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Angela Daly, Private Power, Online Information Flows and EU Law: Mind the Gap

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Book Review

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- 1 This book, which is part of the Hart Studies in Competition Law series, may, at first glance, seem to fall outside the scope of the main areas of interest for many scholars in intellectual property, information technology, and e-commerce law. However, the European Commission's issuance of a Statement of Objections to Google regarding comparative shopping services, the opening of a formal competition law investigation into Google's conduct related to the Android mobile operating system, both in 2015, followed by a 2016 report of the French and German competition authorities on competition law and the collection and use of data, should have put an end to any doubt about the interest of competition law to the sectors such scholars study. Furthermore, this book's subject matter is not limited to competition law and concerns European Union telecommunications regulation, privacy and data protection law, the right to free expression, and technical measures intended to limit the impact of concentrations of private economic power on online information flows as well.
- 2 The first chapter of the book provides an introduction, sets out the mission of the book and outlines its structure and approach. The second chapter establishes the book's theoretical framework which serves as the basis for the discussions of what Daly calls the 'substantive' part of the book, consisting of discrete 'case studies' and providing examples of existing EU law. The first of these is contained in chapter three on dominance and internet provision, particularly covering net neutrality. In the fourth chapter, dominance and internet search are the subject, focussing as might be expected on Google. The fifth chapter deals with dominance and mobile devices, placing an emphasis on application (or 'app') stores. The last of the 'substantive' chapters is chapter six, which covers dominance and the cloud, followed by a conclusion (chapter seven). Notably, each of the substantive chapters contains a competition law analysis, followed by a discussion of other areas of law (data protection and privacy, free expression, etc.) and technique. The chapters are fairly well balanced in terms of length, with the sixth chapter on the cloud being the shortest of the 'substantive' chapters, likely because of its 'speculative' nature, and the fourth chapter on internet search being slightly longer than the theoretical chapter (chapter two) and the chapter on mobile devices (chapter six), due to the European Commission's investigations in this area.
- 3 In the first chapter, Daly sets out some of the limits of the book. First, it does not cover state-only control of online information flows, such as for the prevention of crime. Second, only current EU law (including the European Convention on Human Rights, as amended) is discussed in detail, to the exclusion of 'possible conceptual reforms'. Finally,

consumer protection law is largely left uncovered by the work, which may disappoint certain readers. The book's main argument is made explicit before being developed in the next and following chapters: "that existing EU law and regulation does not adequately address concentrations of private economic power adversely affecting online information flows to the detriment of Internet users' autonomy due to their neoliberal basis".

