



REGULATION OF COMPETITION AND DIGITAL ECONOMY

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do not necessarily reflect those of the
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A TAX THAT COULD FIX BIG TECH

(P. ROMER, MAY 2019)

Antitrust

- Existing antitrust law in the United States addresses mainly the harm from price gouging, not the other kind of harm caused by these platforms, such as stifling innovation and undermining the institutions of democracy.

Regulation

- Our digital platforms [...] may already be too big to regulate. Powerful companies can capture or undermine a regulator.

Taxation

- Putting a levy on targeted ad revenue would give Facebook and Google a real incentive to change their dangerous business model.

BENEFITS AND CHALLENGES OF DIGITAL MARKETS

The digital economy is creating substantial benefits

- New categories of products and services
- High-quality and low prices, in many cases zero price
- Lower cost of starting a business and scaling up

Digital markets are often characterised by significant market power...

- Extreme returns to scale
- Network externalities
- The role of (big) data
- Limitations to switching and multi-homing
- Behavioural biases

...which is often perceived to extend over and beyond individual (relevant) markets

Dominance is persistent

Market concentration can be efficient...

- Economies of scale
- Network externalities

...but can also give rise to substantial costs

- Raise effective prices for consumers, reduce choice or impact quality
- Barrier to entry and expansion
- It could impede innovation
- «It is troubling when so much information is controlled by so few companies» (tragedy of the commons)

THE GOAL OF ANTITRUST ENFORCEMENT

The modern enforcement of competition law is usually driven by the promotion of a consumer welfare standard

Critique

- Unduly focussed on prices
- Static and myopic
- Too high evidential threshold
- It has led to declining enforcement and increased market concentration

Alternatives (neo-Brandeisian antitrust)

- Size to be *prima facie* evidence of a problem
- Broad public interest test: inequality, unemployment, political implications, etc.

THE CONSUMER WELFARE STANDARD

Consumer welfare standard is not only about prices and quantities

- Quality and variety of products
- Service level
- Innovation

It applies also when monetary prices are zero

- By considering qualitative aspects such as privacy and quality

It encompasses both consumers and businesses that are customers

It can (and should) be considered dynamically

1. “Traditional” competition law is flexible enough to deal with new issues arising in the digital economy
2. There is work to be done in order to apply the traditional tools properly to a new context
3. However, not all policy issues raised by the digital economy are necessarily competition (law) issues

A RANGE OF POLICY OBJECTIVES ...

Privacy

- Can be seen as a non-price dimension of competition
- But markets for privacy are likely to be largely inefficient
- The relationship between competition and privacy is unclear
- Individual consumers might benefit but society might not
- Privacy considerations are being incorporated into antitrust analysis
- Bundeskartellamt: intervention against Facebook for combining data from different sources without a user's explicit and voluntary consent
- Regulation (GDPR)

Pluralism

- Echo chambers, filter bubbles, etc.
- Digital platforms might have changed the relationship between market structure and pluralism
- Structure vs. conduct regulation

[...]

... TO BE PURSUED WITH A RANGE OF INSTRUMENTS

COMPETITION LAW: AREAS OF INTERVENTION

Anticompetitive agreements

- Fixing prices
- Sharing markets
- Bid rigging
- Vertical restraints
- [...]

Abuse of dominance

- Access to essential inputs
- Exclusionary pricing practices
- Excessive prices
- [...]

Mergers

- Horizontal
- Vertical
- Conglomerate

Advocacy

- Legislation
- Regulations
- Opinions
- [...]

MERGERS

Mergers and acquisitions play a big role in shaping the structure of digital markets.

DoubleClick/Google Waze/Google Instagram/Facebook WhatsApp/Facebook LinkedIn /Microsoft Shazam/Apple	2008-2018: <ul style="list-style-type: none">• Google has acquired 168 companies• Facebook has acquired 71 companies• Amazon has acquired 60 companies Targets are 4-year-old or younger in nearly the 60% of cases
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Are competition authorities actually reviewing those mergers that might be particularly problematic in the digital industries?

