THE TRAGEDY OF THE SUCCESSFUL FIRM

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I. INTRODUCTION

How can a firm know with certainty which business plans are safe for it to pursue to find success? The answer is that it cannot. For all its voluminous case-law and reputation as the most active competition law enforcement jurisdiction in the world,[2] the EU has yet to send firms a cohesive message about the boundaries within which they can conduct themselves shielded from antitrust liability. As a result, like Odysseus caught between Scylla and Charybdis, ambitious firms are forced to choose between cripplingly safe choices and the risk of competition enforcement action.

Nowhere is this dilemma more pronounced than in cases involving on-line platforms and platforms in general, because even two decades after the emergence of the first serious body of literature on platform theory,[3] novel business models still surface frequently and have yet to be fully assessed. The two recent decisions on *Google Search*[4] and *Google Android*[5] did little to clarify the boundaries of acceptable business conduct, and instead further entrenched the chronic fogginess of European competition law. This observation is without prejudice to the outcome of the cases. One can agree or disagree with the findings of the Commission, but it is hard not to notice the missed opportunity to provide concrete guidance on what firms, and indeed those that revolve around platform business models in particular, can do to stay outside of enforcers' hunting grounds. It is one thing to say that the tests and standards of competition law are wrong, and another to say that they are vague. The latter is arguably more pernicious because not only does vague not equal right, it also raises uncertainty.

I focus here on four areas that the European competition law apparatus must address if it is to guide innovative firms toward success without fear of undue punishment. Firstly, it must acknowledge and actually use the properties and special characteristics of platform ecosystems in its case-law reasoning. Secondly, it must either properly define or scrap the concept of special responsibility altogether. As it currently stands, the concept only serves to justify conclusions that cannot be adequately supported by a theory of abuse, without adding any substantive elements to the analysis. Thirdly, firms need to be told what abuse of dominance means in a non-circular manner (unlike current practice) so they may have a chance to steer away from it. Ideally, the concept will be tied to terms that have discoverable and, even better, quantifiable content. Lastly, the European competition law apparatus must settle on one or more goals for competition law, and for every instance of abuse it must explain which one of these

2 Mike Konczal, "Meet the World's Most Feared Antitrust Enforcer," *The Nation* (February 15, 2018).

3 See Geoffrey G. Parker & Marshall W, Van Alstyne, "Internetwork Externalities and Free Information Goods," *Proceedings of the 2Nd ACM Conference on Electronic Commerce* (ACM 2000) http://doi.acm.org/10.1145/352871.352883; Jean-Charles Rochet and Jean Tirole, "Two-Sided Markets: A Progress Report," (2006) 37 The RAND Journal of Economics 645.

4 Case AT.39740, *Google Search (Shopping)*, June 27, 2017.

5 Case AT.40099, *Google Android*, July 18, 2018.

goals was infringed and in what way. The current practice that adopts one goal but in effect safeguards another is confusing and a threat to legal certainty. The two-sided nature of platform business models further complicates the attribution.

What is argued here is not the merits of European competition law standards, but rather the *lack of clarity* surrounding them. While it would be ideal to get all rules and standards right, a first step must be to attempt to at least clarify them, even if it is done in a controversial manner. The platform economy, in all its innovativeness and malleability, needs clarity more than anything else so that firms know the rules of the game and can adapt accordingly.

II. THE SYSTEMIC NATURE OF PLATFORM ECOSYSTEMS

Platform ecosystems in digital markets may present novel features or features that are uncommon in other sectors of the economy, and therefore an elevated measure of attention is required to acknowledge them. Of those, I identify two: firstly, that digital platform ecosystems are often structured as large technical systems that comprise multiple highly interconnected parts, so that changes in one part may have unanticipated consequences for other parts and the general operation of the system as a whole.[6]

Evidently, successful firms are more likely to bear this kind of systemic quality due to the correlation between size and complexity. For competition law purposes, it is important to acknowledge that, because of the high degree of interdependency, pervasive control over the system may be required to achieve the necessary amount of planning and coordination, otherwise the system risks collapsing under the weight of its own complexity. Sub-optimal performance of ecosystems such as *Symbian* and *i-mode* can indeed be attributed partly to the lack of central coordination.[7] Competition law, in investigating abuse and in designing remedies, should take into account this kind of systemic quality so that it at least correctly appreciates what this control and systemic coordination is contributing, and what will be lost if the system is broken by means of antitrust enforcement.[8]

Secondly, digital platform ecosystems may present novel business models that appear *prima facie* anticompetitive, but that require a closer inspection to appreciate their necessity within the ecosystem and their contribution to the economy. This is particularly true in platform systems where certain components are offered for free and where the distribution of cost recoupment sources may change over time. Under those circumstances, tying elements together or controlling the conditions of access to certain elements helps apportion risk and cost, both of which are essential considerations for firms.[9] The lack of such enabling arrangements will likely result in higher costs and risks for product and service development. This may be an acceptable possibility for competition law, but it is important to at least recognize the trade-off.

