Shaping competition policy in the era of digitisation

European Commission – Call for contributions

Contribution on

Panel 2

DIGITAL PLATFORMS' MARKET POWER

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EXECUTIVE SUMMARY

The market power of certain digital platforms and a critical examination of their corporate policies have prompted lawmakers and the responsible authorities to call for a reform of the existing framework of competition law. Primarily, a tightening of competition law and stronger regulation are currently being discussed. The question is whether decision-makers will opt for a regulative grip on businesses that, in the first place, will harm European undertakings, or for a market-oriented policy that allows for competitive self-regulation of markets, innovation and sustainable development.

European businesses, unlike large data-driven single-firm operated tech platforms, often work together on a project-by-project basis, both horizontally and vertically, in order to achieve efficiencies. For manufacturers of goods and content and downstream technology companies, there is above all a lack of a level playing field when establishing a co-operation that could potentially create a competitive threat to market leading top dogs of the digital economy because each of those co-operations is exposed to considerable legal risks under today´s competition law regime. Under the current “Snowflake approach”, the mere fact of establishing a co-operation creates heavy risks of prosecution and litigation. This is in stark contrast to the justified criticism in economic literature that businesses are reticent on necessary co-operation from an economic perspective. In modern economies, non-co-operation may ultimately lead to non-competition.

A modern competition law framework with a market oriented approach could pose challenges for market-dominant businesses by being more open to co-operations that compete with such businesses and form innovative co-operative marketplaces of the future. More precisely, individual co-operation models that strengthen the competitiveness of the participants and in which the participants remain competitors in their markets (so-called "coopetition") can exercise effective competition *vis-à-vis* established monopolistic platforms. The competitive aim is not to fight monopolies with regulatory legislation but with market mechanisms. A precondition for this is a legal framework that allows for legal certainty and safety when structuring co-operations. This requires a diligent modernisation of substantive competition law as well as procedural law. Most notably, a modernised competition law framework should ensure adequacy in evaluation and procedures for co-operation, market dominance and mergers by introducing a more effects-based test under Art. 101 (1) TFEU and modernizing the current exemption rules under Art. 101 (3) TFEU for *ad-hoc* co-operations not containing hard-core restrictions.

Introduction

We very much appreciate the invitation by the European Commission to submit contributions from those stakeholders that are involved in or affected by the digitisation of the economy in preparation for the European Commission's conference on new challenges for competition law in the era of digitisation to be held on 17 January 2019. We would take the opportunity to submit our views on the future of digital platforms under European competition law.

Commissioner Vestager said in a speech on 18 September 2017 that being open to new ideas is especially important now because markets are going through enormous changes as a result of continuing technological developments. The Commissioner rightly pointed out the need for a new and innovative approach to market players. But equally, a new and innovate approach is necessary when it comes to a reform of competition law as the digital economy is based on a new way of thinking. Whether future competition law and enforcement is successful in ensuring the welfare of consumers and supporting Europe´s 2020 strategy for competitiveness and sustainable development will largely depend on whether it simply proposes new regulation as widely advocated, or whether it proposes a new framework that allows for simple but effective non-bureaucratic rules and supports free competition, innovation and disruption without negative regulatory spill-over effects. This is a crucial aspect because there is a danger that conceivable regulation will first and foremost affect European companies that are challenging existing platform operators. Stronger regulation with a view to US or Chinese companies will ultimately entail considerable bureaucratic and political costs to the European economy.

A. Importance of a reform of European competition law for the European industry in the era of digitisation and platform industries

The European industry is characterized by a diverse corporate landscape that occupies a leading position in the field of application-oriented research and efficient production of a large variety of goods and services. Companies often work together on a project-by-project basis, both horizontally and vertically, in order to achieve efficiencies. The aim here is not the monopolization of a market, but a robust market position based on technologically outstanding products and healthy corporate structures.

This traditional economic approach stands in stark contrast to the way the digital platform and data industry works and to its market objectives. This industry is based on the fastest and strongest possible company growth, network effects and scaling potential. Profitability considerations often play a subordinate role here. The strong market position, the monopolization of customer access and, ideally, the resulting high liquidity at some point, are regularly used for both horizontal and vertical integration of products and services (or their scaling), which also penetrates classic economic sectors such as vehicle technology or house technology ("leveraging"). The expansion of the market position is accompanied here by the

purchase of potential challengers, product bundling, the exploitation of a substantial data pool ("big data") which their (potential) competitors do not have, *de facto* standardization by a company (e.g. through market-dominating software or other technology) and a lack of interoperability of technical solutions, respectively log-in effects, as well as soothing effects for customers of marketplace solutions.

