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Centre on Regulation in Europe

# EFFECTIVE REMEDIES FOR ANTI-COMPETITIVE INTERMEDIATION BIAS

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Improving network and digital industries regulation

# EFFECTIVE REMEDIES FOR ANTI-COMPETITIVE INTERMEDIATION BIAS

## PART 1



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# What is 'intermediation bias'?

- Many digital platforms engage in 'intermediation' to match offers to queries and enable transactions (search, booking, app store, e-commerce)
- Platforms generally have an incentive to suggest good matches to consumers and maximise surplus
- However, this **may** be distorted by...
  - Impediments to competition (behavioral biases, switching costs)
  - Differences in the relative profitability of offers
  - Paid prominence (under certain conditions) and
  - **Vertical integration**
- ....which may incentivise the platform to steer consumers' attention away from the 'best match'

# Detecting intermediation bias

- Distinguishing between 'unbiased' and 'biased' matches can be very difficult, even ex post
  - Incentives are complex
  - Ability can be cumulative result of incremental changes
  - Other factors (e.g. 'scale effect') may confuse picture
- Anti-competitive intermediation bias can only be established **on a case-by-case basis**
- We **presuppose** that anti-competitive intermediation bias has been established (as it has been in some significant EC cases and is under investigation in others)

# Sources of intermediation bias

## Factor-based mechanisms

- Ranking based on factors that are observable by the platform (e.g. organic search ranking)
- The factors and decision rules used to generate ranking are source of competitive difference and highly confidential
- SEOs help third parties improve performance, but own affiliates may have information advantage
- Factors may favour own affiliate offers over others of similar quality, or different factors may apply to affiliate offers

# Sources of 'intermediation bias'

## Payment-based mechanisms

- Ranking influenced by payments (money or data), often in auctions
- Invariably used in conjunction with factor-based mechanisms to give preference to high bids which are also a good match
- Own affiliates may have information advantage over third parties in bidding process, or may be able to outbid due to 'wooden dollars' advantage

# Remedying intermediation bias

- Intermediation bias can have adverse effects:
  - Poorer matches for users
  - Distortion of competition in the downstream market
  - Restriction of entry into intermediation market
- The focus of this study is how to remedy anti-competitive 'intermediation bias' whilst allowing the intermediation platform to continue to perform its core function
- Standard considerations apply: either eliminate incentive or constrain ability

# Structural separation

- Structural separation eliminates incentive, but (as Mrs Vestager notes):
  - Complex boundary issues (at divestiture and subsequently)
  - Complex legal processes
  - Potential efficiency (and competition) losses?
- **Don't ignore, but remedy of last resort**



# Remedies for factor-based mechanisms

- **Disclosure obligations**

- Many calls for 'transparency' in algorithms but
  - How to preserve investment in quality?
  - Will 'bias' be observable ex ante?

- **More work to be done and case yet to be made**

- **Specifying factors**

- Factors, or changes to factors, approved by public authority, but on what basis?
- Randomization: used in some circumstances (e.g. Microsoft IE) but ranking cannot be random

# Remedies for factor-based mechanisms

- **Quotas**
- Might/are used to assess whether changes to a factor-based mechanism remedies bias
  - What is an 'unbiased' allocation? (are fewer affiliate matches evidence of bias or lack of bias?)
  - Can be tested ex ante (simulations) or ex post
  - Likely to be contentious and protracted
  - Might be useful if trying to restore pre-abuse position

# Remedies for payment-based mechanisms

- Payment-based mechanisms already widely accepted today
  - 'Unbiased' auctions may be easier to assess than 'unbiased' factor-based rules
  - Outcomes determined by downstream participants rather than by regulator
    - However:
      - Rivals will object to paying for remediation
      - Addressing 'wooden dollars' issue via margin squeeze rules raises issues
        - Matching revenues and costs
        - Determining appropriate margins
  - **More work to be done – including experiments...**

# THE ROLE OF EXPERIMENTATION IN DESIGNING AND MONITORING THE IMPLEMENTATION OF REMEDIES

## PART 2



**Jan Krämer**

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# Experimentation on remedy design

- Neither factor- nor payment-based remedies easy for an external competent authority to specify ex ante
  - Complex, case-specific interactions
  - Risk of remedies being undermined or circumvented
- Platforms themselves will run multiple experiments to assess impact of possible remedies on outcomes ex ante
- Inherent information asymmetry on true effectiveness of given remedy
- Competent authorities should themselves be **actively involved** in this process, not rely on claims of platform or third parties or on quotas.

# An authority's active role in experimentation requires

- Relevant technical and industry expertise inside competent authority
- Access to all internal documents and data relating to experiments undertaken by the platform
- Ability to specify experiments to be undertaken (within limits)
- Lengthy engagement and monitoring, as assessments should also be undertaken ex post to assess predictions

# Advantages

- Can be used even in complex economic environments to identify causal effects
- Allows some pro-active testing of rules under a safe harbour arrangement, which would protect not only platforms, but also authorities.
- Experimental data gives firm objective and comprehensible arguments to refute requests that go beyond the intended scope or may turn out to be harmful to consumers.
- Potential conflicts could be resolved ex-ante, speeding up implementation

# Challenges

- Authorities could attain business-critical insights beyond those expected under competition investigation
- Tension between acquisition of sensitive data and need to be able to justify specific remedy implementation
- Experiments only well suited to study incremental changes, but not radical changes
- Experiments only informative on status quo, not on conditions that prevailed when anti-competitive conduct started
- Some experimentation costs involved (e.g., opportunity cost). But platforms frequently run experiments themselves.



# Implementation issues

- Establishing intermediation bias and remedying it could be undertaken by different authorities
  - E.g., remedies could be overseen by new digital agency
  - or existing regulator, working in co-operation with competition authority
- How long should remedy implementation be monitored?
- The case for ex ante regulation to prohibit rather than remedy intermediation bias


# Ex ante regulation

- Some of the tools that would be developed to remedy intermediation bias ex post would also be relevant to ex ante regulation:
  - Standard non-discrimination rules will not work given the core intermediation function but:
  - 'Sandboxes' or the sharing and assessment of experimental data and subsequent monitoring could allow platforms to seek approval
  - 'Safe harbours' for changes to factor-based or payment-based mechanisms before they are implemented
- The case for ex ante regulation to **prohibit** rather than **remedy** intermediation bias is a subject of further CERRE research

The logo consists of the word "cerre" in a lowercase, sans-serif font, centered within a white square. The background of the slide features abstract geometric shapes in various shades of blue, creating a modern, layered effect.

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