Candidate 11 – HIGHLY COMMENDED PRIZE - GEORGIA AUSTIN-GREENALL - NORTON ROSE FULBRIGHT LLP

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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?'

1 Introduction

The burden of proof is like the bubble in a spirit level. Ordinarily, the presumption of innocence tilts the spirit level towards the accused and the burden of proof bubble floats towards the authority or party alleging wrongdoing. If the presumption is not of innocence but of wrongdoing, the bubble floats towards the accused. For this metaphorical spirit level to tilt, the blocks beneath it must be sufficiently stacked.

The Competition Policy for the Digital Era paper (the **EC Paper**)[1] concluded that in light of the specific characteristics of digital markets, "one may want to err on the side of disallowing potentially anticompetitive conducts, and impose on the incumbent the burden of proof for showing the pro-competitiveness of its conduct".[2] The EC Paper proposes that because network effects are evident and barriers to entry high, the burden of proof should be imposed on the incumbent platform operator.[3]

This essay asserts that the EC Paper was wrong to propose a presumption of anti-competitive conduct as it is disproportionate and draconian. This argument is structured as follows:

Firstly, three factors that cause market concentration (network effects, difficulties with multi-homing and killer acquisitions) will be analysed to demonstrate that the market is not as "sticky" as the EC Paper suggests;

Secondly, it will be argued that a reversed burden of proof is disproportionate where regulation can act as a complement to competition law in remedying harmful practices by online platforms; and,

Thirdly, the key factors weighing against a shift in the burden of proof will be explained, concluding that the risks of a reversed burden are too high and such a move would be disproportionate.

2 Unsticking the market

The particular characteristics of online platforms mean that a limited number of successful incumbents dominate certain markets. This is not enough in itself to suggest that the burden of proof should be shifted onto platform operators; nor does the European Commission (**EC**) suggest this is the case.

The EC does, however, provide the "stickiness of market power"[4] as one justification for its suggestion that "vigorous competition policy enforcement" is required.[5] This essay asserts

[1] J Crémer et al, "Competition policy for the digital era" [2019].

[2] n1, p 4.

[3] n1, p51.

[4] n1, p3.

that the market is not so sticky, nor the incumbents so stuck, as to justify a reversal of the burden of proof.

2.1 Network Effects

One such characteristic of online platforms is the presence of network effects, whereby either users receive a better experience as the number of other users increases (direct network effects) or the increase in users on one side of the platform prompts an increase in users on the other side of the platform (indirect network effects). The high level of market concentration caused by network effects might act as a barrier to new entrants.

But this market concentration cannot continue forever. It has been suggested that restrictions will start to appear; for example platforms rely on advertising as one source of funding and advertising space on platforms is limited.[6] Even where direct network effects are rife, such as in social media platforms, this does not secure a platform's dominant place. The overthrow by Facebook of MySpace is an often cited example of a whole network transferring to a new platform.

Network effects may also favour different platforms with each generation or weaken over time as consumer preferences change. Whereas 51% of 13-17 year olds use dominant social media platform Facebook, 69% of the same age bracket uses Snapchat.[7] The EC Paper flags the importance of protecting competition for the market, but this is to some extent already protected by the pace of technology. New, innovative platforms and trends can encourage whole generations away from the incumbents, winning the competition for the market.

2.2 Multi-homing

A second hindrance to competition amongst platforms is difficulties with multi-homing (i.e. using multiple platforms). Transaction costs can be associated with switching platforms due to network effects and personal media held on the site, for example. The large amount of data collected by incumbents may restrict new entrants from competing.

Yet where products are sufficiently different, multi-homing can emerge. Again taking the example of social media, many consumers can and do use Facebook, Twitter, Tumblr and others.[8] Where platforms are sufficiently innovative they can act as complements to each other rather than substitutes for one another, and co-exist with the same consumers using multiple platforms. This innovation should be encouraged rather than deterred through a reversed burden of proof.

The EC Paper rightly acknowledges that "case-by-case analysis is primordial" in relation to multi-homing because both competition in the market and competition for the market are

[5] n1, p3.

[6] D Coyle, 'Practical competition policy implications of digital platforms' (2018) Bennett Institute for Public Policy working paper no: 01/2018.

