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Research Article

Anti-competitive behavior in digital markets

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Abstract

The regulations stated in Article 101 of the Treaty on the Functioning of the European Union (TFEU) define that it is prohibited for companies to engage in agreements that are anti-competitive in nature with one another. E-commerce platforms have emerged as significant commercial channels in the virtual realm. The antitrust scrutiny has been drawn towards the limitations imposed by both suppliers and marketplaces on selling through such platforms. There exists a perception among certain individuals that there is a degree of conflict between the two approaches, wherein competition authorities are accused of endorsing marketplace platforms by prohibiting platform bans in distribution contracts, while simultaneously scrutinizing the business practices of these platforms (Colomo, 2018). Notwithstanding, it is imperative to note that this does not inherently denote an inconsistency. Although it is crucial for retailers to retain their autonomy in terms of vending their products through diverse sales channels, it is incumbent upon marketplace platforms to adhere to the regulations governing antitrust. In this sense main purpose of this manuscript is the analysis of anti-competitive behavior in digital markets.

Keywords: EU, Competition law, Anti-competitive behavior, Digital markets, Article 101 TFEU, Article 102 TFEU.

1. Introduction

It is common for digital platforms, such as those used for hotel bookings, to impose most-favored-nation (MFN) clauses upon their clients, specifically hotels. The contractual clauses stipulate that the hotels are obligated to refrain from providing their services at a lower price through alternative platforms, sales channels, or their own website, as documented in Ezrachi (2015) and the EU Report (Ezrachi, 2015; EU Report, 2019). The assessment of MFN clauses can be conducted in accordance with both Article 101 TFEU and Article 102 TFEU. Although MFNs can be observed in both online and offline contexts, the prevalence of their utilization by digital plat-

forms has resulted in increased antitrust scrutiny.

Algorithms have the potential to enable a company to implement dynamic pricing strategies, which involve adjusting prices in response to prevailing market conditions or competitive actions. Pricing algorithms may utilize user data to engage in discriminatory practices.

According to Ezrachi and Stucke (2016), consumers exhibit a preference for certain products or services. This is evidenced by their research findings which indicate that such preferences are prevalent among consumers. The potential antitrust liability associated with such conduct is contingent upon the extent to which algorithms are utilized to engage in collusion with other firms and their algorithms. In such instances, Article 101 TFEU may be invoked.

In cases where algorithms are utilized to impose varying terms on comparable transactions with different trading counterparts, the corresponding provisions of Article 101(1)(d) TFEU or Article 102(c) TFEU, which are worded identically, may be relevant. In the case of MEO (2018), the Court of Justice of the European Union (CJEU) ruled that pricing practices that are discriminatory are only deemed as such under certain circumstances.

Abusive behavior is deemed to distort competition (MEO v Autoridade da Concorrência, 2018). The applicability of price discrimination involving final consumers to Article 101(1)(d) TFEU and Article 102(c) TFEU, which explicitly refer to "other trading parties" (Graef, 2018), requires further examination.

The Court of Justice of the European Union (CJEU) has addressed the issue of applying competition law to distribution agreements in the online domain through a sequence of preliminary rulings. This pertains to online marketplaces. The statement emphasizes that a distributor cannot be prohibited from engaging in online sales by a supplier, as such a restriction would typically be deemed incompatible with Article 101(1) TFEU (Pierre Fabre Dermo-Cosmétique, 2011). The preliminary ruling of the Court in Coty v Parfümerie Akzente (2017) established that manufacturers could anticipate specific limitations concerning online sales channels, particularly marketplace platforms, in the event of dealing with luxury goods. This was deemed necessary for the preservation of the luxury character of such goods (Coty Germany v Parfümerie Akzente, 2017).

