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"Competition law in need for speed"

Foreword

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According to widespread opinion, competition law is not up to the challenges of the digital economy because undesirable developments happen faster than competition law can correct them. This may be the case, for example, if anticompetitive behavior cannot be stopped before markets have tipped and the winner has taken it all. Even if competition persists, the rent of anticompetitive behavior may be higher than the sanctions since fines are not necessarily linked to illegal gains, and in many jurisdictions, private enforcement has to be further developed so that an efficient breach of competition law is still possible. In any event, the general principle is that damages should better be prevented than repaired. And this is where competition law in its current shape shows deficiencies.

In the EU, a completely new body of law is supposed to fix these shortcomings. The Digital Markets Act (DMA), proposed by the European Commission, is supposed to introduce a specific regulation for gatekeeper platforms. In spite of the emergence of conglomerate ecosystems, markets shall remain contestable and fair. The instrument to achieve this goal is *ex ante* regulation that—in contrast to traditional competition law enforced *ex post*—intervenes before harmful behavior is enacted. The new platform regulation is based on a system of notification and designation and establishes a list of specific obligations that are much more detailed than the examples given in many jurisdictions for the abuse of a dominant position. The overall goal of the new mechanism is to guarantee immediate compliance. Behind this is the assessment that classical competition law often comes into play too late. Therefore, straightforward rules shall make it possible to intervene more quickly. The new rules are not supposed to replace existing competition rules but to complement them.

The duration of procedures as a general problem of competition law

While the DMA is a promising proposal to limit market concentration and to guarantee contestability in the digital economy, the underlying problem is of a more general nature and not restricted to specific economic sectors. In many jurisdictions, competition law procedures take too much time. This is a threat not only to the effectiveness of competition policy and its reputation by the public, but to the legitimacy of the economic system in general. Without effective competition, the market economy cannot achieve its goals satisfactorily, neither optimal factor allocation nor the generation of innovation. Excessively long procedures prevent the swift restoration of competition and impair the deterrent effect of sanctions. Of course, the reasons for long procedures may be manifold, for example, the lack of resources, the intricacy of procedural steps or the duration of court proceedings. However, it is often overlooked that the design of substantive and procedural law in itself can also be responsible for lengthy procedures.

Form-based and effects-based elements

Starting in the US and inspired by the Chicago School, competition law has been consistently based on economic analysis. The more economic approach has been adopted in many other jurisdictions including the EU, albeit not always to the same extent. Even in US antitrust law, the effects-based approach has not completely eliminated form-based elements. For example, hardcore cartels remain subject to a per se ban. The US Supreme Court has given the reason for the necessity of per se prohibitions in *Northern Pacific Railway Company v. US* (1958): An "*incredibly complicated and prolonged economic investigation*" is not indicated if economic experience tells us that the behavior in question lacks "*any redeeming virtue*." Hence, in order to avoid unnecessary procedural costs and delays, the analysis of effects is dispensable in

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cases where pernicious effects on competition follow from the form of the behavior. This is an important insight: A comprehensive economic analysis has to take into consideration not only substantive law but also enforcement costs. For the same reason, EU competition law distinguishes between restrictions by object and by effect. If an agreement "*reveals in itself a sufficient degree of harm to competition*," it is "*not appropriate to assess its effects*" (ECJ, 26 November 2015, *Maxima Latvija*, case C-345/14, pt 20). The deeper reason for form-based elements is therefore precisely an economic one: Effective competition can only be maintained if enforcement costs remain manageable and procedures do not take too long. In EU competition law, coherent results are achieved because the efficiency justification always applies, also with respect to restrictions by object.

With respect to unilateral behavior, the proper balance between form-based and effects-based elements has not been found yet. In the EU, the *Intel* case on conditional rebates is the most prominent example. The case started with the formal complaint of the main competitor in 2000, followed by the decision of the European Commission in 2009, of the General Court in 2014 and of the European Court of Justice (ECJ) in 2017, which remanded the case to the General Court where it is still pending. The ECJ has basically requested a stronger substantiation of foreclosure effects. It has to be emphasized that the *Intel* case does not raise new questions of the digital economy (as it is the case for example in some of the *Google* cases) but regards a classic problem of competition law, i.e., fidelity rebates granted by dominant firms. Hence, the long duration of the procedure is not based on latest developments that make completely new approaches necessary. It is rather due to the uncertainties concerning the right balance between form-based and effects-based elements in dominance cases. It is obvious that procedural durations of more than two decades miss the purpose of competition law enforcement.

