Is it time for European Hipsters?

Panel: Aims, Regulatory Environment and Economics of Competition

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Hipster antitrust...
Questions

- Should European competition law react to societal challenges?
- Does it need to change its *instruments*, or even its *focus* in order to do so?
Aims – European competition law

Fairly uncontested:

- Welfarist aims: consumer welfare, market efficiencies, consumer choice
- Market integration aims

(much) more contested

- Fairness (of process, of outcomes)?
- Other stuff: industrial policy, sustainability, democracy, individual freedom?
I  The challenge of sustainability

II  The challenge of digital power
The challenge of sustainability

- dairy farmers protecting blacktailed godwit
- importers strengthen workers’ rights & wages
The challenge of sustainability

In the Netherlands:

- several initiatives not allowed under competition law
- outcomes perceived as ‘unfair’

Problem: balancing non-economic benefits
The challenge of sustainability

Against:
- competition law is (and should) focus on consumer welfare
- wider weighing leads to less legal certainty
- legitimacy of (national) agency decisionmaking
- we have regulation for that!

However:
- Paris agreement, SDG’s, EU sustainability agenda
- What is fair and equitable here?
The challenge of digital power

Is It Time to Break Up Google? - NYTimes.com
The challenge of digital power

- Filter bubbles
- Fundamental rights
- Hypernudging
- Democratic process
- Digital butlers
- Fake news
- Predatory innovation
- Access to big data and/or algorithms and/or platforms
- User-citizen vs user-consumer
The challenge of digital power

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Big Tech raises a Big Question:
- something fundamentally new?
- is power-as-such relevant for competition law?

my hypothesis:

‘Modern Bigness’ is something new
The challenge of digital power

Against changing concepts:
- competition law is (and should) focus on consumer welfare
- wider range leads to less certainty for companies
- legitimacy of (national) agency decisionmaking
- we have regulation for that!

However:
- history of competition law
- if Modern Bigness is new, and challenges fundamental, should competition law act?
Other challenges

- Innovation and competitiveness of EU: protect small and medium sized enterprises?
- Preventing another financial crisis?
- ....
Final thoughts: time for hipster EU competition law?

- (some) response of European competition law is necessary for its *own* legitimacy
- heterodox conception of aims of competition law is not against EU constitutional context, nor history
- European competition law cannot be panacea for all evils
- difficult balancing act of legal certainty and enforceability with response to challenges