ARE WE READY FOR THE DIGITAL ECONOMY?

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PRESENTATION

- Identifies basic concepts of multi sided markets
- Looks at judicial decisions in matters which have some aspect of ICT infrastructure or impact
- Reviews approaches in major jurisdictions
- Asks where does the CARICOM go from here

MULTI SIDED MARKETS – WHAT A LAWYER CAN HANDLE

OECD 2018

KEY POINTS ON MULTI SIDED MARKETS

- *A market in which a firm acts as a platform and sells different products to different groups of consumers, while recognising that the demand from one group of customer depends on the demand from the other group(s) (OECD 2018)*
- Existence of cross-platform network externality
- Platforms can be transaction based or non transaction based depending on whether the transaction is observable (uber) or not (dating site) – typically 2 sided market

KEY POINTS ON MULTI SIDED MARKETS – CONT'D

- Digital platforms are three-sided, matching two sides that each generate positive externalities (users and content providers), and also audience providing for third side that might not deliver positive externalities *(advertisers)*
- Nature and strength of the cross-platform network effects is more important to the analysis than the category of platform
- Each action has a ripple effect on the platform that can lead to tipping effect (monopoly or failure)
- OECD of view that market definition of little value in multi sided markets therefore consider whether it is necessary and proportionate to the case

KEY POINTS ON MULTI SIDED MARKETS – CONT'D

- Where strong cross-platform network effects run in both directions, it is not possible for a multi-sided platform to have market power on one side of the market. Either it has a degree of market power as a platform, or it does not. Substitutability of demand might be different on either side, but given the interrelationship of pricing across the platform, it is not meaningful to conclude that a platform has market power on one-side of the platform
- The effects of potentially exclusionary conduct, such as exclusivity clauses or predatory prices, should be assessed on a case-by-case basis. However, multi-sided platforms may require more scrutiny from antitrust authorities than one-sided markets, and should certainly not be treated more leniently since they may provide particularly fertile ground for exclusionary behaviour

KEY POINTS ON MULTI SIDED MARKETS – CONT'D

- Where cross-platform network effects are strong:
  - mergers of multi-sided platforms might be expected to generate efficiencies if they combine separate user bases and increase interoperability
  - use of vertical restraints by multi-sided platforms might in some cases be necessary to prevent free-riding and hence the bypass of the platform. Where free-riding poses a threat to the viability of the platform there would appear to be significant scope for vertical restraints to generate efficiencies (though this may not be the case for other investments that might be viable as a result of the restraint)

THE COURTS AND THE DIGITAL PLATFORM

FINANCIAL SECTOR

USA
OHIO ET AL V AMERICAN EXPRESS, 25 JUNE 2018

- The plaintiffs sued Amex, claiming that its "anti-steering provisions" violated section 1 of the Sherman Act, which states that *Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal*
- Amex applied low user fees and high rewards to customers, but higher fees than competitor cards against merchants. Merchants would attempt to dissuade or "steer" cardholders from using Amex cards at the point of sale. Amex responded with "anti-steering" provisions in its contracts with merchants

OHIO ET AL V AMERICAN EXPRESS, 25 JUNE 2018

- The court of first instance found that the anti-steering provisions were anticompetitive since they resulted in higher merchant fees. The Court reasoned that the credit-card market should be treated as two separate markets—one for merchants and one for cardholders

- The Second Circuit reversed this decision, holding that the credit-card market is one market, not two and that Amex's anti-steering provisions did not violate section 1 of the Act:

OHIO ET AL V AMERICAN EXPRESS, 25 JUNE 2018

- The parties agreed for the (unreasonable) restraint of trade to be judged by "rule of reason" versus *per se*
- The Court saw the need for accurate market definition when applying the rule of reason. In this case, both sides of the two-sided credit-card market—cardholders and merchants—must be considered. Only a company with both cardholders and merchants willing to use its network could sell transactions and compete in the credit-card market. And because credit-card networks cannot make a sale unless both sides of the platform simultaneously agree to use their services, they exhibit more pronounced indirect network effects and interconnected pricing and demand. Indeed, credit-card networks are best understood as supplying only one product—the transaction—that is jointly consumed by a cardholder and a merchant. Accordingly, the two-sided market for credit-card transactions should be analyzed as a whole