The *Android* case illustrates that quite well. Google's business model is one that has allowed cheaper, broader and faster innovation by giving away Android and Play for free, but cost recoupment and risk management take place by channeling users toward the revenue-generating Google Search, and by keeping users as engaged as possible in the Google ecosystem so that if value moves from one component to another, as it is to be expected in digital markets, the firm can still maintain a healthy balance between revenue-generating sources and free subsidized activities.[10] However, these justifications were not enough to convince the Commission, which requested the dismantling of that business model.

It took many years to appreciate the pro-competitive justifications of vertical and even horizontal restraints as normal business practices. As Judge Easterbrook would put it "wisdom lags far behind the market."[11] The fact that the Commission only recently completed a sectoral

6 Konstantinos Stylianou, "Systemic Efficiencies in Competition Law: Evidence from the ICT Industry," (2016) 12 Journal of Competition Law and Economics 557, 560–562.

7 Takeshi Natsuno, *The I-Mode Wireless Ecosystem* (John Wiley & Sons 2005) 68; Richard Tee & Annabelle Gawer, "Industry Architecture as a Determinant of Successful Platform Strategies: A Case Study of the i-Mode Mobile Internet Service," (2009) 6 European Management Review 217.

8 Richard N. Langlois, "Modularity in Technology and Organization," (2002) 49 Journal of economic behavior & organization 19, 26; Carliss Young Baldwin & Kim B. Clark, *Design Rules: The Power of Modularity* (MIT Press 2000) 260; Stylianou, *supra* note 6, 562–569.

9 Konstantinos Stylianou, "Exclusion in Digital Markets," (2018) 24 Michigan Telecommunications and Technology Law Review 181, 243–251.

10 Geoffrey Manne, "The EU's Google Android Antitrust Decision Falls Prey to the Nirvana Fallacy," (*Truth on the Market*, July 18, 2018) https://truthonthemarket.com/2018/07/18/the-eus-google-android-antitrust-decision-falls-prey-to-the-nirvana-fallacy/.

11 Frank H Easterbrook, "The Limits of Antitrust," (1984) 63 Texas Law Review 1, 5.

inquiry on platform regulation[12] shows that we are still deciphering how platforms operate. The hope is that the Court and the Commission will make clarity in the special characteristics of platforms, as uniquely complex systems, a top priority for their immediate next steps.

III. THE SPECIAL RESPONSIBILITY OF FIRMS

Under European competition law, dominant firms have a special responsibility "not to allow their conduct to impair the genuine undistorted competition on the common market."[13] The concept features prominently in cases that revolve around platform business models, including both *Google* cases and the *Microsoft* case.[14]

The core utility and appeal of the special responsibility obligation is obvious: conduct that may be innocuous when performed by a small firm can have different effects when undertaken by a dominant firm.[15] The idea is that dominant firms by their very size and influence on the market already distort competition,[16] and therefore should not be allowed to engage in behavior that would be otherwise acceptable for fear of further distorting competition.

Despite the initial appeal, the special responsibility obligation has proven controversial because it prevents dominant firms from competing on the same level playing field as other firms, even when that means increased efficiency, and because it punishes firms once they have achieved success for the same practice that was legal before they reached that point.[17]

Criticism notwithstanding, the Commission and the Court of Justice firmly stand by the concept of special responsibility. At a minimum then, they are burdened with their own special responsibility to clarify the scope and meaning of the concept so that firms know what is allowed once they become dominant. Otherwise, it is almost inevitable that a dominant firm will at some point infringe competition law, considering the combination of the Court's opinion that "as a result of the mere presence of a dominant undertaking competition is weakened,"[18] and the special responsibility of dominant firms to not further weaken competition. It is worth asking then, what a dominant firm can do to compete.

The proper demarcation of the special responsibility obligation is long overdue, and the available guidance over the past thirty years has been more confusing than it has been helpful. We know, for example, that the special responsibility "must be considered in light of the specific circumstances of each case,"[19] including the degree of dominance, the magnitude of the competitive harm, the objective being pursued, and the means employed to achieve the objective.[20] And we also know that as part of their special responsibility dominant firms have an obligation to "behave in a way that is proportionate to the objectives they seek to achieve."[21]

Yet even with these pointers it remains unclear what the special responsibility adds to the concept of abuse. Assume for a moment that the Commission and the Court ignored the existence of the special responsibility obligation. How would its reasoning be different? It would still

12 Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy (September 24, 2015 to January 6, 2016) http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=10932.

