

COMPETITION CASES INVOLVING PLATFORMS: LESSONS FROM EUROPE

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Some academics and public intellectuals who lobby for an “*antitrust counterrevolution*” steeped in politics and not economics implicate the power of large technology platforms (“tech platforms”) in terms of “*structural dominance*”.¹ The notion, it is sometimes heard, can be traced to a European culture of strong competition policy known as “*ordoliberalism*”.² Last year, Professor Tim Wu alluded in a conference to the fact that Europe, or part of it, seemed more interested by structural remedies than it often gets credit for.³ In her latest paper on tech platforms, antitrust rising star Lina Khan echoes popular concerns that the US government does not do enough to regulate big tech companies, and cites as a possible alternative several European cases that have found Internet platforms guilty of self-bias or discrimination.⁴ Even more recently, Marshall Steinbaum and Maurice Stucke proposed to introduce an alternative “*effective competition standard*” in US antitrust law which is nominally and substantively similar to the standard applied in European case-law.⁵

In this short comment, I clarify that attempts to search guidance for an “*antitrust counterrevolution*” in European competition policy are misguided. I first explain why there are no parallels to draw between the ongoing US “*political*” antitrust revival and European competition history (1); I then move on to describe that the dominant feature of European competition law is experimentalism, not structuralism (2); I finally share my personal understanding of the contemporary European approach to competition policy in the tech sector (3).

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¹ Or the position of a firm that commands a large share of output. See Lina Khan and Sandheep Vaheesan, “Market Power and Inequality: the Antitrust Counterrevolution and its Discontents” (April 22, 2016), 11 Harvard Law & Policy Review 235 (2017), <http://ssrn.com/abstract=2769132>, accessed 16 October 2018.

² See David J. Gerber, *Law and Competition in Twentieth Century Europe – Protecting Prometheus*, Oxford: Clarendon Press, Oxford University Press, 1998.

³ See Tim Wu’s intervention at “Antitrust and Competition Conference”, Stigler Center, Part 13 Day Two Panel Four “US vs EU” at 1:18, available at <https://www.youtube.com/watch?v=qzjfjYQTa2s>.

⁴ See Lina Khan, Sources of Tech Platforms Power, 2 GEO. L. TECH. REV. 325 (2018).

⁵ See Marshall Steinbaum and Maurice Stucke, The Effective Competition Standard – A New Standard for Antitrust, September 2018, Roosevelt Institute.

1. False Parallels between US “*political*” Antitrust Revival and European Competition Tradition

1.1. US antitrust counterrevolution v European ordoliberalism

The US antitrust counterrevolution movement advances two central ideas. The first is that antitrust policy is a political enterprise. The second is that economics should play no determinant role in the antitrust agenda.

Those two ideas would irk any European ordoliberal. Let us start with the second. The ordoliberal movement is chiefly concerned with safeguarding the proper functioning of the “*price system*”.⁶ At the methodological level, this leads ordoliberals to believe in the “*power of science*”, and in particular of economics, to inform rule making.⁷

But the first idea is where all hell breaks loose for vintage “*ordos*”: political antitrust is oxymoron. In the ordoliberal tradition, antitrust policy should be insulated from any executive or congressional interference.⁸ This explains that competition rules appear in statutes of constitutional rank, and that enforcement is entrusted to unelected technocrats. In fact, ordoliberals do not believe in a deterministic tendency of markets to inevitably concentrate due to advances in technology, but on the contrary ascribe this nefarious perspective to proactive Government policies that are consolidation prone.⁹

1.2. There is no distinctive European structural remedy culture

The idea of a distinctive European tradition whereby structural remedies are applied to concentrated industries is a fiction. Neither the law, nor agency practice – at least at the European level – support the proposition that *ex post* structural remedies are consistently applied in concentrated markets. The law makes clear that “*structural remedies can only be*

⁶ See generally, Thomas Biebricher and Frieder Vogelmann, Introduction, Chapter 1, in T. Biebricher and F.S. Vogelmann (eds), *The Birth of Austerity, German Ordoliberalism and Contemporary Neoliberalism*, Rowman & Littlefield Ltd, 2017.

