Will the FCO shift towards more consumer protection in the digital age? Part Two

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The second part of the blog on the FCO's background paper on "Competition and Consumer Conduct – Conflict or Parallelism between Consumer Protection and Antitrust Law?" covers the interplay between consumer and competition protection and their legal tools in practice, including recent and potential future developments. (For the first part on the general principles please see my previous blog.)

I. Protection of competition and consumer interests

1. Consumer benefits through antitrust enforcement

The paper refers to the FCO's practice in recent years: several cartel cases concerned favorite German consumer products (including beer and sausages), and the FCO terminated vertical price fixing in various consumer product areas. In abuse of dominance cases, the FCO protected consumers from exploitative fees in the area of water and heating supply by ordering consumer refunds or future price decreases.

2. Competition restrictions to the benefit of consumers?

The paper recognizes that consumer interests may justify restrictions of competition, if they generate efficiencies that also benefit consumers, in particular in the context of vertical restrictions. The paper shows, however, that this type of justification has not been successful in Germany recently.

The paper summarizes "prominent examples" like proceedings against hotel booking platforms (*HRS*), and concerning online sales restrictions in selective distribution (*Asics*). In these cases, the FCO explicitly rejected that the consumer interests of reduced transaction costs (searching on a hotel platform) or of customer advice (for finding the right running shoes) would justify the online sales restrictions in question, which were found to increase the price level. The paper also states that preserving a brand image, which could be in the interest of consumers buying luxury products, could not qualify any longer as possible justification for online restrictions in selective distribution after the ECJs ruling in *Pierre Fabre*, at least with respect to total bans of online sales.

The paper raises some unresolved issues: to which extent can courts or the legislator differentiate between rational or irrational customer interests, or how to balance the interests of different consumer groups, e.g., the informed vs the uninformed consumers, when protecting the uninformed consumers may lead to increased overall cost?

II. Consumer protection and antitrust law tools

The paper discusses the interplay of different tools, including increasing transparency, challenging exploitative contract clauses, and how to deal with individualized pricing.

1. Increasing market transparency

Using consumer protection regulation to render various offers more comparable may be ambivalent from an antitrust perspective: if it increases market transparency for suppliers in already concentrated markets, it could facilitate coordinated effects.

On the other hand, consumer rights infringements due to lack of transparency can have significant effects on competition. The paper refers to the OFT's investigation into airlines' practice of surcharge drip fees, i.e., only disclosing a surcharge for using credit cards at a very late stage of the purchasing process. The case was closed with commitments that inter alia credit card surcharges be made transparent.

2. Exploitative abuse and consumer protection

Antitrust law and consumer protection often overlap in exploitative abuse cases. Prominent example is the FCO's pending Facebook case. The paper sees a possible enforcement gap of civil law rules if Facebook did not change its data protection rules despite final court rulings (and subsequent fines).

A dominant company infringing mandatory law may constitute a so-called price or conditions abuse, which is a statutory example of abuse of a dominant position under German antitrust law (Section 19 (2)no. 2 ARC). It involves requesting conditions that, with a high probability, would not have occurred in the context of functioning competition, and is directly applicable to the relation between supplier and consumer. The paper explains that the test whether conditions are abusive in such a case may include compliance with legal principles e.g., as set out in the law governing general t&cs.

3. Individualized pricing

Individualized pricing vis-à-vis users in the Internet may raise antitrust and consumer protection issues. This is an area of ongoing debate, in particular in light of big data, providing increasing knowledge about customers' characteristics and preferences, thereby facilitating price differentiation.

Economic perspective. Price differentiation may create consumer welfare effects due to higher sales volume and profits for suppliers, but also consumer welfare losses, if it enables suppliers to better skim off consumers' willingness to pay. Partially rational consumer conduct and price differentiation may well lead to overall welfare losses, if the pricing targets and harms naive consumers, while sophisticated consumers can hardly profit.

Limits under civil law and possible regulation. Other than the general law against discrimination prohibiting differentiation by consumer gender or age, there is no general prohibition of price differentiation under civil law rules. It is unclear to which extent other criteria, like location (residence), the particular device used or previous searches via the same IP address can lawfully be used for price differentiation (if technically feasible).

The paper concedes it is unclear how regulation could intervene in this area: possibly through disclosing obligations whether, and if applicable, based on which criteria price differentiation takes place. The paper warns, however, that such obligations might cover the core of a company's business activity and related business secrets.

Limits under antitrust rules. Price discrimination vis-à-vis consumers may be illegal if applied by a dominant company. The paper sees the following as relevant in any future case: which circumstances may justify price differentiation and which establish a causal link between the abuse and the dominant position? Like in discrimination cases concerning commercial end customers, the supplier should presumably be allowed a certain scope of discretion. The paper says price differentiation could be justified if it reflects cost savings on the supplier's side (higher or regular purchase volumes), but presumably not if it simply enables skimming off the consumer's willingness to pay.

Price differentiation in the Single Market. The EU services directive prohibits discrimination by the recipient's nationality or residence, and the paper refers to the ongoing Commission's legislative action to prevent geo-blocking in e-commerce and to entrust consumer protection authorities with this task. When geo-blocking involves vertical restrictions of competition, however, competition authorities may have parallel competences (see the Commission's antitrust proceedings against US film studios concerning geo-blocking.)

III. The paper's conclusions

The paper concludes that perceived conflicts between consumer protection and competition law are often based on allegedly different consumer models, and on the question which of various consumer interests should prevail. But even consumer protection does not only follow a single consumer model, nor does antitrust law application. Ultimately, the paper sees a large parallelism of consumer interests and the public interest in functioning competition, and real conflicts as an exception. It finds that conflicts are rather alleged by market participants when pursuing their own interests. While strong and knowledgeable consumers are elementary for functioning competition, competitive markets cannot do without effective enforcement of consumer rights.

IV. Comments

The paper provides a good overview of the FCO's thinking on consumer interests and their role in antitrust law application. It highlights related open issues in the digital economy, including the interplay between consumer protection and antitrust laws, potential areas for regulation as well as potential pitfalls thereof, and gives food for thought.

The summary of the FCO's practice on vertical online restrictions, however, is rather one-sided: the paper fails to mention that the FCO follows a stricter approach than the rest of the ECN (hotel booking platforms) or the Commission Guidelines on Vertical Restraints (third-party platform sales bans), and that this approach is controversial. *Asics* is on appeal, and the question whether preserving a brand image in selective distribution can justify third-party platform sales restrictions post *Pierre Fabre* is pending with the European Court of Justice in *Coty*. A so-called background paper should adequately reflect the status quo.

At the same time, the paper seems to confirm that regarding online sales restrictions the FCO is in practice not willing to accept any consumer interest other than low prices and intra-brand competition. It is striking that product innovation is not even mentioned as a consumer interest in the paper, which is a flaw in the discussion.

Outlook: the paper might hint that the investigation of abusive t&cs may continue beyond the Facebook case, and that the FCO is interested in looking at individualized pricing in the Internet in the future. One may thus well expect the FCO to continue to be a frontrunner in this field.