ONLINE PLATFORMS AND ANTITRUST: EVOLUTION OR REVOLUTION?

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I. INTRODUCTION

The rise to prominence of multi-sided online platforms ("online platforms")[2] in our economy has generated a heated debate over the role of antitrust in addressing perceived competition problems that might be caused by the high degree of market power enjoyed by some of these platforms. Amazon, Facebook, and Google, to cite but a few large online platforms, are today considered in some of the antitrust literature and the non-specialist press as posing antitrust risks. Google itself has already been the addressee of two infringement decisions by the European Commission, both under appeal. Understanding whether or not these claims are true depends on the correct antitrust analysis of the problems perceived. And here comes a new challenge: do digital platforms call for a different antitrust analysis or even different antitrust rules, or are the existing tools sufficient for addressing the new challenges policy makers and enforcers face when dealing with such markets? The debate can be driven by an interventionist agenda, as in Germany, where new antitrust rules are advocated in order to intervene more effectively in digital markets, or by a non-interventionist one, which highlights the inadequacy of traditional tools to capture the complexity of multi-sided online markets, thus calling for caution against intervening too hastily based on an inadequate understanding of the economic phenomena.

This article discusses whether existing antitrust tools are suitable for dealing with online platforms by focusing on three examples, namely (1) market definition and market shares; (2) barriers to entry; and (3) the role of innovation as a safe harbor or as a defense.[3]

II. MARKET DEFINITION AND MARKET SHARES

Market definition in digital markets has become a hotly debated issue, and rightly so. The evolving nature of such markets, their special features (including the fact that they are two- or multi-sided) or the fact that services are often provided for free or — as some argue — at no observable price, certainly make market definition more challenging. However, the issue would become much less pressing if market definition were properly understood for what it is and has always been: a tool to determine whether

2 For a definition of "platforms," in particular with regard to their multi-sided nature, see R Nazzini, "Online Platforms and Antitrust: Where Do We Go from Here?" [2018] Italian Antitrust Review 5, 6 – 7.

3 For more examples of how competition law may apply to complex cases in the digital ecosystem, see, e.g., R Nazzini, "The Evolution of the Law and Policy on Tying from Classic Leveraging to the Challenges of Online Platforms," (2017-2018) 25 Journal of Transnational Law and Policy, forthcoming; R Nazzini, 'Unequal Treatment by Online Platforms: A Structured Approach to the Abuse Test in Google' in D Gerard, M Merola and B Meyring (eds), *The Notion of Restriction of Competition: Revisiting the Foundations of Antitrust Enforcement in Europe* (Louvain-la-Neuve, Bruylant 2017) 281; R Nazzini, "*Google* and the (Ever-stretching) Boundaries of Article 102," (2015) 6 Journal of European Competition Law & Practice 301.

an undertaking has market power and whether the conduct under review has anti-competitive effects. Market definition is *a* tool — by no means *the only* tool — to address one, albeit undoubtedly important, aspect of the problem of market power and anti-competitive effects: the short-term competitive constraints that customers and suppliers exert on a product. The rub is that market definition has become, in practice, a short cut to finding market power and anti-competitive effects: once a market is defined, then it's possible to "calculate" the market share of an undertaking, a group of undertakings, or of merging parties. Once the market share is "calculated," then, if the market share is "high," it becomes much easier for a competition authority to infer market power and anti-competitive effects and much more difficult for undertakings to rebut a case made against them. Therefore, although not many of the sophisticated competition authorities today would equate a given market share with market power and market power with anti-competitive effects, the fact remains that the battle for market definition may well be decisive or, at least, may significantly either reduce or increase the chances of establishing or refuting an infringement case. If market definition was understood once again as what it actually is, a tool for identifying short-term demand- and supply-side competitive constraints on a product, then at least some of the drama would fade away. Market definition would become what it should be, just one element among the overall evidence needed to find market power. The other elements are well known and well-rehearsed in economic and legal literature: barriers to entry and expansion, and countervailing buyer power.[4]

Another, very practical, reason for being cautious about market definition and for playing down its prominence in competition analysis is of course that the art of market definition is prone to a significant risk of error. Consider, for example, the Commission's analysis in the *Facebook/WhatsApp* merger. The Commission defined an EEA-wide or global market for consumer communication apps for smartphones. It then went on to note that traditional electronic communication services (e.g. mobile telephony and text messaging) could be in the same market and so could offer services on other devices.[5] But then, do we have an EEA-wide market or a global one? One that includes mobile telephony and text messages or one that is limited to consumer communication apps? These permutations are hugely significant and can make a real difference to a case. But possibly even more interesting is the approach to "calculating" market shares. Facebook's proposal was to use app reach, that is, the percentage of users on a representative panel who used the app over a 30 day period. Other market participants proposed looking at monthly minutes of use, but no reliable data could be collected. Nor was there any reliable data on messages sent, messages received, and individual vs. group messages.[6] This double uncertainty over market definition and the "calculation" of market shares should caution against any form of overreliance on these indicators of market power and any inference on anti-competitive effects drawn from these crude structural tools.