The European Commission disclosed in 2018 that it was examining Amazon's dual function as both a sales platform for merchants and a direct competitor in various product markets. The article raises apprehensions regarding the possibility of Amazon leveraging its access to data on its merchants, as the provider of the sales platform, to enhance its own competitive standing (Schechner and Pop, 2018). The ongoing investigation by the Commission, as stated in their November 2020 press release, pertains to the case under Article 102 TFEU (European Commission, 2020; Amazon Marketplace, Case AT. 40462, Commission Decision pending). However, it is worth noting that this case has the potential to provide insights into the functioning of a digital platform in a scenario governed by Article 101 TFEU. The Commission's inquiry

into Amazon's engagement with the Buy Box and its provision of access to Amazon Prime customers for retailers is subject to the same considerations, as the limitations under scrutiny pertain to the contractual arrangements between Amazon and autonomous retailers (Amazon Buy Box, Case AT. 40703, Commission Decision pending).
During the summer of 2020, the European Commission initiated an inquiry into Apple's purported denial of access to third-party entities seeking to utilize the tap and go feature on iPhones, as well as its purported denial of access to its mobile payment platform, Apple Pay. The subject matter is currently under scrutiny as a plausible arrangement that may impede competition, with the possibility of being deemed as an exploitation of a prevailing market position (Apple Pay, Case AT.40452, Commission Decision pending).
The proliferation of most-favored-nation (MFN) clauses in certain digital markets, particularly in the realm of hotel booking portals, has resulted in several antitrust inquiries, including the Booking.com cases (2015) (Konkurrensverket, Case 596/2013, 2015; Autorité de la concurrence, 2015; Autorità Garante della Concorrenza e del Mercato 2015; Bundeskartellamt, 2015; Higher Regional Court Düsseldorf, 2019 and the HRS case in Germany) (Kart 1/14 (V) HRS, 2015). The Most-Favored-Nation (MFN) clauses have been a topic of concern in regards to electronic books (e-books). In 2017, Amazon provided commitments to address the European Commission's apprehensions regarding the anti-competitive characteristics of its MFN clauses, as observed in the Amazon E-books case. Amazon had mandated that e-book providers must inform Amazon of any more advantageous or alternative terms and conditions they offer to other entities, and/or provide Amazon with terms and conditions that are dependent on the terms and conditions offered to another e-book retailer (Amazon-Case AT.40153, 2017). The Commission has deemed Amazon's stance on the English and German e-book retail distribution markets for consumers as an act of dominant position abuse (Article 102 TFEU). Alternatively, this particular case could have been resolved pursuant to Article 101 of the Treaty on the Functioning of the European Union (TFEU). As per its commitments, Amazon has pledged to refrain from enforcing any parity clauses that are already present in its agreements and has also vowed not to enter into any e-book agreements that incorporate such clauses.

2. **Abuse of a Dominant Position in the digital market**

As per the provisions of Article 102 TFEU, enterprises that possess market power, i.e., a dominant position in the relevant market, are prohibited from indulging in unilateral conduct that is anti-competitive in nature. The provision enumerates various forms of anti-competitive conduct, including but not limited to the imposition of exorbitant prices and unjust trading conditions, the restriction of markets or technological advancements, discriminatory practices towards trading partners, and the practice of tying or bundling. Nonetheless, it should be noted that the enumeration provided in Article 102 TFEU is not deemed to be comprehensive. In the context of

applying competition law to digital markets, it is noteworthy that unilateral anti-competitive behavior in the digital realm can be subject to existing forms of abuse or novel forms of abuse can be formulated in light of the unique characteristics of digital markets.

