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Notes for the

3rd E.CA Competition Law and Economics Expert Forum: Digital Dominance
Panel II – Remedies: Is There Anything We Can Do About It?

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Remedies

Competition agencies can impose remedies instead of adopting a prohibition decision. To that purpose, the undertakings concerned can offer commitments, which the competition agency then declares binding in its final decision (commitments decision).

- Remedies might be helpful, as they allow to fine-tune the decision to the circumstances.
- But: "Intermediate" decisions restrict the incentive to search for evidence for/against the case. This effect might be strengthened, given the unequal (search) power on both sides.
- Allowing for marginal changes in the decision might also lead to more intervention by special interest groups (e.g. publishers, politicians, …), who try to shift the decision in their favour. This effect is strengthened as the procedure on how remedies are reached is not very transparent.

Digital Economy: High Dynamics, Big Data, Platform Markets

High Dynamics

Not only are the internet giants relatively young companies (Google: 1998; Amazon: 1994; Facebook: 2004), also looking at new ventures, those with the highest values are companies in the digital economy (Uber, 2009; Airbnb, 2008; Dropbbox, 2007; Xiaomi, 2010; Snapchat 2011; …). In these dynamical markets, life cycles of products become shorter, and market boundaries do not remain stable.

- Remedies might be helpful, as the use of remedies might shorten the procedure, due to a less detailed inquiry and cooperation from the side of the firms.
- Since remedies are based on (more or less) voluntary commitments, there will be only

limited documentation and no (or only a short) explanatory statement; only a preliminary assessment will be undertaken, and the decision can afterwards practically not be challenged in substance. This restricts further developments in the law and the academic dispute on the reasoning before/against the case.

- Remedies based on commitments can be used to avoid a burdensome prohibition procedure in complex cases. This, however, does not relieve the competition agency from investigating the facts and making its case (in contrast, the agency is relieved from considering possible counter-arguments and from conducting hearings etc. to that purpose). On the EU level, observers see a tendency to use remedies procedures as a "short-cut" to obtain results difficult to achieve in a confrontational procedure. There is no need to take a position on this issue here. However, one cannot but note that the risk of an insufficient investigation is particularly high in dynamic markets.

Big Data

No need to explain that there is a lot of data in the market. Two interesting implications are worth stressing for this purpose: First, the data owner becomes an expert with superior and potentially exclusive information, in as far as she is the only one with access to the data. Second, data availability allows testing measures much faster and more efficiently. E.g. Google runs many experiments in parallel, testing how different features lead to different responses by the users.

- One has to be aware of this "expert" element when determining appropriate remedies. The long history of regulation of the regulated professions, which deal with "credence goods" professions, might help to assess cases.
- Careful assessment is necessary on how much the (less informed) customers can shoulder for themselves, and how much protection they require.
- This expert knowledge, together with the dynamics of the markets, make it more likely that behavioural remedies can be circumvented unnoticed.
- Competition authorities might make more use of the data available. This may be an argument for resorting more often to interim decisions. Why not test remedies for a limited period of time before they become part of any final decision in main proceedings? (This amendment goes hand in hand with the observation that a risk of an incomplete investigation is particularly high in dynamic markets.)
    - *Note that such a test would be very much different from a "Market test"*

currently used by the EC: In accordance with Article 27(4) of Regulation (EC) No 1/2003 the Commission must conduct a market test of the commitments before making them binding by decision. In that "market test", remedies are not practically put into effect. Rather, the Commission asks for market views on potential remedies. In addition, a decision with "market tested" remedies cannot be amended as easily as an interim decision.

Platform Markets/Scale Economies

Many digital companies are active in markets with platform effects (a good example is Facebook), and/or economies of scale (e.g. the search engine by Google). Now it is too simple to remind competition authorities that platform markets work differently than conventional markets, e.g. with regard to pricing, and with regard to the effects of monopolies. Competition authorities are (mostly) aware of this. Still, platform markets with their various market sides are a useful reminder that many parties are affected by potential remedies.

- Multi sided platforms and limited possibilities to appeal make it more likely, that remedies are detrimental to a third party.
    - *Example: The EC has concluded that the following type of business practices by Google may violate EU antitrust rules prohibiting the abuse of a dominant position: "The prominent display, within Google's web search results, of Google's own specialised web search services as compared to competing specialised web search services (i.e. services allowing users to search for specific categories of information such as restaurants, hotels or products). First, users are not aware of the promotion of Google's services within the search results. Second, competitors' results that are potentially as relevant are significantly less visible and even sometimes not directly visible to users - they are more difficult for the user to find, for instance because the user has to scroll down the screen to see them or has to go to a subsequent search results web page. The Commission is concerned that this practice unduly diverts traffic away from Google's competitors in specialised search towards Google's own specialised search services, by reducing the ability of consumers to find a potentially more relevant choice of specialised search services."*
    - *One potential remedy which has been discussed is that Google will display on top of the page a box with its own vertical search results, as well as three results from competing vertical search engines. This might be good news for the vertical search engines, potentially also good news for the consumers (I do not know), but potentially harmful for the producers of the product category in question (restaurants, hotels, ...) who become more dependent on the vertical search engines.*

Final remarks

- Typical critical practices in dominant position cases, e.g. exclusive contracts, bundling, (technical) restrictions, are also critical in the digital economy.
- More research is required. First on the competitive effects of different practices in digital economies, and the role data (accessibility and ownership) plays in it.

- Second, on our understanding of the “mature customer” and its limitations. How relevant is “one click away”? Why was e.g. tying the internet explorer with windows problematic, if other browsers can easily (and free of charge) being installed?
- Coming back to what I said earlier: Competition authorities might make more use of the technologies available and test their remedies.