Statement

on the European Commission's initiatives for a

New Competition-law tool

and the

Digital Services Act package

4 September 2020

1. Some large online platforms have reached gatekeeper positions in the Internet. For instance, websites need the services of Google Search to be found on the Internet. Another example are online advertisements, which are only widely visible when they are marketed through online platforms such as Google Ads.

2. The importance of online platforms as gatekeepers in the Internet is comparable to the importance of network carriers for accessing the Internet. Network carriers are regulated by authorities. This suggests to subject powerful online platforms to regulatory authorities, too.

   However, online platforms and network carriers differ in important ways. The largest network carriers have achieved their market positions through state monopolies. Online platforms with gatekeeper positions, however, have achieved their positions by competition and superior products.

   Under traditional economic doctrine, reaching a dominant position by means of competition should not be sanctioned or stopped. This could discourage other companies from investing to reach a dominant position, too.

   This argument assumes that the economic benefits from those other companies' pursuit of a dominant position (or more precisely: their incentive from the dominant company's position being unassailable by competition law) exceeds damage from the dominant position of that company which has actually achieved it. When online platforms reach great importance not only on their markets but for major parts of the economy, this assumption could prove wrong.

3. The markets of online platforms could require a different approach than under traditional economic doctrine. In the past 20 years, these markets have

proven tipping-prone in their early stages: One or two online platforms prevail, and the others are pushed out. The online platforms' markets have also proven very stable in the stage of dominance. In most cases, the incumbent's position could not be challenged successfully any more.

This raises the question whether attempts to achieve a dominant position by means of competition should be considered harmful on the online platforms' markets. If this question is answered positively, new competition-law tools are necessary because the existing tools are based on traditional economic doctrine. They cannot prohibit or prevent pursuing a dominant position.

New competition-law tools would have to be developed which allow for intervention before a dominant position is established. Or they have to modify the market environment so that a dominant position cannot be established or remains challengeable.

Aside intervention before dominance, a major hurdle in the existing toolbox is proving dominance. Online platforms' actions are mostly unilateral and thus can only be tackled by means of today's competition law if the online platform is proven to be dominant in the relevant market or to transfer dominance into the relevant market. This is unsatisfactory for several reasons: First, a major online platform may use resources which are not directly related to the concerned market. Existing competition law on dominance hardly can deal with that. Second, proving dominance takes great resources from competition authorities. Accordingly, it limits the number of cases they can handle. Third, market players often cannot prove dominance because they have no access to the required information. Therefore, market players often cannot tackle abusive conduct of online platforms by means of private enforcement.

For these reasons, new competition-law tools should not be based on dominance but on the role, online platforms take in the markets.

4. Online platforms may try to make their customers dependent. A means could be transferring know-how from the customer to the online platform. A powerful online platform may be in the position to force its customers into accepting that it takes over commercial decisions from the customer. When the online platform takes over decision making from the customer, the online platform will gain know-how. The customer, however, will lose know-how. He will increasingly become dependent on the online platform's decisions. And he will be less and less able to switch to another service provider.

The online platform may not even have to force the customer to transfer commercial decisions. Large online platforms make great investments into artificial intelligence (AI) to improve their products. Their AI is meant to make better decisions for the customers than the customers could make themselves. In such cases, customers may transfer decision making voluntarily to the online platform. The result is the same as above, the customer will become more and more dependent on the online platform, and the transfer of decision making my become irreversible.

This is another issue traditional economic doctrine has problems to deal with. The online platform's offer to let its AI make decisions for the customer is an offer made subject to competition and in a market environment. A highly developed AI is a result of innovation competition and a product which customers choose for its superior functions. And that is in line with the goals of competition policy under traditional economic doctrine. Yet, it may result in irreversible dependence and a loss of competition in the long run.

In the end, this may be reduced to the core question if improving knowledge and innovation are beneficial regardless of their distribution (possibly even lying in the hands of a single entity) or if it is preferable to have less knowledge and innovation overall but more evenly distributed.

Another example for transferring know-how from the customer to the platform is taking over the purchasing process from the retailer. The platform gains direct access to the customer and the retailer loses it. The platform gets to know the customer and his habits and preferences, and the retailer is alienated from the customer.

Therefore, dominant online platforms should at least be required not to "bundle" their services with the transfer of commercial decisions and purchasing process. Users should be able to choose if they use the service making their own decisions and processing the purchase on their own or transferring that to the online platform. Competition law would need appropriate tools to ensure that.

5. The extreme growth of some online platforms results to a significant extent from using content of customers and third parties without remuneration. The online platforms use this content for their own business purposes. Sometimes, they even use no-cost content of customers to provide services to these customers' competitors. This cost-free approach makes their businesses very scalable and fuels their extreme growth.

One example are customers of the online marketplace Amazon who have to share the site for a certain product. The first customer has to furnish the site with information and pictures. Another customer may join the site and offer a lower price; then, Amazon advertises primarily this customer's offer on the product site. This customer can freeride on the first customer's investment, and Amazon profits, too.

Another example are customers of Google Shopping. They have to accept that Google Shopping uses their product pictures to advertise their competitors' offers if they provide the better picture and the competitor offers a lower price – or, in Google Shopping's default display mode, pays Google a higher price for top listing.

Such use of content for services provided to competitors stifles non-price competition. Customers have no incentive to invest into the product site. And users of the market place receive less information and information of poorer quality on the product.

Online platforms also try to shift legal responsibility for content on their platform to their customers and third parties who (have to) provide the content. This discourages customers from providing content, too, at least when they are not adequately remunerated for taking the risk.

Therefore, one way to limit the power of online platforms may be prohibiting to tap into customers' assets without remuneration, especially where the platform uses customers' assets to provide services to their competitors. New rules should entitle customers to a fair remuneration. The new rules should be mandatory. Else, the online platforms would use their massive bargaining power to exclude these rules by contract.

6. Today, the forecast horizon of competition law is limited to a few years. Some assume, that online platforms pursue strategies for consolidated dominance over a much longer period.

One example are investments in AI which take much longer to turn into marketable products. It is even believed that AI strategies aim at creating advantages across markets so that the online platform can reach a dominant position on a new market more easily.

Amazon is accused of foregoing profits in favour of investing the money into aggressive pricing – to achieve a consolidated dominant position in the long run and to transfer it into a return on investment through monopoly returns (and possibly behavioural pricing).

The forecast horizon of competition law should be more flexible so that it is able to adapt to the concerned markets and players and to deal with such long-term strategies.

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