[7] C West, 'Social media demographics to drive your brand's online presence (Sprout Social, 5 February 2019) <https://sproutsocial.com/insights/new-social-media-demographics/> accessed 20 October 2019.

[8] n8, p16.

present.[9] This is not consistent with the approach of reversing the burden of proof onto platform operators, which extricates the EC from having to carry out such analysis.

2.3 Killer Acquisitions

A primary concern is that dominant platforms buy promising start-ups in order to effectively swallow up the competition – the so-called 'killer acquisition'. The reason that killer acquisitions are so concerning for competition authorities is that the start-ups acquired early in life "do not yet generate sufficient turnover to meet the thresholds set out in the EUMR"[10] so their competitive potential may be as yet undiscovered. This means digital mergers with a high risk of dampening competition may not be subject to analysis.

Killer acquisitions may well be problematic, but the UK Digital Competition Expert Panel was satisfied that the majority of acquisitions by large digital companies are either "benign or beneficial for consumers".[11] Were the burden of proof to be reversed, the mergers identified as benign would be blocked as the parties would be unable to prove pro-competitive benefits. Proving that something is actively pro-competitive is a higher standard than proving it is not anti-competitive, and this draconian standard might even result in a de facto ban on mergers by dominant firms.

Reversing the burden of proof is therefore not only a disproportionate response to a problem impacting a minority of acquisitions, but also potentially one that could stifle non-problematic mergers.

3 Platforms as regulators and regulating platforms

3.1 Platforms as regulators

One building block tilting our metaphorical spirit level towards a presumption of wrongdoing is the prevalence of unfair practices by dominant platform operators. The EC Paper explains that platforms carry out a rule-setting function, so act as regulators in their particular market place. This rule-setting by incumbents can yield unfair effects, in particular for small and medium enterprises (**SMEs**). This includes unfair terms and conditions, lack of transparency, self-preferencing and unfair 'most favoured nation' clauses (**MFNs**). These practices can result in higher transaction costs for SMEs, or even blocked entry of new participants who cannot compete on these terms.[12]

3.2 Regulating platforms

[9] n1, p6.
[10] n1, p10.
[11] Digital Competition Expert Panel, "Unlocking digital competition" [2019].
[12] N Duch-Brown, 'The Competitive Landscape of Online Platforms', JRC Digital Economy Working Paper 2017-04.

The UK Digital Competition Expert Panel concluded that user access, prominence, rankings and reviews should be provided on a fair, consistent and transparent basis.[13] This suggestion amounts to almost a regulatory equal treatment approach. The EC Paper also advocates for the introduction of a transparency regime.[14]

Regulation is not necessarily a substitute for competition law, but that is not to say it cannot be a complement to the competition toolkit. This essay does not purport to settle the contractors' dispute, but the ability of regulation to deal with some platforms' unfair practices is a block tilting the spirit level away from a reversal of the burden of proof.

The new Platform to Business (**P2B**) Regulation makes a start on filling these regulatory gaps. The P2B regulation applies various consumer law principles to the interactions of intermediaries with business users. Its requirements include 'plain and intelligible' terms and conditions, transparency obligations relating to ranking of results and requirements to provide grounds for restricting/suspending a business's access to the platform; addressing many of the above concerns. As regulation is able to step in and address some of the EC Paper's concerns, this weighs against a reversal of the burden of proof and increases its disproportionality.

4 Factors against a burden shift

So far, the building blocks tilting in favour of a shift in the burden of proof have been considered and somewhat counterbalanced. Importantly, there are also risk factors strongly tilting away from such a shift.

4.1 Chilling effect

The key risk is that of a chilling effect. With the draconian burden of proof of pro-competitive behaviour looming over companies, they may well be dissuaded from carrying out actions that might actually be pro-competitive. For example, the possibility of being acquired may provide start-ups with an exit strategy, supporting market entry by encouraging funders to make an otherwise risky investment in an innovative new business.[15] Innovative start-ups may struggle to receive funding if acquisition by an incumbent is no longer a potential exit strategy, and benign or pro-competitive mergers may be found not to be worth the risk. If the aim of competition law is to maintain a competitive market, it does not do to dissuade pro-competitive behaviour.

