

## **New Competition Tool**

### **Position Paper**

#### **Mediaset S.p.A.**

### **Introduction**

Mediaset would welcome the introduction of new, flexible instruments to address the competition issues raised by digital platforms and data-driven business models. While we acknowledge the opportunities and benefits offered by digitalisation, both for businesses and for consumers, digital markets present certain features that make them prone to the emergence and persistence of market power. Network effects and a tendency to single-home, especially on the user side of platforms, contrive to make many digital markets susceptible to monopolization; data has emerged as an asset that provides an unmatched competitive advantage to those that hold it; control over large user bases makes certain digital platforms indispensable trading partners for business users; further, digital companies often operate both as platforms enabling business users to reach consumers and as a business user in direct competition with other business users, which provides an incentive for discrimination and self-preferencing. So far, the existing competition law framework and the enforcement of competition rules by the European Commission and national competition authorities have proven to be somewhat ineffective in facing these challenges. Regulation of digital platforms and the introduction of a new competition tool could represent a significant step towards restoring healthy competition in digital markets.

### **Main competitive concerns**

In our view, there are three main areas of concern to be tackled with the new competition tool. First, the asymmetry in the applicable regulatory provisions between companies that compete against each other for consumers' attention and advertising revenue: while most digital companies operate free of meaningful regulatory constraint, broadcasters such as Mediaset face significant restrictions. Second, the ability of existing digital incumbents (e.g. Google, Facebook and Amazon) to leverage their market power to enter new markets: the resulting prominence across several, related markets reinforces their existing competitive advantage in a negative feedback loop that entrenches their overall position. Third, the gatekeeping role that many digital platforms have come

to exert: by virtue of the market power they hold, digital platforms are able to dictate unfair terms to business users and potentially discriminate among them or against them. Below, we discuss each of these issues in more detail.

### Asymmetry in regulatory regimes

A large number of digital products and services are offered free of charge to consumers and paid for with advertising revenues. The business model of many digital companies is to harvest attention by means of content or service provision and resell it to advertisers (so called “attention brokers”). Attention brokers are essentially platforms operating in multi-sided markets, much like Mediaset, whose core business is to provide free to air (FTA) commercial broadcasting as well as digital content funded by advertising revenue. Similarly to attention brokers, broadcasters try to capture consumer attention and sell that attention to advertisers.

Traditionally, when defining relevant markets, antitrust authorities have considered online advertising and offline advertising to be clearly distinct. For example, in the *Google/Double Click* merger, the Commission defined the relevant market as “online advertisement”, arguing that: “the widest possible relevant product market considered in the Decision is the overall market for online advertising. [...]”. On the other hand, in *News Corps/BSkyB*, the Commission defined a market that went no further than TV advertising, ruling out any competitive constraint stemming from online advertising. Yet, it is clear that online advertising places a significant competitive constraint on offline advertising: consumers’ attention and advertising budgets are limited and both consumers and advertisers have to make choices as to how they allocate their time and spend, respectively, across platforms. According to a study by Politecnico di Milano (“*Internet Advertising: fruizione su, monetizzazione giù*”), traditional media such as TV and print jointly captured around 80% of advertising revenue in Italy in 2008, whereas online advertising represented 10% of total revenues. In 2019, TV and print only accounted for 52% of advertising revenues, whereas online media have increased their share to 38%. That is, online advertising has grown at the expense of offline advertising, clearly signalling the willingness of advertisers to substitute away from offline media to increase their expenditure in offline media (as well as the tendency of consumers to spend more time online).

While broadcasters and digital attention brokers clearly compete for consumer attention and advertising spend, they are subject to considerably different regulatory regimes that entail

substantial differences in the ability to raise revenue and in the level of operating costs. First, as set out in Article 1 of the revised EU's Audiovisual Media Services Directive (Directive 2018/1808), video-sharing platforms have no editorial responsibility over the content they provide to the general public. On the other hand, audio-visual media services providers, i.e. broadcasters and VOD services, have such responsibility, meaning that their main purpose is the provision of programmes that inform, entertain, or educate the general public. That is, while video-sharing platforms are free to supply content merely based on the profit it is expected to generate, getting by with mere self-regulation, broadcasters are not.

