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ROBERT
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ADVANCED
STUDIES

Issue 2020/02
January 2020

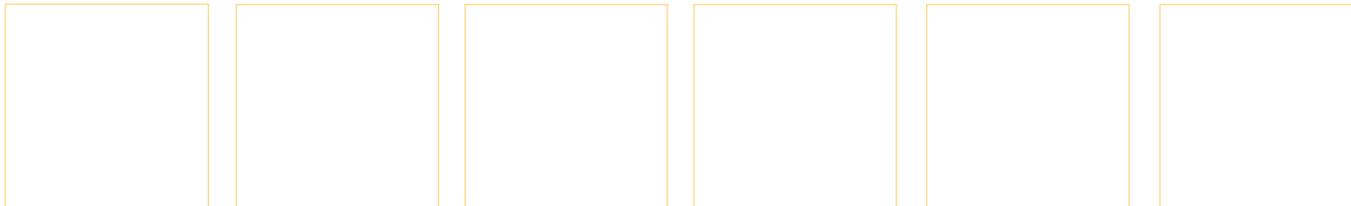
Fourth Annual Conference Hipster Antitrust, the European Way?

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POLICY
BRIEF

Abstract

On 25 October 2019, the Robert Schuman Centre for Advanced Studies hosted the fourth Annual Conference of the Florence Competition Programme (FCP) at the European University Institute (EUI) campus in Florence. The conference discussed the main ideas behind the new 'hipster antitrust' movement in USA and its influence on EU competition policy. The event was opened with a keynote speech delivered by Prof. Marina Lao, Seton Hall University. The conference was divided into three panels, which dealt respectively with i) 'The goals of EU competition policy: shall we go beyond consumers' welfare?'; ii) 'Exploitative abuses in the pharma and digital markets' and iii) 'How to tackle concentration in digital markets'. The event gathered different stakeholders, including competition enforcers, as well as representatives from academia, industry, law and economic consulting firms. The diversity of views ensured a lively debate. This Policy Brief summarises the main points raised during the discussion and seeks to stimulate further debate.



The Goals of EU Competition Policy: Should We Go Beyond Consumers' Welfare?

In the view of many observers, USA antitrust enforcers' attitudes have been surprisingly lax in response to the recent and unparalleled growth of the technology sector,¹ thus allowing platforms which were already dominant to consolidate their power in digital markets. This trend has led, in recent years, to a heated debate which revolved around the idea of reinvigorating antitrust law by challenging the consumer welfare paradigm, claiming that a narrow focus on short-term price and output effects would overlook important considerations that are related to quality, choice and innovation. In this respect, the 'New Brandeis' / 'Hipster' antitrust scholars have gone even further by holding that the main constraint associated with such paradigm is that it does not address the social consequences of concentration, including wealth and income inequality, privacy intrusions, data security breaches as well as political corruption.²

At the conference, a number of speakers argued that while it is true that the US antitrust enforcement has fallen short in dealing with the new challenges that are generated by the digital economy, this may be due to factors apart from any legal deficiencies relating to the consumer welfare paradigm. The difficulty of applying non-

price metrics and burdensome evidentiary standards may have played an important role in impeding the ability of antitrust agencies to keep up with the new digital markets. A number of speakers at the conference therefore argued in favor of introducing 'smart changes', in order to streamline US antitrust enforcement in the digital markets, while retaining the consumer welfare standard. Such an adjustment would strengthen antitrust enforcement without producing the disruptive result abandoning a paradigm that is conceptually sound and that is capable of a broader reach than is typically assumed, if it is interpreted beyond its literal meaning.

