DIGITAL PLATFORMS AND ANTITRUST

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Antitrust law[1] is in perpetual mutation which has a vocation to adapt itself to the best business practices in force. The considerable place taken by digital platforms in the numerical landscape is constantly growing. Otherwise, the technological advance of certain companies puts them in a strong position to exercise their own competition rules on the market, which are often contrary to the law in force within the European Union. It remains to be determined what characterizes these digital platforms and the anticompetitive aspects of their practices.

While there are numerous examples of digital platforms (Alphabet and its subsidiary Google, Meta, Netflix, Amazon, Apple…), it seems difficult to reach a satisfying definition. The recent Digital Services Act seems to fix this issue in those terms : "*a wide range of activities like online advertising, marketplaces, search engines, social networks, application distribution, etc. They are hosting service providers who, at the request of a service recipient, store and distribute information to the public. These platforms facilitate online interactions between users by implementing sophisticated information and communication technologies. Their business model is largely based on the valuation of the data generated by these interactions*"[2].

Some platforms have acquired an unprecedented economic weight that is only imperfectly captured by traditional tools for measuring market power. There are several reasons for this situation. The first one refers to the fact they hold a powerful lever to increase market power. It is due to the network effects attached to the activity of these platforms; the more users they gather, the more attractive they are and the more users they attract. The second factor is the possession of a set of data that contributes to the constant improvement of their services.

Plus, situations of lasting dominance arise from these very particular competitive dynamics and these situations are considered more difficult to contest than in the traditional economy setting. We are witnessing a "winner takes all" phenomenon, whereby the market leader tends to become a monopoly because this platform becomes the preferred partner of providers to access the users.

HOW TO GET AWAY WITH ANTITRUST LAW

Free access and abuse of a dominant position: two sides of the same coin? Competition law regulates and prohibits the practice of predation through prices for companies in a

[1] Having its roots in The Sherman Antitrust Act of 1890 antitrust law refers, among others, to a law that prevents companies from working together, to control prices unfairly or to create a monopoly.
[2] There is a requirement for an annual turnover under the draft legislation of EUR 6.5 billion over the last three financial years within the EEA (or a market capitalization of at least EUR 65 billion within the EEA) in at least three Member States; as well as a requirement for annual active business users.

dominant position. French law contains this action in article L.420-2 of the Commercial Code, while European Union law provides it in article 102 of the Treaty on the Functioning of the European Union.

It refers to a pricing practice, for a dominant operator, consisting in selling below its production costs in order to eliminate, weaken or discipline its competitors[3]. This infringement therefore punishes pricing policies that are so low that the product or service becomes free of charge in order to drive out the competition. An emblematic illustration of this practice can be found in the case *Google v. Bottin*. Bottin, a company in the field of cartography, accused Google and more particularly its Google Maps service of wanting to eliminate the competition through its free API offer. Thus, the underlying question of this case was to know if a free service was a form of predation or not.

On the basis of Article L.420-2 of the French Commercial Code, the Court of First Instance found that Google's behavior "*is clearly part of a general strategy of elimination*"[4]. Indeed, it considered that the free service only served to "*optimize in the long term the marketing of targeted advertisements*"[5], which would result in Google, once all its competitors had been ousted, monopolizing all the advertisers on the market.

However, case law has established the principle that predatory intent must be proven, which was not the case here, especially since the French Competitive Authority (ADLC) considers this theory unreasonable in view of the presence of other mapping APIs available in open source, which are very difficult to oust, even with a practice of predation. This raises questions about this need to prove ousting intent in a predatory practice. Indeed, for multi-product companies (such as Google), predation, and therefore intent to oust, is irrefutably presumed when the price is below the average avoidable cost[6]. However, in order to calculate this average avoidable cost, the entire activity is analyzed. In this case, it was the entire mapping activity, free and paid, of Google Maps that was the subject of this analysis. With these parameters, the twenty ADLC's tests concluded in favor of the digital giant.

