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Market Power of Digital Platforms

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The market power of digital platforms

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In recent times, competition authorities (particularly those in Europe) have proposed various changes to the substantive prohibitions of competition law.[1] These changes are being put forward to deal with problems of competition thought to be caused by the behaviour of digital platforms, in particular, Google and Facebook. In this presentation I shall say why, as a general proposition, the problems raised in dealing with the market power of digital platforms do not require changes in the law. Any problems for competition caused by the conduct of Google and Facebook can be appropriately dealt with using our traditional prohibitions.

Competition authorities in Europe complain that they do not have the tools to deal with competition problems caused by Google and Facebook. But I say that they do have the tools if only they would use them imaginatively. The problems they experience cannot be blamed on their tools but on how they (and ultimately the courts) apply the tools.

Competition authorities and the courts in all jurisdictions are inclined to do economics by numbers. They follow a recipe as they would when making a cake. In an abuse of dominance case, everyone in this audience knows how the numbers go. There a numbered steps and sub-steps. :

1. Step one, define the market in which to assess the market power of the firm alleged to be dominant.
    a. Identify the relevant product;
    b. Identify the relevant geographical area of that firm
    c. Apply the SSNIP test to these product and geographical areas
    d. If not in the United States, test for close substitutes in supply

You know the rest of the recipe.

There are some good reasons why much of the economic analysis in competition law is undertaken this way. One reason is that regulators do not wish to act in an arbitrary manner. They establish Guidelines because they wish to have internal procedures so that members of the investigating team do not go off on a frolic.

In much the same way, the courts in most countries try to abide by the rule of law – which is aimed to ensure that judges do not go off on a frolic.

But there are real problems with doing economics by numbers. One is that it often leads to wrong-headed results. This is particularly likely when the decision-maker is confronted with a problem that is a little bit different from the problems that have arisen in the past. This is what has happened with Google and Facebook.

[1] See European Commission, D G Comp, Assessment Impact Statement, *New Competition Tool*, 4/6/2020.and Digital Services Act package: *Ex ante regulatory instrument for large online platforms with significant network effects acting as gate-keepers in the European Union's internal market*, 2/6/2020.

The other problem is that we kid ourselves if we think that following a cookbook approach somehow makes our decision more objective. One of Australia's most eminent competition-law judges was Robert French, who was later appointed Chief Justice of Australia. When he was a regular Federal Court judge, he wrote a series of wonderfully insightful papers on competition law.

In one of these papers, French argues that much competition law (and, indeed other branches of the law) consist of fact-value complexes. He draws our attention to Professor Julius Stone's discussion of Roscoe Pounds category of 'legal standards' as distinct from 'legal rules'.[2] Stone classifies legal standards as the typical category of indeterminate reference:

> When courts are required to apply such standards as fairness, reasonableness and non-arbitrariness, conscionableness, clean hands, just cause or excuse, sufficient cause, due care, adequacy, or hardship, then judgment cannot turn on logical formulations and deductions, but must include a decision as to what justice requires in the context of the instant case. This is recognised, indeed, as to many equitable standards, and also as to such notorious common law standards as 'reasonableness'. They are predicated on fact-value complexes, not on mere facts.
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> The category of indeterminate reference is illusory, as has been pointed out, only in the modified sense that it does not usually lead compellingly to any one decision in a concrete case, but rather allows a wide range for variable judgment in interpretation and application, approaching compulsion only at the limits of the range.[3]

French suggests that decisions that courts are required to make about markets, dominance, abuse of dominance and substantial lessening of competition are predicated on what Stone calls fact-value complexes. Whether we care to admit this or not, it is true. We kid ourselves if we start to believe that these decisions can be wholly objective.

So what should competition authorities do when assessing the conduct of Google and Facebook. The answer is to start with the analysis of consumer harm. Answer questions such as these:

1. Are consumers being harmed by the conduct?
2. Is this ability to undertake this conduct linked to market power?
3. Is the problem so great that it is worth devoting considerable resources to its investigation and solution?

These are not easy questions to answer; but competition authorities must be able to answer these questions before they start worrying about how to fill out the integers required by the law in order to make a finding of illegal conduct.

That is, competition authorities must start with the analysis of consumer harm. When they are satisfied that the conduct at issue causes substantial consumer harm and that the conduct is linked to market power they should then start worrying about the legal integers.

A Report for the German Ministry for Economic Affairs and Energy two years ago suggested that this should be the approach to market definition in digital markets:

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2 Justice Robert French, "The role of the Court in competition law" 9FCA) [2005] FedJSchol 4, p 2.

3 Julius Stone, *Legal System and Lawyers' Reasonings,* Stanford University Press (1964) p 263-264.

> Digital markets – and markets characterized by digital platforms in particular – pose new challenges to competition law when it comes to market definition. Hence, there are good arguments for more flexibility in the assessment of dominance. Instead of requiring authorities and courts to *always* define market first, as is currently the case, it can make sense, in some cases, to simply infer dominance if it can be established that some unilateral conduct is not sufficiently disciplined by competition and this practice has an exclusionary effect. However, such an evolution of Art 102 is to be left to the Union Courts.[4]

In the time available I am unable to deal with all the problems that competition authorities and commentators have raised with respect to the proper analysis of the conduct of Google and Facebook. But I shall comment on two particular issues.

The first is whether there is a need for increased reliance on a doctrine of relative market power – when, for example Google or Facebook eliminate or make things difficult for a small business.

If the conduct is likely to cause substantial harm for consumers, there should be no need to resort to a special provision dealing with relative market power. The competition authority should proceed by asking the questions I asked above. If the conduct is likely to harm consumers substantial harm and the conduct of Google or Facebook is related to their market power, they should be able to deal with the problem. That is, they will be able, with a little imagination to fill out the legal integers consistent with their analysis of consumer harm. They should already have identified the kind of market power that has created the problem, they should then define the market consistent with the market power that has been identified.

If a competition authority is frustrated by its inability to deal with competition problems caused by the conduct of Google or Facebook, it should not argue that it does not have appropriate legal tools to deal the problems. Rather, it should examine the flexibility with which it uses that tools it has been given.

The second issue is access to non-personal data. DG Comp's Inception Impact Statement of 2 June this proposes that D G Comp might impose platform-specific, non-personal data access obligations; in effect, this would involve creating a compulsory access regime for essential facilities.

The standard objection to any compulsory access regime is that it reduces incentives to invest in assets of the kind to which access is provided. The standard answer to this objection is that appropriate incentives to invest can be provided by setting an appropriate price to be paid by the access seeker. However, there is no obvious appropriate price. Australia has had experience of compulsory access regimes for a couple of decades; and the experience has not been happy. These access regimes have concerned access to services produced by physical facilities and the principal product of these regimes have been prolonged disputes about prices. In my experience, compulsory licensing of intellectual property leads to disputes over prices that are even more intractable than compulsory access to the services produced by physical facilities. Competition authorities should think long and hard before advocating obligations on owners to provide access to non-personal data.

[4] Heike Schweitzer, Justus Haucap, Wolfgang Kerber and Robert Welker, Modernising the law on abuse of market power, Report for the Federal Ministry for Economic Affairs and Energy (Germany), October 2018.

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