Second, online platforms benefit from far more lenient tax treatments: their presence across jurisdictions and the virtual nature of the services they provide enables them to register their revenues in the countries where taxes are lower, minimizing their overall tax liability. Online platforms often operate with a concerning lack of transparency, refusing to disclose their revenues and therefore their accounting information to national authorities, in Italy as well as in the rest of the world. That is, online platforms are able to operate with lower costs than broadcasters.

Third, it is worth recalling that Member States may prescribe ad hoc ex ante remedies. For instance, Mediaset was mandated to set up a separate entity for the sale of advertising on DTT (AGCOM's delibera 136/05), n. 1): this regime, introduced with the aim of reining in Mediaset's potential leverage of market power from analogue to digital, was maintained also following the acquisition of radio properties by Mediaset and is currently organized as follows: Publitalia '80 for free TV; Digitalia for pay TV; Mediamond for web, radio and press. In terms of infrastructure, Delibera n. 395/10/CONS, with reference to market 18 of the EC's relevant market Recommendation, prescribed that Mediaset's fully-owned broadcast network operator Elettronica Industriale had to reserve 40% of its transmission capacity to third parties independent content providers. Moreover, differently from digital attention brokers, Mediaset is subject to stringent caps as to the amount of advertising it can include in its TV programming. These provisions raise costs and limit Mediaset's ability to raise revenues.

Overall, regulatory largesse allowed large online platforms to consolidate unprecedented market power in the EU and worldwide, while broadcasters are burdened with a series of somewhat anachronistic regulatory provisions. Competition works best when the playing field is even, and companies competing against one another are subject to the same set of rules. Instead,

asymmetries in the applicable regulatory regimes put commercial broadcasters at a significant disadvantage.

### **Entry in adjacent markets**

The story we have been told time and again by digital incumbents is that any market power they enjoy is fleeting, and as such not a reason for concern, as they are subject to disruptive innovations that would dislodge them from their leading market position. However, empirical evidence clearly shows that this is not the case: Amazon, Facebook and Google have not only maintained their leadership in their respective core businesses but have also been able to leverage it to enter and effectively monopolize adjacent markets. The resulting prominence across several, related markets reinforces their existing competitive advantage in a negative feedback loop that entrenches their overall position, which has become virtually unchallengeable.

For example, the history of Google is one of expansion into adjacent markets building on its leadership among horizontal search engines. Google has gone on to provide vertical search services (news, products), video sharing services, email services, an operating system for mobile devices, several hardware products (smartphones, tablets, laptops, digital media players), social networking services (the short lived Google Plus) and so on. Entry in these markets was often fuelled by leveraging the customer base that Google had gained in horizontal search. YouTube's leading position among video sharing platforms is now being leveraged to enter and expand into the markets for advertising intermediation and for audio streaming services (YouTube music). Almost each of these entries into adjacent markets has helped consolidate Google's overall position: for instance, the success of Android ensures that Google is the default search engine for most mobile devices, which means that Google has access to much more data than its actual and potential competitors. Having exclusive access to this data means that Google can continuously improve its product and that Google's rivals face significant barriers to entry and expansion. Both mechanisms strengthen Google's dominance.

### **Gatekeeping and dual role of platforms**

Gatekeeper scenarios are also a source of concern. They occur in two-sided markets when users on one side (typically consumers) single-home: the platform they use then becomes the sole means for users on the other side (typically business users) to reach them, thus providing the platform with significant market power. A related scenario is one where the gatekeeper holds a dual role,

maintaining the platform and operating as a business user, as this can create the incentive for self-preferencing: the platform would likely make higher margins from a sale made through its own seller, rather than through a third-party one, thus creating the incentive for a discrimination that would harm competing business users of the platform as well as consumers.

