Recent developments in EU antitrust enforcement against big tech

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The peculiar features of high-tech markets have raised serious antitrust issues pushing so- called 'big tech' firms such as Google, Facebook, Amazon, and so on into the firing line of competition authorities worldwide. In Europe, big tech have been subject to a significant number of investigations by the European Union Commission.

The main risks of the current approach

The European Commission started monitoring big tech two decades ago. With the ensuing explosion of the digital economy, antitrust concerns massively increased and big tech rocketed to the top of the Commission's policy priorities. When approaching big tech cases, however, competition authorities have to deal with the unusual features of high-tech markets which markedly distinguish them from 'traditional' ones.

Among their various characteristics, for instance, strong network effects are particularly evident in big tech markets. As regards multi-sided platforms specifically, indirect network effects are notable and, indeed, they are at the very basis of platform businesses. This raises particular questions of both of market(s)

definition, since distinct, but interdependent, groups of customers are involved, and the assessment of market power.[1]

The realisation of the drawbacks of the technological disruption has grown exponentially. In tech markets, for instance, high market shares may not equate to market power, since they may rapidly turn out to be worthless due to the introduction of a competitor's new, disruptive product. This was clearly emphasised by the Commission in the *Facebook/WhatsApp* merger decision.[2]

Access restrictions to online platforms have also become a topic of debate, as demonstrated by important recent cases, such as *Google Android*.[3] This case concerned, inter alia, the tying of Google Play Store to Google Search and Chrome web search functions, therefore preventing the pre-installation of rival search apps and browsers. The *Google Shopping* case[4] focused on Google's practice of hiding or downgrading product results of rival comparison shopping services; and *Google AdSense* case,[5] considered the possibility for Google's competitors in online search advertising to place search advertising on third-party websites.

The accumulation of massive amounts of data could also have a significant effect on competitive dynamics and may represent an essential asset needed to compete on the market. In fact, smaller competitors may be seriously marginalised due to their inability to collect similar amounts of data to big tech, making them incapable of improving their services to compete effectively. This, in turn leads to the impossibility of gaining new customers and more data. In *Google Android*, the European Commission explicitly found that Google limited possibilities for competing search engines to collect valuable data, preventing them from using its data to improve their services.

The traditional essential facility doctrine has often been invoked as the necessary solution to ensure competition in tech markets.[6] However, this principle has not

1 In *Ohio v American Express*, the US Supreme Court stated that the antitrust analysis of vertical restraints used in two-sided platforms must consider both sides of the platform, since the platform supplies one single product, the transaction, to the two different groups of customers on the two-sides of the platform. Therefore firstly, it has to be assessed whether the platform exceeds a minimum market share screen, and then the anti-competitive effects could be analysed, focusing on the side on which they occur (*Ohio v American Express Co*, 138 S Ct 2274 (2018)).

2 *Facebook/WhatsApp,* case COMP/M 7217, Commission Decision C (2014) 7239 (2014), paragraph 99.

3 *Google Android,* case AT 40099, Commission Decision of 18 July 2018 (public version not yet available).

4 *Google Search (Shopping),* case AT 39740, Commission Decision 2018/C 9/08 (2018) OJ C 9/11.

5 *Google Search (AdSense)*, case AT 40411, Commission Decision of 20 March 2019 (public version not yet available).

6 According to the *essential facility doctrine*, which in Europe has mainly been developed through the case law of the Court of Justice of the European Union, a dominant undertaking may be forced to allow competitors to have access to its facilities on reasonable terms if: *i.* the service or product to which access is denied is indispensable to compete; *ii.* the refusal is not justified; *iii.* the refusal to grant access would eliminate effective competition in the market.

been deployed in proceedings involving big tech before EU courts since the *Microsoft* case in 2007 (Court of Justice of the European Union appeal judgment). The debate on its applicability is still open, particularly in relation to the uniqueness and non-replicability of data.

