Market Power and Special Responsibility in EU Competition, Data Protection and Consumer Law

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Digital Clearinghouse virtual roundtable
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Background

• Future ex ante regulation of ‘gatekeeping’ platforms – upcoming Digital Services Act
• Transposing EU competition law’s notions of market power and special responsibility to the regimes of data protection and consumer law
• Mix of conceptual insights and findings from cases
• Substantive and institutional perspective
### Overview

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EU competition law – recognized uses

• *Michelin I* (1983): dominant firm has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market
• Special responsibility versus abuse
• Super-dominance

• Notion of competition on the merits and the as-efficient-competitor test
EU competition law – possible further uses

• 2019 Vestager report:
  – adoption of a presumption in favour of a duty to ensure interoperability
  – reversal of the burden of proof for practices of self-preferencing in certain circumstances

• Sauter, Journal of Antitrust Enforcement 2019:
  – duty of care towards consumers for taking positive steps to protect consumers by upholding norms of ‘fairness’ and avoiding exploitation
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EU data protection law – recognized uses

• GDPR’s risk-based approach:
  – Level of risk can determine scale of obligations (e.g. data protection by design, security of processing, data protection impact assessments)

• 2014 Google Spain judgment:
  – Ubiquity of online search engines

• 2019 Google decision of French CNIL:
  – ‘particularly massive and intrusive’ character of data processing considering number of services offered and amount as well as nature of the data processed and combined by Google
EU data protection law – possible further uses

• Notion of freely given consent:

Recital 43 GDPR
In order to ensure that consent is freely given, consent should not provide a valid legal ground for the processing of personal data in a specific case where there is a clear imbalance between the data subject and the controller, in particular where the controller is a public authority and it is therefore unlikely that consent was freely given in all the circumstances of that specific situation.

• 2019 Facebook decision of the German Bundeskartellamt:
  – Violation of data protection law as exploitative abuse under competition law that occurred because of Facebook’s dominance
  – Decision annulled in interim proceedings
EU data protection law – possible further uses

• Data protection rules inherently limit data processing of dominant firms to greater extent

• 2020 Submission of Brave to UK CMA public consultation on online advertising:
  – Call upon data protection authorities to enforce purpose limitation to address ‘privacy policy tying’
  – Restrictions on cross-use of personal data among a firm’s services due to separation of consent for each purpose of processing
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EU consumer law – recognized uses

• Relevance of market power in setting enforcement priorities
• In combined competition/consumer law investigations, lower threshold within consumer law can be regulatory advantage
• 2017 Dutch market study into online video platforms as illustration
EU consumer law – possible further uses

• Role of market power in interpretation of open norms, like ‘fairness’, ‘significant imbalance’, ‘undue influence’

• Dominant firms have stronger ability to cause harm to consumers because they cannot switch to other providers

• 2017 WhatsApp decision of Italian AGCM

• Dutch ACM found link between platform size and range of possibly unfair terms in its online video market study
Outlook

• Renewed attention for special responsibility in competition enforcement in the digital era
• While data protection and consumer law are regimes of general application, substance of their provisions leave room to integrate a special responsibility
• However, this is not formalized and requires experimentation by regulators
• Need for effective enforcement: concerns about GDPR’s one-stop-shop system – BEUC refers to ‘enforcement bottleneck effect’