# The application of EU antitrust law to (dominant) online platforms

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# Executive Summary

This dissertation assesses the various challenges involved in the application of the current framework of EU antirust law, and in particular art. 102 TFEU to online platforms. The dissertation is based on the combined research that resulted in the publication of six separate articles and a supplementary chapter. Looking into various topics and considering different angles this dissertation addressed the following main research question: '*To what extent can the current framework of EU antitrust law, and in particular art. 102 TFEU, account for the multisided nature of online platforms and accommodate an application capable of attaining a similar level of enforceability as in non-platform market settings?*'.

An inquiry into the economic, commercial and technological characteristics of online platforms reveals that that the application of the current framework of EU antitrust law to such actors will give rise to multiple challenges. Many of those challenges relate to the multisided nature of such players. The multisided nature of online platforms entails that they cater their services to two or more separate customer groups, meaning they operate on multiple separate yet related markets simultaneously. When brought within the ambit of EU antitrust law, these circumstances would mean that the scope of the legal analysis under such framework might also have to be adjusted correspondingly. Accordingly, generally speaking, when assessing the potential anti-competitive effects as well as the efficiencies generated by the practices of the concerned platform(s) in each case, such assessment may have to extend to more than one market at a time. In turn, this may mean that certain cases will require delineating multiple separate yet related relevant markets. Furthermore, where infringements of EU antitrust law are indeed identified, designing effective remedies might equally require measures that extent across multiple markets simultaneously.

In practice, adjusting the application process if EU antitrust law to the multisided nature of online platforms will entail taking into account several core settings that are inherent to this nature. Generally speaking, the most important of such settings will be the network effects at play, the homing patterns of the platform customer groups (single or multi-homing) and the skewed pricing structures of platforms.

Taking into account the network effects and homing patterns of platform customers in each case will have a significant impact on the outcomes of all stages of the application of the current EU antitrust law framework.

When defining the relevant market, the presence and intensity of (indirect) network effects and the presence of multi-or single homing patterns by the platform customers will determine to a great extent the number of markets that should be defined as well as their respective scope. The skewed pricing structures in such cases will also determine whether the SSNIP test needs to be replaced by a non-price centered test if such structures include zero priced offers with respect to certain platform customer groups.

When assessing the anti-competitive effects of the commercial practices of the platform(s) under investigation, the network effects and homing patterns will determine likelihood and scope of harm that can be expected to arise from its actions. Accordingly, when dealing with potentially anti-competitive behavior such an extended assessment may determine whether such practices are legitimate, or otherwise an abuse of dominance under art. 102 TFEU or a restriction of competition under art. 101 TFEU. When designing remedies, taking account of the network effects at play and the homing patterns of platform customers will determine the intrusiveness of the envisaged measure as well as the number of markets that need to be covered by it.

In cases where the investigated behavior of the concerned platforms involves their pricing practices, taking into account the inherent use of skewed pricing structures by platforms will be essential for assessing the permissiveness of their practices. This aspect, taken together with the network effects and the homing patterns of platform customers, will contribute greatly towards establishing whether certain pricing practices concern prohibited exclusionary or exploitative practices when implemented by dominant platforms. The manner in which such skewness needs to be accounted for in each case will depend on the type of infringement that is considered and its corresponding theory of harm. Where abusive practices are indeed identified, this same composition of settings will also provide guidance on how the pricing strategies of the concerned platform(s) ought to be adjusted so as to comply with EU antitrust law while being mindful of the commercial and economic constraints of platform pricing structures.

Finally, throughout the entire application process, is it imperative that the technical aspects of platforms are crystalized and translated into the specific context of EU antitrust law based on their working in practice. Such technical aspects are often given little attention, however their inclusion in the legal and economic analysis will have significant implications for the entire application process. For example, the outcome of the market definition process for online platforms will often depend on the technical characteristics of these actors, which will significantly determine the degree of interchangeability between platform undertakings that are thought to be (potential) competitors.

