

New technologies, Big Data and the digital economy: current challenges for competition law (from the Volume Editor)

In memoriam of Professor Irena Wiszniewska-Białecka

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ARTICLES

Krzysztof Kanton, Jarosław Łukawski, Szymon Murek, **Attention market. The concept and challenges in a merger assessment**

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Summary: The article focuses on the issue of ‘attention’ paid by consumers to internet and mobile apps content, which from the economic perspective is a resource that falls short. The authors analyze attention as a commodity and present the characteristics of the markets on which it is traded. The publication indicates the challenges faced by competition authorities in assessing concentrations between entities active on the attention market – the so-called attention brokers. In the latter part of the article, the authors analyze the methodology used by competition authorities to assess concentrations between the biggest modern attention brokers. Conclusions and postulates regarding future analyses of concentrations on the attention market are presented in the summary.

Key words: attention, attention market, attention economics, two sided markets, mergers

JEL: K0, K21, L40

Artur Szmigielski, **Favouring one's own products or services by vertically integrated online platforms as a discriminatory abuse of a dominant position**

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Summary: The practice of favouring one's own vertically integrated services by a dominant online platform can be assessed as an independent practice of discrimination (prohibited under Article 102 paragraph 2 point c TFEU). This does not mean, however, that a dominant undertaking has an absolute obligation to treat products or services of its trading partners equally to its own offer. Such practices should be considered abusive if they create unfavourable conditions of competition and have significant anti-competitive effects. What is prohibited by a discriminatory practice does not refer to the fact of favouring one's own services, but to a situation where rivals are placed at a competitive disadvantage, and thus significant parameters of competition, such as innovation and consumer choice, are weakened.

Key words: Online platform, two-sided markets, search engines, abuse of dominant position, discrimination, non-price discrimination, self-preference, vertical integration, search neutrality

JEL: K20, K21, K24, K42

Piotr Semeniuk, **Will competition law solve the *vendor lock-in* problem in the B2B software sector?**

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Summary: Competition law is increasingly being used (so far, mainly in the US) in order to prevent the vendor lock-in problem in the B2B software sector. International academia also calls for increased activities of competition authorities in addressing vendor lock-in problems. Some business practices and contractual clauses applied by vendors in their Polish IT contracts could also be classified as an anticompetitive practice (e.g. exclusivities, tying, bundling, loyalty rebates, refusals to grant a license or to grant access to information on interoperability). Competition law in the world of IT contracts can supply buyers or competitors with arguments to challenge some of the vendors' business practices or contractual clauses.

Key words: competition law, vendor lock-in, software, B2B, software agreements

JEL: K21, K24

Marcin Mleczko, **Technological challenges for anthropocentric competition law: the case of algorithmic pricing in the e-commerce sector**

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Summary: The author presents the problem of algorithmic price fixing in the context of the prohibition of anti-competitive agreements. Firstly, the basic concepts related to this subject are explained. Presented next are various types of algorithmic collusion. The core of the article contains an analysis of different ways of using algorithms based on existing case-law.

Key words: algorithms, artificial intelligence, anti-competitive agreements

JEL: K21, K23, K42

Michał Konrad Derdak, **Do Androids Dream of Price Fixing? Pricing algorithms, artificial intelligence, and competition law.**

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Summary: The article outlines the issue of undertakings' liability for actions taken with the use (or participation) of artificial intelligence, which are in breach of the prohibition to enter into anticompetitive arrangements. Its particular focus is on the currently most important issue in this context, taking into account the experiences so far, namely the issue of using (dynamic) pricing algorithms.

Key words: antitrust liability, pricing algorithms, artificial intelligence

JEL: K21, K24

Laura Skopowska, **Merger control in the Big Data era – on the new jurisdictional threshold based on the transaction value criterion in the context of the European Commission's decision-making practice and the amendments to Austrian and German antitrust laws**

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Summary: During a recent consultation of the European Commission on the assessment of the procedural and jurisdictional aspects of EU merger control, the Commission expressed significant doubts regarding its notification system based solely on a turnover criterion, which can create significant enforcement gaps while assessing acquisitions taking place in the digital and pharmaceutical markets. In the Big Data era, when databases are of increasing market importance, current jurisdictional thresholds may not be a sufficient tool to detect anticompetitive acquisitions on the digital market. This scientific article assesses whether the introduction of new criteria is justified. The article also includes an analysis of amendments made to the German and Austrian merger control procedure which introduce a new criterion of ‘consideration value’ (also referred to as ‘transaction value’) along with the turnover criterion.

Key words: merger control, jurisdictional thresholds, Big Data, turnover threshold, transaction value threshold, consideration threshold, digital markets, data

JEL: 21

LEGISLATION AND CASE LAW REVIEWS

Bartosz Targański, **The prohibition of the use of trademarks in online advertising and the prohibition of cooperation with price comparison websites as a restriction of competition in the context of the Bundesgerichtshof ruling of 12 December 2017**

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 1. Equivalence of internet and stationary sales restrictions
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Summary: The case is part of a series of recent cases where EU competition authorities considered the acceptable scope of restricting online retail sales by producers. According to the decision of the Bundeskartellamt of 26 August 2015, and subsequent rulings of German courts, an absolute ban on the use of trademarks in online advertising and the prohibition of cooperation with price comparison websites imposed on distributors by the producer is a *per se* violation of Article 101(1) TFEU and cannot benefit from a block or an individual exemption. The decision is based on the statement of violation of the principle of equivalence of restrictions of online and traditional sales. According to the author, such an assessment method is not always right. Due to the difference between the two distribution channels, indicating equivalent limitations may be objectively impossible. The decision does not explain sufficiently precisely which factors objectively

determine the luxury status of a given product. This means that there is still uncertainty about the acceptable scope of restrictions on online sales.