3.1 Issues

The fact that large IT companies that run digital platforms operate in so many different marketplaces (Bourreau and de Streel, 2019) sets them apart from other businesses. They are able to expand their market strength from one market into nearby or maybe even rather distant markets by building complete digital ecosystems (EU Report, 2019). Additionally, the user information that digital platforms gather in a particular market that is important to them has a multipurpose nature and might be beneficial in other markets. The question of whether competition law is still relevant in the face of digital ecosystems, is raised by the dynamics of competition, even if Article 102 TFEU still applies when a dominant business uses its market power in places where it is not (yet) dominant. Like this, in order to ensure competition, huge tech corporations' frequent acquisitions of (possible) rivals must also be closely examined. The question of whether privacy-related violations are punishable under the present competition regulations arises given how data-centric digital marketplaces are. Abuses of privacy may, for example, be connected to a platform's services being of lower quality, to the excessive collection of user data that digital platforms demand in exchange for digital services (Ezrachi and Robertson, 2019), or to the poor data protection standards that are given to user data. Insofar as consumers see privacy as an important determinant of quality, the European Commission believes that privacy-related problems may be relevant "in the competition assessment" (European Commission, 2016). However, the 'normative backdrop' (Costa-Cabral and Lynskey, 2017) of the EU's competition laws is blatantly pro-privacy, including the fundamental right to privacy and data protection guaranteed by the Fundamental Rights Charter (Charter of Fundamental Rights of the European Union, 2016 art 8) and other legal frameworks like the General Data Protection Regulation (GDPR) (Regulation EU 2016) and the proposed ePrivacy Regulation (European Commission, 2017). This may result in a more privacy-focused approach being included into EU competition legislation. However, as the two sets of regulations safeguard two distinct legal interests, a violation of data privacy laws should not be automatically interpreted as a violation of the competition laws (Robertson, 2020).

3.2 Experience of the European Union

The European Commission has hitherto mostly relied on already identified categories of digital monopoly abuse. The Google cases indicate what conduct the Commission deems to be an abuse of a dominating position by a dominant digital platform, par-

ticularly when generating new forms of abuses and when transferring previous abuses of dominance into the digital arena. In Google Shopping (2017) (Google Search, 2018), the European Commission discovered that Google was self-preferencing and exploiting its market dominance in general internet search to consistently position its own comparison shopping operation close to the top of the search listings. Additionally, Google downgraded rival comparison shopping businesses in its search engine's general results. Together, these two actions impeded competition by favoring Google's own shopping comparison service and excluding other comparison sites, who were among the complainants who had brought the matter before the Commission (Google and Alphabet v Commission, 2017). The Commission's dependency on self-preferencing as a possible cause of injury will be put to the test in the appeal case before the General Court. Self-preferencing as a theory of damage is incompatible with Article 102 TFEU, according to others who claim that Google is just competing on merits by favoring its own business (Vesterdorf, 2015). Others have criticized the Commission for relying on decisions that included several conceptions of injury, such as refusal to supply, tying, and margin pressure, rather than explicitly stating which legal test it utilized for Google's self-preferencing (Colomo, 2019). Others, on the other hand, have claimed that Google's leveraging technique was anti-competitive because it relied on the dominant platform manipulating information (Colangelo and Maggiolino, 2019). Now the General Court must make a decision. In the interim, if and when the planned Digital Markets Act is passed, it will forbid gatekeepers from doing things like self-preferencing (European Commission, 2020).

The European Commission fined Google €4.34 billion for its anti-competitive behavior in Google Android (2018), its largest fine judgment to date. The license conditions for Google's Android mobile operating system were one of the things the Commission examined.

It concluded that by compelling smartphone makers to pre-install Google's search and browser apps in order to license the company's well-known Play Store, Google engaged in anti-competitive tying. Additionally, Google paid several manufacturers and mobile network providers illegally in exchange for only pre-installing its search app. By compelling manufacturers to install the Google-approved version of Android if they wished to pre-load Google apps, it also engaged in another form of anti-competitive tying. By doing so, it also prevented the creation and dissemination of rival Android versions, or "forks" (European Commission, 2018).

The General Court is now hearing an appeal in this case (Google and Alphabet v Commission, 2018). Its idea of damage is based on conventional tie and additional single branding strategies, all of which have a solid track record in accordance with EU competition legislation. These are just applied to digital markets in the Google Android scenario.