In order to enter new markets and efficiently compete with large international Internet giants, the European manufacturers and service providers regularly have to rely on co-operation, both horizontally and vertically. A functioning digitisation strategy for businesses and the development of their own platforms are essential to ensure the competitiveness of the European economy. Today's leading Internet companies have a wealth of data and platform solutions with unique and stable access to customers. At the same time, European competition law regularly poses a serious compliance risk for new co-operations of European businesses. This leads to a precautionary refrain from co-operative solutions and, as a result, to less competitiveness of European businesses as well as to less innovation and consumer benefit. For manufacturers of goods and content and downstream technology companies, there is above all a lack of a level playing field when establishing a co-operation that opens up a competitive threat to monopolists, because each of those co-operations is exposed to considerable legal risks. In effect, the current law becomes an additional barrier to competitiveness because, unlike monopolists, companies have to disprove mere presumptions of anti-competitiveness before setting up a co-operation. The mere fact of establishing a co-operation creates compliance risks because the dogma of the postulate of independent decision-making by undertakings ("Selbständigkeitspostulat")[1] automatically opens up room for investigations under competition law based on the presumption of a breach of competition law in cases of market-oriented collaboration – without any prior assessment of possible pro-competitive effects of the co-operation.[2]

This is in stark contrast to very much justified criticism in economic literature that businesses are reticent on economically necessary co-operation. In particular, more than ever before, "coopetition", i.e. the duality of co-operation and competition in markets, is required for the comprehensive use of information from the various digitisation initiatives; a concept that may not even fit into a dogmatic view of healthy competition that is characterized by a steady struggle for the better idea, better resources and singular customer access.[3] However, common standards, uniform platforms and, in part, common business models are the driving

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1 ECJ, 16.12.1975, C-40/73, Suiker Unie and Others v Commission, ECLI:EU:C:1975:174; *Bunte/Stancke*, Kartellrecht [Competition Law], 3rd Ed. 2016, p. 18 et seq.

2 *Bellamy/Child*, European Union Law of Competition, 7th Ed. 2013, 2.095. In para. 2.091 *Bellamy/Child* refers to exemptions of this rule that are regularly not met in co-operations that simply increase efficiencies (they refer, *inter alia*, to cases where one party is not able to act independently, for example by reason of capacity or know-how).

3 Very much to the point: *Wagner*, "Warum Deutschland bei Industrie 4.0-Themen die Nase vorne hat - und dennoch nicht gewinnen kann" ["Why Germany is ahead in industry 4.0 issues - but still cannot win"], manager magazin, 22.4.2016, www.manager-magazin.de.

forces behind the further development of digital business concepts and new co-operation models.[4] Encapsulated networks, non-disclosed standards and interfaces and the demand for proprietary platforms as an incentive to purchase further products are comparable to the desire to develop one's own connector in order to exclude competition from the customer relationship. This means that non co-operation may ultimately lead to non-competition.

Besides these difficulties with the current legal framework, factual application of competition law often leads to dilemmas when new business models and market requirements on the one hand lead to more transparent and efficient markets, but on the other hand also pose serious punishment risks.

B. Examples of current dilemma situations

There are many of examples where the traditional approach of competition law does not fit the modern era of digital and platform industries any more. We take the liberty of presenting only three arbitrarily chosen examples for a better visualization of our submission.

1. A large search engine manufacturer could use its map services and the transaction data from the analysis of mobile phone data to gain such a large advantage in software for autonomous driving that the technical backlog in vehicle construction could be compensated in the medium term. Any horizontal or vertical co-operation of the classic manufacturers in the field of data pooling and standard setting – while theoretically possibly permittable even under current law – would face serious legal challenges under administrative and civil law. Whether such co-operation is indeed permittable would be burdened with legal uncertainties (regarding competition law and data protection law) and an ex-post assessment by authorities and courts. A business judgment that takes into account significant (and possibly burned) investment costs and compliance risks may lead to the conclusion to better not seek for solutions independent from established platforms.

