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Competition in Digital Markets and Innovation - Dominant Platforms and Competition Law or Regulatory Remedies

(topics and highlights from ASCOLA PAPER - to be further developed)

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Starting in a less consensual manner with a key initial question:

Are innovation and the digital age - that seems to encapsulate in itself innovation and economic efficiency - necessarily positive in terms of the world economy?

Recent research (e.g. Mitko Grigorov - *(Un)Productivity in the Digital Age* - (2015, April 24). *(Un)Productivity in the Digital Age*.


has evidenced that productivity, as measured by output per work hour, has not increased significantly during the current Digital Revolution, despite rapid and intense technological progress and the influx of new inventions...
OUTLINE

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III - Competition in digital markets and innovation - Dominant Platforms and Remedies - Consolidation of Platforms and Merger Control

IV - Dominant platforms and market power - adequate remedies in merger and abuse cases

V - Digital platforms - antitrust vs regulatory governance - what is the proper balance?
Coming back to our initial finding that - *productivity, as measured by output per work hour, has not increased significantly during the current Digital Revolution* - Not only the failure of technological progress to bring immediate increases in productivity and standards of living is *paradoxical from an economic view* but, also,

The **delay in productivity growth** associated with the current ‘Digital Revolution’ is much larger than the one which occurred during the First Industrial or Technological Revolution (1760 onwards) and the one which occurred during the Second Industrial or Technological Revolution (1900 onwards)

A number of very diverse reasons may be at play in this **paradoxical outcome** of the **current digital revolution** (as debated inter alia by R. J. Gordon - (2012). *Is US economic growth over? Faltering innovation confronts the six headwinds: National Bureau of Economic Research*, or by the IMF expert Mitko Grigorov (aforementioned)
Why has, in fact, the advent of the Internet, smart phones, data analysis tools - in short, information and communication technologies developed and dominated by key technological oligopolistic players like Amazon, Apple, Facebook, Google or Microsoft - failed to translate actually into higher productivity and income growth? (to the point that some renowned and mainstream economists identify here a current structural problem of the world economy)

One possible first answer going beyond traditional economic models is a serious knowledge management problem of what may be termed - also paradoxically - the ‘age of desinformation’ (an intrinsic difficulty to manage efficiently an overflow of data).
This overabundance of information forces very **narrow specializations** (and difficulty of apprehending the ‘big picture’) and contributes to business models of technology giants that are, on the one hand, largely dominant (or monopolists in certain niches) and that, on the other hand, compete on assets (e.g. Big Data or others) that may be interchangeably used across various economic sectors, without consumer perception of this successive re-utilization of data originated in them....

Another possible answer and corresponding issue has to do with a **re-adjustment problem** - associated with the time spent adjusting either to new versions of the same technology (in quick succession) or to related technologies, also developed in quick succession - technology may grow so fast that it tends to surpass the normal **learning curve** of users of technologies in various economic transactions/activities - this contributes to dependency of users on rather artificious skills developed and acquired by technology giants across various sectors, with the corresponding market power...
Also, another possible answer and corresponding issue has to do with what may be construed as an ‘information package problem’—information used to be processed and packed for cumulative consumption—in the digital world/era. Every unit on the internet is self-contained and to some extent detached from the test of reality (not corresponding to traditional patterns of knowledge—sequential and in cumulative layers)—this also leads to a mismatch between a hectic growth of technology and the progress of management strategies. Managers and distribution of goods and services have to coexist in non-digital channels and in a plethora of digital channels and functionalities.

Conversely technology giants develop conglomerate strategies re-using adaptable skills and data in various ventures for fear of ‘winner takes all’ situations—this enhances the ‘information-package problem.’
So, in a nutshell, there are *contradictory elements* at play as regards what we may call *digital platforms* in the *current competitive environment*.

On the one hand, as these platforms benefit from network effects and rely on scale economies, this may lead in certain cases to ‘winner-takes-all’ situations.

On the other hand, the dynamic nature of the markets at stake may enable potential challengers to use an increasing variety of ways to reach end-users and that may allow such challengers to bypass gate keepers.

