Transatlantic Competition Policy and Digital Markets

Introduction

"The changes are so profound that, from the perspective of human history, there has never been a time of greater promise or potential peril. My concern, however, is that decision-makers are too often caught in traditional, linear (and non-disruptive) thinking or too absorbed by immediate concerns to think strategically about the forces of disruption and innovation shaping our future." – Klaus Schwab, The Fourth Industrial Revolution

Although it could be considered slightly hyperbolic, it is widely stated that we are currently experiencing an unparalleled period of great technological change, which is reflected in the behaviour of digitalised markets. Products and services that were practically unimaginable a few years prior are now quickly becoming obsolete and overshadowed by the potential new entrants on the horizon. As a result, markets for digital products and services are usually very concentrated, made up of only the few competitors that can afford to keep pace with the perpetually innovative race of research and development. Companies that cannot match their competitors rapidly exit the market, due to the huge influence of network effects causing the market to tip, as was the case in the early social media and general search engine markets.[1]

The rapid change within these markets has made competition authorities uncomfortable, struggling to differentiate between competition on the merits and unfair methods that should be considered anti-competitive. The nature of these markets to rapidly tip in favour of a dominant firm, who is then difficult to unseat, provides competition authorities with a small window of opportunity to meaningfully affect the market. This short time frame, combined with the highly technical nature of the market, does not provide a competition authority with the sufficient time to carefully consider whether a firm's conduct should be determined as anti-competitive.[2] The resultant uncertainty has led to an increasing divergence in competition policy between the two most influential jurisdictions, the United States of America and the European Union. While, the European Union has become increasingly interventionist in recent years, with three high-profile cases against Google whose accumulated fines totalled EUR 8.2 billion, until very recently there has been little to no action against Google in the United States.

[1] George J. Stigler Center for the Study of the Economy and the State, The University of Chicago Booth School of Business, Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee, Report, page 11.
[2] ibid, pages 66-71.

This is peculiar because both jurisdictions are motivated principally by consumer welfare, leading to the assumption that the actions of the competition authorities should be relatively aligned.

The divergence between the two systems offers an interesting insight and opportunity to reflect on the merits of both jurisdictions' policy. It is significant because it offers other jurisdictions differing perspectives on how they can adapt to emerging digital markets. The objective of this paper is to put forward the position that there should be a convergence in the competition policy of this area, and that it should be reflective of the current European approach to market transparency and consumer welfare, but not its emphasis on market structure.

Convergence between the two jurisdictional systems has long been encouraged due to the benefits of encouraging cross-border business transactions, which enhance economic growth, and reducing the enforcement costs of controlling competitive conduct.[3] Additionally, this paper will advance the position that a point of consideration specific to digital markets is their potential to increase the pro-competitive conditions of related markets. Digital technologies have the potential to greatly increase transparency in various markets, as has been shown by the impact of price comparison services[4] and open banking.[5]

Microsoft III[6] is widely recognised as having influenced the European Commission's own enforcement action against Microsoft.[7] The European Court of Justice relied on the evidence of the results of the Microsoft settlement to rebut Microsoft's arguments against the dissemination of interoperability information.[8] This demonstrates the potential for direct savings by the competition authorities in terms of relying on the findings of their counterpart during an action for enforcement, which would be particularly useful in highly technical markets.

Convergence on the policy relating to these markets can ensure that these products fulfil their pro-competitive potential and deliver the promised boost to consumer welfare, as opposed to

[3] William E. Kovacic, Competition Policy in the European Union and the United States: Convergence or Divergence?, Bates White Fifth Annual Antitrust Conference, Washington D.C., June 2 2008,
[4] David Ronayne, Price Comparison Websites, University of Warwick, Department of Economics, 2015.
[5] Competition and Markets Authority, Making Banks work harder for you, Final Report, August 9 2016.
[6] United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).
[7] Keith N. Hylton, Microsoft after Fifteen Years, Competition Policy International, Volume 11, Number 1, Spring/Autumn 2015.
[8] Case T – 201/ 04, Microsoft Corp, EU:T: 2007: 3601, para 10; Case AT.39740 Google Search (Shopping), June 27 2017, para 663.

differing regulatory standards that might stifle innovation or fail to prevent the exploitative abuse of consumers by digital monopolists.