2. A large single-firm operated online sales platform may establish itself as a bottleneck between manufacturers and customers. This leads to multiple powers of the online sales platform because it efficiently controls access to customers and will, ultimately, also have control over the design and prices of products as it has superior knowledge of customers due to respective data access. Thus, manufacturers of consumer goods fear to loose customer contact on cost of monopolistic online sales platforms. Any co-operation of manufacturers, for example to establish a platform, respectively marketplace, that could compete established platforms – even if theoretically possibly permittable under current law – would face serious legal uncertainties regarding competition law and data protection law even if such co-

[4] *Wagner*, at the place indicated.

operation would lead to increased competition between participating undertakings as well as vis-à-vis established platforms.

3. Internet platforms, for example in the form of price-comparison and brokerage sites, may very well lead to increased market transparency and competition. Manufacturers and services providers factually have to submit competitive sensitive information, for example with regard to prices and capacities, to these platforms. Otherwise they would loose customer access and – ultimately – business. On the other hand, traditional competition law may judge the submission of such sensitive data or the (identifying) utilization of such internet public data for market research purposes as a breach of secrecy competition by a hub and spoke agreement. Another related problem are platform tools automatically adjusting prices or serve manufacturers with price recommendation based of data intelligence.

These are only three examples of dilemmas for European businesses when facing international competition in the digital economy. The examples illustrate that the traditional approach in competition law does not necessarily safeguard functioning competition anymore but, contrarily, may harm functioning competition of European businesses – in particular small and medium sized businesses.

C. Proposals for a modern substantive competition law framework in the era of digitisation and platform industries

A reform of competition law should take place with a broad view to a coherent and effective legal structure. A modern and effective system would ensure adequate assessment and procedures for co-operation, dominance and mergers and a level playing field for co-operating and market dominant businesses. This includes substantive as well as procedural competition law.

Single-firm operated platforms tend to form "natural monopolies", which will at best be replaced by new monopolies (Schumpeter´sche Monopolies).[5] The most popular approach on this problem is calling for more regulation and a break up of monopolists ("Hipster Antitrust"/"New Brandeisian School").[6] A modern competition law framework with a market oriented approach could face challenges for monopolists by being more open to co-operations that compete with such monopolies and form innovative marketplaces of the future. More

[5] *Evans/Schmalensee*, "The Industrial Organisation of Markets with Two-Sided Platforms", Competition Policy International, Vol.3, Nr. 1 (2007), S. 165; Background paper of the BKartA on the conference of the working group "Digitale Ökonomie – Internetplattformen zwischen Wettbewerbsrecht, Privatsphäre und Verbraucherschutz", S. 5 f.; *Haucap/Heimeshoff*, "Google, Facebook, Amazon, eBay: Is the Internet Driving Competition or Market Monopolisation?", DICE Discussion Paper No. 83, Jan. 2013, S. 4 f.

[6] See, most famously: *Khan*, "Amazon's Antitrust Paradox", The Yale Law Journal, 2017 (Vol. 126) No. 3, p. 712 et seqq.

precisely, individual co-operation models that strengthen the competitiveness of the participants and in which the participants remain competitors in their markets (so-called "coopetition" or "cooperation competition")[7] can exercise effective competition vis-à-vis established monopolistic platforms. The competitive aim is not to fight monopolies with regulatory legislation but with market mechanisms. A precondition for this is a legal framework that allows for legal certainty and safety when structuring co-operations. This requires a diligent modernization of substantive competition law as well as procedural law. In light of the main topic of this contribution and the respective panel, the following is limited to main aspects of a more feasible substantive competition law framework for co-operations in the field of Internet and other technology platforms.

I. Presumption of restriction of competition

According to the ECJ's established case law, a restriction of competition already exists if companies do not determine their behaviour in competition without contacting other companies.[8] The "competitive behaviour" already concerns, for example, the exchange of company information on technical developments, joint research, licensing, the design of products, the joint operation of platforms or any other joint offer of services or products. As a result, single undertakings can operate Internet platforms with market shares of more than 70% (or theoretically 100%) while a corresponding co-operation based platform challenging this dominant market player would possibly be subject to the ban on cartels. In any case, the partners to a co-operation would likely have to prove that the co-operation is exempt from the ban on cartels. However this carries a high risk of sanctions if an *ex post* examination decides that the exemption does not apply. Such a “Snowflake approach” with an extremely low substantial pick-up threshold is effectively a market entry barrier and has negative effects on innovation and competitiveness of European businesses.

Thus, a modernized competition law framework and accordingly modernized Horizontal Guidelines[9] should find that co-operations and ancillary information exchange that affect competitive parameters and lead to joint decision-making between companies do not necessarily harm competition and therefore do not fall within the scope of Art. 101 (1) TFEU to the extent the collaboration is indispensable to the project and there is no restriction of competition by object.

