Book Review

Kevin Coates: “Competition Law and Regulation of Technology Markets”

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Technological innovation has changed the world in the past century. The digital revolution has changed the nature of media, and when media change, society changes as well. This powerful observation on media by Walter Benjamin in the 1930s gets at the impact of technological change on businesses and consumers alike. Seizing upon recent innovations in the information, communication and media markets, Kevin Coates’s new book explores some of the fundamental questions of the digital age, including the role of competition law and regulation in rapidly evolving technology markets and the challenges faced by legislators and law enforcers in keeping up with industry.

*Competition Law and Regulation of Technology Markets* successfully accomplishes an ambitious task, addressing nearly all the important issues and delivering a complete picture of US and EU competition law generally and the impact of the law on technology markets in particular. Coates is accurate and attentive to detail, starting out by exploring the role of competition law, intellectual property law, telecom regulation and data protection law across differing markets, including the underlying technology in each market, the networks, and the services and applications. The book’s value lies in its presentation of the law’s development over time and how the rules have evolved in light of significant cases like AT&T, Microsoft, Kodak, Aspen Skiing, Sony/BMG and Intel.

The first chapter lays a broad foundation in the objectives of competition law and regulation, outlining the elements of any framework for considering competition policy: market regulation, public policy, and economics. The author distinguishes among two categories of regulation: rules that aim to improve the operation of markets, and rules concerned with other public policy objectives, such as consumer protection. In addition to these two groups, there are also property rights, which can be considered a form of regulation. In Coates’s view, the *ex ante*/*ex post* distinction is not the appropriate paradigm in which to consider the roles of competition law and regulation. This much is illustrated by the distinctive levels of interaction between competition law and regulation under EU and US law, respectively. In the EU, competition law and regulation are highly interactive, but in the US they are not. To Coates, this suggests that where regulation is designed to promote

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competition in a particular sector, then it should share some commonality on analysis and structure with competition law, and vice versa, competition law should learn from the experience of the sector-specific regulation.

In explaining the economics of market regulation, Coates probes familiar Chicago School and Post-Chicago distinctions, including the former’s efforts to define consumer welfare using a total welfare standard and the latter’s efforts to shift focus away from overall efficiency. These different ideas shape the US enforcement record, with the Chicago School view being the more prevalent. However, there are also voices with a strong belief in the government’s capacity to promote technological advances, recognized even by some avowed libertarians. Perhaps the most convincing proof lies precisely in the high tech markets of Silicon Valley, which, yes by way of a heavy fight for a free market, did make their ways into the market.\(^2\) Coates also explores the goals of market regulation and takes a historical look at how competition law and regulation have not always been concerned primarily with the maximization of “consumer welfare.”

Having covered the basics of competition policy, the author uses the second chapter to provide an introduction to competition law. Coates looks at the origins of competition law and provides an overview of the EU and US regimes, including Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), EU merger control and state aid, and Sections 1 and 2 of the Sherman Act, Section 4 of the Clayton Act, the Federal Trade Commission Act, and the merger control rules in the US. A separate section is devoted to competition law and other, sector-specific regulation, under both EU and US law. In this section, Court of Justice decisions such as *Ahmed Saeed* and *Deutsche Telekom*, and US Supreme Court decisions such as *Trinko* and *Credit Suisse*, are explained in detail.

The last section of the second chapter begins to address the role of competition law in high technology markets, using an analysis of the US and EU *Microsoft* cases. The author maintains the role of neutral observer, identifying the different approaches of US and EU authorities in *Microsoft*. He explains the history of the cases in plain and concise language, highlighting the importance of this landmark decision on the development of the abuse of dominance standard under EU law. One aspect missing from this discussion is an analysis of the cooperation between EU and US authorities in the enforcement of Article 102 of the TFEU and Section 2 of the Sherman Act, which remains unclear. However, Coates perceives that the courts and authorities in Europe seem more convinced of the need to intervene in technology markets as a general matter, which moves public enforcement in the EU in a different direction than public enforcement in the US. At the end of the section the author outlines his views on the impact of the remedy imposed by the European Commission (EC) in its 2004 *Microsoft Interoperability* decision.

