THE RISE OF GLOBAL REGULATION OF ONLINE PLATFORMS:

POSITIVE V. NEGATIVE OBLIGATIONS

PANEL 5

PROHIBITION OF SELF-PREFERENCING

FLORENCE COMPETITION SUMMER CONFERENCE

14 JUNE 2022
ONLINE & FIESOLE

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Concerns about entrenched market power in digital platform markets

- Certain **characteristics of digital markets** pose particular challenges for competition authorities:
  - Speed of change in digital sector and rate of innovation
  - Network effects and important economies of scale and scope
  - Winner-takes-all dynamics with consequent tendency for markets to tip
  - The black-box nature of the platforms that are invisible and unfathomable to most of the public (and most regulators, too, let's be fair)
  - The existence of **structural barriers** to entry
    - e.g., vast datasets as necessary inputs to compete; use of machine learning and AI in positive feedback loops by incumbents makes it harder to enter a market
  - The exploitation of behavioural biases to lock-in consumers, or nudge them towards certain desired outcomes
  - The difficulty in curbing entrenched market power, once obtained.
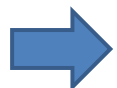
  ➡ These features underlie the prohibition on self-preferencing in the ex-ante regulations

The objectives of regulations

➢ The ex-ante rules enacted or proposed so far have some common objectives. They broadly aim to ensure

    ✓ **Fairness**
    ✓ **Contestability**
    ✓ **Innovation**
    ✓ **Transparency**

➢ By seeking to tackle exclusionary or abusive conducts

➢ **But some of the ex-ante regulations also seek objectives beyond improving market conditions**

    • *E.g.* giving market players 'equal chances', evening the playing field and encouraging competition IN the market (rather than FOR the market)

✓ It would be helpful to enforcers if certain expressions were more clearly defined to allow clear interpretations of the obligations and prohibitions

Self-preferencing in regulation

- ✓ Prohibition aims to ensure fairness and contestability, by preventing a firm from using its dominance on a platform to gain advantage in another market.

  - Ex-ante prohibitions may prevent irreversible damages to competition and the use of self-preferencing to maintain or expand a dominant position

  - It also provides a satisfactory level of legal certainty

- ➢ Enforcement authorities will need to be well-equipped to enforce the new provisions. Platforms' self-preferencing strategies might be difficult to identify and sanction as **they are mostly implemented via algorithms** that place a firm's products above those of competing companies.

- To help monitor measures and obligations, the DMA provides for the possibility of appointing independent external experts and auditors that would assist the EC.

- These measures can be complemented with a provision whereby third parties could complain about platforms' display practices and request remedies from an arbitrator with sufficient independence, technical knowledge and access to the platforms' data and algorithms.

It's all about the consumer

- In a broader context, the negative obligations spring from realisation that platforms exploit consumer biases. As these are largely subconscious, the regulator cannot rely on grand principles.

- Consumers may be significantly more 'sticky' with respect to competitive offers on the market. Consumer inertia means that the theory that 'competition is just a click away' does not really hold true.

- Even if there are no switching costs, and therefore traditional models would predict intense competition, in reality consumers may stay put.

- In particular, if consumers have biases towards **defaults or risk aversion**, then this competition may never take place
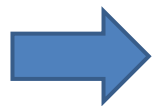
  ➡ **being the default option becomes a very valuable asset**

- Self-preferencing exploits this consumer behaviour that is well-documented in the experimental economics literature

Thank you

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