During the first panel of the conference, the discussion focused on the inclusion of considerations that are related to 'fairness' in the application of antitrust law. First, some of the panelists noted that, from a procedural perspective, there exists a widespread agreement that ensuring 'fair' treatment during the course of antitrust investigations is indispensable. However, when it comes to the substantive assessment of anti-competitive practices, one must admit that there is a risk of unpredictability that has to be addressed in order to avoid the misuse of antitrust enforcement. Therefore, panelists noted that the very-well known battle for the 'soul' of antitrust can be traced back to the dispute between those who claim that markets would work more efficiently when unconstrained by regulation against those for whom economics represents just one of the tools that can be used to fulfil the objectives of antitrust law.³

The new Brandeis School, the most recent movement to advocate in favor of fairness considerations in the US, has put special emphasis on the link between, on the one hand, permissive antitrust enforcement, and, on the other hand, market power and inequality risks. In the EU, antitrust enforcers' line of action has shown that there is a certain will to look beyond consumers' effects when assessing the anti-competitive effects of certain business practices; a trend that cannot be observed equally on the other side of the Atlantic. The record €4.34 billion fine imposed by the European Commission in July 2018, in the *Google Android* case⁴, represents a promi-

1. Google, Facebook, Apple, Amazon, and Microsoft, in the aggregate, have managed to make over 500 acquisitions in the past ten to fifteen years, in several cases without any challenge from either the American or European antitrust enforcers. See M. Lao, *Strengthening Antitrust Enforcement within the Consumer Welfare Rubric*, CPI Antitrust Chronicle, November 2019.

2. Considering alternatives to economic efficiency as objectives for antitrust enforcement can raise major concerns. In particular, there is a wide consensus that antitrust should not be distracted from its economic efficiency mission, since no other economy wide tool would be capable of doing it. See T. Brennan, *Should Antitrust Go Beyond 'Antitrust'?*, 63 Antitrust Bulletin 49, 2018. In the vast array of existing literature on the topic, see also Lina M. Khan, *The New Brandeis Movement: America's Monopoly Debate*, 9, Journal of European Competition Law and Practice 131, 2018. The term was originally coined by Kostia Medvedovsky; the name was taken from Louis Brandeis, who served on the US Supreme Court between 1916 and 1939. For criticisms of the movement, see, *inter alia*, E. Dorsey, J. Rybnicek and J. D. Wright, *Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent-Seeking*, Competition Policy International Antitrust Chronicle, 2018.

3. E. M. Fox, *The Battle for the Soul of Antitrust*, 75 California Law Review 917, 1987.

4. European Commission, Case AT.40099 *Google Android*, 18 July, 2018.



ment example in this respect. Significantly, whereas the European Commission considered Google's conduct to be in breach of Art. 102 of the Treaty on the Functioning of the European Union (TFEU), in the US, the case was unanimously dropped by the Federal Trade Commission (FTC), in 2013.⁵

Interestingly, some of the youngest antitrust jurisdictions have taken into consideration goals that are different from consumer welfare and efficiency. China's Anti-Monopoly Law lists the "protection of fair competition in the market" among the objectives of its legislation, while contemplating the realisation of the 'healthy development of the socialist market economy' at the same time⁶. This type of approach is openly rejected by those who are unwilling to accept the influence of industrial policy on antitrust. However, it is useful to demonstrate the existence of a certain parallelism of China with the EU with regard to consumer harm and foreclosure effects when assessing anti-competitive practices on the basis of sound economic analysis. In this respect, the main conclusion reached at the conference was that a cross-border dialogue seems to be the way forward for launching a new, fairness-based, era of antitrust.

Finally, other panelists suggested that discussions relating to the aims of EU competition law are as controversial as in other jurisdictions, due to the existence of some confusion over what the 'aims' are. In their view, the enlargement of the scope of EU competition law does not have much to do with its aims, rather, it deals with the development of techniques that aim to ensure that consumer welfare or economic freedom are safeguarded. They concluded that the most compelling concern is that the burden of proof placed on the Commission is often excessively high, as shown in *Cartes Bancaires*.⁷ Advocating changes is therefore worthy of attention, as long as such changes are directed towards the current evidentiary burdens rather than to the enlargement of the "aims" of EU competition law.