⁷ See Franz Böhm, Walter Eucken and Hans Großmann-Doerth, The Ordo Manifesto of 1936 in T. Biebricher and F.S. Vogelmann (eds), in T. Biebricher and F.S. Vogelmann (eds), *The Birth of Austerity, German Ordoliberalism and Contemporary Neoliberalism*, Rowman & Littlefield Ltd, 2017. Chapter 2, “*Men of science, by virtue of their profession and position being independent of economic interests, are the only objective, independent advisers capable of providing true insight into the intricate interrelationships of economic activity and therefore also providing the basis upon which economic judgments can be made.*” And “*whether competition is efficient or obstructive, whether or not price-cutting contradicts the principle of the system – all these issues can only be decided by investigations conducted by economists into the various states of the market*”.

⁸ See David J. Gerber, Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the “New” Europe, 42 Am. J. Comp. L. 25 (1994).

⁹ See Walter Eucken, “Competition as the Basic Principle of the Economic Constitution” in T. Biebricher and F.S. Vogelmann (eds), in T. Biebricher and F.S. Vogelmann (eds), *The Birth of Austerity, German Ordoliberalism and Contemporary Neoliberalism*, Rowman & Littlefield Ltd, 2017. Chapter 5.

imposed either where there is no equally effective behavioural remedy".¹⁰ And the European Commission has only imposed *ex post* structural remedies once in the past 15 years.¹¹

1.3. EU and the “*big is good*” tradition

Unlike the “*big is bad*” grassroots history of US antitrust law, European competition law has originally not objected to industry concentration.¹² This can be seen in the text of the Treaties of 1957, which still embody EU competition law as it stands today. The Treaties did not prohibit dominance in itself, just its abuse. For years, the provision was not enforced. Moreover, the Treaties initially did not provide for a merger control system. It took 30 years to Europe to adopt this structural instrument. As observers like Professor Pinar Akman have rightly noted, post war European economic policy was essentially about growing domestic European firms and promoting businesses’ productive efficiency.¹³

1.4. Contemporary EU enforcement against big tech does not prohibit discrimination, but bans RPM

The idea that current EU competition enforcement reflects the agenda of the “*antitrust counterrevolution*” movement is belied by cases. To start, it is not true that European competition enforcement addresses discriminatory practices of vertically integrated platforms. The legal theory of liability built by the Commission in *Google Shopping* does not once refer nominally to the ban on dominant firm discrimination found at Article 102 (c) TFEU. Granted, the decision refers to a concept of “*equality of opportunities*”. But a reading of the decision raises doubt as to whether (i) this is dispositive in the decision; and (ii) this refers actually to a duty on the defendant to preserve “*living profits*” for any non-integrated firm on the platform,¹⁴ rather than a non-discrimination idea.

¹⁰ See Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32003R0001&from=FR>.

¹¹ As far as I know, this happened in EU Commission Decision of 20th September 2016 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (EC Antitrust Procedure), Case AT.39759 – ARA Foreclosure, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39759/39759_3071_5.pdf Three other cases involve negotiated settlements in industries subject to ex ante regulation like gas and electricity.

¹² See Pinar Akman et Hussein Kassim, “Myths and Myth-Making in the European Union: The Institutionalization and Interpretation of EU Competition Policy”, (2010) 48(1) *Journal of Common Market Studies*, p. 111-132.

¹³ See Pinar Akman, “Searching for the Long-Lost Soul of Article 82 EC”, *Oxford Journal of Legal Studies*, Vol. 29, No. 2 (2009), pp. 267–303.

¹⁴ This idea was central in *United States v. Aluminum Co. of America (Alcoa)*, 148 F.2d 416 (2d Cir. 1945).

Besides, European competition enforcement finds antitrust liability in cases where antitrust counterrevolutionaries would prefer immunity. Resale price maintenance (“RPM”) is a case in point. European law declares them *per se* unlawful. The political antitrust movement would leave them unscathed, because they often benefit small upstream firms.

1.5. European competition case-law has abandoned the last remnants of ordoliberal interpretation, and now embraces an empirical approach of antitrust

Admittedly, the EU courts’ case-law has previously promoted ordoliberal interpretations of the Treaty competition prohibitions. In unilateral conduct cases, the EU courts have long adhered to the idea that dominant firms had a “*special responsibility*” not to impede competition by virtue of their structural position, and subjected them to strict and asymmetrical behavioral constraints. From a US perspective, this case-law could be described as the intellectual equivalent of *Brown Shoe*¹⁵ or *Von’s Grocery*¹⁶. But in its 2017 opinion in *Intel*, the EU upper Court discarded this approach, in favor of an empirical assessment focused on the economic effects of dominant firm behavior. The Court endorsed the idea that dominant firms can lawfully exclude less efficient competitors. This policy had been previously promoted by the EU Commission in a 2009 policy paper.¹⁷

2. European Experimentalism

A better word to describe European antitrust is “experimentalism”. European competition law is less risk averse in situations of uncertainty. Antitrust cases can be initiated in settings with imperfect information, emergent behavior, and unclear judicial precedent. This sometimes lead agencies to develop a very precautionary approach to antitrust policy.

