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Three Tech Competition Concerns

By **Vivek Mani, Lorenzo Vasselli and Pradeep Venkatesh**
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Vivek Mani

Lorenzo Vasselli

The largest technology firms have increasingly been scrutinized by competition enforcers and governments that are concerned with potential anti-competitive behavior. Recent European cases involving Google, Amazon and Facebook, as well as the acquisition of numerous smaller firms by large technology companies, have spurred a lively debate, particularly with regard to the adequacy of current competition policy frameworks in dealing with competition issues.[1]

In this article, we focus on three recurring concerns raised in the context of several initiatives in different jurisdictions (including in Europe,[2] Australia,[3] the United Kingdom,[4] Germany and Austria[5]) in relation to large technology companies:

- Killer acquisitions by large technology firms;
- Exclusionary practices surrounding data access; and,
- Exploitation of consumers through data abuse.

For each of these concerns, we also highlight some of the main proposals being advanced.

Killer Acquisitions

A "killer acquisition" describes a transaction where an incumbent firm acquires "innovative targets [in order to] preempt future competition."[6] Killer acquisitions were first described with reference to overlapping drug projects in the pharmaceutical industry. However, the term has been commonly used in the technology sector to describe acquisitions where a target firm, which is typically small, offers an innovative service that is not currently being offered by an acquiring firm, which is typically large.

After the acquisition, the acquiring firm could choose to discontinue the target's innovative projects entirely, thereby killing the target, or may integrate the innovations into its own ecosystem, potentially increasing the acquiring firm's efficiency.[7] Despite potential efficiency gains, this transaction could be viewed as a killer acquisition if (absent the merger) the target firm would have gone on to develop a viable alternate product or service that competes with the buyer's current business offerings. In such a situation, the acquiring firm would be eliminating a potential future competitive constraint.[8]

An important concern is that killer acquisitions may not be subject to merger review under current merger guidelines for various reasons, including:

- The merging parties may not have significant current horizontal overlap (i.e., the acquirer and target firms may offer services with "considerably different functionalities"[9]); and

- At the time of acquisition, the target does not generate sufficient turnover (yearly revenue) to meet the current threshold requirements for review.[10]

While large technology firms — Amazon, Apple, Facebook, Google and Microsoft — have made over 400 acquisitions in the last decade, few of these acquisitions have met the thresholds that necessitated review by the competition authorities, and none have been blocked.[11] This track record is viewed by some competition authorities as evidence that current merger guidelines do not allow for proper consideration of killer acquisitions. Specifically, some recent proposals argue that more intervention is necessary "to challenge mergers that could be detrimental to consumer welfare through reducing future levels of innovation and competition."[12]

The Austrian and German competition enforcers have, following a public consultation, recently introduced a new transaction-value threshold for mergers.[13] Using this threshold, the competition authorities aim "to be able to [analyse] mergers where the target company does not (yet) reach a relevant turnover threshold but has great competitive market potential as reflected in the value of the consideration." [14] With this new threshold, mergers would be scrutinized if, despite low turnover of the target firm, the value of the transaction exceeds either 400 million euros in Germany or 200 million euros in Austria.[15]

The recent Furman report suggests a "balance of harms" approach for killer acquisitions which would "[take] into account the scale as well as the likelihood of harm in merger cases involving potential competition and harm to innovation."[16] Following this approach, a merger would be blocked if it is "expected to do more harm than good."[17]

Similarly, the Crémer report proposes that mergers should be assessed in a wider market for the "digital ecosystem" rather than in markets narrowly defined, given the network effects that are often present "in the provision of digital services."[18]

The Furman report also recommends that "[d]igital companies ... should be required to make the [U.K. Competition and Markets Authority] aware of all intended acquisitions."[19]

These recommendations, taken together, would impose both a significant reporting burden on large technology companies and an increased review requirement on the competition authorities such as the CMA. Importantly, such review will require the competition authorities to take a view on how the target firm would have evolved absent the merger, an exercise which poses considerable challenges. In addition, imposing stricter scrutiny on mergers involving start-up firms may have unintended consequences. For example, by precluding acquisitions of start-ups by large technology firms, these proposals may diminish entrepreneurship and remove a significant driver of innovation: the hope of being bought out.

Data Access and Exclusionary Practices

Some competition authorities have also expressed concern about the potential exclusionary conduct of digital platforms operated by many of the large technology firms. Digital platforms, such as Facebook and Amazon's Marketplace, attract and link multiple distinct stakeholder groups. Additionally, these digital platforms tend to be multisided, typically have significant network effects, involve "big data," and include substantial economies of scale and scope.[20]

In providing services, digital platforms typically have access to a large quantity of individual user data and can use these data to develop new or better products. Alternatively, user data can be monetized by selling access to third parties, such as advertisers. The ability of digital platforms to monetize these data are viewed as crucial for their success.[21]

