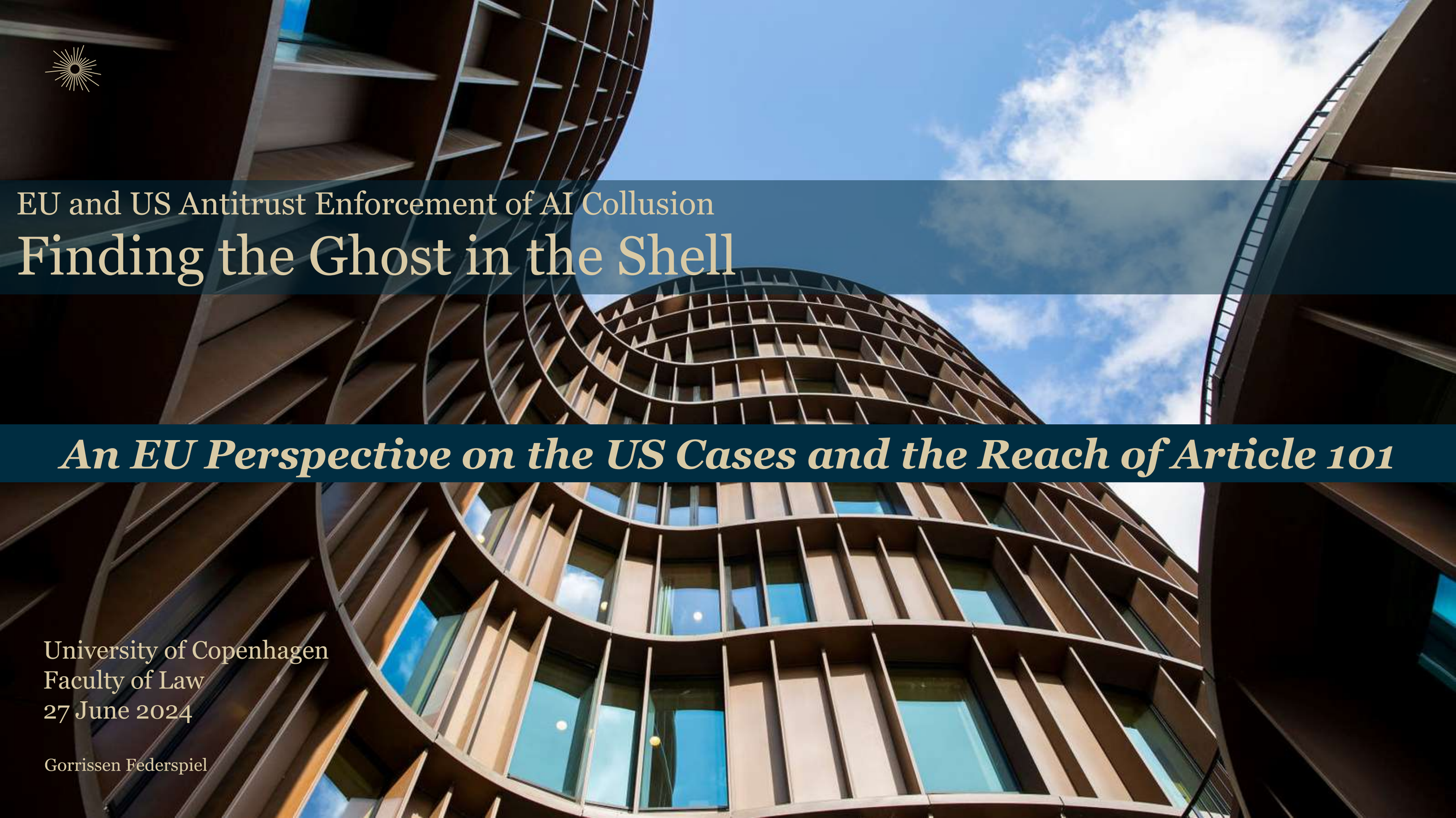

EU and US Antitrust Enforcement of AI Collusion

Finding the Ghost in the Shell

An EU Perspective on the US Cases and the Reach of Article 101

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Introduction

- The emergence of Artificial Intelligence (AI) solutions has given rise to fierce debates in national and international competition law communities
- The key question can be phrased as follows:

  If a certain behaviour would infringe competition rules if carried out by individuals, would the same apply if the behaviour results from the use of AI?
- This question touches upon several fundamental issues of competition law and policy, including
  - What kind of human involvement (such as 'meeting of the minds') is required for an infringement of competition law to occur?
  - Who should bear the responsibility if AI solutions are found to infringe competition law?

