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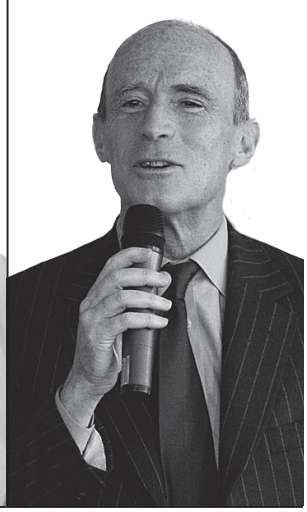

ROUNDTABLE ON **THE REGULATION OF DIGITAL PLATFORMS**

27 September 2018 - Hôtel Lutetia, Paris

ANTOINE WINCKLER

One of the challenges of digital platforms is societal. GAFA [Google/Apple/Facebook/Amazon] have a market value of $3,000 billion, as well as $556 billion in cash and $70 billion in annual investment in research and development. Digital platforms are at the root of the radical transformation of many industrial sectors, from distribution to advertising, but also of the way of life of our societies. Several economic concepts, particularly industrial microeconomics, are being challenged. Another issue concerns our legal systems: does the power of platforms require the intervention of national or supranational institutions?

"COMPETITION LAW SEEMS TO BE THE MOST LIKELY RESPONSE TO PLATFORM ISSUES. BUT IT MUST BE MORE PARTICIPATORY. WE NOW HAVE EXAMPLES OF THIS WITH BUSINESS REVIEW LETTERS AND ALSO 'SANDBOXES.'"
JEAN TIROLE

The question of regulation can be addressed from both a legal and an economic point of view. As Jean Tirole pointed out in *Economics for the Common Good*, GAFA illustrate the economic phenomenon of "winner takes all." The number of users has a direct effect on the development of the platform. It is possible to compare this problem with the notion of natural monopoly. The question arises as to whether a certain form of regulation should apply to platforms, such as sectoral regulation.

The other bias is whether our competition law needs to be adapted or whether it is already well equipped. The fundamental criterion for assessing the practices of these platforms in competition law is the subject of an important debate: should the notion of consumer welfare be supplemented by other concepts such as equity? Some regulators seem to want to change the application of competition law in this respect.

JEAN TIROLE

The three regulatory methods are self-regulation, competition law and public service regulation. With technological change, the shortcomings of these methods have become more visible. The question of the acquisition by powerful players in a sector of potential competitors is problematic, in particular as regards proof of anti-competitive effects. Regulators should also encourage innovation by addition rather than innovation by substitution or imitation. The analysis of these operations requires an a priori study, without real data, since the target is not yet a developed competitor. Proponents of dismantling web

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*The opinions expressed herein are those of the author and not those of the institution to which he or she belongs.

giants, such as Google at the moment, have not constructed a practical enough program: the theory of essential facility, for example, is difficult to implement because it has not been determined which facility held by Google would be perennially essential. As for public service regulation, cost measurement is also made more difficult in the digital sector. For one thing, it would be necessary to monitor companies throughout their life cycle, which is obviously impossible. For another, large platforms are often global operators. Most of the regulated sectors have national companies and a national regulator. The establishment of a supranational regulator for platforms seems unlikely.

Competition law seems to be the most likely response to platform issues. But it must be more participatory. We now have examples of this with business review letters and also "sandboxes." The idea is to propose to competition authorities new solutions to old or emerging problems. This provides authorities with a chance to either reject the solution or condition their acceptance on certain conditions, as was done in 1997 by the Department of Justice regarding patent pools. Obviously, there is no absolute legal certainty for the practices thus validated, but this allows companies to move forward and authorities to learn and correct in the event of an assessment error (for example, by adding new conditions for the use of the practices in question).

Success could also occasionally come from collective negotiations between the players in the sector. But it is true that such negotiations themselves can raise competition concerns (such as boycott strategies). Examples include the setting of technological standards, conditions for access to essential facilities or interchange rates. In any case, it will be necessary, on the one hand, to have a framework in accordance with economic principles and, on the other hand, to have a certain right to make mistakes (which in turn requires an ex post evaluation of the authorities' policy).