Understanding European Competition Policy

It is true that at the heart of both jurisdiction's competition policy is the protection and enhancement of consumer welfare. Nevertheless, it is equally true that there is a vast difference in interpretation of how that is best achieved. This has often led to an increased perception that these differences in interpretation are a result of a politicisation of the systems, rather than a different understanding of market forces.[9] This paper puts forward that, even in the event that some political influence exists, it is not the main motivating factor for enforcement actions.

There is a growing consensus among European competition policymakers that the current standards of competition law are not fit for the digital age. This has manifested into a debate on whether to transition to a transaction value-based model for merger review, as opposed to the traditional turnover threshold test. Member States, such as Germany and Austria, are motivated to catch what they might consider anti-competitive mergers, such as Facebook's acquisition of Instagram and Whatsapp, which may have been motivated by a strategy to prematurely foreclose a potential competitor.[10]

Although increasing the scope of potential scrutiny for mergers would not necessarily lead to a disagreement among American policymakers, the proposal for a reform of the burden of proof and new theories of harm specific to digital markets will almost certainly be viewed as controversial. In a report published by the European Commission, it put forward the concept of reforming the burden of proof in abuse of dominance by a tech firm. As such, it would not be necessary for the competition authority to demonstrate anti-competitive effects, but rather the burden of the dominant tech firm to demonstrate the pro-competitive nature of their conduct.[11] This has been further stated publicly by the European Competition Chief Margaret Vestager, who seeks to build on the role she played as the European Commissioner for Competition.[12] Placing such comments in the context of the Commission's Google Shopping

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[9] Geoffrey A. Manne, A Comparative Look at Competition Law Approaches to Monopoly and Abuse of Dominance in the US and EU: Why US Antitrust Law Should Not Emulate European Competition Policy, Washington, D.C. December 19 2018.

[10] https://www.competitionpolicyinternational.com/the-transaction-value-threshold-in-germany-experiences-with-the-new-size-of-transaction-test-in-merger-control/

[11] See the "Error Cost Framework" Chapter at page 50 of the European Commission's report "Competition Policy in the digital error", May 2019.

[12] https://www.competitionpolicyinternational.com/eu-vestager-considers-toughening-burden-of-proof-for-big-tech/.

decision, where the Commission was rather dismissive of the pro-competitive justifications put forward by Google, it is understandable that such a reform is met with concern.

While it could be easy to attribute such call for reform being motivated by the fact that these American dominant tech companies are not European, which is a growing concern among European politicians,[13] established European competition law provides a different explanation. It has long been a focus of European competition law to protect the competitive process of a market, as "*consumers benefit from competition through lower prices, better quality and a wider choice of new or improved goods and services*." [14] This has often led to the criticism that European competition law is too protective of competitors,[15] whereas American antitrust law is focused on "*the protection of competition, not competitors*."[16] However, there is a well established understanding in European competition law that inefficient competitors are not protected from being foreclosed from the market. As was stated in *IMS Health*, "*the primary purpose of [Art 102] is to prevent distortion of competition — and in particular to safeguard the interests of consumers — rather than to protect the position of particular competitors.*"[17]

What significantly differentiates European competition policy is its focus on pre-emptive intervention. Without an effective competitive process, the consumer is vulnerable to exploitative abuse by the monopolist. In such a case, competition authorities often face an uphill battle of demonstrating the existence of an abuse, such as excessive pricing, due to the unavailability of an easily identifiable counterfactual scenario. Without such a counterfactual scenario, the risk of a false positive intervention is recognised as exponentially high and possibly more detrimental to society than no intervention at all.[18] At this point, the only recourse for a competition authority is to risk a wrongful intervention or wait for the arrival of a new competitor in the market, which is completely dependent upon the market factors and