Antitrust experimentalism is the result of several features of the European competition system. *First*, though *Intel* upholds an economic test of anticompetitive effects, the case law meanwhile sets flexible rules of evidence in unilateral and coordinated conduct cases: no proof is required of “*actual*” harm to competition, let alone a “*quantifiable*” estimation.¹⁸ Instead, the plaintiff must show a “*capability*” of harm. In this assessment, plaintiffs can

¹⁵ *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962).

¹⁶ *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966).

¹⁷ See Guidance Communication on the Commission’s enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, OJ C 45 2009, 7–20.

¹⁸ Unless the defendant makes such arguments. See *Intel v Commission* [2017], ECLI/EU/C/2017:632, §§138 - 144. See *MEO — Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência* [2018], ECLI:EU:C:2018:270, para 27 (hereafter *MEO v Autoridade da Concorrência*): “it cannot, however, be required in addition that proof be adduced of an actual, quantifiable deterioration in the competitive position of the business partners taken individually”.

bring evidence under a totality of the circumstances standard.¹⁹ Moreover, the Courts have repeatedly insisted that the concept of “*abusive*” conduct is fluid, and not fixed.

Second, European Commission decisions are self-enforcing, presumptively lawful and subject to limited judicial review. In particular, judicial review over economic assessments focuses on marginal errors of appraisal. In US terms, a *Chevron* deference doctrine applies in EU competition policy.

Third, cultural factors indicate that: (i) there is less faith in Europe in the tendency of markets to self-correct, and more trust in the ability of technocrats to correct market failures or improve market outcomes (the Treaty rules on competition were drafted by a small group of diplomats and technocrats in much discretion in the aftermath of WWII, not as a result of a populist movement);²⁰ (ii) antitrust decision makers seek avoidance of both type I *and* type II errors on equal footing; (iii) public choice theory has few adepts in Europe; and (iv) originalism is not a strong intellectual current in European doctrine, and purposive discussions on the goal(s) of competition laws rarely clutter enforcement.

Fourth, distributional choices are embedded in European competition law. The Treaty proscribes excessive transfers of wealth from buyers to dominant sellers. And judicial *dicta* that insist on the protection of “*competition as such*” or of “*market access*” entitle agency to favor specific horizontal private interests – like small firms – against others – like big firms. The *Google Android* case shows this. The Commission – according to its press release – passed judgment of the sufficiency of Google’s turnover, noting that it “*would still have benefitted from a significant stream of revenue*” had it not abused a dominant position at the expense of other companies.

3. Unpacking the European Approach to Competition Policy in Platform Markets

It is difficult to credit the EU with a clear and specific competition policy for platform markets. True, buzzwords like “*fairness*”, “*openness*” or “*level playing field*” have been prominent in high level policy speeches.²¹ And, the 2018 *Google Android* case is a repeat of

¹⁹ See *MEO v Autoridade da Concorrência*, paras 27-28: “*regard to the whole of the circumstances of the case*” ... “*all the relevant circumstances*”.

²⁰ See Warloutzet, Laurent, and Tobias Witschke. “The difficult path to an economic rule of law: European Competition Policy, 1950–91.” *Contemporary European History* 21.3 (2012): 437-455. See also Didry, Claude, and Frédéric Marty. “La politique de concurrence comme levier de la politique industrielle dans la France de l’après-guerre.” *Gouvernement et action publique* 4 (2016): 23-45 (in French). See also, P. Akman, quoted above.

²¹ See Margrethe Vestager, “The importance of being open – and fair”, speech on 2nd March 2018 in Harvard University, available at https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/importance-being-open-and-fair_en.

the 2004 *Microsoft* case, suggesting consistent support to the idea of keeping technology platforms open.

