Candidate 4 – 1st PRIZE - IMOGEN GREEN, SLAUGHTER & MAY

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Earlier this year, experts from the European Commission (EC) and a UK Digital Competition Expert Panel both made recommendations to adapt competition law and policy to the challenges of the digital era. Do you think the EC was right to propose a presumption of anti-competitive conduct, effectively shifting the burden of proof for pro-competitive benefits onto platform operators?

Introduction

Announcing the European Commission's (the "**EC**") report on *Competition Policy in the Digital Era* (the "**Report**") on 4 April 2019, Margrethe Vestager observed that competition can "*be fragile in this digital age*".[1] Competition law is making global headlines, and platform operators like Google, Facebook and Amazon are in the spotlight. Debate has long raged over these companies' supposed anti-competitive conduct, but 2019 has seen an uptake in politicians and regulators alike opining on the merits and pitfalls of antitrust regulation for digital platforms. Considering Amazon, Alphabet (Google's parent company) and Facebook are by market value the third, fourth and sixth-largest companies in the world, it is unsurprising that the role of platforms in digital markets, and how best to ensure competition is preserved, is an incessant talking point for competition authorities and among the competition community.[2]

Earlier this year both the EC and a UK Digital Competition Expert Panel published reports on competition policy in the digital era.[3] One of the Report's central suggestions was that the burden of proof in behavioural investigations should be shifted for platform operators: incumbent companies, particularly in highly concentrated markets characterised by strong network effects and high barriers to entry, should prove their conduct is pro-competitive instead of enforcers proving the opposite.[4] While there is broad consensus that the challenges posed by the digital

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[1] https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/defending-competition-digitised-world_en, accessed 20/10/2019.

[2] https://www.statista.com/statistics/263264/top-companies-in-the-world-by-market-value/, accessed 20/10/2019.

[3] The EC published *Competition policy for the digital era*, 20 May 2019. The UK Digital Competition Expert Panel published *Unlocking digital competition*, 13 March 2019 (the "**Furman Report**").

[4] Report, pg. 4.

economy necessitate a competition policy update, the recommendation that the burden of proof should be reversed is controversial, and rightly so.

The presumption of anti-competitive conduct

The Report's proposal does make some sense, and the justifications for reversing the burden of proof – set out below – are key issues antitrust authorities are already grappling with.

1. **Economies of scale and network effects**

One justification for the EC's proposal is that dominant platforms can "*expand into neighbouring markets, thereby growing into digital ecosystems, which become ever more difficult for users to leave*".[5] Economies of scale mean that the initial costs of entering digital markets are high, whilst marginal costs are nearly non-existent once systems are up and running. Feedback loops further hamper the ability of new entrants to compete with established players who benefit from large customer bases and vast data pools. Facebook provides perhaps the most notorious example of this tendency. In January 2019, it announced plans to unify Facebook and the recently-acquired messaging services of Whatsapp and Instagram into one system by 2020.[6] With control of three major platforms, Facebook can use metadata such as contacts or external pages to provide data to advertisers or to train algorithms, further strengthening its dominant position. The Report is therefore right to highlight how important it is for new market entrants to attract a critical mass of users and generate positive network effects. If they are unable to do so, even those with intrinsically better products than incumbents may not succeed in challenging market leaders. Requiring platform operators to prove that their conduct is pro-competitive could go some way in rectifying this imbalance.

This problem is compounded by the fact that digital markets are fast-moving and prone to "tipping". As the Furman Report highlighted, one of the key weaknesses of antitrust enforcement in digital markets is the length of time it takes for cases to reach their conclusion, meaning that market realities may have irreparably shifted by

[5] *Ibid*.
[6] https://www.nytimes.com/2019/01/25/technology/facebook-instagram-whatsapp-messenger.html, accessed 20/10/2019.

the time an abuse of a dominant position investigation is concluded.[7] For instance, in *Google Shopping* – which resulted in the largest fine ever issued for an Article 102 Treaty of the Functioning of the European Union ("**Article 102 TFEU**") investigation - comparison shopping rivals had asked EU authorities to intervene to stop Google's behaviour at a much earlier stage in the EC's eight-year probe.[8] Some rivals claim they were forced out of business during the years the EC took to reach a decision, as Google's abusive behaviour drained their sites of traffic, revenue and investment.[9] It is problematic that investigations take such a long time because, as the General Court said in *Microsoft vs. Commission*:

> "*[i]f the Commission were required to wait until competitors were eliminated from the market, or until their elimination was sufficiently imminent, before being able to take action under Article [102] EC, that would clearly run counter to the objective of that provision, which is to maintain undistorted competition in the common market and, in particular, to safeguard the competition that still exists on the relevant market*."[10]

The digital age thus requires competition enforcement to strike the right balance between preserving incentives for innovators and detecting the "tipping point" when today's disruptors become tomorrow's dominators.[11] Shifting the burden of proof might allow abusive behaviour to be caught more quickly.

