

TAKEAWAYS FROM THE CERRE EXECUTIVE SEMINAR - 8 MAY 2019

ASSESSING THE MARKET POWER OF DIGITAL PLATFORMS

BACKGROUND

On 8 May 2019, the Centre on Regulation in Europe (CERRE) organised a high-level seminar to present and debate with key stakeholders the findings of its latest report: *'Market Definition and Market Power in the Platform Economy'*.

With the rise of digital platforms and the natural tendency of markets involving platforms to become concentrated, competition authorities and courts are more frequently in a position to investigate and decide cases that involve platforms.

Authored by CERRE Research Fellow Martin Peitz (University of Mannheim, Department of Economics) and his colleague Jens-Uwe Franck (University of Mannheim, Department of Law), the report provides guidance on how to define markets and on how to assess market power when dealing with two-sided platforms.

More precisely, it shows that **European rules to assess market power in the platform economy are on the right track but require clarifications.**

The authors emphasise that in such complex environments, the ability to properly define and assess market power is essential to the effective application of competition law.

To debate these findings, CERRE gathered over 60 representatives from online platforms, telecom operators, device manufacturers and regulators, representatives from the European Commission's DG CNECT, DG COMP, DG GROW and DG MOVE, and other key stakeholders such as Member States' permanent representations to the EU.

The questions at the heart of the debate:

- ▶ How important is market definition as the first step of a competition investigation involving two-sided platforms?
- ▶ How significant are market shares as indicators of market power?
- ▶ What are alternative useful indicators of market power in markets involving two-sided platforms?
- ▶ In which way must the traditional factors to assess market power be adapted or supplemented to do justice to the particularities of platform markets?

Those questions were discussed between selected speakers within two panel discussions, one focusing on market definition, and the other on market power.

HOW TO DEFINE MARKETS IN THE PLATFORM ECONOMY?

On the importance of market definition as a first step of a competition investigation involving two-sided platforms, the main takeaway is that **there is no general consensus**. While some participants argued that it is not necessarily a *sine qua non* condition, others insisted that it should never be skipped. According to the former, we should not adopt a 'definition-first' type of approach, as this would entail that "if we don't get the first step (i.e. market definition) right, then we won't be able to apply the right theory of harm".

Things are more complicated than that in reality, they argued, and a competition investigation is more of a dialogue than a step by step process. As for the latter, their view was that market definition is not only a legal requi-



rement, but it also constitutes an institutional safeguard against misinterpretations.

Market definition must be interpreted in a way that makes it easy for courts to know if a decision is right or not, they added.

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All seemed to agree that **market definition in the platform economy is complex. National and European authorities need to invest substantial resources into investigations.**

As a result, analyses are laborious, time-consuming and complex to carry out for regulatory and competition authorities. It is also often complicated for case handlers to obtain all the relevant data they need for their investigations.

In addition, it was put forward that **the granularity of markets and the personalisation of services is only going to increase in the future, further adding to the complexity of case analyses.**

There also seemed to be a general agreement that, as put forward in the report, **a multi-market approach typically leads to better results** than a

single-market one, precisely because it allows authorities to assess demand-side substitution in a more transparent way.

Finally, most discussants seemed to agree with the point made in the report that **primary law does not need to be adapted, but that an amendment of the outdated guidance papers and the guidelines issued by the European Commission and other authorities would be desirable** to reflect recent developments in the platform economy.

The initiative of the Bundeskartellamt, which regularly communicates on its vision of market definition, was particularly commended. It would be good for the European Commission to follow this example, some stressed.

HOW IMPORTANT ARE MARKET SHARES FOR MARKET POWER AND WHAT ARE ALTERNATIVE INDICATORS?

In their report, Prof. Franck and Prof. Peitz argue that in platform contexts **market shares, considered in isolation, are not an adequate indicator of market power.**

In such cases, they explained, market shares are less apt to measure market power and should be considered in the given context: *"Even more than in traditional markets, market shares are only one out of a plurality of factors that may indicate market power"*. This view was not challenged by the discussants.

Possible additional indicators of market power that were cited during the seminar include:

- ▶ The number of exclusive deals a platform has (with the reserve that those could sometimes be misleading);
- ▶ The prominence of single-homing by platform users;
- ▶ Barriers to entry, including network effects when they give rise to barriers to entry.

This last point coincides with the authors' view that, when assessing market power, **barriers to entry deserve careful examination by competition authorities, as they are at the core of persistent market power.**

As they elaborate, *"the absence of successful entry attempts may be seen as an indication of market power.*

However, it must not be overlooked that entry threats may arise from firms offering different services, as long as they provide a new home for users' attention and needs."

In relation to this, some argued that **the most important barrier to entry for smaller firms are network effects.**

Following discussions on the pros and cons of these indicators, an important clarification was made: **no matter the indicator used, it is not enough to assess the dominant position of a company if taken individually.** To make a precise assessment, various indicators have to be combined.

Some participants also added that, at the end of the day, market power is not an issue *per se* in the platform economy, because if there are positive network effects, having large companies is also beneficial from a society's perspective.



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CONCLUSIONS

One conclusion to be drawn from this Executive Seminar is that, **in any competition investigation, it is crucial to keep in mind the burden of proof.**

One view is that if market dominance cannot be proven by the competition authority or the plaintiff in case of private litigation, the conclusion must be that there is no market dominance and, thus, authorities and courts should not speculate the contrary.

However, one might consider that the burden of proof may be reversed under certain circumstances such that the presumption that a firm or a group of firms is dominant in the market must be proven to be false by the accused parties. Otherwise, the presumption of dominance prevails.

The fact that the question of the appropriate rules on the burden of proof may depend on the institutional framework for competition enforcement – which differs among the EU Member States – and also on the type of decision an authority takes or a court has to render may be an issue here.

To avoid a fragmentation of legislation and competition practice by courts and authorities across EU Member States, Prof. Franck and Prof. Peitz recommend that discussions be reinforced at the EU level on topics such as the burden of proof and theories of harm in particular in merger cases and abuse of dominance cases.

"We find that the current EU law is well suited to cope with the challenges posed by the rise of digital platforms. We strongly advise against the introduction of new competition rules that specifically apply to platforms. Nevertheless, we do believe that EU and national competition and courts would benefit from clarifications on how to apply competition law when defining markets and assessing market power in the context of platforms"

Prof. Jens-Uwe Franck & Prof. Martin Peitz

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CERRE REPORT
"MARKET DEFINITION AND MARKET POWER
IN THE PLATFORM ECONOMY"



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