Modernizing the current policy on the exchange of information is particularly crucial. Especially in the "information age", knowledge about an object, a person or a fact and market intelligence in general is decisive for the technical and economic success of European businesses. Co-operation between companies requires the exchange of information.

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7 *Brandenburger/Nalebuff*, “Co-opetition”, 1996.

8 See footnote 1.

9 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ 2011 C 11, 14.1.2011.

Furthermore, the co-ordination of the industry with public authorities and politics requires an intensive exchange of information in order to be able to find appropriate solutions. Market dominant tech companies are less dependent on external information flow because they gain their market position through superior data pools. Rather, they benefit if their competitors are prevented from sharing their information and know-how for competition law reasons.

While the Commission also notes in its Horizontal Guidelines that an exchange of information, e.g. in the form of benchmarking, can also have pro-competitive effects, the current version of the Horizontal Guidelines and the practice of competition authorities and courts do not reflect this. Moreover, this practice creates considerable legal uncertainty and is unconvincing from a competition point of view. This concerns, for example, the exchange of information in technical co-operation as well as the question of the supply of information to Internet-based third-party, joint sales or comparison platforms. Concerns about the *ex post* qualification of a specific information exchange as *per se* restrictive of competition regularly lead to a lack of co-operation that could challenge market dominant tech companies. The strict approach currently adopted by enforcers and courts ultimately leads to a situation in which the anti-competitive and progress-inhibiting effects of this practice may outweigh any pro-competitive benefits of information exchange.

II. Restriction of competition by effect

Generally, the speed and uncertainty of new economic developments impede attempts to forecast competitive developments by market share assessments. Of course, competition law needs to ensure that sufficient competition will remain. However, in a digital world with random disruptive economic developments, the traditional market share test at least has reached its limits. More than ever, economics is an uncertain process of discovery. This therefore requires a modernized approach to the effects test that may include more elements from game theory and refer to a more realistic *de facto* approach on effects.

In case of a case-by-case or "*ad-hoc*" co-operation where businesses intend – *inter alia* – to establish joint platforms, R&D or standards, quantitative effects on markets should therefore focus on the business contributed to or affected by the co-operation, rather than on accumulated market share of the co-operation partners if there are no significant anti-competitive spill-over effects of the co-operation (e.g. price harmonization, service quality, capacities) on their stand-alone businesses.

III. Exemption rules

European competition law provides for exceptions to the general prohibition of co-operation. However, these exemptions are not sufficient to instigate pro-competitive activity in the digital economy. Since co-operation in the field of platform solutions primarily concern competitors, exemptions and guidance on horizontal co-operations are required.

The (few) existing block exemption regulations ("BERs") are not suitable to cover forms of co-operation that can institutionally challenge market dominant technology companies. There is, unlike with vertical co-operations,[10] no general exemption from co-operation between competitors (i.e. from "horizontal co-operation"). Horizontal co-operations have to be self-assessed in light of the general exemption rule of Art. 101 (3) TFEU and the Commissions´ Horizontal Guidelines.

The existing BERs only apply if the joint market share of the participating companies is low (R&D BER:[11] 25%, Technology Transfer BER:[12] 20%, Specialisation BER:[13] 20%). The market share does not refer to the business concerned, i.e. the market share of the co-operation itself, but to the combined market share of the co-operation partners. The market shares are similarly restrictive with regard to a possible exemption for vertical co-operation (Vertical BER: 30%, Technology Transfer BER: 30%). In addition, the admissibility of the co-operation always requires a number of further strict conditions to which a market dominant company in its market activity is not equally subject, even with market shares of above 70%. This is due to the fact that its competitive behaviour – of course – is not qualified as restrictive of competition *per se* – unlike co-operation between companies. A level playing field between market-strong enterprises and potential challengers is thus not supported by BERs.

In addition, there are substantial legal uncertainties with the application of the BERs in individual cases. The companies themselves have to assess *ex ante* whether the requirements of BERs are met and bear the burden of proof as well as the risks of fines, nullity and damages.

The risk is even greater if companies wish to make use of the individual exemption provision pursuant to Art. 101 (3) TFEU. Under this provision, agreements are exempt if they bring efficiency and consumer benefits, any restrictions are indispensable to achieving these benefits, and they do not give the parties the possibility of terminating remaining competition. It is difficult to evaluate whether and under what specific circumstances these conditions will be met, and authorities and courts do not need to carry out an *ex ante*

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[10] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010 L102/1, 23.4.2010; see also Guidelines on vertical restraints, OJ 2010 C131/01, 19.5.2010.