2. Platform operators' access to large amounts of data

A further justification offered by the Report for reversing the burden of proof is that "*dominant platforms control specific competitively relevant sets of user or aggregated data that companies cannot reproduce*".[12] This can lead to platform operators abusing their dominant positions. For instance, in February 2019 the Bundeskartellamt found that the extent to which Facebook collects, merges and uses

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[7] Furman Report, pg. 103.
[8] *Google Search (Shopping)*, Case AT.39740, 27/06/2017.
[9] https://www.ft.com/content/7068be02-5f19-11e7-91a7-502f7ee26895, accessed 20/10/2019.
[10] *Microsoft vs. Commission*, Case T-201/04, 17/09/2007, ¶ 561.
[11] Johannes Laitenberger, *Striking the right balance in the enforcement of competition rules*, 20/09/2017, pg. 3.
[12] Report, pg. 4.

data constituted an abuse of its dominant position.[13] Similarly, the EC is currently investigating whether Amazon uses its sellers' data to leverage its position as a competing retailer on its marketplace.[14] Access to data is clearly vital, and approaches like the Competition and Markets Authority (the "**CMA**") setting up a new data unit to provide insights on the impact data and algorithms have on markets and consumers should be welcomed.[15] Again, it is easy to see why the Report's authors recommended shifting the burden of proof in light of the vast amount of data platform operators have access to.

3. Self-preferencing: Platform operators' dual role

A further problem the Report explores is the dual role platform operators like Amazon play in digital markets. As Vestager has explained:

> "*platform businesses […] also compete in other markets, with companies that depend on the platform […] the very same business becomes both player and referee, competing with others that rely on the platform, but also setting the rules that govern that competition*".[16]

This can lead to self-preferencing: a company serving as both a "gatekeeper" to a platform and a competitor on that platform can leverage its gatekeeping position to favour its own products over those of competing sellers on the platform. In *Google Shopping*, for instance, the EC found Google prioritised its own comparison shopping service in the advertising boxes that appear at the top of a Google search, and ordered it to separate its shopping service from its advertising service.[17]

Problems with the presumption

[13] https://www.competitionpolicyinternational.com/germany-decision-of-facebook-proceeding-published/, accessed 20/10/2019.
[14] *Amazon Marketplace*, Case AT.40462.

[15] https://www.herrington-carmichael.com/cma-data-unit-taking-on-the-digital-age/, accessed 20/10/2019.
[16] https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-digital-economy_en, accessed 20/10/2019.
[17] *Google Search (Shopping)*.

Despite the above justifications, there is much that is wrong with the Report's recommendation to place the burden of proof on platform operators to defend their conduct as pro-competitive.

1. Legal hurdles

Firstly, as DG Competition Head of the Digital Single Market Task Force Thomas Kramler has indicated, there are significant legal hurdles to the Report's recommendation. Speaking at the International Bar Association's annual competition conference in October this year, Kramler pointed out that under Article 2 of Council Regulation No 1/2003 "*the burden of proving an infringement of […] Article 102 of the Treaty shall rest on the party or the authority alleging the infringement*". In addition, Article 48 of the Charter of Fundamental Rights of the European Union contains a presumption of innocence, so shifting the burden of proof would require a rewrite of key EU legislation. Kramler suggested that it would be more useful to focus on lowering the standard of proof competition authorities must meet to intervene in digital markets, particularly in tipping markets where trends towards concentration might be irreversible.[18] His suggestion that the standard of proof should be lowered so it does not require a high probability that anti-competitive effects on the market will occur is a better suggestion than presuming all the conduct of platform operators is anti-competitive.

2. Legal uncertainty

The Report's proposal also introduces legal uncertainty.[19] As Professor Pinar Akman has highlighted, presumptions of unlawfulness are generally only accepted when there are robust economic theories and empirical evidence that demonstrate that a given practice is almost always anti-competitive, such as horizontal cartels.[20] By contrast, the Report leaves questions concerning how regulators will decide who

[18] https://www.ibanet.org/Conferences/conf860.aspx, accessed 21/10/2019.
[19] https://globalcompetitionreview.com/article/1189740/eu-digital-report-lawyers-react, accessed 20/10/2019.
[20] https://globalcompetitionreview.com/article/1209577/google-counsel-digital-enforcement-should-not-alter-legal-certainty, accessed 20/10/2019.

counts as a platform operator, and how those who do count as a platform operators will be able to prove their conduct has pro-competitive benefits, unanswered. It has been suggested that the presumption of anti-competitive conduct could only apply to "gatekeeper" platforms with strategic market positions, but assessments of which platforms qualify as gatekeepers would be complex.[21]

The Report itself notes that the "*innovative and dynamic nature of the digital world*" is "*not yet completely understood*", meaning "*it is extremely difficult to estimate consumer welfare effects of specific practices*".[22] A footnote caveats the suggestion that dominant platforms should be responsible for showing a practice at stake brings sufficient compensatory efficiency gains by admitting that the Report's authors "*are aware of the difficulties of the task in carrying out [the] balancing of effects […] the difficulty in quantifying the harm might likely apply with respect to the task of quantifying the efficiency gains too*".[23] As Google's Miguel Perez Guerra has remarked, clarity is a "*fundamental aspect*" of legal certainty, and legal certainty is a principle that "*every democracy that prides itself on upholding the rule of law should embrace*".[24] It is worrying that regulators have suggested adopting a presumption of anti-competitive conduct whilst admitting that their current understanding of digital markets is insufficient.