OHIO ET AL V AMERICAN EXPRESS, 25 JUNE 2018

- P shown to not have carried their burden to show anticompetitive effects since the argument that Amex's anti-steering provisions increase merchant fees wrongly focuses on just one side of the market. Evidence of a price increase on one side of a two-sided transaction platform cannot, by itself, demonstrate an anticompetitive exercise of market power. Instead, P must prove that Amex's anti-steering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the two-sided credit-card market. They failed to do so

- P offered no evidence that the price of credit-card transactions was higher than the price one would expect to find in a competitive market. Amex's increased merchant fees reflect increases in the value of its services and the cost of its transactions, not an ability to charge above a competitive price. The evidence that does exist cuts against the P's view that Amex's anti-steering provisions are the cause of any increases in merchant fees: Visa and MasterCard's merchant fees have continued to increase, even at merchant locations where Amex is not accepted

OHIO ET AL V AMERICAN EXPRESS, 25 JUNE 2018

- This Court will "not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level." P did not show that Amex charged more than its competitors
- P also failed to prove that Amex's anti-steering provisions stifled competition among credit-card companies. To the contrary, while they have been in place, the market experienced expanding output and improved quality
- There is nothing inherently anticompetitive about the provisions. They actually stem negative externalities in the credit-card market and promote inter-brand competition. And they do not prevent competing credit-card networks from offering lower merchant fees or promoting their broader merchant acceptance

OHIO ET AL V AMERICAN EXPRESS, 25 JUNE 2018

- The minority, looking at the evidence in the case, emphasized that Amex's conduct actually had anti-competitive effects. The minority pointed out that ***because of the contractual restrictions, which effectively locked in merchants to Amex's network (more precisely, the restrictions prevented merchants from encouraging cardholders to switch to rivals with lower merchant fees), Amex was able to frequently raise its merchant fees without losing any business.*** The result was that lower cost rivals could not compete to gain market share and "consumers throughout the economy paid higher retail prices as a result"

EC
MASTERCARD, 22 JAN 2019

- When a consumer uses a debit or credit card in a shop or online, the bank of the retailer (the “acquiring bank”) pays a fee called an “interchange fee” to the cardholder's bank (the “issuing bank”). The acquiring bank passes this fee on to the retailer who includes it, like any other cost, in the final prices for all consumers, even those who do not use cards. Prior to 2015, the interchange fees of each country in the EEA varied considerably
- Pre 2015, Mastercard's rules obliged acquiring banks to apply the interchange fees of the country where the retailer was located

EC
MASTERCARD, 22 JAN 2019

- The Commission investigation (started in 2013) found that because of Mastercard's cross-border acquiring rules retailers paid more in bank services to receive card payments than if they had been free to shop around for lower-priced services. This led to higher prices for retailers and consumers, to limited cross-border competition and to an artificial segmentation of the Single Market
- On this basis, the Commission concluded that Mastercard's rules prevented retailers from benefitting from lower fees and restricted competition between banks cross border, in breach of EU antitrust rules. The infringement ended when Mastercard amended its rules in view of the entry into force of the Interchange Fee Regulation 2015

EC
MASTERCARD, 22 JAN 2019

- The Commission concluded that Mastercard's rules until 9 December 2015 infringed Art 101 of the TFEU, which prohibits agreements between companies or decisions by an association of undertakings that prevent, restrict or distort competition within the EU's Single Market
- Mastercard cooperated with the Commission by acknowledging the facts and the infringements of EU competition rules
- The Commission granted Mastercard a 10% fine reduction in return for this cooperation, fining Mastercard Euro 570mn

UK
SAINSBURY, ASDA V. MASTERCARD; SAINSBURY V. VISA
JULY 2018

- Question on appeal from CAT on lawfulness of multilateral interchange fees (MIF) (charged on all card purchases)
- The UK Court of Appeal upheld all the retailers' appeals against the judgments by two Commercial Court judges. In particular, the Court of Appeal has now made clear that the banks' interchange fee arrangements were restrictions of competition under Article 101(1) TFEU. It also overturned the conclusions of the Courts below on whether the restrictive practices were justified in the interests of economic efficiency under Article 101(3) TFEU
- The cases were remitted to the Competition Appeal Tribunal for further directions

