

Remedies in the Digital Era - Challenges and Limitations

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Where is the Novelty?

Virtual Competition

- ▶ Key gate keepers
- ▶ Network effects
- ▶ Data as input to innovation
- ▶ Advanced analytics and data collection
- ▶ Asymmetry of information and analytical power
- ▶ Stealth - tracking, harvesting, targeting and manipulation
- ▶ Zero price markets and quality degradation
- ▶ Markets for goods, services and ideas

Welfare Effects

- ▶ Exclusion - Exclusivity and self favouritism
- ▶ Exploitation - the things you own, end up owning you

Challenge I - 'Is this a Competition Problem?'

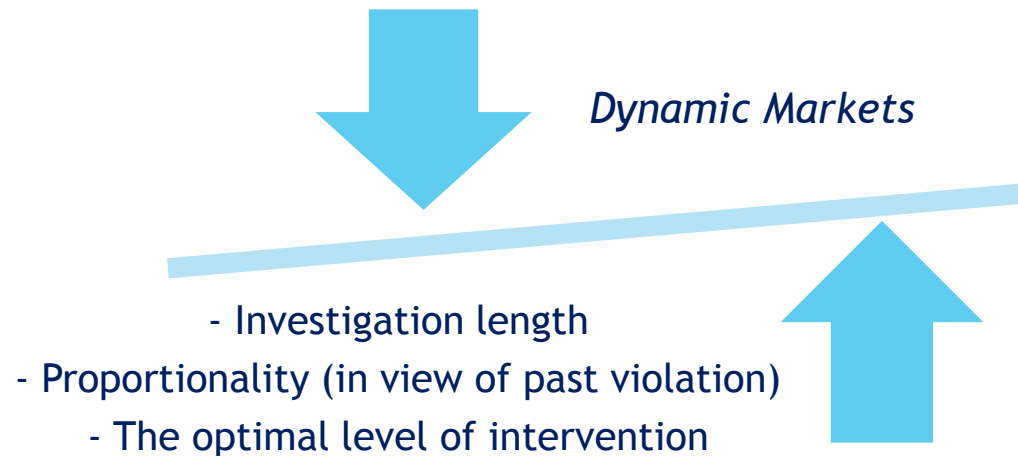


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Challenge II - Remedies

- ▶ ‘Bring the **infringement effectively** to an end, having regard to the principle of **proportionality.**’ (Recital 12, Regulation 1/2003)
- ▶ Eliminate or neutralise lasting effects of the infringement. (C-119/97P Ufex)
- ▶ Remedy should be clear and precise. (T-167/08 Microsoft)
- ▶ The Commission cannot deprive the undertaking of its choice between the various measures which can bring the infringement to an end.



a. Vertical Competition / Self-favouritism

▶ Amazon investigation

- ▶ Collection and analysis of retailer data (dual business model).
- ▶ Promotion of own products.

“[I]f you as Amazon get the data from the smaller merchants that you host... do you then also use this data to do your own calculations: As what is the new big thing, what is it that people want, what kind of offers do people like to receive, what makes them buy things?” (Commissioner Margrethe Vestager)

▶ Case AT.39740 – Google Search (Shopping)

- ▶ Google gave its own comparison shopping service an illegal advantage.
- ▶ ‘Google to stop its illegal conduct... refrain from any measure that has the same or an equivalent object or effect... comply with the principle of giving equal treatment to rival comparison shopping services and its own service - apply the same processes and methods to position and display rival comparison shopping services.’

Google Remedy

- ▶ Auction in which *Google Shopping* participates as a separate, stand alone, unit.
- ▶ ‘Comparison Shopping Service (CSS) Partner Programme’
- ▶ *Google Shopping* committed to run at notional profit margin.

Industry Criticism

- ▶ Rivals do not gain sufficient access.
- ▶ Auction as an inadequate mechanism - extracts profits from rivals.
- ▶ Box features ‘fake’ comparison sites by merchants who aim to benefit from CSS credit programme.

Challenges

- ▶ ‘Equal treatment’ or ‘costless’ bids?
- ▶ Can you have equality in vertical competition without undermining business model?
- ▶ Can one challenge the advertising model? Promote organic search only?
- ▶ What degree of separation would be acceptable? Structural remedy?
- ▶ Is price cap an efficient approach?
- ▶ Chilling effect & free riding ← → Exclusion, extraction & leveraging

b. Leveraging/Illegal Tying

- ▶ Case AT.40099 - Google Android
 - ▶ Tying of the Google Search app and the Google Chrome browser, as a condition for licensing Google's app store (the Play Store)
 - ▶ Illegal payments conditional on exclusive pre-installation of Google Search.
 - ▶ Obstruction of development and distribution of competing Android operating systems.
- ▶ ‘Reduced the incentives of manufacturers to pre-install competing search and browser apps, as well as the incentives of users to download such apps.’
- ▶ ‘Google to bring its illegal conduct to an end in an effective manner... refrain from any measure that has the same or an equivalent object or effect.’

Google Remedies (Oct 2018)

- ▶ Manufacturers free to install Google Android or Android forks.
- ▶ Google Android and Play Store not conditioned on pre installation of Google search and browser.
- ▶ Search app and Chrome, will be licensed separately (free)
- ▶ Up to \$40 charge to license the App Store/Gmail/YouTube (on devices activated after 1 Feb 2019).

Criticism

- ▶ Increase cost to consumers (charging for 'free' service)
- ▶ Remove incentive to change?

Challenges

- ▶ 'Equal treatment'?
- ▶ Differential effects on large and small companies.
- ▶ Viable criticism or attempt to force a subsidy?
- ▶ The weight attributed to monetisation of investment in Android.

c. Mandatory Access to Key Input Data

Challenges

- ▶ Risk of chilling investment and competition.
 - ▶ Data as secondary market
- ▶ Risk of free riding on investment
 - ▶ Who provided the input? Under what circumstances?
- ▶ Impact on third parties - Personal Data & GDPR
- ▶ Interoperability - Usability and format of data.
- ▶ Ex-ante / Ex-post

d. Restriction on Data Gathering

Challenges

- ▶ What amounts to excessive harvesting?
- ▶ How much information is needed for a service?
- ▶ Consumer facing remedy -
 - ▶ Design effective conduct remedy - Privacy Paradox
 - ▶ Default - most privately friendly option - upfront decision by user.
- ▶ The limits of transparency and consumer empowerment.

Concluding Remarks

- ▶ The nature of big data and big analytics may undermine the true ability to provide effective ex-post remedy.
- ▶ Prolonged remedy implementation and design may fail to stop the market from tipping.
- ▶ Dynamic markets may be better served by ex-ante measures.
- ▶ The societal cost of over and under intervention.
- ▶ Wider toolbox:
 - ▶ Competition analysis may help understand the welfare effects.
 - ▶ Wider toolbox of remedies could provide effective solution.