Dealing with Online Markets & Digital Services

20 June 2019
The starting point – the role of data (an EU perspective)

David Wood
The interplay between data and antitrust in Europe

- IP/antitrust issues seem to have been largely resolved
- Data has been an issue in EU antitrust cases before.
- ‘Big’ data - sunshine or oil?
- Concern at power of digital platforms
New Regulatory Approach

- Problematic interplay with GDPR
- Portability and interoperability rules
- Contractual provisions
Pure Antitrust

- Remedies for past infringements
- General principle of access
Digital platforms and market power issues in the EU

Peter Alexiadis
The key questions

- To what extent is online platform concentration necessary, given the inevitability that network effects product benefits?
- What is the point where privacy erosion exceeds economic benefits?
- Is it realistic that market power would lead to the raising of prices, the lowering of quality or the loss of choice? Or are we talking about losses in innovation?
- How difficult is it for new entrants to achieve scale after entry?
- How can we determine whether the potential dynamic costs of concentration in digital platforms outweigh any static benefits?
<table>
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<th>Case</th>
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| Google Shopping ([AT.39740](#) - 27.07.2017) | The market for general search services and the market for comparison shopping services, both of which are national in scope, throughout the EEA. | 1) Systematic preferential placement of Google’s own comparison shopping service (displayed at or near the top of the search results)  
2) Demotion of rival comparison shopping services in Google search results (most highly ranked rival services appear only on subsequent search pages) | 1) Google did not provide verifiable evidence to prove that its conduct was indispensable in realising efficiencies, nor and that there was no less anti-competitive alternative to the conduct capable producing such efficiencies.  
2) Anti-competitive conduct terminated within 90 days or penalty payments up to 5% of the average daily worldwide turnover |
| Google Android ([AT.40099](#) - 18.07.2018) | The markets for general Internet search services (national EEA market), licensable smart mobile operating systems and app stores for the Android mobile operating system (which are both worldwide in scope, other than in relation to China). | 1) Illegal tying of Google’s search and browser apps, as a condition for licensing Google’s app store (the Play Store)  
2) Illegal payments conditional on exclusive pre-installation of Google Search  
3) Illegal obstruction of development and distribution of competing Android operating systems | Anti-competitive conduct to be terminated within 90 days or penalty payments up to 5% of the average daily worldwide turnover |
| Google AdSense ([AT.40411](#) - 20.03.2019) | Online search advertising intermediation in the EEA. | 1) Exclusivity clauses with publishers prohibiting them from placing any search adverts from competitors on their search results pages  
2) “Premium Placement” clauses requiring publishers to reserve the most profitable space on their search results pages for Google’s adverts and requesting a minimum number of Google adverts, thereby preventing competitors from placing their search adverts in the most visible parts of websites’ search results pages  
3) Clauses requiring publishers to seek written approval from Google before changing the way rival adverts are displayed  
4) Rivals unable to grow and offer alternative online search advertising intermediation | 1) Google did not demonstrate that the clauses created any efficiencies capable of justifying its practices.  
2) Google ceased the illegal practices a few months after the Commission issued a Statement of Objections in July 2016 |
1. Continuing role of competition law as a supplement or complement to regulation.
2. Rethinking the consumer welfare standard in terms of timeframe and standard of proof. Possible need for clearly documented consumer welfare to offset strategies reducing competitive pressure on dominant platforms.
3. When defining markets, explore the interdependence between the various sides of a digital platform, rather than isolating each side of the market as a separate market.
4. Emphasise theories of harm driven by anti-competitive strategies at the expense of emphasising market definitions.
5. Measuring market power by reference to concept of “unavoidable trading partner” or a firm with “intermediation power” regarding platforms.
6. Shift the balance between “Type 1” and “Type 2” analyses in antitrust, by erring on the side of prohibiting potentially anti-competitive conduct. Support this greater enforcement trend by a shift in the burden of proof and/or the standard of proof.

