WERKSMANS ATTORNEYS

COMPETITION

Re-inventing the wheel or balancing the scales?

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Digitalisation, globalisation and the COVID-19 pandemic have made certain online platforms (along with their products and services) integral to the lives of billions of global citizens and the operations of businesses across a range of sectors in both the global and local economies.[1]

The rapid growth of the digital ecosystem (i.e. digital markets and platforms, including Tech Giants/Big Tech), as well as its tendency towards market-concentration, has brought to question whether current competition law and policy is adequate enough to deal with competition concerns emanating from digital markets.[2] This perceived competition enforcement gap – which gives Big Tech untamed economic and social power – has led to calls for reforming or amending competition laws or their enforcement mechanisms in major jurisdictions such as the United States and the European Union.[3]

The big push – Regulatory reform

Inasmuch as state regulators and governments have now embarked on the journey of bringing competition law and policy into the digital era, and recognising the need to rein in Big Tech, many of the challenges that competition law reform proposals seek to tackle are not new. Fundamental questions about competition law and economics, and their application to different business practices in different contexts have been around for as long as competition law has existed.[4]

Governments across the globe have been readying themselves to regulate the conduct of digital platforms. For example, in Europe, the European Commission has released regulations relating to the use of Artificial Intelligence in the digital ecosystem.[5] Further afield into the Americas, the United States Congress has published at least five antitrust bills aimed at regulating Tech Giants – with President Biden calling for an "*antitrust push to rein in Tech Giants*" during his 2023 State of the Union address.[6] Closer to home, the South African Competition Commission ("**CCSA**") has started to hone-in on digital markets and economies by launching a number of initiatives that focus on the Information Technology industry, and competition law concerns that lie therein.[7]

Most of the current competition law and policy proposals proceed from the basis that traditional competition law has failed to deliver what is expected of it in the digital economy and thus, must be revised, supplemented or even (possibly) superseded by *ex ante* regulations specific to the digital economy.[8]

Competition law fundamentals

It goes without saying that considerations regarding *ex ante* regulation of digital ecosystems should be focused on competition law remedies that are aligned with desired policy outcomes.[9] In its own words, the CCSA stated that its Online Intermediation Platforms Markets Inquiry ("**Digital Markets Inquiry**") stems, *inter alia*, from "*a general recognition that normal enforcement tools may be inadequate on their own to prevent initial market leaders from durably entrenching their position.*"[10]

Further, a foundational premise of the CCSA's Digital Markets Inquiry was to consider transactions in the digital ecosystem and ensure the conduct of Tech Giants does not have a negative impact on smaller players in the market (i.e. HDPs and SMMEs)[11] – a fundamental competition policy consideration from a South African perspective.[12]

From a global perspective, leading commentary has identified successful *ex ante* competition regulation(s) as encompassing an increase in output, decrease in prices, improvement in product quality and/or innovation.[13] In September 2020, the CCSA published a strategic view on regulating competition in the digital economy (i.e. Digital Economy Report 2021) and identified (i) market concentration, often created by first-mover advantages; (ii) data accumulation and network effects; and (iii) ease of entry into secondary and tertiary levels of digital markets, as areas of concern from competition law perspective:[14]

What is clear from the above mentioned position of local competition law authorities – and the competition law community at large – is that even in the context of digital platforms and ecosystems, the fundamentals of competition law and economics remain: responsive merger control, protection against cartel conduct and the implementation and/or enforcement of measures that prevent the abuse of dominance.

Ex ante regulation

While other regulators seem to be finding their feet in their respective approaches to *ex ante* digital platform regulation, the CCSA has provided some guidance as to its approach to the regulation of digital ecosystem/markets. Some of the most relevant considerations include defining the "relevant market" definition; identifying platforms that are intermediaries to parties on two different sides of the relevant market; and deciphering what constitutes market power in the context of markets, network effects, and the consequences of a lack of profitable as a result of business activities that require large-scale reach.[15]

From an abuse of dominance perspective, companies today have an incentive to collect extremely large sets of data, as this fuels a competitive-edge in the market.[16] Accordingly, there is the risk that dominant firms may stifle the digital economy, especially considering the manner in which vertically integrated digital firms are capable of not only owning, but also competing with sellers on certain digital platforms. It goes without saying such a scenario(s) has the potential to result in anticompetitive conduct (i.e. self-preferencing).

For example, Google relies on user data to gain a competitive advantage in the online-advertising space.[17] What this means is that Google (and Google-owned intermediaries) are able to access users' data information while simultaneously placing time restrictions on outside parties; and thus affording Google (and its affiliates) more comprehensive user data that is accompanies by a speed advantage.[18]

As a result, regulators such as the CCSA have indicated their intention to require dominant tech companies to locally notify all domestic acquisitions – including investments in start-ups, and any other global acquisitions of targets that have some or other presence in South Africa. Further, the CCSA has expressed its preference for relevant global tech mergers to be filed concurrently in South Africa, and other major jurisdictions, in order to encourage collaboration between regulators.

