in Georgia. The GCA's annual enforcement record for the year 2017 included 5 completed investigations, 2 merger clearances, 5 market monitoring exercises and various other recommendations and decisions.¹²⁰ Important steps have been taken to strengthen the institutional capacity of the GCA. Finally, in order to remedy the issues related to antitrust enforcement in the regulated markets, the GCA has concluded a memoranda of cooperation with three sector regulators.¹²¹

Despite all these efforts, Georgia's international ranking in the domain of

antitrust remains unsatisfactory¹²² and the World Bank has also highlighted significant opportunities for improvement¹²³. These challenges are duly acknowledged: "the continuation of the DCFTA implementation, notably through regulatory approximation and institutional capacity building, will require continuous efforts by the Georgian authorities as well as on the EU side in terms of assisting Georgia in this process."¹²⁴

The Association Implementation Report stipulates the specific tool for addressing the shortcomings: "With the support of EU Technical Assistance, Georgia is strengthening law enforcement, cooperation between the Competition Agency and the sector regulators, as well as the promotion of competition culture".¹²⁵ Indeed, the EU's Technical Assistance project deserves a special mention. Launched in March 2017, this comprehensive project has ambitious aims and its work is still in progress. The Georgian government, striving for full and effective implementation of the DCFTA, is expected to take the findings and recommendations of the invited experts into account. Therefore, further amendments of the Law on Competition, in the spirit of the Competition Chapter of the DCFTA, should be welcome.

¹²²Global Competitiveness Report of the World Economic Forum contains the following ranking for Georgia:

6.01. Intensity of local competition 94; 6.02. Extent of market dominance 67; 6.03. Effectiveness of anti-monopoly policy 112 (out of 137 economies); available at:

<https://www.weforum.org/reports/the-global-competitiveness-report-2017-2018>.s

¹²³World Bank, Implementation Completion and Results Report, (IDA-51470, IDA-52850, IDA-55110, IDA-55120), para. 39. available at:

<http://documents.worldbank.org/curated/en/125021470159322846/pdf/Implementation-Completion-and-Results-Report-00003174-07292016.pdf>.

¹²⁴See, Supra, note 7.

¹²⁵See, Supra, note 8.

¹¹⁹Article 4 of the Law on Competition refers to labour laws; it also mentions intellectual property and securities regulation, however with certain caveats.

¹²⁰Source: Annual Report of the Competition Agency of Georgia, available at:

<http://competition.ge/images/upload/Annual%20Report%202017.pdf>.

¹²¹Ibid.

Questions Regarding the Interpretation and/or Application of Competition and State Aid Law in the Area of Energy? – The Energy Community Secretariat Will Help!



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The [Energy Community](#) is an international organisation that aims to extend the EU internal energy market to South Eastern and Eastern Europe (Albania, Bosnia and Herzegovina, Georgia, Kosovo, Former Yugoslav Republic of Macedonia, Moldova, Montenegro, Serbia and Ukraine; “the Contracting Parties”) beyond the borders of the EU on the basis of a legally binding framework, the Energy Community *acquis*. Competition and State aid law is one of the main pillars of this *acquis* which will help to liberalise and integrate the markets. It is enshrined in Article 18 of the [Energy Community Treaty](#) and therefore is part of the Energy Community law.

The Secretariat is the only permanently acting institution of the Energy Community. It is an impartial and independent institution with its seat in Vienna, employing a variety of experts from a number of fields such as legal, infrastructure, oil, gas, electricity and renewables. It is responsible for the day-to-day activities of the Energy Community and acts as the “Guardian of the Treaty” by reviewing the implementation by the Parties of their obligations under Energy Community law and assisting the Parties to achieve compliance with their obligations.

The Energy Community also has its own [Dispute Settlement Rules](#) which codify an enforcement mechanism modelled after the

EU infringement procedure. It is a procedure which may be initiated by the Energy Community Secretariat for the non-compliance of a Party with its obligations arising under the Energy Community Treaty and may lead – as a last resort – to a decision by the Ministerial Council finding an infringement (and ultimately non-monetary sanctions in case of serious and persistent breaches).

