



DANISH COMPETITION AND CONSUMER AUTHORITY

COMPETITIVE MARKETS AND CONSUMER WELFARE

13 | 2018

THE CHALLENGES FOR PRESENT AND FUTURE COMPETITION ENFORCEMENT

The Danish Competition and Consumer Authority hosted an international conference in March 2018 where leading European competition experts were gathered to discuss some of the hottest topics within the world of competition enforcement such as digitalization, income distribution, fairness, Brexit, the Facebook-case in Germany and more.

This article contains excerpts from the conference '*The challenges for present and future competition enforcement*' in Copenhagen, 9 March 2018

On 9 March 2018 the conference “The challenges for present and future competition enforcement” was held in Copenhagen. It focused on global themes such as income distribution and digitalization and the relationship with competition enforcement. It was attended by nearly 200 people.

The first speaker was Frédéric Jenny, Chairman of the OECD Competition Committee, who talked about the specific challenges digitalization poses for enforcement and the implications of the increasing gap between capital gains and cost of labor. He was followed by EU Competition Commissioner Margrethe Vestager who focused on fair markets in a digital world and the role of competition policy. Amelia Fletcher, Professor of Competition Policy at University of East Anglia talked about the specific issues that arise in the distribution of surplus between consumers and producers in the digital economy. Andreas Mundt, President of the Bundeskartellamt, focused on big data and the Facebook case.

The conference concluded with a panel debate between the heads of the Competition Authorities from France, Germany and the UK, Isabelle de Silva, Andreas Mundt and Andrea Coscelli. The themes discussed included the differences in tradition and approach to competition policy and enforcement and the perspectives for enforcement after Brexit.



Frédéric Jenny
Chairman of the OECD Competition Committee

Development of the digital economy and distribution issues: what is the proper goal for competition law?

The development of the digital economy poses a number of challenges to competition enforcement. To name but a few, models and tools traditionally used in antitrust such as the SSNIP test cannot be applied to multisided platform businesses without significant modification; fundamental aspects such as determining whether the players involved can be considered undertakings can be particularly difficult

in the sharing economy; and artificial intelligence applied to algorithms poses new questions regarding liability.

In addition to these challenges, competition and globalization are currently being subject to a significant degree of criticism. Globalization and digitalization have succeeded in increasing output but not in distributing it fairly as the gap between capital gains and the cost of labor, particularly low skilled, has widened. One of the reasons seems to be that whereas capital is increasingly mobile, labor is often not very mobile with the result that the reallocation of resources inherent to the competitive process does not take place as it does in the theory of competition. Although enforcers typically focus on ensuring that the competitive process is fair, the result of this process is often perceived as unfair. How can competition authorities react? One possibility is including fairness as one of the goals of competition law, another is prioritizing cases that are meaningful from a fairness perspective, such as excessive pricing in the pharma industry, and advocating for better policies that ensure that the result of the competitive process is actually fair.



Margrethe Vestager
European Commissioner for Competition

Fair markets in a digital world

Competition is about making markets work more fairly for everyone. However, this does not mean that competition on its own can guarantee that markets treat people fairly; it has to be complemented by other tools such as specific regulation that for example ensures that products are safe for consumers.

Making sure consumers get a fair deal is as important offline as online. Big innovative companies have every right to succeed, but they must not misuse their power. In this sense, decisions like Google shopping are important: it is not ok to make it harder for other shopping services to compete by showing its own services at the top of the search results and demoting rivals to appear on average on page four. This decision also shows that competition rules are designed to

adapt and that they are also valid for digital markets.

But rapidly changing digital markets create new challenges. Regarding algorithms, we have to work “ex ante” to make sure that they know the rules and that they are owned by someone who is responsible for their actions; algorithms need to go to law school before they are set loose.

To ensure these markets do not develop in ways that can harm consumers it is important to act quickly. But this is no easy task as it requires understanding new markets and dynamics and speed must not come at the expense of the quality of decisions and to tackle this, the Commission has set up a panel of external experts to advice on how digital markets affect consumers and how competition enforcers should respond.