New challenges

None of the above is to say that there are no new challenges posed by digitalisation or digital platforms insofar as competition policy is concerned.[19] Indeed, there is scope (both globally and locally) for growth and innovation in how competition law regulates the new challenges posed by the digital ecosystem. For example, the extensive use of (big) data and algorithms, particularly with regards to self-learning algorithms that are capable of effecting market conditions such as price, quantity and quality.[20]

When your data depository and platform are the biggest, competition law becomes important or a problematic weapon!

Conclusion

Although platform governance is multidimensional and requires governance under a variety of public policies, the Tech Giants behind the vast majority of digital products and services can be counted on the fingers of one hand.[21] Where such a small number of economic players have such large economic and societal influence, market power and related competition concerns become an important piece of the 'platform governance' puzzle.[22]

Current challenges in competition law policy are not necessarily the outcome of digitalisation or the practices of certain digital platforms. Before new laws hit the books, and new authorities are created, a reality check is needed to understand the root cause of the apparent 'failures' of existing competition policy, for whom such policy has failed and the causal relationship between those failures and the business models/practices of the digital economy in general, and Big Tech in particular.[23]

The foregoing discussion makes it plain that competition law and policy, and competitive relationships, are characterised by a constant conflict of interest. On the one hand, the struggle is in favour of the client; yet on the other hand, there lies (potentially) prejudicial effects to 'the other that suffers'.[24] Accordingly, it is the function of law to identify and recognise the interests involved in the competitive struggle, to delimit same in relation to each other, and to differentiate between the circumstances under which such interests will be protected from infringement (i.e. delictual liability), and those under which a harmonious balance may be found/restored.[25]

Simply put, the importance of the fact that legal protection against unlawful competition presupposes the existence of competition[26] – and that will remain true, even in the era of Big Tech and digital platforms.

Footnotes

[1] Centre for International Governance Innovation "Competition Law, Digitalization and Platforms: Separating the Old Challenges from the New" accessed 20 February 2023.

[2] S Gumede and P Manezhe "Competition Regulation for Digital markets in Africa: Lessons from South Africa" at 6.

[3] Centre for International Governance Innovation "Competition Law, Digitalization and Platforms: Separating the Old Challenges from the New" accessed 20 February 2023.

[4] Centre for International Governance Innovation "Competition Law, Digitalization and Platforms: Separating the Old Challenges from the New" accessed 20 February 2023.

[5] European Commission "Regulatory framework proposal on artificial intelligence" accessed 27 February 2023.

[6] Competition Policy International "Biden Calls For Antitrust Push to Rein In Tech Giants" accessed 8 February 2023.

[7] Competition Commission "Online Intermediation Platforms Market Inquiry – Terms of Reference (9 April 2021)" at para 2.4.

[8] Centre for International Governance Innovation "Competition Law, Digitalization and Platforms: Separating the Old Challenges from the New" accessed 20 February 2023.

[9] The Regulatory Review "Data Privacy Through the Lens of Big Tech" accessed 20 February 2023.

[10] Competition Commission "Online Intermediation Platforms Market Inquiry – Terms of Reference (9 April 2021)" at para 2.4.

[11] Competition Act 89 of 1998, section 12A.

[12] Competition Act 89 of 1998, section 12A.

[13] The Regulatory Review "Data Privacy Through the Lens of Big Tech" accessed 20 February 2023.

[14] Competition Commission of South Africa "Competition in the Digital Economy Version 2" (2020).

[15] Centre for International Governance Innovation "Competition Law, Digitalization and Platforms: Separating the Old Challenges from the New" accessed 20 February 2023.

[16] The Regulatory Review "Data Privacy Through the Lens of Big Tech" accessed 20 February 2023.

[17] The Regulatory Review "Data Privacy Through the Lens of Big Tech" accessed 20 February 2023.

[18] The Regulatory Review "Data Privacy Through the Lens of Big Tech" accessed 20 February 2023.

[19] Centre for International Governance Innovation "Competition Law, Digitalization and Platforms: Separating the Old Challenges from the New" accessed 20 February 2023.

[20] Centre for International Governance Innovation "Competition Law, Digitalization and Platforms: Separating the Old Challenges from the New" accessed 20 February 2023.

[21] Centre for International Governance Innovation "Competition Law, Digitalization and Platforms: Separating the Old Challenges from the New" accessed 20 February 2023.

[22] Centre for International Governance Innovation "Competition Law, Digitalization and Platforms: Separating the Old Challenges from the New" accessed 20 February 2023.

[23] Centre for International Governance Innovation "Competition Law, Digitalization and Platforms: Separating the Old Challenges from the New" accessed 20 February 2023.

[24] Van Heerden-Neethling "Unlawful Competition" 2nd edition (2007) at 3.

[25] Van Heerden-Neethling "Unlawful Competition" 2nd edition (2007) at 3.

[26] Van Heerden-Neethling "Unlawful Competition" 2nd edition (2007) at 10.

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