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Lectio Praecursoria

Introductory lecture at the public examination of my doctoral dissertation 'Competition, Data and Privacy in the Digital Economy: Testing Conventional Boundaries and Expanding Horizons – Towards a Privacy Dimension in Competition Policy?' at the Faculty of Law, University of Helsinki, 19 October 2019

Introduction

For the past three years, I have conducted doctoral research in the field of competition law, which is an inspiring discipline, as it continuously offers novel issues to research and write about. This is especially true in today's digital age with rapid technological developments and increasing access to information. The topic of my research and what was to become the final dissertation began to take shape in my mind when working as an in-house counsel at Nokia, a multinational technology company. I was involved in the fascinating antitrust cases against Google as part of the FairSearch coalition, a group of businesses united to promote fair competition, innovation and consumer choice across the Internet. I was privileged to follow from a front-row seat the developments and the discourse on digitalization and the big data phenomenon, and I was intrigued by emerging questions on the implications of the data economy for my field of practice.

My thesis examines one of these emerging issues, namely the role of privacy in competition law in the digital economy. In these opening remarks, I will not attempt to summarize the whole thesis. Rather, I will highlight some key takeaways from my research that I found exceptionally interesting.

I set out to explore the growing role of data in competition law, and especially the significance of personal data by looking at the interlinkage between the two areas of privacy and competition policy. With the transition from the price-driven to the data-driven economy, our society has grown to rely on products and services that are free of charge to consumers, but because they have no monetary price, there is hesitation as to whether action should follow. My thesis questions whether competition policy is too fixated on the idea that the only real harm consists of raising prices. Consumers pay for supposedly free online offerings by giving away their personal information.[1]

[1] Since the European Commission's decision in 2017 in the Google Search case, where Google was found guilty of abusing its dominance as a search engine, and slapped with a then-record fine of more than €2.4 billion, it is no longer unrealistic to say that individuals pay for free services by giving away their personal

When many products and services seem free in online markets, with user data as the invisible cost, looking only at price effects in competition law is misleading. My thesis asserts that an overly price-centered approach risks overlooking significant welfare harms relating to important non-price parameters of competition, such as privacy and consumer choice.

Data as the new oil?

You have all heard by now the common metaphor that data is the new oil. To describe that data has become a core economic asset, it is also referred to as the 'fuel of the future' or the 'currency of the digital economy'.[2] It has even been assigned its own new asset class by the World Economic Forum.[3] Today data is collected in masses from our every online interaction, and since 2016, the global flow of information generates more value than the global goods trade, according to a study by McKinsey.[4] This is remarkable, as digital data flows were practically non-existent just fifteen years ago. Companies such as Facebook, Amazon and Google have become powerful by collecting and monetizing user data, and these data-driven businesses occupy an increasingly important role in the modern economy. The value of the EU's data economy is estimated to exceed 700 billion euros in 2020.[5]

No doubt digitalization offers great potential – for doing business more efficiently, making better use of resources and improving people's lives. At the same time, there is growing concern with the collection and use of consumer data, inviting questions about the application of competition law to data, for example in

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data. According to the European Commission, 'Google's flagship product is the Google search engine, which provides search results to consumers, who pay for the service with their data.' European Commission press release 27 June 2017, Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service. According to the OECD, the expression online 'free' service is generally considered misleading for consumers, because the services delivered, in fact, 'involve non-pecuniary costs (for consumers) in the form of providing personal data, paying attention to ads, or the opportunity costs of reading privacy policies.' OECD, Big Data: Bringing Competition Policy to the Digital Era. 29–30 November 2016, 25.

[2] The Economist 6 May 2017, Fuel of the future: Data is giving rise to a new economy.

[3] The World Economic Forum, Personal Data: The Emergence of a New Asset Class, January 2011. See also World Economic Forum, Big Data, Big Impact: New Possibilities for International Development 2012.

[4] McKinsey & Company, Digital globalization: The new era of global flows. McKinsey Global Institute Report, March 2016, 7.

[5] Finnish Competition and Consumer Authority (FCCA), Questions related to competition and consumer protection in data economy, February 2019, 11. See also McKinsey Global Institute, Big Data: The Next Frontier for Innovation, Competition, and Productivity, June 2011, 2.

establishing market power. Instead of talking about monopolies in the traditional sense, new concepts, such as data-opolies and digital gatekeepers, are emerging. This reflects that the traditional notion of market power, as tied to price, has become elusive.

