Difficult Choice of a Rational Approach to Regulating the Activities of Digital Platforms

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Introduction

Digital platforms have become the cornerstone of the modern global computer network. Most active internet users are their customers; they control a considerable part of contemporary daily internet services, they have become gatekeepers, and they own basic or unique resources that the majority cannot avoid using.

However, up until recently, the online markets and global market players were not regulated in terms of protection of competition. This led the global markets to come under control of a few US corporations that now set rules for both commercial sellers and their customers (OECD, 2020).

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The reasons, outcomes, and possible ways to regulate the digital platforms to restore some competition on the market and introduce better protection of rivals and consumers are the subject of this research.

Methodology

The methodology is based on confronting two approaches: the commercial approach of a large corporation that seeks to monopolize and manipulate the market (Meehan, 2015) in order to increase its profits; and the legal approach of securing competition on the market through mandatory legislation and enforcement by designated antitrust legal authorities.

A commercial company always seeks to increase its profits, and after passing a certain threshold in terms of size or market share, it will try not only to compete, but also to change market conditions to make them more favorable. In order to do so, it must either collude with competitors, or gain dominance through buying them out or driving them off the market. When one of the competitors becomes dominant, other competitors are likely to stop (or at least diminish to a large degree) their competitive activities and start to follow (i.e., to align their market strategies with what the dominating company is doing on the market). Therefore, the competition on any dominated market will always be distorted. The degree of distortion depends largely on market power of smaller competitors: the bigger their market power is, the less this distortion will be. This is the basics of economics of competition law, and online business is still a business, so it will follow the same patterns.

However, there are many features inherent to online markets and market players only: for example, constant and rapid changes forcing even recognized market leaders to frantically innovate, or huge role of economies of scale and network effects, making userbase sometimes much more important than profits. Therefore, in many instances, a good strategy would be to provide basic services free of charge to attract more users, and then charge those of them who want extended functionality (or a similar bonus).

Traditional competition law is unable to correctly account for that strategy as well as many other particularities of online markets. Therefore, it is crucial to gain a good knowledge of how these markets work and what balance of benefits and additional costs would the current market structure offer to participants and consumers before trying to regulate them.

The aim of the analysis is to understand how this situation arrived at the monopoly of digital platforms, and what can be done to improve the situation from the competition point of view, while not losing economic benefits, which digital platforms are offering to consumers around the globe.

Results

The online information services—offering a connected world with almost zero costs to deal—seemed to be ideal base to achieve perfect competition market. The basic checklist of the perfect market criteria, and how they benefit from an online world, is as follows:

- **A large number of buyers and sellers:** using online trading platforms, any producer from around the world can offer its goods or services to an infinite number of consumers.
- **Every participant is a price taker:** any consumer can check prices around the world, making it impossible to arbitrarily set prices on common goods.
- **Homogeneous products:** interestingly, the availability of detailed information on product and its properties would likely cause producers to undergo some kind of standardization where they would match specific sets of features to a specific price. Customers would likely choose lower price if they did not understand the difference in properties or do not need additional features. Moreover, standardization is a good thing when selling to large groups of consumers, as new clients better understand what to expect.
- **Rational buyers:** more information means better choices. Some consumer bias would still be there, but with wider choice and full information about the product and the market, the consumer tends to act rationally even where subjective preferences are usually involved.
- **No barriers to entry or exit:** new online trading platforms did just that—ensured a very low-cost access to enormous pools of consumers.
- **No externalities:** one way of minimizing externalities is raising awareness about them through spreading of information. That will make it possible to either minimize them or at least account for them, thus bringing the market closer to perfect competition.

- **Perfect factor mobility:** online platforms ensure exactly that—making it possible to assess and allocate efficiency almost in real time and make an informed choice.
- **Perfect information:** that is exactly what Internet is about—information, reviews, and opinions on any product or service out there (if, of course, this information is true and correct).
- **Profit maximization of sellers:** information exchange makes it possible to assess and quantify costs and revenues, making it easier to create an accurate business plan accounting for possible risk factor and market conditions.
- **Zero transaction costs:** it is impossible to bring transaction costs to zero; however, online trading platforms brought transaction costs down to a small fraction of what they used to be. The costs of logistics also dropped significantly due to increased efficiency and online logistics platforms matching carriers with shippers allowing for more efficient use of cargo capacity.