- Thresholds based on turnover do not capture all possibly critical mergers
- Potential alternatives: value of transaction, special regime for dominant digital companies

Are competition authorities employing an adequate analytical framework in reviewing mergers that affect digital industries? (Big Data, privacy, zero-price markets, conglomerate mergers...)

- Traditional theories of harm might not fully capture the risks of digital conglomerate mergers
- The counterfactual in dynamic markets is very hard to identify and predict
- Traditional standard of proof tends to place more weight on the risks and costs of over-enforcement

VERTICAL AGREEMENTS

Internet intermediaries bring together or facilitate transactions between third parties on the Internet, increasing competition in a broad range of industries

At the same time, some specific features of digital distribution may raise a number of issues from a competition perspective

Digital platforms may enter into agreements with producers/sellers that may have the effect of limiting competition (among producers and/or among platforms)

- e.g. OTA's price parity clauses: intervention against price parity clauses by European competition authorities (including AGCM) – balance price competition and investments
- e.g. e-books: *i*) the joint switch by publishers from a wholesale model to agency contracts that contained the same key terms for retail prices - including an unusual retail price Most Favoured Nation (MFN) clause, maximum retail price grids and the same 30% commission payable to Apple, *ii*) MFN clauses included in Amazon's e-books distribution agreements.

Producers may impose contractual restrictions on retailers to limit the use of e-commerce

- Almost one in five retailers are contractually restricted from selling on online marketplaces and almost one in ten retailers are contractually restricted from using price comparison web sites
- Antitrust cases on bans to online sales, marketplaces, price comparison tools (balance price competition and non-price competition)

ONLINE COLLUSION AND ALGORITHMS

- The rise of computerized market environments, accumulation and harvesting of data, automation of protocols and machine learning have may far reaching consequences for the ability of companies to reach, monitor and enforce collusive agreements.
- 4 scenarios
 - **Messenger** – humans agree to the cartel and use the computer to assist in implementing, monitoring, and policing the cartel.
 - **Hub and Spoke** – use of a single algorithm to determine the market price. The developer of the algorithm helps orchestrate industry-wide collusion, leading to higher prices.
 - **Predictable Agent** – each operator (independently) designs the machine to deliver predictable outcomes and react in a given way to changing market conditions. An industry-wide adoption of similar algorithms may lead in this case to anticompetitive effect through the creation of interdependent action.
 - **Autonomous Machine** – competitors unilaterally create and use computer algorithms to achieve a given target, such as profit maximisation. The machines, through self-learning and experiment, determine independently the means to optimise profit.
- Tacit collusion does not amount to a violation of competition law!

ABUSE OF DOMINANT POSITION

Traditional focus on exclusionary abuses

Recent cases by the European Commission

- **Google Shopping** (2017): Google fined €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service
- **Google Android** (2018): Google fined €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine
- **Google AdSense** (2019): Google fined €1.49 billion for imposing a number of restrictive clauses in contracts with third-party websites which prevented Google's rivals from placing their search adverts on these websites
- **Amazon (ongoing)**: Probe into Amazon's access and use of data from merchants that use its marketplace

Two recent cases opened by AGCM

- **Amazon**: Discrimination in favour of third-party sellers that use Amazon's Fulfillment by Amazon (FBA) through which sellers delegate to Amazon the end-to-end management of the orders, including storage, packaging and shipping, post-sales assistance
- **Android Auto**: Refusal to supply to Enel X access to Android Auto

ABUSE OF DOMINANT POSITION, ACCESS TO DATA AND PLATFORMS

Dominant data-rich firms may refuse to grant other firms access to data. Can a refusal to grant access to data, including through interoperability, amount to an abuse of dominant position?

Should platforms be allowed to subject their own products or services to different rules than the other products and services sold on the platform?