EU Competition Rules

- European Union competition law includes two key prohibitions relating to behaviour that may negatively affect competition:
- Prohibition against anti-competitive agreements
  - Business entities are not allowed to conclude agreements which have as their object or effect the restriction of competition
  - Examples are price fixing agreements and agreements on the sharing of markets or customers
- Prohibition against abuse of a dominant position
  - Entities with a dominant position on a market are not allowed to abuse this position
  - Examples are the use of excessive pricing, predatory pricing, loyalty inducing rebates or discriminatory prices

Some Potential Competition Law Issues

AI used to implement unlawful agreements

- AI may be designed to implement an unlawful agreement or practice
  - E.g., if AI is used to implement or monitor a price fixing agreement, fill out elements in the agreement or facilitate unlawful information exchange)
- Clearly, competition rules apply to such behaviour

Competitors use the same AI

- AI solutions are sold by external vendors, and thus competitors may acquire identical or similar solutions
- As a result, the pricing mechanisms of competing entities may be based on the same underlying logic
- Currently, it is unclear how this should be addressed from a competition law perspective

AI independently 'infringes' competition law

- AI solutions may 'realize' that reduced price competition can lead to higher profits, or that discriminatory prices yield a better financial result
- As a result, AI systems may opt for pricing strategies that could be perceived as infringements of competition law – inter alia in the form of an unlawful agreement (if such an agreement had been concluded), tacit collusion between competitors, or abuse of a dominant position
- This raises some key questions relating to the assessment of AI under competition law, including:
  - Can the 'independent' behaviour of an AI system infringe competition rules?
  - Who is responsible? The software manufacturer or the user of the specific solution?

Implementation of Unlawful Agreement through AI

- Commission 2023 Guidelines on Horizontal Agreements (at 379):
  - ”… firms involved in illegal pricing practices cannot avoid liability on the ground that their prices were determined by algorithms.”
  - “… an algorithm remains under the firm’s control, and therefore the firm is liable even if its actions were informed by algorithms.”
- In the Commission’s 2018 decisions in the *Asus*, *Philips*, *Pioneer* and *Denon & Marantz* cases, AI was used to monitor compliance with an unlawful retail price maintenance agreement
- In general, a legal entity may be liable for the acts of an external service provider, cf. the European Court of Justice’s judgment in the *VM Remonts*-case (2016):
  - “Article 101(1) TFEU must be interpreted as meaning that an undertaking may, in principle, be held liable for a concerted practice on account of the acts of an independent service provider supplying it with services only if one of the following conditions is met:
    - the service provider was in fact acting under the direction or control of the undertaking concerned, or
    - that undertaking was aware of the anti-competitive objectives pursued by its competitors and the service provider and intended to contribute to them by its own conduct, or
    - that undertaking could reasonably have foreseen the anti-competitive acts of its competitors and the service provider and was prepared to accept the risk which they entailed.”

Competitors Share AI Solutions

- Under EU competition law, various forms of “common solutions” adopted by competitors may be anti-competitive
  - For example, two competing firms would not be allowed to agree that a single third firm should determine the prices of both competing firms
  - Similarly, a “hub-and-spoke” arrangement where information exchange or coordination between competitors takes place through an intermediate (perhaps vertically related to them) may infringe competition rules
- Presumably, an agreement or a concerted practice relating to the adoption of the same price algorithms would fall within Article 101
- In the absence of any “meeting of the minds”, the mere fact that competitors use similar AI solutions should not as such infringe competition rules
- Additional considerations:
  - It may be relevant to consider liability as a “facilitator” for the provider of the AI solution
  - Article 101 applies to all essential parameters of competition – not just pricing

Concerted practice – EU legal framework

- The concept of a ‘concerted practice’ is not defined in the TFEU
- European Court of Justice (case 48/69, *Imperial Chemical Industries*):
  - ”… a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.”
- Requires a *Meeting of the Minds*:
  - Contact between undertakings
  - Aimed at coordinating
  - Parallel commercial behavior

Can AI Independently Infringe Competition Law?

- Parallel commercial behaviour as such does not infringe competition rules
- While undertakings may not escape liability (for otherwise non-compliance behaviour) by adopting AI solutions, the emergence of such solutions cannot extend the scope of competition rules
- What if AI solutions act in parallel, e.g. in respect of pricing?
  - Is there an underlying agreement between the competitors on pricing?
  - Is there any unlawful information exchange between the competitors? (Either directly or through a third party)
  - Is there any agreement/concerted practice relating to the use of the same AI solution?
- If no agreement/concerted practice exists, presumably competition law (at least at its current stage) does not restrict AI from acting in parallel with competitors
- Does it matter whether parallel behaviour happens randomly? That the AI solution may be designed to seek parallel behaviour? That over time the solution learns to do so?
  - To apply Article 101, a “meeting of the minds” is still required
  - If desirable, these issues should be addressed through specific regulation rather than under existing competition rules

Questions?

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