It may be argued that competitive pressures in these markets tend to force potentially dominant platforms to keep on innovating - there would be a *virtuous dimension of dynamic non-price competition* - But that is not necessarily so... CAUTION is required...and in these technology markets positive effects of innovation in terms of accrued productivity are far from being a necessary or inevitable output.
At a first level it is important to conceptualize - for antitrust and regulatory purposes - these big technology groups of undertakings and accordingly - at a second, inter-related level - to critically review and discuss the antitrust and regulatory governance to which these must be submitted, considering the contradictory forces we have already identified in these markets.

Are these big technology groups monopolist firms in certain segments which conversely offer ‘free’ goods and services in related domains that do not represent as such economic activities subject to antitrust discipline? Are these groups oligopoly firms of a new kind operating in a context in which new qualitative patterns of oligopoly interplay have emerged?

Essentially I believe the most workable conceptual framework is to conceive these groups as multi-sided ‘platforms’ operating more and more on a conglomerate basis.
And as multi-sided ‘platforms’ operating more and more on a conglomerate basis with considerable market power (we shall refer henceforth to ‘platforms’ or ‘digital platforms’ or, if that might be the case, to ‘dominant platforms’) these technology groups, considering the prevailing competition law models within the ICN (especially the US and EU ones - with a greater focus on the latter), are particularly subject to merger control scrutiny (quick ex ante control more in line with the dynamic nature of these markets) and to abuse of dominant position/monopolization scrutiny (implying a timelag in such antitrust scrutiny in comparison with the quick pace of evolution of these markets).

We shall briefly review some key developments in these areas of antitrust scrutiny and the difficulty in construing appropriate REMEDIES.
In parallel, these multisided ‘platforms’ operating more and more as conglomerates with considerable market power are also submitted to ‘ex ante’ sectoral regulation.

This raises the challenge of how to optimise ‘ex ante’ regulation in these extremely dynamic digital markets with sometimes volatile consumer preferences which are difficult to predict in a realistic manner?

That, in turn, raises the dual issue of (i) the role to contemplate to regulation in this field and of the (ii) respective boundaries between regulatory intervention (if any or significant) and antitrust discipline - something we shall try to very briefly address at the end of this Presentation...
Different phases and trends in terms of EU Merger practice, beginning with a first phase in which the Commission prohibited five concentrations related with broadcasting and digital platforms - from 1994 to 1998.

Reference is made here to Commission decisions Bertelsmann/Kirch/Premiere (Case IV/M.993); Deutsche Telekom/Beta Research (Case IV/M.1027; MSG Media Service (Case IV/M.469); Nordic Satellite Distribution (Case IV/M.490); RTL/Veronica/Endemol (Case IV/M.553).

These cases had in common considerable vertical elements involving broadcasters with content and/or infrastructure providers.
However, there has been a **shift in this domain**. The Commission seems to have evolved from a position (1994-98) of willingness to secure platform competition as an overriding concern to a more flexible position open to clear transactions in this field subject or not to commitments.

**General trend in EU merger control as from 1998 towards approval of notified transactions in the digital/broadcasting sector (involving various platforms) - many of which upon the condition that participating entities would respect the undertakings they proposed to the Commission in order to eliminate the anticompetitive concerns that resulted from the notified deal.**

**Until the end of 2014 and considering the NACE code the Commission has approximately adopted since May 1998 (date of the last in a string of prohibited decisions) 29 decisions subject to commitments in the information and communications sector (20 under article 6(1) (b) and 9 under article 8(2) of the EU Merger Regulation.**
A somehow paradigmatic example of this may be found in the Vivendi/Canal+/Seagram decision (Case COMP/M.2050) in which the Commission, despite various competitive concerns on high levels of market power (e.g. (a) creation of a company with the world’s largest film library; (b) creation of the second largest library of TV programming in the EEA and of the first acquirer of output deals signed with the US studios; (c) Likelihood that Canal+ would have as a result of the concentration exclusive access to Vivendi’s movie rights) approved the concentration on the basis of a mix of behavioural and structural commitments - e.g. Vivendi undertaking to divest its entire stake in BSkyB and not to Grant to Canal+ the first-window rights covering more than 50% of Universal’s production, leaving the remaining 50% to other operators.
It may be disputed however whether this mixed-flexible approach will always work towards ensuring effective competition.

