

Toward a regulatory framework for digital platforms ?

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Rules are evolving in the Digital Single Market.

Digital platforms are concerned by most of them

- **Data protection** reform (Privacy issues, rights to transfer, to be forgotten, fines more convincing, etc.).
- New package for **E-commerce** (geo-blocking & cross-border delivery, consumer's protection).
- Proposal for revised directive on **audiovisual media services**
- Proposal for a "European **Electronic Communications Code**"
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- Initiatives concerning **copyright**, labor law and the **collaborative economy** (EU and national level), Communication on "Online Platforms and the Digital Single Market Opportunities and Challenges for Europe"
- In France, Lemaire's law « pour une République numérique » (transparency and loyalty, consumer rights, etc.).

- **But how public policy can deal with the platform's gatekeeper in a "winner takes all" economy ? Is it a competition policy issue ?**
- The Commission seems not to be ready to decide on how to deal with platforms (Communication 2015, Communication 2016)

Competition law is often at the center of much debate.

- In an economy of "Winner takes all" many concerns are about the market power of the winner. Rules / controls are envisaged, but the essential threat is still the market power and the ability to "control" the dynamic of competition.
- 2SM economics highlight a trade off between
 - The necessary dominant position of platforms to optimize the management of the relationships between the two (or more) sides by
 - Cross-subsidizing participation to manage externalities
 - Regulating quality/entry
 - Oversighting competition to avoid abuses
 - An the negative Impacts of such dominant positions in terms of:
 - Capture of rents in the short run
 - Market foreclosure in dynamics
- But Competition authorities face the limits of the traditional instruments of economic analysis regarding 2SM.

Google vs. Commission: Why such a long story ?

- The Google "case" is the best illustration.
 - Google is concerned by almost all dimensions of the challenges brought forward by digital business models: privacy, taxation, copyright, etc.
 - Presumption of anticompetitive behavior on several issues (search engine, advertising, Android, application store)
- Since 2010, however, the European Commission has been unable to reach clear decisions (3 Statement of Objections after 4 years looking for an agreement)
- Weakness or incompetence can't be invoked, we need to look at the specifics of platform / 2SM economics .

Economic theory has changed the understanding of anticompetitive behavior in two-sided markets

« A regulator **failing to understand the nature of two-sided markets** might misleadingly complain about predation on the low-price side or even excessive pricing on the high-price side, despite the fact that such price structures are also selected by small, entering platforms. **Regulators should refrain from mechanically applying standard antitrust ideas where they do not belong** »

Jean Tirole, Prize Lecture, December 8, 2014



- Since the early work (2000) several hundred articles. (Evans & Schmalensee
- Despite the profusion of research, academics have not completed the exploration of this new field. There are still differences of opinions on the outcome of alternative 2SM configurations. Economics is not yet able to provide a new toolbox for competition authorities (Verdier, Auer & Petit, etc.).

Practitioners of competition law can not rely on robust economic methods

Standard methods not applicable :

- relevant market?
- dominant position ?
- predatory pricing?
- excessive pricing?
- Various indicators and test based on price variation (Lerner index, hypothetical monopolist test, ...) must be modified by incorporating cross market effects.
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- Modeling opening new perspectives: What about Tying? Exclusivity?
- Are Cross Platform Parity Agreement (APPA) pro or anti-competitive? (OECD)
- Few empirical analysis to validate models (M. Verdier, Evans & Schmalensee)
- *Ad hoc* modeling may occur

..... But Competition authorities want to keep the same analytical framework

- Consensus among Competition Authorities (and Commission) : the competition law should not be changed to meet specific concerns with the use of digital platforms analyzed as 2SM. Concepts and standard of proof have to be unchanged.
- Some major stakeholders are offering to modify procedures or procedural practices: use of provisional measures, commitment procedures, criteria for concentrations
- Provisional measures such as commitments procedure can effectively address some of the specific 2SM issues (quick time, flexibility and disputes).



Provisional measures and commitment procedures are attractive

- Facing new practices that may have extremely rapid and structuring impacts, Competition Authorities face strong asymmetries of information (factual, technical).
- Until now Two Sided Market theory has been relied upon to justify practices that would have been considered as anti-competitive in a "standard" anti-trust perspective.
- Practitioners face difficulty in both cases. Whatever the approach, precedents will be questionable, and case law would be weakened by legal uncertainty.
- Provisional measures / commitments procedures partially meet these challenges and allow to decide quickly .
- The French Competition Authority has been using them repeatedly, simultaneously or not. Google (Navyx, 2), Apple (Iphone, 2) Booking (commitments).

