



Vodafone position paper: “Shaping competition policy in the era of digitisation”

Summary

Europe has an opportunity to harmonise and strengthen the actions of European and national competition authorities regarding the digital economy. The right competitive landscape will encourage and enable European businesses to succeed in the era of digitisation.

In order to ensure that the EU competition law regime plays its part in achieving these goals, Vodafone’s recommendations would be as follows:

- DG Comp should initiate a sector inquiry to assess platform-related competition concerns and should be as rigorous in its approach to digital markets as it is in all other areas.
- EU and national competition authorities (NCAs) should take a more proactive and dynamic approach to competition analysis. Competition authorities must analyse a wide range of evidence and factors into their analysis, including all aspects of platform business models and the impact of advertising, data and network effects.
- DG COMP should proactively collect data on an ongoing basis to enable it to identify and respond to potential competition concerns quickly. This data collection should be an ongoing requirement given the speed of change in digital markets to ensure that the digital sector becomes truly competitive and that Europe continues to benefit fully from further innovation and investment in this area.
- EU and national competition authorities should make greater use of interim measures to speed up ex post enforcement, thereby reducing the risk of irreversible harm/foreclosure.
- All remedies should be considered, including structural separation when less intrusive remedies are insufficient to ensure competitive markets. However, there also needs to be an acknowledgement that competition laws cannot provide all of the answers. Ex ante legislation has an important role to play in addressing unfair commercial practices and discrimination, particularly where there is a relationship of dependency between the business user and platform. Light touch, ex ante regulation is needed to address these imbalances and encourage fairness. The recently proposed Platform to Business regulation and New Deal for Consumers are a good starting point for such ex ante

regulation, focusing on fairness and transparency towards businesses and consumers interacting with such platforms.

Introduction

As a pan-European provider of communications, content and other digital services, with a large network of commercial and consumer relationships across Europe, Vodafone has a particularly good view of the competitive dynamics in Europe's digital economy. Vodafone has invested €81bn over the past five years. This comprises of €48bn to modernise our mobile and IT networks and deploy fixed fibre networks in Europe, €15bn on spectrum and licences to secure spectrum primarily for 4G, and €18bn in M&A including cable companies in Germany, Spain and the Netherlands¹². Vodafone supports both consumer and enterprise customers, the latter who range from small businesses to large multinational companies, including across new areas such as Internet of Things and Cloud & Security services. Vodafone is both a business user of platforms and platform provider. Our connectivity and digital services are essential services for consumers and key enablers for European businesses to succeed in the digital economy.

We therefore consider ourselves to be particularly well-placed to contribute to the ongoing debate as to how EU competition law and regulatory policy could be applied to better support competition and innovation in the rapidly evolving digital economy.

Competition and the Digital Single Market

European businesses need the right regulatory framework to support competition and innovation. However, regulation, both ex ante and ex post, is struggling to keep up with changing business models and the evolution of digital services.

ThinkYoung's report on *Transforming European Start-Ups into Global Leaders*³ states that:

"The European Union needs to ensure that Europe's firms remain competitive in a global economy that is increasingly penetrated by digitalisation. Former US start-ups such as Apple, Alphabet (Google), Facebook, and Amazon are now among the top ten publicly traded companies worldwide in terms of market capitalization. During the past year, two former start-ups based in China, Tencent and Alibaba, have also become part of the top ten. The emergence, scale-up process, and internationalization of these firms appear to have been the result of ecosystems that have

¹ https://www.vodafone.com/content/annualreport/annual_report18/downloads/Vodafone-full-annual-report-2018.pdf

² This excludes the planned acquisition of Liberty Global assets in Germany and Eastern Europe for a further €18.4billion

³ <http://digitaldirections.com/wp-content/uploads/2018/05/TY-REPORT-Final.pdf>

supported the birth, incubation and sustained growth of these start-ups. Of all start-ups valued at over US\$1bn, it is estimated that only 10% are based in the EU, and only 6% are based in EU-27 countries (that is, excluding the United Kingdom). This compares to 53% in the US and 23% in China. On the face of it, ecosystems that support innovation seem to be barely existent or deficient in Europe.”