Under the perfect competition model, the best would be to have a single marketplace. Several marketplaces will only take the situation away from the perfect competition, because either sellers and buyers will be split between several independent platforms, thus narrowing the choice, or they will have to participate in several platforms, thus increasing the costs. Therefore, the lowest costs will be achieved with a single marketplace, thus pushing the market to a monopoly. However, the marketplace would have a purely technical role, being simply a place to meet, not affecting negotiating and making deals. Real-life physical marketplaces would usually do exactly that: they provide place to offer goods, security. and basic infrastructure at a transparent price, but wouldn't interfere in the trading itself. Therefore, it is important to understand why it is so different with digital markets and their gatekeepers.

There are economic factors, making dominance as the optimal strategy for a digital platform (Australian competition and consumer commission, 2019):

- **extreme economies of scale**, i.e., once the infrastructure is up and running, new customers bring new revenue at virtually no new costs;

- **very strong networking effect**, i.e., the more customers the platform already has, the more popular it is, and the more users will choose it just to get access to that audience;
- **benefits from expansion,** i.e., expanding to adjacent or similar market, a digital platform will be able to offer its customers more services and opportunities, and at the same time will get more data and insights that can be integrated, thus offering new opportunities.

Subsequently, there are non-economic factors coming into play. Trust is a crucial factor for the success of a digital platform; therefore, to win trust of their customers, the platforms have to assume a more active role in ruling the market. The crucial areas would be the following:

- **Fraud**. Online fraud is simple and lucrative, so all digital platforms are plagued with fraud. If left unattended, fraud will quickly scare all the customers away.
- **Imbalance of information**. Sellers always have more information about their goods and the market than buyers do, so they can manipulate customers and their choices (Thaler et al., 2010). To compensate that, there is a need for independent sources of information, or at least some kind of feedback.
- **Need for moderation**. The aforementioned and many other reasons lead to the absolute necessity of a moderation system that would protect both buyers and sellers.

Therefore, moderation is an indispensable service (Talking Tech, 2020). However, the digital platform has to make binding rules specifying desired and undesired behavior, and enforce them, thus assuming administrative power over both sellers and buyers on the market. These rules must be determined, including whether they will include the legal requirements or not, and if so, of what jurisdiction.

All major digital platforms are US corporations operating globally. They have to obey the US legislation, but their rise occurred at the period when the concept "The less regulation is better for the market" again reigned in the USA thanks to the Chicago school works and similar doctrines (Kovacic, 2018). New rising stars of the digital economy were protected by extremely favorable legislation, like the US Sect. 230 (Communications decency act), relieving content hosting entity of any

responsibility for user content, and the courts that set very high standards of proof for antitrust enforcement, thus effectively cutting it out. US digital platforms tended to ignore the legal requirements of other countries, always demanding that US jurisdiction, legislation, and court to be used. Other jurisdictions were much less powerful to oppose major US corporations, and were reluctant to act as well (Stigler Committee on Digital Platforms, 2019).

Therefore, for more than a decade, online corporations were writing rules to their liking with no one to control them. Firstly, software corporations invented their “user license”, where they refused any liability for their software whatsoever and completely shifted all responsibilities and risks to users. Then, Google took it a step further by allowing itself to collect and process any user data it was getting its hands onto. After this, blog platforms and social networks made another step, proclaiming all user-generated content their property and making profits off it, while all responsibility for this content was still borne by users. Then, Uber and other platforms used the pretext that they “are simply an informational service” to circumvent legal requirements in more traditional industries like taxi services or accommodation. Finally, the whole “startup culture” started to look like a system, designed to supply new concepts and products to monopolies for buy-out instead of going to market to compete with them and thus eliminating even remote possibilities of future competition.