The digital hand

What this new economic reality with data and analytics is doing is that it is changing the market dynamics, and competition might actually be driven by different forces. Often consumers have no idea about how, and the extent to which, they are possibly being exploited when handing over their personal information.[6] Here, we can draw an analogy to the 1998 American movie 'The Truman Show' starring Jim Carrey – a controlled environment which is nothing more than a façade. Such an environment may deliver relative well-being to its subjects, but the main beneficiary is the controller of the ecosystem. Today, with changes related to the data economy and evolving data-driven businesses, the arising concern is that the *invisible hand* of competition, which should safeguard consumer welfare, according to Adam Smith's understanding of the system of natural liberty'[7], is being replaced by the *digital hand*.'

The privacy paradox

Studies actually show that less than a quarter of Europeans trust online businesses to protect their personal data.[8] Consumers' ability to make decisions about their personal information is hindered because they are often in a position of imperfect information about when their data is collected, for what purpose, and with what consequences.[9] There exists a privacy paradox, where many users are concerned about privacy, but few actually act on those concerns.[10] For example, think about how few Facebook users abandoned their user accounts after the Cambridge

[6] Ariel Ezrachi – Maurice E. Stucke, Virtual Competition: The Promise and Perils of the Algorithm-driven Economy. Harvard University Press 2016, 27.

[7] Adam Smith, The Wealth of Nations. Cannan, University of Chicago 1977, 477.

[8] See e.g. the 2016 Eurobarometer on ePrivacy. European Commission Directorate General for Communications Networks, Content & Technology, Flash Eurobarometer 443 – ePrivacy 2017.

[9] Alessandro Acquisti – Leslie K. John – George Loewenstein, What is Privacy Worth? The Journal of Legal Studies 42(2) 2013, 249.

[10] Francisco Costa-Cabral – Orla Lynskey, The Internal and External Constraints of Data Protection on Competition Law in the EU. LSE Law, Society and Economy Working Papers 2015, 2.

Analytica scandal. Consumers' concern for their data protection can also be distorted by other factors, such as the power of defaults[11] and the 'free effect'. There is also the situation of a dysfunctional equilibrium, when users become cynical and fail to read privacy policies, which in turn leads to companies having vague policies, as they expect few consumers read them.[12]

Dual dignitary-economic role of data

When describing personal data, it is essential to highlight its dual nature. While the industrial metaphors mentioned, whether oil or fuel, reflect the economic value of data, they do not take into account that personal data is also essentially linked to the dignity, autonomy and privacy of individuals. In other words, personal data has both an economic and a dignitary value.[13] In Europe, this is acknowledged through a strong level of protection, and human dignity is recognized as an absolute fundamental right in the EU, as is privacy and data protection.[14]

Privacy at the focus of competition authorities

It is no news that exploitation of personal information raises privacy concerns. But, what is a new development is that this is no longer just a question of consumer and data protection but also one of competition law. Competition authorities are now focusing on the complex relation between data, market power, and competition, with the aim of better understanding the possible effects for consumers and digital

[11] The power of the default refers to the notion from behavioural economics, which often stands in contrast to the approach of traditional law and economics, can help explain the market power of dominant companies in online markets and the presence of barriers to entry. Michal S. Gal – Daniel L. Rubinfeld, The Hidden Costs of Free Goods: Implications for Antitrust Enforcement. Antitrust Law Journal 80(401) 2016, 36.

[12] Joseph Farrell, Can privacy be just another good? Journal on Telecommunications and High Technology Law 10(2) 2012, 251.

[13] This dual dignitary-economic role can be described as personal data leading 'a double life in digital society'; on the one hand, personal data is a digital reflection of our physical and spiritual selves, and on the other hand, personal data has an economic life as a result of the informative insights that can be gleaned from such data. Orla Lynskey, Non-price Effects of Mergers. Background note for 129th OECD Competition committee meeting 6–8 June 2018, 1.

[14] In the words of the EU Competition Commissioner, 'the right to decide what happens with our personal information is one of our most fundamental rights as individuals. And we can't just leave it to the market to protect those rights.' Speech by Margrethe Vestager, What competition can do – and what it can't. Chilling Competition Conference 25 October 2017.

markets. The behaviour of data-driven businesses is increasingly being scrutinized by these authorities.

The German Facebook case

A sort of culmination point of this development is where the competition and data protection laws intersect. In this regard, a fascinating development is the German *Facebook* dominance case, where the German competition authority is breaking ground in merging competition and data protection laws. This precedent from earlier this year adopts a novel theory of harm and establishes a competition breach due to Facebook's practices conflicting with data protection rules. The future will show the final outcome of this case, as it is currently suspended and under appeal, but in my view, there will be implications and it is not unthinkable that this novel approach may pick up steam in competition policy.

Increasing interplay between traditionally separate areas

In my thesis, I challenge the traditional view and conventional treatment of the competition and data protection regimes as constituting completely separate areas. In my view, the two fields of law co-exist and interact with each other. What do I mean by that?

