Judge the play, not the players

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Introduction

A skilled tackle or an underhanded foul? In line with the opposing player or offside? Staying on track or cutting corners? In the world of sports, it is difficult to imagine how decisions would be made on these issues absent clear rules and competent referees to enforce them. One thing is certain: a sporting contest missing either of the two would be chaos both to watch and to play.

Using a sports analogy, a senior European Commission official recently asked, somewhat rhetorically, whether the operator of a major online marketplace, which also sells as a retailer in that marketplace, can be both "*an umpire and have a team*".[1] Concerns surrounding the dual role of online platforms serving as both "umpire" and "player" have already led many to respond in the negative. Indeed, one can readily find in the press references to public officials calling for greater regulation of online platforms, with some even going so far as to call for extreme solutions such as a "break-up" of vertically-integrated platforms, on grounds that they are inherently illegal.[2]

But, let's take a step back. Is there really something fundamentally anti-competitive in vertically-integrated platforms or in their rule-setting powers to justify a *per se* presumption of illegality?

Inherently anti-competitive?

If it were *per se* illegal to play the dual roles of owner / regulator and downstream player, this would mean that vertical integration by platforms is always anti-competitive. But, we know this is not the case. It would be perverse to prohibit *per se* a business model that eliminates double marginalisation, promotes innovation and generates vast efficiencies for consumers.

The recently published special advisers' report, "*Competition policy for the digital era*," expressly recognises that vertically-integrated platforms have "*incentives to write good rules to make the platform more valuable to their users*".[3] Indeed, profits of vertically-integrated platforms are directly tied to the economic value of their ecosystems. To succeed, online platforms generally need thriving third parties operating at the downstream level. There are countless examples of platforms that did not meet their objectives because they were unable to attract or maintain third parties' participation in downstream markets. They include, to name a few: Symbian, Windows Phone, Sidecar (ride-hailing), Panoptix (building efficiency systems), Covisint (auto parts exchange) and Dell Marketplace. Vertically-integrated platforms do not presumptively have an inherent conflict of interest and an incentive to foreclose downstream players. For the majority of those platforms, implementing such a foreclosure strategy would be very short-sighted.

Judge the play, not the player

The European Commission has so far focussed on the play, not the player. In *Google Shopping* and *Google Android*, it was not the dual role *per se*, but rather findings of anti-competitive behaviour and foreclosure effects that led to the conclusion that competition law had been violated in those cases.

All firms, including those becoming dominant on a given market, are entitled to compete for business. Indeed, "*when companies are able to compete on their own merits, businesses and households benefit from a wide range of good quality, innovative products and services at competitive prices.*"[4] Competition on the merits includes, in particular, competing by improving the quality of technologies and products, which vertical integration in many circumstances helps to achieve.

Importantly, the EU Courts have made it clear that the conduct of a dominant company cannot be characterised as abusive merely because it affects competitors.[5] In line with a famous observation by Judge Learned Hand, moreover, "*the successful competitor, having been urged to compete, must not be turned upon when he wins.*"[6] Even if a platform achieves dominance, this is not something that should be punished, provided it was achieved legitimately.

Accordingly, there should be no place in EU competition law for an impulsive presumption of *per se* illegality towards dominant vertically-integrated platforms. As in any fairly-played sport, it is reasonable to expect that, instead of rushing to premature conclusions based on who is playing, the authorities will carefully assess how they play. In competition law, this requires a careful effects-based analysis of conduct using economically sound theories of harm. Any alleged anti-competitive practice of a dominant platform should be subject to rigorous factual, economic and legal analysis to determine whether the platform is engaging in competition that is not on its own merits and results in appreciable anti-competitive effects harming consumers.

** The author is an associate at Sidley Austin LLP. The views expressed in this article are exclusively those of the author and do not necessarily reflect those of Sidley Austin LLP or its partners. This article has been prepared for informational purposes only and does not constitute legal advice.*

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[1] See Twitter @TommasoValletti, tweet of 17 July 2019, available here.

[2] For example, Elizabeth Warren, U.S. 2020 presidential candidate, is proposing "*legislation that requires large tech platforms to be designated as 'Platform Utilities' and broken apart from any participant on that platform*". *See* Team Warren, *Here's how we can break up Big Tech*, Elizabeth Warren, 8 March 2019, available here.

[3] European Commission, *Competition policy for the digital era*, J Crémer, Y-A de Montjoye, and H Schweitzer, 2019, available here, p. 61.

[4] European Commission, *Report on Competition Policy 2015*, COM (2016) 393 final, available here, p. 2.

[5] *See, e.g.*, Judgment of 27 March 2012, *Post Danmark I*, C-209/10, EU:C:2012:172, para. 22 – "*competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers*"; and judgment of 6 September 2017, *Intel*, C-413/14 P, EU:C:2017:632, 134.

[6] *United States v. Aluminum Co. of America* (ALCOA), 148 F.2d 416 (2nd Cir. 1945), at ¶ 430.