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On the study "Restoring Balance to Digital Competition - Sensible Rules, Effective Enforcement": Interview with Rupprecht Podszun

Marie CARTAPANIS

Rupprecht PODSZUN

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Resume: *On September 29, 2020, Philip Marsden[1] and Rupprecht Podszun[2] published a background study entitled "Restoring Balance to Digital Competition - Sensible Rules, Effective Enforcement" which makes several proposals to rebalance the power in the digital economy. To put it in a nutshell, the authors consider that relying on ex post law enforcement is insufficient, and they support the enactment of the New Competition Tool currently proposed by the DG COMP and based on the model of the Market Investigation References regime which is implemented in the UK since 2002. They propose new rules based on three principles: freedom of competition, fairness of intermediation and the sovereignty of economic actors to take their decisions autonomously.*

On September 29, 2020, Philip Marsden and Rupprecht Podszun published a background study entitled "Restoring Balance to Digital Competition - Sensible Rules, Effective Enforcement" which makes several proposals to rebalance the power in the digital economy. They start from the following observations: facing large platforms, the bargaining power of traditional companies and civil society is weak, and their dependance on the large players is still growing. Thus, the authors intend to answer five questions: How can we design new tools and regulation to correct market failures in relation to digital platforms before the abuses of market power happen? How do we ensure that competition based on merits prevails? How do we ensure that the best product wins, not just the platform that offers it? How do we re-set the balance so that genuine innovation and choice prevail, and all businesses have an equal opportunity to compete in the marketplace? And how do we ensure that consumers are not digital serfs - mere inputs into the tech giants' offerings - but instead are 'king and queen' of the competitive marketplace?

The study is therefore clear as to its objectives and the authors make numerous proposals, both substantial and institutional, to restore competitive relationships in markets linked to

[1] Philip Marsden is professor of Law and Economics at the College of Europe, Bruges; Deputy Chair, Bank of England Enforcement Decision Making Committee; and a case decisionmaker for several UK regulators. He was a member of HM Treasury's Digital Competition Expert Panel which produced the report 'Unlocking Digital Competition'.

[2] Rupprecht Podszun is a professor for Civil Law, German and European Competition Law at Heinrich Heine University Düsseldorf and an Affiliated Research Fellow with the Max Planck Institute for Innovation and Competition, Munich. He is the Vice-President of ASCOLA, the Academic Society for Competition Law.

digital platforms and aggregators. The challenge is therefore, ultimately, to introduce rules that seize the digital platforms' market power and its resulting imbalances without, however, destroying the benefits of this digital environment and the innovation it fosters, and while respecting the companies' rights: not only their right to compete but also their guarantees (procedural guarantee, confidentiality, etc.) The report makes several proposals, starting from the assumption that positive law is insufficient.

To put it in a nutshell, the authors consider that relying on *ex post* law enforcement is insufficient, and they support the enactment of the New Competition Tool currently proposed by the DG COMP and based on the model of the Market Investigation References regime which is implemented in the UK since 2002. They propose new rules based on three principles: freedom of competition, fairness of intermediation and the sovereignty of economic actors to take their decisions autonomously. These principles are intentionally described as having a constitutional character and a huge importance: that's why the authors thus consider they should be the foundation of any new EU regulation in this area. From an institutional point of view, the authors believe that ensuring the rules are fit for purpose requires new institutional capabilities, and a strong interplay between DG COMP and DG CNCT.

The full report is available at the following link: https://www.kas.de/de/einzeltitel/-/content/restoring-balance-to-digital-competition-sensible-rules-effective-enforcement

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1° You are the Vice-President of ASCOLA, Professor at Heinrich Heine University Düsseldorf and an Affiliated Research Fellow with the Max Planck Institute for Innovation and Competition of Munich. In the report, you explain that Germany has been a leader offering inspiring studies, targeted legislative amendments and leading investigations on violations of antitrust, consumer protection and privacy law. How do you explain it?

Many of the EU Member States have led stunning cases on digital issues, and very successfully, so I am sure they were an inspiration to the European Commission. I do not just think of the German Bundeskartellamt, but also the French Autorité de la Concurrence, the Italian AGCM or the British CMA. Germany stepped forward with legislative proposals, based on studies by scholars and also a governmental commission, that go far beyond what we knew so far: The rules on abuse are extended to a form of "regulation light", if I may say so, integrating per se style rules for "undertakings with paramount significance for competition across markets". These are presumably the GAFA companies, or what the Furman Report calls companies with a "strategic market status". Also, the new German competition act will have a stricter provision on tipping and easier access to data that is important for undertakings to compete. In 2017, Germany had already introduced new rules to its competition

rulebook, including a better focus on intermediary power and a transaction-value based threshold in merger control. The latter one was of course an answer to the Facebook/WhatsApp saga. You may remember that many jurisdictions, including the EU, were not able to catch that significant merger for merger control under the original provisions.