At the same time, one could easily refute the idea that Europe's vision is to keep markets open for competitors, new entrants, and new business models. The analytical approach to market definition followed in *Google Android* leads *de facto* to a zone of immunity for closed platforms. Moreover, no remedies were adopted in the two cases against Google, suggesting a degree of forbearance to market forces.

This notwithstanding, four policy patterns seem to emerge. *First*, tech policy is essentially deemed to be the province for *ex ante* regulation. The General Data Protection Regulation ("GDPR") is a case in point.²² But that is not all. Platform cases in Europe are often followed or seconded by regulatory propositions, positioning antitrust enforcement as a fact finding exercise or as a regulatory kick starter. Some illustrations include ongoing proposals to introduce an online platform regulation²³ or a tax on revenues from digital activities.²⁴

Second, the long game of EU tech policy may be to protect economic players active on the content development segment of the market (artists, publishers, developers, etc.). This can be seen by tying platform-adverse antitrust enforcement initiatives to content provider-friendly copyright reform, net neutrality regulation and proposed online platform regulation.²⁵ There is a particular political economy underpinning this policy: (i) the main two European tech power players are Spotify and Deezer; (ii) the European publishing industry enjoys strong political clout;²⁶ (iii) Europe has traditionally claimed a "*cultural exception*" in content production (movies, music, etc.).

Third, intra platform competition matters, regardless of inter platform competition.²⁷ Again, the 2017 *Google Shopping* case shows this neatly. The Commission's concern was to restore a degree of competition amongst comparison shopping services, and make sure that edge providers maintain enough traffic to remain on the platform. A statement that makes this clear is when the Commission seems to fault Google for being a late entrant in intra

²² See Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

²³ On 26 April 2018, the Commission proposed a Regulation on promoting fairness and transparency for business users of online intermediation services.

²⁴ See *European Commission – Fact Sheet*, "Questions and Answers on a Fair and Efficient Tax System in the EU for the Digital Single Market" [MEMO/18/2141], 21st March 2018, available at http://europa.eu/rapid/press-release_MEMO-18-2141_en.htm.

²⁵ See <https://www.theverge.com/2018/9/12/17849868/eu-internet-copyright-reform-article-11-13-approved>

²⁶ See <https://www.nytimes.com/2015/08/29/technology/european-publishers-play-lobbying-role-against-google.html>

²⁷ See <https://www.politico.eu/article/europe-vs-google-whats-the-next-battle-in-search/>

market competition (“*Google has artificially reaped the benefits of the Conduct. Google did not invent comparison shopping*”).²⁸

Fourth, tech platforms must honor the “*trust*” placed by third parties in them, if not risk antitrust exposure. The two Commission decisions against Google in 2017 and 2018 have in common to affirm liability against a dominant firm that pretends to provide a service on certain nominal terms, yet effectively deviates from these terms thereby frustrating clients and rivals’ expectations. Though it is not clear whether such breaches of trust played any dispositive role in the findings of liability, it is unambiguous that it slanted the context against the defendant. In *Google Shopping*, the Commission mentioned in its decision is that Internet search results were not supplied as neutrally as users believe;²⁹ and in *Google Android*, the defendant was publicly criticized for maintaining restrictions on the development of Android forks, while selling its mobile OS as “*open source*”.³⁰

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²⁸ EU Commission Decision of 27th June 2017 relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area [EC Antitrust Procedure], Case AT.39740 – Google Search (Shopping), Para 343, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf (hereafter EU Commission Decision, Google Search (Shopping)).

²⁹ See EU Commission Decision, Google Search (Shopping), 27 June 2017 at §599 (“*Google did not inform users that the Product Universal was positioned and displayed in its general search results pages using different underlying mechanisms than those used to rank generic search results*”) and § 663 (“*Google has provided no evidence to demonstrate that users do not expect search services to provide results from others. On the contrary, as indicated in recital (599), Google did not inform users that the Product Universal was positioned and displayed using different underlying mechanisms than those used to rank generic search results*”). In a 2016 press release during the investigation that led to the decision, the Commission voiced concerns that “*users do not necessarily see the most relevant results in response to queries - this is to the detriment of consumer*”. See European Commission - Press Release, Antitrust: Antitrust: Commission takes further steps in investigations alleging Google's comparison shopping. 14 July 2016

³⁰ In previous cases like *Astra Zeneca* or *Huawei v ZTE*, the European courts have deemed abusive certain types of dominant firms’ opportunistic conduct.