Make or break in 2019?

DEVELOPMENTS IN COMPETITION POLICY

2019 is unfolding as an important year for competition cases at the European Commission, as well as in other jurisdictions around the world. This bulletin looks at some of the key developments to be expected: the application of competition policy to the Goliaths of the digital markets, new approaches to litigation following breaches of competition law and – perhaps most fundamental of all – the impact of wider public policy concerns on the aims and scope of competition law.

Dialling up

The hottest question in competition law relates to its impact on digital markets. What role does it have to play in shaping the size and behaviour of leading firms? The debate on this game-changing issue has continued to gather pace. There have already been high-profile decisions by the European Commission (EC), such as *Google Shopping* and *Google Android*, leading to multi-billion euro fines, and the EC has opened up a new battle against Amazon relating to its dual role as retailer and as a provider of marketplace services to rivals.

The German Bundeskartellamt is promising a decision on its investigation into Facebook's use of third-party data early in 2019, and has also launched a sector inquiry into online advertising and initiated a joint project with the French Autorité de la Concurrence on algorithms and their effects on competition. Meanwhile the Autorité de la Concurrence has separately investigated online display advertising. The OECD has held regular conferences on regulation and competition policy in digital markets, most recently in January 2018, and the debate is going mainstream.

Even President Trump has recently waded in, saying that the US administration is looking into potential antitrust violations by Amazon, Facebook and Google parent Alphabet. In Prospect magazine, the economic historian Professor Niall Ferguson has opined that:

> "*We'll hear a lot more about breaking up big tech in 2019…. Tim Wu of Columbia Law School argues [big tech firms] should be broken up: Facebook should relinquish Instagram and WhatsApp; Google should give up YouTube and DoubleClick; Amazon should spin off Amazon Web Services*".

Political changes are bringing even more of a spotlight on to these issues. Following a whole series of elections in Europe, a new set of European Commissioners will take office in Brussels in November 2019 – on the current Brexit timetable, this will be without the UK as a member state. The choice of Competition Commissioner will be critical. There was a time when the current office-holder, Margrethe Vestager was actively seeking a second term, but a lack of support from her home state of Denmark now makes her survival look unlikely. So she will be legacy-building in 2019, and digital markets have undoubtedly been her area of greatest focus, although currently it looks as if any intervention will stop short of demands for break-up.

Commissioner Vestager is supported by an activist chief economist in Tommaso Valletti, who has called for several policy changes in digital markets:

- a focus on so-called "killer acquisitions" – reflecting a concern that large tech platforms buy up smaller potential future rivals under the radar screen of competition law;
- a rethink of the "burden of proof" in the digital space – questioning whether "more likely than not" is the right standard for the assessment of dominant platforms; and

- a broader reappraisal of digital markets – perhaps re-categorising many as "markets for attention" online.

Similar debates are happening at national level. In the UK, Professor Jason Furman, a former economic adviser to Barack Obama, is grappling with many of the same issues as chairman of the independent panel looking at competition in the digital economy, due to report early this year. The UK Competition and Markets Authority (CMA) is reported to be considering a market study into digital advertising. In Germany, the "Kommission Wettbewerbsrecht 4.0", a panel of experts, is expected to work up recommendations for changes to European competition law in light of increasing digitalisation by autumn 2019.

A final lightning rod for policy-making in Europe will be the debate now kicking off on the revamping of the vertical guidelines. The EC ended 2018 by launching a consultation on the new rules (which are due to come into force in 2022). At the time of the last update (in 2010), the existing rules were designed to privilege and protect the nascent industry of online distribution. With the e-commerce sector inquiry under its belt, and with its focus today on the strength of the online platform giants, the EC now wants to turn the dial back in favour of bricks and mortar. But the internet is still undoubtedly seen a valuable tool for single market integration, so the critical question for consultation is: to what extent?

Avoiding pile-ups

Another area of rapid evolution concerns competition litigation. The EU Damages Directive has now been implemented in the majority of member countries. The courts in several of them are now beginning to grapple with follow-on damages claims. Of particular significance is the *Trucks* decision, since it relates to an industry where there are many customers with sizeable individual purchases across many countries. This in turn has led to large numbers of claims, some in jurisdictions which have limited experience of such cases.

The *Trucks* decision also raises interesting questions as to how courts in different jurisdictions (or different courts in the same jurisdiction) should take each other's decisions in to account. Currently, the *Trucks* claims are most advanced in Spain, Israel and Germany – and in Germany, cases can be brought in multiple regional courts. It will be interesting to see the extent to which there will be convergence or divergence between them – for instance, how economic evidence on overcharge is treated, how pass-on is measured, and how the correct counterfactual should be identified (and the extent to which economic evidence is helpful in that exercise).

The kind of confusion that can arise has been illustrated by the *Interchange* cases in the UK. These have resulted in different UK courts and tribunals coming to different views on the same substantive issues (e.g., the appropriate counterfactual – what "merchant interchange fee" would have been charged absent any anti-competitive agreement?). Mr Justice Roth, President of the UK Competition Appeal Tribunal (CAT), has expressed a desire to avoid the same problems of divergence arising in Trucks. It remains to be seen whether this will prove possible through active case management, and whether a similar level of consistency is achievable both within and across other member states.