UK
SAINSBURY, ASDA V. MASTERCARD; SAINSBURY V. VISA JULY 2018

- The MasterCard and VISA scheme rules, which provided for a default MIF in the absence of bilaterally agreed interchange fees, breached Article 101(1), which prohibits as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
  (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
  (b) limit or control production, markets, technical development, or investment;
  (c) share markets or sources of supply;
  (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;…

THE COURTS AND THE DIGITAL ECONOMY

COMMUNICATIONS SECTOR

US
MICROSOFT, MARCH 2013

- D.C. Circuit Court of Appeals reversed first court's order that the company be split, but upheld many of the findings that the company violated federal antitrust law. Specifically, the court found that Microsoft prohibited computer manufacturers from modifying or removing pre-bundled icons and entries, which prevented the distribution of rival browsers and maintained Internet Explorer's dominant position on the desktop.

- Microsoft also purposefully linked Internet Explorer with the operating system, preventing its removal even by experienced computer users. The court found that Microsoft entered into agreements with Internet Access Providers and Independent Software Vendors to promote Internet Explorer exclusively, and also to use Microsoft's Java Virtual Machine 16 instead of Sun Microsystems' Java programming

- Case remanded to a different district court judge, and settlement terms were agreed and accepted, in the public interest

EU
MICROSOFT, 2004

- 3 statements of objections: withholding interfacing information, abuse in leveraging power over PC OS to workgroup servers and tying Windows media player with the Windows package
- EC found breach of Art 82 (now 102) and imposed a licensing disclosure requirement, offering a version of Windows without media player in addition to the bundle, and fined Microsoft Euro 497.2mn

EU
MICROSOFT, MARCH 2013

- In 2009, EC addressed concerns of tying MS Internet Explorer to its OS Windows. Microsoft entered into legally binding commitments under Art 9 of the Antitrust Reg that it would first offer users a browser choice screen until 2014
- A breach was reported from May 2011 to July 2012 in Windows 7 Pack 1
- The EC fined Microsoft Euro 561mn for non compliance under Art 23(2) Antitrust Reg, the first time a fine was levied for non-compliance

EU
FACEBOOK ACQUISITION OF WHAT'S APP 2014

- EC cleared the merger:
  - Consumer commercial services – companies were held not to be close competitors and consumers would still have a wide choice post merger
  - Social networking services – companies were distant competitors, no matter what the precise boundaries of the market
  - Online advertising – regardless of whether FB introduced advertising on WA or collected WA data for advertising purposes, the transaction raised no concerns because other advertisers could also offer. A large amount of user data not within FB exclusive control would continue to exist

EU
FACEBOOK ACQUISITION OF WHAT'S APP 2017

- EC fined FB Euro 110mn or provision of incorrect or misleading information in 2014. FB notified in 2014 that it would be unable to establish reliable automated matching between FB and WA user accounts, however, WA announced updates in 2016 that would allow possibility of linking FB and WA identities
- EC stated that the new information did not alter their 2014 decision

EU
GOOGLE, JUNE 2017

- EC fined Google Euro 2.42 bn for abuse of dominance as a search engine by the advantage given to Google's own comparison shopping service

EU
GOOGLE, JULY 2018

- EC fined Google Euro 4.34 bn for antitrust breach. EC found:
  - Google required manufacturers to pre-install search app and browser as a condition for licensing play store
  - Made payments to manufacturers for exclusive pre-installation of Search on mobile devices
  - Prevented manufacturers from selling any smart phones pre-installed with Google apps from also installing any Android forks not previously approved by Google
  - Concluded that Google was dominant for general internet search engines, licensable smart mobile OS and app stores for Android

EU
GOOGLE, JULY 2018

- EC concluded that the 3 types of abuse formed part of an overall strategy by Google to cement its dominance in general internet search
- Google denied rival search engines the possibility to compete on the merits, reduced the incentive to pre-install competing search engines, obstructed development of Android forks (which was a possible platform for rival search engines to gain traffic)

EU
GOOGLE, JULY 2018

- Dominance not illegal in the EU but dominant companies have a “special responsibility” not to abuse their powerful position by restricting competition either in the market in which they are present or other markets
- Browsers are an important entry point for search queries on mobile devices. 2016 examination showed that if preinstalled, 95% of searched on mobiles used Google. If not 25% were Google searches, showing users do not download competing apps if there is pre-installed apps. Therefore there was little opportunity to off set the commercial advantage resultant from the pre-installation

