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Research Article

Digital Markets in EU Competition law

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Abstract

Online marketplaces' expansion has completely transformed the way in which products and services are traded, benefiting both consumers and companies in a variety of ways. However, the decentralized nature of online markets, the problem of market domination, and the growing use of big data in digital marketplaces, has brought many difficulties related to competition law. Further complicating matters is the growth of platform-to-business (P2B) partnerships. This manuscript discusses recent competition cases involving online platforms and offers an outline of the difficulties faced by competition authorities in dealing with competition concerns in digital markets. The specific applicability of Articles 101 and 102 of the Treaty on the Functioning of the European Union to concerns involving digital platforms will be thoroughly examined. There will also be discussion of potential fixes for the concerns mentioned. The study outlines the raised concerns and offers potential solutions. Thus, it will provide a glimpse into a potential future strategy that the European Union competition authorities, including the Commission and National Competition Authorities, may adopt about online platforms.

Keywords: Competition Law, online platforms, digital economy, challenges, Platform-to-business partnerships, EU, Article 101 TFEU, Article 102 TFEU.

1. Introduction

There are several connotations when discussing a "market." The ability of shoppers to evaluate prices and make wise decisions inside a conventional farmer's market is perhaps the most notable example. Another connection might be a "bazaar" in middle eastern culture, cultures that have similar ideas, although in different variations.
What about markets of contemporary economies? Modern is frequently used interchangeably with online in the new economy because of the sector's enormous growth in innovation over the past several decades. The comparison to marketplaces like the farmer's market or the bazaar does not immediately come to mind, despite the fact that the majority of current customers utilize the internet for their regular

purchases. Consumers' focus on online marketplaces has changed along with their knowledge of their involvement in a bigger market and, consequently, in a larger context. The ability for customers to compare costs, terms, possibilities, quality, and much more has never been greater than it is now (European Commission, 2017). This is due in large part to the abundance of information available on the internet as a whole, but it's also because vertically integrated platforms are becoming more and more prevalent and play a significant role in online competitiveness (Hoffer and Lehr, 2019).

However, the consumer is now cut off from the information source throughout the comparison process and is unlikely to engage in any direct engagement with the business beyond email or phone calls. Online platforms like Google, Facebook, and Amazon were able to develop, flourish, and thrive in this climate. This manuscript will discuss recent competition cases involving online platforms and offer an outline of the difficulties faced by competition authorities of the European Union in dealing with competition concerns in digital markets.

2. Objective of the study

The main issue of this manuscript is whether the present legislative framework of EU competition law is adequate to manage the new issues surrounding the digital environment and competition law. The study will be undertaken with reference to the Treaty on the Functioning of the European Union (TFEU) Articles 101 and 102 as they make up most of the legal framework.

The objective is to determine what are the problems created by traditional markets compared to online platforms related to EU's competition rules. This study will also attempt to offer potential answers to these problems, be it through altering competition laws or, if required, by taking more extensive legal initiatives.

3. Methodology

The methodology used is based on the qualitative data collection method. The theories that have been discussed are in light of a better understanding of EU competition law and the possible intervention on the digital marketplaces' operations in cases of abuse of their dominant position. Furthermore, by reviewing academic literature as well as analyzing case laws, the study aims to examine the adaptation of the traditional competition laws to the ever-changing online platforms. The focus has been turned to the published scientific articles to help present possible solutions to the identified issues as well as published books in order to follow the latest developments.

4. Analysis of Digital markets

4.1 *Accumulation and practices of data processing*

The Commission emphasizes the significance of data processing techniques and accumulation in relation to online platforms by stating that they may pose privacy

and competition law concerns, notwithstanding the fact that they are closely related to the multisided market model (Martens, 2016). One must also recognize that there are differences between accessing data in an online setting and traditional enterprises while attempting to establish online platforms. The volume of data is important because online platforms operate with and rely significantly on a larger volume of data than traditional organizations would ever have to. Online platforms are not the only ones that gather data, but their magnitude and lack of openness in this area should not be neglected when opting to define online platforms.

