Fair questions online

ISSUES IN CONCENTRATED DIGITAL MARKETS

The internet has enabled 3.9 billion users, connected via 18 billion devices, to communicate with each other as never before. However, our daily interactions on the net have increasingly been channelled through a narrow set of providers, whether platforms, private networks, or content providers. This has led to concerns common to the regulation of all concentrated markets, notably the danger that incentives to innovate will be reduced. But regulators and policy-makers have also been responding to wider concerns about "fairness" in these markets. This article argues that not all of these issues can easily be characterised as competition problems, and may therefore require different forms of regulatory intervention, while the competitive dynamics in these markets may, in fact, still provide strong incentives to innovate even where firms possess significant market shares.

The fact that the internet uses a set of open and common standards for data transmission is perhaps its defining characteristic, and has enabled its rapid growth and transformative impact on the economy. It has meant that any device manufacturer or software application designer could create new services, products or production processes and reach the global customer base. Where these applications and devices start to generate data flows, then a variety of networks provide infrastructure to enable communications.

This openness is sometimes linked with the idea that the internet embodies "fairness". In principle, there are no proprietorial standards, licences, or intellectual property rights which provide a barrier to internet connection. In its early days, the equipment that enabled communication was of necessity "neutral" in how it treated data travelling between networks, and this was equated with "fairness". Similarly, recent net neutrality legislation is partly intended to make "fair" treatment of data obligatory.

Yet paradoxically, a system built around a set of open standards, and accessible to all consumers and suppliers, has tended to lead to concentration in some markets, which in turn has often been associated with "unfairness". The reasons why concentration occurs in some digital markets were reviewed in a previous Frontier article, *Regulating the Titans*[1]. In brief, assets in digital markets are more likely to be intangible (brand, reputation, ideas, software), and this makes it easy to scale quickly in response to demand changes (i.e., markets have highly elastic supply). Moreover, platform markets often exhibit "network effects", which means that as scale increases so the products become more valuable to users. In combination, these features may lead to such markets tipping easily into dominance by one supplier.

Fair to whom?

The concept of "fairness" has certainly played its part in debates on the objectives of competition policy. A fairly typical articulation of the link came from the European Competition Commissioner, Margrethe Vestager, at the Global Competition Law Centre annual conference in Brussels last year, when she

[1] https://www.frontier-economics.com/uk/en/news-and-articles/articles/article-i2301-regulating-the-tech-titans/

argued that “we have competition rules because we believe they make our society a better place to live...they make our markets work more fairly for consumers.”

Laws which underpin competition policy often explicitly use “unfairness” to define prohibited behaviour (as, for example, in Article 102(a) of the Treaty on the Functioning of the European Union). However, the application of these laws depends on specific legal and economic tests and standards that have been developed in competition jurisprudence, rather than measurement against some objective standard of “fairness.”

Moreover, the focus of competition policy is on the ability of a well-functioning market to prevent lazy or exploitative behaviour by suppliers, by offering consumers choice. Thus the effect of market “unfairness” on the consumer, while it may sometimes be direct - higher prices - may also be indirect. Take, for example, the role competition has to play in stimulating innovation.

The archetypal “lazy monopolist” knows that introducing innovative new products is likely to cannibalise its existing revenues, and thus has little incentive to invest, to the detriment of customers’ interests. And concentration in digital markets does indeed give rise to the concern that dominant digital platforms could exercise market power by limiting investment in innovation, depriving consumers of the benefits of technological progress - an example of how an “unfair” market may lead to a loss of welfare.

Such concerns may, however, be excessive. In fast-changing digital markets, consumer tastes shift rapidly and even large platforms need to respond - as for example to the shift in usage from desktops to mobile devices. And some of the features that make digital markets liable to “tip” into dominance equally make them vulnerable to innovative entry. So, in practice, the digital giants have not tended to sit on their hands, but have introduced innovative products or entered new digital markets - as exemplified by Amazon’s move into broadcasting or Apple’s cloud services.

In any case, although the speed of change in these markets may be unfamiliar to competition policy-makers, and require change in their own approaches, the issues discussed above are well within their analytical framework. But these do not encompass all those questions relating to the concept of “fairness”. As sector regulators - for example, for financial services - demonstrate in their approach to regulation, the objective of ensuring that providers are “treating customers fairly” goes beyond the group of “fairness” issues thrown up by competition policy.

Direct action?

In all markets, there are some actions that might be considered “unfair”, but which do not infringe competition policy. In digital markets, platforms could engage in “unfair” practices which do not directly relate to their market position. Key issues have arisen, for example, with respect to their handling of personal data.

Advances in data processing, coupled with the revolution in how we use devices, mean that customers’ data is increasingly valuable. It can be used to sell them advertising, or enable providers to discriminate in the products and services offered, or prices they ask customers to pay. Any platform could “unfairly” exploit this position in a number of different ways: for instance, by failing to provide customers with the appropriate level of control over the value that they create with their data.

The ability to exploit customers in such a way is not obviously related to market power. It might simply stem from the way consumers behave: the unlikelihood that they will fully understand the implications of making their data available, or that they will use the tools available to manage their data defensively. Few will be fully aware, for example, of the extent to which the algorithms that target content on the basis of their personal data will make their experience of the internet different from other people’s.

It could, of course, be argued that this is a classic example of a market with “information asymmetries”, which competition authorities can and should address by ensuring customers have more and better information, but experience has demonstrated that information overload is a poor way of addressing such problems, and that *ex post* competition analysis is likely to be a blunt tool if it is effective at all. Instead targeted and proportionate *ex ante* interventions to ensure customers are treated fairly may be more appropriate and effective.

Policy-makers worldwide have come to see this, and to buttress competition regulation with other mechanisms and sector or issue-specific regulators. In addition to the net neutrality regulations mentioned above, last year the EU General Data Protection Regulation came into effect, and its operation is overseen by Information Commissioners who can impose large fines.

The impact of data breach events that have to be reported to the commissioners on corporate reputations (and share prices) is a further important influence. The impact on Facebook's market value of the Cambridge Analytica scandal was a severe warning to others. Meanwhile the proposed EU regulation on promoting fairness and transparency for business users of online intermediation services[2] seeks to regulate platforms such as Amazon market place or eBay to protect and promote "fairness" for businesses that use them.

Conclusions

Competition authorities need to be aware of, and ready to respond to, the tendency of some digital markets to "tip" into concentration and the risk that major players can exploit their market power in a way that would be "unfair" to consumers. However, these markets may also self-correct through rapid change and new entry, while by no means all concerns about "unfairness" in these markets either stem from market power or are easily susceptible to correction by competition authorities. The emergence of new sector or issue-specific regulators demonstrates policy-makers' recognition of this limitation, but at the same time gives rise to other questions as to which regulatory regime is appropriate to addressing which perceived problem.

Competition authorities need to be clear about the true source of the issues that may arise in these markets. And in general, interventions should:

- Keep policy tools focused on specific concerns, and focus remedies on the specific behaviours which are likely lead to harm;
- Use effects-based tests to weigh up benefits of intervention against potential costs (in terms of loss of competition, innovation or monitoring costs);
- In these fast-changing markets, be ready to respond to new situations and concerns;
- Help consumers to know and enforce their rights, while recognising that the complexity of the tools used by platforms poses a sometimes insuperable barrier to customer understanding; and
- Evolve an ongoing and adaptable understanding of which regulatory authority is the most appropriate to intervene.

[2] https://ec.europa.eu/digital-single-market/en/news/regulation-promoting-fairness-and-transparency-business-users-online-intermediation-services