7. There is a need to promote competition “for” the market, through the promotion of various policies such as multi-homing and switching, primarily by encouraging data portability and data interoperability.

8. Also need to promote competition “on” the platform where the platform acts as a de facto regulator in a digital marketplace. There is a responsibility to ensure undistorted competition unless objectively justified. Two particular examples of such anti-competitive conduct include: (a) leveraging; and (b) self-preferencing practices, if they are likely to result in long-run exclusionary effects.
9. The significance of data and data access will always depend on an analysis of the specificities of a given market, the type of data, and data usage in a given case. Data pooling arrangements (i.e., a market-based solution) can be encouraged in many cases, and a more stringent data portability regime can be imposed on dominant firms (i.e., a regulatory solution). There might even be a need to update existing policies in relation to ancillary markets and ‘aftermarkets’ when dealing with data.

10. Aside from considering whether to change jurisdictional thresholds to capture value-driven transactions, there is also pressure to revisit the nature of substantive assessment in merger review. It is proposed by some that theories of harm be modified to blend “horizontal” merger elements with “conglomerate” elements in determining whether the post-merger firm could strengthen its dominance by reinforcing customer loyalty through network effects.
1. Develop a Code of Competitive Conduct with the participation of strategically situated industry stakeholders, which would apply to digital platforms designated with a “strategic market status”.

2. Combine competition policy to address market abuse with policy measures designed to overcome market failure through the erosion of entry barriers.

3. Advance concepts of data openness and personal data mobility, by providing access to non-personal (or anonymised) data to tackle entry barriers, while protecting privacy.

4. Adapt merger policy to make it more forward-looking and taking into account that current merger practice is arguably characterised too much by concerns about ‘false negatives’.

5. Enact institutional and procedural changes such as the creation of a Digital Markets Unit, coupled with changes that would: (1) enable greater use of interim measures; (2) adjust appeal standards to confer an appropriate margin of discretion to the CMA (i.e., close to the standard of judicial review); (3) shift the burden of proof on to defendants; (4) introduce new powers to impose solutions and to monitor, investigate and penalise non-compliance; and (5) forge greater international cooperation to address transnational issues.
Risk of “tipping” in digital markets

1. Combination of economies of scale (extreme returns) and scope (which favour the development of ecosystems conferring advantages to incumbents)
2. Existence of network externalities on the side of the consumer or seller
3. Growth in product, service and hardware integration
4. Behavioural limitations on the part of consumers (i.e., for whom default settings might be inadequate and provenance indications might be very important)
5. Ability to use data as a competitive parameter (whether as an input, a ‘currency’ and something which exacerbates competitive ‘first mover’ advantages)
6. Difficulties in new entrants raising capital / Importance of incumbent branding
7. Unlike physical assets, data can be duplicated but this can be excluded by contract, technical barriers or regulation
Reflections...

• Much publicised pending action vs Amazon and pending Spotify action vs Apple
• The impact of indirect network effects in assessing the scope of relevant markets will need to be assessed by reference to:
  • Internal evidence gleaned from the parties’ internal documents
  • Evidence received from other digital platforms/marketplaces
  • Economic evidence
  • Consumer surveys (see CMA’s JUST EAT Case, Nov. 2017)
• Logical that competition regulators would view competition concerns differently depending on whether an online platform is closed or open. Open platforms are more susceptible to challenges for abusive self-preferencing, as such practices are closely aligned with traditional views about non-discrimination. By contrast, closed platforms generate greater efficiencies when self-preferencing. Closed platforms are, however, just as vulnerable to anti-competitive leveraging allegations, especially when assessing the cross-usage to which data can be targeted.

• There is no “one size fits all” approach to addressing consumer harm on digital platforms because the balance between the various sides of a digital platform (often more than two) varies depending on whether the platform is, inter alia, open or closed, designed to act as a marketplace, designed as a means of social interaction, or sees itself as part of the shared economy.