Similarities and commonalities

While the two areas are distinct, there are also commonalities and shared concerns, which include the welfare of the individual, power and information asymmetries, and market integration.[15] By focusing on these shared interests, there is potential for convergence and interplay between the two areas.

Historical hard line softening

My research findings suggest that the historical hard line between competition and privacy is softening. Looking at the growing number of cases and recent developments on data and privacy in the competition field, it is possible to identify a gradual change in the approach to a potential privacy dimension in competition law. This is visible especially when looking at the European Commission's analysis in certain

[15] Orla Lynskey, The Foundations of EU Data Protection Law. OUP 2015, 101.

merger cases. For example, in the cases of *Google/DoubleClick*[16] and *Facebook/WhatsApp*[17], it was held that any privacy-related concerns are outside the scope of the competition rules and should only be dealt with under data protection rules.[18] In comparison, the analysis in the cases of *Microsoft/LinkedIn*[19] and *Apple/Shazam*[20] present a more evolved perspective, where privacy is explicitly mentioned as an important competitive parameter and driver of consumer choice.

Comparative EU/US approach

When exploring the role of privacy in competition law, I adopt a comparative perspective and look at the different privacy cultures and competition policy goals in the EU and the United States. The outcome is that certain differences and special characteristics make EU competition law better placed to accommodate privacy concerns.

In essence, this is due to the following reasons. The American approach to privacy protection and its fragmented codification is very different from the European understanding of privacy as a fundamental right and question of dignity.[21] Data protection has a much more prominent role in Europe, also because of the recent entry into force of the GDPR[22].

Also, comparing the EU and US competition regimes, although they look similar at first glance and share the same basic principles, their policy objectives have evolved in different directions. Europe's underlying philosophy to competition diverges in many ways from that in the US: non-price dimensions are more significantly embedded in EU competition law, which is multidimensional and provides a range of policy goals. These include the ordoliberal understanding of

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[16] Case COMP/M.4731, C(2008) 927.

[17] Case COMP/M.7217, C(2014) 7239.

[18] *Facebook/WhatsApp,* para 164: 'Any privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the Transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules.'

[19] COMP/M.8124, C(2016) 8404.

[20] Case COMP/M.8788, Commission decision of 6/9/2018, not yet reported.

[21] Francisco Costa-Cabral – Orla Lynskey, Family Ties: The Intersection Between Data Protection and Competition in EU Law. CMLR 54(21) 2017, 28.

[22] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

freedom of choice and the concept of fairness. Conversely, US antitrust policy is much more price-focused, which is a consequence of the influential Chicago school that excluded political and social goals, and believes that markets self-correct. In contrast to the American system, EU competition law can also address exploitation of consumers (and not only foreclosure of competitors). This is in essence what the German case against Facebook is about.

The current public debate

Since the beginning of my research, the field has evolved significantly, with several investigations and studies on the role of data in competition law, and the topic of companies' use of data as market power is increasingly debated, also in the public media. Think only of the Cambridge-Analytica scandal and Facebook's handling of personal information. My research being very current has made it both extremely interesting and challenging.

My research project has presented me with fascinating academic discussions and taken me to interesting international conferences in several places, including Stockholm, London, Brussels, Graz, Prague, Vilnius and a memorable research visit to Oxford.[23] But in terms of substance, my research has taken me to some more philosophical and moral questions than what I initially imagined.

In the discourse on competition law's optimal policy goals, I have encountered proposals of adding a moral compass to the antitrust toolkit.[24] Some speak of restoring the competition ideal[25], whereas other suggest fighting for the soul of antitrust.[26]

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[23] The research benefited from an academic visit in 2018 at the Institute of European and Comparative Law (IECL) at the Oxford Law Faculty. I am grateful to the academic staff at IECL, including professor Ariel Ezrachi at the Oxford Centre for Competition Law and Policy, for insightful and inspiring discussions on my research topic.

[24] Alec Burnside, Bob Dylan and consumer welfare. 7 August 2017, Lexology.

[25] Maurice E. Stucke – Ariel Ezrachi, The Rise, Fall, and Rebirth of the U.S. Antitrust Movement. Harvard Business Review 15 December 2017, <https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement>.

[26] Ariel Ezrachi – Maurice E. Stucke, The fight over antitrust's soul. Journal of European Competition Law & Practice 9(1) 2018.

History repeating itself?

In addition, what I didn't expect in my research on the role of data in competition policy was to find out that in some ways, history is actually repeating itself.

