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# How to make competition policy fit for the digital age?

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# How to make competition policy fit for the digital age?

**In 2019, many reports have been adopted or commissioned by antitrust authorities across the world to identify the new issues raised by the digital platforms and analyse how they could be dealt with by competition policy. What are your main takeaways from those reports? Do you see a consensus emerging among economists on the need to adapt competition policy?**

Jorge Padilla: Those reports suggest the existence of a broad consensus among economists and non-economists on a number of principles. First, contrary to what was argued for years, the emerging consensus is that competition policy has a role to play in winner-takes-all markets in order to ensure that dominant platforms are effectively disciplined by Schumpeterian innovation. Second, most practitioners believe that the costs of the type II errors, i.e., the costs of underenforcement, may be very high given that incumbents benefit from network effects. Third, they seem to agree that remedying anticompetitive behaviour in digital platform markets is a complex exercise and that cease and desist orders are unlikely to restore conditions of competition. Hence, *ex ante* regulation may be needed. Not everyone agrees, of course, but there is a growing majority of economists that subscribe to these propositions. The problem, in my opinion, is that as a result we may end up adopting horizontal regulations that treat all digital platforms equally, failing to reflect important differences in business models and market positions. It is important to focus intervention on those platforms which, due to their market power and business models, have the incentive and ability to behave against the public interest.

Jacques Crémer: I agree with basically everything that Jorge said; let me just add two additional points. First, the reports stress that the economics of the digital age are different. As the Stigler Center report puts it, markets are prone to tipping and "*the competitive process shifts from competition in the market to competition for the market*." This does not imply that competition policy has no role, but does imply that it must rethink its tools and that the law—at the minimum the case law—must be adapted. Second, the growing importance of data in the digital economy requires new thinking—should we target "excessive" accumulation of data by large platforms or simply abusive use? Should we, and how, enforce data sharing? Which issues should be treated by competition law, by specific data regulation or by privacy law? I should add that at the University of East Anglia, Sean Ennis and Amelia Fletcher have done a great service to the competition policy community by comparing at a fine level of detail the recommendations of the UK, Stigler Center and EU reports; see *Developing international perspectives on digital competition policy* on SSRN). They point out their similarities, but add that "*the reports exhibit notable differences in respect to their specific recommendations.*"

**In its new Digital Strategy adopted in February 2020, the European Commission announces a review of the fitness of the competition rules for the digital age. Could you give the three most important reforms that should be done by the Commission to improve the fitness of the rules?**

Jorge Padilla: First, I believe that we need to reconsider market definition. It is now a static notion that needs to be adapted to incorporate the dynamic competitive threats that platforms face from potential competitors. Most likely, this will lead to wider markets and may make it more difficult to establish dominance. But, on the other hand, it will facilitate intervention against killer acquisitions, since some platforms that may be regarded as complementary under a narrow market definition could be seen as competitors when a wide market (e.g. the market for attention) is defined. Secondly, I believe we may need to close an enforcement gap in Article 102 TFEU. Unlike in the US, EU law does not condemn unilateral actions by non-dominant players that attempt to monopolise markets anticompetitively. The problem is that non-dominant platforms may scale up very quickly and thus may achieve dominance in the blink of an eye using strategies that their competitors cannot replicate and/or contest. This is particularly problematic in the case of conglomerate platforms (i.e., firms operating multiple platforms) because they can engage in predatory strategies in markets where they are not present, taking advantage of their ability to recoup instantaneously through their other platforms where they possess some market power but cannot be regarded as dominant. Finally, I believe it is essential to reconsider the remedies imposed in platform markets: cease and desist orders have proved ineffectual and access remedies may not be able to restore conditions of competition when the market has already tipped. We thus need to reconsider the pros and cons of structural remedies.

Jacques Crémer: Let me preface my answer by stating that there is only so much that competition policy can do. It is a real problem that none of the large platforms which structure much of the access to information and goods in the world are European, and this is not due to anticompetitive behaviour by these platforms. We need rigorous thinking, effective action and political courage to tackle the lack of innovation in Europe and I find "Shaping Europe's digital future" weak in that regard.