A shift from platform competition to some form of regulated market concentration - the Commission seems to have adopted an approach which “heralds a new era of realistical appraisal of the underlying financial conditions in which the sector operates” (see Alexiades and Cole, “Revisiting Competition Law and Regulatory Analyses of Consolidations in the Communications Sector”, in Financier Worldwide’s Industry Sector Review: Technology, media and Telecommunications Report (2004), 14.

Well representative of that SHIFT in merger control is the recent Facebook/WhatsApp Commission decision (case COMP/M.7217) in which the Commission inquired about various potential anticompetitive risks of the merger to conclude ultimately that the transaction was unlikely to be anticompetitive
Some key observations on REMEDIES:

In mergers usually the Commission prioritizes STRUCTURAL to BEHAVIORAL commitments - However, as regards recent track-record of merger control decisions in broadcasting/digital platforms/communications the Commission seems to be approving operations subject to both STRUCTURAL and BEHAVIORAL undertakings - which implies risks...
Some particular hurdles in this field, occurring not only in merger control but also in abuse and monopolization cases:

Traditionally, competition law considers market power to be a basis for potential antitrust liability, especially in the merger context. Accordingly, market definition remains a key way that authorities around the world undertake a market power inquiry. However, in some high tech markets - involving communications platforms - market definition is not always clear. Indeed, traditional measures like market share may not be appropriate measurements in analysing a given market.
And on **substantive issues**, many of the same concerns that **mergers** in the **high tech sector** raise also arise in **dominance/abuse/monopolization cases**. As underlined in various recent analyses and commentaries, competition authorities should review facts carefully and understand particular markets before intervening bearing in mind that all high tech markets *(i)* may not have significant network effects that impact competition, *(ii)* may not have traditional defined markets, and *(iii)* may not justify structural presumptions of significant market share leading to market power - all suggest that competition authorities should be careful in identifying potential anticompetitive conduct and crafting appropriate remedies.
As emphasized by various commentators (e.g. Harry First - “Netscape is Dead - Remedy Lessons from the Microsoft Litigation”, in C&R, Year 1, N° 1, 2010, p. 319), “In carrying out any remedies in dominant firm cases, enforcers and courts should (...) be cautious, but they need not be timid. As an examination of the range of remedies imposed in the Microsoft litigation shows, any remedy in a dominant firm case presents unknowns (...). Enforcers need to evaluate the effectiveness of remedies. The evaluative process requires a definition of goals and the articulation of benchmarks for measuring progress and success (or lack of it). Absent this evaluative process, remedies will continue to be haphazard and we will learn little from past efforts”.

I would argue that in an appreciable number of cases involving dominant platforms this evaluation involves too many hurdles (“unknowns”) and therefore in a number of situations ex ante regulatory solutions are required.....
But, in terms of antitrust vs. ex ante regulatory governance - **what is the proper balance?**

The recent **BEREC** (Body of European Regulators for Electronic Communications) **Report on Oligopoly Analysis and Regulation** (Of December 2015) has shown that not all oligopolies in this field are problematic to an extent that requires regulatory action.

Given the characteristics of these markets premature and badly calibrated regulatory intervention may lead to unintended consequences.

In short, the extremely dynamic nature of these markets may lead to (i) a preference in principle for flexible tailor made ex post antitrust intervention but (ii) conversely, the difficulty in tailoring adequate antitrust remedies justifies in some cases stable overall ex ante regulatory solutions...
Furthermore, a regulatory focus should be put in issues concerning protection of consumers vis-à-vis the significant market power and leverage that digital platforms hold - in terms e.g. of privacy for consumers and data protection by business - these may have numerous points of contact with issues pertaining to ex post economic assessment of commercial behaviour built on significant market power but involve also other public interests and tend to require more stable overall ex ante solutions.

Otherwise complex digital operations may be left to excessive uncertainty as illustrated in the recent ECJ ruling declaring the EU-US safe harbour agreement on data invalid (“Maximillian Schrems” Case - case C-362/14)

It is far from certain however that the Proposals unveiled by the Commission on 25 May 2016 on audiovisual rules and online platforms represent the more balanced approach (regulatory vs antitrust) - see in particular “Commission Staff Working Document - Online Platforms -accompanying the document ‘Communication on online platforms and the digital single market’” COM(2016)288
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