Exploitative Abuses in the Pharma and Digital Markets

Since the Treaty of Rome, Article 102 TFEU has listed several forms of exploitative conduct as examples of the abuse of a dominant position. In particular, a dominant firm can neither impose 'unfair purchase or selling prices' (i.e., excessive pricing) and 'other unfair trading conditions',⁸ nor "discriminate" between its customers.⁹ Due to the inability to set clear guidelines on what constitutes exploitative abuses and a possible overlap with sector-regulation, in the past sixty years the European Commission has seldom investigated exploitative abuses. In recent years, however, the Commission and a number of National Competition Authorities (NCAs) have investigated a number of cases concerning exploitative abuses in a number of industries, such as energy, and the pharmaceutical and digital markets. During the conference, panelists debated the reasons for the current 'revival' of exploitative abuses in Europe. Some speakers noticed that, by sanctioning excessive prices, a competition agency often tries to achieve a number of additional objectives beyond the consumers' welfare. In this regard, some panelists referred to the European Commission's 1973 decision in *United Brands*. By finding that the prices for bananas in Ireland were illegally excessive, the Commission aimed to achieve anti-inflationary objectives, thus going beyond the traditional goals of EU competition policy. On appeal, the EU Court of Justice quashed the decision, finding that the European Commission had failed to consider additional factors that might explain the 'excessive' price of bananas in Ireland compared to other EU Member States (i.e., higher transport costs and fluctuations in the wholesale prices of bananas). The *United Brands* ruling thus introduced a high burden of proof that was needed for the competition agency to sanction cases relating to excessive prices under Art. 102 TFEU; a high threshold that still exists today.¹⁰

5. See S. Marco Colino, *The Antitrust F Word, Fairness Considerations in Competition Law*, Journal of Business Law, 2018.

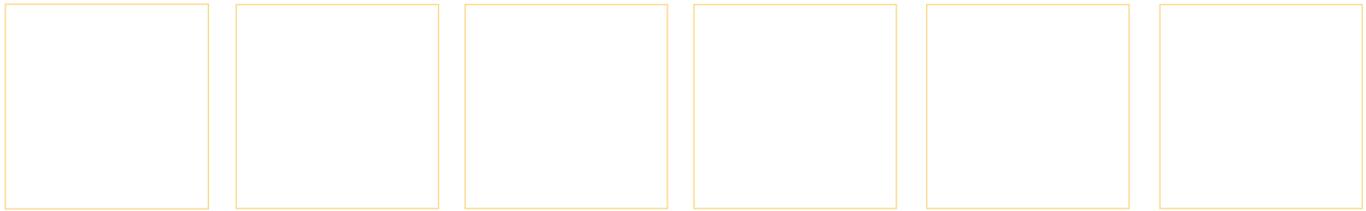
6. Anti-monopoly Law of the People's Republic of China, adopted at the 29th Meeting of the Standing Committee of the 10th National People's Congress on 30 August, 2007.

7. Case C-67/13, *Groupement des Cartes Bancaires v. European Commission*, ECLI:EU:C:2014:2204, 2014.

8. Art. 102(a) TFEU

9. Art. 102 (c) TFEU.

10. It is worth mentioning that in the US antitrust law does not prevent firms with legally acquired market power from charging profit maximizing prices.