Unlike the US, European Union tried to limit the new monopolies. However, the EU competition control system turned out to be very slow, and therefore completely useless for dynamic digital markets. The three investigations against Google (Google shopping preferences, Android, and Ad services) opened in 2010–2011 took 7 years to complete, the fines were set only in 2017–2018, and the court procedures are still under way. The Intel investigation was opened in 2006, the fine was imposed in 2009, the General court upheld the decision in 2014, this court decision was struck down by the ECJ in 2017 and sent back for reconsideration, and now in 2022 the fine was annulled due to errors is Commission’s economic assessment. As another example, the Commission investigated the CRT monitors tubes cartel that apparently functioned in 2000–2003, but the fines were set around 2015; by that time the CRT monitors have long became extinct, completely replaced by LCD monitors. For fast-evolving digital markets, a justice served long after the market itself ceases

to exist would have no deterrent effect, and would be perceived just as some kind of levy at best.

The situation started to change in the mid-2010s. By 2018–2021, many countries such as Germany, France, Japan, Britain, USA, Portugal, Mexico, and Canada (Lancieri & Sakowski, 2020), international organizations including BRICS, other stakeholders like the Stigler institute, and many other private institutions published research and analytical papers on the topic of digital platforms dominance and illegal benefits from such dominance (Lancieri & Sakowski, 2021), as well as prospects for regulations and specific measures that can be applied. Among the typical violations, they site (Crémer et al., 2019):

- self-preferencing practices where one business division promotes another to its users;
- bundling, tying practices and predatory practices, including "killer acquisitions"; and
- data-related practices.

In addition to scientific research, several major competition cases were opened and investigated in the USA, the European Union, and other jurisdictions. In the EU, the 13-year-long cases against Google nevertheless led to fines amounting to EUR 8 bln (Antitrust, 2017), and new cases against Google, Apple, and others were open.

Multiple antitrust probes and lawsuits are currently underway in the USA. The biggest action was brought by Department of Justice and 10 states regarding a strategic alliance between Google and Facebook in the area of programmatic ad buying (automated dynamic auctions, conducted during the page loading process). According to it, Facebook canceled the development of its own ad-serving system and instead joined the Google alliance, allegedly on far more preferential terms than other participants. Preferences from Google included extended timings, direct settlements with target sites, and additional feedback that was not available to other participants, effectively giving Facebook a considerable advantage within Google's system.

In December 2020, the FTC filed a suit against Facebook to require the divestiture of Instagram and WhatsApp. Another lawsuit was again brought by the DoJ concerning the Google-Apple deal to set Google as default search engine on iPhones. According to internal documents,

Google attached great value to this deal, saying that loosing Apple would be a huge loss. According to the lawsuit, Apple could be getting between $8 bln and $12 bln under that deal.

The USA, the EU, and other jurisdictions also presented new legislation proposals, aimed at limiting the power of major digital platforms (so-called gatekeepers), ensuring access to their facilities by smaller rivals, and restoring competition on digital markets to a certain extent.

European Union

For two decades, the online services sector in the EU was mainly regulated by the e-Commerce Directive (Directive 2000/31/EC). The directive aimed to create a common space for the provision of online services in the EU by setting a base standard of provision of services while limiting liability for intermediary service providers and prohibiting imposing any general obligation to monitor information such providers transmit or store. The two latter principles are similar to the US Section 230 (Communication Decency act), providing immunity for websites and platforms regarding third party content they host. These priorities were aimed at ensuring the fast and unrestricted growth of the online sector. However, now that this sector is dominated by digital platforms, the old legislation is no longer fit for purpose.

The new EU digital strategy explains—while admitting tremendous role of digital platforms in boosting efficiency and creating new opportunities for digital business—that the primary need for regulation arises from "trade and exchange of illegal goods, services, and content online" and using online services "by manipulative algorithmic systems to amplify the spread of disinformation, and for other harmful purposes". The economic problems are mentioned as well: "the accelerating digitalization of society and the economy has created a situation where a few large platforms control important ecosystems in the digital economy. They have emerged as gatekeepers in digital markets, with the power to act as private rule-makers. These rules sometimes result in unfair conditions for businesses using these platforms and less choice for consumers".

The stated general aims are similar to other initiatives: to protect consumers and their rights, to ensure the accountability of online platforms, and to foster innovation and competitiveness. Other aims include the harmonization of rules and the creation of a level playing field in such areas as control over illegal content, democratic supervision over

systemic platforms, mitigating manipulation and disinformation risks, etc. (Andriychuk, 2022).

