

Designing Intervention Standards for Digital Platforms

Alexandre de Streeel, University of Namur, CRIDS/NADI, CERRE

Peter Alexiadis, Kings College, Gibson Dunn & Crutcher



Commission Digital Strategy

- *Ongoing evaluation and review of the **fitness of EU competition rules** for the digital age (2020-2023) and launch of a sector inquiry (2020)*
- *Explore, in the context of the Digital Services Act package, **ex ante rules** to ensure that markets characterised by large platforms with significant network effects acting as gate-keepers, remain fair and contestable for innovators, businesses, and new market entrants (Q4 2020)*
- Communication from the Commission of 19 February 2020, Shaping Europe's digital future, COM(2020) 67, p.10

OUTLINE

1. Existing precedents
2. Adapting existing competition law standards
3. Using Complementary ex ante tools
4. Choices of remedies
5. Institutional design
6. Takeaways

1. EXISTING PRECEDENTS

Competition Law and beyond

- **Thresholds** for intervention
 - Special responsibility (Case 322/81 *Michelin I*)
 - Bottlenecks - Gatekeepers
 - Unavoidable trading partners
 - Economic dependency (in national and, increasingly, EU laws)
- Theories of **harm**
 - *Google Shopping* (self-preferencing/discrimination), *Google Android* (bundling), *Google AdSense* (exclusivity)
 - *Facebook Germany* (unfair trading practices)
 - *Amazon, Apple*



1. EXISTING PRECEDENTS

Economic Regulation for digital platforms

- **Asymmetric**

- *EECC*: SMP regime in telecoms using the “three criteria” test
 - High and non transitory entry barriers
 - No tendency towards competitive outcome
 - Inefficiency of competition law



- **Symmetric**

- *EECC*: Interoperability for number-independent ICS, CAS operators
- *Open Internet Regulation*: Net neutrality
- *P2B Regulation*: Transparency

1. EXISTING PRECEDENTS

Remedies: Participatory design

- Good faith **negotiations**
 - Art. 60 EECC for interconnection
 - Standard Essential Patents: licences on FRAND terms
- Voluntary **commitments**
 - In antitrust: art. 9 Reg. 1/2003
 - In regulation: art. 79 EECC



2. REFORMING COMPETITION LAW

Assessment of market power

- **Conglomerate effects**
 - “System” markets (Case T-427/08 *CEAHR*)
 - Links between markets (Merger analysis with conglomerate effects)
- **Potential competition**
 - *Horizontal Merger Guidelines, Case C-307/18 Generics UK*
 - Using the “Five forces” identified by Porter
- **Innovation**
 - Innovation markets (*Horizontal Cooperation Guidelines*), innovation spaces (*Dow/DuPont*)
 - Control of key capabilities: data, skills, risky and patient capital

2. REFORMING COMPETITION LAW

Theories of harm

- **Bundling** and envelopment strategies in ecosystems
- Refusal to **grant access** to key innovation capabilities
- Discrimination and **self-preferencing**
- **Violation of key normative regulatory principles**



3. COMPLEMENTARY TOOLS: THRESHOLD

- Furman et al.: **Significant Market Status**
 - Enduring market power over strategic bottleneck
- ARCEP: **Systemic** (structurantes)
 - Bottleneck
 - User (or turnover) threshold
 - Ecosystem
- 10th Amendment to German competition law: **Paramount significance**
 - Dominance on one or more markets
 - Vertical integration and activities on otherwise related markets
 - Access to resources in particular financial and data
 - Importance for third parties



3. COMPLEMENTARY TOOLS: THRESHOLD

<p>1. Market structure which is concentrated and non- contestable</p>	<ul style="list-style-type: none"> - Digital platforms - Inputs: barriers to entry, control over key innovation capabilities - Customers: single-homing or ineffective multi-homing 	<p><i>Priorities for antitrust</i></p>
<p>2. Platform is a digital gatekeeper, unavoidable trading partner</p>		
<p>3. Lack of effectiveness of competition law</p>	<ul style="list-style-type: none"> - Frequent or timely intervention required - Extensive compliance requirements 	<p><i>Ex ante competition law or “soft” regulation</i></p>

4. REMEDIES

- **Range:** Better behavioural than structural
 - **Access** to key capabilities and interoperability
 - Prohibition of anti-competitive **discrimination** and self-preferencing
 - Facilitation of consumer **switching**
- **Method:** Participatory
 - **Codes of Conduct**
 - Good faith **negotiation**



5. INSTITUTIONAL DESIGN

- **Strengthen competition law**
 - Update **guidance**: determination of market power and theory of harm (after EU case precedents delivered)
 - More reliance on **interim measures**
- **Extend** features of competition law
 - Market power investigation power
- Or add **“soft” regulation**
 - With strengthened coordination between national regulators

6. TAKEAWAYS

Competition law

ADAPT

- **Market power** determination
 - Ecosystems, potential competition, innovation
- **Theories of harm**
 - Leverage and conglomerate effects, access to key capabilities, discrimination
- **Remedies**
 - Access and interoperability, prohibition of anti-competitive discrimination, facilitation of consumer switching

STRENGTHEN

- Clearer rules
- Priorities: concentrated and non-contestable market structures, digital gatekeepers
- Interim measures

EXTEND

- Sectoral inquiries to become market investigations (with attendant regulatory-style remedies)

6. TAKEAWAYS

Possible complementary regulation

THRESHOLD

- Non-contestable market structure
- Digital gatekeepers
- Ineffectiveness of competition law

FIRM BEHAVIOUR AND REMEDIES

- Explore scope of participatory

INSTITUTIONAL DESIGN

- Strengthened cooperation between national regulators