> "We need to reconsider market definition. It is now a static notion that needs to be adapted to incorporate the dynamic competitive threats that platforms face from potential competitors."

To get back to the question, we should indeed reconsider market definition, but its importance should also be downgraded and replaced by a focus on the analysis of the competitive threats that large platforms face (or do not face!). Second, competition policy will not prevent the existence of large and dominant platforms. There may be relatively little to impose competition "for the market," that is ensuring that the dominant position of some of the large platforms is under threats from entrants. On the other hand, we should vigorously pursue policies that ensure that there is competition "on the market," that is to ensure that the ecosystems or the marketplaces that they manage are open. Finally, something should be done so that the decisions of competition authorities are taken much faster. This will require a combination of changes in their organisation and, maybe, greater reliance on regulation or on per se illegality.

**The Commission will also explore the need for "*ex ante* rules to ensure that markets characterised by large platforms with significant network effects acting as gatekeepers, remain fair and contestable." Do you think that such regulation is necessary to complement *ex post* competition policy?**

Jorge Padilla: Yes, I am in favour of *ex ante* regulation provided it has a subsidiary role. Like in the regulation of electronic communication services, it is essential that *ex ante* regulatory obligations should only be imposed where there is not effective competition, i.e., in markets where there are one or more undertakings with significant market power, and where competition law remedies are not sufficient to address the problem. For example, I believe that access remedies may have to be imposed in these industries in circumstances where the conditions of the so-called "exceptional circumstances test" laid out in *Bronner* or *Microsoft* fail to apply. This is because dominant platforms may be able to soften and/or eliminate competition in adjacent markets even in situations where access to them is not indispensable to compete in the short term but where access to them is crucial to reach a critical mass and, hence, be able to compete effectively in the long term.

> "There seems to be an emerging consensus that remedying anticompetitive behaviour in digital platform markets is a complex exercise and that cease and desist orders are unlikely to restore conditions of competition. Hence, *ex ante* regulation may be needed."

Jacques Crémer: Indeed, *ex ante* regulation should be simple and fast. However, I have seen very little precise thinking about how it would be done, by which type of agency(ies), with what type of power, what type of mandate and what type of incentives. How would they relate to other regulatory agencies or regulations/ laws which already have a long history (consumer law, contract law, labour law) or are being developed as a

consequence of digitalisation (data protection, privacy)? From the viewpoint of an economist, a difficulty is that there has been very little research in economics of regulation for the last twenty-five years—it was quite an active field in the 1990s. We urgently need more theoretical and empirical research to provide guidance on the design of regulatory bodies.I would nuance Jorge's statements about regulation focussed only on dominant firms. It is easier to enforce general regulations and there are some regulations which could be usefully imposed across the board—I am thinking of areas such as transparency regulations: for instance, it would make the market more competitive if platforms had to divulge when their rankings are influenced by side payments, and there is no reason not to impose this requirement on smaller platforms also.

**In that regard, how do you assess the "double mandate" of the Executive Vice-President Vestager combining antitrust and regulatory powers?**

Jorge Padilla: I am not in favour or against. As former Chinese leader Deng Xiaoping said, "[i]*t doesn't matter whether the cat is black or white, as long as it catches mice.*" There are clear advantages in coordinating different policy instruments under the same leadership. And yet economic theory suggests that the existence of two separate agencies may be more likely to correct type II errors (insufficient intervention), which are the sort of errors that motivate the current call for reform.

"The focus of the reform should be placed on the control of the unilateral conduct of firms operating platform businesses, especially those whose business models involve the sequential entry and domination of adjacent platform markets."