4.2 Market definition adaptation to digital markets

The EU Report implies that depending on whether an ex-ante (Article 102 of the Treaty on the Functioning of the European Union or TFEU) or an ex-post (merger control) perspective is taken, market definition in digital marketplaces may vary dramatically. Especially in the digital ecosystems that digital platforms are creating, it could be necessary to define secondary markets that are unique to a certain ecosystem in situations where consumers are confined to that environment. This would necessitate highly tightly defined secondary markets (markets where investors buy and sell securities) and, accordingly, stringent antitrust criteria under the existing EU competition law framework.

The Furman Report (2019) recognizes the value of market definition, such as in determining concentration levels used frequently in merger control by competition economics. While it draws attention to the challenges associated with market definition in digital marketplaces, it does not offer a solution. In order to take into account, the complexity of digital markets, the Commission Competition Law advises that the Commission's Market Definition Notice of 1997 be updated. It argues that the European Commission may wish to provide distinct recommendations on how to define markets in the digital environment in light of the features of digital markets. This first piece of advice has already paid off. Vestager (2019) the Commission's executive vice president and commissioner for competition emphasized that in the digital world, particularly in multi-sided platforms and zero-price marketplaces, well-established approaches for establishing antitrust markets may no longer be applicable.

It is unclear if this analytical instrument can continue to fulfill its historically assigned duty of evaluating market strength in these marketplaces from a predominantly quantitative point of view given the difficulties that market definition is facing in digital contexts (Furman Report, 2019). Market definition may need to concentrate on its second key function in digital markets, namely characterizing the market to provide the necessary context for comprehending the markets in question and creating a cogent theory of harm in those markets (Robertson 2020).

4.3 The reason digital platforms are different: Potential issues

In the contemporary economy, online platforms are at the center of discussions of competition law, thus it is important to understand any possible difficulties that the implementation of competition law may encounter with this relatively new business

model. This section will first go through the challenges of defining a market in the context of the internet and developing market dominance. The discussion will then shift to data-related concerns by looking at the overlap between data protection and competition legislation, followed by an evaluation of the potential competitive value of data.

4.4 The online perspective of market power

Finding a market definition is the first obstacle in an online setting. The methodologies that are being employed reflect the fact that the traditional approach to defining a market places a strong emphasis on economic factors (Jones and Sufrin, 2016). Cross-price elasticities (Jones and Sufrin, 2016) and the SSNIP (small but significant non-transitory increase in price) test (the test that identifies the smallest relevant market through supply and demand substitutability of a certain focal product) both require quantitative procedures for specific prices to be determined, help identify alternative replacements for an item or service in order to describe the market. The fact that products and services are frequently provided for free presents a challenge to the tried-and-true procedures of competition law when applied to online platforms. Since there are no prices to compare, these free goods cannot be subject to quantitative methods of market definition (Podszun and Kreifels, 2016). In light of the pricing models used by many digital platforms, where using services is free for at least one side of the market, the SSNIP test and cross-price elasticity simply fail. However, as demonstrated by examples like Microsoft (Microsoft v Commission, 2007) and Cisco Systems (Cisco Systems and Messagenet v Commission, 2013) monetary remuneration is not a necessary component in defining the market. The Commission used qualitative approaches rather than quantitative ones to define the markets in the cases of Hoffmann-La Roche (Hoffmann-La Roche v Commission, 1979) and France Télécom (France Télécom v Commission, 2007) and it actually favors quantitative methods where qualitative ones fall short of capturing a market's unique characteristics (Hoffer and Lehr, 2019). This demonstrates the adaptability of competition law in this area and may be helpful in defining the market for online platforms.