However, some competition authorities are now concerned that if "competitors ... are either denied [access to user data] or granted access on less favourable terms, [they] are effectively shut out of the market."[22] Given the importance of user data to the success of digital platforms, restricting data access could act as a barrier to entry for smaller competitors. In particular, restricting data access would have the greatest exclusionary effect on small firms in markets with a high degree of data concentration or markets where access to user data leads to an important competitive advantage.[23] Indeed, according to the Crémer report, refusal to grant access to consumer data would be found to be an abuse of dominance if "access to [the] data is essential for competing on ... neighbouring markets."[24]

In terms of potential solutions, the Crémer report notes that the standard practice of licensing of essential inputs (e.g., infrastructure) through the application of the "essential facilities" doctrine may be flawed in the context of digital services because of specific features of digital services, such as the heterogeneous nature and use cases of user data.[25]

Instead, as a remedy to potential data foreclosures, the Crémer report proposes to go back to the interest balancing criterion of the "essential facilities" doctrine that examines "whether such access is truly indispensable, and [considers] the legitimate interests of both parties."[26] As a result, a possible solution (one that allows competitors to effectively compete in neighboring markets) may include ensuring data interoperability and oversight through a regulatory scheme.[27]

The Furman report contains a similar, albeit less detailed, proposal, stating that "in some markets, the key to effective competition may be to grant potential competitors access to privately-held data."[28] The Furman report admits that this would represent a significant intervention, noting that "less interventionist solutions [may] produce the desired competitive outcome."[29]

The Furman report also proposes a less drastic measure to address this exclusionary practice: pursuing personal data mobility. This solution aims to give consumers greater choice over their digital services by allowing consumers to "choose for [their data] to be moved or shared between the digital platform currently holding it and alternative new services."[30]

While the potential solutions attempt to reduce the possibility of future exclusion, the interventions may also result in additional costs for market participants. Further analysis of the competition and welfare implications of these solutions is necessary.

Exploitation of Consumers

Some competition authorities are also concerned about consumer harm due to potential exploitation of consumers through data abuse.[31] While these concerns apply to all large technology firms, digital platforms have been particularly scrutinized as they provide services to customers at low or no monetary cost in exchange for consumers agreeing to platforms' terms and conditions regarding the use of their data.

The Australian Competition and Consumer Commission notes that digital platforms "seek consumer consents to their data practices" through "take-it-or-leave-it" agreements that "bundle a wide range of consents."[32] Such terms-of-use agreements are seen to deepen information asymmetries and prevent consumers from providing meaningful consent, resulting in consumer protection concerns. Additionally, these agreements, when reviewed from a competition regulation perspective, are often thought to "reflect the significant bargaining power held by digital platforms compared with consumers."[33]

The recent Facebook case in Germany shows that such impositions may be relevant from both competition and data protection law perspectives. The Bundeskartellamt held that Facebook, as a dominant company with bargaining power over its users, imposed far-reaching data processing conditions that users had no ability to prevent. [34]

In particular, once users accepted the terms and conditions, Facebook could collect users' information from third-party sources and assign these data to the users' Facebook account without the users' knowledge.[35] This amounted to a violation of both European data protection rules and European competition law; this business practice was found to constitute an exploitative abuse of consumers from a dominant firm in the social network market.[36] In light of these findings, the Bundeskartellamt prohibited Facebook from "making the use of the Facebook social network ... conditional on the collection of user and device-related data" and from "combining that information with ... user accounts without the users' consent."[37]

To prevent such conduct, the Furman report and the ACCC both recommend establishing a privacy code of conduct, formed around a set of core principles that digital platforms should abide by.[38] Such a code of conduct is envisioned to include requirements that digital platforms will disclose "all relevant information that details how a consumer's data may be collected, used, disclosed and shared by the digital platform, as well as the name and contact details for each third party to whom personal information may be disclosed"[39] and will "provide consumers with specific controls to opt-in and out of whether their personal information is shared with third parties and whether their personal information is used for targeted advertising or online profiling purposes."[40]

In order to "more effectively deter businesses from leveraging their bargaining power over consumers," the ACCC further proposes "civil pecuniary penalties" for digital platforms that impose "unfair contract terms in their terms of use and privacy policies."[41]

Large technology firms are under particular scrutiny, and face various proposals for both regulation and reform to tackle the aforementioned competition policy concerns. The proposals discussed in this article reveal the onset of an interventionist approach. We recommend a more detailed examination of existing evidence and the effects of the proposed remedies in order to ensure that they do not have unintended consequences on market competition.

Vivek Mani is a principal, Lorenzo Vasselli is a research associate and Pradeep Venkatesh is a senior analyst at Cornerstone Research Inc.

