

Kluwer Competition Law Blog

European Commission conference on ‘Shaping competition policy in an era of digitisation’: 5 key points and practical implications

Grant Murray (Baker McKenzie) · Thursday, January 24th, 2019

#1. The Commission’s big three worries: Data as a vital tool for doing business; platforms which control access to important digital resources and then expand; killer acquisitions and other ways of blocking the path to innovation. The Commission feels a great responsibility to “shape digitisation before it shapes us”. While the existing legal toolkit is probably ‘fit for purpose’, it is not ‘business as usual’.

Implications? An emboldened Commission. The Commission may feel vindicated as a result of views expressed at the conference (which it had organised). Numerous speakers hinted that it will be the EU and not the US which takes the lead in this area. Likely to mean new policies and approaches in coming years – including presumptions and tweaked standard or proof reflecting less of a worry about false positives?

#2 Killer acquisitions: The concern that Big Tech is buying up innovative competition before it becomes a threat. Scepticism about whether this is pro-competitive. Mentioned again and again – including by Jean Tirole – though it was a bit of an echo chamber at times without tech companies on the panel to talk of benefits.

Implications? Acknowledged at times that more economic thinking needs to be done to distinguish between pro-comp acquisition and rent-chasing entry. But must be a risk that agencies won’t wait (they openly worry about certain tech deals that were cleared) and will adjust the rules with, e.g. a presumption of anti-competitiveness (to be rebutted by acquirer who has the data) or more lax legal standard of proof (reflecting greater willingness to take risk of false positives where markets prone to tipping). In the meantime, acquirers will want to be able to justify each acquisition on the basis of efficiencies (both before and after). Especially important if there is a pattern of acquiring certain entities at a certain time. Extreme care needed with internal documents describing deal rationale so as not to give wrong impression.

#3. Claimed efficiencies under attack: Tech companies were described as adept in identifying these but it was argued that new critiques of these efficiencies are accumulating. More work called for by academics and agencies to study trade-offs. Claimed efficiencies under scrutiny are, apparently, better matching of consumers to ads = the revenue that pays for “free” services’; killer acquisitions (again); limiting entry into ecosystem increases quality.

Implications? Seems a call for agencies to be more sceptical about efficiencies. Companies are going to need to be able to defend claimed efficiencies. To show that clicks do not simply translate into a demand for low-quality content; to be able to show why limiting entry into ecosystem increases quality and defends legitimate property rights. Need to be alive to fact that agencies may want to see customer and not platform make the decisions- given the mantra: to protect competition as a process of rivalry where customers take informed decisions. Watch out for arguments that market power is merely owed to the violation of some other area of law.

#4. Innovation and regulation: A call from some quarters for a more discerning approach to what is meant by “innovation”. Argument that not all innovation is beneficial; that it should not be seen as having a momentum and agency all of its own which cannot be stopped. And regulation claimed to be more than technocratic boundary setting, able to foster the right type of innovation. Jean Tirole sees “public intervention” as inevitable but seemed against break ups (no concrete case and different to telecoms where you can identify the essential facility). Invited regulation for Most Favoured Nation clauses/best price guarantees which “allow platforms to tax their rivals”. Some hinted at a need for regulation to work with the GDPR which it was argued may favour big tech when it comes to personal data, strengthening market power.

Implications? Need to show that engaged in socially beneficial – and not – damaging types of innovation. Tirole endorses “participative antitrust” where industry makes proposals to competition authorities who assess and provide business review letters and evolve guidelines and rules. Commission wants to shape digitisation before it shapes “us”. Companies will no doubt want to be part of the debate and narrative before they are, themselves, shaped by regulation.

#5 Contestability: Agencies urged to focus on how to keep markets open – to keep monopolists on their toes. But acknowledged by panels as a challenge. Agencies were counselled to watch out for platforms who know what they are doing forecloses/protects against expansion (e.g. of a new entrant in niche segment).

Implications? Some agencies might now be less trusting of natural market forces. Companies will benefit from being able to point to evidence of actual new (and expanded) entry in niche segments – that are not acquired but flourish even within an ecosystem. Companies will need to watch out for measures which interfere in any way with multi-homing. Agencies are quick to describe human biases (e.g. strength of pre-loaded defaults) to strengthen their case so good empirical evidence may be needed to available to ensure a real world view.

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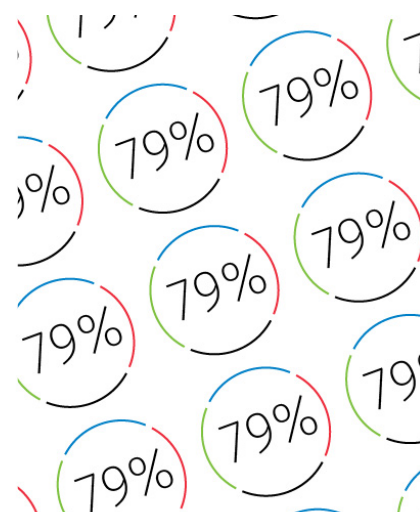
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