Does this mean that competition authorities should do away with market definition and "calculation" of market shares? This may be over-ambitious. When the DG Comp Economic Advisory Group on Article 102[7] suggested that this could be done in abuse of dominance cases, the proposal quickly, and unfairly, became one of the least popular ever made in competition enforcement in the European Union. Old ways die hard. But if good old market definition is here to stay, at least I would suggest:

- Considering all plausible market definitions
- Taking full account of feedback effects of any price increase or degradation of quality on one side of the market on the other side or sides of the market
- Analyzing the competitive pressure on the platform under investigation regardless of formal market definition and market shares
- Verifying whether the evidence of anti-competitive effects is consistent with the existence of substantial and durable market power by the platform
- Rejecting any inference market share = market power = likely anti-competitive effects
- Focusing on evidence of restriction of competition and anti-competitive effects on the market. In the absence of such evidence, no infringement can be established regardless of market definition and market share.

4 R Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (Oxford, OUP 2011) 342- 358.

5 Commission's decision of October 3, 2014 in Case No COMP/M.7217 *Facebook/WhatsApp*, paras 20 – 34 and 36 – 44.

6 Case No COMP/M.7217 *Facebook/WhatsApp*, paras 95 – 100.

7 J. Gual et al, *Report by the EAGCP "An economic approach to Article 82"*, July 2005, http://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf.

III. BARRIERS TO ENTRY

In antitrust analysis, barriers to entry and expansion play a key role. Size does not matter if markets are open and contestable and any undertaking with a sound business model and appropriate resources can enter the market and compete on the merits.

In digital markets, disruptive innovation is particularly relevant. Competition is not only competition in the market, that is, competition by players in relation to given products and technologies, but could be competition from innovators that introduce a new product or alternative technology which may eventually replace the previous ones and render them obsolete. When such successive innovation cycles are observable in the market, then even high market shares may simply be a transient phenomenon. The European Commission explained this concept eloquently in *Facebook/Whatsapp*:[8]

> The Commission notes that the consumer communications sector is a recent and fast-growing sector which is characterised by frequent market entry and short innovation cycles in which large market shares may turn out to be ephemeral. In such a dynamic context, the Commission takes the view that in this market high market shares are not necessarily indicative of market power and, therefore, of lasting damage to competition.
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> […]
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> The consumer communications apps market has been characterised by disruptive innovation. For example, BlackBerry launched the first successful smartphones with integrated consumer communications app and had a very significant market position. However BlackBerry Messenger was available only for BlackBerry smartphones and lost importance with the emergence of multi-platform apps once Android and iOS devices gained a larger part of the smartphone market … WhatsApp itself was launched in 2009, when the shift of users of consumer communications services from PC to smartphone started, and today it has approximately 600 million active users. Similar market dynamics can be found with respect to LINE and WeChat, which were both launched in 2011 and each of which has now more than 400 million active users worldwide.

Of course, disruptive innovation is not an article of faith and cannot become a pretext for a non-interventionist agenda. Relying on disruptive innovation as a competitive constraint requires evidence that the market dynamics are characterized by innovation cycles and that this does in fact exert competitive pressure on the incumbents. This may or may not in fact be true for each individual case. When it is true, however, then heavy-handed competition intervention aimed at solving perceived problems may do more harm than good. *Primum non nocere, deinde curare.* A maxim as needed in medieval medicine as in 21st Century competition policy.

Evidence does indeed suggest that barriers to entry in online markets are not necessarily significant. The success of WhatsApp in messaging services, Facebook's success over MySpace in social networks, Google's success over Yahoo! and AltaVista in search, would appear to show that innovative companies can quickly gain market share and displace less efficient incumbents. This is also due to the ease with which consumers can switch to new apps, platforms, and services. Apparently, Pokémon Go reached 40 million users within weeks of launch and in July 2016 iPhone users were spending more time on Pokémon Go than on Facebook. Reaching so many customers in such a short time would be unthinkable outside the "digital space", which has opened up enormous opportunities for innovation, entry of new competitors, and expansion of existing suppliers into new sectors.

