Kluwer Competition Law Blog

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

Silke Heinz (Heinz & Zagrosek Partner mbB, Germany) · Thursday, November 24th, 2016

The Federal Cartel Office (FCO) held a conference with antitrust experts (professors and judges) on October 6. 2016, on "Competition and Consumer Conduct – Conflict or Parallelism between Consumer protection and Antitrust Law?" As part of the conference, the FCO published a background paper on the same topic, available in German, see http://www.bundeskartellamt.de/DE/UeberUns/Veranstaltungen/ArbeitskreisKartellrecht/arbeitskreiskartellrecht_node.html

I. Background of the discussion

Currently, consumer protection in Germany is typically enforced through civil law means, while the FCO typically enforces antitrust law. In other jurisdictions antitrust authorities are also empowered to enforce consumer protection, such as the FTC in the US and regulators in several EU Member States. There is a debate in Germany whether to introduce public consumer protection enforcement. According to recent news the government plans to introduce consumer protection powers for the FCO regarding the Internet.

The background paper does not set out any concrete plans, but it deals with the more preliminary question of possible overlaps between consumer and competition protection in substance. Nevertheless, the paper gives an interesting insight into the FCO's thinking on

• areas with an **interplay between consumer protection and antitrust enforcement** issues, particularly in the Internet;

• where it sees **room for consumer protection regulation**; and

• how it may continue to take into account **consumer protection issues in its antitrust enforcement practice**. The Facebook proceedings, regarding a possible abuse of dominance by using unlawful general t&cs, mark a new development in this context, and another potential future focus might be the use of individualized pricing in the Internet.

This first part of the blog will cover the general principles the paper discusses regarding consumer conduct and market effects, dealing with consumer welfare loss scenarios and possible regulatory intervention, as well as consumer conduct in antitrust application. The second part of the blog will cover the paper's discussion of the interplay of protection of competition and consumer interests and of consumer protection and antitrust law tools in practice.

II. Consumer conduct and market effects

The paper starts by looking at how consumer conduct can affect markets.

1. Consumer conduct and welfare loss scenarios

Consumer conduct and targeted business practices. Even in the case of entirely rational consumers, information and motivation asymmetries may lead to increased transaction costs (e.g., it is rational not to compare all the information available on various offers before buying a cheap product). Partially irrational consumer conduct, such as wrong evaluation because the consumer follows intuition rather than using the information available, loss aversion, consumer inertness and incorrect expectations as to one's future consumption, may also create welfare losses. The paper notes that the digitization of many industry areas has blurred the boundaries between rational and partially irrational conduct.

These types of conduct may lead companies to offer complex pricing schemes and diversified products, to disclose certain price elements only at an advanced stage of the purchase process (e.g., airport fees), or to offer cheap purchase prices for a product with high follow-up costs for necessary disposables/accessories. Contracts aiming at wrong consumer evaluation are deemed undesirable both from a consumer protection and competition perspective: it becomes more difficult for consumers to compare offers, their search costs increase and they don't make optimal decision, with the result of inefficient allocation of resources and that not the best suppliers will prevail in the markets. The paper lists the energy, telecommunication, insurance and financial services sectors as potential industries in which using wrong consumer evaluation might be feasible.

Possible government intervention. For consumer protection purposes companies could be required to disclose any relevant information timely, or the legislator could impose tying prohibitions or stricter limits on contract durations than under current laws governing general t&cs. From an antitrust perspective, however, the paper prefers increasing the comparability of the various fees in order to foster competition among suppliers. At the same time, such measures should not lead to a comprehensive pricing model regulation or to any overregulation.

The paper refers to the emergence of comparison websites as a solution created by the market. These have e.g., triggered more active consumer market participation in the energy sector, thus contributing to the success of electricity liberalization. At the same time, however, it may cause consumer protection issues if comparison websites, their criteria for displaying suppliers and their search results themselves do not meet transparency standards.

Digital platforms. In particular regarding digital platforms, the paper therefore contemplates possible disclosure obligations, including on the platform's business model or business cooperation, criteria used to display search results, or whether, and if yes based on which criteria, there is price differentiation. The paper notes, however, that any information disclosure obligation needs to have a real effect in order to justify the associated costs, and that the proportionality principle and the protection of business secrets might speak against disclosure of certain details of a business model.

2. Consumer conduct in antitrust application

The paper sets out how consumer conduct plays a role inter alia in the areas of market definition and abuse of dominance. The rational consumer is the starting point for defining a market, but in practice actual consumer conduct is taken into account as often as possible. This is illustrated by market definitions in liberalized markets: e.g., regarding electricity supply the FCO defines separate product markets for consumers that entered special electricity supply agreements (and switched supplier) and for those who stayed with the incumbent.

Partially rational consumer conduct may play a role in the area of tying or bundling by suppliers using evaluation errors or transaction costs. The paper mentions in particular the use of default bias, for example in the travel and flight industries regarding additional services (such as cancellation insurance) which the consumer automatically books unless actively opting out. The paper also refers to the two Commission Microsoft cases (bundling its media player and later its internet search engine with its operating system), where consumer inertness and lack of awareness of alternatives played a role, as well as the ongoing Commission Google proceedings on "bundling" Google's search engine with Google Shopping. Here the paper says that the consumer perception of the way search results are displayed (and subsequent traffic based thereon) may play a decisive role.

This entry was posted on Thursday, November 24th, 2016 at 2:51 pm and is filed under Consumer welfare refers to the individual benefits derived from the consumption of goods and services. In theory, individual welfare is defined by an individual's own assessment of his/her satisfaction, given prices and income. Exact measurement of consumer welfare therefore requires information about individual preferences.

Source: OECD“>Consumer welfare, Germany
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.