Kluwer Competition Law Blog

On-platform Tying or Another Case of Leveraging – A Discussion on Facebook Marketplace

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Factual background

Just before 2022 ended the Commission sent a statement of objections to Meta regarding the potential abusive behaviour of Facebook. According to the statement of objections, Facebook may be engaging in (i) abusive tying practices with regard to Facebook Marketplace as users (i.e. consumers) that log into Facebook and are automatically also offered access to the Facebook Marketplace, without the possibility to avoid this from happening, and (ii) the imposition of unfair terms and conditions on competing classified ads service providers that advertise their services through Facebook and/or Instagram. According to the Commission, Facebook is using the ad data generated by these parties to benefit solely Facebook Marketplace, while unreasonably burdening its competitors with requirements that are not necessary for the provision of ad services to these parties.

Despite the rather straightforward objections mentioned by the Commission, finding an abuse of dominance, in this case, will be rather challenging. Should this case evolve beyond the statement of objections, it may become another landmark case in the context of multisided platforms. The alleged grounds for abuse may bring about either a new type of tying practices in the context of multisided platforms or yet another case of abusive leveraging *à-la* Google Shopping. Both options, as will be discussed, are not entirely evident.

On-platform tying – A new form of tying practices in the context of multisided platforms

The type of tying addressed by the Commission in the case of Facebook opens the door to finding a new form of anti-competitive tying in the case of multisided platforms, namely on-platform tying. In such a context, on- platform tying would entail situations where the various services facilitated by a multisided platform are tied to each other. In practice, this would entail the use and/or participation of one service (i) is made conditional upon the use of or participation in another service; or (ii) that the use of one service automatically triggers the use of or participation in another platform service. This kind of practice has not yet received much attention in the context of competition policy. Most of the focus in this regard has been on cross-platform tying, where two or more separate platforms are tied (e.g. Google Android). This is unfortunate from an enforcement perspective since the two types of tying possess a similar if not identical anti-competitive potential.

In the context of platforms both on-platform and cross-platform tying allow the concerned entity to leverage part of its customer base onto a new platform or platform service without having to face the so-called chicken-and-egg problem that every multisided platform experiences when first launching. This aspect also makes such strategies useful for launching so-called '*envelopment*' attacks, which allow the respective entity to extend to other markets, or otherwise protect oneself from such an attack by potential competitors. Given that the leveraged customers need to be (potential) users of both the tying and tied platforms (in case of cross-platform tying) or platform services (in case of on-platform tying) such practices will typically be applied with respect to the end-consumer side of multisided platforms.

The potential of such practice to facilitate significant market power leveraging across markets will depend on the degree of overlap between the two platforms or platforms' services with respect to such end consumers. The greater the degree of overlap, the greater the leveraging potential. In practice, the degree of overlap will be determined to a great degree by the functional (and commercial) relationship between the tied platforms or platform services. Such a relationship can be that of complements (e.g. Android OS and PlayStore), weak substitutes (e.g. Facebook and Instagram) or unrelated services (e.g. Windows OS and LinkedIn). The choice to engage in cross-platform or on-platform tying depends on the circumstances of each respective case and the kind of multisided platform(s) that may be more suitable for one of the types more than the other (see here for a more extensive discussion on tying and multisided platforms).

Against this background, one may argue that on-platform tying scenarios also form a significant blind spot in the context of the DMA, which only seems to acknowledge the possibility of cross-platform tying. A close reading of Articles 5 and 6 reveals *de facto* a collection of various forms of cross-platform tying practices. By contrast, on-platform tying can be said to be mostly left out of the DMA. Whether this will change in the future will depend on how the Commission will deal with multi-service gatekeeper platforms. Essentially it mostly comes down to the manner in which Art. 3(9), which appears to indicate a possibility of having a multi-service gatekeeper platform, will be implemented in the designation decisions. How exactly this would work in conjunction with the thresholds of Art. 3(2) is not clear, however, not having this possibility to designate certain platforms as a multi-service gatekeeper may prevent the possibility of addressing on-platform tying scenarios within the DMA. This is also what makes the situation of Facebook so important as it could serve as a future reference case for future designation decisions as well as substantive updates of the DMA. Until then, however, such practices will have to be addressed under Art. 102 TFEU.

When it comes to the desirability of enforcement, it is worth noting that studies in the field of economics have shown that the anti-competitive potential of tying practices in the context of multisided platforms is no different than in non-platform settings and thus justify, at the very least, a legal inquiry into their permissiveness. Generally speaking, the anti-competitive potential of tying practices has been considered to result in (i) foreclosure in the tying and/or tied product markets; (ii) deterrence of entrance in the tying and/or tied product markets as well as a (theoretical) third product market for a novel product capable of replacing the combination of the tying and tied product; (iv) the extraction of supra-competitive prices in both tying and/or tied product markets. The manifestation of such potential harms in practice depends, however, on the circumstances of each case and the market conditions present at the time of the analysis.

