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CONCURRENCES LAW & ECONOMICS WEBINARS
#1 Reviewing the role of technology players: Essential facilities or evolving business models

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Bill Batchelor

We have seen consultations launched this week for proposed ex-ante regulation of platforms and a new "competition tool", by which the Commission would be empowered to investigate and impose regulatory obligations across an industry without needing to demonstrate illegal conduct under Article 101 or 102. One of the consultation options for the latter notes that it may be specifically limited to the digital sector. It may be noted that last year's platform regulation on business to business practices has not yet come into force.

Regulators and policymakers are positing new concepts (digital "gatekeepers", "systemic" platforms) which are not antitrust terms of art. It is unclear how these concepts may fit with the established case law, for example, in relation to essential facilities (if indeed, essential facilities are appropriate at all in this context). It is important to understand how any new concepts or tests may be formulated in accordance with a justiciable legal framework.

We similarly see concerns expressed about markets which may "tip" or in other words, where consumers find value in a critical mass of connections, for example between buyers and sellers. But is it appropriate to be concerned by the possibility of a market "tipping"? After all, the essence of the internet is to join individuals with common interests across the globe. This is one reason why it is so highly valued by consumers. The value on The Internet, too, has the power to lower barriers costs for swift adoption of new business models and make it is easy to switch from one platform to another or to join multiple groups. It is important to understand how we should take account the efficiencies generated for consumers through any network benefits, and whether we should be concerned about these effects in digital markets if switching is easy and multihoming common. In relation to the proposed new competition tool, this seems similar to the UK market investigation power. What would be the benefits of a market investigation and sectoral remediation power and how would an administrable "trigger" be articulated? Is there a reason to address specifically digital markets? The UK market investigation cases might suggest there is nothing

specific about digital markets. Indeed, the history of UK market investigations has seen it look at a wide range of issues, many of which – to our present-day eyes – may seem rather quixotic, regulating matters such as breakfast cereal, breweries and pubs, perfume advertising, car dealerships and "white goods". Given the range of sectors, and variety of quasi-regulatory outcomes that might flow from a market investigation, is this better be left to the EU legislator to gain the input of all stakeholders and policy considerations, rather than considering only competition considerations?

"THE UK MARKET INVESTIGATION CASES MIGHT SUGGEST THERE IS NOTHING SPECIFIC ABOUT DIGITAL MARKETS."
BILL BATCHELOR

Nicholas Banasevic

With a rapidly evolving technological and economic backdrop, do antitrust rules need to be adapted for purpose in this area?

The criticisms of antitrust case enforcement are not new. More recent criticisms question the ability of antitrust to deal with "new phenomena" (e.g. two-sided markets, network effects or data), and of a potential need for different tools or more than antitrust (e.g. systemic or policy regulations).

Are hi-tech markets different or unique? This sector is not the only one where innovation occurs. Hi-tech products (e.g. search engines, operating systems, eBooks, computer chips, smartphones etc.) do not all have similar characteristics. Are these phenomena new (e.g. two-sided markets, free products, network effects)?

There may be more prevalence of network effects leading to lock-in, switching costs and the antitrust vigilance. Against this backdrop, the evidence and the harm of a specific practice still need to be assessed on a case-by-case basis.

What is the role of antitrust in these markets, individual case enforcement, regulation and legislation? What is the meaning of "effects" under Articles 101 and 102?

As regards individual case enforcement, antitrust has generally been able to analyse the analytical framework of two-sided markets, network effects, free products, the role of data etc., but those are not in themselves new phenomena, although the intensity and importance of data may be more important now than in the past.

Case enforcement is not the answer to everything as it deals with issues on a case by case basis. Systemic issues are better dealt with through potential regulation (e.g. a concise list of clear-cut obligations and prohibitions).

Individual case enforcement should, of course, be, substantively, analytically, and procedurally, as effective and timely as possible. What do we mean by "effects"? What is the standard of proof? We want proactive and vigorous antitrust enforcement in individual cases. Beyond that, the potential new competition tool could deal with structural competition issues across markets. There is also the potential idea of ex-ante policy regulation for systemic issues where antitrust is not best-suited.

As for the status of a gatekeeper, it depends on whether we think about this from the perspective of potential regulation or individual case enforcement. In the public consultation on possible regulation of digital platforms, there is a legitimate question on whether and how this should be considered. In individual case enforcement, whether a company is dominant needs to be determined on the basis of the characteristics of the market. The label in that context is a bit less relevant, but when you get into the facts, this may have an impact on the analysis. It is also relevant legally if we are dealing with essential facilities. However, what matters is the specifics of the facts in the market. Regarding the question of tipping, we recognise the benefits that platforms can and do bring to markets and consumers. The broader concern is nevertheless there because of the potential harm to choice and innovation that can

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occur as a result of certain conducts. In individual competition cases, network effects, if they occur, are generally an evidential fact taken into account in the analysis of dominance.

As for market investigations, the Commission launched a public consultation a few days ago on a possible new competition tool. Based on our experiences and reflection, there is a concern that there are structural competition issues that cannot be addressed in an effective way through individual case enforcement.

Jorge Padilla

The debate about the role of competition policy dates back to the early 2000s when Microsoft's bundling strategy was thoroughly scrutinised on both sides of the Atlantic. At the time, many of us thought that antitrust intervention in high tech markets was likely to produce too many false convictions. First, because the sort of conduct that could be understood as anticompetitive could also have efficiency justifications. Secondly, because we sincerely believed that innovation would overcome any potential position of dominance. We thought the threat of entry would discipline incumbents regardless of their market shares. Others thought that intervention in such markets was warranted since there was a high risk that any anticompetitive conduct would quickly generate a monopoly because high tech markets are prone to tipping.

