Governing online platforms: Competition policy in times of platformization

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ABSTRACT

This paper argues that a paradigmatic change in competition policy is needed and empirically under way to cope with the challenges posed by economically strong online platforms and their big-data-based business models. Competition policy needs to move further away from its traditional price-oriented emphasis and increasingly focus on non-price competition, on attention markets and zero prices, and on big user data, which has become a new asset class in digital economies.

1. Introduction

The governance of online platforms has become a top-priority for policy-makers, regulatory agencies, and competition authorities worldwide (e.g., European Commission, 2015, 2016a; House of Lords, 2016; OECD, 2009). Their functioning and big data-based business models have given rise to a multitude of policy questions and to much analytical uncertainty regarding the appropriate treatment of issues ranging from privacy protection to intellectual property rights. While many areas of law are affected by these developments and often simultaneously, it is competition law that has gained special prominence. This is owing, on the one hand, to the strong market positions of individual companies like Google, Facebook or Amazon (Just & Latzer, 2017; Latzer, Hollnbuchner, Just, & Saurwein, 2016). In fact, the enormous global economic significance of these international players dwarfs that of any of the traditional media and communications companies. The disruptive effects of their market entry on (national) communications markets have resulted in uncertainties regarding the appropriate treatment of dominant positions in general and the presumed abuse of market power in particular. On the other hand, the economics of platform markets has contributed to the prevalence of the role of competition law and its enforcement in the debates on online platforms. This has been developed, scrutinized and formalized since the early 2000s under the labels of two- or multi-sided markets and equivalents such as intermediation markets or platform markets (e.g., Armstrong, 2006; Caillaud & Jullien, 2003; Evans, 2003; Rochet & Tirole, 2003, 2006; Rysman, 2009). Altogether, online platforms and their multi-sidedness have emerged as a major, albeit controversial topic in competition policy, leading, among other things, to calls to modernize competition law (Zimmer, 2015).

This paper focuses on competition policy and challenges for the control of market dominance and anticompetitive behavior in times of platformization. Its contribution is two-fold. First, it draws from the economics of two- or multi-sided markets and argues how these theoretical insights – coupled with the rise of economically highly significant Internet companies – are forcing a paradigm change in the area of competition policy. In essence, theoretical advances and new market conditions require (1) a shift in attention from traditional price-oriented analyses to systematic inclusions of non-price competition factors like quality, innovation, and
privacy, (2) due consideration of attention markets and the acknowledgement of markets in the absence of price, as well as (3) alertness to the role of user data and big data that has become a new asset class in digital economies. There is accordingly a need to expand both into new areas of inquiry (e.g., big data) and into areas that have in principle been known for a long time, yet have generally been downplayed or ignored and defined as non-competition goals. For example, the now prominently emphasized concepts and contentious areas like price structure and allegedly free goods, non-transaction markets (Filistrucchi, Geradin, van Damme, & Affeldt, 2013) or attention platforms (Bundeskartellamt, 2016a) are not new to competition cases in the communications sector. They have, however, regularly been accorded a low profile or discounted outright, with the consequence that the competitive assessment and protection has often been directed only at competitors and at monetarily paying sides of the market (e.g. advertisers but not general users).

Second, the theoretical discussion is coupled with an analysis of more than 35 ongoing and concluded competition cases and investigations, which shows how – after periods of ignorance and conceptual pondering – competition authorities are now partly and hesitantly theoretically embracing such a shift in competition policy. It further shows how at the same time in practice they are struggling to reconcile all pending challenges and to take all new dimensions into consideration systematically.

The paper proceeds as follows: Section 2 briefly revisits the aspects of the economics of platform markets that indicate where increased attention from competition authorities and more research is needed. Section 3 elaborates in more detail on the focuses identified and situates these within competition investigations and policy discussions. Section 4 concludes.