But

- How to establish the “right” remedies ?
 - How “make” them binding ?
 - Commitment procedures lose their ability if the threat is not credible enough.
 - These limits probably explain the Commission's failure against Google in 2000-2005.
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- It is necessary to have clear cases establishing the circumstances in which certain practices are prohibited.
 - But it will take time to have strong cases. Commitment decisions cannot be used to predict the law.

Regulate platforms or markets ?

- Tools of competition law (relevant market, dominant position/ asymmetric regulation, Significant Market Power) was the regulatory backbone for electronic communications. It cannot be the same for digital platforms.
 - Competition authorities should therefore manage a cost/benefit analysis of each alternative market structure to assess what would be the optimal one in a context where
 - Alternative scenarii are speculative (like in the case of M&A)
 - Costs and benefits are highly sensitive to the nature of the business and to actual strategies vis-à-vis new entrants
 - Externalities might exist across 2SMs (as illustrated by Google)
- => New investigations should be undertaken for each 2SM case in a context of permanent evolution and reorganization of links across platforms and 2SMs.
- Each platform, each new business model transforms competition and markets. Problems need to be analyzed for each value chain on a case by case basis. A generic tool doesn't exist. The time for a regulatory framework, with precise rules, has not come yet.

Reducing information asymmetry and developing the ability to act rapidly on a “political” basis are keys.

Hal Varian (2014) :

“There is now a computer in the middle of most economic transactions. These computer-mediated transactions enable data collection and analysis, personalization and customization, continuous experimentation, and contractual innovation”

“Google runs about 10,000 experiments a year in search and ads. There are about 1,000 running at any one time, and when you access Google you are in dozens of experiments (user interface experiments, ranking algorithms for search and ads, feature experiments, product design, tuning experiments)”.

- National and European administrations can’t just observe and wait.
- In order to access to better understanding and characterize behaviors, lowering information asymmetry must be a major concern.

Remedies ?

- To develop a capacity to assess the impact (and the dynamic) of platforms and their algorithms
 - especially by being able to record transactions, manage tests at a wide scale, develop analytic capabilities
 - e.g. a specialized (European) agency able to federate initiatives, incl. those of various stakeholders
- To launch (European-wide) investigations on the basis of
 - complaints of potentially injured parties
 - whistleblowers or users' reports
- To rely on the set of political means (and threats) to fight abuses and maintain openness...beyond antitrust and economic regulation
 - Taking into consideration, the numerous dimensions of the potential impacts of platforms: fundamental rights, collective security, cultural pluralism, democratic values, fiscal revenues, social protection and solidarity, etc.

Thank you

European Commission seems not to be ready to decide on how to deal with platforms

Communication from the Commission « A Digital Single Market Strategy for Europe”, 2015.

“(…) Some platforms can control access to online markets and can exercise **significant influence** over how various players in the market are remunerated. (…)

Some online **platforms** have evolved to become players **competing in many sectors of the economy and the way they use their market power raises a number of issues** that warrant **further analysis** beyond the application of competition law in specific cases. “

Communication from the Commission «Online Platforms and the Digital Single Market Opportunities and Challenges for Europe», 2016.

Beyond the application of competition policy, the question arises as to whether EU-level action is needed to **address fairness of B2B relations**. At this stage, **more information is needed** (…). Where business models of entire ecosystems of SMEs are dependent on access to a small number of online platforms, or where platforms have access to datasets of unprecedented size, **new asymmetries may be created**. In such situations, some suppliers to platforms can be disproportionately exposed to potentially **unfair trading practices**, even **in the absence of established dominance of a platform**.

Google vs. Commission: Why such a long story ?

- **November 2000:** Opening of an antitrust investigation (online search).
- **2011-2014:** several unsuccessful attempts to reach an agreement (consultation, research commitments / and remedies market test). The last, about to succeed , is followed by strong opposition movements from economic and political actors.
- **April 2015:**
 - Statement of Objections about the **search engine** that systematically favors its own comparative shopping tools in its general search results pages
 - **separate antitrust investigation** into Google's conduct as regards the mobile operating system **Android**
- **April 2016:** Statement of Objections concerning abuse of dominant position exercised with the **operating system Android**.
- **July 2016:**
 - New SO (completing the April 2015 on search engine);
 - **Third SO** on restrictions imposed by Google's **contextual display ads** from its competitors.