The digital economy in particular is both innovative and disruptive. Digital services such as cloud, AI and IoT are transforming industries across Europe. For example, more than a million EU enterprises trade through online platforms in order to reach their customers. Online platforms can create more choice for consumers and allow businesses to reach a much wider set of customers without investing heavily in infrastructure.

As digital markets feature large economies of scale and many therefore have winner-takes-all dynamics, there are always likely to be a small number of very large digital platforms. Markets with these characteristics can tip, a process in which one firm conquers the entire market and drives developers and users away from the smaller rival platforms. Competition in the market becomes competition for the market.

The growth of platforms in particular has led to an increased dependency of businesses on those platforms, which have become gatekeepers to markets and consumers. The asymmetry between the relative market strength of a small number of large and powerful platforms and the myriad businesses (big and small) that now rely on those platforms to reach their customers has created new issues. In particular:

- As platforms benefit from both direct and indirect network effects, the bigger they are the more successful they become. Access to those platforms then becomes essential to participate in many digital markets.
- As platforms become the first point of entry to a market, businesses who are now reliant on those platforms start to lose their direct customer interface and ability to improve and personalise products to meet customers' needs. This is particularly an issue where the platform offers its own vertically integrated products or services in competition with the third party businesses using the platform.
- Digital incumbents create their own ecosystems with multiple services which interoperate and create barriers to switching. For example, once a customer has purchased a phone with a specific operating system, their choice in relation to a number of other services – maps, communications, storage, search – is immediately

reduced on the basis of what apps are pre-installed, prioritised or work with that operating system or app store installed on the phone. A customer wanting to switch from an iOS phone to Android would need to move all these services across – and many of those services are not interoperable.

- Digital platforms have an ability to collect, use and analyse large amounts of data in order to optimise the service and experience of each customer. This data aggregation capacity can have beneficial effects as it may allow a platform to improve the services and customer experience which it offers to customers (e.g. by making them more tailored). However, it may also reinforce the position of dominant platforms (or even allow platforms to leverage dominance into new markets) if competitors are unable to offer similar services (or services which offer other benefits to customers) because they cannot access or generate data themselves.
- Digital incumbents leverage their market power into new areas and services, which reduces the ability for new entrants to innovate and disrupt existing businesses. Often these services are used to support the core business of the platform (e.g. advertising, device sales) and are offered below cost or are funded by data.

Incumbents such as Google, Apple, Facebook, Amazon and Microsoft are now the largest public companies by market cap and getting bigger every quarter. Facebook and Google now control over 80% of all global digital advertising (excluding China)⁴ and still continue to gain share. Between them, Android and iOS accounted for 99 percent of all smartphone sales in 2016 and 2017 (see chart below). WhatsApp alone now generates nearly three times as much daily traffic as all SMS⁵. In such markets the risk is that the platform operator chooses winners and losers and steers the supply and demand in accordance with its own parameters – often to its own services.

Ability of platforms to leverage market power and rapidly foreclose competition in new markets

Another challenge is the way in which platforms will leverage their data and user base to expand into new areas e.g. Uber's expansion into food delivery (Uber Eats). This both creates barriers to new entrants and enables platforms to use tying in order to overcome price constraints. More

⁴⁴ <https://www.ft.com/content/cf362186-d840-11e7-a039-c64b1c09b482>

⁵ <https://inform.tmforum.org/news/2017/01/margins-pressure-whatsapp-generates-three-times-daily-traffic-sms/>

attention needs to be addressed generally towards leveraging given that it can mask anticompetitive entry⁶.

