

Antitrust enforcement in the digital economy: what lessons for China?

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Abstract

The digital industry is reaching a mature stage. In recent years in the United States and in Europe a discussion had started on the proper tools to adopt in order to stop serious anticompetitive practices. Many believe that antitrust enforcement is sufficient, others argue for the introduction of specific regulatory tools. The major reason why antitrust seems less effective in digitals is that the opportunities to discriminate against competitors are very large. While price discrimination is relatively easy to identify and to sanction, non-price discrimination which is widespread in digitals is much trickier to prove because it may be the result of many different strategies. Furthermore the affected party of these anti-competitive strategies is not the final consumer but other firms, making more difficult to detect the theory of harm. As a result antitrust enforcement, especially because cases last for years due to their complexity, is often on the defensive, prohibiting practices already no longer that relevant and late with respect of current anti-competitive practices.

The benefit of a regulator is that it provides legal certainty and sets rules ex-ante and valid for all. The risk is that these rules may be too restrictive and block also pro-competitive practices. In this respect China has adopted a much more flexible approach, relying on the antitrust authority, as provided by the Chinese State Council in its Guideline for the platform economy industry. In principle an antitrust authority is much more effective, provided that cases are decided based on accurate evidence, rigorously and quickly. In an innovative industry the process of decision making by the antitrust authority cannot last for years. And a well-staffed and professional authority is a necessity because cases very often require the agency to collect a vast amount of information that a single complainant is unable to provide (this is why private litigation based on the antitrust provisions is not a solution in digitals). Furthermore only a well-staffed agency can devise and monitor the required remedies. This why SAMR needs to multiply its staff and reach the size of antitrust agencies in comparable jurisdictions in order to increase its effectiveness.

Relying on antitrust enforcement requires defining a precise economic objective since existing legal provisions are drafted in a very general way. A clear objective provides the legal certainty that legal provisions now lack. The maximization of consumer welfare has been the standard that has served us well for decades. The digital economy has put into question the consumer welfare standard because the possible anticompetitive effects of platforms strategies are often not directed to final consumers, but to other firms that provide complementary services to the dominant platform. A recently developed standard based on transaction cost economics is discussed in the paper and applied to a number of recent antitrust cases to show its effectiveness.

• Professor of Economics, Scuola Nazionale dell'Amministrazione, Rome (Italy) and Chairman, Working Party on "Competition and Regulation", Competition Committee, OECD, Paris (France). I would like to thank Cyril Lin for very helpful comments that substantially improved the paper and Ginevra Bruzzone for pointing out to me the importance of discussing the contestability assumption in the EU Digital Markets Act.