The relevance of such an analysis is well illustrated by an analogy. For example, when small bookstores get squeezed out by Amazon's free shipping policy with no minimum purchase threshold, would it make sense to analyze free shipping and Prime together?

Such a calculation process allows these large digital platforms to engage themselves to practice a predatory policy, because they know that they will be covered by this global analysis of their activities, and can lead them to greater, more insidious abuses, which some people call "*manipulation of gratuitousness*"[7].

Google, a company faithful to this kind of litigation, has given us the opportunity to witness a representation of this notion in 2017 and 2021. Indeed, the European Commission

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[3] ADLC, Decision No. 04-D-17 of May 11, 2004 concerning the referral and the request for interim measures submitted by AOL France SNC and AOL Europe SA.
[4] Judgment of the Commercial Court of Paris n° 2009061231 of January 31, 2012.
[5] Ibid.
[6] Average costs that could have been avoided if the company had not produced an additional unit.
[7] M. BEHAR TOUCHAIS (dir.), L'effectivité du droit face à la puissance des géants de l'Internet, vol. 2, 2016, IRJS, Paris.

recognized, in a 2017 "*Google Shopping*" case, Google's abuse of its dominant position, notably by favoring its own product comparison over competing product comparison sites. The firm has appealed this decision which fined Google more than €2 billion before the European Union Tribunal[8].

The Tribunal, in view of "*the importance of the traffic generated by Google's general search engine for comparison shopping services*, *the behavior of users, who typically concentrate on the first few results* [and] *the large proportion of 'diverted' traffic in the traffic of comparison shopping service*"[9], considered that this practice was likely to lead to a weakening of competition on the market. Consequently, the exorbitant fine imposed by the Commission was maintained.

Nevertheless, in view of the multiplicity of convictions of these companies and the enormous means at their disposal, it seems likely that these fines are only an "island of loss in an ocean of profit".

This abundance has been documented in a special report from the European Court of Auditors[10], which counts, over the last 10 years, an increase in mergers of about 40%, as well as the emergence of new digital markets has seriously complicated the application of competition rules. The Court also states that digital platforms no longer compete "in" a market but "for" a market, which translates into the policy "winner takes all".

It is important to mention that the role of the great data crossroads that these digital platforms are, gives them the red carpet for numerous practices that restrict competition. This is the case of Google or Microsoft (Bing) through the role of gatekeeper that makes smaller search engines completely dependent on the first two, which often have contractual agreements with these gatekeepers, meaning that they are dependent not only with search results but also with ads that appear at the top of search results pages.

Moreover, large digital platforms are not lacking in imagination when it comes to anticompetitive practices. Apple, which the French Competition Authority has found that its practices had the effect of undermining intra-brand competition and at the same time evicting certain distributors, notably through economic dependence, a practice that has not been the subject of many decisions, which makes the case all the more novel. The abuse of economic position orchestrated by Apple discriminated between Apple premium resellers (APRs) tied to the exclusive sale of Apple products and the newly created Apple stores. The APRs suffered from stock-outs, which was not the case for the Apple Stores.

FILLING THE GAP BETWEEN NEW REGULATIONS AND NEW PRACTICES

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[8] Judgment of the General Court (Ninth Chamber, Extended Composition), 10 November 2021, In case T-612/17 Google and Alphabet v. Commission.

[9] European Union Tribunal, PRESS RELEASE No. 197/21, Luxembourg, 10 November 2021.

[10] European Court of Auditors, The Commission's EU merger control and antitrust proceedings: a need to scale up market oversight, Special report, 2020, p. 16.

One of the major issues for competition authorities has been to determine when to intervene in the face of the exponential growth of the largest digital platforms. The United States, from a liberal perspective, has seen fit to let big champions emerge freely under the name of GAFAM. Today, the European Union suffers from a lack of timing which leads it to be dependent and see its digital sovereignty in jeopardy. Although innovative and benefiting many users, digital platforms are not exempt from competition law. However, their drastic evolution in recent years has undermined the application of this law, which is why the Digital Markets Act is at the heart of the discussions, as it would have the ambition to modernize the ways of implementing the measures applicable to these Internet giants in order to align with their evolutionary perspectives.

