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Assessing data access issues in online platforms

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ABSTRACT

Online platforms have the characteristics of a particular type of market known as 'multi-sided'. These businesses create value by bringing advertisers and users together. Access to user data is critical to this process. On the basis of economic literature, the features of multi-sided platforms will be discussed. It will be argued that the characteristics of multi-sided platforms increase the likelihood that successful companies become dominant due to the existence of indirect network effects. In these circumstances, dominant platforms may foreclose competition by raising barriers to entry in the large collections of user data. This may give rise to access problems for competitors and new entrants that need access to data gathered by dominant platforms in order to provide competing or complementary services. A comparative legal analysis will be used to assess the standards that are applicable in the United States (US) and the European Union (EU) for finding liability for refusals to deal under antitrust or competition law. The private antitrust cases that have already occurred regarding access to user data in the US show that the scope of applicability of the US essential facilities doctrine is very limited after the judgment of the Supreme Court in *Trinko*. Although the European Commission and the European Court of Justice seem to be willing to accept liability for a refusal to deal more easily than their US counterparts, high legal hurdles still have to be met under the essential facilities doctrine in the EU. Nevertheless, there are scenarios in which liability for refusals to give access to data will likely be accepted in the EU.

1. Introduction

Since several years companies in the internet economy have been offering online platforms such as YouTube, Google and Facebook. These platforms are multi-sided markets. Instead of targeting one customer group, platform providers are competing for users and advertisers. Contrary to 'traditional' companies in the information technology sector like Intel and Microsoft, platform providers do not gain revenue by selling their technology to consumers but rely on deriving benefits from valuable information they collect about their users. The collection of user data enables them to offer targeted

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advertising services to advertisers who fund the platform. In addition, the quality of the services that can be offered to users depends to a large extent on the nature and amount of the data collected. As they are dependent on their user base, platform providers may not be willing to give competitors access to the information they have gathered about users. For example, social network providers typically do not allow third-party websites to directly acquire the user's information.[1] This article aims to analyze how European competition law may intervene to redress potential data access problems in multi-sided online platforms.

In Section 2, economic literature on multi-sided markets will be reviewed to highlight the main characteristics of multi-sided platforms. Section 3 presents the importance of user data as a competitive asset for online platforms. In Section 4, a comparative law approach will be used to study how European competition law can approach access problems in online platforms. While there is no decision or judgment on these issues yet in the European Union, a few private antitrust cases dealing with these problems have already occurred in the United States. The US cases will be discussed and it will be analyzed whether EU competition authorities and courts will take the same approach. Section 5 concludes.

2. Multi-sided nature of online platforms

By focusing on online platforms, this article intends to concentrate on internet services that act as an intermediary or a platform between users and advertisers.[2] Web-based businesses such as search engines and social networks aim to build an audience for advertisers. In order to attract users, these platforms offer users access to content such as videos (YouTube), or provide users a service like search functionality (Google) or social networking possibilities (Facebook). Access to the user traffic is sold to advertisers who generate the money for the platform. Although transaction or e-commerce platforms such as Amazon still mainly rely on income from fees they charge sellers on their platform, the provision of advertising services also starts to raise a considerable amount of revenue.[3] E-commerce platforms therefore also seem to be evolving into online intermediaries between users and advertisers. The different types of advertising-based online intermediaries can be seen as multi-sided platforms (MSPs).

A body of literature has been developed by economists that explains the nature of MSPs. MSPs have been long recognized in traditional advertising-supported media like newspapers or magazines. Understanding how MSPs work is important for competition law analysis, because the specific characteristics of MSPs bring certain implications that differ from single-sided markets. The main characteristic of MSPs is the interdependence of the different sides of the platform which is reflected in the existence of indirect network effects (Evans, 2003, pp. 331–333; Filistrucchi, Geradin, & Van Damme, 2013, pp. 37–39). In addition, the skewed price structure has been described as a distinctive feature of MSPs (Rochet & Tirole, 2006, p. 646). In this section, these two characteristics are highlighted.

2.1. Indirect network effects

According to Rochet and Tirole's definition, two-sided – or more generally multi-sided – markets are '*markets in which one or several platforms enable interactions between end-users and try to get the two (or multiple) sides "on board" by appropriately charging each side*' (Rochet & Tirole, 2006, p. 645). The term 'market' is used with a loose meaning here, unlike the use of the term in competition law analysis (Evans & Schmalensee, 2011, p. 3), such as in 'relevant market'. The term 'market' is often used interchangeably with 'platform'. Both refer to a place where different groups of customers meet and interact. Instead of MSPs, the term two-sided platforms has been commonly used for the purposes of simplicity, while the insights of two-sided platforms are also applicable to MSPs. We intentionally choose to use the term 'MSP' to emphasize that this type of business can involve more than two different groups of customers.

MSPs serve as intermediaries which bring different groups of customers together. The essential characteristic of MSPs is that one group of customers will value the platform more when there are more customers of another group (Armstrong & Wright, 2007, p. 353; Evans, 2003, pp. 331–333; Filistrucchi et al., 2013, pp. 37–39). For instance, eBay is interesting for sellers, because it has many buyers, and *vice versa*. Google attracts advertisers because it has a large number of users as audience and at the same time as potential buyers for the advertised goods and services. On the other hand, users who look for information to buy certain products benefit from the number of advertisements, since it will increase the probability to find relevant products.

This implies that a group of customers is influenced by another group of customers. The link between the two groups is called 'indirect network effects', or 'indirect network externalities', as the two groups do not internalize the networks effects among themselves (Rochet & Tirole, 2003, p. 995). Rather, the network effects are internalized by the platform that provides intermediary services to enable different groups of customers to interact with each other (Evans, 2003, pp. 331–333). The

[1] Under Facebook Terms of Services on Safety, Facebook prohibits automatic collection of user content: '*You will not collect users' content or information, or otherwise access Facebook, using automated means such as harvesting bots, robots, spiders, or scrapers*) *without our prior permission*', available at https://www.facebook.com/legal/terms.

[2] A third customer group that is present on some online platforms, particularly social networks, is application developers. To simplify the analysis, the role of developers will not be discussed.

[3] In addition to the fees it charges sellers, Amazon receives income from its own sales. Amazon's revenues from its ad business in 2013 were estimated to amount to $835 million, placing it ahead of Twitter that accounted for $583 million in advertising revenues (Hof, 2013).