From an institutional point of view, Germany has a competition authority, the Bundeskartellamt, that is very active, very independent, and does not shy away from the big fish. I have the impression that some form of, well, competition with the EU's DG COMP gives the Bundeskartellamt the edge. The *Facebook* case that the Bundeskartellamt investigated, and also investigations into Amazon's practices surely met with a lot of interest in Brussels and motivated case handlers in Germany to pursue this path.

It struck me as interesting that even politicians, not known for pro-regulation, championed the field. My impression is that traditional German media companies were very effective in campaigning here and introduced a skepticism to the digital giants very early. That set the tone for the political debate in Germany that resonated with Commissioner Vestager's approach in Brussels.

2° You denounce the length of decision-making (notably in the Google case), which is explained, at least in part, by the heavy burden of proof of competitive analysis. In parallel you say that the European Union could help in this endeavor with specific "Do's and Don'ts" for platforms. Does this mean that your proposals come close to the establishment of rules prohibiting unilateral anti-competitive behavior *per se*?

If we are very honest with ourselves as competition scholars, we have to admit that competition law, in the digital field, proved rather ineffective: Procedures take very long, many remedies lack some bite, and even our analysis does not really get to the decisive points since we always try to stay in the realm of traditional "theories of harm" that are based on pre-platform economics, and on economics only, while antitrust law traditionally is about more than just consumer welfare.

Now, Philip Marsden and I tried to find out what could help, and some form of per se rules seems necessary to us. This is what the Commission has in mind with the Digital Services Act or Digital Markets Act. Such rules make it easier to enforce, and also for companies to comply. It does not serve the business community if we base our investigations on far-reaching and vague notions.

Such a list of prohibited practices is nothing to worry about, by the way. We have that very often – just think of the rules in the Unfair Commercial Practices Directive or the Unfair Contract Terms Directive.

3° In your report, you develop three principles: Freedom of Competition, Fairness of Intermediation, and Sovereignty of Decision-Making. Could you please tell us more about these principles? Do you intend to prioritize them? Moreover, based on the reasoning of the German Supreme Court, you consider that these principles should have constitutional value. How do you see this transposition into European Union Law?

Would that imply, for example, a modification of the treaties?

That's a tough – and interesting question. The starting point is the following: We need to have an idea of how we wish to shape the economy in digital times. This is one of the inspiring messages of Margrethe Vestager who started her process in devising new rules with this very question. What are the principles that should govern the platform economy? It does not suffice to readjust antitrust law here and there, and – by the way – I do not see rules for big tech as the only thing or even the most important one. There are other issues, such as a European innovation strategy, building up a stellar digital infrastructure, educating young people, having a plan for the social disruptions etc., that I see as vital.

But turning to the principles that should underlie regulation: Freedom of competition is self-explanatory for competition lawyers. Fairness of intermediation is something that we see all the time in our legal systems, e.g. when you have rules on representation. I see agency problems with platforms – they act agents for several market sides, with all the potential to abuse this trust placed upon them, so we should have rules on their fairness. You would probably not just trust an agent who promises to you to find a good car for you for a cheap price and who promises to a car dealer to find a customer who is willing to pay a good price. If the agent acts for both sides and is in control of all information, you probably have the desire to make sure that it is not just the agent profiting in the end. This is my institutional take on platforms. Fairness, in this regard, is a prerequisite for our trust in markets.

Regarding the sovereignty of decision-making: This goes back to my very basic understanding of how markets work. The economic actors, including consumers, take decisions autonomously based on good information. Nowadays, however, information and paths for decisions are more and more pre-defined or controlled by platforms. If you search the internet, you are completely in the hands of the search engine, and at present you have no way to control whether their choice for you is accurate. Your smartphone is completely dependent on the operating system. More and more decisions are taken away, delegated away. That's comfortable, but it restricts freedom, and ultimately, I think, it is also against the idea of markets.

We call these principles "constitutional" since we believe they are fundamental in value. And they are already there. We do not need to change the Treaties for this, it is more about our general understanding.

4° You develop the idea that it is necessary, within the framework of free competition, to ensure competition "on the platform" and you think that platforms that have created market-places must ensure that there is free on-platform competition. You are considering for example the "competition by design", because whoever makes the rules in a marketplace needs to respect the public order - including anti-trust rules. Does this idea come close to that of compliance? Would you go so far as to impose a duty of control on the platform?

This is another no-brainer in my view: If you are in charge of a marketplace, you must ensure that the market works properly. That is the general principle. So, if there is price-fixing in markets, cartels, discrimination, illicit

binding, exclusivity arrangements, the operator of the marketplace has a responsibility to step in. One of the clever moves of some platforms was to reap the large chunk of profits without being assigned any responsibility for what is going on. Probably, anti-competitive behaviour is not the biggest problem on platforms, but they should be held liable for ensuring this. And I am sure that there may be a technical side to it. It may matter how you programme your features. The ECJ's *Eturas* case gave us an early idea of this, back in 2016. Competition by design is definitely something that scholars should have an eye on.