This brings up the second problem with market definition in an online setting, namely the multifaceted nature of online platforms. One frequent approach to define a market in a setting with multiple sides is to identify which side of the market the behavior in issue is occurring on, by making a division of the platform into several smaller markets rather than taking into consideration all sides (Höppner and Grabenschröer, 2015). However, an economic analysis would treat a multisided market as a single market rather than dividing it into its several sides as independent markets (Evans, 2003). Since such behavior would thus be neutral overall, this method would run the danger of missing actions that may have a beneficial influence on one part while concurrently having a negative impact on another (Schweitzer, Haucap, Kerber and Welker, 2017).

The substantial dependence of online platforms on network effects in defining the market is another problem. When attempting to identify the relevant market,

these impacts must be taken into consideration because they are signs of a bigger, multifaceted relevant market. While it is still theoretically conceivable for many markets to coexist on the same platform, the challenge of the network effects is present where no aspect of the market can be evaluated without taking into consideration the other aspect (Podszun and Kreifels, 2016).

In a zero-priced market, the established SSNIP test would present the issue of how to assess a price rise when it comes to data (Auer and Petit, 2015). Instead of relying on quantitative comparisons, a market definition should consider the product or service in question's capacity to be substituted on a qualitative level. Once the definition of a relevant market is resolved, the evaluation of the relevant market as a whole and the measurement of market power become difficult.

Traditionally, the relative quantity of revenue on the relevant market (Iacovides and Jeanrond, 2018) as well as other characteristics, such as the number of clients are used to determine a given actor's position in that market. Market shares are then calculated as a measure of the total market power (Hoffer and Lehr, 2019). However, in an online world where the competitive landscape can change quickly, it might be challenging to assess a competitor's relative strength using this revenue strategy. Because of this, market shares are no longer as useful as they would be in conventional markets as a gauge of market power. The number of daily, weekly, or monthly users, the number of platform referrals to sellers, and the market share of items supplied by a platform have all been proposed as alternative indicators of market dominance (Iacovides and Jeanrond, 2018).

The existence of entry obstacles is another important consideration in determining market power (Competition Committee, 2006). The low bar for merely migrating from one platform to another complicates this element in the internet setting. It is challenging to portray an accurate image of the market power of an online platform due to the ongoing potential of users switching platforms, which implies that existing market power can be lost quickly.

Competition authorities must use as many criteria as possible (Organization for Economic Co-Operation and Development, Directorate for Financial and Enterprise Affairs, Competition Committee, 2006) as well as take into consideration the fierce competition and the everchanging positions of the digital platforms within the relevant markets in order to accurately estimate market power (Mandrescu, 2017).

4.5 Competition Law and Data Protection

Many online platforms may not request financial compensation from at least one aspect of the market they participate, but the services they provide are nonetheless paid for using a new kind of currency, namely personal information (Robertson, 2019).The usage of this money straddles the line between data privacy and protection rules on the one hand, and competition legislation on the other. The question now is whether or not data-related abuses should be under the purview of consumer protection legislation alone (European Commission, 2016).

Consumers sometimes are unaware of the quantity of information they divulge and how it is utilized to improve and develop the service or commodity, whether it is to their favor or harm (McDonald and Cranor, 2010). As a result of being directly targeted for personal data and frequently not being upfront about it, the typical customer may find it challenging to defend their privacy (Kerber, 2016). This lack of openness is also evident in customers' propensity to provide personal information in order to use services that appear to be free at first glance, which poses issues for privacy legislation. This is particularly true when considering the potential lack of platform switching alternatives caused by powerful network and lock-in effects, despite the possibility that a different platform would be better suited to the customer's privacy needs and would more properly satisfy them (Kerber, 2016). If we talk about the exposure of personal data, privacy issues are clear-cut, while competitive problems are less so. However, it becomes evident that impacts like being able to more properly analyze market dangers or customizing the supplied commodity pose a significant importance in the competitive process when considering how gathering and usage of data might benefit online platforms. As a result, both the privacy and the competitive sides of the law are affected by data abuse.