As already mentioned, the idea behind the DMA is to escape from the difficulties of traditional competition law by listing specific obligations applying to designated gatekeepers. While the obligations in Article 5 of the DMA proposal are self-executing, the obligations in Article 6 DMA have to be further specified. From a competition law perspective, both groups of rules are to be qualified as form-based. Apparently, exaggerations of the effects-based approach have led to an unsatisfactory situation that has to be fixed by new rules based on a radically different approach. The DMA particularly stresses that the new rules—while providing for some flexibility in exceptional circumstances—renounce on an assessment of effects and even on an efficiency defense. Thus, the discontent with the cumbersome and lengthy procedures in traditional competition law has led to an initiative that makes the pendulum swing in the direction of a pure form-based approach. This is in radical contrast to the decades-long efforts in favor of a more economic method of analysis. In our view, such pendulum swings could be avoided if a better balance of form-based and effects-based elements were sought from the outset. In particular, the category of restrictions by object for particularly dangerous forms of behavior should also be introduced into the prohibition of abusive behavior by dominant firms. The goal is not to take an "object shortcut" but to complete the economic analysis by including enforcement costs and duration.

Interim measures

Besides a rebalancing in substantive law, competition law procedures could be accelerated by more frequent use of interim measures. In many jurisdictions, such measures are in principle available. But they are rarely used in practice. In the EU for example, interim measures imposed on Broadcom in 2019 have been the first example since the interim measures imposed on IMS Health in 2001 (successfully challenged in court). The *Broadcom* case demonstrates the potential of interim measures: One year after the adoption of interim measures, the procedure was closed by commitments restoring competition. As in the *Intel* case, the focus was on a well-known group of cases—namely, exclusivity arrangements by a dominant firm. However, the outcome was completely different. Whereas the *Intel* case is still pending, the competition law problem could be swiftly solved in *Broadcom*.

Of course, interim measures do not bar parties from lodging an appeal (see *IMS Health*). But they may create an incentive to find a quick and sustainable solution (*Broadcom*). The legal prerequisites should be adapted to the important role of interim measures. As noted by the Furman Report, the requirements for interim measures should be designed in a way that makes interim measures more practicable. For this purpose, the preventive character of interim measures has to be kept in mind, and hindsight biases have to be avoided. Certainly, legal cultures are different when it comes to interim measures. It will therefore be important to compare the different experiences in the world in order to improve the practicability of interim measures. The OECD Competition Committee could play a major role in this respect as always when it comes to the search for best practices on a global level.

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Perspectives

Lengthy procedures may cause irreparable damage to competition and therefore constitute a risk for the efficacy of competition law at large. A basic condition for speedy procedures is certainly that competition authorities and courts are adequately equipped and that the enforcement mechanism is appropriately shaped. This is not sufficient, though. Substantive law and procedural instruments have to be designed in a way that does not inhibit speedy proceedings. The discussion on the effects-based vs. form-based approach has not led to a satisfying result. Exaggerations of the effects-based analysis are responsible for protracted procedures. This problem has become most apparent in the digital economy. In the EU, the DMA is a promising project to guarantee the contestability of markets in timely procedures. At the same time, it must be borne in mind that small or medium-sized jurisdictions do not have the capacity to set up a completely new system that requires significant personal and material resources. In these jurisdictions, the number of employees of the entire authority is often smaller than the staff that will be responsible for the application of the DMA alone.

This makes it particularly clear that a new platform regulation does not obviate the need for a better articulation of traditional competition law. Finding the right mix between form-based and effects-based elements does not contradict the economic approach but follows from it. Moreover, it would speed up procedures with respect not only to the digital economy but to all economic sectors. The better balancing of substantive law should be complemented by appropriate procedural instruments. An example is the availability of interim measures, not only in theory but also in practice. All measures together have a common goal: Competition law should ensure good solutions in good time. Otherwise, it will lose its importance and will be gradually superseded by specific regulations that are more effective and can intervene more quickly. Given the fundamental importance of competition law for the market economy, the resulting loss of orientation should definitely be avoided. ■

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