Hipster Antitrust, the European way?

How to tackle concentration in digital markets

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REPORTS RELEASED IN THE LAST THREE YEARS

- **European Commission :** “Cremer” Report: “Competition policy for the digital era (2019)
- **OECD:** “Rethinking antitrust tools for multi-sided plateforms (2018)
- **UK Treasury:** Report of the Digital Competition Expert Panel: “Unlocking digital competition” (2019)
- **House of Lords:** Report of Select committee on communications: “Regulating in a digital world” (2019)
- **CMA:** “Ex-post assessment of merger control decisions in digital markets” (2019)
- **Autorité de la Concurrence and Bundeskartellamt:** Joint report "Competition Law and Data“ (2016)

… and also many academic papers

WHY SO MANY ACQUISITIONS?

- Acquisition in the last decade,
  - Amazon, Apple, Facebook, Google, and Microsoft combined have made over 400 acquisitions globally.
  - Google alone has been buying more than one firm per month (176 acquisition over 120 months)
  - In 2017 alone, Alphabet, Amazon, Apple, Facebook and Microsoft spent a total of $31.6bn on acquisitions of start-ups.

- Efficiency incentives:
  - **Supply side incentives:** Economies of scope in product development
    - sharable inputs: for example, data, processors, knowledge on artificial intelligence, labour skills (For example, Mark Zuckerberg stated in 2010 that "*Facebook has not once bought a company for the company itself. We buy companies to get excellent people*") …
  - **Demand side incentives:** if consumers value of product synergies, firms may produce ecosystems so as to capture (at least a part of) this value.
    - Example: Iphone and Apple watch

ADAPTATION OF EU MERGER CONTROL

- Notification thresholds
- Market definition
- Theory of harm in innovation
- Assessment

NOTIFICATION THRESHOLD

- European Commission :
  - Turnover (Aggregate worldwide turnover: EUR 5 000 million; Community-wide turnover of at least two of the undertakings concerned of more than EUR 250 million);

- Germany and Austria:
  - Turnover (both worldwide turnover and domestic turnover thresholds);
  - Transaction value (Germany: EUR 400 million; Austria: EUR 200 million);

- UK:
  - Turnover (UK turnover of the enterprise being acquired exceeds £70 million);
  - Share of supply (aggregate supply of 25% in a product market in the UK);
  - Proposition of the Digital competition expert panel:
    - Identification of companies with “strategic market status”
    - “*Digital companies that have been designated with a strategic market status should be required to make the CMA aware of all intended acquisitions*”

MARKET DEFINITION

Necessity to go beyond strict substitutability in market definition

- Cremer Report (2019):

  "*When it comes to conglomerate mergers where the operator of an ecosystem with a dominant position in a core market buys up a firm that is active in a separate, but related market and has the potential to grow into a competitive threat beyond that market,* ***competition authorities should inquire whether acquirer and target operate in the same "technological space" or "users' space"****. We believe that this analysis should rather follow the logic of the analysis of a horizontal merger*"

- Use of an approach similar to that followed by the Commission for electronic communications:

  "*Customers use mobile phones for different purposes, a voice call or sending an SMS…, customers appreciate the ease and convenience of having only one handset and SIM card. Thus, consumers purchase a bundle or "cluster" of services from one mobile operator… mobile firms benefit from economies of scope and consumers benefit from a reduction in transaction costs.* ***Thus, the relevant market should include a "cluster" of products, where non-substitutable services are included in the same market***."

- Schweitzer (2018):

  "*Instead of looking at relatively narrowly defined markets, the Federal Cartel Office could therefore look at a* ***broader category of competitive relationships*** *which may better capture the reality of fast-changing markets in the presence of potentially disruptive activities.*"

THEORY OF HARM OF INNOVATION

- Necessity to measure the impact of a merger on industry wide innovation
- Empirical evidence suggests that mergers may reduce R&D investments by merging firms:
  - Cunningham (2019): Study of 16 000 drug projects by 4000 firms (close substitutes of incumbent products)
    - Project acquired by an incumbent with an overlapping drug are 28% less likely to be continued compared to drugs that are not acquired
    - Finding concentrated in markets with (i) low degree of competition and (ii) the patent on the acquirer overlapping drug is far from expiry.
  - These results may not transpose directly to the digital sector where mainly acquisition of complementary technologies

- Question: How do competitors react?
  - the presumption that a reduction in the number of rivals is detrimental to consumer welfare (as it is the case in product markets) does not hold
  - The impact of the merger on rival's incentives to innovate depends on whether R&D efforts are strategic substitutes or strategic complements.
    - If strategic substitutes and a merger reduces the merging parties' incentives to innovate post-merger, rivals will increase their efforts to innovate.
    - If R&D efforts are strategic complements, a merger which reduces the merging parties' incentives to innovate will reduce industry-wide innovation.

ASSESSMENT ISSUES (1/2)

1) “balance of probabilities” standard

- Issue in the digital sector: several false negative and no false positive. This raises concern:
  - Tirole (2018): “*Consider the acquisition of WhatsApp and Instagram by Facebook. They were social networks, just like Facebook. They could have become Facebook competitors. But is there any evidence for that? Not really, as this is just a guess …The suppression of competition in the absence of data is hard to prove.* ***<u>My guess is that we should err on the side of competition, while recognizing that we will make mistakes in the process</u>***.”

- Alternative standard:
  - UK Digital Competition Expert Panel: Proposition to move from a “balance of probabilities” standard to a “balance of harms” standard (look at the expected value of harm rather than only at the probability distribution of the different levels of harm)

- Reversing the burden of proof (as proposed by former DG Comp Chief Economist Tommaso Valletti)

Necessity to find the right balance as blocking some pro-competitive mergers may have a knock on effect that will deter some future pro-competitive mergers

ASSESSMENT ISSUES (2/2)

2) Assessment of potential competition

- Use of information about the transaction value
  - What are the source of profit justifying such a transaction value?
  - Can this level of profit be obtained absent a SLC in the future?
- Consideration of a longer time horizon to assess the likelihood of future growth of a target

THANK YOU