This does not mean, of course, that competition enforcement becomes irrelevant in digital markets. On the contrary, competition enforcement has a key role to play in policing these markets to keep them open and contestable by intervening timely and robustly against any conduct that raises entry barriers and excludes competitors, not on the basis of superior efficiency, but as a means of preserving market power and slowing down innovation and growth. Commentators have pointed to data and so-called Big Data as potentially being a barrier to entry. The fact that online platforms rely on data in their business models and may obtain a vast amount of data that they can process at incredible speed is not, in itself, a matter of concern. Quite the contrary, the benefits of this new data-driven economy are enormous. Furthermore, precisely because of the new opportunities unleashed by the digital economy, obtaining and using data has become much easier and cheaper today than it was in the past. In *Google/Double Click*, for example, the merged entity would obtain data sets from Google and Double Click, thus being able to match data from both data sets. However, there were several competitors that ran both a search engine and ad service and, furthermore, data

8 Case No COMP/M.7217 *Facebook/WhatsApp*, paras 99 and 116.

could be purchased from third parties.[9] In *Facebook/WhatsApp*, the merged entity could collect data from WhatsApp in order to improve targeted advertising on Facebook. However, the amount of data available to competitors remained considerable.[10] In *Microsoft/Yahoo!*, combining data from both search engines would improve services and allow the merged entity better to compete with Google.[11]

On the other hand, in *Bazaarvoice/Power-Reviews* in the United States of America, a merger was reversed on application by the Department of Justice because it would have substantially lessened competition in "ratings and reviews platforms" used by retailers and manufacturers in the United States by eliminating Bazaarvoice's closest competitor. Although the focus of the analysis was not data or Big Data, one of the key findings was that the parties' network connecting retailers and brands and the parties' combined datasets would not have been replicable by competitors either organically or by M&A. As more manufacturers purchased the parties' platform, it became more valuable to retailers because it allowed them access to a greater volume of ratings and reviews. And the more retailers used the platform, the more valuable it became to manufacturers because it allowed them to share their reviews with a greater number of outlets through "syndication." Network effects were crucial to the decision to order the divestiture of the acquired business.[12]

Thus, data and Big Data may or may not be a barrier to entry in given circumstances. Careful analysis is required before conclusions are drawn in any individual case.

IV. INNOVATION

Firms must be able to innovate even if innovation excludes competitors. But how to define "innovation"? And are there exceptions — that is, could innovation be detrimental to competition?

As to the first question, a working definition of innovation could be coextensive with dynamic efficiency: innovation is the introduction of new production processes or new or improved products that shifts the supply and demand curves so as to increase social welfare. From this definition, the answer to the second question follows: as a general principle, there should be no exceptions to the rule that innovation is presumptively pro-competitive and cannot be prohibited under competition law. This is, however, and somewhat bizarrely, not the position taken by EU competition law: under Article 101(3) improvements to technical and economic progress that also restrict competition are allowed only if certain conditions are fulfilled, namely if a fair share of the resulting benefits is passed on to consumers, if the restrictions to competition are proportionate to the objective pursued, and if they do not result in the elimination of all competition in the products or services concerned.[13] A similar test applies under Article 102[14] and in the review of mergers.[15] This is, at first sight, surprising, if not shocking: competition authorities and courts appear to be able to evaluate innovation under a broad proportionality test and prohibit improvement in technical and economic progress if, to their judgment, the restrictive effects on competition are not outweighed by the benefits.

If we were starting with a clean slate, perhaps a different rule would be more in line with the objectives of competition policy, which is to maximize social welfare and productivity growth in the long term.[16] It would be possible to establish a safe harbor, that is, a presumption of

9 Commission's decision of March 11, 2008 in Case No COMP/M.4731 *Google/DoubleClick*, paras 359 – 366.

10 Case No COMP/M.7217 *Facebook/WhatsApp*, paras 180 – 189.

11 Commission's decision of February 18, 2010 in Case No COMP/M.5727 *Microsoft/Yahoo! Search Business*, para 192.

12 All the key documents in the case, including the memorandum opinion and the judgments of the court, are available at https://www.justice.gov/atr/case/us-v-bazaarvoice-inc.

13 Art 101(3) TFEU.

14Under Art 102, see, e.g., Case T-201/04 *Microsoft Corp v. Commission* [2007] ECR II-3601, para 709 and Case C-209/10 *Post Danmark A/S v. Konkurrencerådet* ECLI:EU:C:2012:172, paras 41 and 42.

15 Commission's decision of July 13, 2011 in Case No COMP/M.6342 *UPM/Myllykoski and Rhein Papier*, para 167 and Commission's decision of February 1, 2012 in Case No COMP/M.6166 *Deutsche Boerse/NYSE Euronext*, paras 1133 – 1342.

