

Competition in Digital markets In Need of Regulation?

Daniel Zimmer

Many people are concerned about the strong market position of certain individual companies of the digital economy.

With some services, a strong market concentration can be explained by certain cost structures.

In addition, network effects must be taken into account: the more users a social network has, for example, the more attractive that network becomes for more and more users.

Moreover, the quality of some services also increases with a growing number of users: the largest search engine does a quicker and better job than any other of learning what is relevant for people when dealing with an immense body of searches.

The German Monopolies Commission has presented a report on competition in digital markets that assesses some of the policy recommendations that have been expressed in the public debate. The report advises against reducing the size of large platforms (for instance by dividing them up) so as to make room for competition between several smaller providers.

From an economics perspective, one central question arises: is a market position vulnerable or not? As long as a provider has to worry that a competitor could gain a significant portion of its customers, it must continue to vie for these customers – for example with innovative products and good quality.

It is paramount that companies that are strong on certain markets remain vulnerable to competition, and that they may not insulate themselves from competition by means of their own doing.

Competition law must on the one hand prevent firms with market strength from buying the competition off the market. On the other hand, it must prevent them from sealing off the market by means of conduct like abusive contracts.

The fundamental contexts and the complexity of multi-sided platforms need to be taken into consideration by competition authorities and courts when assessing specific cases under competition law.

In particular with regard to the definition of markets, greater attention should be paid to the characteristics of multi-sided platforms. Traditional methods that have been developed for market definition on one-sided markets (such as the so-called SSNIP test) are not always suitable in the context of two-sided (or multi-sided) platforms.

Moreover, the Monopolies Commission recommends two concrete amendments in the context of merger control and the rules on abuse of dominance:

First, the scope of application of merger control should be extended to include mergers of firms that have heretofore shown only modest annual turnovers, but evidently have a high market potential, which is expressed by a high sales price.

In the digital economy many firms are sold in a very early stage of development in which they have not yet realized significant turnovers.

In the absence of a high turnover such acquisitions cannot be checked by the European Commission or the German Competition authority.

In the digital economy a company's potential is often better expressed by the price offered or paid for it than in the turnovers it previously achieved.

For this reason the Monopolies Commission recommends complementing the existing merger thresholds based on turnover by additional notification requirements based on the transaction volume. Such rules appear necessary in order to close loop-holes: The acquisition of companies that have not yet realized high turnovers may nevertheless have significant effects on competition.

A further reform proposal of the Monopolies Commission relates to the rules on abuse of dominance: In view of the commission proceedings in abuse cases should not go on for such a long time that market-dominant companies may reinforce their position by means of continued abuse during the procedure.

The Monopolies Commission recommends to the European Commission to put the instrument of interim measures to more frequent use in cases of abuse in digital markets. Further, it suggests an amendment to the procedural rules to the effect that, after a reasonable period, a commitment proceeding should automatically become a dispute proceeding pursuant to Article 7 of Regulation 1/2003.

The Monopolies Commission does not consider separate regulation for search engines to be appropriate, at least not at present. An obligation to disclose the search algorithm cannot be recommended. If the search algorithm were publicly known, website operators would be able to optimise their sites such in a way that would considerably impair the display of search results according to their relevance.

The separation of general and specialised search services, would not be an adequate measure to effectively mitigate potential market distortions.

As long as chances exist for the stimulation of competitive forces, one must advise against such a serious intrusion into existing company structures, also since rationalisation advantages would be foreclosed and existing advantages of scale and scope, though being to users' benefit, would disappear.