Competition Law & Tech - A New Approach

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In the past two years, the European Commission and national agencies have concluded investigations into a wide range of tech companies' practices, including Google's Shopping service and Android agreements, Amazon's most-favoured-nation clauses, Facebook's data-gathering arrangements, and Qualcomm's contracts for supplying baseband chipsets. There are ongoing cases into Amazon's dual role as marketplace operator and merchant, as well as the terms it applies to business users.

Running alongside enforcement activity, there has been a series of public policy debates about the role of technology in society more generally, the architecture of digital platforms, and the rights and interests of users.

In January, the European competition community converged in Brussels to discuss competition policy in the era of digitisation. A report will follow shortly from the panel of special advisors established by Commissioner Vestager. The conference received papers from over 100 contributors including technology firms, mobile carriers, media organisations, consumer groups, competition agencies, practitioners, and academics. In the UK, Professor Furman is leading a review of competition in the digital economy, following close behind a study for the German government into "Modernising the Law on Abuse of Market Power" which focused heavily on the impact of technology on competition. The Australian Competition and Consumer Commission is currently gathering feedback on its preliminary report into digital platforms.

This enforcement and policy activity has context. Governments and citizens are asking important questions about new technologies and how they are affecting our lives, our politics, and our economies. We need to help find answers. They won't always involve competition law.

My remarks here will focus on how Google can work with antitrust agencies on issues to do with market power and contestability. I will not seek to re-litigate the Shopping or

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Android cases, which are now before the Courts. Rather, I want to provide three observations that will hopefully give a sense of how we see our role in competition law reform.

1. <u>Commercial And Consumer Interests Are Not Necessarily Misaligned</u>

Our long term success is in providing accurate and trustworthy information to consumers. Wanting to be reliable makes commercial sense: if we lose trust in, for example, Search, it doesn't just affect people's willingness to rely on us for search results, it also affects their willingness to use us in other product areas, now or in the future.

Trust in Google is not just a function of what we do or don't do, but how the industry behaves more generally. We therefore also have a stake in many of the questions that are being asked of tech today even if our businesses differ. If the industry doesn't work constructively with policy makers then we all risk interventions that could be more costly for us than those which could be achieved through cooperation.

Data portability is one area where tech firms are being asked to do more. This stems from the perception that data is important to the production function of many goods and services. This has led to calls for better data flows.

We realised some time ago that allowing users to easily port data contributed to how they felt about our services. Consumers wanting to switch will find a way out sooner or later, and it is pointless and damaging to the brand to frustrate them. There are three examples of things that we did to respond to that insight:

- In 2007, we launched the "Data Liberation Front" – an engineering team with the goal of ensuring that users can migrate data to and from Google, including having their data sent to them via OneDrive, Dropbox, or other locations.

- In 2011 we launched Google Takeout – a hub with instructions on how to review privacy settings, control what activity Google records, track and delete data, and transfer or download a copy of your data. In 2017, Google Takeout had approximately 21 million unique visitors, who had exported in total more than one Exabyte of data since launch. That's the equivalent of 50,000 years' worth of DVD-quality video.

- More recently, we launched the open source Data Transfer Project in collaboration with Microsoft, Twitter and Facebook, which makes data transfer between services even easier. It allows users to port their data between different companies directly without needing to download and upload it to the new service.

Our initiatives are not a complete solution to data portability concerns. No one company could unilaterally create fixes that will create the right trade-offs between corporate incentives and the common good. These examples simply illustrate that openness and reducing switching costs can in some cases align with a company's goals.

To find the right approach requires a careful diagnosis of the problems. Technology markets have some unique characteristics and the possibility of barriers to competition, including a lack of access to data. But when it comes to articulating the concerns, we can do better than saying data is oil or sunshine.