During the conference, panelists discussed recent cases of excessive prices that involved the manufacturers of generic drugs, such as the *Aspen*¹¹ case in Italy, and the *Pfizer-Flynn*¹² case in the UK. Some speakers noticed that the entry of generic manufacturers into the market usually lead to a price drop for off-patent drugs. Secondly, price variations may be due to the temporary fluctuations in supply and demand in the market. Thirdly, in regulating the retail price of drugs, the health care authority looks at the portfolio of generic drugs as a whole, rather than to the price of individual drugs. Consequently, the 'excessive' price of some generic drugs may be explained by different factors. From this perspective, anti-trust intervention would be justified only in cases in which the generic manufacturer engages in an aggressive negotiation strategy with the health care authority, threatening the authority by threatening to withhold the drug from the national market, if the authority did not agree with the proposed price increase (i.e., the *Aspen* case in Italy). Other panelists, however, contended that such an approach, noting that, under some specific cases, generic drugs' prices may fulfil the conditions that are usually identified by economists as justifying an anti-trust intervention: manufacturers may have significant market power, since some medicines are not substitutable for patients; anti-trust intervention does not negatively affect the incentives of the manufacturers to innovate, since the drug is off-patent; finally, the health care authorities seem unable to solve the issue of excessive prices for generic drugs. In view of these considerations, some speakers argued that competition policy intervention seems justified in the case of certain instances of excessive prices for generic drugs. However, alternative anti-trust tools (e.g., market studies and merger control) may be more suitable than sanctioning excessive prices under Art. 102 TFEU.

Other panelists, however, objected to this restrictive approach, noting that the prices of generic drugs fulfil the conditions that are usually identified by economists as justifying an antitrust intervention: manufacturers usually have significant market power, since the medicines are not substitutable for patients, and the market

is characterised by high entry barriers; antitrust intervention does not negatively affect the incentives of the manufacturers to innovate, since the drug is off-patent; finally, the health care authorities seem unable to solve the issue of excessive prices for generic drugs. In view of these considerations, some speakers argued that competition policy intervention seems justified in the case of excessive prices for generic drugs. However, alternative antitrust tools (e.g., market studies and merger control) may be more suitable than sanctioning excessive prices under Art. 102 TFEU.

In discussing the 'revival' of exploitative abuses in Europe, panelists also debated the decision by the German *Bundeskartellamt* concerning *Facebook*¹³ and the preliminary injunction adopted by the Higher Regional Court of Düsseldorf in August 2019. Although the case is still pending at the moment of writing, in its preliminary injunction, the Düsseldorf Court showed "serious doubts" about the legality of the *Bundeskartellamt* decision. During the debate, some panelists criticized the *Bundeskartellamt* decision, since the authority analysed Facebook's conduct under data protection, rather than competition, rules, thus going beyond its institutional mandate. In addition, the authority based its decision under Art. 19 of the German Act against Restraints on Competition (GWB), rather than on Art. 102 TFEU, in spite of the clear cross-border dimension of Facebook's conduct.

How to Tackle Concentration in Digital Markets

Digital markets are characterised by a few large players, the so-called GAFA (i.e., Google, Amazon, Facebook and Apple). Statistics show that the market share of GAFA has substantially increased in every market in which they operate during the past decade. Although GAFA started as small start-ups some decades ago, and they operate in markets characterised by a high degree of innovation, it seems unlikely that new start-ups may be able to overtake GAFA's dominant role in the digital markets in future years.

11. Autorità Garante della Concorrenza e del Mercato, Decision No. 26185, 29 September 2016.

12. UK Competition Appeal Tribunal, *Flynn Pharma Ltd and Flynn Pharma (Holdings) Ltd v Competition and Markets Authority*. Ruled on 7 June 2018, 1275/1/12/17.

13. The German text of the decision is available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/AktuelleMeldungen/2019/29_03_2019_Ver%C3%B6ffentlichung_Entscheidungen_Facebook.html (15.1.2020).



A number of solutions have been put forward to attempt to solve the issue of the increasing degree of concentration in digital markets. According to the new Brandeis antitrust movement, the high degree of market concentration justifies an *ex-ante* 'structural approach' by competition enforcers. From this point of view, some speakers have noticed that the multiple multi-billion fines that were imposed in the past few years by the European Commission on Google have proved ineffective in correcting the firm's market behaviour. In this regard, it is worth noticing that the US Senator Elizabeth Warren, has suggested 'breaking-up' GAFAM, although it is unclear how this approach would affect the business models of these firms and, consequently, the network benefits they create for consumers. Alternatively, behavioural remedies, such as mandated access to data, have also been proposed as being a suitable solution through which to mitigate GAFAM's market power, although it remains unclear how such solutions might be enforced in practice by a competition agency. Thirdly, a number of authors have suggested that the increased market concentration could be tackled via a change in the procedural aspects of competition policy enforcement, for instance, by reversing the burdens of proof and lowering the standards for judicial review.