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[1] Examples of European cases include: i) European Commission's Google Shopping case in 2017, European Commission, "Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service," June 27, 2017, http://europa.eu/rapid/press-release_IP-17-1784_en.htm, accessed July 30, 2019; ii) European Commission's Google Android case in 2018, European Commission, "Antitrust: Commission Fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine," July 18, 2018 http://europa.eu/rapid/press-release_IP-18-4581_en.htm, accessed July 30, 2019, iii) ongoing investigation into Amazon's business practices from the European Commission, "Antitrust: Commission Opens Investigation into Possible Anti-Competitive Conduct of Amazon," July 17, 2019, http://europa.eu/rapid/press-release_IP-19-4291_en.htm, accessed July 30, 2019; iv) Bundeskartellamt's Facebook case in 2019, Bundeskartellamt, "Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources," February 2, 2019, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html, accessed at July 30, 2019. Additionally, the five largest companies in digital services have made over 400 acquisitions over the last decade. See, "Killer Acquisitions" section below.

[2] Jacques Crémer, et al., "Competition Policy for the Digital Era," European Commission: Directorate-General for Competition, 2019 ("Crémer Report").

[3] Australian Competition and Consumer Commission, "Digital Platforms Inquiry: Final Report," June 2019 ("ACCC Report").

[4] Jason Furman, et al., "Unlocking Digital Competition: Report of the Digital Competition Expert Panel," HM Treasury, March 2019 ("Furman Report").

[5] Bundeskartellamt, "Joint Guidance on New Transaction Value Threshold in German and Austrian Merger Control - Publication of Final Version," July 9, 2018, ("Press Release on New Merger Guidelines in Austria and Germany"), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/09_07_2018_Leitfaden_Transaktionsschwelle.html, accessed July 30, 2019

[6] Colleen Cunningham, et al., "Killer Acquisitions," Mimeo, March 22, 2019, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3241707.

[7] Crémer Report, pp. 117–118.

[8] See Crémer Report, pp. 110–124. Specifically, "according to the Horizontal Merger Guidelines, a merger may have significant anti-competitive effects not only when it eliminates present constraints,

but also in cases where there is a significant likelihood that the target would grow into an effective competitive force in the future (para. 60)," p. 119.

[9] Crémer Report, pp. 112, 119.

[10] Crémer Report, p. 111.

[11] Furman Report, p. 12.

[12] Furman Report, p. 12.

[13]See, Bundeskartellamt, "Joint Guidance on New Transaction Value Threshold in German and Austrian Merger Control Submitted for Public Consultation," May 14, 2018, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/14_05_2018_TAW.html accessed July 30, 2019. See also, Press Release on New Merger Guidelines in Austria and Germany.

[14] Press Release on New Merger Guidelines in Austria and Germany, p. 2.

[15] Press Release on New Merger Guidelines in Austria and Germany, p. 2.

[16] Furman Report, p. 100.

[17] Furman Report provides an application of this approach to the example of the Facebook/Instagram merger. Thanks to this approach, the merger assessment would take into account "the forgone benefits from the competition that a rival could bring, for example through increased quality and availability of innovative new services, lower costs of digital advertising being passed through to consumers, and greater privacy protection." See Furman Report, p. 99.

[18] Crémer Report, p. 11.

[19] Furman Report, p. 145.

[20] Multi-sided markets are those in which a digital platform serves many distinct groups of users. Network effects that the platform becomes more valuable to a given person with each additional user. Big data refers to the interaction with a large volume of personal data. Extreme economies of scale and scope indicate that the marginal cost to support an additional user diminishes drastically as the user base grows. See, for example, ACCC Report, pp. 6, 63. See also, Crémer Report, p. 108.

[21] Crémer Report, p. 92.

[22] Crémer Report, p. 92, 93.

[23] Crémer Report, p. 99.

[24] Crémer Report, p. 100.

[25] Crémer Report, p. 98.

[26] Crémer Report, p. 107.

[27] Crémer Report, p. 98.

[28] Furman Report, p. 74.

[29] Furman Report, p. 75.

[30] Furman Report, p. 9.

[31] Exploitation of consumers refers to the imposition of unfair trading conditions to the detriment of consumers. See, Bundeskartellamt, "Facebook, Exploitative Business Terms Pursuant to Section 19(1) GWB for Inadequate Data Processing (B6-22/16)," February 6, 2019. Such practices may fall under Article 102(a) TFEU, available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E102&from=EN.

[32] ACCC Report, p. 374.

[33] ACCC Report, p. 397.

[34] "Bundeskartellamt, "Facebook, Exploitative Business Terms Pursuant to Section 19(1) GWB for Inadequate Data Processing (B6-22/16)," February 6, 2019, p. 11.

[35] See, Bundeskartellamt, "Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources," February 2, 2019, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html, accessed at July 30, 2019

[36] See, "Bundeskartellamt, "Facebook, Exploitative Business Terms Pursuant to Section 19(1) GWB for Inadequate Data Processing (B6-22/16)," February 6, 2019, p. 7.

[37] See, "Bundeskartellamt, "Facebook, Exploitative Business Terms Pursuant to Section 19(1) GWB for Inadequate Data Processing (B6-22/16)," February 6, 2019, p. 1.

[38] Furman Report, p. 59; ACCC Report, p. 481.

[39] ACCC Report, p. 485.

[40] ACCC Report, p. 484.

[41] ACCC Report, p. 441.