4.2 Measuring consumer harm or lack thereof

The EC Paper states that "even where consumer harm cannot be precisely measured, strategies employed by dominant platforms aimed at reducing the competitive pressure they face should be forbidden in the absence of clearly documented consumer welfare gains."[16] However, if the harms cannot be measured then there cannot be sufficient evidence of the extent of these harms to warrant a move as drastic as a shift in the burden of proof.

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[13] n11, p61.

[14] n1, p70.

[15] n11, p91.

[16] n1, p3.

The Learlab report for the CMA reviewed acquisitions by Amazon, Google and Facebook, finding that these dominant companies tend to acquire young targets. This presents a difficulty in formulating the counterfactual, as it is difficult to establish whether and how the start-up would develop into a competitive force absent the merger.[17]

The authorities should not reverse the burden of proof unless and until they are satisfied that harm exists and is extensive. Inability to measure harm does not equate to entitlement to presume that harm is there. Authorities will need to find a way to measure the potential harm, such as through retrospective analysis and accessing internal documents, rather than absolving themselves of the requirement to measure the harm at all.

Recent competition case law demonstrates that harm must be measured rather than presumed even in seemingly clear cut circumstances. For example, the Competition Appeal Tribunal held in *Ping* that even a blanket ban as wide as to prevent all online sales does not automatically restrict competition.[18] In *Coty,* the Court of Justice made consideration of the supplier's interest in protecting its luxury image, demonstrating that legitimate interests must be considered even where a company aims to reduce the competitive pressure it faces.[19] Context must be considered and case by case analysis carried out.

4.3 Scope

Further, the scope of the EC Paper's proposal is unclear; it is not explained exactly what behaviour is caught, which firms would be subject to the reversed burden, and whether this would be assessed on a case by case basis. Were the net to be cast widely, there is a risk of scope creep; this approach could be transferred to markets with similar characteristics to the digital markets, resulting in a heavy-handed approach to mergers in other fast-moving markets. This is undesirable because of the risk of chilling effects in these markets too.

4.4 Differing positions of experts

A final important point to make is that competition law experts have differing positions on a burden of proof reversal. Whilst the EC Paper proposes a presumption of anti-competitive conduct, the UK Digital Competition Expert Panel explicitly rules this out, stating that "a presumption against all acquisitions by large digital companies is not a proportionate response to the challenges posed by the digital economy".[20] The joint memorandum released by the Belgian, Dutch and Luxembourg competition authorities also rejects a shift in the burden in favour of commissioning "an economic study on merger control in the digital sector".[21] Where there is no agreement between the experts on a presumption of anti-competitive conduct, and the evidence in favour of doing so does not stack up, it would be disproportionate for the European Commission to rely solely on the EC Paper and act on its recommendation.

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[17] Lear, "Ex-post Assessment of Merger Control Decisions in Digital Markets" [2019].

[18] *Ping Europe v. CMA* [2018] CAT 13.

[19] *Coty Germany GmbH vs Parfümerie Akzente GmbH*, C-230/16, EU:C:2017:941.

[20] n11, p101.

[21] Belgian Competition Authority, Authority for Consumers & Markets and Conseil de la Concurrence, "Joint memorandum of the Belgian, Dutch and Luxembourg competition authorities on challenges faced by competition authorities in a digital world" [2019], p3.

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5 Conclusion

This essay does not deny that the online platforms market is highly concentrated, or that certain harmful effects arise for some businesses using these platforms. However, a shift in the burden of proof would require platforms not only to demonstrate that their conduct is not anti-competitive, but that it is pro-competitive.

This drastic measure necessitates enough evidence of the stickiness of the market and consumer harm caused as a result. Dominant platforms have been overthrown in the past, multi-homing is evident in at least some platform markets and killer acquisitions have been found to represent a minority of acquisitions.[22] Furthermore the difficulties in measuring consumer harm, risk of a chilling effect, lack of clarity in scope and differing positions on this topic from experts weigh strongly against a shift in the burden. The blocks beneath the spirit level are not, for now at least, adequately stacked. The burden of proof bubble should remain unmoved.

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[22] n11, p40.