However, these Rules – in Article 2 – also contain a very useful and flexible cooperation mechanism between the Energy Community Secretariat and national authorities. It has codified an already existing cooperation mechanism and provides for an obligation of the national authorities (including competition and State aid authorities) to inform the Secretariat whenever a question concerning the interpretation or application of Energy Community law, including competition and State aid law, is raised in proceedings before it. This is only the first step to open the floor for the cooperation mechanism enshrined in the same provision: any national authority may then ask the Secretariat for assistance by submitting an opinion to it. This so-called opinion by the Secretariat may come in a variety of forms, depending on the request, needs and questions raised by the national authority. This may take the form of an overview of the legal framework applicable to a case/question, an overview of relevant case-law of national/international courts/authorities, an assessment of a legal question, assistance to apply competition or State aid *acquis* to a specific case, etc. The assistance provided by the Secretariat is very flexible and primarily depends on the needs of

the requesting authority or will be discussed with it beforehand.

The Secretariat's opinion shall be in line with the case law of the Court of Justice of the European Union and it may consult the Advisory Committee (an independent body composed of five legal experts) before issuing the opinion. It shall be based on the extensive expertise of the Secretariat in the energy sectors and the region.

However, it is important to point out that this opinion of the Secretariat shall simply be taken into account by the national authority. The national authority remains competent to render the final decision and keeps its independence with regard to this decision. This is, of course, without prejudice to the Secretariat's possibility to open an infringement procedure to the extent that the authority's final decision (or the absence of such decision) violates the competition and State aid acquis.

The deadline of a maximum four weeks and the flexibility of the mechanism and expertise of the Secretariat have helped to render this mechanism a success story.

Such a mechanism becomes all the more important in countries where the legal competition and State aid tradition is not established yet, and even more so, where the human and technical resources of national authorities are limited. The purpose of this cooperation mechanism is manifold:

- providing professional assistance to the national authorities by: reviewing the case law of the European Commission and the Court of Justice of the European Union; working together and applying European competition and State aid law to concrete national cases – assistance

with the analysis NOT decision-making;

- assisting the national authorities with the assessment of often complex legal questions of interpretation and application of Energy Community law;
- increasing the quality of decisions taken by national authorities;
- assisting the Secretariat in its monitoring tasks and enabling it to gain an overview of the enforcement actions taken in the energy sectors by the Contracting Parties;
- checking / ensuring compliance of national decisions with Energy Community law during the drafting process at expert level, thus preventing the initiation of ex post infringement actions by the Secretariat against the Contracting Parties;
- ensuring effective enforcement and the coherent interpretation of the competition and State aid acquis in relation to the energy sectors by the Contracting Parties.

In the past, the Secretariat has established close cooperation with a number of competition and State aid authorities in its Contracting Parties and wishes to extend its offer of assistance.

In Albania, the national State Aid Commission has very limited human and technical resources. The Commission, as the decision-making institution, should be assisted by a secretariat that prepares these decisions. However, unfortunately since the latest government reshuffle, such secretariat does not exist anymore. The Commission was notified of a State aid measure, namely a guarantee given by the Government of Albania to a loan provided by KfW to the transmission system operator (OST) for the "400 kv Albania-Macedonia transmission line

Fier-Elbasan-Qafthana”. The assessment of this guarantee involved a detailed legal and economic analysis, which the authority undertook with the assistance of the Secretariat. The State Aid Commission came to the conclusion that the guarantee constituted State aid, but that it was compatible and therefore legitimate.

In Ukraine, the competition and State aid authority, the Antimonopoly Committee of Ukraine, in the framework of an investigation requested an opinion on the extra-territorial application of Energy Community competition law in cases involving operators from third countries. In its letter, the AMCU posed questions as to its ability to apply national competition law, in particular the prohibition of abuse of dominance, to market operators from third countries. It asked for clarification

on EU and Energy Community practice regarding the enforcement of national competition law vis-à-vis third country operators. The Secretariat therefore gave an opinion laying down the single economic entity theory, the implementation theory and the effects theory as well as the applicable case law.

In a world of ever-broader competence of national competition and State aid authorities and limited human and technical resources of these authorities, any cooperation which is flexible and fast enough to amount to effective assistance instead of another burden should be a welcome step towards the common goal of competitive markets. The Energy Community Secretariat offers its assistance in the area of energy, so take this opportunity!

Literature Digest



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This issue of the Literature Digest for the July 2018 issue of the RCC Newsletter focuses on competition restraints relating to the digital age and e-commerce. While some papers have focused on practical issues making their way through the courts, most of the recent academic literature has focused on competition restraints that may arise in the future. Papers exemplifying this approach include:

[Ariel Ezrachi ‘The Ripple Effects of Online Marketplace Bans’ \(2017\)](#) World Competition 40 (1) 47

Online marketplaces bring together large numbers of sellers and buyers. In doing so, they facilitate dynamic inter- and intra-brand competition. While online marketplaces can have significant pro-competitive effects, they can also give rise to antitrust concerns regarding sellers’ efforts to maintain a uniform, consistent brand image, and product and service quality. The article identifies various types of measures that sellers can adopt to this end, from purely qualitative criteria (which are valid under EU law) to absolute restrictions on internet sales (which are per se prohibited).