Key words: price comparison engines, trade mark, Internet sales, vertical constraints

JEL: K21

Anna Laszczyk, **RPM in e-commerce – *la nouvelle vague* or *nihil novi*? Review of the decisional practice of competition authorities**

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- V. Conclusions

Summary: The aim of this paper is to analyse selected decisional practice of the European Commission and national competition authorities concerning RPM agreements in the e-commerce sector. This research is motivated by the recent e-commerce sector inquiry conducted by the European Commission. Conclusions from this inquiry suggest that suppliers frequently influence the pricing policy of their retailers to the detriment of competition and final consumers. This paper describes first the characteristics of e-commerce and considers features, which may be potentially relevant from the competition law perspective, differentiating it from brick-and-mortar distribution. It is a defensible view that RPM in e-commerce does not require the establishment of new assessment tools. This hypothesis seems to be further confirmed by the conclusions derived from the review of selected decisional practice. At the same time, analysis of RPM in e-commerce requires the competition authorities to carefully consider the economic context of the arrangements. In particular, the motivation of the supplier should be thoroughly analysed in the context of counteracting free-riding and protecting the value of the brand.

Key words: resale price maintenance, RPM, e-commerce, European Commission, Internet

JEL: K21

Natalia Hartung, **Why would anyone need my data? An analysis of the Opinion of the French Competition Authority on the use of data in online advertising**

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- V. Concluding remarks

Summary: This article discusses the Opinion of the French Competition Authority on the use of data in online advertising. The first part of the article describes the functioning of the market of online advertising, including programmatic advertising, the importance of data and internet users, as well as the position of key market participants, namely Google and Facebook. The second part discusses the preliminary competition law analysis of the online advertising market. The Authority considered the following relevant markets: services for internet users, social network advertising, Display advertising, Search advertising, intermediation services and data analysis services. The French Competition Authority then described certain problematic practices occurring on these markets, for example tying, predatory pricing, exclusivities, leveraging, and the obstruction to interoperability and discrimination. The final part of the article addresses topics that were not subject to an in-depth analysis in the Opinion, that is, the two-sided nature of the online advertising market and whether data can be regarded as a new currency in the digital economy.

Key words: art. 101 i 102 TFEU, merger control, sector inquiry, online advertising, data, opinion of the Competition Authority, multi-sided markets, Google, Facebook, digital economy

JEL: K21, K24, K39, K49

Iga Małobęcka-Szwast, **Violation of data protection law as an abuse of a dominant position? The Bundeskartellamt's proceedings against Facebook**

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IV. Conclusions

Summary: The article attempts to assess the main assumptions of the proceedings initiated in March 2016 by the Bundeskartellamt, the German competition authority, against Facebook, and thus answer the question whether an infringement of data protection law may constitute an abuse of a dominant position under EU competition law. In the wider perspective, the proceedings conducted by the Bundeskartellamt also raise important questions regarding the relationship between competition law and data protection law, including data protection issues in competition law, as well as the competences of antitrust authorities to assess breaches of data protection law.

Key words: personal data, abuse of a dominant position, internet platforms, social networking platforms, data protection law, competition law, digital market

JEL: K20, K21, K24, K42

Grzegorz Materna, **Non-compete clauses as a barrier to the development of alternative taxi reservation channels in the light of the decision of the Autorità Garante della Concorrenza e del Mercato of 27 June 2018 (case I801B, Taxi – Milano)**

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Summary: The article discusses a decision taken by the Italian Competition Authority that concerns vertical relations between taxi corporations and taxi drivers in Milan. According to the Authority's decision, non-compete clauses for taxi drivers may have a foreclosing effect for entrants that use new technologies, and thereby create an alternative to incumbent radio taxi corporations. However, the Authority's classification of the non-compete clauses resulted from the economic and market context in which they were used, and above all, from the fact that these non-compete clauses were used by taxi corporations that included almost all taxi drivers operating in Milan. In other economic and legal conditions, the Authority found that the effect of the investigated non-compete clauses might be different.

Key words: taxi transport services, vertical agreements, non-compete clause, new technologies

JEL: K21

BOOK REVIEW

Maurice E. Stucke & Allen P. Grunes, **Big Data and Competition Policy**, Oxford University Press, 2016, pp. 368 (Marcin Mleczko)

REPORTS

Report on the Seminar 'Current challenges of the digital economy in the area of combating anticompetitive agreements' Warszawa, 12.04.2018 (Urszula Czarnomska-Bokowy, Paulina Komorowska)

Report on the XIII Antitrust Conference 'Antitrust between EU Law and National Law', Treviso (Italy), 24–25.05.2018 (Grzegorz Materna)

Report on the Seminar 'Monopoly and its exploitation in the digital economy – what is the role of competition law?', Warszawa, 02.10.2018 r. (Szymon Murek)