Over time, various studies by proponents and opponents of the Chicago School, have been conducted to establish the conditions under which undesirable outcomes may arise (see the seminal

work by Whinston). In the context of multisided platform settings, as in the case of Facebook, similar findings have been made. Accordingly, the profitability and manifestation of anti-competitive tying by multisided platforms in practice is not certain under all market conditions. An important aspect in this regard was found to be the degree of the two-sidedness of the markets that are being tied (see more extensive discussions here and here). The more two-sided these markets are, the more likely it is for (anti-competitive) tying to be profitable. The fact that the tying and/or tied products or services are provided for free (zero-priced) does not detract from the potential anti-competitive concerns. Quite the contrary, it is precisely these circumstances of zero pricing which increase the likelihood of tying practices. If platforms are unable to compete on prices for their goods or services, they need to find a manner in which they can improve their zero-priced offer for consumers of commercial trading parties while battling against competitors.

Against this background, it can be argued that the Commission's case against Facebook may merit legal scrutiny, as the circumstances of the case are of such a nature that may lead to some or all of the competitive concerns commonly associated with abusive tying practices from an economic perspective. The problematic issue in the case of Facebook is in this regard not one of economic rationale but rather a legal one, as the criteria for establishing the existence of abusive tying under Art. 102 TFEU in this case do not appear to be fulfilled.

On-platform tying under Art. 102 TFEU

Dealing with on-platform tying under Art. 102 TFEU in essence requires translating the existing legal test for abusive tying to the context of multisided platforms. While this process is as such rather straightforward – reaching a finding of abuse in such a context may prove to be rather challenging when taking Facebook's case as an example. The legal test for abusive tying practice under Art. 102 TFEU requires proof of: (i) a dominant position in the tying product market, (ii) the tying must concern two separate products or services, (iii) customers are coerced into obtaining the tying and tied products or services together (iv) the tie has a foreclosure effect and (v) there is no objective justification for the practice (see Microsoft, paras. 850-869; Google Android, paras. 741-751).

Fulfilling the first two criteria requires essentially the possibility to define (separate) relevant markets for the various services offered on the platform. Such a possibility is not unprecedented, as witnessed by the Google Shopping case, where the Commission did exactly that. Nevertheless, that does not mean this possibility is always evident. Far from it. As platform services become more integrated and multi-service offers become more common such a market definition becomes more difficult to defend. Take for example Booking.com, should the market definition be done at the platform level or the individual service level (hotel room booking, flight search, taxi booking), or both? The answer is far from evident as the market shows plenty of standalone and multi-service offers. In the case of Facebook, this matter is, for now, less likely to be challenging as it would require deciding whether to define separate relevant markets for the social media and the marketplace services offered by it to consumers. Since these services are commonly provided separately and similar combined offers are far from being common commercial practices it is not hard to see why these would be considered to constitute separate services for the legal test of tying under Art. 102 TFEU.

The third criterion which requires an element of coercion may similarly pose some application

challenges in practice. At its core, this criterion in the context of a multisided platform should be used to assess whether the respective customers of the platform are able to participate actively or passively or otherwise make use of a single platform service. This core rationale is important to keep in mind as the presence of coercion is not so much a binary matter as much as it is a matter of degree.

At the most extreme side of the spectrum of coercion (in on-platform tying cases), situations would arise where the respective services of the platform must be utilized in tandem in order to work. This would be, for example, the case if booking a room on an OTA would require also making a flight reservation or airport-taxi reservation through the same OTA platform. Somewhere in the middle of the spectrum, a less evident form of coercion would then entail the automatic launch of additional platform services upon the use of one service. For example, this could be the case if searching for a hotel room on an OTA would also trigger a flight search service on the same OTA based on the consumer data processed on the platform. An even less evident form of coercion would entail the offering of multiple services in parallel which are then coupled with ongoing (aggressive and/or even misleading) nudging designed to push consumers into participating or making use of multiple platform services. Finally, at the very end of the spectrum, where no form of coercion is found in the sense of Art. 102 TFEU, there would be situations where multiple services are offered by one multisided platform and such a platform does no more than promote such multi-service options to its customers. Of course, between these theoretical points of reference, there is an endless amount of variations possible depending on the circumstances of each case.

