Digital ecosystems, decision-making, competition and consumers

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Is it a matter for competition law to protect decision-making by consumers?
Restrictive business agreements
101 TFEU
- Apple e-books
- Amazon and traders (ongoing)

Abuse of dominance
102 TFEU, national rules
- Facebook user data
- Google Android, Shopping
- Amazon e-books MFN/parity

Merger control
ECMR, national rules
- Facebook/WhatsApp
- Microsoft/LinkedIn
European Commission, Case M.7813 – Sanofi/Google

Onduo Virtual Diabetes Clinic
From platforms to ecosystems
Competition on the market
Competition for the market

"tipping"
Incentive for platform to shift from brokering transactions to getting involved:

- Reduce choices
- Steer information
- Favour own products

No control:
Competition pushed to the periphery
Network effects
Use of data
Modular product design

\{ Economies of scale and scope, zero marginal costs \}

In case of success: extreme returns

Follow-up strategies
Digital ecosystems (1):

- consumer lock-in
  - choices made
  - biased information
  - path dependency with high switching costs
Digital ecosystems (2):

- supplier lock-in
  - technological requirements (API)
    - contractual restrictions
    - biased information
Is this the economy we want?
“Competition is for losers.”

*Peter Thiel (2014)*
Market design (Alvin Roth) vs discovery procedure (Friedrich von Hayek)
Structure or effects?

Outcome

Starting point

Roth

Chicago

Post Chicago

Ordoliberals

Harvard School

Hayek

0-2

2-4

4-6

6-8

8-10
Recalibrating the goals of competition law?

„If we will not endure a king as a political power we should not endure a king over the production, transportation and sale of any of the necessaries of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity.“

*John Sherman, Speech in Senate, 21.3.1890*

„From a political point of view, the excessive concentration of economic power destroys the basis of our liberal order. Political democracy and the market economy are unimaginable without decentralising power.“

*German legislature, introduction of merger control, 1973*
Institutional economics framing of the loss of decision-making?
Principal delegates decision-making to Agent, which takes decisions for the Principal. There is a conflict of interest.
Doubled agency costs
→ conflict of interest
→ information asymmetries
→ misrepresentation
→ monitoring
→ lost opportunities
Loss of innovation
Centrally operated „markets“ may tip:

reducing transaction costs (efficient intermediary)

vs

raising agency costs and reducing dynamic efficiencies (inefficient gatekeeper)
Reducing agency costs:

• competition for agents
• performance-based rewards
• information rights and obligations (P2B-regulation)
• collective bargaining
• hierarchical control
Protection of autonomy in competition law
requirement of independence:

“...the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market...”

ECJ, Case 40/73, at 173 – Suiker Unie
Settled case law
yet: horizontal cases

• Züchner (1981)
• Astruienne (1984)
• John Deere (1998)
• Hüls (1999)
• Anic Partecipazioni (1999)
• Steel Cases (Eurofer, Thyssen, Krupp Hoesch, Corus) (2003)
• Asnef Equifax (2006)
• T-Mobile Netherlands (2009)
• Dole Food (2015)
• Eturas (2016)
• Duravit (2017)
New:

application to
- consumers
- digital ecosystems (horizontal, vertical, conglomerate)
- abuse cases
It is an abuse of dominance if a gatekeeper systematically reduces the decision-making authority of consumers and third-party companies.
Sanofi/Google – Onduo JV

Commission assessment (2016):

• separate markets
• no horizontal overlaps, thus no competitive concern
• non-opposition

• right to data portability
The way forward
Key ideas:

- Tougher merger control for killer acquisitions
- Earlier intervention in case of „monopolisation“-strategies
- Lowering the threshold (dependency / dominance)
- Access to data
- Moving away from market definition
- Ease data sharing
- Creating national and European champions
Regulation?


Divestiture?
Market failure of super platforms

- Monopoly power
- Information asymmetries
- Principal-agent-conflicts
- Strong imbalance of power

- Systemic risks?
- Structural unfairness?
- Role as marketplaces?
„We are a utility.“

Mark Zuckerberg
(according to Eli Pariser, The Filter Bubble)
1. Shift from platforms to ecosystems
2. Incentive for gatekeepers to deprive consumers and suppliers of decision-making authority
3. Market design vs digital autonomy
4. Economic framing as a principal-agent-problem with doubled agency costs and a loss of innovation
5. Take „requirement of independence“ from horizontal to ecosystem cases, also for consumer benefit
Thank you!

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