3. Existing tools

Others insist that antitrust regulators' existing tools remain adequate for the digital era, as most problems encountered in the digital economy "*are not analytically new*".[25] If competition authorities are capable of adapting their methods to meet the demands of an evolving market, there is no need for burdens of proof to shift. Competition law is a flexible tool as it takes into account market realities and can deal with a wide range of anti-competitive practices. Indeed, the variety of abuses and anti-competitive agreements pursued by competition authorities in recent years

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[21] https://www.slaughterandmay.com/media/2537538/competition-law-in-the-digital-age-july-2019.pdf, accessed 20/10/2019.
[22] Report, pg. 71.
[23] *Ibid*.
[24] https://globalcompetitionreview.com/article/1209577/google-counsel-digital-enforcement-should-not-alter-legal-certainty, accessed 20/10/2019.
[25] https://globalcompetitionreview.com/article/1209347/eu-enforcers-clash-over-regulating-the-digital-world, accessed 21/10/2019.

shows that competition policy can be adapted to the challenges of many newly developed markets, such as dealing with the player/referee paradigm explained above. As early as 2004, the EC found Microsoft had unlawfully tied its Windows Media Player to its Windows operating system, thus leveraging its position in the platform market to entrench its position in a downstream market.[26] The EC made a similar finding against Microsoft regarding Internet Explorer in 2009.[27] The existing antitrust toolbox has therefore proved itself capable of remedying instances where platforms leverage their market power to unjustifiably restrict competition. As numerous academics have recommended, existing antitrust rules can be applied differently and more innovatively in the future in order to act more quickly in fast-moving markets and to uphold legal certainty, so there is no need to shift the burden of proof.

Better suggestions

The above does not mean that the two reports contain no valuable proposals. On the contrary, some of their better suggestions are set out below.

1. **Specialist digital market units**

The Furman Report's principal recommendation was that the CMA should establish a Digital Markets Unit, with the functions of: (i) developing a code of competitive conduct to complement antitrust enforcement; (ii) enabling greater personal data mobility and systems with open standards; and (iii) advancing data openness. This is a wise suggestion because the unit could encourage platform operators to improve their pro-competitive conduct, and data openness could help to level the playing-field by lowering barriers to entry for new, smaller players. In the US, the Federal Trade Commission has launched a technology trade force, so there is clearly an opportunity for cross-border collaboration, which makes sense when regulators are dealing with global tech giants.[28] Hopefully, with more digital market experts increasingly monitoring the competitive landscape, regulators will find it easier to be forward-looking and to catch anti-competitive conduct more quickly.

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[26] *Microsoft*, Case COMP/C-3/37.792, 24/03/2019.
[27] *Microsoft – Tying*, Case COMP/39.530, 16/12/2009.
[28] https://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology, accessed 21/10/2019.

2. Increased use of interim measures

The Furman Report also sensibly suggested that the CMA should increase its use of interim measures, streamlining the interim measures process to facilitate and encourage their use to restrain suspected anti-competitive practices.[29] While ordering companies to cease certain types of conduct before there is a formal finding of wrongdoing is slightly draconian, it is important in fast-moving markets like the digital sector. In a joint memorandum from October this year, competition authorities in Belgium, Luxembourg and the Netherlands advocated for ex ante regulation that allows EU authorities to order "*proportionate remedies on dominant companies*" to prevent competition problems, rather than waiting for those problems to manifest themselves.[30] The EC appears to be heeding the Furman Report's advice, deploying interim measures for the first time since 2001 earlier this month when it ordered Broadcom to stop imposing exclusivity and quasi-exclusivity requirements on purchasers of its chipsets.[31] Increasing the use of interim measures – based on at least some evidence of anti-competitive conduct and concrete theories of harm – is again a better suggestion to shifting the burden of proof.

Conclusion

Vestager is right that competition is fragile in this digital era. Regulators must handle it with care, approaching bold, ill-thought through proposals with caution, whilst also ensuring that they act quickly enough to prevent markets from tipping and irreparably damaging the competitive landscape. While it is clear that competition policy does need a radical shake-up to tackle the challenges emerging from the digital era, this should not be at the expense of legal certainty and should not involve rewriting either Article 102 TFEU or the Charter of Fundamental Rights of the European Union. Better suggestions include setting up new specialist digital markets units and increasing the use of interim measures.

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[29] Furman Report, Recommended action 12.
[30] https://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology, accessed 21/10/2019.
[31] https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6109, accessed 20/10/2019.

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