Data has also been carefully taken into account in merger cases. In *Facebook/WhatsApp*[7] the European Commission assessed whether Facebook would have acquired access to the data generated by WhatsApp. In *Microsoft/LinkedIn*[8] the European Commission analysed the ability of Microsoft to use data as an input to improve a service, while potentially impeding competitors' access to data needed to make similar improvements to their competing products.

Lastly, it is worth mentioning the proceedings recently opened by the European Commission against Amazon to ascertain possible anti-competitive behaviour in the use of rival sellers' data for its own retail activities.[9]

In Europe, apart from a few cases in which the competition authorities have deployed other instruments such as consumer law and privacy rules, the main proceedings against big tech have concerned abuses of dominant position. However, the approach adopted appears to move between two opposing tensions – late antitrust intervention and antitrust over-enforcement.

Late antitrust intervention

Antitrust enforcement against big tech firms must address the fact that innovation evolves so rapidly that it becomes extremely difficult, if not impossible, to adopt remedial measures promptly enough to prevent potential negative effects. In this respect, competition intervention risks being late and, consequently, in vain as the technologies may be out-of-date, or markets may have evolved by the time decisions are delivered. Moreover, such risk is worsened by the fact that competition authorities' decisions are usually appealed and their judicial review may take several years.

Obviously, the investigation timeframe depends on a variety of factors not necessarily linked to the competition authorities' efforts. These might include the complexity of the case, the complexity of the technologies concerned (which may require assistance from specialised personnel), the internal checks and balances,

7 See, note 2.

8 *Microsoft/LinkedIn*, case M 8124, Commission Decision C (2016) 8404 [2016].

9 *Amazon Marketplace*, case AT 40462. Among the other recent cases before the EU Commission against big tech that are not strictly related to the issues considered above, it is worth noting the Amazon e-book MFNs case (*E-Book MFNs and related matters,* case AT 40153, Commission Decision 2017/C 264/06 [2017] OJ C 264/7) and the two cases against Qualcomm (*Qualcomm – Exclusivity Payments),* case AT 40220, Commission Decision 2018/C 269/16 [2018] OJ C 269/25 and *Qualcomm (Predation)*, case AT 39711, Commission Decision of 18 July 2019 (public version not yet available).

the organisation and the resources of authorities themselves, the possibility to reach a settlement with the undertakings involved, etc.

However, the imposition of interim measures to avoid serious and irreparable harm from occurring pending an investigation's conclusion, could represent an effective instrument worth promoting. For instance, for the first time in 17 years, such action was taken by the European Commission this year in proceedings against Broadcom.[10]

Antitrust over-enforcement

The second danger is the risk of antitrust over-enforcement. This is the risk of enforcing antitrust rules where there are no genuine antitrust issues at stake.

I do not mean that cases against big tech firms have not been grounded on a solid antitrust basis. I merely wish to underline the perils of using the antitrust toolkit with the aim of controlling their massive economic power, in absence of evidence of anti-competitive harm, given the risk of slowing down or discouraging innovation or of politicising antitrust enforcement by using antitrust tools for non-antitrust goals.

Antitrust decisions must always be supported by strong evidence. In addition, where conduct falls within the framework of several disciplines, see for instance, the various *Facebook* cases.[11] The borders of competition law should not be blurred by applying competition law to non-competition problems, in absence of clear antitrust abuses.

Killer acquisitions

For some years commentators have strongly criticised the analytical approach applied to big tech conduct, considering it too lax, specifically in the assessment of acquisitions.

In fact, the acquisition of potential rival small and medium startups or growing undertakings is a factor which has allowed big tech firms to expand their power consistently. This process, known as 'killer acquisition' slips under the antitrust radar, as such transactions are not usually caught by the legal thresholds for mergers based on turnover or market share. As underlined in the *Unlocking digital competition*, a report

10 *Broadcom,* case AT.40608, 26 June 2019.

