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**ANTITURES CHALLENGES WITH DIGITAL COMPETITION
FROM THE VIEWPOINT OF A COMPETITION ECONOMIST**

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Motivating questions

- The increasing role of digital commerce and platforms brings up new antitrust questions and challenges
1. What practices should firms be more careful with from a competition law point of view?
 2. What fields should competition lawyers / economists be more careful when giving such advice?
 3. Should some competition law principles OR practice change to reflect these developments?

Recent policy developments

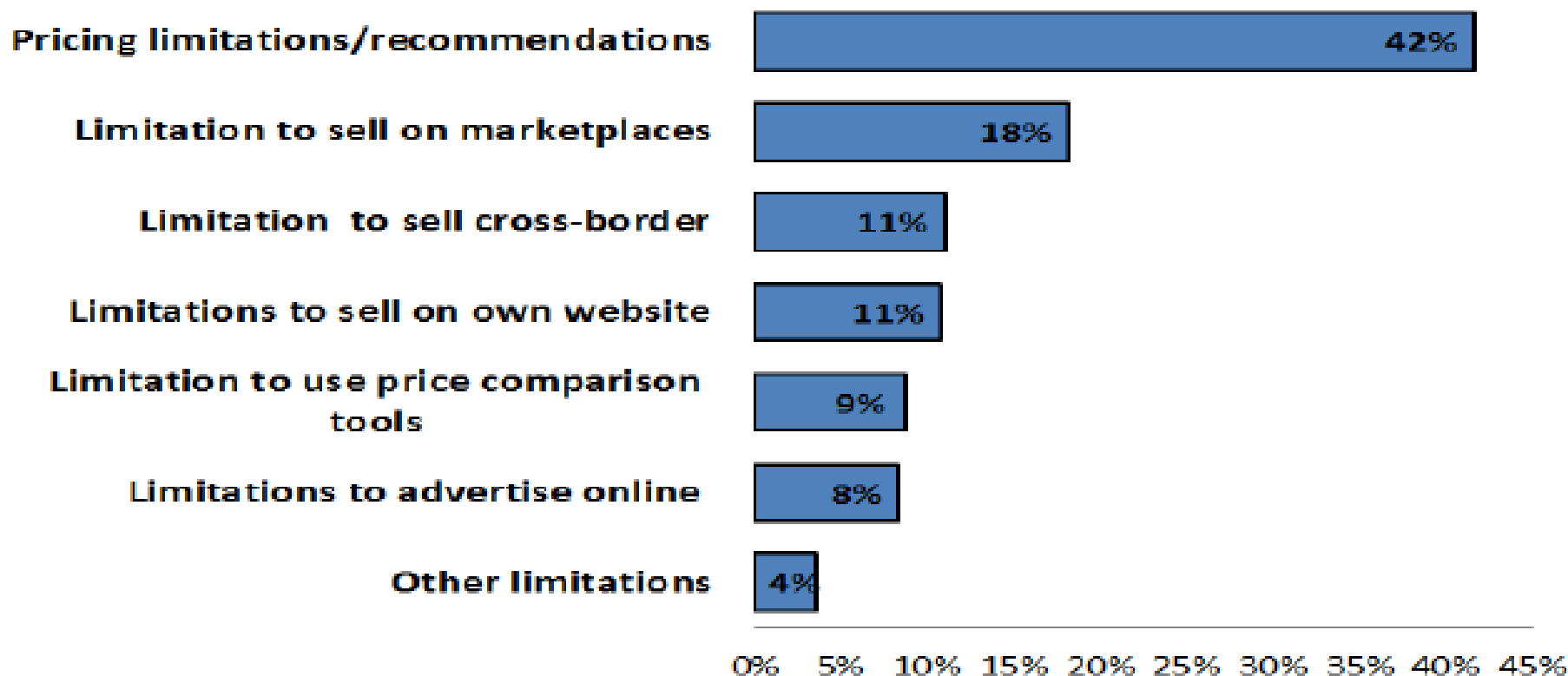
1. EU 2017: Final report on the E-commerce Sector Inquiry
 - Also an accompanying detailed Staff Working Document
2. EU 2019: Competition Policy for the digital era – a report by outside experts (Crémer et al)
3. National level: modifying merger thresholds partly to „capture” more transactions in the digital sector
 - Examples: Austria, Germany, Hungary
4. National level: proposals to modify framework of intervention in cases concerning digital sector
 - Germany 2018: an academic report (Schweitzer et al)
 - UK 2019: report by the Digital Competition Expert Panel