13 Case T-286/09, *Intel Corp. v. Commission*, [2003] ECLI:EU:T:2014, para 114. See also Case 322/81, *NV Nederlandse Banden-Industrie Michelin v. Commission*, [1983] ECR 3461.

14 *Google Shopping, supra* note 4, para 331.

15 Antonio Bavasso, "The Role of Intent under Article 82 EC: From 'Flushing the Turkeys' to 'Spotting Lionesses in Regent's Park,'" (2005) 26 European Competition Law Review 616.

16 Case C-333/94P, *Tetra Pak International SA v. Commission*, [1994] ECR II–5951, para 24.

17 Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (New York : Oxford University Press 2011) 175–177; Rafael Allendesalazar, "Can We Finally Say Farewell to the 'Special Responsibility' of Dominant Companies?," *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart Publishing).

18 *Tetra Pak*, *supra* note 16.

19 Joined cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge Transports and Others v. Commission*, EU:C:2000:132, para 114; Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB*, EU:C:2011:83, para 84.

20 See Case T-321/05, *AstraZeneca v. Commission*, [2010] ECR II–2850; *Compagnie Maritime Belge Transports*, Id.

21 Joined Cases T-191/98 and T-212/98 to T-214/98, *Atlantic Container Line AB and others v. Commission* [2003] ECR II-3275, para 1120.

need to establish market power, identify abuse, and examine potential justifications and effects, just as in current practice. The conflation of the concept of abuse with that of special responsibility offers — at present — nothing specific absent which the Commission and the Court could not reach the same conclusions. It is therefore prudent to either discard the concept of special responsibility or to cohesively delineate its prescriptive content.

IV. EXPERIMENTATION WITH NEW BUSINESS MODELS AND THE NON-CIRCULAR DEFINITION OF ABUSE

Regardless of any special responsibility, but exacerbated by the existence of it, dominant firms only violate competition law if they abuse their position, not by simply holding a dominant position. The Commission and the Court go to great lengths to substantiate the abuse element in case-law, but their starting point is vague, which taints the entire analysis based thereupon.[22] This leaves firms with innovative business models in the dark regarding which practices may be considered abusive, and the only way to find out is *ex-post*, after they have been challenged by the Commission.

The *Google Android* case is the most recent example of that. In choosing a novel business model, whereby Google recoups the costs of maintaining the platform not from OEMs or consumers but from advertisers through tying Play with Google search,[23] Google had no guidance on whether such a practice could constitute abuse. And while no amount of guidance could result in certainty, the EU's existing approach to the concept of abuse is completely vacuous. Notice again, that the problem is not the outcome of the case, but rather the *ex-ante* guidance on what could have been an (il)legitimate business model.

At the heart of the problem is that the concept of abuse is defined circularly by means of a reference to harm to competition. For example, in an early attempt to distinguish between normal competition and abuse, the Court in *Continental Can*, after looking at "the spirit, general scheme and wording of Article 86" [now 102],[24] opined that "the provision is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure."[25] Therefore — the Court continued — abuse can occur when "an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition."[26] The evident problem with this formulation is that the Court never explains what effective competition is or what it means for dominance to substantially fetter competition. Moreover, an attempt to define abuse by looking only at the outcome says little about the distinction between abusive and normal business practices, because even perfectly legitimate business practices can substantially fetter competition, if for example they are superior to their competitors'.[27]

A few years later, in what is now a staple excerpt from the Court's body of antitrust case-law, the Court linked normal competition to abuse and defined the latter as "recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators" with "the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."[28] Without further guidance from the Court, it is this passage that best exemplifies the circularity of defining abuse as the opposite of normal competition and vice versa; the key element of what constitutes normal competition is missing, and this is really all that matters.

This definition was reused in many subsequent Court decisions, notably in *AKZO* and *Irish Sugar*, where the Court unhelpfully expanded on the concept by stating that "Article 86 of the Treaty [now 102] prohibits a dominant undertaking from eliminating a competitor and thereby

22 Einer Elhauge, "Defining Better Monopolization Standards," (2003) 56 Stanford Law Review 253.

23 Manne, *supra* note 10.

24 Case 6/72, *Euroemballage Corporation and Continental Can v. Commission*, [1973] ECR 215, para 22.

25 Ibid [26].

26 Ibid.

27 Case C-209/10, *Post Danmark A/S v. Konkurrencerådet*, 2012 E.C.R. 172, paras 21-22.

28 Case 85/76, *Hoffmann-La Roche & Co. AG v. Commission*, [1979] ECR 461, para 91.

reinforcing its position by having recourse to means other than those within the scope of competition on the merits."[29] Similarly to previous cases, invoking competition on the merits, (a synonym for normal competition) without elaborating on what qualifies as such, does little to shed light on what is allowed and what is not. Subsequent cases, including *Google Shopping*, add little clarity by linking abuse to indirect harm to consumers through "impact on an effective competition structure."[30]

It should be evident that the definitions of what constitutes abuse of dominance are of limited help to firms that want to experiment with new business models that have not been tested in court before. The intense scholarly debate on the topic is not much more illuminating either.[31] It is now the task of enforcers to adopt one or more meaningful tests of the available definitions or devise their own, which, however, should provide enough guidance for firms to *pro-actively*, rather than *ex-post facto*, be able to rely on.