The proposal shifts toward an ex-ante regulatory approach and moving from common principles (like art. 101/102) to more directly defined formal rules and obligations with direct effect (Coyle, 2018). It is divided into two legislative acts:

- **Digital Services Act (DSA)** is aimed at online intermediaries and platforms: for example, online marketplaces, social networks, content-sharing platforms, app stores, and online travel and accommodation platforms.
- **Digital Markets Act (DMA)** is aimed at gatekeeper online platforms that play a systemic role in the internal market and serve as hubs between businesses and consumers for important digital services.

These acts are to be made in the form of regulations, therefore introducing uniform mandatory rules throughout the EU territory.

The gatekeeper platform must fulfil certain criteria. It should:

- have a strong economic position and a significant impact on the internal market, and be active in multiple EU countries;
- have a strong intermediation position, meaning that it links a large user base to a large number of businesses; and
- have (or be about to have) an entrenched and durable position in the market, meaning that it is stable over time.

Gatekeepers will be subject to additional obligations that include ensuring access to their services, the ability for business users to review data generated by them with the gatekeeper, the ability to control advertising efficiently independently from the gatekeeper, and the ability to make deals with customers outside the platform. DMA also requires greater transparency in online advertising, including providing more information to ad-placing market players about market and campaign effectiveness.

DMA does not aim to regulate existing monopolies (which is more the US case), but rather to foster competition on the market by helping smaller market players (G'Sell, 2021). Traditionally, the definition for the

term "gatekeepers" is rather vague and can be construed later to reflect changing market situation. The specific list of obligations is also very general and needs to be detailed in future.

Surprisingly, DMA also does not specifically address mergers (except for "obligation to inform" authorities). This is an important area, as the mergers play a great role in helping monopolies to keep their position on the digital market. Both the UK and the USA pay much more attention to merger regulation.

According to some lawyers, the specific criteria and obligations seem to be the generalized versions of criteria/obligations formulated in major EU court cases against tech companies in recent years (Caffarra & Morton, 2021). On the one hand, this is a simple way to codify the regulation scheme that already passed its judicial review. On the other hand, such a generalization would not probably be enough to make the legal framework work. Situations differ and the markets tend to change, so the norm, formulated by the court for a specific case and its specific circumstances, will hardly be suitable for general use.

Besides new rules for gatekeepers and digital platforms in general, the proposal also includes provisions regulating illegal, illicit, and questionable content, its reporting, and its removal. Other proposed rules include the demand to have a local representation office. The proposed scheme may lead to suspicions that state structures or supranational bodies may use DMA/DSA obligations for political censorship purposes and harm freedom of speech and pluralism of opinion in media due to excessive reporting and content removing requirements.

United States

The US regulation proposal concentrates more on mergers and acquisitions. Buying out competitors—sometimes even before they gain any considerable market share—is the best way for dominant market players to strengthen their advantages and get rid of a rising competitor, as well as also to get access to all intellectual property it developed.

Senator Klobuchar's project calls for a review of the merger test that will be changed from "substantially lessen competition", with "more than a de minimis amount" criterion to "create an appreciable risk of materially lessening competition". The wider test will allow competition authorities to capture acquisitions of small competitors by the Big Tech platforms before any substantial competition could have emerged, and also to better

plead in courts which will be no more in position to demand detailed substantiation of inevitable and provable harm to market and competition. For some types of mergers that are likely to cause harm to the market, the burden of proof will be transferred from the authorities to the parties to a merger that will have to prove that the merger does not create an appreciable risk of materially lessening competition or tend to create a monopoly or monopsony. The type of mergers captured will be mergers significantly increasing market concertation, acquisitions of competitors by the dominant market player (with 50%+ market share or possessing significant market power), or mergers with more than $5 bln of value involved.

Another aim would be to prevent harmful conduct from dominating entities: new provision is introduced into the Clayton act, prohibiting “exclusionary conduct” (materially disadvantaging competitors or limiting their opportunities to compete) presenting “appreciable risk of harming competition”.