16 My view is that the objective of competition policy should be to prohibit conduct that, by reducing market rivalry, is detrimental to long-term social welfare understood as the sum of the surplus of producers and consumers in the long term reflecting not only purely economic welfare but also societal preferences and values: R Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (Oxford, OUP 2011), 11 – 50 and 317 – 318.

lawfulness, for conduct that is genuine innovation, regardless of any balancing test. Under such a safe harbor, conduct could still be prohibited when innovation is not genuine innovation but has no other purpose than to exclude rivals. It is important to note that the test cannot be only "intention to exclude rivals" — all innovation is carried out with the "intention to exclude rivals" in one way or another. A necessary limb of the test is that conduct is not "genuine innovation" — this should require proof that the conduct is not of any material benefit to consumers and that it is therefore only aimed at excluding competitors. A classic objection to this approach is that competition authorities and courts should not "second-guess" the market on innovation: they should not be the ones to judge whether innovation is "genuine." However, this cannot mean that it is sufficient for an undertaking simply to state that something is an innovation to escape all antitrust liability. Competition authorities and courts must be able to verify whether the safe harbor applies in the first place, which means that they must be able to verify whether the conditions for application of the "safe harbor" are met. This would still be a significant change to the current legal position under EU law, which regards innovation as a possible defense to a *prima facie* infringement case.

However, even under EU law, it is possible to adopt a more or less restrictive approach to defenses based on dynamic efficiency. At one end of the spectrum, undertakings can be put to the strict test that their conduct fulfills all the conditions necessary to establish the relevant defense. On the other hand, a competition authority or court could recognize that the importance of innovation in fostering social welfare, productivity and economic growth is such that the law cannot require the adoption of less efficient alternatives simply in order to keep rivals afloat. In *Streetmap.eu Ltd v. Google*, Roth J in the English High Court, having ruled that technical improvements in the quality of goods can be a defense to an abuse of dominance case, went on to say that, where efficiency is a technical improvement, proportionality does not require adoption of an alternative that is much less efficient in terms of greatly increased cost or which imposes an unreasonable burden on the dominant undertaking (at the very least in a case where there is no suggestion that the conduct impugned was likely to *eliminate* competition).[17]

In the end, the difference between dynamic efficiency as a safe harbor or as defense may be somewhat abstract. It is obvious for the undertakings concerned to plead that their conduct is dynamically efficient and adduce sufficient evidence to substantiate their pleading. There is no difference, up to this point, between the safe harbor and the defense approach. However, under the safe harbor approach, provided that the safe harbor is pleaded and sufficient evidence to substantiate the pleading is adduced, it is then for the competition authority or claimant to prove that conduct is not "genuine innovation." Under the defense approach, it is for the undertakings concerned to prove that, or at least to discharge an evidential burden to the effect that, the conditions of the defense are established. In practice, the problem lies in the burden and standard of proof or evidential burden. Provided that (1) the burden/standard of proof or evidential burden are not so strictly interpreted and set so high that they cannot reasonably be met, on the understanding that businesses cannot be expected to have knowledge that goes beyond a reasonable assessment of own demand and opportunities for growth; and (2) businesses are not required to incur additional burdens or choose less efficient alternatives for the purpose of helping or not damaging rivals, then the defense approach can also be sensibly applied and be consistent with a competition policy that truly fosters economic growth and productivity and contributes to the maximization of the opportunities that the digital economy brings about for businesses and consumers alike.

V. CONCLUSION

The digital economy has created unimaginable growth opportunities for businesses and consumers and has the potential further to improve social welfare, living standards, and productivity. Competition has an important role to play in helping market players deliver these benefits to the economy. The main task of competition enforcement is to ensure that markets remain open and competitive and that new entrants and innovative undertakings have a fair opportunity to compete with incumbents on an equal footing. To accomplish such a task effectively, competition policy should develop and apply analytical tools that, while consistent with the existing legal framework, rise to the challenges and opportunities created by the new, dematerialized, highly dynamic, innovation-driven digital environment. This does not require enacting new antitrust rules or revolutionizing the way in which such rules have been developed and applied so far. But neither would it be wise to apply competition law to online platforms without taking into account the specificities of the market phenomena under review. Legal tools and concepts such as market definition and market share, barriers to entry, and innovation "safe harbors" or "defenses" should and will continue to play a significant role in the antitrust analysis of online platforms, but need to evolve and adapt to the new requirements of the digital economy. Costly mistakes, both in terms of failure to intervene when required and erroneous interventions, will be the price that we will all pay if this does not happen at the speed that the pace of economic development requires.

17 Streetmap.eu Ltd v. Google Inc [2016] EWHC 253 (Ch), paras 142 – 176 (Roth J).