Some characteristics of digital market

- Distributors use online sales more standardly (2015: just 30% only offline, 40%: only online), increasingly at digital marketplaces (20%)
 - Fastly changing products and consumer needs
 - Wide range of price and product differentiation strategies
1. Price transparency drastically increases with online trade
 - Pros: easier for consumers to search & compare → increased competition
 - Cons: easier for firms to monitor → easier to enforce and coordinate
 2. Increased use of vertical restraints, esp. with consumer goods
 - Pros: selective distribution systems tackle free-riding problems
 - Cons: they might also constrain competition, especially cumulatively
 3. More widespread use of data, esp. with digital content
 - Pros: possibility of synergies between complementary applications
 - Cons: potential leverage / foreclosure effects

One result from EU E-commerce Sector Inquiry

Proportion of retailers with contractual restrictions, per type of restriction



Recent famous cases

1. Unilateral behavior of dominant platforms (§102)
 - i. EU 2017: Google 1 (Search) – fine of 2.4 billion euros
 - Distorting search and search&advertising markets
 - ii. EU 2018: Google 2 (Store) – fine of 4.3 billion euros
 - Tying and single-branding practices to leverage market power
 - iii. Germany 2019: Facebook – no fine, but requirements set
 - Service conditional on using personal data – exploitation
2. Restrictive agreements connected to platforms (§101)
 - i. Cases on hotel bookings (booking.com & others) – MFN clauses
 - ii. EU ongoing: Amazon – potentially also under §102
3. Mergers involving platforms
 - i. More visible ones at the EU-level
 - Facebook/WhatsApp 2014
 - Microsoft/Linkedin 2016
 - Apple/Shazam 2018

Main topics to talk about

1. Is a more activist role warranted in the digital economy?
2. Assessment of platforms' behavior regarding consumer goods – §101 and some §102
 - I will mostly talk about MFNs at the end in length
 - Some parts are more legal (eg. territorial restrictions) – I will omit these
3. Assessment of companies' behavior regarding data & digital content - §102, Consumer&Data Protection issues
 - Mostly legal AND/OR EU-level, so I will not talk about it
4. Merger control
 - I will briefly talk about this

Should CompPol be more activist in digital?

- Another inherent characteristic of digital economy: significant positive externalities in consumption and production
 - Pros: more concentrated markets can internalize more of these benefits
 - Cons: large firms are more protected and may abuse their market power
- Similar properties led to Regulation in network industries
- However, there is a key difference regarding the time dimension
 - Favors interventions: CP may need to be more risk-averse because of tipping
 - Against interventions: markets may self-correct because they also change
- My opinion: a more activist policy might be accepted, but there should be some necessary requirements to apply
 - Acceptance of case-by-case (rule-of-reason, economic) analysis
 - More clear guidance should be given out by Competition Authorities
- 8 • Decision should be made in much shorter time

The necessity of case-by-case evaluation

- Fortunately, most commentators / proposals so far emphasize that case-by-case evaluation is needed
- However, we have seen it with §102 reform that it does not work so well - controversies remain as lawyers tend to cite old case law
 - See lessons learnt from Prokent/Tomra, Intel, etc.
- If the below statements from (not so) old cases would be used in digital economy, big danger of over-intervention and all of its bad consequences
 - Dominance can be established with market shares larger than 50%
 - Dominant firms have a special responsibility not to foreclose any competitor
 - Competition Authority should not use As Efficient Competitor Test
- Therefore, a real commitment to case-by-case evaluation should be very much a requirement

Issues with market definition and power

1. Fast-changing substitution possibilities → boundaries of relevant markets are less clear
2. Lot of times zero prices / unmeasurable consumption data → classical market definition (SSNIP) techniques may not work
3. Platforms are usually active on (at least) two sides of the market → market power needs to be analyzed on all of them

Consequences :

- In market definition, the analysis of functionalities and the alternatives offered to customers are imperative (Facebook/Whatsapp)
- Potential competition should be key in any market definition / power evaluation
- Market shares should be less informative in market power assessment
- In market power (dominance) assessment, the „unavoidable trading partner” condition is key to check, for various sides
- Maybe market power could be inferred from market behavior? (Germany)
- Should we also look at a third market of „intermediation”? (Germany)