How to preserve innovation through competition policy

Despite the best efforts of DG COMP and NCAs, the application of competition policy has not adapted quickly enough to the challenges posed by the behaviour of large digital platforms. It is well documented that multi-sided platforms present particular challenges to competition authorities because it is harder to apply the current tools and conventions of competition policy to them⁷. However, two-sided markets are not new (newspapers, commercial broadcasting, food retail etc.) and competition authorities have extensive experience in those markets.

In order to address these concerns, we would recommend the following:

More Proactive and Dynamic Competition Analysis:

Arguments over market definition can become a distraction in some competition cases. What is important is to assess the real and potential constraints faced by a platform both now and in the future. Competition authorities must analyse a wide range of evidence, to be able to assess multi-sided platforms, data and ad funded services and anti-competitive practices such as excluding or blocking competitors and the impact of big data and network effects. In looking at how to assess this wide range of evidence, authorities must recognise that these are moving targets as digital markets are evolving so quickly – just as new competitors and constraints can emerge, so existing competitors can disappear or be foreclosed and markets can tip to virtual monopoly if competition law enforcement is not agile enough. The challenge of using a rigid SSNIP test in multisided markets, where services are paid for via data is already well documented.

Thus, detailed research and monitoring of the sector is needed and so the Commission's initiative in this call for inputs is welcome. We also welcome the ongoing study to raise awareness about algorithms⁸ and the appointment of experts in the context of the Platform Observatory (although in Vodafone's view it would be more helpful if industry, as well as academic representatives, are included).

⁶ Choi and Jeon (2016) suggested is that anticompetitive tying and predation are interchangeable strategies.

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See https://www.bennettinstitute.cam.ac.uk/media/uploads/files/Practical_competition_policy_tools_for_digital_platforms.pdf

⁸ European Commission, policy web page: "Call for tender: Study to raise awareness about algorithms", 17 July 2017, available at <https://ec.europa.eu/digital-singlemarket/en/news/call-tender-study-raise-awareness-about-algorithms> [accessed 16 January 2018].

A similar approach has been taken in relation to other industries such as the food industry where there are parallels with the platforms economy. For example, European and national competition authorities have investigated and imposed sanctions for serious infringements of competition rules in food markets in more than 110 antitrust cases and reviewed close to 1300 merger cases. They are currently investigating about 60 further antitrust cases. In addition, the NCAs have also undertaken more than 100 monitoring actions to improve knowledge and to identify possible malfunctioning of food markets. As stated by the European Competition Network, “*these actions have shed light on structural and cyclical factors which constrain price formation and have revealed that certain food markets may face structural problems which can only be tackled by regulatory instruments other than the competition rules*”⁹. Given the criticality of digital markets to the future of Europe, similar monitoring and research should be implemented in the platform economy, looking particularly at advertising, data and network effects and how these can be leveraged to foreclose competition.

We would therefore strongly recommend that a platform sector inquiry, which would complement and build on the work previously done in the e-commerce inquiry. Europe has an opportunity to take a leading role here and demonstrating thought leadership globally, at a time when many countries outside Europe are also considering the same issues. While some of the NCAs in the EU have been particularly proactive in digital markets in recent years, in our view DG COMP would be best placed to carry out such an inquiry to ensure a coordinated approach.¹⁰

Faster action/enforcement: Despite the challenges of applying it in these new contexts, competition law is nevertheless still an essential tool both in terms of merger control and ex post antitrust enforcement. However, competition tools may be relatively slow to invoke and time consuming to implement. Here we support the approach recommended by the GSMA in their report, Resetting Competition Policy Frameworks for the Digital Ecosystem as set out below:

Recommendation 15: Adopt interim measures to speed up ex post enforcement and mitigate potential harm from anticompetitive conduct

Authorities need to address the concern that ex post enforcement can take too long in highly dynamic industries. Taking interim measures can speed up the ex post process and prevent