Jacques Crémer: I was very excited when I saw that Commissioner Vestager was put in charge of the political priority "Europe Fit for the Digital Age." The problem is not so much whether one person has both antitrust and regulatory powers, but to have a well-defined procedure for coordination of policies which impact the digital economy. For instance, it is clear that labour law has to be adapted to the growing importance of the gig economy and that this should be done in a way that promotes not only fair and efficient labour markets but also a vibrant market for new forms of labour. I was hoping that Commissioner Vestager would somewhat be in charge of ensuring this coordination. Alas, her mission letter was somewhat disappointing in this regard, as it provides her a list of very specific areas to tackle rather than defining a broad area of competence. I hope that the practice will be better.

**To be more specific, there is now a debate in many European countries on the criteria to identify the digital platforms which may justify strengthened supervision by antitrust and/or regulatory agencies. The Furman Report in the UK proposes the "significant market status," the French telecommunications regulation (Arcep) proposes the "systemic platform" while the 10th amendment of the German Competition Law proposes the concept of "paramount importance." How do you view those proposals? What could be a relevant threshold?**

Jorge Padilla: Frankly, I believe we should not be obsessed with labels. The focus of the reform should be placed on the control of the unilateral conduct of firms operating platform businesses benefiting from network effects, and especially on those whose business models involve the sequential entry and domination of adjacent platform markets as a way to entrench their dominance in all markets where they operate. I am particularly concerned about conglomerate platforms, because their wide portfolios make it virtually impossible to challenge them in any of the markets in which they operate.

Jacques Crémer: Again, I basically agree with Jorge. Let me just comment on the relevant threshold. We know very little about the link between "market share" and dominance, in the sense of having "*the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers.*" We discussed tipping earlier, but some markets with network effects seem not be subject to tipping. For instance, in its investigation of the acquisition of GitHub by Microsoft, the Commission, to my mind correctly, estimated that, despite the fact that there are network effects and despite the fact that GitHub had a market share above 40%, "*it is easy for developers to switch hosting platform*." The role of competitive analysis as opposed to the determination of set thresholds is paramount.

**In terms of anticompetitive practices, the recent cases and reports revolve mainly around the following behaviours: discrimination and self-preferencing; access to key innovation capabilities, in particular data; bundling and envelopment; and big tech acquisitions. Are the current competition economics methodologies and tools fitted to deal with those behaviours?**

Jorge Padilla: Broadly speaking, yes. And yet the devil is in the details and those details are missing in many of our theories. Thus, further theoretical and empirical research is needed to fine-tune our policies. For example, in my opinion, we have not clearly established when self-preferencing is really a problem as a matter of economics. Under which circumstances it is welfare reducing to favour a subsidiary? Are those circumstances different in digital markets? Why are we concerned about self-preferencing by platforms but do not object to the use of private labels by brick-and-mortar retailers? I am not arguing that intervention should be delayed until we have pinned down all details. After all, we are still debating about the economics of loyalty rebates and that has not stopped the Commission from intervening in a number of rebates cases. I am simply stating that we should continue improving our understanding of these markets and of the different

business models adopted by digital platforms and refine our theories of harm so that the pendulum does not swing excessively from underenforcement to overenforcement.

> "There still are lots of work to be done to better understand the economics of the digital world. In the meantime, all involved, lawyers, economists, authorities, firms, will make mistakes, but it would be a worse mistake to do nothing."

Jacques Crémer: Let me explain why I do not like answering questions of the type "Are current competition policy/economics/law tools/practices well fit to deal with the digital economy?" If we answer yes, are we saying that nothing needs to be changed? This is clearly not the case, as our American colleagues who complain about the weight of precedents keep reminding us. If one answers no, are we saying that we cannot enforce competition law until we have better tools? The best we can honestly say is that the tools and methods that we have enable us to do some things, but that there still are lots of work to be done to better understand the economics of the digital world. In the meantime, all involved, lawyers, economists, authorities, firms, will make mistakes, but it would be a worse mistake to do nothing.

