Designing an EU Intervention Standard for Digital Platforms: Brief Comments

CERRE, 4 March 2020

Amelia Fletcher
Centre for Competition Policy, UEA
Digital Competition Expert Panel

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Introduction

- This paper enters a crowded landscape, and indeed provides a useful list of recent papers:
  - from UK, European Commission, Stigler Center in US; and also Benelux, Germany, Italy, Netherlands, Portugal, Australia, Japan and UNCTAD.
- Initial reflections: Really good to have a report that:
  - is more legally focussed, providing (as comprehensive as possible) legal support for views.
  - brings debate up to date, with great summary of key case precedents/policy developments
  - supports some earlier recommendations, while introducing some new ideas
- Reminder of key issue: We see several platform markets:
  - Which have 'tipped' to being highly concentrated, have created bottleneck power
  - Where this market power has been (or risks being) extended into related markets, and in some cases creating ecosystems of linked markets
  - And that this is seemingly long-term. ('Creative destruction' process can't be relied on)

Much agreement that dial needs resetting, but how?

- UK Report concluded that standard competition law does have a key role to play, but that this is not enough. Two main reasons:
  - *First,* some key drivers are inherent in the economics of these markets (Network effects, economies of scale and scope, and roles of data and consumer biases. Seen elsewhere but the confluence and strength of them in digital is different).
    - This mean could see tipping/leverage even without any 'strategic' firm behaviour which we might normally consider a contravention of antitrust law. As such, we need to be more proactive to promote competition than standard antitrust.
  - *Second*, concerns that *ex post* antitrust enforcement
    - takes too long, too backward looking and too narrowly focussed
    - to provide an effective forward-looking framework for competition, even allowing for deterrence effects, in these fast moving & highly tippy markets, given complexity of these markets and patchwork of different issues arising.

UK recommendation for a 'Digital Markets Unit' – not old-style utility but pro-competitive - with three key objectives

- A code of conduct for designated 'Strategic Market Status' platforms. Code would differ across markets, given their somewhat different issues, but based on a few over-arching core principles.
  - [Participative development required, and continuous revisiting to ensure flexibility.]

Then two data related. [NB Noting that data not rivalrous in use, designed to limit monopolisation of data, to enable competition on other dimensions.]

- Promotion of data mobility and interoperability, via open standards, to facilitate switching and multi-homing. Why?
- Promotion of 'data openness' – access to data where this is required to 'train' the AI underlying new and competing digital products, so allowing new competition and innovation to emerge. Obviously protecting privacy.

NB Not to prevent ecosystems but to promote competition *across* and *within* ecosystems.

EC-commissioned report (Crémer et al, 2019)

- Greater focus on what can be done under existing competition law, including:
  - Allowing for dominance to be found at below 40% market share if intermediation power
  - Reversing burden of proof in some cases, based on an error-cost framework, to make enforcement quicker and easier. (Self-preferencing" is discussed as a possible example).
- EC Report does not recommend the creation of an ex ante regulator, **but does** suggest a couple of duties that arguably come very close *to ex ante* regulation:
  - a responsibility for dominant platforms to ensure their rules do not impede free, undistorted and vigorous competition amongst platform users without objective justification; and
  - a duty on dominant platforms to ensure interoperability.
- It **does** recognise that ongoing data access is likely to require sector-specific regulation.
- It **does** recognise that regulation may be needed in the longer run where similar issues arise continuously and ongoing intervention is needed.

CERRE Report: Some support for earlier recommendations

- Need for greater focus on problematic digital practices, such as bundling/envelopment strategies, refusal to grant access, discrimination/self-preferencing. (Cf EC/US)
- Principles for intervention should be based on assessment of Type I/Type II error risk (cf EC/US).
  - Eg: Refusal to supply ***data*** should face a lower threshold than standard RTS. (Cf EC)
- Standard competition law does have a key role to play, but there is also a likely need for *ex ante* regulation. 'Bottleneck power' may be useful in targeting this. (cf UK/US – and to some extent EC).
- *Ex ante* regulation most likely to be needed in relation to interoperability, data mobility, data access. (cf UK/US – and to some extent EC)
- Dominance may be found where first 2 proposed criteria hold. That is:
  - Where (i) markets are highly concentrated and non-contestable and (ii) platforms are 'digital gatekeepers' which act as unavoidable trading partners. (cf EC – proposes dominance may be found below 40% share on basis of 'intermediation power')

CERRE Report: Introducing some new ideas

- Renewed emphasis on ‘special responsibility’, including this being stronger for ‘super-dominant’ firms. (Cf. UK Report reference to old EU dominance-based merger test)
- Market definition to be retained, but market power to be assessed by reference to conglomerate effects in linked markets (a little like Germany ’UPS’ test)
- Potential for competition assessment on basis of ‘innovation capabilities’ such as data, computing power, skills, patient capital (where inimitable, rare, valuable and non-substitutable).
- Poor compliance with normative regulation could constitute abuse. (Interesting. Re P2B?).
- New A102 guidance needed (cf NB UK proposal for rewrite of Merger Assessment Guidelines).
- Agnostic on institutions, but DGCompetition well-positioned, with additional powers (Cf UK/US)
- In particular, (as alternative to specific digital regulation), DGCompetition could be given UK-like market investigation power, with an ability to impose behavioural remedies.
- Also support participatory remedy design. (cf UK, which also recommends power to impose)

CERRE Report: Other comments

- Report does oppose some earlier recommendations:
  - No need for change in burden/legal standards (including interim measures). (Cf EC/US)
  - Regulatory threshold test should be onerous, like SMP. (Cf UK)
- A few areas where CERRE Report not as clear as might be (at least to this economist):
  - Unclear about distinction between greater use of 'special responsibility' and reversing burdens of proof. (Also, are digital platforms to be treated differently?)
  - Unclear about implications of giving greater weight to Type I/Type II errors (beyond SR and refusal to supply data)
  - How does special responsibility fit with 'competition on the merits' and the AEC test?
  - How would Criteria 3 apply where effectiveness of competition law is limited by timeliness/narrowness/retrospectiveness/remedy monitoring, not applicability? (Cf UK)

Final thoughts

- Overall, though, this is a really nice contribution, which provides a valuable reference point, builds on past reports and takes the debate forward very usefully.
- UK Report highlighted need for a global discussion around these issues, and for action to be coordinated on as trans-national a basis as possible.
  - CERRE and this report can clearly contribute
  - It will be very interesting to see the forthcoming EU consultation on its “Digital Services Act”.
- I also look forward to the rest of this afternoon’s discussion.

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