- 4 The second chapter of the book is the most dense and theoretical of all. Daly begins by tracing the history of the Internet from its ARPANET origins, early Internet legislation, the advent of Web 2.0, and the assertion of political and legal control over the medium, the "privatisation" of the same, and the emergence of concentrated private power in the hands of large Internet corporations often operating as "web-based platforms". The book then introduces concepts such as digital labour, economic surveillance, and "the invisible handshake" between states and large online players (i.e. the collaboration between states and large Internet corporations, which usually escapes public awareness), with platforms taking a role in policing online activity which falls afoul of copyright and other laws. "User autonomy" (as preferred to "consumer welfare") is pictured as a desirable goal for EU law and regulation, with 'users' being described as individuals "who both produce and consume information over the internet", thus distinguishing them from mere consumers – "an inappropriate and outdated concept given the increased capacity for individuals to produce as well as consume facilitated by the internet", according to Daly. This implies optimal online information flows, without censorship, "illegitimate" restrictions or blanket surveillance.
- 5 Daly then points to what she views as different shortcomings of competition law (and of the arguments of the influential Chicago School) in the context of the Internet. This is due in part to it not being well adapted to free goods and its focus on consumer welfare as opposed to user autonomy, which she argues does not account for new needs and desires of users, such as the production of content. She rightly identifies two recent factors – the development of BigData and the entry into force of the EU Charter of Fundamental Rights (covering rights to protection of private life, protection of personal data, freedom of expression and information, etc) – as having shifted the debate on competition law and social/non-economic factors (such as human rights). The EDPS is cited in this context taking the view that it may be necessary to incorporate data protection violations into the concept of consumer harms for competition law enforcement purposes. However, Daly aptly points out that such non-economic factors of user autonomy may conflict with neo-liberalism and cause regulatory tension for competition authorities. Unfortunately, Daly avoids discussing potential paths of competition law reform here as it is outside the scope of her book. However, she does point to "regulatory capture", which may result from corporate lobbying and the time lag for regulation as factors which may force users to seek alternative ways to advance autonomy, such as 'code-based' technical solutions.
- 6 Dominance in the context of Internet provision is covered by the first of Daly's case studies in the third chapter centred on ISPs – the only such study where ex-ante regulation has been adopted. Here a very helpful and clear explanation of net neutrality has been provided in the context of the concentration of Internet content in large players that can afford to use content delivery networks (CDNs) and/or make deals with Internet access providers to achieve more favourable results (such as speedy provision of their data to users) for themselves. As in the other case studies, the focus is on a 'choke-point' of the Internet, where an information gate-keeper (here, the ISP) is placed. Without specifying the myriad details of this chapter, it is important to highlight the role of deep packet inspection (DPI) technology, which allows ISPs to use their power to control what data their customers could access. This raises concerns with regards to – competition law, especially where ISPs have a dominant position in their market or 'significant market power'. In addition, there is a perceived invasion of privacy tied to the use of DPI. Sector-specific (telecommunications) regulation and competition law already exist in the EU to cover this area, and these are supplemented by data protection and privacy laws, however national security exceptions may apply. Otherwise, ISPs are prohibited from "listening, trapping, storage or other kinds of interception or surveillance of communications" without users' consent under the ePrivacy Directive, unless an exception applies, however it may be difficult to obtain knowledge that a violation exists. Daly points to weaknesses in the Net Neutrality Regulation, as a measure that came "too little, too late" when technology and business practice have moved on, specifically highlighting that it would be difficult today to ban CDNs because of their widespread use. What may be left are technical solutions such as the use of encryption technology to block ISPs from monitoring the content of data, and other solutions such as P2P file-sharing networks and community mesh networks, each with its own weaknesses.
- 7 In the fourth chapter, dominance in Internet search is the focus – arguably the most currently visible of the areas from a competition law perspective, with the dominant search engine Google in the European regulator's spotlight. The importance of search engines for the finding of information and making sense of it on the Internet goes without saying,

although competition law only addresses economic concerns in this regard and not non-economic ones such as biased information-filtering privacy and data protection infringements according to Daly. Relevant to the Google cases, the creation of barriers to entry may result in the field of online search and advertising from the collection of information about users and their behaviour by the search engine. As search engines are not subject to any sector-specific ex-ante regulation in the EU (unlike ISPs), Daly informs us that the initial legal solution for problems in this area is to be found in competition law, and application of such law is made easier because of Google's dominant position in online search and advertising. Daly reminds us of the information asymmetry due to the opacity of Google's algorithm – a subject that could have been explored in further detail by the author. In this chapter, the author also studies the various elements of the European Commission's investigation into Google (involving, inter alia, favouring its own comparison shopping service in search results) and prior cases involving the giant, as well as highlighting its role in the “invisible handshake” with the US authorities unveiled by the Snowden NSA revelations. Daly suggests that further regulatory reform, potentially involving transparency and “search neutrality”, may be desirable, and that extra-legal solutions such as the creation of alternative search solutions either through state action or through peer-to-peer design are suggested as a potential way forward. However, it remains to be seen whether these are realistic options given the failure of past initiatives such as the Quaero case that Daly mentions.