• The effectiveness of remedies will pose ongoing problems for antitrust regulators, both in terms of scope and timeliness.
An emerging competition issue – High Tech enters the banking sector

Jorge Padilla
ALTERNATIVE BUSINESS MODELS

- Big Tech Platforms may act as marketplaces

- Or as financial intermediaries, in direct competition with incumbents
Unlike FinTech start-ups, Big Tech Platforms (a) have exceptional data and the ability to monetize it effectively, (b) play a central role in relation to many consumer decisions impacting on their financial choices, (c) enjoy significant brand recognition and customer trust.

They also enjoy other considerable competitive advantages: network effects and economies of scope on the demand and supply sides.

They not only have lots of valuable customer data, they also have the analytical tools (e.g. AI algorithms) to analyze and interpret such data in order to anticipate their customers’ needs and influence their conduct.

And they have the scale required to profitably invest in the development of new tools.
The entry of Big Tech players into online banking may increase effective competition in retail and SME banking (e.g. lending and payment markets) by leveraging their **superior information** about consumers preferences, habits and conduct to offer better targeted banking products and to reach out to consumers that may not be served otherwise.

Big Tech players may also be able to offer **new services** by bundling their existing services with traditional banking products.
COMPETITIVE MAVERICKS OR EVIL MONOPOLISTS?

- Big Tech companies operate disruptive business models, which may allow them to dominate consumer and SME banking as they have monopolized other markets.

- Experience shows that when Big Tech companies enter industries with complex vertical value chains, they seek to monopolize the layer or layers where they operate, entrench those monopolies by taking advantage of network effects, and extract value from all other layers by:
  - **Vertically integrating** upstream and/or downstream
  - **Discriminating** in favour of their own upstream/downstream businesses in their core platforms
  - **Leveraging** dominant services and/or data superiority to attack adjacent markets
ENTRENCHED DATA SUPERIORITY
A LEVEL-PLAYING FIELD OR ASYMMETRIC REGULATION?

- Payment Systems Directive 2
  - Banks will have to allow authorized Third Party Providers (TPPs) (i) access to their customers’ account information and (ii) make payments from customers’ accounts
  - TPPs will be able to compete with banks by offering payment initiation services (PIS) and account information services (AIS), thus threatening incumbents’ profitable distribution services

Additional pressure on bank margins, growing bank dependence on fin tech solutions and investment in in-house IT infrastructure; security risks due to TPP data sharing.

Big Tech Platforms threaten the most profitable lines of business of incumbents:

- According to a recent McKinsey report, they could target the distribution business of banks, which represents 47% of their revenues but 65% of their profits and has an ROE of 20% (compared with an average ROE of 7-8%)
IMPACT ON FINANCIAL STABILITY

- **Potential moral hazard** problems
  - Since platforms have little or no stake in e.g. the loans they help to originate. Vallee and Zeng (2018) explain that as the platform takes a more central role in screening loans, it has incentives to reduce the quality of the loan pool to maximize loan origination volume. This results in lower returns compared to scenarios where sophisticated investors are active in loan evaluation and funded only high-quality loans.
  - And traditional banks will have less of an incentive to engage in credit screening

- **Potential adverse selection** problems due to
  - *Cream skimming*: platforms may be able to screen out bad loans more effectively than FinTech start-ups and traditional banks
  - The *arm’s length double-blind nature* of peer-to-peer lending makes online lending susceptible to adverse selection by borrowers: Balyuk and Davidenko (2018) show that default rates on P2P loans are higher than on other credits to consumers with similar credit scores

- As a result, credit risk may be shifted to traditional banks, their investors and their depositors and lending may prove less efficient
POLICY OPTIONS

- Neutrality obligations

- Privacy regulations

- Data sharing
  - Which info?
  - At which price, if any?
  - Privacy concerns
    - Opt-out v opt-in clauses?
    - Reciprocity?
Recent German initiatives

Dr. Jens-Olrik Murach
• **Principle** for the assessment of multilateral conduct under Article 101(1) TFEU, i.e., horizontal and vertical agreements or concerted practices between at least two undertakings:
  ▪ If conduct has an EU cross-border dimension (interpreted broadly), Member State authorities must apply the EU rules in parallel to national rules.
  ▪ The application of national rules must not lead to different result as under the application of EU rules.