The fourth chapter focuses on competition law and pricing. It provides a detailed overview of specific pricing problems such as predation, rebates and discounts, and margin squeeze and excessive pricing, using examples from cases in the EU and US. Coates’s comparative approach is an especially valuable undertaking. The author leaves no stone unturned, giving readers all the relevant underlying sources that inform the EU and US approaches, such as the concept of predation described by the General Court and the Court of Justice in their *Akzo*, *Tetra Pak* and *Wanadoo* decisions, and by the US Supreme Court in

Matsushita. Coates’s concise writing makes it easy to follow even more complex issues such as the recoupment requirement, again viewed differently by EU and US courts.

The question of rebates and discounts in the EU is described through the example of the Michelin I, Prokent/Tomra and Intel cases, supported by the Article 102 Enforcement Priorities Guidance released in 2009 as a major document that is supposed to lead to a more detailed assessment of the effects of rebates. This approach is in line with the EC’s determination to focus on examining the exclusionary effects in more detail. The US treatment is shorter than the EU treatment in this section, but the Intel and Brooke Group cases are offered as leading examples of the US approach to rebate practices. This again is illustrative of the different approaches that are sometimes taken on the two sides of the Atlantic.

Margin squeeze is another example where the EU and US antitrust authorities and courts have taken differing positions. While the EU sees this conduct as a stand-alone abuse, the US is likely to see it as not unlawful at all, or, as the author explains, not unlawful absent an antitrust obligation to supply the product or service in question. The most prominent cases, such as Deutsche Telekom in the Court of Justice and Linkline in the US Supreme Court, are analyzed in detail. Finally, the author also explores excessive pricing as an exploitative pricing practice. Here again, contradictory views are reflected in EU and US law, with the US determining that excessive pricing is not a Sherman Act violation.

The chapter on intellectual property is divided into two sections, with the first providing a general overview of intellectual property rights and the second discussing the relationship between property rights and competition law. In the overview, Coates addresses justifications for property rights and intellectual property rights, the origins of modern intellectual property rights, the types of intellectual property rights in the modern world, and the legal bases for intellectual property rights. In separate sections, patent, copyright, and intellectual property protection of software are analyzed in a comparative approach considering both the EU and US legislative frameworks.

The second part of the chapter addresses the most challenging questions of the interface between intellectual property rights and competition rules, such as the licensing of intellectual property rights under EU law and the US IPR Guidelines, as well as patent pools and collective licensing. Although intellectual property rights are mostly granted at the national level in the EU, rules on free movement and competition apply as well. All the relevant secondary EU legislation, such as the EU Software Directive and the Technology Transfer Block Exemption, and the Guidelines for each, is covered in the chapter.

The chapter also carefully describes the scope of the US IPR guidelines, distinguishing it from the EU landscape. One of the most prominent cases, the Google Books settlement, was still ongoing during the book’s writing. Coates presents the objectives of the Google Books settlement, dividing them into three categories: (1) procedural issues arising from the Rule 23 requirements; (2) copyright law issues; and (3) antitrust law issues. Coates notes that the main concerns are the treatment of orphan books and the risk that only Google would be able to distribute them after gaining market power as a result of the settlement.\(^3\)

The following chapter addresses competition law, standards and interoperability issues in three sections discussing the most challenging topics, such as standard-setting organizations and standardization agreements, compliance with the rules of standardization bodies, and commitments given in standardization procedures. These are very relevant issues for assessing unilateral conduct as well as interoperability and access to technologies. Both the EU and US frameworks are outlined, covering primary and secondary sources such as interpretation of Article 101 (3) TFEU and the EC’s Horizontal Guidelines, which set out in general how standardization agreements should be assessed under Article 101 (1) and (3) TFEU. The US law does not provide guidelines specific to standardization, but enforcers can draw from guidelines for collaborations among competitors and the licensing of intellectual property rights. As the author notes, both the EU and US have dealt with cases of an alleged failure to comply with the rules on licensing under RAND (reasonable and non-discriminatory) terms in the US or FRAND (fair, reasonable and non-discriminatory) used by European Standardization Organizations. Notably, the Rambus case, both in the US and EU, and the Magill, IMS, and Microsoft cases, which all involve questions of compulsory licensing, are analyzed in detail. This exhaustive comparative analysis is very useful in an area where case law remains controversial. Unilateral refusals to supply have been the subject of landmark cases such as Commercial Solvents, Magill, Bronner, and Microsoft, all of which are discussed in this section. The same attention is paid to Aspen Skiing, Kodak, and Trinko, followed by Intel. Here too, the approaches in the EU and US diverge. Finally, the author looks at the problem of patent ambush and discusses why the EU and US yet again may be taking different approaches, as well as difficulties associated with identifying the proper counterfactual if an ambush has taken place.

