The FCO publishes discussion paper on internet platform markets – part two

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Silke Heinz (Heinz & Zagrosek Partner mbB, Germany)

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This blog deals with the 2nd part of the FCO's discussion paper on internet platforms: possible theories of harm and intervention of competition agencies. For the first part on general concepts please see my previous blog.

Merger control
The FCO explains that reducing the number of platforms may actually increase competition, due to the easier internalization of network effects, leading to efficiencies. On the other hand, this can raise concerns when resulting in the "**tipping**" of a market. Whether tipping is a practicable theory of harm is unclear, as its effects are difficult to measure. However, the FCO is willing to rely on this concept for clearing a merger of competing platforms catching up with the market leader, even if this furthers narrows the market to only two players – provided these can compete more effectively against the leader, thus preventing tipping. (The FCO applied this line of reasoning in the merger of the real estate internet platforms *Immonet/Immowelt*).

The FCO elaborates on possible concerns when **incumbents with "deep pockets" acquire innovative newcomers**, thereby eliminating potential competition and securing their existing (strong) market position. This may chill the dynamics of competition, as incumbents might have little incentive to invest in product development and cannibalize their existing offer. The FCO refers to *Facebook/Whatsapp* (and in the past *Google/Doubleclick*) as examples for this theory of harm.

The paper also mentions that agencies may not be able to review mergers involving newcomers if these do not (yet) meet the **turnover thresholds**, even though they have a lot of competition potential, in terms of business concepts, data access and IP rights. The FCO indicates that this may require adapting the merger review thresholds, without, however, being more specific.

The FCO notes that **coordinated effects** are often viewed as a lesser concern in two-sided markets, given that any implicit coordination would need to cover multiple market sides, and that indirect network effects rather increase the incentive to deviate from tacit collusion. The FCO did not find coordinated effects despite high combined shares in *Immonet/Immowelt*, as well as in *Verivox/Check24*, involving the two leading German comparison platforms with combined shares of >95% (because of existing asymmetries, a different focus of activities and the lack of a sanction mechanism).

The paper points out that **access to data** may be a key element in some internet platform mergers, sometimes even their rationale, and improved access to data may thus play an indirect role in merger review. There is a discussion on the relation of antitrust and data protection, and the paper explains that the majority opinion is not to use antitrust law in order to foster data protection.

Contractual restrictions
The FCO states that **price parity/MFN clauses** may restrict competition between platforms at horizontal level, as they may impede market entry for new platforms that cannot offer lower commission fees and thus lower end customer prices. The justification for this type of restriction is to prevent free-riding on contract-specific investment and information provided to the other party. The FCO refers to the *HRS* case, in which it found a restriction of competition and no exemption, which was upheld by the Düsseldorf Court of Appeals.

The paper asks whether it is adequate to assess price-parity clauses between a platform and one platform side as vertical restraints that may benefit from the vertical block exemption regulation. To the extent that the platform operator also acts as a distributor on its own platform, price-parity clauses with other distributors on the platform amount to horizontal price agreements, which is what the FCO found with respect to Amazon's price-parity clauses regarding its Marketplace platform.

Abuse of dominance/market power
Leveraging may play a role, when dominant undertakings try to secure their position by impeding innovative competitors on neighboring markets, in particular if their technology is capable of substituting the dominated market. The FCO concedes that finding and assessing such strategies in dynamic markets is not easy, as replacing competitors may also be the result of competition on the merits.

Another topic is whether dominant players need to **grant competitors access to internet-specific services** under non-discrimination obligations, in particular to IP rights (software patents), other company assets (interfaces, search algorithms) or business secrets (user data). A related question is when internet platforms obtain a gatekeeper function and how to deal with them granting their own services a preferential treatment. In the FCO's view, it is not possible to automatically apply the essential facilities doctrine developed for (physical) network industries with natural monopolies to the digital economy.

The paper refers to Google's general search engine and the discussion on a review of its search algorithm, in particular on discrimination-free access. The FCO believes that search engines should have broad discretion regarding the relevant criteria (based on user preference) for the search results. This does not mean that there is no scope for discrimination when displaying the search results. In *Google/VG Media*, the FCO found that shortening the content of search results in order to avoid the risk of legal infringements and liability would most likely be an objective justification, but going beyond what is necessary might constitute an infringement of the non-discrimination principle.

On **price abuse**, the paper explains that the pricing may differ by platform side (one side may even be offered free of charge), but is set simultaneously and interdependently, so that an analysis would need to cover the pricing structure and price level of all platform sides in order to capture the overall pricing strategy. The FCO notes that conventional methodology used in excessive pricing, *i.e.*, the concept of comparison markets or cost control, would not necessarily seem adequate in this respect. The possibility of dynamic and even individualized pricing (based on user data) poses additional challenges to conventional price abuse concepts.

Overall, the FCO follows a balanced and more economic approach, and aims at capturing the particularities of platform markets, which may require deviations from a conventional antitrust approach. The paper raises several important issues, even if in some aspects the suggestions may go too far.

This applies to the idea of revised merger filing thresholds to capture mergers involving newcomers. The German Monopoly Commission floated the idea recently and suggested to look at the deal size in such cases – which would raise numerous practical problems. It is not clear why the thresholds should be lowered for internet platforms, in particular if – as the paper says – the easier internalization of network effects following a merger would generally lead to efficiencies.

It is also unclear why price-parity/MFN clauses should not be assessed under the rules for vertical restraints. These clauses typically relate to vertical relations, and agencies can review potential impacts at horizontal level based on network effects. In HRS, the FCO even suggested that the VBER might not apply, as the price-parity clause's effects were similar to resale price maintenance – and the paper seems to come from the same direction.

Interestingly, it does not mention the different approaches NCAs took across the EU in hotel platform probes: regarding booking.com's price-parity clauses, most NCAs accepted commitments of a limited duration, whereas the FCO rejected these. This seriously undermines a coherent application of Article 101 TFEU, an issue which would certainly merit discussion in the paper.