Consequences for firms / advisors

1. If Authorities adapt a more active approach on digital markets, this would necessitate a more risk-averse approach for parties too
 - Not necessarily in shying away from some new practices, but more in insuring themselves against potential risks by preparation
2. More compliance effort could be needed, with economic inputs
 - Efficiency motivation of business practices are advised to be prepared in advance (at least in sketch), not just when an investigation starts (or ends..)
3. Classical market definitions should not be taken for granted
 - One should at least check for the sensitivity of competition law messages to alternative definition, including the ones with potential competition
4. One should be more careful to automatically apply market share thresholds for safe harbours
 - Especially be wary of cumulative effects with vertical restraints

New challenges in merger control

Two main topics came up in recent debates:

1. Can classical theories of harm be applicable for mergers in digital economy or should they be changed?
 2. Should there be revised thresholds for merger notification in digital economy?
- In my view, there is no perfect answer to the second without reviewing some ex-post evidence, which is not really available yet
 - Actually, Crémer et al (2019) also propose not to change the EU-thresholds yet but study first national experiences

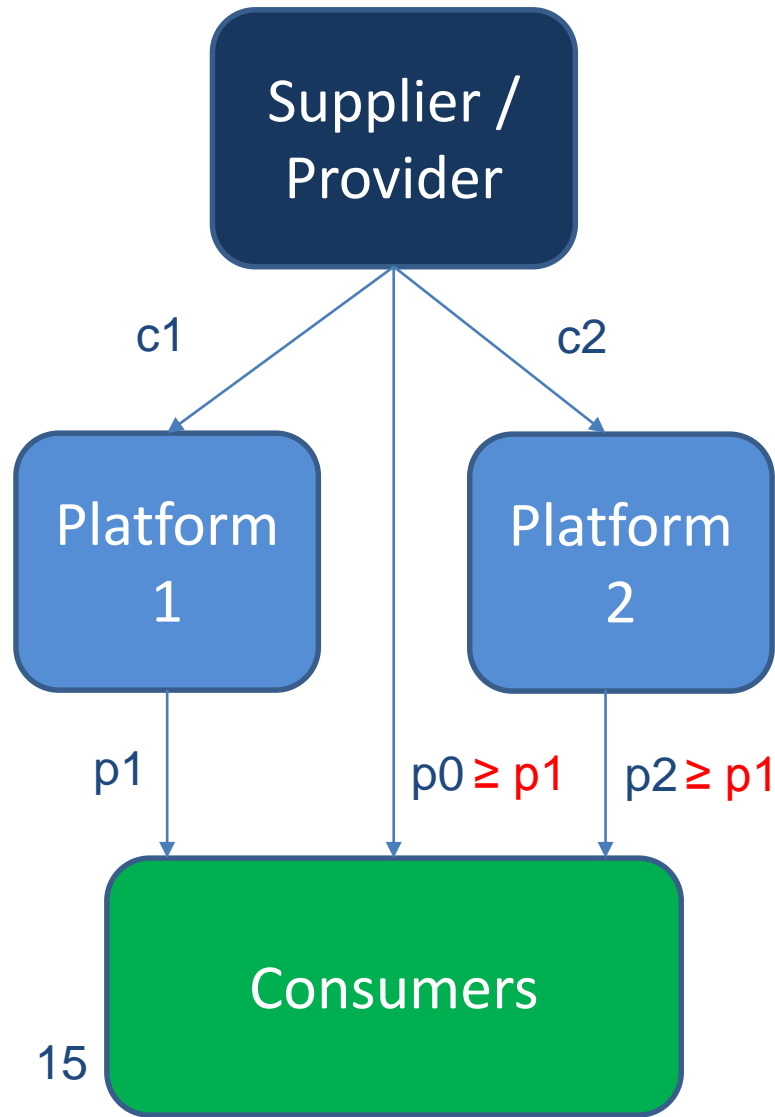
Competition concerns with digital mergers