Since 2000 our understanding of competition in high tech markets has changed profoundly. Today, we are much less optimistic about the disciplinary role of potential competition. Increasing dominance is a common phenomenon in many high-tech markets; in those markets' incumbents have been able to entrench their positions of market power by creating barriers to entry and/or preying on actual and potential entrants. We understand competition in these markets much better than we did at the turn of the century, and therefore that we feel we are in a better position to distinguish between competitive and anticompetitive practices.

We are now much more concerned about type II errors than we were back then because intervention takes much more time than we expected and because the agencies are limited in their ability to remedy anticompetitive actions. It is hard to restore competition if the agencies can only request infringers to "cease and desist" and restorative remedies are not legally available. This is a problem in general but a much larger one in markets characterised by network effects and switching costs. This explains why most economists are much more open to intervention in these types of markets today than they were in the past.

Of course, none of this justifies the adoption of *per se* rules and caution should be exercised before adopting presumptions. We must look at the particular circumstances of each case because not all tech-markets are identical and also because there are different business models at play. In fact, software platforms, hardware platforms, online advertising platforms and marketplaces all have different incentives. Thus, one must look at the incentives resulting from different business models before deciding to intervene in a particular case. In conclusion, the debate today is not about whether intervention may be justified or not but about the type of remedies to be implemented.

Not every platform or two-sided business is necessarily a gatekeeper. Yet, I firmly believe that many platforms are gatekeepers because they control access to a large number of users. Gatekeepers have large installed customers bases and their customers face significant switching costs and/or shopping costs. Being a gatekeeper is not necessarily a problem if that position has been achieved through business, skill and industry or mere luck. Being a gatekeeper is typically a sign of having done things very well in terms of pricing structure and quality decisions. However, gatekeepers have a special responsibility not to engage in conduct that could cause a distortion of the competitive process and consumer harm. The actions of these companies may impact the competitive process in a way that is not necessarily aligned with consumers' interests. Therefore, agencies need to be watchful. Regarding tipping, many platforms do not tip. Tipping will not occur when products are highly differentiated or when multihoming is common. Market tipping is not a problem in itself. It may simply be the consequence of the efficiencies of the platform which comes to dominate the market and the dynamics and feedback effects that characterise

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platform that has achieved a monopoly position, that has benefitted from tipping, is nonetheless subject to potential competition, then perhaps we need not worry. Unfortunately, the evidence of the last 20 years indicates that once markets tip, gatekeepers are hardly ever disciplined by potential competition.

The analysis of potential competition requires assessing contestability by competitors employing exactly the same business models, but by other large platforms operating other business models. But this last possibility needs to be investigated carefully. The more distant those constraints are in terms of characteristics of the offerings etc, the less credible the competitive discipline imposed by the entrants will be. If incumbents are not disciplined by contestability, and there is evidence that innovation is less intense in some markets, we need to see if we can address that monopoly problem through ex-post intervention, or alternative requires recreating rivalry through ex-ante regulation, as we did in telecommunications.

Ingrid Vandenborre

The price might not be the key parameter for competition in tech markets. In order to assess the impact on consumer benefits, we look at other factors such as consumer choice and innovation. However, those cannot be assessed on a quantitative basis. We are not quite as clear on the criteria for intervention based on impact on innovation or consumer choice in tech markets as we cannot measure in quantitative terms what the impact on innovation or choice may be in the same way as we do for the price. There are many voices for more intervention and for more flexible standards of review because of that. In fact, some would propose that the focus should be on ensuring the competitive process can play, without being concerned about having to demonstrate proof of an anticompetitive impact on innovation or on consumer choice. However, focusing on the process as the goal in and of itself, risk not necessarily achieving the consumer benefits we are hoping for... It reminds me a bit of the discussion we have in the pay-for-delay cases: litigation is viewed as a means of competition and thus it is always preferable, without assessing the possible implications for consumer benefit. In both cases, we cannot reasonably predict the outcome, so we defer to the process.

Second, these markets move quickly. The CMA took the view that it would not be sufficient to assess the impact of a merger in the current state of competition – we have to take into account how competition will evolve going forward.

Third, one important element is the timeframe assessment of competitive effects. It may be important in tech markets to revisit or extend our time horizons in order to assess not only effects but also entry, the impact on choice and price. Impact on price may neutralize over time, and barriers to entry may be assessed differently if we take a longer time horizon. A competitive assessment should determine, not assume, the relevant time frame for determination of competitive impact.

It is difficult to measure what constitutes a gatekeeper element and whether companies are gatekeepers.

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The dominance criteria consist of quantifiable elements; we all historically have been looking at 35-40% as an indicative guide for dominance. There are no similar quantitative and objective criteria for gatekeeper status. That makes it difficult for companies to address such finding, or have it revisited over time.

Regarding tipping, we are now developing a sort of prospective analysis to prevent tipping effects altogether. It is not yet clear that every platform would bear a tipping risk. Indirectly, this creates a discussion around the burden of proof: this whole debate is trying to suggest that when you are a platform and there is a reason for a tipping effect, presumptions are a way of slightly pushing back towards the companies the burden of proof. They need to prove efficiencies to get away from the concern about potential tipping. It is important that in corollary with putting some of that dialogue around assuming tipping is a negative factor, there is at the same time dialogue around the efficiencies that the agencies will accept to assess in this context, and what criteria will be relevant to that assessment.