⁹ http://ec.europa.eu/competition/ecn/food_report_en.pdf

¹⁰ See the French Competition Authority (“FCA”) sector-specific inquiry into display online advertising <http://www.autoritedelaconcurrence.fr/pdf/avis/18a03.pdf>, the joint report of the FCA and the German Bundeskartellamt on Big Data, Australia’s competition watchdog is focusing on the potential anticompetitive effects of platforms such as Facebook and Google on media plurality, online advertising, and big data collection in its sweeping probe of the country’s digital marketplace, Germany’s Federal Cartel Office launched a wide-scale study of the country’s online advertising market in 2018, the UK Government has put together a panel of experts to review competition in the digital age.

ongoing or future harm. Authorities should review timeframes to ensure there is an appropriate balance between the speed of the competition proceedings and the quality of the investigation. This involves (i) prioritising urgent cases, (ii) enhancing data gathering and processing capabilities, (iii) making use of outside industry experts early on, (iv) using early settlements and commitments where appropriate and (v) ensuring a purposeful, streamlined appeal process¹¹

Balance between ex ante and ex post: Competition rules protect firms and consumers against anti-competitive behaviours by undertakings having market power but cannot not address fairness as a principle (as recognised by the competition authorities themselves¹²). In addition, the difficulty of establishing a theory of harm combined with a fear of retaliation can strongly discourage business users from bringing any competition claims. Where there is an imbalance in bargaining power especially over smaller, local providers, this can result in the imposition of unfair commercial terms or practices on business users of platforms (who often compete with vertically integrated services), which they have no choice but to accept. Ex ante regulation therefore has a useful role here. By addressing unfair commercial practices, ex ante regulation can act as a deterrent to prevent platforms from imposing such unfair practices and also give business users new ways to challenge such practices, which are less extreme than launching a full competition case. The recently proposed Platform to Business regulation and New Deal for Consumers are a good starting point for such ex ante regulation, focusing on fairness and transparency towards businesses and consumers interacting with such platforms. The advantage of ex ante EU regulation is also that it would bring a harmonised approach to the current fragmented national laws which attempt to address this area¹³.

Monitoring and Enforcement: In order to properly assess the current landscape, national competition authorities should be able to request and analyse data on an ongoing basis. A sector inquiry or market review of the platform sector is one method as set out above; another may be to address the imbalance in bargaining power and resulting unfair trading practices via ex ante regulation, together with a requirement for platforms to provide information on request to competition authorities to enable them to better assess the market. In their report on Internet Platforms and Non Discrimination, Jan Krämer, Daniel Schnurr and Alexandre de Streel recommend the imposing of a new obligation of transparency on platforms stating that “Data

¹¹ https://www.gsma.com/publicpolicy/wp-content/uploads/2016/10/GSMA_Resetting-Competition_Report_Oct-2016_60pp_WEBv2.pdf

¹² Commission Green Paper on unfair trading practices in the B2B food and non-food supply chain, COM (2013) 37, p. 10 ; Commission Services Impact Assessment for the Proposal for a Regulation on promoting fairness and transparency in P2B, SWD(2018) 138, p. 42 ; Report of the European Competition Network of May 2012 on competition law enforcement and market monitoring activities by European competition authorities in the food sector; Valletti (2018).

¹³ For full details of national laws addressing fairness and transparency in this area, please see <http://www.crid.be/pdf/public/8297.pdf>

collection should be done on a continuous basis in order to establish an empirical basis for quicker and better assessment and possibly enforcement of competition issues. Moreover, the simple fact that such information is collected and readily available could act as a “coercive regulatory device”. This may prevent unjustified discriminatory actions against content providers in the first place and foster effective competition between content providers on the platform in the long run.”¹⁴

Such data, when collected can be considered and analysed by the newly formed Platform Observatory, which should be fully funded and charged with analysing the platform markets and reviewing the benefits and harms on a static and dynamic basis. Given the speed of change in the digital economy, ongoing monitoring is essential.

¹⁴ http://www.cerre.eu/sites/cerre/files/171205_CERRE_PlatformNonDiscrimination_FinalReport.pdf