During the conference, panelists discussed the case of increased market concentration in the media industry. While traditional media are financed both by advertisements and subscription revenues, the new digital media are financed exclusively via targeted advertising, which is more effective for advertisers. During the last 8 years, for example, the *New York Times* has lost 74% of its revenues from advertising, while Google advertising gains have jumped. The decline of the traditional media has had a negative impact on the plurality of information and decreases the quality of that information. Unlike traditional media, social platforms do not control the accuracy of the information that is posted by their users and thus do less than they potentially could to halt the spread of 'fake news'. During the conference, speakers debated the effectiveness of possible solutions that aimed to safeguard media plurality, for instance, the *ex-ante* prohibition of new acquisitions by digital media companies.

Another aspect debated during the conference was the role of merger control in digital markets. A number of speakers agreed that merger control should be adapted to the reality

of the digital markets. Firstly, a number of countries (i.e., Germany and Austria) have recently introduced a new transaction value threshold for merger notification in order to catch acquisitions that would otherwise fall outside their jurisdiction. Secondly, the traditional approach to market definition seems to be outdated, due to the prevalence of multi-sided markets in the digital world. In addition, the recent EU Commission report on competition policy in the digital economy has suggested that conglomerate mergers should be assessed with closer scrutiny,¹⁴ when the acquired and acquiring firms operate in the same 'technological and users' space' (i.e., a broader concept than the traditional definition of a relevant market), and the transaction should be considered to be *de facto* horizontal, rather than as a conglomerate merger. Finally, in terms of theories of harm, nowadays, merger control pays greater attention to the impact of the transaction on the incentives of the merging parties to innovate.

Finally, panelists discussed the proliferation of reports recently published by different competition authorities in Europe on the challenges faced by competition policy in the digital economy.¹⁵ Although the focus of such reports is slightly different, they all call for a strengthened degree of antitrust enforcement in the digital economy. However, some panelists also noticed that the current attention being given to the digital economy in Europe seems to be guided by a rather 'emotional' reaction, due to an awareness that Europe is lagging behind in the 4th industrial revolution. However, it is currently unclear what the outcome of the recent wave of policy reports will be, as amendments to the Treaty and to EU Merger Control Regulation are very unlikely at the moment. A strengthened antitrust enforcement *vis-à-vis* big tech firms may be undertaken only by broadening the existing theories of harm that are mentioned in the enforcement guidelines of the competition agencies.

14. J. Crémer, Y.A. De Montjoye, H. Schweitzer, *Competition Policy for the Digital Era*, report carried out on behalf of DG Competition of the European Commission, 2019.

15. Among the reports published in the course of 2019, see: J. Crémer, Y.A. De Montjoye, H. Schweitzer, *ibid.*; M., Schallbruch, H. Schweitzer, A. Wambach, *Competition Law 4.0*, report carried out on behalf of the German Federal Ministry for Economy Affairs and Industry; J. Furman and others, *Unlocking Digital Competition*, report carried out on behalf of the UK Government.



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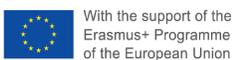
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Florence Competition Programme

The Florence Competition Programme (FCP) in Law & Economics is a programme of the Robert Schuman Centre for Advanced Studies at the European University Institute, which focuses on competition law and economics. FCP acts as a hub where European and international competition enforcers and other stakeholders can exchange ideas, share best-practices, debate emerging policy issues and enhance their networks. In addition, since 2011, the Robert Schuman Centre for Advanced Studies organises a training for national judges in competition law and economics co-financed by DG Competition of the European Commission - ENTraNCE for Judges.



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ISBN:978-92-9084-815-8

ISSN:2467-4540

doi:10.2870/50385