There are many examples of gatekeeping in digital markets. Facebook and Google are gatekeepers in advertising markets: they have nearly exclusive access to their user bases (i.e. there are few, if any, alternatives available to advertisers to reach those users) and are thus able to dictate the terms in their interactions with other players in the advertising industry, such as advertisers and publishers. Apple and Google are gatekeepers in the markets for mobile apps, representing a gate for app developers to be able to reach Android and iOS users. Amazon is a gatekeeper in the e-commerce sector: there are users who shop exclusively (or nearly so) through Amazon: merchants who want to reach them have no choice but to join Amazon's Marketplace, and accept the terms set by Amazon.

Mediaset has direct experience on the issue of gatekeeping. YouTube would be a very valuable outlet for Mediaset's content, considering its unparalleled and nearly exclusive reach on younger demographics that are the hardest to reach for a traditional broadcaster. Yet, in its dealings with YouTube, Mediaset has experienced that the terms proposed were unfair and that there would be no transparency as to how YouTube would manage Mediaset's content. Further, there is no transparency as to ways and the extent to which Mediaset content is promoted by YouTube. Mediaset is unable to know how YouTube's internal search engine and recommendation system work, and the criteria used to determine which content is prioritized. In this regard, it should be noted that YouTube would have an incentive to prioritize user-generated content over professionally produced content as margins on the former are higher.

In addition, Mediaset envisages that significant gatekeeping issues will emerge in the audio-visual industry. The way that many digital incumbents operate is to leverage their unique access to large customer bases to impose themselves as an unavoidable layer of intermediation between that customer base and business users that wish to reach it. As consumption of audio-visual content shifts to the digital environment, broadcasters will no longer have direct access to consumers: digital platforms will likely come in to intermediate that relationship. This will then lead to the same issues that have been reported above with respect to YouTube, i.e. unfair terms for monetization of

content, lack of transparency over search and recommendation systems, bundling with ad intermediation services, exclusive control of consumers' data.

More generally, content creators such as Mediaset are increasingly dependent upon digital platforms for the distribution of their content and for its monetization. Digital platforms exploit content created by third parties, yet by controlling access to customer bases they are able to dictate terms to content creators and retain a substantial share of the industry profits while providing what is essentially an intermediation service. Indeed, there is a clear imbalance between the roles exerted by content creators and intermediaries and the share of profits that content creators and intermediaries are able to gain. The upshot, in the long term, is that incentives for the creation of original content will decrease, to the detriment of consumers.

### **The new competition tool**

The issues outlined above cannot be fixed through the use of traditional enforcement tools: Article 101 of the EU Treaty deals with agreements and does not cover these concerns; Article 102 of the EU Treaty could in theory be applied to some of the issues we outlined (such as gatekeeping) but has a number of limitations. Indeed, Article 102 allows intervention to deal with specific anticompetitive conducts. However, the competitive concerns that arise in digital markets are of a more systematic nature, stemming from the inherent characteristics of these markets: anticompetitive conducts take advantage of these features but addressing them through traditional enforcement tools would not represent an effective and long-lasting solution. Further, building an Article 102 case takes time: given how dynamic digital markets are, and how fast prominent positions can be gained (also thanks to networks effects), the enforcement of Article 102 is clearly an imperfect tool.

Along with the introduction of appropriate ex ante regulation, the Commission clearly needs a new tool that enables it to intervene in a more flexible and timely manner, preventing companies' conducts as well as market features from permanently harming competition. While it should not entail fines, the new tool should be backed up by full investigative powers: the Commission should be able to send requests for information and interview company management and employees (as well as impose penalties for non-compliance). Building cases requires collecting information, and companies are often the best – if not the only – source of information. Further, the new tool should

entail the ability of DG Competition to make recommendations/proposals to policy makers as well as impose remedies on companies.

These powers should of course be balanced by appropriate safeguards. While it would not result in an infringement decision or in the imposition of penalties, the new competition tool could have relevant consequences on companies involved in the investigation, such as the divestiture of assets. Companies investigated should have every right to fully participate in the proceedings, access relevant documents, express their views and so on, very similarly to what occurs in art. 101 and art. 102 cases. This should also include the ability to appeal any decision and the right to have a full judicial review. Companies that have an interest in the investigation should also have a right to fully participate in the proceedings and express their views on issues and remedies (as in art. 101 and art. 102 cases).

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