2. Multi-sided markets and where competition enforcement should focus

Over recent decades, competition policy and its enforcement have experienced a stronger institutional linkage between economics and law (Just, 2008), aligning it, among other things, more tightly with modern industrial organization scholarship (Budzinski, 2011). In this context, the theory of two- or multi-sided markets has emerged as one of the most widely discussed topics. Hundreds of scholarly papers have been published on this issue within a short timeframe and manifold voices have been raised in favor of harnessing its theoretical suppositions, for example for competition-law enforcement in the digital economy (Auer & Petit, 2015; Caillaud & Jullien, 2003). The sheer magnitude of academic publications, the omnipresence of this topic in the daily news and in policy documents, as well as the ease with which this concept is generally employed, suggest a consistent corpus of assumptions and consolidated theory ready for immediate practical implementation. However, this does not stand up to closer scrutiny. There is no unified theory of two- or multi-sided markets as of yet and a great deal of divergence with regard to definitions and scope as well as inconsistencies in practical application. This should alert us to the difficulties of turning theory to policy and practice (Auer & Petit, 2015).

Nevertheless, the concepts on which it rests succinctly direct attention to various issues that for decades have been accorded negligible status in competition enforcement in general and in media cases in particular. This has been criticized in the past, however, with little response or impact on enforcement or policy (e.g., Evans, 2011; Just, 2000). Now that these concepts are vested and articulated in more formalized economic terms – and given the new market circumstances – they have a more decisive voice. This makes them more readily acceptable to competition authorities and courts. A fact that is also elucidated by changes to competition laws as a result of these insights, as exemplified by the 2017 revisions to the Austrian Cartel Act and the German Restraints of Competition Act (see 3.2 and 3.3).

The workings and characteristics of two- or multi-sided markets have been explained and discussed in detail elsewhere (see e.g. references above), which is why this paper pays direct attention only to those elements that require it for the subsequent analyses. These are the price structure, price allocation and zero-priced goods as well as the existence of diverse interlinked markets caused by indirect network effects between the various demand sides. These characteristics in turn direct attention to non-price competition, attention markets, and data as currency and strategic asset.

The fact that platforms coordinate the demand of at least two distinct but – due to indirect network effects – interdependent groups of customers (i.e. two interdependent demand sides) highlights the importance of the price structure, i.e. the way the total price is allocated. According to Rochet and Tirole (2006) a market is two-sided “if the platform can affect the volume of transactions by charging more to one side of the market and reducing the price paid by the other side by an equal amount; in other words, the price structure matters, and platforms must design it so as to bring both sides on board” (p. 665). The prices on each side are designed in such a way as to reflect the magnitude and direction (i.e., positive or negative) of the present indirect network effects. This may result, for example, in prices that are significantly above marginal cost on one side and significantly below such cost or even set at zero on the other side, without this being an indicator of anticompetitive behavior like predatory pricing or a sign of market power (Wright, 2004). The question of predatory pricing was recently disputed in France in a damages claim brought by Evermaps/Bottin Cartographe against Google. Evermaps contended that Google was exploiting its dominant position and engaging in predatory pricing by offering mapping products for free. While the Tribunal de Commerce de Paris granted damages to Evermaps in a first-instance decision, this was later overturned by the Paris Court of Appeal. The court acknowledged the functioning of multi-sided markets and argued that such pricing structures may be rational in order to attract customers on the other side of the market (Autorité de la concurrence, 2014; Cour d’appel de Paris, 2015).

The revenue model and thus the decision on how the price is allocated and how the product or service is sold is consequently a key component of the business model. Due to the various types of platform industries, from credit-card markets to search engines, there is also a variety of business models (Rochet & Tirole, 2003, Latzer et al., 2016). Many of the new Internet companies adopt an “audience-makers” (Evans, 2003) business model, which has prevailed in traditional media markets like newspapers or television. In essence, this entails matching audiences or users to advertisers or, as it has long been described in communications research,
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