The article then devotes particular attention to two types of online restrictions: (i) contractual marketplace

bans, i.e. instances where the producer requires the retailer to only utilise the retailer’s own approved website for sales and marketing, and prohibits the retailer from selling the products in question through online marketplaces; and (ii) de-facto marketplace bans, i.e. instances where the use of certain standards and criteria in the agreement between the producer and retailer leads to requirements that cannot be met by any other marketplace. The author argues that contractual and *de facto* market bans should not be able to benefit from the Vertical Block Exemption, and should be instead subject to an effects-based assessment.

The analysis precedes the Court of Justice of the European Union’s decision in [Coty](#), which held that such bans could fall within the Vertical Block Exemption. At heart, the difference between the approach proposed in this article and that adopted in *Coty* arises from the author having a more pessimistic view than the European Commission and courts on how open to competition online markets are.

[Inge Graef ‘Algorithms and fairness: what role for competition law in targeting price discrimination towards end consumers?’](#) (December 19, 2017)

The advent of data analytics and algorithm-based services has made it easier for firms to engage in price discrimination. Price discrimination is mostly considered to be welfare-enhancing from an economic perspective, particularly if it leads to greater economic

output. At the same time, personalised pricing is commonly felt to be unfair – and some forms of price discrimination are anticompetitive, particularly if they lead to pricing some consumers out of the market. As such, the overall effect of price discrimination on output and welfare depends on the specific circumstances of the case.

This paper seeks to identify the circumstances under which price discrimination may infringe competition law. The challenge for competition law is to ensure that only discrimination that is harmful to consumer welfare is prohibited, while not precluding undertakings from engaging in discrimination that is welfare-enhancing. The author identifies two types of price discrimination that may be problematic: (i) exclusionary effects, where the supplier's conduct produces effects against competitors in markets in which the supplier also operates; and (ii) exploitative effects, where the supplier gives preferential treatment to some customers and not to others when they are in competition with each other. Since price discrimination is more likely to negatively impact consumers in monopolistic markets, it makes sense to limit enforcement actions to discriminatory behaviour of dominant companies when exploitative behaviour seems sustainable over time.

However, many fields other than competition law regulate personalised pricing, including laws on data protection, consumer protection and antidiscrimination. Given the practical difficulties in identifying anticompetitive price discrimination, and the relative bluntness of competition remedies in this area, competition enforcement against

personalised pricing should take into account whether there is an actual enforcement gap that is not already filled by other legal fields.

[Christopher Townley, Eric Morrison and Professor Karen Yeung 'Big Data and Personalised Price Discrimination in EU Competition Law'](#) (2018) Yearbook of European Law (forthcoming)

This article focuses on a similar topic to the paper reviewed above. The main differences are two-fold: this paper contains a much more detailed analysis of what economic theory and legal theory have to say about price discrimination; and it identifies a 'fairness' objective in European competition law which goes beyond welfare maximisation.

As regards consumer welfare, this paper reaches similar conclusions to the one above: price discrimination often makes consumers better off by raising the consumer surplus, but the welfare effects of price discrimination still need to be assessed on a case by case basis. As regards fairness, the authors note that identifying situations which are widely perceived as unfair is difficult, partly due to the different ways in which fairness might be understood.

In the light of this, the authors conclude that fairness should only have a secondary role as regards algorithmic consumer price discrimination, in the form of a 'defence' to an allegation of abuse of market power. From this perspective, algorithmic consumer price discrimination which reduces consumer surplus may nonetheless avoid falling foul of competition law if it can be justified on grounds of fairness. Otherwise, it is preferable that fairness based objections

to algorithmic practices be primarily addressed via legal regimes that are directly concerned with the goals of ensuring collective fairness and distributive justice.

Both of the above papers on price discrimination provide comprehensive overviews of the problems that personalised pricing is likely to pose to competition enforcers. Both papers also display sophistication in how they assess whether competition law is a suitable tool for addressing price discrimination, in particular in the manner in which they attempt to take into account the wider regulatory framework applicable to price discrimination. This approach seems to be rather common in academic papers looking at how competition law should apply to the digital economy, and points towards a need to think about competition law in a wider (regulatory) context.

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