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‘Platform software vs. the software of competition policy’

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To be discussed

- Jean Tirole* notes that the ‘software of competition policy’ has to be adapted to 2-sided markets
- I interpret that software as what lies between the hardware of the statute and the apps of the cases: ie the ‘operating system’ which captures the common approaches and procedures which competition officials take to individual cases, captured in published or unpublished guidance and or in oral tradition
- Big question: is what I am describing a temporary ‘patch’ to existing competition law software, or does or must it get close to a full ‘new release’?

* *Economics for the Common Good, page 392*

Area of application

- In principle patches/revisions to the software affect all applications of competition law – market inquiries, Articles 101 and 102 cases, and mergers
- They also are needed where competition law approaches are read across to *ex ante* regulation, as happens in telecoms, for example
- I will seek to illustrate some of the issues in practice by reference to a UK merger inquiry involving two food ordering platforms*

*CMA, A report on the Anticipated Acquisition by JUST EAT plc of Hungryhouse Holdings Limited, November 2017.

What are the problems?

- What implications for competition law flow from the economic analysis of two-sided markets? For example:

- the SSNIP test may not work; or if the price is zero may have to be replaced by a test based on quality loss
- with indirect network externalities, familiar pricing warning signals (eg. below marginal cost or above stand alone cost) may not apply
- application of UPP or GUPPI may involve knowledge of SIX different diversion ratios

- Could this mean we can say nothing and must allow everything?

Sources of enlightenment

- Episodically published NCA guidance
- Internal discussions and updating which must go on in NCAs
- Prominent cases in other jurisdictions
- OECD, Rethinking Antitrust Tools for Multi-sided Platforms (2018) *

*Available at: http://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf

Dimensions to be considered

- *market definition*
- *the implications of single- and multi-homing*
- *price-concentration analysis and the strength of the indirect network effects*
- *the probability of the market tipping*

Market definition

- Two markets or one? The new standard solution is that, in the case of a ‘transaction’ 2-sided market with a single price, there is one market only; with a non –transaction market, for example when attention is swopped for the service, there are 2 markets
- The OECD is more agnostic

- “in some cases a formal market definition can be dispensed with;
- in the absence of indirect network effects, separate market definition exercises on each side will suffice;
- where there are indirect network effects they can usually be taken into account in the framework of either a separate or combined market definition”

The implications of single- and multi-homing

- A preliminary definitional and measurement point: suppose I always buy my sushi from a restaurant on one platform and my pasta from a restaurant on another: am I multi-homing? Probably not
- The basic insight is that if one side single-homes, platforms compete to acquire agents on that side - to sell on to the other side
- In this case, 'we therefore expect competition to be concentrated on the consumer side.'

Single- and multi-homing

		Restaurants	
		Single-homing	Multi-homing
Customers	Single-homing	Platforms compete on the consumer side and on the restaurant side – ‘competition for the market’	Platforms compete on the consumer side; Market power on the restaurant side
	Multi-homing	Platforms compete on the restaurant side; Market power on the consumer side	Platforms may try to push restaurants (or consumers) towards single-homing

Price-concentration analysis & the power of the indirect network effects (INEs)

- Generally difficult to measure,but in this case there were geographical markets which can be compared
- It was possible to see the impact of changes in restaurant numbers on platforms on the value of orders placed on others
- Also the INEs may peter out beyond a certain point
- In this particular case, there was evidence that the number of restaurants of one merger party had a negative but diminishing impact on the other interest,

The probability of the market tipping

- If the market will tip in any case, merger prohibition simply lengthens and sharpens the birth pangs of history: there is no substantial loss of competition
- Analysis and cross-sectional observation suggests that some markets tip, some don’t: it depends on service differentiation, strength of INEs and homing practices
- Evidence of industry expectations can be found in board documents; from survey evidence; and from the econometrics described above

What does this account tell us?

- Mergers and other issues arising in two-side markets are decades- or centuries- old: in advertiser supported media, shopping malls, even airports
- The growth of new, dynamic and profitable platforms has elicited more explicit economic analysis
- I have identified various ways in which a recognition of the problem can elicit a response
- Prominent recent cases and post-mortems on concluded cases are still in train; ‘patches’ are emerging
- There is no radical ‘new release’ of competition law in development; will regulators show the way?