The European Commission contends that Google's conduct with relation to display search adverts violates EU competition law in the third Google case, Google AdSense (2019). In contracts with substantial customers, Google made sure that these cus-

tomers didn't see search advertisements from any of Google's rivals (exclusivity). It achieved this by requiring its clients to acquire its permission before modifying the display of rival search advertisements and by compelling these clients to offer premium position to a certain amount of Google search ads. As a result, present and future rivals were essentially barred from entering this valuable sector (European Commission, 2019). Once more, established theories of damage linked to exclusivity and single branding are applied to a digital market setting. It is thus not anticipated that the case would produce unique antitrust theories of harm particular to the digital world once the General Court decides on Google AdSense (Google and Alphabet v Commission, 2019).

3.3 Article 102 TFEU in an online context

The norm that holds greater relevance in the meaning of digital platforms is Art 102 TFEU, as these markets are frequently prone to tipping and monopolization, as has been widely acknowledged. The advancements observed in recent years have led to the emergence of dominant technology companies, commonly referred to as 'tech giants', which wield significant influence within their respective industries. Examples of such companies include Amazon and Facebook. This influence renders them a subject of scrutiny by competition authorities, with particular emphasis on potential violations of Article 102 of the Treaty on the Functioning of the European Union.
The provision of Article 102 of the Treaty on the Functioning of the European Union (TFEU) is aimed at addressing instances of competition constraints arising from the independent actions of companies that hold a dominant position in the market. Similar to the provisions outlined in Art 101 TFEU, the utilization of Art 102 TFEU also entails a three-fold process, which includes the determination of the applicability threshold, the assessment of the impugned conduct, and the potential validation of such conduct. For the applicability of Art 102 TFEU, it is imperative that an enterprise possesses a superior position in the marketplace that is relevant (Jones and Sufrin, 2016). Subsequently, the evaluation of the behavior takes place in a subsequent phase and is categorized into two categories: exclusive or misuse of the dominant position. Presently, the emphasis of enforcement is on exclusionary abuses, as they are considered to be more detrimental (European Commission, 2009). There is no equivalent provision to Article 101(3) TFEU that specifically addresses the potential for justification. Undertakings have the ability to provide substantiation for their actions being unbiased and present arguments for efficiency (European Commission, 2009).

3.4 Establishing dominance

The initial stage in the application of Article 102 of the Treaty on the Functioning of the European Union involves the determination of the dominant position of an enterprise in the relevant market. The process involves two stages, wherein the initial

stage involves the definition of the relevant market, followed by an evaluation of the market dominance of the relevant undertaking in the said market (Jones and Sufrin, 2016).

The establishment of dominance in online platforms may encounter challenges stemming from various factors, including the multi-sided market characteristics, market dynamics, and the potential for transitioning within online platforms and traditional markets (Mandrescu, 2017). It is crucial to consider the distinction among digital and traditional markets when evaluating market power during the second phase of establishing dominance. The conventional approaches may not be entirely appropriate or sufficient in this context and may require modification to prevent inaccuracies in the evaluation (Wright, 2004).

3.5 Market power

The concept of market power within the predetermined relevant market is a fundamental element of Article 102 TFEU. For Art 102 TFEU to be applied to a particular behavior, it is imperative that the relevant enterprise, particularly in this scenario, the relevant online platform, holds a position of dominance in the market. The assessment of an undertaking's market power necessitates the consideration of three fundamental components, namely existing competition, anticipated competition, and compensating buyer power (European Commission, 2009). Market shares serve as an initial indication of market foundations and may be utilized as a foundation for presuming dominance. Nevertheless, it is important to note that market shares alone do not provide adequate evidence to determine whether an undertaking holds a dominant position (Whish and Bailey, 2018). The measurement of market shares pertaining to online platforms poses a challenge due to the fact that these platforms operate across multiple markets, which may have varying market shares (Evans and Schmalensee, 2019; Faull and Nikpay, 2014). Nevertheless, it should be noted that a digital platform with limited market shares in a particular market may still exert influence by leveraging its dominant position in another aspect of the platform, resulting in an asymmetrical competitive advantage (Evans and Schmalensee, 2014). Hence, it is probable that the significance to market shares as that of a gauge of market dominance would be reduced, given that the online market's dynamics have demonstrated that market shares have the potential to fluctuate significantly over brief time intervals (Mandrescu, 2017). Alternative indicators to market shares could include quantifying the quantity of distinct users that competing websites attract or analyzing acquisition trends to obtain information about market dynamics shifts.

