2018 set to be dynamic antitrust year for online distribution models

January 18, 2018

A dynamic year lies ahead for companies with online distribution models. Competition authorities are set to tackle the challenges arising from the ever-increasing importance of the digital economy. These ongoing enforcement actions will provide companies with greater guidance on how to deal with the antitrust implications of digital phenomena such as algorithms, big data and geo-blocking. In addition, they are likely to result in more clarity on how and when to apply the notion of "fairness" in competition law assessments, as referred to in speeches by Competition Commissioner Vestager and mentioned in the 2017 State of the Union. At the same time, competition authorities will scrutinise seemingly increasing concentration levels among online distribution facilitators, like telecom companies, social media platforms and online intermediaries; good reason for companies to watch this space.

This article is part of our Crystal Ball Gazing series, in which we look ahead at possible developments in 2018.

Algorithms

Pricing algorithms are useful tools that companies use to help them set prices for their products which reflect both consumer and competitor behaviour. However, many companies using these tools may still have Competition Commissioner Vestager's warning of antitrust compliance by design ringing in their ears. If algorithms are used to coordinate among competitors or maintain minimum prices, companies can expect enforcement actions. In addition, dominant companies should consider themselves forewarned by Google's record fine for using search algorithms to the detriment of its competitors. The Commission's ongoing investigations into Google's Android mobile operating system and AdSense's advertising programme may also reach a conclusion in 2018.

Competition authorities face difficulty in tackling algorithms' possible unwanted effects without any sign of coordination or dominance. Non-dominant companies using similar pricing algorithms in concentrated markets without any kind of horizontal coordination between them may leave competition authorities sitting on their hands, looking at increased prices or reduced output.

The results of a study commissioned by the Commission to raise awareness about algorithms may help to provide more hands-on guidance on antitrust compliance by design. Until then, companies are well-advised to keep tabs on how their algorithms work and monitor their pricing or foreclosure effects on a regular basis when using them, including from a competition law perspective.

Geo-blocking

Geo-blocking refers to commercial practices by companies to prevent online shoppers from purchasing consumer goods or accessing digital content services based on the shopper's location or country of residence. Geo-blocking has exercised the minds of many competition authorities, because it can only be tackled by EU competition law if it either relates to a contractual restriction – and is thus linked to an agreement between a supplier and a distributor – or is based on a unilateral decision by a dominant company. Non-dominant companies with wholly-owned EU-wide distribution networks may therefore escape scot-free – but the regulation combatting unjustified geo-blocking in the e-commerce sector, expected to come into effect by the end of 2018, may put a stop to that. The regulation distinguishes between the following three situations where a supplier may not discriminate between end-users within the EU:

- it sells goods to be delivered in a member state to which it already offers delivery, or the goods are collected by the end-user at an agreed location;
- it provides end-users with electronically-supplied services such as cloud services, data warehousing services, website hosting or the provision of firewalls;
- it provides services which are received by the end-user at the supplier's premises or at a physical location where the supplier operates; for example, hotel stays, sports events, car rental, entry tickets to music festivals, or leisure park tickets.

Big data

The ownership and usage of large quantities of data collected online from consumers (known as "big data") can raise various antitrust concerns, such as data-related exclusionary conduct by dominant companies, or price discrimination facilitated by data collection affecting downstream competition. The German competition authority recently published its preliminary assessment that Facebook abused its dominance in the market for social networks with its specific terms and conditions on the use of user data. A final decision is expected in the summer of 2018. Competition Commissioner Vestager also recently expressed her concerns about the anti-competitive effects of big data. It is therefore a fairly safe bet that more big data enforcement actions will be on the agenda for 2018.

Concentration levels

The potential anti-competitive effects of big data have also raised concerns in EU merger control. This is one of the reasons why the Commission launched a public consultation on the functioning of the EU Merger Regulation in 2016. In the consultation, the Commission explored whether companies should notify mergers if they meet a certain transaction or data set value, even when they do not reach the turnover thresholds. This addition to the current, purely turnover-based thresholds is significant for certain industries, where an acquired company may have achieved little turnover as yet, but holds commercially valuable data, or has considerable market potential through innovation. The evaluation was scheduled to be completed in the autumn of 2017, so any changes to the EU Merger Regulation may materialise in 2018. However, it remains to be seen whether these upcoming amendments to the EU Merger Regulation will indeed resolve all issues relating to companies playing a pivotal role in online

distribution and market concentration, if the substantive test and application practice remain unchanged. John Kwoka, in his recent book Mergers, Merger Control and Remedies, indicated that competition authorities would do better to block megadeals, instead of adopting divestiture or behavioural remedies to resolve their negative effects on, for example, prices and innovation, since these remedies rarely prove effective. This may inspire authorities to increase the level of scrutiny.

It will be telling to see how the Commission treats the upcoming Deutsche Telekom / Tele2 transaction, particularly considering the General Court's recent beating of the Commission's merger assessment in the Liberty Global / Ziggo deal. The General Court annulled the Commission's merger clearance for failure to explain why it had not assessed the deal's potential vertical anti-competitive effects on the premium pay-TV sports channels market. If the Commission clears the Deutsche Telekom / Tele 2 transaction, only three mobile network operators will remain on the Dutch market: the merged entity, VodafoneZiggo, and KPN. The European Commission has already cleared several 4-to-3 mergers in the mobile telecommunications sector, but in 2016 blocked the proposed acquisition of mobile network operator O2 by Hutchison in the UK: its 25th prohibition in 25 years. Whether the reasons to block this transaction were case-specific, or reflective of a trend to increase the level of scrutiny in 4-to-3 mergers, is likely to become clearer in 2018.

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