Amelia Fletcher

Professor of Competition Policy at University of East Anglia.

The intersection between fairness and digitalization.

Digitalization has changed traditional supply and demand side decision making, along with the way we transact and distribute. Although the positives seem to outweigh the negatives, digitalization raises a number of concerns for competition policy, particularly regarding fairness.

One key aspect is vertical fairness, that is, how surplus is split between firms and consumers. The increase of market concentration and of corporate profits are particularly significant in certain digital markets. This raises the question: has competition enforcement been sufficient? To ensure it is, enforcement could benefit from further research into certain areas like the interaction between innovation and competition, or conglomerate and network effects. Regarding horizontal fairness, issues arise both from the supply side - is surplus evenly distributed amongst companies?-and the demand side-are the more digitally engaged consumers getting a better deal? Advocacy could

complement enforcement in these areas, for instance by leveling the playing field and helping consumers become more engaged.

So, while competition can help make markets work more fairly it is important to bear in mind that it is only part of the solution and that for markets to work fairly a holistic policy framework is needed.



Andreas Mundt

President of the Bundeskartellamt

Digitalization and big data

Digitalization poses several questions and specific challenges for competition agencies. Firstly, debate arises on the question when and how much to intervene. Agencies need to strike the right balance between keeping markets open and avoiding chilling effects in potentially dynamic markets, while having in mind that the social costs of underenforcement can be very high especially in the digital economy. Secondly, part of the challenge is understanding the changes that result from new business models and new market environments. To do so we may need to continuously refine our conceptual framework. That is why the German Competition Act has been recently amended by explicitly introducing in the assessment of market power aspects that are critical for platforms and networks, such as network effects and access to data. In addition, the merger regulation has been amended by introducing a threshold based on transaction value to cover acquisitions of firms with high (innovative) potentials but low current revenues.

A pioneering case currently being handled in Germany is the Facebook case, where data plays a key role. Facebook is suspected of having abused its dominant position in the German market for social networks by imposing unfair conditions on private users: Facebook does not only collect data when users visit the Facebook website or use the Face-

book app; the use of the network is conditional on allowing Facebook to gather all sorts of data generated by using third party websites or apps and to merge it with the user's Facebook account. And Facebook does not reveal what it does with the data and with whom the data is shared. Users have to accept all this data processing as a precondition to use the by far leading social network in Germany. Exploitative business terms can be a type of exploitative abuse under German law. One benchmark for such an exploitation can be a breach of data protection principles. Therefore the case also illustrates the link between competition and data protection and the importance of successful cooperation across areas.



Andreas Mundt

President of the Bundeskartellamt (DE)

Isabelle de Silva

President of the Autorité de la concurrence (FR)

Andrea Coscelli

Chief Executive of the Competition and Markets Authority (UK)

Panel debate:

The impact of country specific traditions in competition enforcement and Brexit

Although competition enforcement is harmonized across Europe, there are country specific differences that stem from a combination of factors such as history and culture. For instance, vertical restraints are an enforcement priority in Germany where the protection of small companies also plays an important part in competition enforcement. In France interim measures are used to a greater degree than in other jurisdictions and former state monopolies have faced a number of investigations into abusive conduct.

As to the UK, the merger regime is voluntary and the competition authority has substantial powers to intervene in a market when serious competition issues are detected in a market study.

The panel also discussed the actual implications of Brexit, which are of course dependent on the final agreement with EU. However, a significant degree of convergence was expected in merger and cartel cases while the scope for divergence was considered greater as far as abuse of dominance and vertical restrictions are concerned. In addition, Brexit could give the UK scope to be more experimental.

The panelists also stressed the importance of cooperation post Brexit and expected it to be successful. Although this cooperation would fall short of the advanced integration of the ECN, there are a number of means already in place, for instance within the ICN or the OECD, and they expected fruitful bilateral and regional cooperation.