[13] https://www.politico.com/news/2019/10/28/europe-technology-silicon-valley-059988
[14] Guidance on Art 102 Enforcement Priorities OJ [2009] C 45/7, para 5.
[15] Geoffrey A. Manne, A Comparative Look at Competition Law Approaches to Monopoly and Abuse of Dominance in the US and EU: Why US Antitrust Law Should Not Emulate European Competition Policy, Washington, D.C. December 19 2018.
[16] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977); Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).
[17] Opinion of Advocate General Jacobs, CASE C-7/97 Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG [1998] I-7811 para 58; Case T-184/01 R *IMS Health Inc. v Commission* [2001] ECR II-3193, para 145.
[18] Case C-177/16 *Biedrība Autortiesību un komunicēšanās konsultāciju aģentūra – Latvijas Autoru apvienība' v Konkurences padome* [2017], Opinion of Advocate General Wahl, para 105.

barriers to entry that such a new entrant would have to overcome, along with the assumption that the new entrant would actively engage in aggressive competition with the incumbent.

Therefore, does it not make sense to act when there is still an effective competition process in the market, rather than wait until the eradication of competition? This reluctance to rely on a hypothetical and unknown competitor has been a driving force in the application of European competition law, especially regarding the standards of predatory pricing, *"it must be possible to penalize predatory pricing whenever there is a risk that competitors will be eliminated… The aim pursued, which is to maintain undistorted competition, rules out waiting until such a strategy leads to the actual elimination of competitors."*[19]

Placing the European Commission's approach to digital markets within this context, it is understandable that rapid changes within the structure of a market would cause concern. Network effects present within many digital markets result in significant barriers to entry that may be potentially impossible to overcome, short of a drastically mismanaged commercial strategy undertaken by the incumbent, *"the Commission has all the more reason to apply [Article 102] before the elimination of competition has become a reality because that market is characterised by significant network effects and because the elimination of competition would therefore be difficult to reverse."*[20]

The Comparative Situation in American Antitrust Policy

Whereas European competition policy can be characterised by its focus on pre-emptive enforcement, the development of American competition policy has been driven by a strict adherence to the consumer welfare standard. This difference is best exemplified in the US approach to predatory pricing, where it must be demonstrated that there is proof of below cost pricing, recoupment of losses, and the lack of any reasonable business justifications for the conduct. This contrasts with the European approach where there is no requirement to demonstrate the possibility of recoupment. The US approach is guided by the belief that *"[w]ithout recoupment, even if predatory pricing causes the target painful losses, it produces lower aggregate prices in the market, and consumer welfare is enhanced."*[21]

[19] Case C-333/94 P, Tetra Pak v Commission, para 44.
[20] Case T – 201/ 04, Microsoft Corp, EU:T: 2007: 3601, para 10; Case AT.39740 Google Search (Shopping), June 27 2017, paras 285 to 305.
[21] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-27 (1993).

US courts have also been hesitant to intervene when there is sufficient risk of a false positive ruling. As was famously stated by Supreme Court Justice Scalia, "*mistaken inferences and the resulting false condemnations are especially costly, because they chill the very conduct the antitrust laws are designed to protect."*[22] The highly complex and technical nature of digital markets would result in a high burden for a potential enforcement action to demonstrate its necessity.

Nevertheless, there has been an increasing interest in dominant tech firms from the Federal Trade Commission and other antitrust authorities.[23] However, any such intervention as a result of these investigations will face a much more difficult case than the upcoming appeals of the European Commission's decisions, resulting in the likelihood of European competition policy leading global policy development due to its numerous interventions.[24]

