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EU Competition Law and E-Commerce: Love-hate relationship?

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Three themes

1. What does EU competition law have to say with regard to the way e-commerce is developing?
2. How is the law being enforced?
3. Who is enforcing it?



Digital Single Market Strategy for Europe (May 2015)

- **EU industrial policy**
 - Facilitate cross-border e-commerce
 - Improve telecommunications networks to facilitate provision of on line services
 - Encourage investment in new technologies & public services
- **Limits to EU industrial policy**
 - Little EU funds
 - Few competences to compel Member State action
 - Focus on: competition law, consumer law, IP law, internal market law



Competition Law: E-commerce Sector Inquiry (May 2015)

- **Motivation**
 - Little cross-border trade
 - Examines private barriers to trade that may infringe the competition rules
 - Complements the Digital Single Market that examines public trade barriers
- **Sector Inquiries generally**
 - Normally followed up by enforcement
 - Here enforcement precedes & is in parallel with the inquiry



French NCA as a pioneer enforcer: *Pierre Fabre (2009-2014)*



- Cosmetics company preventing on-line sales of its goods to preserve brand image
- Infringement of Article 101, confirmed by ECJ
- Followed by several settlements to facilitate on-line sales in many sectors



On-line Travel Agents: NCAs in UK, Germany, Italy, Sweden and France



OTAs sell hotel bookings on behalf of large hotel chains

- Two largest in the EU are: booking.com and Expedia

Dispute concerns MFN clause:

- Hotels may not offer better deals on their rooms through other on line or offline channels



Competition concerns

- Eliminates price competition between retailers selling hotel rooms
 - E.g. competition between two on-line travel agents
 - E.g. competition between hotel's website and OTA websites
- Raises entry barriers for new OTA businesses who cannot compete on price
 - New OTA has no incentive to offer a hotel a lower commission fee because it cannot pass on the benefit without others also will discount



Commitment decisions in France, Sweden and Italy (2015)

- Booking.com agrees to modify MFN clause:
 - Hotels can set different prices for off-line sales
 - Hotels can agree different commissions/prices with other OTAs
 - Hotels cannot use their own website to provide discounts to all customers, but may offer discounts to groups or under hotel loyalty schemes



Prohibition by the German Competition Authority (January 2015)

- Competition Authority claimed that MFN ('best price') clauses restrict competition
- Regional Court agrees that there is a restriction and no good justification
- Test case against one OTA, followed by cases against the others in April 2015



France: Legislative Prohibition

- Loi Macron (9 July 2015)
 - Authorises hotels to set what prices they want to their hotel rooms, even on-line
 - Overturns the balance struck by the French NCA in April 2015
 - Is closer to the German model, but applies to all hotel-OTA relationships, even new entrants.

hoteliers in France regain their entrepreneurial freedom and will be able to offer their customers any trade or tariff advantage they consider appropriate (Hospitality Europe)



Economic approach

- OTAs are the new entrants
- MFN prevents free-riding
- MFN does not prevent non-price competition
- OTAs increase competition among hotels

Intense Lobbying

Complaints against OTA come from hotel associations

(who voluntarily use OTAs)



E-books Commission 2012



Agreements between four publishers and Apple to raise the retail price of e-books:

‘Maximum’ retail price lists

Most Favoured Nation Clause (if a retailer offers a lower price, then Apple may also set that low price)



The Story

- 2007 Amazon launches 'Kindle'
- 2007 Amazon promotes ebook best sellers with very low prices. Publishers unhappy as it reduces overall income for books
- 2009 Apple launches iPad & wants to establish iBookstore
- 2009 four publishers get Apple to agree to sell books at retail price fixed by publishers
- 2010 four publishers use the Apple agreement to force Amazon to also agree to fixed retail prices
- 2011 UK Competition Authority begins investigation
- 2011 Commission removes the case from the UK



The result: A 'commitment decision'

- Collusion among Apple & 4 publishers
 - Apple coordinates collusion, breach of Article 101
- Remedy:
 - Parties agree
 - to abandon agreement fixing maximum prices for five years
 - To abandon MFN agreements for five years
 - Give retailers freedom to offer discounts for two years

United States: criminal prosecution

Publishers settle

Apple appeal denied by
Federal Court of Appeal
on 30 June 2015

France, Germany etc. have retail price maintenance for paper books

Cultural policy: publishers can make profit on best-sellers to publish culturally important books.

How can **Member States** respond to ebooks?



- If you buy a pay-TV service in the UK, you cannot access it in another country of the EU
 - A competition problem? (agreements between film companies and TV operators preventing cross-border sales)
 - action against Sky and US film companies, July 2015
 - An internal market problem? (rights of consumers affected)
 - A copyright problem? (copyrights are national still)



Google (since November 2010, statement of objection issued April 2015)

- Abuse of dominant position:
 - Use its market power in ‘general search’ (90% in the EU) to move into the market for ‘comparison shopping search’
 - Favourable treatment of ‘Google Shopping’ website versus other competitors: higher rankings, penalties on rivals on the ranking
- Plausible theory of harm under Article 102

- Commission started with a wider set of concerns
 - Advertising exclusivity (if you advertise on Google, you cannot on other search engines), portability of advertising data...
- Repeated attempts to reach a settlement failed under Commissioner Almunia
- In April 2014 a commitment decision seemed likely (Google promising to put three competitor websites on page 1 of search results)
- New Commissioner Vesttaeger opens a formal proceeding: why the change in strategy?



The role of the Commissioner in the work of DG Competition

(Source: the Economist 2 May 2015)





What is the approach of EU competition law to e-commerce?

- **Attack on vertical relations**
 - Normally pro-competitive, so why bother?
 - Old-fashioned approach
 - Market integration important for Commission
 - Concern about opening up e-commerce competition
- Google – a ‘normal’ Art 102 case
 - Monopoly leveraging a well-established approach to monopolization



How is the law enforced

- Mostly commitment decisions
 - No admissions of infringement – parties volunteer to change conduct
 - Weak judicial oversight
 - Greater capacity for agency and firms to identify how to best design business to comply with law
 - Administration model of antitrust enforcement
 - Misused in eBooks, remains possible in Google



Who is enforcing the law?

EU-level

- **Legislation**

- Hartlapp et al *Which Policy for Europe?* (2014)
 - Internal policy conflict
 - Increasing politicization of College of Commissioners
 - Personal characteristics of Commissioners, DG officials

- **Competition enforcement**

- Can it avoid the conflicts of law-making?
- Can kick-start legislation (see telecoms, energy, postal services, health care)
- Less comprehensive



Who is enforcing the law?

National level

- **France**

- Pioneer in attacking e-commerce restrictions
- Played role in reforming Commission Guidelines

- **Multiple NCAs tackling the same conduct**

- Hotel booking
- Why no Commission intervention?
- Experimentalist governance by NCAs?
- Co-ordination role of Commission?