- 8 Next, dominance and mobile devices are covered by the author in the fifth chapter. Here a focus has been on the vertical integration of closed systems, with power being concentrated through app stores. Problems related to anticompetitive conduct by the entities controlling the app stores, to expression and control (censorship or limitations placed on what you can do with devices), and to privacy and data protection of user data, are highlighted. From a technical standpoint, digital rights management measures (DRMs) and technical protected measures (TPMs) may be used to effectively lock users into an app store or system. However, here one hurdle is that there is no dominant player who might be subject to an abuse of a dominant position claim in the broader market, although a specific app store may constitute a market in and of itself, depending on the facts. Daly discusses cases involving Apple and Google on e-books, Google Play, then Android in this context, as well as potential anti-competitive conduct such as tying, locking users into an ecosystem, and blocking apps. The author sees the right to data portability, contained in the forthcoming EU General Data Protection Regulation (GDPR), as a potential tool, but cautions that it only applies to data processing

for which the legitimate basis is consent (or a contract). Once again, Daly finds gaps relevant to user autonomy in existing legislation and regulation.

- 9 The last of Daly's cases studies – one covering dominance and the cloud – is contained in the sixth chapter and is, according to her, the more “speculative” chapter as it addresses cloud services before they have been subject to any competition investigation. After describing the different kinds of clouds, the book sets out perceived problems with the cloud. One such issue involves DRMs and TPMs in the cloud, which may be more restrictive than what the law requires, where the original goal of such measures was protection of the rights of copyright owners, and where permitted user exceptions are not considered for use in the cloud, the result being a lack of portability and interoperability for users. In addition, network effects and associated accumulation of user data by platforms may create a barrier to entry. Nonetheless, Daly considers that the markets for cloud appear quite competitive and that it would be difficult to find dominance or collusion, such as to allow the use of competition law to curtail anti-competitive behaviour that limits users' autonomy.
- 10 The conclusion of the book revisits some of the arguments detailed above, reminding the reader of some of the limitations of the work, and positing that areas for future research include a “more thorough consideration of consumer protection's role in advancing user autonomy online”; in particular, potential conceptual reform of the area to take consumer protection law to “prosumer” protection law, taking into consideration the productive attribute of users as well. Daly concludes that technical measures may be the “most realistic” way for users to protect their autonomy online.
- 11 This discussion of the importance of technical measures, together with an elucidation of the difficulties of competition law within the online context in the absence of findings of dominance, constitute strong points of the book, along with a very helpful explanation of net neutrality provided at a moment when the new US administration is calling this principle into question. The organisation of chapters following the development of the theoretical framework around the “substantive” cases of ISPs, search, mobile devices, and the cloud, is effective for the purposes of the study. The analysis focussed on neoliberalism is interesting, as is the critique of some of the European Union's regulatory approach (chapter two); nonetheless, some of the author's choices of language, such as “Big Data evangelists” and “technocorporatist alliance” (chapter 5) might be considered by some readers as unfortunate, however sympathetic they may be with Daly's arguments. One detailed point

might be made in order to provide clarity for the readers, although this takes nothing away from the author's arguments: in chapter six Daly refers to article 3 of the GDPR as providing that the regulation applies to "controllers or processors not established within the EU but which are processing EU citizens' data"; yet, article 3(2) of the GDPR imposes no such requirement of EU citizenship, and refers instead to "the processing of personal data of data subjects who are in the Union" in connection with the offer of goods or services (including "free" ones) to them, or the monitoring of their behaviour to the extent that it occurs in the Union.

- 12 As discussed above, the reader may have hoped that this book contained suggestions for competition law reform to address the gaps Daly has identified, or a greater handling of consumer protection law and the discussion around digital labour, or even a further development covering the interplay between competition law and intellectual property in the online context. The author would have rightly argued lack of space; moreover, she does provide solutions which are alternatives to competition law in regulating private power and does posit "user autonomy" as a goal to be preferred over "consumer welfare". Notwithstanding such gaps, Daly's very readable book provides an important and well-researched contribution in an area – competition law – that is now inextricably linked to the domains of other legal specialties such as privacy and data protection, the right of expression, and intellectual property. Thus, this book is highly recommended reading for Internet scholars, whatever their specific area of expertise.