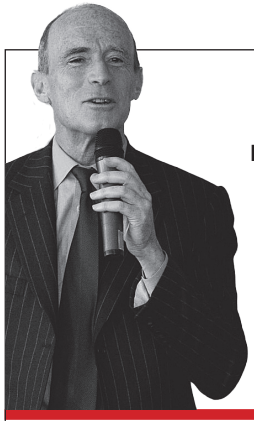
NILS WAHL

What is the purpose of competition law? This should be the increase in economic efficiency to the benefit of the final consumer. This can be achieved by prohibiting practices that are harmful to competition, whether coordinated or the result of a single company. The existing competition rules are sufficient to achieve this objective. Exclusive practices are prohibited, whether implemented in physical or digital markets. There is no difference. Price coordination is prohibited, whether as a result of meetings or algorithms. This vision may be too simplistic. It is true that regulators sometimes have difficulty applying a theory of harm or proving effects in certain situations. But these practical variations do not mean that the body of general rules should be modified. On the other hand, if the objective of competition law were to change, for example, to add equity or sufficient choices, a method should be defined to determine the minimum acceptable level of equity or whether a specified number of choices is sufficient or not.

In addition, the Court of Justice is interested in increasing the amount of data exchanged. However, this problem – since it is indeed a problem – does not seem at first sight to be a matter of competition law. The impact of the data on competition is not clear.

ISABELLE DE SILVA

Current discourses on GAFA are generally negative. The power of GAFA would be dangerous for democracy and the economy. As Jean Tirole points out, certain observations such as the need to dismantle Google and other players are sometimes presented as a matter of course. First of all, it should be recalled that



"ONE OF THE CHALLENGES OF DIGITAL PLATFORMS IS SOCIETAL. … ANOTHER ISSUE CONCERNS OUR LEGAL SYSTEMS: DOES THE POWER OF PLATFORMS REQUIRE THE INTERVENTION OF NATIONAL OR SUPRANATIONAL INSTITUTIONS?"

ANTOINE WINCKLER

"THE INCREASE IN ECONOMIC EFFICIENCY TO THE BENEFIT OF THE FINAL CONSUMER [IS THE PURPOSE OF COMPETITION LAW]. … THE EXISTING COMPETITION RULES ARE SUFFICIENT TO ACHIEVE THIS OBJECTIVE. EXCLUSIVE PRACTICES ARE PROHIBITED, WHETHER IMPLEMENTED IN PHYSICAL OR DIGITAL MARKETS."

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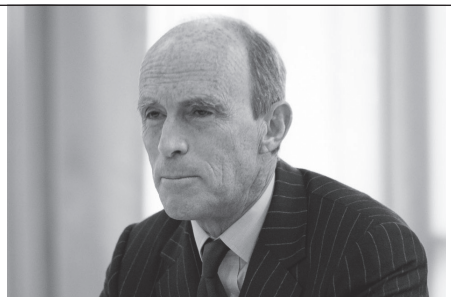



antitrust has not failed in the digital platforms sector. It has been able to adapt fairly quickly and remains a relevant tool.

The power and size of GAFA nowadays often are highlighted as a negative element. There is a need to clarify the issues and understand why size is a competitive issue. The public debate is so abundant, perhaps because of concerns about the place that platforms have taken in society. But these are not the first very powerful companies; we have already experienced these problems in sectors such as food and energy.

In addition, it should be recalled that the effects of platform-related networks have a positive impact on consumers. Competition authorities are very attentive to the effects of size and networks, and to their analysis. The question of market contestability is equally important, as is the link between dominance and market power, and the ability of new entrants to enter a market and innovate.

The competition authorities have a very strong duty to adapt. There was a strong awareness of the need to address the subject of platforms.

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The European Commission's *Google Shopping* decision was a turning point. The qualification of the dominant position on the search engine was interesting. The Commission had the challenge of demonstrating the theory of harm and the effects of foreclosure. This decision is important because of its subject matter but also because of its methodology. Beyond the sanction imposed, the issue at stake in the decision is based on the obligation to comply, which is going to push Google to review its operating model. This must be taken into account over and above the reproaches often made about how long the procedures take and interventions coming too late. Decisions like *Google Shopping* or *Google Android* still send a signal to the entire sector concerned. The other platforms must apply the clear rules.

Among the changes in the Competition Authority's decision-making practice is the consideration of competition from digital players on traditional players. For example, in the *Canal+* decision of 2017, the Authority took into account digital players such as Netflix. The complementarity between physical sales and online sales was also taken into account in the 2016 *Fnac/Darty* decision. Finally, the Authority analyzed platform-specific issues in the *Seloger/LogicImmo* decision, including multihoming, network effects and data value. Reflection on theory and economic life must be pursued in parallel. The Authority collaborated with the British CMA on the theme of ecosystems in 2015 and with the German Bundeskartellamt on big data in 2016. It also published an opinion on online advertising in 2017 and is preparing a joint study with the Bundeskartellamt on algorithms. One of the questions asked concerns the creation of presumptions of liability in relation to algorithms.