The Commission has explicitly stated that a differentiation exists between competition law and data protection in relation to privacy matters. This is due to the fact that privacy concerns have not been taken into account in prior rulings. The differentiation between competition law and privacy laws presents a challenge, as the demarcation between the two is not readily discernible. Data protection laws and competition law frequently address similar behaviors in relation to data usage, albeit with distinct objectives for doing so. The intersection between the aforementioned legal domains is further underscored when contemplating the possibility of categorizing instances of consumer privacy breaches as market failures, thereby subjecting them to scrutiny under competition law on the basis of their detrimental impact on consumer welfare (Kerber, 2016).

In the given context, potential instances of market failure may manifest in the form of an overabundance of data collection and inadequate options for accommodating varying consumer privacy preferences. A plausible resolution to the lack of clarity in this differentiation could potentially be derived from the concept of data portability. The scenario may potentially motivate online platforms to enhance their privacy policies, with the aim of retaining consumers on their platform, while also maintaining a competitive edge by retaining access to the consumer's data in comparison to their rivals. The intersection of privacy and competition concerns presents a potential opportunity for mutually reinforcing positive effects. Specifically, competition policy and privacy laws may serve as incentives for improvement, thereby promoting positive outcomes (Kerber, 2016). Similar to the concept of data portability, the implementation of robust privacy regulations or policies has the potential to foster increased competition among online platforms. This is because heightened levels of data security may be perceived as a favorable attribute by consumers and other

platform stakeholders when selecting a platform.
The question of how to address data-related abuses under competition law requires a nuanced approach, given the significant impact that data usage can have on both competition and privacy. It is imperative that the Commission maintains its stance of refraining from addressing privacy-related issues in its investigations to avoid further blurring of competencies. Nonetheless, it is imperative to acknowledge that data cannot be entirely dismissed, as it constitutes an increasingly significant element of competition, as will be expounded upon subsequently. The treatment of data within the realm of competition law is warranted when the objective of regulating specific practices is not primarily focused on safeguarding consumer privacy, but instead on assessing the potential influence that a given policy implemented by an online platform may exert on the competitive landscape and market structure.
Given the equal negative effects that data usage may have on privacy and competitiveness, the question of how to address data-related abuses under competition law requires a distinct response. The Commission's stand on not including privacy-related issues in its investigations must be upheld to avoid obfuscating the lines of competence more than is necessary. Data cannot, however, be completely ignored because it is a developing aspect of competitiveness, as will be illustrated in greater detail below. As a result, data must be handled in accordance with competition law in scenarios when the focus of targeting certain practices shifts from safeguarding customers' privacy to the potential effects that a particular policy of a digital platform may have on the market structure and the competitive process.

4.6 Competitive value of data

Data, a new resource in the competitive process that is heavily gathered by online platforms and frequently forms the basis of the online economy, is now being used by platforms in a more comprehensive way (Kerber, 2016). However, the sheer collection of data does not increase the market power of an online platform by itself, thus it is necessary to assess how data may be used as an advantage beyond the simple possession and accumulation of data. This is particularly relevant in light of Peter Hustinx's position, which he adopted back in 2014, that data gathering and management are sources of market power. Hustinx was the previous European Data Protection Supervisor (European Data Protection Supervisor, Press Release, 2014). Since data is the primary driver of e-commerce markets and the deciding element when it comes to business choices within the online sector, market power and data could no longer be separated in 2014 and could no longer be divided in the modern economy.
It is helpful to analyze the data collected from numerous sources to gain insight about customer preferences or competition endeavors. Important data that may be utilized to modify the business plan being employed by online platforms and make them more suited to the requirements and desires of the market or marketplaces they are operating in. The production of indirect network effects through the modifications that

take place depending on this data is another aspect of data collecting and possession. The multi-sided market model is based on the development of opportunities for interaction, so while platforms are enhancing the customer experience and increasing use by one side of the market, a higher engagement of users on the other side of the market is inevitable (Evans and Schmalensee, 2014). In order to increase the demand of the multisided market and the revenue that may be gained from the platform, the focused use of data acts as a catalyst to draw people to the platform. By tailoring marketing strategies to the intended audience, one can increase customer numbers through network or lock-in effects.