V. PLATFORMS AND THE CORRELATION BETWEEN ABUSE AND THE GOALS OF COMPETITION LAW

One final area that platform business models have complicated for competition law is that of its goals and purposes. Competition law has always faced an existential crisis about what its purpose is in the economy and society, and the two-sided nature of platforms comes to perplex the inquiry because its economic activity inextricably combines suppliers and consumers — two opposite, but complementary poles.

If firms are to consider the boundaries of legality set by competition law, they need to know what competition law has set out to achieve in the first place, so that they can then try to compete in a way that honors those goals. Of the various goals that competition law has been argued to serve are efficiency,[32] consumer welfare,[33] the process of competition *per se*,[34] as well as other non-economic goals like fairness, freedom, and equal opportunities.[35] While all of these goals sound positive, they are not necessarily aligned. For example, in the *Google Shopping* case the Commission emphasized fairness and equality of opportunities, but did not prove reduction of consumer welfare, which other jurisdictions place a premium on. By prohibiting Google from promoting its own comparison shopping results, the Commission protected other comparison shopping websites (i.e. equality, fairness), but not necessarily the interests of consumers (i.e. consumer welfare).

The multitude and disparity of competition goals makes the link between them and any alleged abuse non-obvious and therefore necessary to affirmatively identify. The risk here is that enforcers claim to apply competition law to achieve one goal, but in reality they apply it in a way that achieves another, or they mix up multiple goals, making it impossible in the end to infer which goal of competition law the alleged abuse runs afoul of. Without the specific link between goal and abuse, it is impossible for firms to know *ex-ante* the type of competition they can engage in.

Platform business models further complicate the situation because platforms serve the interests of two different sides at the same time. Should both sides be taken into account when settling on the appropriate goals of competition law and the potential violative conduct thereof? And if so, which goal should be assigned to each side (if different)? This is not a moot question; its latest manifestation was in this year's *American Express* case, where the Supreme Court, in siding with Amex, acknowledged that Amex's anti-steering provisions may raise merchants' fees, but do not overall raise prices beyond competitive levels in the credit card market taken as a whole, which includes merchants and consumers (the two sides).[36] Not only do both sides need to be considered, but each side may be served by different interests. Clarity on what competition law aims to achieve is paramount in pointing to the interests that are, in turn, to be protected. As Bork famously stated "Antitrust policy cannot be

29 Case T-228/97, *Irish Sugar plc v. Commission*, [1999] ECR II-2969, para 111 (citing Case C-62/86 *AKZO v. Commission* [1991] ECR I-3359, para 69).

30 *Google Shopping, supra* note 4, para 332.

31 For a summary, see OECD, "Competition on the Merits (Report DAF/COMP(2005)27)," (2005).

32 See e.g. Robert Bork, "Legislative Intent and the Policy of the Sherman Act," (1966) 9 Journal of Law and Economics 7.

33 See John B. Kirkwood & Robert Lande, "The Chicago School's Foundation Is Flawed: Antitrust Protects Consumers, Not Efficiency," in Robert Pitofsky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (Oxford University Press 2008).

34 See Eleanor Fox, "The Efficiency Paradox," in Robert Pitofsky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (Oxford University Press 2008).

35 *Google Shopping, supra* note 4, para 331.

36 *Ohio v. American Express Co.*, 585 U.S. _ .

made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals? Everything else follows from the answer we give..."[37]

VI. CONCLUSION

Alan Greenspan described antitrust as "a world in which the law is so vague that businessmen have no way of knowing whether specific actions will be declared illegal until they hear the judge's verdict—after the fact."[38] While a measure of uncertainty will always remain this is no excuse to shirk an effort to define, as best as possible, these key concepts and tools of competition law. As the platform economy is still being deciphered, clarifying the areas identified herein likely poses the most pressing points on which the Commission and the Court should focus their energy.

37 Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books 1978) 50.

38 Alan Greenspan, "Antitrust," in Ayn Rand (ed), *Capitalism: The Unknown Ideal* (Penguin 1986).

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