5° More broadly, reading your report shows that, in your opinion, any global problem requires a global response. And in this regard, your diagnosis is clear. The consumer must be sovereign in his decision-making, which means that he must be autonomous. First, because the Hayek "discovery procedure" of a competition-driven market economy is only possible if individuals express their needs and wishes in their most individual way. Second, because users merit a particular respect as human beings - not as simple "data-fied" objects that can be easily exploited. You indicate in your analysis that "Economic Law is also based on a respect for fundamental constitutional values. One of these values is the right to self-determination in important matters of one´s own life". Do you think that competition law can, and must, integrate into its objectives other purposes than that of competition and its avatars (innovation for example), such as fundamental rights?

I love your description of the problem, yet I am hesitant to fully subscribe to it. I would not draw a distinction between competition on the one hand and respect for fundamental rights on the other hand. My understanding of a market economy, of a competition process is that this requires and enables the free self-determination of individuals. So, if I speak up in favour of such a constitutional value, I just wish to remind people of the basis of all our economic activity: the right to determine for yourself how to spend, how to consume, how to invest, how to work. That is a fundamental right, but it does not go beyond competition law. It may go beyond the ideas of some scholars who favour market design – which in my view is close to a socialist planning economy with computers and data. It also conflicts with some version of competition that is just a reduced downsized version, mainly composed of economic models. To all those people, I would love them to have a look into the speeches by John Sherman who sponsored modern antitrust law with the Sherman act: It was never about consumers paying two cents less for a product, but it was also about self-determination.

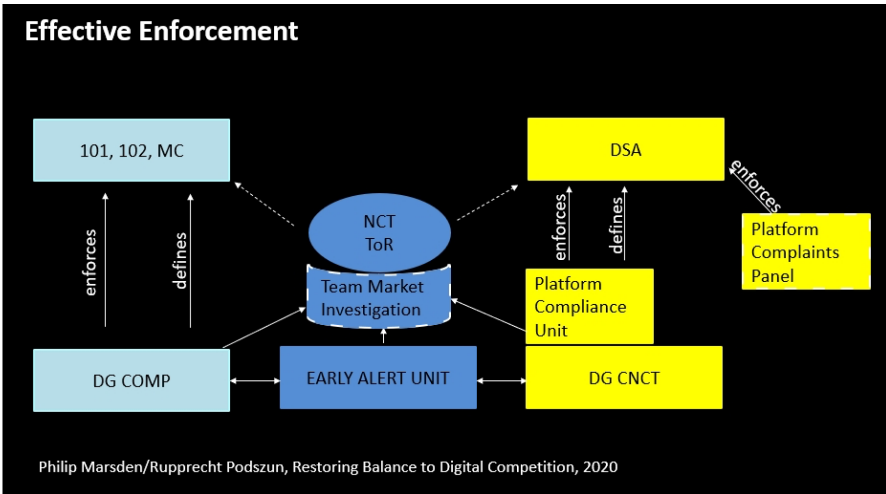
6° You recommend the creation of three new units to monitor markets, ensure compliance with the new rules, and resolve private disputes: A new Early Alerts Unit formed within DG COMP to monitor market developments; A new Platform Compliance Unit in DG CNCT; and a new Platform Complaints Panel to deal swiftly and independently with private complaints of violations of the regulation. Could you tell us more? In addition, recently, during a Webinar organized by the French Competition Authority, a representative of the European Commission indicated that the new tools would, in practice, be applied on a very *ad hoc* basis because the

European Commission does not have the necessary resources to implement them very often. In your opinion, should the Commission focus its intervention on the digital sector on the basis of the new tools you propose, even if it means that it couldn't enforce as often as it did in the past articles 101 and 102 TFEU? Do you think this political choice would be suitable and efficient regarding the general objectives of competition law, which include prevention of antitrust offenses and deterrence?

The Commission should not scale down its stance in other fields, that remains so important.

The Commission probably cannot do all that alone. It needs the help from national authorities and of private market actors and of independent experts. This is exactly the reason why Philip and I came up with our ideas this way: The Market Investigation teams for instance should be composed of independent experts and Commission staff on an ad hoc basis. The Platform Complaints Panels should act as institutions of independent experts, again with national and EU agency staff, who can easily resolve day-to-day cases that do not merit a fully-fledged Commission investigation or where court cases would be too burdensome. The Platform Compliance Unit at DG CNCT that would work closely with the Early Alert Unit in DG COMP would need to be more permanent and stay on top of the issues. One of their tasks would be to make sure that rules do not get outdated. Procedures however need to be smarter and swifter than they are at present. I am not an expert of internal DG COMP mechanisms, but I guess that there is some room for improvement there, too.

Regarding the question whether this should be restricted to the digital field I do not see why this should only cover certain sectors – and I do believe it is hard to even define "digital sectors" today. The whole economy is digital nowadays. Having said that, it is obvious to me that the first cases will probably centre around the "walled gardens" or "digital ecosystems". So, I would prefer to discuss the exact institutional design where Philip and I put the focus of our proposals – just see our nice graph on that!



Interview by Marie CARTAPANIS