The problem of requiring firms to develop an alternative monetisation strategy through competition law

Raphael Reims *challenges the competition law requirement for firms to develop an alternative monetisation strategy. The European Commission Android decision highlights the problem of proactive competition law enforcement taking place in innovative-intensive markets. Intervention reforms may combat these problems.*

It is not so simple to agree that if a business model is inherently anticompetitive, there is every reason to rely upon competition law to require firms to develop an alternative monetisation strategy. The two most important problems of this competition law requirement are the increasingly proactive remedies and the enforcement in innovation-intensive markets.

Proactive Enforcement

The first problem area is that competition law enforcement is increasingly proactive, rather than reactive. Reactive enforcement remedies (over the administrative fines imposed) are negative in nature. This means there is an obligation *not to* engage in similar infringement in the future. It also means intervening on a one-off basis. Typically, this applies to behaviours like cartels and predatory pricing.

Conversely proactive enforcement remedies are positive. So the obligation is *to do* something. Such as, giving access to a platform and licensing IP under competition authorities' conditions, selling assets, or modifying product design or services. Most notably, the European Commissions' Internet Explorer decision required Microsoft to give Windows users a choice of different browsers.

The development of proactive competition law can be criticised in many ways. Increasingly proactive enforcement leads to unpredictable legal assessment factors for companies. It is difficult for companies to guess how they should behave before a potential decision is made. Moreover, proactive enforcement involves business decisions where competition authorities and courts may be ill-equipped. For example, whether a neutral search engine or one that integrates various services is suitable is primarily a commercial question. Furthermore, a proactive remedy might not be entirely implementable, as unexperienced competition authorities and courts cannot foresee practical obstacles. Similarly proactive remedies may have unintended consequences. For example, the European Commission required an operating system without preinstalled Windows Media Player (Windows 7N) that was of no interest for the market. Finally, proactive remedies require continuous monitoring and can therefore not be easily carried out and require more manpower in the competition authorities.

Enforcement in innovation-intensive markets

The second problem is that competition law enforcement increasingly takes place in innovation-intensive markets. Innovation-intensive markets, refer to markets where competition is driven by innovation rather than price or output. Digital markets are a prime example of these. Consequently the shape of the market changes frequently and innovation must be assessed in the context of an exemption or justification. In turn this leads to the eternal question of whether one should intervene quickly or trust in innovation to address concerns. For example, the European Commission's Microsoft/Skype decision cleared the merger despite high market shares because of possible innovations frequently changing the market. This is a good illustration for this problem as sometime later WhatsApp emerged and removed the concerns.

European Commission's Android decision

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These problems are highlighted by the European Commission's 2018 Android decision of an abuse of a dominant position according to Article 102 TFEU.

The decision concerned three types of behaviour by Google in relation to Android: tying, anti-fragmentation obligation and exclusive dealing. In terms of tying, Google licensed its Android app store 'Google Play' to mobile phone manufacturers, for running on any Android mobile operating system providing that they pre-install a few of Google's apps, like Google Search and Chrome. The anti-fragmentation obligation referred to Google having licensed its version of the Android mobile operating system to mobile manufacturers only if they committed to not develop or sell competing and incompatible versions. Exclusive dealing refers to Google having offered payments to mobile phone manufacturers on the condition of pre-installation of Google Search.

Tying

The Commission felt that the tying behaviour was different from normal competition methods because Google Play and apps are separate products with separate customer demand and Google's apps licence condition would have been coercive. This can be criticised against the background that Google had licensed Google Play for running on any Android mobile operating system to mobile phone manufacturers for free. It was therefore challenged in recouping its investments, which Apple does freely via the sale of its devices. Moreover, nothing prevented Google's app competitors from gaining access to Android mobile operating systems. Users are familiar with app downloads and have fast internet connections. Elsewhere, the increased market share of Google's apps may be explained by their technical advantages.

Anti-fragmentation

The Commission reasoned that there was an abuse because Google's license condition was unrelated to the contract subject and would have forced mobile phone manufacturers to accept it. As such Google's license condition would have prevented the realistic emergence of another version of the Android mobile operating system. However, this can again be criticised as Google licensed Google Play for running on any Android mobile operating system to mobile phone manufacturers for free. Therefore Google was again challenged in recouping its investments leading to the need for the mentioned vertical restraint. Just as Apple does not license iOS to others, the vertical restraint meant Google could avoid incompatibility of apps and devices and preserve its equivalent reputation. Finally, the franchising criteria should have been considered as the anti-fragmentation obligation was similar to a franchising agreement. Consequently, the anti-fragmentation obligation would probably not have been classified as an abuse, because the obligation sought to protect the know-how of Android and the uniformity and reputation of the operating system.

Exclusive dealing

The Commission viewed exclusive dealing as an abuse because the paid pre-installation of Google Search prevented competitors' access to a large portion of potential customers. Again this neglected that Google licenses Google Search for free and is therefore again challenged in recouping its investments leading to the need for the mentioned vertical restraint.

The decision's remedies also demonstrate the criticism of proactive competition law enforcement. The decision was assorted with a EUR 4.34 billion fine and the requirement to end the infringing behaviour – by changing the terms of Android's operating system licensing. In response, Google started to charge a licensing fee for parts of its products, like Google Play, to mobile phone manufacturers. Whether the market is better served by this can be doubted.

Reform ideas

Despite all the criticism of increasing proactive competition law enforcement, its background must also be considered. For example, digital markets tend to monopolise through fast network effects. These are effects where adopting a good benefits other adopters of the good, thereby increasing incentives for adoption. Examples are the effects of WhatsApp, Facebook and DVDs. An example of reforms addressing these problems is the German Act Against Restraints on Competition Digitisation Act. It also reduced the hurdle for interim measures. Elsewhere institutional reform ideas relate to new authorities and a new role of courts.

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Conclusion

Proactive competition law enforcement taking place in innovation-intensive markets is problematic. Indeed criticisms of the European Commission's Android decision show that it is too simple to agree that an inherently anticompetitive business model will rely on competition law to require firms to develop an alternative monetisation strategy. Whether the corresponding reform processes will change this remains to be seen.

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

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