For example, questions have been asked around how data is used and whether consumers have enough transparency. But these kinds of statements beg more specific questions. To what extent is a market failure informational? Do consumers lack information that would help them make better decisions? Or, if they have the information, are they lacking the tools to use it effectively, for example to make comparisons between different services? Or is the problem not that we don't have adequate information but rather that we lack the means to act on it because of switching costs or a lack of any realistic alternatives? Not every concern will be a competition issue – an informational deficit isn't necessarily a competition issue; but preventing switching might be.

Companies, like Google, are well positioned to provide data-driven insights that can help identify the specific problems and potential solutions. Products can evolve in ways that don't take account of all the implications. A design path may not violate competition rules, but it still may not be the most advantageous approach for consumers. If companies have an incentive to provide trusted and reliable products then they should be interested in identifying the things they can improve. This is, at its core, what the A/B testing we do every day is designed to do and it's why we iterate on the products that we launch. A better outcome for companies (legal certainty) and consumers (less time for solutions) would probably come from doing this kind of work without waiting for specific allegations or suspicions of misconduct.

When it comes to data, there is already a move to understand the characteristics of the problem before making rules. Commissioner Vestager said recently that *"it might be*

better… to adjust our approach to fit the way data is used in each sector of the economy separately." Having regard to the specifics make sense: different types of data are collected and used in different ways in different industries. Looking at the specific facts of a particular concern allows us to strike a balance between promoting data access and incentivising investment that benefits consumers. For example, the German report mentioned above distinguished between data from routine user interactions that can be gathered at low cost and mapping data that come from substantial investments by Google, Apple and others. So too fact-specific enquiry will involve looking at the balance that may need to be struck between respecting different stakeholders' rights. For example, balancing demands by firms for access against rights that data protection rules may have granted.

There may be creative solutions to data-related concerns. Some contributors to the Brussels conference raised concerns about their ability to share or pool data due to perceived competition risks. To overcome this apparent barrier, the Commission could introduce a block exemption enabling smaller tech companies to pool their data without antitrust risk. In Europe, we already have block exemptions for vertical agreements, technology transfers, and insurance of motor vehicles.

These are just a couple of ideas of how industry and government can better work together to diagnose problems and develop effective solutions. In some cases, the interests of industry and society may not be as misaligned as some seem to believe. Data portability is, I think, an example of where Google has already made some headway. Providing the tools to move data aligns with the purpose that we've set ourselves of wanting customers to stay with us because of the merits of our products rather than lock-in. But we can always do more.

Google's SVP of Global Affairs, Kent Walker recently said "*Many laws and regulations have contributed to the internet's vitality: competition and consumer protection laws, advertising regulations, and copyright, to name just a few. Existing legal frameworks reflect trade-offs that help everyone reap the benefits of modern technologies, minimize social costs, and respect fundamental rights. As technology evolves, we need to stay attuned to how best to improve those rules.*" Finding those trade-offs requires cooperation and creativity.

2. <u>Specific Concerns Require Targeted Solutions</u>

My second observation is likely unsurprising and overlaps with my first: overly-broad measures risk legal uncertainty and jeopardising pro-competitive conduct. Targeted

solutions can avoid these risks while effectively addressing the concerns that have been raised.

The example of so-called "killer acquisitions" has been much discussed recently. One variant of this idea relates to the risk of incumbents buying up nascent firms whose technologies have the potential to challenge existing products or services, and which the buyer might have an incentive to "mothball". Another variant is that – even if incumbents continue to develop the acquired technologies – the acquisition removes a potentially meaningful competitor, thereby reducing competition. Commission Vestager said recently that "*when you bring all those different services under one roof, the drive to make them better may start to fade away*."

As a first step, it's important to distinguish acquisitions of potentially competing companies from acquisitions of complementary businesses. So while one might ask whether a merger between two firms with overlapping competencies eliminated potentially competing businesses, I think that raises conceptually different issues to a merger that allows a firm to diversify.