The Furman[11] and Crémer[12] reports raise the main issues concerning antitrust in the digital market. On this topic both the experts plead for the implementation of a kind of precautionary principle: Even a significant doubt about the harmfulness of a behavior or a concentration should lead, in very specific circumstances and when the possible damage is particularly serious, to action of the regulator rather than its inaction.

These reports also refer to other measures able to detect anticompetitive behavior. The Crémer report refers to the need to adapt the tests used to establish the anticompetitive nature of certain unilateral practices, while the Furman report encourages the introduction of new *ex-ante* regulatory tools and institutional changes and suggests the renovation of merger control to use it as a market regulation tool.

The main proposal of the Furman report is based on the porous border between merger law and killer acquisitions which refers to the purchase of young and innovative companies that could eventually represent a competitive threat by the giants of the digital economy. These transactions present difficulties, as they involve targets whose activity in terms of revenues is too low to cross the notification threshold[13].

The report recalls the test that the Competition and Markets Authority (CMA) must apply when it intends to block a merger, namely that it must demonstrate that harm to competition is more likely than not. This test would prevent the CMA from dealing effectively with certain mergers that could eliminate a major source of competition for powerful operators[14].

Among the existing tools, precautionary measures are generally mentioned. It allows an authority to take urgent measures necessary to restore a competitive situation on the basis of a finding of infringement. It has also been submitted that the commission should make use of

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[11] J. Furman, Unlocking digital competition: Report from the Digital Competition Expert Panel.
[12] J. Crémer, Competition policy for the digital era.
[13] M. Cousin, La régulation des plateformes digitales et les limites du droit de la concurrence, revue Lamy de la concurrence, n°89, 1er décembre 2019.
[14] For example see the Facebook/Instagram merge, authorized during the first phase by the Office of Fair Trading.

the power given to it by article 10 of Council Regulation (EC) No 1/2003 by issuing informal guidance on certain specific practices involving new issues.

Even if the toolbox of these authorities has continued to expand over time, their scope of action remains constrained by the texts they implement in terms of substance. The competition authority intervenes to prevent or put a stop to behavior or concentrations whose harmfulness or at least the risk that they pose to competition must be established. The debate on the adaptation of the tools of competition law thus leads to another, that on the establishment by law of principles of ex ante regulation[15].

Both Furman and Crémer reports reach the same conclusion: since the current tools of antitrust are too weak to control abuses of dominant positions, the need for a change is now greater than ever[16].

In particular, the DMA will have to deal with new issues such as the metaverse, which are becoming part of the legal debate and represent major advances in digital technologies. These issues will, in part, have to do with the reduction of competition by these metaverse platforms (such as Microsoft or Meta) which would be in a dominant position to dictate their own market conditions such as abusive royalties, abuse of economic dependence or the obligation to use dedicated cryptocurrency storage and exchange services. The concerns related to the metaverse are all the more real since Facebook, according to a report by the antitrust commission of the American Congress on the actions of GAFA, has bought nearly a dozen companies related to VR and machine learning over the period 2018-2020. In view of the competitive problems that could be reinforced by this type of practice, is the competition law ready?

CONCLUSION

The Digital Markets Act is avant-garde in that it breaks the codes of the classic competitive method. Indeed, by prohibiting certain behavior ex ante, whereas the traditional method evaluates anticompetitive behavior ex post, it marks a break with the traditional tools of regulation of competition. The Digital Markets Act sets up as a real arm of the sovereignty of the Union and avoids a dispossession of a new kind. Since 2015, this digital package has adapted competition law to the changing paradigms.

[15] M. Cousin, La régulation des plateformes digitales et les limites du droit de la concurrence, revue Lamy de la concurrence, n°89, 1er décembre 2019.
[16] M. Cousin, Concurrence dans l'économie digitale: à qui dit profiter le doute sur la nocivité d'un comportement ou d'une concentration ?, Revue LAMY de la Concurrence, n°83, 1er mai 2019.