[11] Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, OJ L 335/36, 18.12.2010.

[12] Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements, OJ L 93/17, 28.3.2014.

[13] Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, OJ L 335/43, 18.12.2010.

evaluation, but can rely on an *ex post* evaluation of competitive effects when deciding about a later prohibition or on fines.

Under current competition law, it is not possible to request the competition authorities or other institutions to issue a decision on whether the exemption criteria are satisfied.[14] While market dominant companies are only exposed to risks if they abuse their market power through obstruction measures, refusal of access or other restrictions or exploitation practices, potential challengers are already exposed to legal risks under the current competition law regime when establishing co-operative challenges to those market dominant platforms.

A modern and effective system would ensure an adequacy in evaluation and procedures for co-operation, market dominance and mergers. It would be conceivable to establish the following framework for exemptions:

- A presumption of exemption under Art. 101 (3) TFEU for *ad-hoc* co-operations not containing hard-core restrictions.

- A general, "Umbrella"-, BER for horizontal agreements that, in the first place

    - do not contain hard-core restrictions (i.e. restrict competition by object[15]), like non-ancillary agreements on price, customers, geographic scope and capacities/output

    - do not restrict any participating undertaking from competing in the business of the co-operation unless this restriction is ancillary to the co-operation

    - ensure that each participating undertaking having given a reasonable period of notice has the right to withdraw from the co-operation, without incurring any unreasonable sanctions

    - ensure that sufficient competition will remain – a quantitative test should refer to the business contributed to the co-operation rather than on accumulated market shares of the co-operation partners.[16]

- A constitutive automatic exemption through a notification procedure. The exemption should be provided on the condition that the agreement in question is notified to the

[14] There is no need but also no possibility to apply for an exemption with competition authorities: 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, OJ L 1, 04.01.2003, p.1-25. Regulation (EC) No 1/2003 in its Art. 10 contains a consultation clause that has almost no practical relevance. Informal consultation is not the norm and provides limited legal certainty.

[15] ECJ, 13.12.2012, C-226/11, Expedia, ECLI:EU:C:2012:795; Commission, Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice, {C(2014) 4136 final}.

[16] See above, para C. II.

competition authority in accordance with a respectively amended procedural regulation and that the authority does not oppose such exemption within a period of three months.[17] If the authority does oppose exemption, the co-operation would be automatically prohibited *ex nunc*.[18]

The competition authorities would thus continue to be the guardians of functioning competition and could use their resources efficiently without structurally hindering competition for innovation. Such a solution would also be reasonable and justifiable because it is arguably less of a risk for competition and consumers than, for example merger clearances, because co-operations – unlike concentrations – can easily be dissolved again in case they prove to be anti-competitive in practice.[19]

Such a modern framework could ensure that co-operative and innovative platform solutions that pose an effective competitive challenge to large single-firm operated platforms can be established as new, open and competitive marketplaces that meet the expectations of customers with regard to efficiency and service in a digital economy.

D. Closing remarks

Again, we very much appreciate the opportunity to submit our views on the future of digital platforms under European competition law. A workable and sustainable economy, and European businesses and customers, require an efficient competition law and enforcement framework. We believe that it is reasonable and necessary to empower competition law for the demands of the digital economy. However, any future approach should be based on the primacy of solutions compliant to a free market economy. Solutions should be found that support private efforts for innovation and competitiveness and that keep markets open rather than to cause unpredictable spill-over effects by regulation.

We are very confident that both objectives, (1) keeping markets open and competitive, and (2) allowing businesses the broadest possible leeway for co-operation in the platform economy, can be achieved. Of course, all the foresaid deviates from current thinking patterns and therefore requires a fresh approach. Given the uncertainty and speed of today's economic developments, however, competition law should have the courage to take calculable risks and thereby promote the greatest possible opportunities for open, innovative and competitive markets.

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[17] In a certain analogy to Commission Regulation (EEC) No 2349/84 of 23 July 1984 on the application of Article 85 (3) of the Treaty to certain categories of patent licensing agreements, OJ L 219, 16.8.1984, p.15 et seqq.

[18] Would mean that there is no violation of the ban of cartels before the date of decision of the authority.

[19] *Stancke*, NZKart 2018, 285 (Editorial).