The chapter on product design and innovation addresses more general issues concerning product design and competition rules, and it also addresses specific issues in a section on technical tying, efficiencies and harm, and remedies. A large portion of this section is devoted to the case law, including the Microsoft tying litigation in the EU and US, and the Federal Trade Commission’s case against Intel. The discussion of the Microsoft tying litigation covers various aspects of three cases involving technological (or technical) tying allegations: the Department of Justice’s case against Microsoft involving the tying of Internet Explorer with Windows, the EC’s case against Microsoft regarding the same, and the EC’s case against Microsoft involving the tying of Windows Media Player with Windows. The author undertakes a comparative analysis of the EU and US approaches addressing all aspects of competition law, including notions of consumer harm, the relevance of intent, and efficiencies. At the end of the section the author looks at difficulties associated with constructing an appropriate remedy that does not undermine any pro-competitive benefits that, as the author observes, do exist.

The part of the book on networks and network neutrality focuses on the EU and US sector-specific laws relating to data communications networks. The chapter explains institutional and legal frameworks in detail, pointing out differences in certain areas. The second section, on network neutrality, the open internet and competition, is especially interesting. After describing the varying EU and US approaches, Coates gets to the controversial aspects of network neutrality, which he compares to the after-market type of problem in antitrust. The chapter is a valuable addition to the ongoing debate about the importance of net neutrality and future regulation, because it identifies all the important unanswered questions. The author’s conclusion is that one big unanswered question still remains: How can net neutrality policy be implemented on the new network “infrastructure,” where the infrastructure itself is made up of content providers like Facebook and Google?
Coates also provides a detailed overview of the EU regulatory framework as amended by the 2009 package, including all directives and notices, guidelines and reports supporting the legislative framework. In contrast to EU legislation, the US net neutrality framework has been markedly different. The section of the book on US regulation covers a brief history of past US telecom law and subsequently turns to specific elements of current US telecom regulation. In that context the implications of the AT&T break-up are tackled.

The last chapter of the book is devoted to data, data protection and competition law. It discusses in two sections data protection and privacy, first in the EU and then in the US. As a result of the dynamic nature of the internet, the unstoppable and inescapable spread of knowledge and information causes many modern privacy problems. The EU section covers the EU Data Protection Directives, Directive on Privacy and Electronic Communications and Data Retention Directive. The US part discusses Section 5 of the Federal Trade Commission Act and the Children's Online Privacy Protection Act. Later in the chapter, Coates discusses the theoretical basis for privacy as a competition law concern. Special attention is given to the Google/DoubleClick merger, including both the EU and US merger investigations. The author takes data protection as another example of a disparity between US and EU approaches. In the author’s view, the EU treats data protection with greater importance, as shown by the regulatory framework of the Data Protection Directive, while in the US there is no comparable regulation. The debate will certainly continue, especially regarding divergence among jurisdictions in this important aspect of doing business. Data protection invokes many questions that have arisen in the new markets, and the zeitgeist is demanding new regulation that will be appropriate for the changed technology landscape. At the beginning of 2012, the European Commission released a proposal for a new framework on the protection of personal data. The new rules are an important milestone in the regulation of international data transfer insofar as they add, among other things, “the right to be forgotten,” which shall guarantee individuals the right to withdraw consent for the use of personal data even that they have released themselves.

*Competition Law and Regulation of Technology Markets* provides a thorough tour of the different and very often contradictory approaches to many of the most important issues facing US and EU governments in the digital age. The book is not only very well written, it is an extremely useful and unique source for practitioners, policy makers and academics alike. It raises many important questions, like what to do about the fact that U.S enforcers look primarily to effects on consumers while the EU focuses on competitors. The case law provides a good reference to both *de lege lata* and *de lege ferenda* in the area of competition law and technology markets. The reader also will benefit from the comprehensive table of cases and table of legislation, which contain all the relevant case law and legislation affecting technology markets and more, in both the EU and US. A detailed index is included at the end of the book, containing all the relevant legal and technical terms. This too is a useful reference tool.

The text itself, with its thorough and comprehensive analysis, will serve as a valuable resource for private practitioners, public enforcers, academics in law and economics, students in advanced studies of competition law and economics, media and social science researchers, and everybody else interested in the role of competition and technology markets. This is true not only for EU and US readers, but for readers in jurisdictions where a competition

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enforcement culture is still developing, who are interested in learning from experienced authorities.