The present approach to evaluating market power centers on the assessment of barriers to entry that potential competitors may encounter, thereby determining the likelihood of potential competition (Graef, 2015). The GCA has put forward a proposal that aligns with this approach, which outlines various criteria for evaluating market power. These criteria include both immediate and indirect impact of networks, econ-

omies of production, multihoming and distinction, availability of data, as well as the innovation capacity of digital markets (Bundeskartellamt, 2016). The assessment of market power based on the availability and utilization of Big Data is a subject of critical examination in the context of competition (Lerner, 2014; Graef, 2015). This is due to the fact that such data often falls under the purview of privacy regulations (data protection). The uncertainty surrounding this criterion stems from the potential for Big Data to confer a significant competitive advantage, which may be offset by a rapid decline in its value if not effectively utilized and integrated into the overall business strategy (Haucap and Heimeshoff, 2014). Consequently, it is more advantageous to incorporate the utilization of Big Data in the assessment procedure, as opposed to solely having access to it. One recurring theme observed among the suggested criteria has become the ability to impede competition by establishing significant obstacles to entry. This suggests a potential change in the evaluation of market dominance, with a shift away from emphasis on present competition and towards consideration for potential competition.

It is probable that the significance of opposing purchasing capacity, which is the third base of assessment, will decrease. Digital platforms are enabling user interactions, thereby distributing the purchasing power among multiple buyers and rendering the online marketplace concept possible. The presence of opposing buyer influence would serve as a balancing force to the significant market dominance of a business entity, thus constraining its capacity to operate in a detached way from market forces (European Commission, 2009). The probability of customers switching between online platforms is low due to the presence of network effects that generate strong incentives for them to remain loyal to a particular platform.

3.6 Abuses of dominance in the digital sphere

The topic of how to handle abuse of dominance in such markets takes center stage in all publications on competition law in digital marketplaces. Article 102 TFEU can adapt to the environment of the digital market in many cases, as discussed in the discussion of the European Union's experience with abuse of dominance in those markets, but the particularities of platforms are still not entirely understood. In order to create a code of behavior for businesses with an advantageous market status, the Furman Report recommends creating a digital markets unit (2019). This code of conduct should specifically address how strategic market status enterprises should interact with customers and smaller businesses, and it should be guided by rules that keep particular conceptions of damage in mind. For instance, smaller businesses that rely on digital platforms with advantageous market status should have inclusive access, their position and reviews should be determined on an equal, consistent, and open base, and they should not be required to single-home on one specific platform. This strategy is reminiscent of the notion of relative market power, which is included in the competition legislation of certain EU Member States but not at the EU level.

Exploitation and self-preferencing are two harmful tactics of online platforms that the EU Report cites as needing special attention. It emphasizes that self-preferencing

is only considered abusive under Article 102 TFEU if it has an anti-competitive effect (2019). Additionally, it states that in digital marketplaces, factors of competition like innovation and quality are more significant than impacts based on price. At last, the EU Report calls for the strictest possible application of competition law in digital marketplaces, preferring to err on the side of excessive enforcement.

The Competition Law 4.0 Report cautions that, related to the EU Report, the elevated concentration in online markets and the gatekeeper role of digital platforms could result in a substantial cost for false negatives (Competition Law 4.0 Report, 2019).

As previously outlined, the European Commission has initiated an evaluation of the competition law framework of the European Union, with a focus on defining the digital market. Furthermore, it has also engaged in the realm of unilateral conduct. The European Commission released a legislative proposal in December 2020, titled the Digital Markets Act, which was entered into force in November 2022 which outlines various obligations for entities known as gatekeepers. These obligations are detailed in Articles 5 and 6 of the Digital Markets Act Proposal.