DIFFERING APPROACHES

DIGITAL PLATFORMS

TECH COMPETITION

- New technologies with exponential growth, and little time for policy and law to catch up
- Ease of business, efficiency, customer satisfaction, high quality
- Lack of authorities factoring in cyber health, big data, IoT, protection of minors, consumer rights and hate speech
- Gap in technology and procedure cannot lead to market failure or abuse

TECH COMPETITION - US

- FTC hearings on “Big Data and Competition”, “Evaluating acquisitions of nascent competitors in digital markets”
- US DOJ Antitrust div, Feb 2019, while zero price strategies have exploded with digital platforms, the strategy itself is not new. Case by case analysis is required; caution issued against distortions of antitrust standards to address privacy and data protection if they do not impede the functioning of the free market

TECH COMPETITION – AUSTRALIA/NEW ZEALAND

- Productivity commissions released joint report (Feb 2019) : zero priced goods and services complicate the analysis of market definition and market power. If "winner take most" markets prevails, tools such as essential facilities and essential access doctrines may need to be expanded – the digital platform's data would be viewed as an essential input and therefore reasonable access would have to be provided
- ACCC – digital preliminary enquiry asks that governments be responsive and proactive to anticipating the challenges and problems

TECH COMPETITION – UK

- Unlocking Digital Competition 2019 – the Furman report:
  - The digital economy has benefited consumers by creating entirely new categories of products and services. Many of these products and services are high-quality with low prices, in many cases a monetary price of zero. It has also benefited businesses by lowering the cost of starting a business and scaling up through cloud computing, access to platforms, and digital comparison tools
  - In many cases, digital markets are subject to 'tipping' in which a winner will take most of the market
  - Concentration in digital markets can have benefits but also can give rise to substantial costs

TECH COMPETITION – UK (CONT'D)

- Competition for the market cannot be counted on, by itself, to solve the problems associated with market tipping and 'winner-takes-most'
- Government policy and regulation also has limitations
- *The Panel believes that competition policy should be given the tools to tackle new challenges, not radically shifted away from its established basis. In particular, policy should remain based on careful weighing of economic evidence and models. Consumer welfare is the appropriate perspective to motivate competition policy and a completely new approach is not needed. This approach is flexible and can take into account broader considerations than price, narrowly defined, and also include choice, quality and innovation, among other areas*

TECH COMPETITION – EU

- Online platforms:
  - Can create and shape new markets
  - Operate in multisided markets but with varying degrees of control over direct interactions between groups of users
  - Benefit from 'network effects', where, broadly speaking, the value of the service increases with the number of users
  - Rely on information and communications technologies to reach their users, instantly and effortlessly
  - Play a key role in digital value creation, notably by capturing significant value (including through data accumulation), facilitating new business ventures, and creating new strategic dependencies
  - Have brought a range of important benefits to the digital economy and society. Online platforms facilitate efficiency gains, and act as a magnet for data-driven innovation. They increase consumer choice, thereby contributing to improved competitiveness of industry and enhancing consumer welfare

TECH COMPETITION – EU

- Digital Single Market:
  - Where free movement of persons, services and capital is ensured and where the individual and businesses can seamlessly access and engage in online activities under conditions of fair competition and a high level of consumer and personal data protection, irrespective nationality and place of residence
  - 3 pillars: access, environment for level paying field and right innovations, and economy and society
  - Key achievements thus far are GDPR, Network Information Security directive, working on use of high quality 700 MHz, European electronic communications code, funding for BB, revised CR, proposed reg for geo-blocking

TECH COMPETITION – EU

- European Data Economy:
  - Addresses big data and generation of value
  - Focus on free flow of non-personal information
  - Single Cybersecurity Market – joint certification framework, 'duty of care' principles to reduce product and software vulnerabilities, security be design for connecting devices
  - 2017 report on impact of competition on telecoms markets: 2002 – 2015 – 1024 comp policy cases in EU telecoms markets. Report noted that coherent approach between competition and regulatory practices with established conditions for access to fixed network, regulatory spectrum assignment contributing to fair and effective competition

CARICOM – DIGITAL SINGLE MARKET?

CHALLENGES

- How do we get to CARICOM single digital market, single data market, single cybersecurity market?
- Lack of single policy and legislative approach
- Different levels of establishment of public key infrastructure, policies and laws
- Varying public institutional development
- Financial and economic policy
- Political will

Q&A