Furthermore, establishing whether certain practices constitute an abuse of dominance or a restriction of competition will often depend on whether their technical manifestation is adequately identified and understood. This is particularly important in the process of expansion that all platforms go through at a given point in time as such process will inevitably entail some form of cross market leveraging. In such cases anti-competitive leveraging actions such as tying and bundling strategies can easily become obscure when these are technically implemented. This can occur for example through cross platform sign-in obligations (i.e. using platform A requires signing in with an account of platform B) or the unsolicited creation of cross platform profiles (creating an account for platform A automatically creates one for platform B as well), which are often used in practice and are rarely viewed with suspicion. Similarly, with the rise of price monitoring and setting software, understanding the workings of such software together with the manner and context in which it is applied could determine whether the use of such software can be seen as a form of concerted practices or a legitimate practice. Of course, given the logical link between infringements of EU antitrust law and their corresponding remedies, the technical of online platforms will also need to be taken into account when designing remedies. Failing to do so would risk coming up with disproportionate remedies that require technically unfeasible adjustments or otherwise ineffective remedies that may be circumvented or minimized. Therefore, correctly contextualizing the technical architectures and functionalities of online platforms will be indispensable for applying the current EU antitrust law framework to their practices.

Based on the research presented in this dissertation, it is submitted that accommodating all these platform related considerations in the current framework of EU antitrust law is overall possible but requires supplementary efforts in order to be workable. Often such efforts will simply concern additional guidance for existing practice. For example, under the existing framework there is nothing truly preventing the definition of multiple relevant markets in a given case, however, what remains to be developed is a guiding methodology for deciding when and how this should be done. Similarly, there are no legal hurdles that would exclude the possibility of converting the SSNIP test to non-price test carrying the same logic, however, doing so requires also introducing a corresponding procedural framework that determines how such test should be constructed and applied. The assessment of anti-competitive behavior across markets is also certainly possible, and at times even required within the current framework, however, the manner in which such effects should be assessed needs to be established.

In other instances accommodating the current framework to online platforms may require the adjustment of certain existing legal tests for infringements. Although such adjustments may appear more significant they do not

require substantively deviating from existing practice but rather translating such practice to the setting of multisided markets. Accordingly, the respective frameworks can remain intact, however, their mode of application may have to be redefined. In this respect the matter of remedy design entails perhaps the most evident example.

Creating remedies capable of dealing with the fast paced and unpredictable market dynamics of online platforms, will require using the current framework of Regulation 1/2003 more creatively than before. Such creative use would entail a strategic combination of interim measures and final (behavioral or structural remedies) or the introduction of flexible remedies consisting of multiple measures that are triggered based on market developments. Despite being unconventional, these options are feasible within the existing legal framework of Regulation 1/2003 and are imperative for the effective application of EU antitrust to online platforms. Such solutions could prevent network effects, which are inherent to online platforms, from amplifying the competitive harm produced by such actors. In extreme circumstances these may even help prevent markets from tipping or alleviate some of the competitive harm in case of markets that have tipped.

Although the commercial behavior of online platforms is increasingly being covered by newly developed regulatory frameworks, it is noted that such developments are not likely to make the need for adjustments to the existing framework of EU antitrust in practice less acute. This is because platform-specific frameworks, such as the Digital Markets Act (DMA), will apply solely to a sub-set of online platforms and address a (limited) pre-defined scope of undesirable practices. Consequently, the majority of practices implemented by online platforms that are capable of raising competitive concerns will remain to be addressed under the scope of EU antitrust law.

With these insights in mind, the conclusion of my dissertation is therefore that the current framework of EU antitrust can, to a great extent, account for the multisided nature of online platforms and ensure its enforceability with respect to these actors. Achieving this outcome in practice will require, however, translating such framework as a whole, throughout all the stages of its application, to the commercial, economic and technical settings of online platforms. Doing so will often require revisiting the boundaries of such framework and re-defining some of the forms of its application so as to maintain its enforceability in an effective manner. The research covered in this dissertation attempts to provide guidance as to how such task should be performed. Such guidance is not intended to be exhaustive nor exclusive but rather present various possibilities in which the current framework could be adjusted to deal with online platforms. Alternative solutions may, in time, also prove to be suitable provided that the core rationale of this dissertation is followed, namely that the distinguishing multisided nature of online platforms requires being taken into account throughout the entire

application process of the current EU antitrust framework. Treating such process as 'old wine in new bottles' and perusing similar approaches as in the case of traditional non-platform markets will undoubtedly lead to undesired outcomes of over-or underenforcement.