**Regarding remedies design, several commentators recommend a process which is, on the one hand, more participatory and, on the other hand, more experimental. Do you agree with those suggestions? How could they be implemented in practice?**

Jorge Padilla: In my experience, no remedy will ever command the support of all parties involved. Dominant firms often complain that the remedies imposed unduly interfere with their business models and, more precisely, with their ability and incentive to engage in disruptive innovation. They typically regard all remedies as disproportionate. On the other hand, complainants complain about the timidity of the remedies adopted by the competition authorities. They claim those remedies are insufficient to restore the conditions of competition that prevailed prior to the abuse. This problem is unlikely to be resolved by making the remedy design process more participatory, even if I believe there is merit in consulting widely about remedy proposals. In my opinion, what we need is to adopt "contingent remedy designs." That is, remedy designs which may unfold in different ways over time depending on whether effective competition is restored. These remedies could be structured in stages. Stage 1 remedies can be relatively simple. No further remedies will be imposed if stage 1 remedies deliver the right outcomes but if, on the contrary, they fail to achieve their goals, then stage 2 remedies will be triggered, and so on and so forth. Stage N remedies may involve structural divestments. I believe these dynamic remedy designs could achieve much more than the current static designs, where agencies bet on their ingenuity and put all their eggs in one basket. On the one hand, the remedy designs I propose are much more flexible. On the other, they can be structured so that they incentivise dominant firms to comply with them from the outset (thus avoiding the more and more draconian remedies of later stages).

> "We need to adopt "contingent remedy designs", that is remedy designs which may unfold in different ways over time depending on whether effective competition is restored."

Jacques Crémer: Jorge has more experience than I do on these matters, so I will defer to him. Let me just make one extra point. Speed is often of the essence. There are practices which could kill competition fast, but whose prohibition would at most marginally hurt consumer welfare. They need to be stopped immediately. As many of the reports discuss, we need to change the calculus when there is uncertainty, and this is especially the case when remedies would be ineffective if applied too late.

**There is now a debate on the burden of proof and the establishment of presumption, in particular in case of big tech acquisitions. Do you think that, for some acquisitions, a rebuttal presumption of anticompetitive effects should be established? If yes, for which reasons and at which conditions?**

Jorge Padilla: Many economists believe that all horizontal mergers, whether they involve big tech platforms and irrespective of the industry, should be banned unless the merging parties can show efficiencies. I disagree because I believe that in many instances the alternative to a merger is not the status quo but a less efficient form of exit, and also because start-ups may find it easier to enter markets if they anticipate that they may be acquired by incumbents with the ability to scale them up in case their ideas prove successful. In any event, if the burden of proof is reversed, so that only mergers that can be proved to be efficient will be cleared, then we need to reconsider the standard of proof regarding efficiencies. Currently, when efficiencies are assessed only after the merger is regarded as otherwise anticompetitive, the standard of proof for efficiencies is very stringent: efficiencies must be material and the merger must be indispensable to their achievement. I am not sure that this is the right standard of proof if the burden of proof is reversed. Would we prohibit a merger that produces efficiencies because we believe the efficiencies could be achieved in a different way based only on a presumption of anticompetitive effects? It seems unreasonable, especially because it is not clear to me whether we can presume that those supposed anticompetitive effects will be equally significant irrespective of the economic context where the transaction takes place.

> "If the burden of proof is reversed, so that only mergers that can be proved to be efficient will be cleared, then we need to reconsider the standard of proof regarding efficiencies."

Jacques Crémer: Let me pick up on the issue of burden of proof in general. In our report, Y.-A. de Montjoye, H. Schweitzer and I call for a reversal of the burden of proof for a certain number of practices. Some of the most thoughtful critics of this proposal point out that this requires lots of discipline from the competition authorities, especially in Europe, where they have more power. I stand by our proposals, but if they are accepted, competition authorities need to make sure that they put in tools and maybe specialised internal teams to give a fair hearing to the arguments of the parties. It is very difficult to be both prosecutor and judge and even harder when you have to decide whether the "accused" is convincing in its rebuttals of your argument.

Jorge Padilla and Jacques Crémer: We would like to end by thanking Alexandre de Steel for his challenging questions and for encouraging us to clarify our answers. ■

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