Already decades ago there were concerns about restricting the goals of competition only to economic issues, as articulated by the late Robert Pitofsky, a leading American antitrust scholars and my professor at Georgetown Law School, who maintained that it is actually bad policy and bad law to exclude certain political values in interpreting the antitrust laws.[27] His comments may not have been that far off the mark, considering today's economic climate, growing concerns about market concentration and politicians proposing regulation or break-up of companies.[28]

These suggestions reflect that, in this regard, history is repeating itself. Looking at the academic and public discourse, one may think of it as a crossroads where competition policy is proposed to be rethought as it was back in 1890. The anti-monopoly cartoon 'The Menace of the Hour' from 1899 illustrated the public and populist view of monopolies, especially of Standard Oil (a company that was broken up into 34 business entities).[29]

The image from 2018 of the technology octopus reflects the powers and influence of the tech giants Amazon, Apple, Facebook, and Google, with broad implications that are economic, political (reaching all the way to the White House) and societal, as well as legal risks and privacy intrusion (which is illustrated by the octopus getting into the minds of people on their phones).[30]

Today it is suggested that the tech giants (Apple, Google, Facebook and Microsoft*)* each easily have more than ten times the net income as did Standard Oil when it was broken up.[31] In this regard, we are living in very interesting times. We already know that antitrust law will be a hot topic in the 2020 US presidential

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[27] Robert Pitofsky, Political Content of Antitrust. University of Pennsylvania Law Review 127(4) 1979, 1051.

[28] According to the EU Competition Commissioner, 'digital technology is transforming every part of our lives […]. And we're seeing signs that competition might not be working the way it should. There's evidence that some markets might be getting more concentrated, with more of the market in the hands of just a few companies.' Speech by Margrethe Vestager, The importance of being open – and fair. European Conference. Harvard University 2 March 2018.

[29] George Luks, The Menace of the Hour. Cartoon for Verdict Magazine 1899.

[30] Andrew Rae, Tech Octopus. Cartoon for Esquire Magazine 2018.

[31] Over the past decade, these companies have aggregated more economic value and influence than nearly any other commercial entity in history. Together, their market capitalization amounts to $2.8 trillion (equalling the GDP of France) and a staggering 24 per cent share of the S&P 500 Top 50.

elections with Senator Elisabeth Warren calling for the break-up of technology companies. In Europe, Competition Commissioner Vestager is starting an unprecedented second term, with the additional portfolio of digitalization, 'Making Europe fit for the digital age'.

Political dimension

This brings me to another key takeaway that I want to mention, which is the political dimension of competition law. What my research has shown is that over time, many different values have been advocated in the name of competition law. Depending on which scholarly work one goes to, different policy goals are mentioned as the primary objectives of the law. Depending on the interests that are being promoted, different values are put forward as a driver for law enforcement.[32] This multitude of values shows that competition law is political.

So where does this leave us? If competition policy is an expression of the current values of society, then it is quite a compelling proposal that competition policy should also consider values beyond price, such as privacy. In today's modern economy, data protection and privacy are, after all, fundamental rights and significant values shaping the digital markets. Here, it is worth recalling the words of Ezrachi and Stucke in their editorial 'The fight over antitrust's soul':

> The reality is that 'competition law' has never been, nor will it ever be, pure from normative political, social and economic values. Ultimately, it comes down to the values we want to promote and our belief in how competition works.[33]

Conclusion

Now, I would like to conclude with the following thoughts. My thesis argues that competition policy cannot be interpreted as simply a question about prices and economic efficiency. Rather, competition policy should be interpreted flexibly in order to properly understand the dynamics in digital markets, where the role of personal data is significant. For the consumer welfare standard to work as an optimal

[32] According to Ariel Ezrachi, competition law is intrinsically pre-disposed to a wide range of considerations, and 'its true scope and nature are not 'pure' nor a 'given' of a consistent objective reality, but rather a complex and at times inconsistent expression of many values'. See Ariel Ezrachi, Sponge. Journal of Antitrust Enforcement 5(1) 2017, in which Ezrachi discusses, among other, competition law's susceptibility to national peculiarities and the variety of goals depending on national interests.

[33] Ezrachi – Stucke 2018. See also Eleanor M. Fox, The Battle for the Soul of Antitrust. California Law Review 75(3) 1987, 1153–1154.

welfare or well-being standard, a shift should take place from static consumer harm to dynamic consumer harm, where there is more focus on non-price dimensions, including privacy as a qualitative element, and consumer choice.

Developing a privacy dimension in competition policy will require further work, thought and future practice to arrive at operational standards. What the digital economy and society at large needs may well be a multi-regime response, which in turn entails that privacy and competition policy need to work together. By no means does my thesis aim to represent final thoughts on the matter. Rather, what I describe is the beginning of what I see as an important intellectual shift for the future development of competition law.