US antitrust authorities also have the difficulty in demonstrating a decrease in consumer welfare that is not reflected in price levels, the parameter which the consumer welfare standard has traditionally been measured by. A growing concern is that the current consumer welfare standard is too narrow to effectively encapsulate the harm posed by online platforms, *"price is not the most appropriate criterion in competition analysis involving online platforms, as many services are offered for free, although, in fact, consumers pay through the provision of personal data. Certain practices by dominant platforms or in mergers may thus still give rise to consumer harm in forms other than price."*[25] This has not been a prevalent issue in European enforcement, as criteria, such as the choice of available products with differing features, have been recognised as worthy of protection.[26]

Therefore, it would be in the interest of American policymakers to reform the law to better recognise the new potential harm that consumers suffer from a monopolist outside of the traditional increase in pricing. This could be done by extending the criteria that is considered under the consumer welfare standard to include factors such as data privacy, which is also the

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[22] Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004), IV.
[23] https://www.politico.com/states/new-york/albany/story/2019/09/06/state-antitrust-probes-target-facebook-google-as-ftc-investigates-tech-1173296; https://www.bloomberg.com/news/articles/2019-06-04/google-s-enemies-sharpen-complaints-as-doj-opens-antitrust-probe
[24] William E. Kovacic, Competition Policy in the European Union and the United States: Convergence or Divergence?, Bates White Fifth Annual Antitrust Conference, Washington D.C., June 2 2008, page 3.
[25] United Nations Conference on Trade and Development, Competition issues in the digital economy, para 11.
[26] Guidance on Art 102 Enforcement Priorities OJ [2009] C 45/7, para 19; Case T – 201/ 04, Microsoft Corp, EU:T: 2007: 3601, para 10; Case AT.39740 Google Search (Shopping), June 27 2017, para 646.

source of serious enforcement undertaken by the Federal Trade Commission.[27] By ensuring an effective competition process for online marketplaces, where consumers do not pay an excessively high price in terms of the actual currency being paid, personal data, there would be an increased saving in terms of enforcement actions and less potential for large-scale abuse. There would also be an increase in the competitive conditions of the market, as shown by Microsoft offering rewards to consumers for the use of Bing in exchange for personal data. It would also allow the US to be a major influence in developing global competition policy in digital markets.

The Pitfalls of Current European Competition Policy

The European emphasis on preserving the structure of the competitive process has led to what many consider to be a relatively unsupported finding in the European Commission's argument regarding anti-competitive conduct in Google's integration of its comparison shopping service with its general search service.[28] Witnessing the dramatic growth in market share that Google Shopping received, with little modification to the actual service beyond displaying it prominently on the Google Search Results Page, prompted the Commission to find "self-favouring" to be anti-competitive.[29] The Commission was also rather dismissive of the click through data supplied by Google, which aimed to evidence an improvement in the quality of the product, with consumers receiving a relevant result more efficiently than before. What is more surprising about the European Commission's decision to dismiss this evidence of pro-competitive effects, is that this same evidence was accepted by the Federal Trade Commission during their investigation into Google's conduct during 2012,[30] and by the English High Court in the virtually parallel case of the integration of Google Maps.[31]

Effectively, the Commission's enforcement borders on a finding against Google for its product design, the same product design that has effectively rewarded them a super dominant market share. In *Microsoft IV*, the Supreme Court was cautious *"that it is not a proper task for the Court to undertake to redesign products."*[32]A sentiment that is appropriately relevant when

[27] https://www.ftc.gov/news-events/blogs/business-blog/2019/07/ftcs-5-billion-facebook-settlement-record-breaking-history

[28] Pınar Akman, The Theory of Abuse in Google Search: A Positive and Normative Assessment under EU Competition Law, University of Illinois Journal of Law, Technology and Policy (2017).

[29] Case AT.39740 Google Search (Shopping), June 27 2017, para 492.

[30] Statement of the Federal Trade Commission Regarding Google's Search Practices in the Matter of Google Inc. FTC File Number 111-0163, January 3, 2013, page 2.

[31] Streetmap.Eu Limited v Google Inc., Google Ireland Limited, Google UK Limited [2016] EWHC 253 (Ch), paras 147 and 157.