The law must be modified on certain points. An amendment has been tabled to the Covenant Act to reflect certain changes related to the ECN+ Directive. The French Commercial Code must also evolve, for example, on the proportionality of investigations to the needs of the business or the automatic seizure of assets in the field of protective measures, which is useful in the digital economy. Other projects are more forward-looking. The Authority would like to have more resources to detect practices. Remuneration of whistleblowers and ex post merger control are among the options.

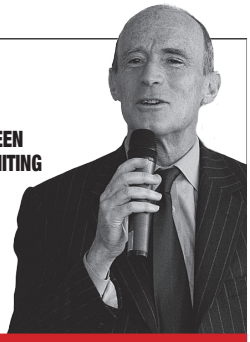
On the issue of competition law objectives, it seems that broader objectives are already being taken into account by the Authority. For example, privacy and consumer interest have been taken into account, including in the advertising advisory.

ANTOINE WINCKLER

A balance must be struck between speed of intervention, which is all the more important for the fast-moving digital markets, and limiting errors. Provisional measures may allow for a satisfactory compromise. In the *Google Shopping case*, the decision came too late, after the competitors had been ousted. But





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on the other hand, a decision that would be rendered quickly but would have counterproductive effects would raise a legal problem.

ISABELLE DE SILVA

The toolbox must be used in all its diversity. Sufficiently upstream, it is possible to use soft law tools as the Authority did with its opinion on online advertising. Some cases lend themselves well to the commitment procedure.

NILS WAHL

The difference in the competition authorities' approach to digital does not always seem justified. It is true that some concepts need to be rethought and others are completely new. How to define a market if the price is zero? The German approach is to say that an operator can be dominant even if the consumer does not pay, which is fascinating. On the other hand, other issues presented as platform-specific are actually more general: the problem of buying potential competitors may also arise in other sectors.

ISABELLE DE SILVA

The CMA had the interesting idea of ex post control of authorized concentrations. In most cases, this procedure has led to approvals. When Waze was acquired by Google, the strong development of this application was not anticipated. It is therefore interesting to study the factors underlying the ex post authorization decision and to draw lessons from it. But the forecasting aspect is always inevitable.

On the issue of zero price, it is possible to define the platform market, for example, when one side of the platform is free but the other is not free. This was the case in the *Seloger/LogicImmo* case: Internet users could use the platform for free, but there was a direct link to the price paid by real estate agencies to host their ads.

The theoretical framework developed for platforms in recent years is beginning to be applied more and more regularly by competition authorities. The development of decision-making practice will be beneficial, particularly to better understand the different nuances in the application of the law.

QUESTIONS

In her article "Amazon's Antitrust Paradox," Lina Khan argues that by focusing on the immediate effects on prices, competition authorities forget to study prices in the long term, which ultimately leads to price increases. This proposal recalls the idea of a "right to make mistakes" by the competition authorities. But is it true?

JEAN TIROLE

Competitive analysis absolutely requires looking at long-term effects. It must be dynamic and not static. Contestability, i.e., competition for the market and not competition in the market, is linked to the natural monopoly created by network effects. This is why barriers to entry are at the center of the analysis. To discipline existing companies and force them to innovate and charge low prices, new entrants must be able to enter – and enter effectively – the market. As Nils Wahl explained, the current rules allow practices that artificially increase barriers to entry, such as tied sales and discounts linked to loyalty programs, to be punished. But some practices, while not new, are much more apparent in digital markets, such as most-favored-nation (MFN) clauses. Although useful, these clauses can have devastating effects by allowing companies to tax their competitors. The rules must be adapted to these specific problems.

Is competition law intended to regulate all issues related to platforms, including privacy issues? Does it have the competence to do so?

ISABELLE DE SILVA

Competition law is not intended to ensure that platforms comply with the conditions of use of their data or do not distribute fake news. Some platform issues are not within the scope of competition law. On the other hand, a broad approach to the economy is useful. The Commission's decision-making practice has recently begun to take innovation into account in the competitive analysis. Parallel regulations are needed, with different objectives but a common effort. The Authority works in a network with other national and foreign regulators. For example, the BER allows European competition authorities to work together with the Commission and between national agencies in the context of subsidiarity. ■