The «essential facility doctrine»

- Product/service objectively necessary to compete effectively on a downstream market
- Elimination of effective competition on the downstream market
- Consumer harm
- In the case of intellectual property rights: the appearance of a «new product» is impeded

ADVOCACY

Promoting entry...

...and a level playing field

Achieve the aim of increasing competition whilst managing the social costs associated with disruptive market changes

Examples

- Taxi industry: i) elimination of the discrimination between taxi drivers and professional private hire vehicles drivers; ii) removal of barriers to entry for the new forms of mobility services; iii) the introduction of a compensation scheme to attenuate the social costs of the reform. Amicus curiae intervention (UberBlack, Tribunal of Rome).
- Non-hotel accommodation services: action against Regional regulations introducing unjustified/disproportionate restrictions in the provision of non-hotel accommodation services

POLICY INSTRUMENTS

Antitrust

Other legal
regimes

Regulation?

ANTITRUST (R)EVOLUTION

Evolution of antitrust toolbox

- Market definition
- Multi-sided markets and zero-price markets
- Measuring market power
- Dynamic competition and uncertainty

Evolution of policy

- Digital market as a priority
- Risks and costs of under-enforcement vs. risks and costs of over-enforcement

Broader “institutional” challenges

- Laws, standard and burden of proof, jurisdictional review, etc.

Some concrete measures taken by AGCM

- Big Data market inquiry (joint with communications and privacy regulators)
- Development of capabilities: data scientists
- International cooperation: ECN Digital Group

OTHER LEGAL REGIMES

Other legal regimes

- Contract law
- Consumer protection law
- Unfair trading law
- Privacy law

For instance, the Italian Competition Authority makes ample use of its **consumer protection powers...**

...in a way that can also indirectly serve the interest of promoting competition in the market

- Transparency
- Behavioural biases
- Consumers awareness and empowerment

Examples

- Facebook/WhatsApp
- Amazon
- Price comparison websites

REGULATION?

(SEE REPORT OF THE STIGLER CENTER, MAY 2019)

A sectoral regulator could be endowed with the authority to move quickly

It can establish rules to constrain future conduct before there has been harm to competition

Regulation could lower barriers to entry

Regulation could mimic antitrust laws but with a lower burden of proof

Clarity and legal certainty

Broadly applicable regulations

- Data collection
- Restrictions on practices that enhance behavioural «mistakes»
- Data portability and mobility
- Open standards
- Interoperability

Regulations that apply to firms with bottleneck power

- Non-discrimination and foreclosure
- Bundling

Remedies

- Data sharing
- Full protocol interoperability
- Non-discrimination
- Unbundling

BUT: regulatory failures, risk of capture, rigidity, etc.

REGULATION?

The Digital Regulator (Stigler Center, USA)

- Create general conditions conducive to competition (see previous slide)

Digital Market Unit (Furman Report, UK)

- Support greater competition and consumer choice in digital markets
- Backed by new powers in legislation
- Develop a code of competitive conduct that would apply to companies with «strategic market status»
- Enable greater personal data mobility and systems with open standards
- Advance data openness

Competition Policy for the Digital Era (European Commission)

- Competition law has been designed to ever-changing markets
- Complementarity between antitrust and regulation
- Regulation on specific issues may be needed in the longer run (interoperability)
- But do not envision a new type of «public utility regulation» as the risks are too high

CONCLUSIONS

The digital economy is having a potentially disruptive impact on rules and institutions that govern markets

Significant market power and persistent dominance appear to be features of key digital platforms

The implications for the economy and society are wide-ranging

Antitrust can (and should) develop to tackle effectively competition problems in digital markets

Antitrust can be complemented by regulation aiming at fostering competition if there is a clear market failure that warrants “ex-ante” intervention and potential regulatory failures are minimal

But not all problems raised by digital platforms are competition problems

The interest of individuals and overall social welfare can be protected only by using the full set of policy tools available (legislation, sanctions, regulations, taxes, etc.)

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