[32] Massachusetts v Microsoft Corp 373 F3d (DC Cir 2004) at 1250.

considering the unique parameters of the comparison search and general search services markets, where *"[t]he quality of the [search engine results page] is (along with speed of response) the key means by which general search engines compete."*[33] The European Commission's findings are also inconsiderate of the potential for market growth through the increasing accessibility of Google's comparison shopping service. As was demonstrated in the English High Court case concerning Google Maps, there was a substantial increase of new consumers in the market which had apparently been brought about by Google's product change.[34] Such an increase in accessibility to new users makes the possibility of a false positive even more detrimental, as it denies these consumers access to the increased transparency benefits of comparison shopping services.

The failure to fulfil the potential of the comparison shopping services is already being demonstrated. On the 28th September 2018, the UK competition authority received a super-complaint from a consumer rights group that they had failed to act in regard to the detriment of a significant number of consumers overpaying for their services.[35] The complaint focused on certain consumers being affected by negative price discrimination, as a result of their choice to not switch suppliers. During two sectoral regulators' investigation into this collective harm, they found that the consumers that suffered from this price discrimination were characteristically unfamiliar with searching for better offers using comparison services.[36] The likely result of the European Commission's finding against Google for the integration of its comparison shopping services will be a significantly reduced incentive for other tech companies to innovate and attach their comparison shopping service to its main platform to improve accessibility. Equally, there will be less incentive for tech firms to enter into specific comparison shopping markets, such as insurance or broadband, where a more accessible service could significantly improve competition for the benefit of consumers in the related market.

The proposal to alter the burden of proof for large tech firms to demonstrate that they are not disruptive of competition in the market could be considered absurd. It completely limits the

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[33] Streetmap.Eu Limited v Google Inc., Google Ireland Limited, Google UK Limited [2016] EWHC 253 (Ch), para 171.
[34] ibid, para 116.
[35] https://www.gov.uk/government/news/cma-to-investigate-loyalty-penalty-super-complaint.
[36] Ofcom, Qualitative research: Consumer engagement in fixed broadband, Executive Summary, 25th September 2019, para 3.5.2, https://www.ofcom.org.uk/__data/assets/pdf_file/0018/168210/qualitative-research-engagement-fixed-broadband.pdf; Financial Conduct Authority, General insurance pricing practices Interim Report, Market Study MS18/1.2 , October 2019, paras 3.15-3.18.

potential benefit of increased transparency that a digitalised market can have on the competitive process. The strict adherence to maintaining the current structure of the competitive process completely obscures the fact that these markets are not operating optimally for consumers, where a significant proportion of consumers find these new digital markets too inaccessible and difficult to understand. The inaccessibility of digital services is a motivation for the new regulation promoting increased transparency for online marketplaces[37] and the longstanding policy of making online services universally accessible.[38]

Conclusion

Therefore, to realise the actual benefits of tech firms entering the market, competition authorities must consider the improved accessibility of the new entrant's product and the subsequent benefit to competition in related markets through increased transparency. In such a case, a move by the European competition authorities to the American assessment of an objective justification of pro-competitive effects would prove to be ideal. As demonstrated in *Microsoft III*, when the Supreme Court allowed an exception from the per se illegality of tying for software platforms,[39] a generic application of traditional competition law principles is not suitable for markets that are unfamiliar and require careful scrutiny.

Nevertheless, it would also be worthwhile for the American strict adherence to the consumer welfare standard to soften. This would not only lead to a benefit from the increased savings and growth of a convergent policy, but would also afford better welfare protection for American consumers in a non-price competitive market. As such, the assessment of whether there exists pro-competitive conduct must take into account more criteria than simply price levels. To receive the full benefit of digitalisation and ensure true competition on the merits, the increased transparency measures imposed by European regulation must be incorporated into US policy.

[37] Online Intermediation Services Regulation (EU) 2019/1150, Recital 26.
[38] European Electronic Communications Code 2018/1972, Recital 226.
[39] United States v. Microsoft Corp., 253 F.3d (D.C. Cir. 2001) at 84.