Some of the responsibilities assigned to gatekeepers appear to have been derived from legal precedents that the Commission has acquired expertise in through its involvement in digital markets. The proposal incorporates a market investigation mechanism that is restricted to three distinct objectives, namely, determining the qualitative aspects of gatekeeper identification, addressing systematic violations with the Digital Markets Act, and potentially revising the legal framework to tackle competition issues in digital markets where gatekeepers are involved. These objectives are elaborated in Articles 15, 16, and 17 of the Digital Markets Act Proposal. The Commission's proposition of this tool is a limited implementation of the recommendations outlined in the EU Report and deviates significantly from the original consultation regarding the proposed new competition tool (European Commission, 2020). The responsibility of advancing the Digital Markets Act Proposal in the legislative process now lies with the European Parliament and the Council.

In the future, the relationship between the Digital Markets Act and national regulations pertaining to competition in digital markets will likely be a significant area of focus. The Ministry for Digital and Economic Affairs in Austria has initiated an evaluation of the competition law structure in Austria, with the aim of incorporating digital markets and data. In commencing this examination, the Ministry engaged in consultations with the German Ministry, the German Monopoly Commission, and the European Commission, as reported by the Federal Ministry for Digital and Economic Affairs in 2020. This initial step holds potential for the development of a comprehensive digital competition law framework across Europe.

3. **Conclusion**

The final stage of the three-part evaluation process involves the potential for a rationale to be provided for the behavior in question under Article 101(3) of the Treaty on the Functioning of the European Union. In accordance with Article 101(3) of the Treaty on the Functioning of the European Union (TFEU) (Protimonopolny úrad Slovenskej

republiky v Slovenská sporitel´na a.s, 2012), practices must satisfy all four criteria in a cumulative manner. The responsibility of providing evidence falls to the projects concerned, but it shifts once they have produced convincing proof that they comply with the aforementioned criteria (GlaxoSmithKline Services Unlimited, 2006).

As per the provisions of Article 101(3) of the Treaty on the Functioning of the European Union (TFEU), any practice must serve the purpose of enhancing the manufacturing or delivery of goods, or advancing technical or economic progress, while ensuring that the consumers are provided with a just proportion of the resultant benefits. The regulations should not impose unnecessary limitations that do not contribute to achieving the intended goals. Additionally, the regulations should prohibit the companies from the opportunity to eliminate competition in a significant portion of the market that is affected.

When considering digital platforms as multi-sided markets, meeting the first two criteria can prove to be challenging as efficiency must be attained within the exact same market where the restrictive practice is implemented (European Commission, 2004). This presents a significant challenge, as the various market segments comprise distinct customer groups, rendering it highly improbable for a single group to derive advantages from the implementation of the limiting practice in question (Gürkaynak, Inanilir, Diniz and Yasar, 2017; de Pablo, 2019).

The fourth condition stipulated in Article 101(3) of the Treaty on the Functioning of the European Union mandates that any restrictive practice that has been proven must not grant the involved undertakings the ability to eliminate opposition in a significant portion of the pertinent market. The assessment of online platforms may present a greater level of complexity compared to traditional markets due to their inherent susceptibility to tipping. Consequently, a comprehensive evaluation of potential elimination must encompass an analysis of the degree of network impacts, economies of scale, congestion constraints, distinction, and multi-homing opportunities (Katz and Shapiro, 1994; Evans and Schmalensee, 2007). On the opposite end of the spectrum lie dynamics that exhibit high levels of competition, which may impede tipping and thus make monopolization improbable (Evans and Schmalensee, 2007). The process established by both of those extremes could be perceived as a continuous progression within a revolving system, wherein one platform supplants the other (Daigle, 2015). Demonstrating whether or not a platform's behavior has resulted in the elimination of competition in a significant portion of the pertinent market is a challenging task. This adds to the ambiguity surrounding the potential for justification under Article 101(3) of the Treaty on the Functioning of the European Union.

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