Can competition law rein in Big Tech?

Large technology companies such as Google, Facebook, Apple, and Amazon have a large impact on the economy and wider society, and that raises concerns on many fronts, ranging from data protection to the democratic will formation process. They also tend to become monopolies, which poses a challenge for competition law. ***Raphael Reims*** *analyses the problems inherent in regulating Big Tech.*

Is competition law capable of dealing with the business methods of Big Tech or would a separate regulatory regime be more appropriate?

Big Tech has a large impact on the economy and wider society, which raises concerns on many fronts, ranging from data protection to the democratic will formation process. But the competition concerns are solely related to the tendency of digital markets to lead to monopolies. The undesirable effects of monopolies are reduced outputs, higher prices, transfers of income from consumers to producers, and high expenditures by companies to acquire a monopoly. This also explains the numerous competition law proceedings against Google, Facebook, Twitter, Amazon, Apple etc. as well as reports for the European Commission and national authorities.

The potential to lead to monopolies stems from features incorporated by digital markets in particular, but not exclusively. They are regularly two-sided markets, in which companies sell two different products to two different consumer groups. The more they sell to one group the more the other group has an incentive to join. For example, Visa sells its products to retailers and consumers. The more consumers use a Visa card, the more retailers want to adopt it, and vice-versa. In addition, digital companies regularly benefit from network effects. These occur if one's adoption of a good benefits other adopters and increases incentives to adopt. Examples of this are the user structure of Facebook, WhatsApp and Windows. Furthermore, digital markets regularly show increasing returns to scale. This means that production costs are extremely less than proportional to the number of customers. An example is Facebook's employee and facility costs in relation to its number of users and advertisers. Finally, free services are regularly offered on digital markets because consumers are attracted by free services. The problem is that only a few companies can afford this.

Finally, the concern about monopolies in digital markets is not always justified. For example, consumers' ability and incentive to use different platforms can also avoid monopolies, which are sometimes more vulnerable than assumed. Nevertheless, the tendency remains that digital markets have the potential to lead to monopolies.

Problems of applying competition law in the field of Big Tech

Competition law enforcement has been increasingly proactive in trying to deal with Big Tech's monopoly tendencies. When enforcement is reactive, the remedies are negative in nature, such as when companies are told not to engage in a similar infringement in the future, sometimes having to pay an administrative fine. These interventions are on a one-off basis. Such remedies are particularly common in the case of cartels. On the other hand, proactive enforcement uses positive remedies, often including a company's obligation to do something, which may require continuous monitoring. An example is the European Commission's Internet Explorer decision, by which it required Microsoft to give Windows users a choice of different browsers.

The increasingly proactive competition law enforcement is problematic for several reasons. It leads to difficult-to-predict legal assessment factors for companies. For example, if the holder of an intellectual property right refuses to license it, this constitutes an abuse of a dominant market position under the following vague legal criteria: if supply is indispensable for others to compete effectively in the downstream market, if the refusal prevents the emergence of a new product and if the refusal is likely to eliminate effective competition in the downstream market.

Proactive competition law enforcement involves business decisions for which competition authorities and courts may be generally ill-equipped. For example, the relevant officials and judges are not trained to distinguish between the advantages and disadvantages of a neutral search engine or one that integrates various services. Similarly, the remedies require continuous monitoring and can therefore not be carried out so often or require more manpower from the competition authorities.

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In addition, proactive competition law enforcement remedies might not be adequately implementable. An example is the European Commission's Google Shopping decision, where it required Google, among other things, to redesign Google Search to equally treat Google Shopping and competing comparison shopping services in its search results. However, the corresponding competitors still argue today that the changes introduced by Google Search fail to comply with the obligation imposed by the Commission.

Finally, the remedies imposed by proactive competition law enforcement may have unintended consequences. For example, the European Commission required Microsoft to release the operating system Windows 7N without preinstalled Windows Media Player that was of no interest for the market.

Separate regulatory regime

A number of reforms have been proposed to address the aforementioned problems. A report for the European Commission proposed that behaviours that are potentially anticompetitive be prohibited and that companies should have the burden of proof of the pro-competitiveness of their behaviours. Another example is the corresponding report in the United Kingdom. It proposed, for instance, increasing the discretion of competition authorities and creating higher hurdles for appealing their decisions. These proposals can be criticised for lowering the threshold for proactive enforcement, thereby increasing it.

The draft of the EU Digital Markets Act chose other paths. It was presented as a rapid intervening specific instrument not of competition law but of regulatory law and has numerous special features. For example, the draft doesn't discuss anticompetitive effects and provides no efficiency justification. This can be criticised as ignoring case-by-case market-specific economic characteristics.

The scope of application is also unusual. It refers to so-called gatekeepers. These are companies that: a) operate a core platform service which serves as an important gateway for business users to reach end users; b) enjoy an entrenched and durable position in its operations — or it is foreseeable that they will enjoy such a position in the near future; c) and have a significant impact on the internal market. The criticism here is that the scope of assessment is very broad and a judicial reviewability is questionable.

With regard to the prohibited behaviours, a distinction is made between self-executing prohibitions and those prohibitions that demand further specification by the European Commission. The former includes the prohibition of requiring users to register to other core platform services when they want to use a service; the prohibition of preventing users from raising any issue before an authority; and the prohibition of using non-transparent advertising services. The latter includes the prohibition of self-preferencing (when platforms favour their own products or services), the prohibition of using non-public data for the benefit of a vertically integrated platform operator; the prohibition of unfair negotiations of app store providers with app developers; and the prohibition of denying competing search engines access to data. The prohibition of various types of behaviour can be criticised as being very broad.

Conclusion

Competition law is only partially capable of fulfilling the expectations associated with Big Tech. But the draft for the EU Digital Markets Act as a separate regulatory regime can also be criticised. Whether it is more appropriate to deal with the respective concerns regarding the business methods of Big Tech companies will only become clear in practice.

Author's disclaimer: The views expressed in this article are mine and should not be attributed to my law firm or clients.

Author's disclosure: I don't have any professional involvement with Big Tech companies.

Notes:

- *This blog post expresses the views of its author(s), not the position of LSE Business Review or the London School of Economics.*
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