• **Exemption for unilateral conduct, i.e., abuse of a dominant position (the “German clause”)**
  ▪ Member States can apply stricter rules for unilateral conduct compared to EU rules.
  ▪ This is where national enforcement regarding online markets has its focus.
“With increasing digitalization we are witnessing a new economic revolution, which has an impact on literally all companies and which also raises new competition issues. In view of this in early 2015 the Bundeskartellamt set up an Internet Think Tank. Its objective is to develop the right approach on how to deal with online platforms under competition law, combining both theory and practice.”

“We think that the classical tools of competition law are generally sufficient to deal with most of the new issues arising in the context of digitalization. Nevertheless, some fine-tuning of the legal framework could help us to tackle the issues in this area appropriately.”

“Access to data has also developed into a significant competition parameter and potential source of market power.”

Source: ILFR Survey | Merger Control 2017, p. 6 et seq
“Fine-tuning” of the German Act Against Restraints of Competition

- Clarification regarding **Market Definition**:
  
  “The assumption that a market exists shall not be invalidated by the fact that a good or service is provided free of charge.”

- Clarification regarding **Market Dominance**:

  “Particularly, in the case of multi-sided markets and networks, in assessing the market position of an undertaking, account shall also be taken of: (a) direct and indirect network effects; (b) the parallel use of services from different providers and the switching costs for users; (c) the undertaking’s economies of scale arising in connection with network effects; (d) the undertaking’s access to data relevant for competition; (e) innovation-driven competitive pressure.”
“Fine-tuning” of the German Act Against Restraints of Competition (cont)

• Introduction of new alternative merger control thresholds: (i) Target has sales of below EUR 5 m in Germany, (ii) consideration for the acquisition exceeds EUR 400 million, (iii) the target has substantial operations in Germany that are not reflected by its low domestic sales (e.g., many users of an online platform (data) or substantial R&D).

• The Bundeskartellamt was for the first time granted competences in the area of economic consumer protection, which includes in particular the Act against Unfair Competition and the Law on Companies’ General Terms and Conditions of Business.
Enforcement Trends – Some Examples

• **October 2017 - Sector Inquiry into comparison websites:** A Sector Inquiry was launched into online comparison websites. A large number of website operators were questioned on topics such as rankings, financing, corporate links, reviews, and market coverage, in order to identify and specify possible violations of consumer law provisions. December 2018: No action required.

  - The EU just announced that it is set to introduce a regulation forcing online platforms to set out how businesses are ranked in search results, and to give the reasons for any differentiated treatment of goods or services the platform offers. The European Council adopted the Regulation last week.

• **November 2018 – Amazon:** Bundeskartellamt has initiated abuse of dominance proceedings against Amazon to examine its terms of business and practices towards sellers on its German marketplace, amazon.de.
• **February 2019 - Facebook**: Bundeskartellamt prohibits Facebook from combining user data from different sources.

• **Mai 2019 - Sector inquiry into Smart TVs**: The aim of the inquiry is to examine how smart TV manufacturers handle user data from the stage of collection up to its commercial use.

• **June 2019 – IBM/T-Systems**: IBM Deutschland has withdrawn its notification of plans to acquire essential hardware and software as well as personnel, from the mainframe service business of T-Systems International. Bundeskartellamt had explained that there were preliminary competition concerns about the acquisition.
The emerging Asian experience

Sébastien Evrard
Asian developments

• Rise of Asia tech players
• Increased enforcement of competition laws across Asia
• Focus on platforms
  o China: VIE issue
  o Japan: sector inquiry
  o Korea: ongoing investigations
• First Asia-specific platform merger: Grab/Uber
• Lessons:
  o More enforcement to come
  o Do not underestimate less experienced agencies
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