The next step is to understand the source of the apparent concern that competition agencies are failing to block or remedy acquisitions of potential rivals. Is this, for example, due to a failure in agencies' factual and economic assessments, or is it because of some short-coming in the existing legal framework? Or some other factor entirely? This is important because understanding the source of the concern affects what any proposed solution should look like.

On one view, this issue comes down to agencies missing particular pieces of evidence or indicators that a firm will grow into a viable competitor. One example that is sometimes mentioned is the *TomTom/Tele Atlas* case. Here, the Commission considered that timely entry into the supply of navigable maps by Google and Microsoft was unlikely. Hindsight is, of course, a wonderful thing. Sometimes even experienced tech executives struggle to determine the potential of a particular company or technology, even in the short term. When eBay purchased Skype in 2005 for $2.6 billion, it would hardly have expected to take a $1.4 billion write-down just two years later. So we shouldn't be too quick to blame agencies for the inherent limitations of making predictions.

On another view, competition agencies are prevented from intervening because of the high evidentiary threshold for identifying potential competitors. An idea sometimes floated is that the burden should be shifted onto the acquiring company to prove that the target is not a viable competitor or that the merger will result in efficiencies. But this

presumes the current rules have failed in some way; that they have prevented competition agencies from intervening in cases that ought, on the merits, to have been blocked or otherwise remedied.

Is this borne out by the facts? Better counterfactuals are not immediately obvious. As a former Director of Economics for the OFT recently asked, "*to what extent would Instagram have become Instagram today absent investments that Facebook made?*". There are plenty of examples where acquisition by an incumbent has provided nascent companies with the financial security, expertise and infrastructure necessary to scale up their new technologies and grow.

Google's acquisition of Android is perhaps a case in point. Not a single Android device had been released by the time Google purchased the company in 2005. Google's support enabled Android technology to fuel the release of billions of devices worldwide and the creation of hundreds of thousands of jobs among OEMs, app developers and others. Of course, that begs the question of what a realistic counterfactual to Google's acquisition might be. How would Android have developed independently or as a part of a different company? Would we have lost significant benefits if Android had failed to gain traction outside Google? One thing that's clear is that Google did not snuff Android out.

So what might a solution look like? How should we take account of the "killer acquisition" concern when it's hard to distinguish "killer" deals from pro-competitive or neutral ones?

One option that should be uncontroversial is for competition agencies to analyse more closely the deal documents to discern what the acquirer itself views as the competitive potential of the target. Agencies could also carry out "deep dives" into the basis of acquirer valuations of the target to understand – for example – whether the value of the deal comes from removing a potential rival. The internal documents of the acquirer and valuation reports from investment banking advisors are likely to provide compelling evidence of whether the target is viewed as a viable competitor or not.

Another possibility is to review past cases to improve future practice. Google is working with the CMA on a review of the Waze transaction. Ad hoc reviews of past cases is good practice and is not confined to the tech sector, although there remains the difficult question of identifying the counterfactual position, had the merger not occurred.

Where does this leave us? The overriding message to my mind is that concerns like "killer acquisitions" need to be properly understood – and the uncertainties recognized –

before appropriate remedies can be put in place. Otherwise, we risk implementing broad-brush solutions that inhibit pro-competitive mergers without necessarily improving the prospects of potential rivals. In other words, the best solutions are those that are targeted and proportionate to the concern at issue.

3. A "Participative Process" Could Enhance Competition Law Enforcement

The recent debate about technology and antitrust has considered not just substantive questions but also procedural ones, including how the process of identifying and resolving competition concerns in technology markets could be improved. It seems to be common ground that possible improvements include (i) increasing the speed of decision-making, given that technology markets are often fast-moving; (ii) creating guidelines and a sufficiently deep body of decisions to offer guidance, both positive and negative (which could include engagement from industry to provide relevant data and expertise); and (iii) increasing the depth of sector-specific knowledge held by public authorities.