When turning to the case of Facebook, it is hard to see on the face of things how the criterion of coercion would be met. When logging in to Facebook, the main interface does indeed display a tile of the Facebook Marketplace with which consumers can directly go to this section of the platform and make use of this service. The mere placement of this tile on the main interface and adding the Marketplace service to the platform as such can hardly be considered to coerce consumers to participate or make use of this service, actively or passively. So in a way, one may argue that there is no actual tying at all – but rather the parallel provision of multiple services on one multisided platform. The fact that consumers can switch from one service (social media) to another (Marketplace) with one click and without having to sign in to a different platform does not make such practice coercive in the sense of tying practices. Finding coercion under such circumstances would be problematic, not only for Facebook but for all the multisided platforms which at some point in time intend on extending the scope of their services, as it would *de facto* result in condemning such expansions, which would be unreasonable – even when dealing with tech giants like Meta. Accordingly, even if such practices may give Facebook a competitive advantage over its competitors, which is in itself far from evident, it is hard to argue why these practices *alone* should be considered to depart from the mantra of *competition on the merits*.

That being said, the inability of qualifying such practices as tying under Art. 102 TFEU does not mean that Facebook is entirely off the hook, as the statement of objections of the Commission also mentions a second (potentially) problematic behaviour, namely the imposition of unfair terms and conditions on providers of classified ads services which advertise on Facebook and Instagram. Such terms would allow Meta to use the ads-related data derived from these service providers to give a competitive edge to Facebook Marketplace. Against this background, it can be argued that the two behaviours together may fall under the scope of the generic abuse category of '*leveraging*'.

Leveraging under Art. 102 TFEU

The case law on Art. 102 TFEU has time and time again repeated the mantra that the scope of abuses under the law and letter of Art. 102 TFEU is non-exhaustive. In other words, new types and forms and abuses can be found to exist which do not fit with the existing legal tests of abuses noted in the provision itself or developed later through case law. The most prominent case in this respect is undoubtedly that of Google Shopping.

The idea behind the non-exhaustive nature of Art. 102 TFEU and the generic qualification of abusive leveraging are then intended to prevent unforeseen anti-competitive practices of dominant undertakings from escaping legal scrutiny due to legal formalistic requirements which are inherently prone to being outdated. In such context, the concept of abusive leveraging offers, theoretically at least, significant room to deal with complex scenarios as it allows to bundle together multiple behaviours that jointly may give rise to an abuse of Art. 102 TFEU. Such practices need not be abusive on *their own* but rather in conjunction with each other. Evidently, this option, while being useful for enforcement purposes is at the very least controversial from the perspective of undertakings, as it comes with a noticeable cost for legal certainty. Although this is certainly true in practice, it is also important to keep in mind that even such a wide type of qualification still has its legal boundaries. Accordingly, for leveraging strategies to be abusive, these must be considered to constitute a deviation from competition on the merits ***and*** (actually or likely) produce anti-competitive effects or otherwise constitute a form of exploitation. When turning back to the case of Facebook, it becomes clear that fulfilling these requirements is not necessarily as simple as it would appear.

As mentioned, the alleged tying practices will not likely qualify as abusive tying under Art. 102 TFEU nor will they seem to depart from what would be considered competition on the merits. Nevertheless, the addition of the Marketplace tile on the main interface of Facebook and the seamless integration of the classified ads service may indeed succeed in getting some consumers to choose Facebook Marketplace over competing classified ads platforms. The imposition of unfair terms and conditions with respect to classified ads providers that advertise their services on Facebook and/or Instagram does seem to depart from competition on the merits. However, it is not clear whether such behaviour produces or is likely to produce a foreclosure effect to the extent that it is limited to data accumulation practices. The fact that such terms give Facebook an (unfair) advantage with regard to data accumulation does not automatically translate into an actual or potential foreclosure effect. That being said, together, the two behaviours combined may strengthen each other's leveraging potential in the market for classified ads services and thereby bring the entire practice under the ambit of Art. 102 TFEU which otherwise may not be possible when the behaviours would be addressed separately.

Outlook

The recent investigation against Facebook with regard to its commercial practices related to Facebook Marketplace may turn out to be yet another landmark case dealing with multisided platforms. The identification of on-platform tying practices could constitute a major development which has yet to be addressed under the scope of Art. 102 TFEU and has been (almost) completely missed in the case of the DMA.

Unfortunately, due to the circumstances of the case, at face value, it is unlikely that an actual abuse

could be established in the case of Facebook, thereby limiting the precedent value of this investigation to the mere signalling of such an option in the future. The exact manner in which the Commission will choose to proceed with this case remains to be seen and evidently also depends on Meta's own reaction to the statement of objections. What is clear, however, is that perusing the matter as two separate, yet related, abuses under Art. 102 TFEU may not be feasible. By contrast, finding an abuse based on the combined effects of both behaviours under the umbrella of leveraging may prove to be a realistic possibility. Given the controversial nature of this latter approach, the Commission would have to make its best efforts to justify a finding such an abuse which will undoubtedly be appealed and met with quite some critique from both practice and academia. Nevertheless, formally speaking, such an approach would be in line with the rationale of Art. 102 TFEU, even if it does seem unconventional.

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** This entry is a re-post of the contributor's own CoRe Lexxion blog post, find link here.*

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