11 European Commission, case COMP/M 7217 cit and Bundeskartellamt, case B6-22/16, decision 6 February 2019 from the antitrust viewpoint; Autorità Garante della Concorrenza e del Mercato, case PS11112 – *Facebook - data sharing*, decision 29 November 2018 from the unfair commercial practices viewpoint; Facebook settlement with the US Federal Trade Commission for US$5bn in July 2019 from the privacy viewpoint for the illegal use of data in the *Cambridge Analytica* case, but other cases have been decided locally ie, Berlin Regional Court in 2018, or shall be decided in the near future (Court of Justice of the European Union, case C-311/18 *Facebook Ireland/Schrems* upon referral of the Irish High Court) on the potential illegal use of data from a privacy viewpoint.

commissioned by the United Kingdom government's Digital Competition Expert Panel, in the last five years Amazon, Apple, Facebook, Google and Microsoft closed almost 250 acquisitions. However, the report states that 'none of these mergers were notified voluntarily to the CMA [the UK's Competition and Markets Authority], and none were called in for investigation, either at phase 1, or the more serious phase 2 level'.[12]

Lowering the thresholds for big tech mergers has been proposed as the only means of reviewing killer acquisitions. However, such acquisitions, insofar as they result in the strengthening of a dominant position, could be reviewed on the basis of the prohibition of abuse of dominance, which encompasses every kind of abusive conduct adopted by a dominant undertaking. The acquisition of a smaller competitor could also potentially turn into an abuse of dominant position, an approach which was used by the European Commission in the *Continental Can* case over 40 years ago when the merger control rules did not exist.[13] It could be argued that this triggers the evaluation of the intent underlying the acquisition project, but there are procedural tools to deal with this evaluation known as disclosure orders. Moreover, it should not be forgotten that the abuse is characterised by the materiality of the conduct and its potential effects regardless of the intent.

Breakup, a remedy again in the spotlight

Among the remedies frequently discussed to solve the problems of big tech's huge power, the so-called 'breakup' remedy appears to be at the top of the list. Such a process is currently gaining enormous attention not only from academics and practitioners, but also in the media, since big tech has entered onto the political agenda in the United States.

The breakup remedy has been employed a few times in US antitrust history, yet the EU is not so familiar with it. Nevertheless, it should be noted that is clearly provided for by EC Council Regulation 1/2003[14] as a residual remedy to be used in exceptional circumstances when there are no other instruments available. As Commissioner Margrethe Vestager has clearly stated, it 'would be a remedy of very last resort' that 'would keep us in court for maybe a decade.'[15]

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12 Digital Competition Expert Panel, *Unlocking digital competition*, March 2019, p 91 www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel, last accessed 17 July 2019.

13 *Europemballage Corp and Continental Can Co v Commission*, Case 6/72 (1973) ECR 215.

14 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, (2003) OJ L 1/1. See specifically, article 7 and recital 12.

15 'EU: Vestager says breaking up Facebook would be a last resort', *Competition Policy International*, 19 May 2019, www.competitionpolicyinternational.com/eu-vestager-says-breaking-up-facebook-would-be-a-last-resort accessed 17 July 2019.

In fact, since innovation depends largely on big companies' teams and shared technologies, a poorly considered breakup could mean the separated entities having a serious lack of personnel, organisation, information, and intellectual property rights. The resulting entities could have a diminished capacity to innovate. In addition, companies, once broken up, would not be able to exploit synergies and, as a result, would be subject to higher costs with a potential impact on efficiency.

Final remarks

For many years, the drawbacks of the technological disruption have not been properly understood. Among various antitrust issues that have recently arisen, the huge power of big tech has become particularly serious. Competition authorities have to deal with it and its complex interaction with numerous factors. In this respect, the traditional antitrust toolkit may still be deemed adequate, as antitrust issues posed by big tech do not require instruments specifically designed for them, merely the correct, and promptly applied use of the current antitrust rules.

About the author

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