- With full-grown firms, classical theories of harm work quite well
 - Especially if horizontal merger, but even with non-horizontal
- However, Authorities might be worried a bit with mergers when one (typically acquired) party is yet a start-up
 1. If horizontal, increment will be small
 2. If non-horizontal, efficiencies could be there and harms hard to prove
- Therefore, there are some suggestions to refine the traditional horizontal merger concerns
 1. Early elimination of potential rival
 2. Reducing innovation-based competition
- In both cases, more emphasis will be on market definition and the „ecosystem” in which firms compete, plus potential competition
 - So these are the areas where more ex-ante preparation could be necessary

Vertical restraints in the digital economy

- Vertical restraints can be assessed on (at least) two grounds
 1. Under §101 as vertical agreements
 - These are very important in national jurisdictions
 1. Most Favored Nations clauses (MFN)
 2. Dual pricing: different wholesale prices applied depending on whether the good will be sold online or not
 2. Under §102 as classical exclusionary abuses
 - Typical examples: bundling, refusal to deal
 - These are more frequently assessed at EU-level or in bigger jurisdictions
- In my view, the overview of MFNs can be very instructive, as it covers lot of issues raised by other restraints
 - And even smaller jurisdictions had quite a few cases

MFN clauses with (initiated by) platforms



- Main differences from traditional manufacturer – retailer model:
 1. Downstream platforms are just intermediaries / agents
 2. Downstream prices on platforms are set by upstream supplier
 3. Supplier could sell itself too
- Downstream price parities
 - Narrow MFN1: $p0 \geq p1$
 - Broad MFN1: $p2 \geq p1$ and $p0 \geq p1$
 - If broad MFN2 too $\rightarrow p1 = p2 \leq p0$
- Availability parity: supply is at least as big at Platform 1 than at other places

Positive effects of downstream MFNs

Possible arguments, some are stronger / more likely

1. Decrease of transaction costs (time)

- Consumer search costs: lowest price guarantee
- Negotiation costs can also decrease between supplier and platform

2. Intensifying competitive pressure

- Increase of inter-brand competition: consumers can compare the competing products of most suppliers at a few (maybe one) marketplace
- Intra-brand competition could also intensify in non-price dimensions

3. Decrease of free-riding and hold-up problems

- Without MFN, the better platform (with larger supply but also larger costs) would be used only for comparison, then buy at platform with lower prices
- Without guarantee to recoup investments, less incentive for platform to do
- If a market is two-sided, this problem is even more accentuated

- MFN's solution is to bundle acts of search and purchase

Negative effects of downstream MFNs

Possible arguments, some are stronger / more likely

1. **Loss of intra-brand competition** (tacit collusion) – prices of a given product could equal on platforms
 - Especially if MFNs with multiple platforms or there is a strong platform
 - MFNs increase transparency even further, can conserve not effective comp.
2. Platforms' have low incentive to decrease fees towards suppliers
→ as this builds into customer prices, can lead to larger level
 - If a platform could achieve lowering its fee, it would not affect retail prices because of MFN, so could not affect its turnover
 - However, if platforms also compete in non-price dimensions, a decrease in fees can cover the costs of required investments
3. Platforms' have low incentive to investment / entry
 - Less opportunities to expand (additional profit) because of price restriction

17• **Foreclosure can be substantial if one leading platform**

Which MFNs should one use: narrow or broad?

- Frequent arguments for moving towards narrow MFN
 1. Narrow MFN could be less restrictive to intra-brand competition
 2. Narrow MFN could already significantly reduce the free-riding problem
- Albeit the direction of both effects is economically robust, no general result on their magnitude and balance
- Consequence 1: changing to narrow MFN is not always necessary
 - Especially if lot of competing platforms AND/OR viable entry is possible
- Consequence 2: changing to narrow MFN is not always sufficient to exclude competitive concerns
 - Especially if there is one leading platform and main competitive pressure comes from own upstream sales (which would be restricted by narrow MFN)

Lessons from MFNs

These messages can actually be applicable to other practices too

1. There is no unified picture: it is worthwhile to know the different MFNs and their relative advantage and drawbacks
 - As well as the possibilities to assess / compare them
2. A practice approved (or banned) in a case should not necessarily lead to the same outcome in another
 - But it is naturally very important to know previous case law
3. Individual market practices (cases) can be judged only after assessing the market-specific facts
 - Useful to know the (possibly empirical) experience from previous cases, but a case-by-case analysis is necessary

Thank you for your attention!

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