2019 should also provide greater clarity on what evidence is required to enable collective action claimants – whether opt-in or opt-out – to get their cases certified. The UK has currently seen two opt-out collective actions (*Dorothy Gibson vs Pride Mobility Scooters; Walter Merricks vs. Mastercard*) rejected at the certification stage by the CAT, although the *Merricks* case may well be appealed. In *Trucks*, there are both opt-in and opt-out collective action claims, which are scheduled to be heard by the CAT in the summer of 2019. These cases should provide much greater clarity on what is required to get a collective action claim certified, and in particular what is required to demonstrate "commonality" between the members of the collective action.

Are we the champions?

These debates are, perhaps, peripheral to the bigger challenge to competition policy that has attracted growing political support in the past few years. After decades of broad consensus about – or acquiescence in – the virtues of free trade and market competition, two linked political forces have posed increasing opposition to this faith. For both good reasons and bad, positive interventionism and protectionism are pushing at the gates of antitrust policy and enforcement, demanding to point them in rather different directions.

- **Positive interventionism**: A growing concern that markets are not working well for ordinary people is being buttressed by academic economic research highlighting increased market concentration and a falling share of economic growth accruing to workers and consumers. During 2018, the EC launched a study of the extent to which European markets were becoming more concentrated, mirroring research in the US - which pointed to antitrust underenforcement as a root cause of rising market power. The EC's Chief Economist has mused publicly about the need to evaluate the impact of mergers on labour markets – to ensure that merging parties cannot use their combined hiring power to exploit workers.
- **Protectionism**: the old debate about "competitiveness" versus "competition" has revived, with a renewed desire for industrial "national champions", and/or defence against other countries' "champions". The US-China trade war, and the weakening of the World Trade Organisation under assault from the US President, have also upped the risk that the long decline in global trade barriers has lurched into reverse. These issues will infect and complicate global merger cases, particularly where these mergers are undertaken as a reaction to intense competition from the US or China. The pressures are being felt as the EC considers its verdict on the Siemens/Alstom merger, where the merging parties are seeking to develop a European rail champion able to compete with Chinese firms. The EC's Statement of Objections, issued in November 2018, suggests it still remains sceptical of the "competitiveness" case, but protectionist pressure is mounting.

At the same time, the focus of competition authorities on consumer issues indicates a certain unease that their regulatory activities are not seen as of value to ordinary citizens. Changes in powers or focus have nudged them to pay greater attention to bread-and-butter issues that would historically have been dealt with under consumer protection laws. In the UK the CMA has said that it is recommending "bolder use of existing enforcement and regulatory powers to tackle harmful business practices" with early signs of this approach being seen in its investigation of care home charges for residents after their death.

The CMA has also recently investigated the treatment of long-term as opposed to new customers, using its broad powers to investigate how markets function (rather than using its Article 101/102 TFEU-equivalent powers). In September 2018, Citizens' Advice submitted a super-complaint on "loyalty penalties" – situations where customers receiving ongoing products or services such as broadband and home insurance face price increases if they remain with their existing provider rather than switching.

The CMA has responded by proposing that firms should publish the size of any loyalty penalty and has made clear that it will consider price caps or limits of any price differential, similar to the price cap that has recently been introduced in the UK energy market. Interestingly, these proposals have been made largely on distributional grounds, rather than because prices overall are deemed to be above the competitive level. The UK Financial Conduct Authority (FCA) has similarly made it clear that it sees the treatment of "loyal" customers as an important issue, particularly in relation to retail insurance, current accounts and cash savings. Following the cap introduced on payday loan charges, the FCA has recently published proposals for a similarly interventionist approach to overdraft fees.

The Bundeskartellamt also received new competences in the area of consumer protection in mid-2017 and, as a consequence, launched a sector inquiry into comparison websites, in October 2017. The first results were published for consultation in December 2018. Its findings were that many websites provide reliable information, but some problems remain, e.g. a lack of information on the details of the ranking criteria for search results and recommendations made by the websites. The Bundeskartellamt is keen to take an active role in preventing violations of consumer protection law, especially in digital markets.

Conclusion

Firms in a wide range of sectors will need to consider how to respond to these emerging regulatory challenges, which will require increasingly creative thinking about how to understand and engage with competition authorities. Essential to this thinking will be an understanding of how those authorities' concerns are changing, and of the economic and political forces that impinge upon them, which are taking them into territory that has traditionally been thought of as the responsibility of others.

Changes in markets, particularly in the rapidly-expanding digital world, are driving some of these; but so are the populist challenges to economic faith in the benefits of competition and free trade. A renewed focus on consumer interests and distributional effects is already stimulating regulatory interventions of

a form not seen for some time. To plan their strategies most effectively, businesses will need to keep a careful eye on developments in both policy and practice, during a year that is likely to take both outside the traditional boundaries of competition law.

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