Along with increasing a platform's attractiveness, data may also deter potential rivals from joining the market because it is impossible to recreate the amassed volume of data and the beneficial effects it can have on the changing platform. Even if collecting the same volumes of data were eventually feasible, this would not be as efficient since it would frequently take too long for rivals to have an influence based on their own research and analysis.

The amount of accumulated data a platform has and is prepared to use might have a significant impact on its pricing strategy. With the use of algorithmic changes to the pricing structure, different customers may be charged various amounts. Based on the data gathered, a platform may infer the price a certain customer is prepared to pay, allowing for customized pricing and the best possible return for both the platform and any customers who might profit from lower rates.

Criteria such as variety, velocity, quantity, and significance of data provide an abstract measurement of the potential contribution of Big Data (Devins, Felin, Kauffman and Koppl, 2017) to the competitive process.

With the changes in the internet environment, the worth of data is not just rising but also changing how market power is evaluated, which is now inextricably related to the volume of data a platform can gather and analyze. The marketplace value of data is significant and must be taken into account in any judgment addressing unfair practices involving data in a framework governed by competition law, so-called zero-price marketplaces should no longer be confused for such.

5. **Conclusions**

It has become obvious from the examination of the elements causing digital platforms to be a complicated field of competition law that legal standards must now allow a marginal approach. Therefore, economics must be more thoroughly considered when applying these legal standards and must take the lead in the legal analysis. This is particularly true in online changes, where legal criteria frequently remain vague if not supplemented with more clear economic terminology and judgments.

The relationship between market power and turnover is another challenge that needs to be solved by the usage and interpretation of the legal definitions. Even while certain digital platforms might not appear to make a lot of money on paper, their economic

worth reflects the contrary. As a result, it is vital to modify the accepted criteria for determining market power, moving away from assumptions based on revenue and toward more flexible parameters.

Finally, changing the way competition legislation is enforced is necessary due to the characteristics of online marketplaces. Online platforms have developed certain strategies that damage, and these need to be addressed with new and adjusted enforcement strategies because the current price-centric approach has the potential to blur the distinction between object and effect restriction as well as between Art. 101 and 102 TFEU (Nowag, 2018). Such difficulties must be avoided by changing competition policies to take a more diversified and contemporary stance to maintain long-standing established enforcement techniques.

As seen by the recent case law, the debate over the integration of various factors to improve the legal terminology has evolved, but the legal foundation upon which EU competition law is built has not. However, given that the application of Article 101 and 102 of the TFEU is not limited to traditional businesses, this is not crucial. On the contrary, the application of these principles has shown to be quite adaptive and flexible. The Treaties provide a gradual comprehension of and adjustment to the features of the digital era, as proven by the diverse judgments of the Commission as well as the EU courts.

The P2B regulation, a new regulatory action, goes beyond the simple interpretation of terminology to the new conditions. In order to identify and pursue cases of abuse more easily it is proposed to increase the honesty of online platform agreements with regard to their business partners utilizing the platform. Although this policy does not directly alter competition laws, it does address the two most serious problems in digital competition lack of transparency and data misuse. As a result, it demonstrates how modifications to enforcement strategy as well as rules governing behavior in online marketplaces may assist increase competition without overly controlling the latter.

Competition would not be as successful if it was controlled by even more legal regulations. Since it gives market participants the required information, self-regulation through enforcing the transparency standards appears to be the most successful approach moving ahead. EU competition regulations were developed to be flexible, allowing for changes to be made to the legal definitions as necessary. However, changes to policies may be made to fix problems brought on by a lack of legislation since they are more adaptable than any sort of law could be, given how quickly the internet is developing and innovating. A fair market for competitors may be achieved to a larger extent than it is presently by making transparency one of the key factors in interactions with online platforms. In conclusion, it can be argued that the structure in place at the moment is adequate for addressing upcoming issues relating to the digital environment.

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