A new FTC division will be established to conduct market studies and analyses of markets and mergers. The bill also calls for increasing competition authorities’ budgets and enhancing enforcement through civil fines for antitrust violations.

The competition reform package invoked vivid discussions, and while some argue that it is excessive, others would suggest that more action is needed. The spectrum of opinion is very wide—from free market theories stating that digital markets have successfully got out from monopolization loops several times in the past and will self-regulate again in future, to spilt-up theory adepts, proposing to break digital platforms to several independent entities based on the functional or market approach to restore free competition.

The European Union and the United States are not the only jurisdictions developing new regulation schemes for digital platforms. Similar proposals are made and submitted in many jurisdictions worldwide. For example, in England, following analytical work (HM Treasury, 2019), the CMA (Competition and market authority) is elaborating a mandatory code of conduct for dominating digital platforms and has already created a special Digital Market Unit within its structure that will oversee compliance with this code. The code aims to limit restrictive practices, provide access to information to rivals, and better control anticompetitive mergers.

Discussion

The need for regulation is long overdue. Global digital platforms have become so rich and powerful that they can easily suppress any possible competition on unregulated markets. The only way they can lose their market power is through their own mistakes; for example, the chip giant Intel, in 2006, left the ARM mobile market and sold the respective division, failing to see its market perspectives. However, such examples are scarce and almost non-existent on software market where a powerful company can easily buy out the competitor with better product, technology or functionality and then use it or just abort developments and sales thus depriving the market of effective tools and solutions. Sometimes it even happens involuntarily when a big company buys a start-up with rising product or technology, but huge monopolist turns out to be hulky to realize the potential and offer the market new interesting product or technology. In both cases the results are the same: the market development is slowing down, customers are not getting the products they need or want and overall harm is done.

So, how the digital markets can be regulated?

The extreme approach of some US free market advocates (as referred to earlier) would be to leave the market without any regulation at all. The central point in the concept is that the free market will regulate itself back to the competition, one way or another, sooner or later. Indeed, the high-tech market has already demonstrated several times that, after arriving at a monopoly, it would then take a sharp twist thanks to new technology, new products or something else, and fierce competition will erupt again. However, this concept is clearly wrong. Firstly, possible future demonopolization is just an option, not the inevitable development of events. Secondly, it is not a sufficient remedy for years—or even decades—of a monopoly sucking resources from consumers and rivals and crippling the market. Thirdly, the overall harm to the economy, slowing down of the market, etc. will evidently surpass any possible good from unregulated market environment. .

Then, there is a more traditional approach. The idea is that the market structure should be defined by free competition and reflect the balance between abilities and efficiencies of market participants, and if the domination is on the merits, it should not be fined ipso facto (Hovenkamp, 2021). State intervention should be careful and limited with the aim to ensure some level of competition or basic protection for consumers and

smaller competitors, while trying to preserve the free functioning of the market to the fullest degree possible that should ensure the benefits that free unrestrained market usually bring.

Other approaches would envisage a more regulated market where the state creates a framework for the digital platforms to fit in. However, the more regulation an approach provides for, the more questions regarding quality of regulation will emerge (Strowel & Vergot, 2016). Common principles require proper and timely enforcement, and detailed formalized terms will never keep pace to an ever-changing digital market. The detailed regulation would be very difficult to implement, as the digital platforms are global multimarket corporations with a very complex interconnected structure and sophisticated data exchanges (for the most part hidden from general public and even state regulators). It is impossible to make a quick but full-scale economic assessment of their activities, competition landscape, and possible abuse. Even if the abuse seems obvious, it is impossible to economically justify it, as the prices almost never reflect real costs of the specific service. Therefore, it is impossible to fine-tune the market or to calculate the fines reflecting illegal benefits for the digital monopolist or harm to the market and competition within an acceptable timeframe.

The sound response here would be to ensure some basic level of protection for customers and market players who need access to the digital platform's facilities, sacrificing accuracy in order to set clear and easily enforceable formalized rules of the game. This is because it is more important to take quick action than to make an accurate analysis outlining the possible abuse. That is what the EU seems to be trying to do, although to a limited degree.