Of course, it's one thing to say what an optimal enforcement environment would look like; it's another to identify specific steps that we should take to get there. One such step could be to create opportunities for industry, competition agencies (and agencies with overlapping competencies), and consumer groups to come together to develop industry-wide codes of practice on particular issues, such as data portability. The aim of this process would be to provide technology firms with legal certainty, while also finding a way to address or pre-empt competition concerns quickly and effectively. This process would be different from both self-regulation and traditional *ex post* enforcement, and would complement existing antitrust procedures.[2]

Collaborative solutions have sometimes been shown to be a swift, effective way of solving problems. For example, the CMA identified a range of problems in the retail banking sector: charging structures were complex and opaque; less sophisticated customers were not confident in searching for, comparing, and switching to alternative banking providers; there were few (if any) prompts for customers to think about switching; and it was difficult for new banks to acquire customers because of incumbents' superior information about existing SME customers. Part of the CMA's remedy was "Open Banking" which enables customers to share transaction and other data with regulated third parties through secure APIs, thereby enabling third parties to offer services like budgeting advice or comparisons of different products based on the customer's specific needs. This remedy is viewed as being

[2] At the recent Brussels conference, Professor Tirole referred to a "participative" model, whereby "*the industry or other parties propose possible regulations and the antitrust authorities issue some opinion, creating some legal certainty without casting the rules in stone*."

highly successful, with more than 200 organizations in the process of joining the Open Banking network just one year in.

Open Banking is not the only example. Following an investigation into the supply of groceries to retailers, the UK's Groceries Code was set up to provide a code of conduct for the industry, enforced by an independent Adjudicator. This is another example of how targeted regulatory intervention can have an impact. Although note here the legislative changes that were required and that this adjudicator was created when industry had failed to provide its own alternative.

Another example of this "participative" type of industry-wide initiative is in Hong Kong where companies have the option to submit proposed agreements, conduct, or industry codes to the Hong Kong Competition Commission for a clearance decision, with the possibility for public comment. In January this year, for example, a pharmaceutical industry association put forward a sectoral information sharing arrangement for review. And while the agency declined formally to exempt a Code of Banking Practice from the rules on restrictive agreements in 2018, it confirmed that it had no intentions to bring enforcement actions in respect of the Code.

Going beyond industry codes, there may also be scope for more ex ante review of proposed agreements or conduct by competition agencies before they are put into practice. Professor Tirole referred to the DoJ's 'business review letters' procedure whereby firms can seek guidance on whether the DoJ will sue if proposed conduct is implemented. And before the Modernisation Regulation in 2004, the European Commission provided comfort letters (and sometimes individual exemption or negative clearance decisions) for practices that were submitted for review. The OFT also used to have a system for providing ex ante guidance on complex matters.

4. A New Approach?

Tech companies should engage. We should accept that our sector has its own characteristics and that barriers to entry are possible. And we should seek solutions to challenging problems. We have data and experience that have the potential to contribute to finding creative and effective solutions. But policy-makers and agencies will also need to step forward to help us identify the specific problems that we need to address and find the right trade-offs.

To borrow a phrase from economists, we seem to be at a "tipping point". Prescribing overly-broad remedies risks inhibiting pro-competitive arrangements and might be

disproportionate to the problems they are trying to solve. At the same time, technology companies need to take seriously the calls for reform; whether or not we agree with all the concerns being raised, user trust is important for technology, perhaps more than other sectors, so we have to make changes that meet the expectations of our users and partners.

I wanted to outline three observations that give some sense of how we see our part in this process. First, we have a commercial incentive to maintain the trust of our users and so have a role in ensuring, for example, that they can make informed decisions about their data, and in lowering barriers to sharing. Second, we see a role in helping explore and find targeted and proportionate solutions to other concerns that have been raised, including participating in agencies' retrospective reviews of previous merger cases. Third, and perhaps most importantly, we believe that we have a role in helping develop new participative procedures to promote legal certainty, timely and effective intervention, and enhanced sector-specific knowledge among competition agencies.