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Statement of Opponent

Doctoral Dissertation of Maria Wasastjerna, ‘Competition, Data and Privacy in the Digital Economy: Testing Conventional Boundaries and Expanding Horizons – Towards a Privacy Dimension in Competition Policy?’

1 Overarching remarks

This doctoral dissertation examines a topical question: what role, if any, should privacy play in competition law and, in particular, should competition law include privacy amongst its objectives. The dissertation examined these questions through a comparative lens, comparing the regime in the EU to that in the US.

While these questions have been examined extensively in recent years, this dissertation adds to the existing scientific knowledge in several important ways.

Most significantly, the dissertation is a fine example of intra- and interdisciplinary research. Within the discipline of law, it shows a competent grasp of data protection as well as competition law and from two jurisdictional perspectives (the EU and the US). This legal research is complemented by insights gleaned from economics and philosophy regarding core concepts such as ‘fairness’ and ‘welfare’. This is a very extensive body of legal doctrine to master for doctoral dissertation purposes and few scholars manage to demonstrate such a breadth and depth of research in their early career work. The extensive research that is conducted is weaved effectively into the analysis throughout the dissertation making it an enjoyable as well as an informative work to read.

Furthermore, the work is compelling in its claim that an ahistorical approach to competition law should be avoided and that the political dimension of this field of law should be acknowledged.

2 Assessment of doctoral dissertation in light of grading criteria

2.1 Familiarity with the field

Following the introduction, the substantive work begins by introducing the concept of privacy in EU and US legal regimes. This chapter competently summarises the state of the art in both legal frameworks in a way that is accessible to the reader in the space available.

In the next chapter, the fundamental concepts of competition policy in the digital economy are introduced. This chapter shows clear familiarity with the broader legal debates underpinning competition policy, in particular as regards the objectives of competition law, which are developed further later in the work, as well as core economic concepts. It also delves deeper into lesser known conceptual controversies, such as the distinction between consumerism and producerism discussed on page 69.

The author brings these two fields of law together in a compelling manner in Chapter 4. Her manner of presenting the fundamental developments, for instance through images such as that on page 111 and concise explanations, helps to render complex intersections more clear.

2.2 Mastery of research methods and scientific integrity

The candidate sets out their methodological approach in the introductory chapter. This approach is grounded in legal dogmatics, as it elucidates the current legal regime and attempts to interpret and systematise the law. This approach is evident in the earlier chapters of the dissertation (in particular Chapters 2–4). Subsequent chapters, in particular Chapter 5, take a more normative approach and chart a potential path for the law to take in the future: ‘Rethinking competition law in the digital age’.

The candidate clearly masters research methods to the extent required for doctrinal and normative legal research. The approach taken also reflects the candidate’s scientific integrity. While this dissertation gives rise to no ethical issues, the piece reflects this integrity by taking due account of and engaging with legal literature which militates against the author’s proposed approach.

2.3 Contain new scientific knowledge, be scientifically convincing and contain justified results

What is particularly impressive about the work is the way in which it connects very recent sources, including policy documents, online sources and judicial decisions, with lesser known older texts. For instance, although there is a lot of academic literature on the objectives of EU competition law, the author brings these sources together and explicates their relevance to the digital context superbly in Chapter 3. The discussion of the potential role for ordoliberalism and freedom of choice on pages 88–92 is rich yet accessible and the link between ordoliberalism and current ostensible market consolidation is nicely made. This is but one example of many which reflect the scientifically convincing nature of the work.

While the work does not contain any single new contribution to existing scientific knowledge, its contribution to such knowledge stems from the way in which it interconnects existing legal doctrine. For instance, on page 183 it suggests that consumer wellbeing could be an objective of EU competition law: while this claim has been made in isolation in the past, in this work it is explicitly connected to the broader discussion on the objectives of competition law. Seen through this lens, it is a more natural and convincing step for the legal doctrine to take.

The results and future policy suggestions set out in Chapter 5 follow on coherently from the analysis in preceding chapters. This chapter offers more detailed analysis of controversial policy questions, such as putting a value on personal data, than in any other work I have encountered. While the recommendations put forward are again not new, what this chapter offers is more critical analysis of existing recommendations (for instance, that ‘tech giants’ be broken up) than is visible in other literature. One potential omission from the research, which could be rectified if the work is published as a monograph, is a consideration of the institutional implications of a hybrid or fused approach to the intersection of data protection and competition law.

2.4 Demonstrates critical thinking

The dissertation reflects critical thinking throughout. While the author lends her support to what remains a minority view within competition law, that data privacy can be a parameter of competition, the dissertation engages evenly with both sides of this debate and the author offers ample justification for the approach recommended in the research.

3 Public examination

The public examination offered the opportunity to discuss several contentious questions with the doctoral candidate. These include the following non-exhaustive list:

- Do you agree with the approach taken by the Bundeskartellamt in its recent decision regarding the intersection of data protection and competition law?
- Should we conceptualise the lack of choice on a given market as a market failure?
- Is it desirable to treat personal data as an asset?
- Has EU law and policy had a negative impact on innovation?
- Can you offer a retrospective analysis of the Facebook/Whatsapp merger decision? What could or should have been done differently, if anything?

In answering these questions, which ranged from technical considerations of how the law applies in specific factual contexts to broader conceptualisations of what is desirable in the long term in the information society, the candidate was articulate and clear. Her answers evidenced that these were questions she had considered and she was able to offer viable, and persuasive, responses.