Another approach, also represented in the US, could be to split up the gatekeeper digital platforms into several independent entities, each having its own separate market. Such a move would likely strip digital platforms of some of their market power. It could also restore some competition by relatively strengthening market position of actual and potential competitors. However, splitting up will also take away economies of scale and networking effects, and will hinder inter- and intra-market data exchanges thus driving up the costs. As a result, the additional costs can easily surpass the alleged monopoly markup that the digital platforms previously enjoyed.

As opposed to the traditional approach of controlled competition, there is also an approach of controlled monopoly. The concept would be

to identify the essential facilities within the multimarket digital corporations and to make some kind of "natural monopoly" out of them: that is, to create an independent entity or division, responsible for, for example, accumulating and processing market data from all market players and then providing all of them with access to these data and insights.

The main advantage would be that the single unified infrastructure, universal access to all market data by that entity, and the availability of data and insights to all market players could drive down the costs and ensure a level playing field for all market participants.

Unfortunately, this approach has many inherent drawbacks too. Let's take an example. The EU has been trying to liberalize its electricity and gas markets for more than two decades already. The idea was to unbundle the infrastructure element from marketable components and to introduce competition where it is feasible, while keeping costly infrastructure as a monopoly offering universal transparent access to its resources. In 2021–2022, the discouraging results of gas market unbundling can be seen in real time. Even the much less speculative electricity market still encounters many unforeseen difficulties. For example, the infrastructure component (that was taken out and reorganized as an infrastructure-operating monopoly) showed no interest in seizing new market opportunities, expanding its own networks, optimizing costs, etc. Without going into unnecessary further details, it should be noted that complex infrastructure systems are affected by various internal and external factors that are difficult to fully account for or forecast. And if they are operated as natural monopolies, they would naturally tend to stabilize their functioning and minimize their efforts, refusing to adapt to any changes in the market and strongly opposing to any attempts to impose any changes. This behavior is very manifets even on ultrastable with guaranteed demand like energy market. Digital markets are very dynamic and have to constantly adapt to the changing situation and customers' requests. Thus any natural monopoly would quickly become a major deterrent factor, crippling the market and eliminating many opportunities for change and growth.

Given evident natural monopoly flaws like a lack of will to evolve, state intervention is likely to be required to force a monopoly to react to the evolving demands of the market, but administrative and market approach do not co-exist well together, and administrative pressure can distort the market and make it even more ineffective (Amenta et al., 2021).

Conclusions

The digital marketplaces that promised to create a more competitive environment than ever turned into powerful monopolies, controlling both sides of the market, and manipulating consumers' choice using the data they extracted from these very consumers. Social networks turned into oppressing, data-stealing factories, using its power to manipulate ad business and to otherwise control their customers' behavior. Google, from the "freedom corporation", as it used to call itself when fighting for a market share with Microsoft, other well-known monopolist, became itself the symbol of grim monopoly, data appropriation, and manipulation. Google has become more a "Corporation of evil" than Microsoft once was.

All "let the market be free and it will regulate itself to the best of competition and fair play" concepts have again been proven wrong. Unless the market participants get beaten with the regulatory stick, they will always strive for eliminating competition, and gain market power only to then use it to increase their profits through manipulating the market. Therefore, the question is not whether to regulate or not, it is what regulation scheme to choose.

However, the digital platforms did bring enormous drops in costs, increased efficiencies, and instant free access to virtually any information. Therefore, despite all the bad things like market control, monopoly markups, and manipulations, from the point of view of an economically wise attitude, they are still more beneficial for markets, rivals, and consumers than traditional old models. Moreover, while accurate quantified assessment is impossible because platforms hide all information regarding their internal activities, it is still safe to assume that braking or even considerably limiting existing digital platforms from collecting, processing, and exchanging data would lead to a considerable rise of costs, leading to additional losses of all market players and consumers instead of benefitting any of them.

As a result, the markets continue to undergo monopolization and suffer from severely distorted competition, but trying to brake the current system could be even worse. This is why the new regulation must be implemented carefully: not only to restore some competition and protect consumers, but also to preserve the current high efficiency level so that the costs stay low and economic benefits for markets and consumers are not lost.

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