

Kluwer Competition Law Blog

Dutch Government Publishes Discussion Paper on Online Platforms and the Need for Additional Regulation: Input Requested Before 3 February 2019

Mariska van de Sanden (Bird & Bird, The Netherlands) · Wednesday, January 2nd, 2019

I. Introduction to the internet consultation

On 19 December 2018 the Dutch Ministry of Economic Affairs and Climate (“Ministry”) started [an internet consultation on competition law and online platforms](#), in particular on the question whether additional regulation is required to deal with the challenges these platforms bring. Online platforms, such as Google, Amazon and Facebook, play an increasingly important role in our economy and society. The high profitability and scale of some of these platforms have offered them a strong position within society, with little competition. This has raised numerous questions, like whether additional regulation is indeed required for online platforms. Also, the increasing use of data and algorithms is being mentioned as a new challenge for the regulators and competition authorities.

The purpose of the Ministry with this consultation is to start a discussion and to examine the usefulness and necessity of additional regulation to deal with these new challenges. To this end, the Ministry also published a discussion paper which analyses the pros and cons of such additional regulation by looking into the current issues and possible solutions to solve these (“the Paper”). The Ministry invites everyone to respond to the Paper, especially to the questions included in it. The consultation ends on 3 February 2019.^[1]

This post first summarizes the main issues identified in the Paper (§2) and then shortly discusses to what extent the current tools are sufficient to deal with these issues (§3). The post ends with some remarks (§4).

II. Main challenges competition law and online platforms

The discussion paper identifies three main challenges for keeping digital markets competitive:

- **Market power:** according to the Paper, most online platforms are characterized by having network effects, data advantages and economies of scale. Despite these characteristics, many online markets still create competition between platforms.

However, the Paper explains that some online platforms seem to have gained a so-called “lasting” position of market power. This, combined with the trend of conglomerates, seems to lead to the situation in which it is almost impossible to enter the market and effectively compete, even for a disruptive innovative competitor.

- **Algorithms:** the Paper refers to algorithms as a tool for the implementation of traditional cartel agreements, but also for *de facto* vertical price-fixing and tacit collusion. Although tacit collusion is not prohibited, it can have adverse effects on consumers. Moreover, in theory, self-learning algorithms could become cartels in the future, even without human intervention, if they learn from each other and from data that collusion is more profitable than competition.
- **New forms of abuse:** the exclusion by rank orders, restriction of freedom of choice by behavioral targeting, under-investment in privacy and data protection and individualized price discrimination are named as new forms of possible abuses.

III. How to deal with these challenges?

The Paper subsequently explores how regulators and competition authorities can deal with these new challenges and to what extent the current rules are sufficient. On the one hand, for many situations, the competition rules seem to be sufficiently flexible to be applicable in digital markets, as is shown by recent enforcement cases like the *Google Shopping* and *Android*-cases. In addition, for some practices, other laws seem to be more appropriate to deal with these practices, like consumer protection or privacy rules. On the other hand, in some cases, additional regulation might be required. For example, since tacit collusion is currently not prohibited but can cause consumer harm, some additional rules might be necessary. The Paper suggests that such rules would first have to be tested in an experimental environment to keep potential market disruptions to a minimum. Moreover, it proposes that the undertaking that chooses to use a certain autonomously operating algorithm should also be liable for any foreseeable damage caused by that algorithm.

Furthermore, the Paper holds that where there is no lasting market power, regular *ex post* competition law should in principle be sufficient. However, for those situations in which lasting market power seems to exist, the following policy options are explored by the Paper: legislation which, for example, obliges platforms with a gatekeeper function to be neutral in their rankings or conditions for access to the platform. Or legislation which keeps markets contestable, facilitates access (e.g. by sharing data, introducing data portability for business users and/or interoperability). Another option, which is explored in the Paper, is the interference with the market structure by splitting up the dominant platform (horizontally or divisionally). Moreover, the Paper explores the possibility of introducing a transaction value based threshold for data-driven mergers.

IV. Final remarks

The Paper is a valuable contribution to the discussion about the new challenges that the digital markets bring. The conclusion that competition regulators and authorities should in the first place continue to invest in developing knowledge and expertise about these markets and have sufficient tools to enforce the current rules in digital

markets seems to be a valid one. In addition – and only in addition – *ex ante* regulation could be considered. It would in my opinion have been even more interesting if the Paper had also explored more in-depth which tools the regulators would need to deal with the new challenges and to what extent the use of such tools could avoid the need for additional regulation. At EU-level, for example, an increased use of interim measures is explored in order to enable the European Commission to respond faster to competition restrictive practices^[2] and in Germany, the *Monopolkommission* and the *Bundeskartellamt* are considering the introduction of new rebuttable presumptions in order to be better able to deal with the challenges digital platforms bring.^[3]

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