ANTITRUST AND THE DIGITAL ECONOMY: IN SEARCH FOR IDENTITY?

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“One, No One and One Hundred Thousand” is the title of a famous novel by Nobel Prize winner Luigi Pirandello. The main character in the novel, Vitangelo Moscarda, discovers that everyone he has ever met has constructed a Vitangelo persona in their own imagination and that none of these personas corresponds to the image that he has constructed of himself.

In face of the evolution of the digital economy, antitrust authorities appear to have something in common with Vitangelo Moscarda: consumers, individuals, politicians have probably different ideas of what antitrust is and what it should do in face of the digital revolution. And this is also true among antitrust practitioners, lawyers and economists, as well as across competition agencies.

The recent decisions adopted by the European Commission in the Google Search and Google Android cases not only have fueled a heated debate among practitioners, but have also drawn attention to the different policies taken by agencies in different jurisdictions when dealing with certain practices in the digital ecosystem, and more broadly to the difficulties in developing a global competition policy for the digital age.

The digital revolution has developed with a speed and disruptive scope on the economy and society possibly unparalleled in previous industrial revolutions. It has created new services and new markets, shaping a digital ecosystem that has become the modern agorà where not only the economic, but also the social and democratic life of the 21st century takes place.

Creating the conditions for a digital economy to flourish is an important policy objective. In fact, delivering sustainable economic and social benefits from a digital single market is a key aim of the digital agenda for Europe. The digital economy expands the range of choices available to consumers, provides innovative services, enables the use of resources that would otherwise be under-used, lowers prices, and makes it possible for consumers who do not use traditional services to access new ones. For these reasons, antitrust authorities need to intervene, with advocacy and/or enforcement powers, in those cases where the innovation that flourishes on the web is obstructed by rules or conduct designed to protect more traditional market operators.

At the same time, however, the digital agorà is not developing as an open public space, but one which is designed and governed by a handful of global giants, that operate in markets where high concentration and barriers to entry are fed by a combination of network effects, economies of scale, lock-in practices, and big data economics.

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These far-reaching processes – where economic and wider social transformation are closely related – clearly affect antitrust authorities because, since the early days of competition law dating back to the Sherman Act of 1890, these institutions lie at the crossroad of the market, democracy and social cohesion. Yet, as the economy, individuals and society confront themselves with the changes brought about by digital disruption, antitrust enforcement appears to be in search of a (new) identity. In fact, different stakeholders appear to hold rather different views on which identity this should be: in front of the digital revolution, is antitrust one, no one or one hundred thousand?

Over time, antitrust authorities of different jurisdictions seem to have converged to a common identity, shaped around the notion of market efficiency and consumer welfare. And economists seem to expect that this is indeed what antitrust authorities should be interested about.

However, some fear that such a strong identity and analytical refinement ends up leaving antitrust at the periphery of the economic governance of markets and society and makes it unable to pursue society’s interests. The concern is that a consumer welfare standard focuses narrowly only on consumers, and on short-term price effects, and thus has weakened antitrust enforcement and its ability to be really relevant in the digital world. As a result, it is sometimes contended that antitrust cannot see the wood for the trees.

As a consequence, some commentators suggest that antitrust authorities should broaden their horizon and ensure that markets are efficient, but also able to serve wider interests. In this perspective, antitrust should therefore embrace a wide public interest standard, employing a more comprehensive approach to antitrust analysis so as to consider a broader range of effects arising from mergers and business practices.

In any case, at a time of holistic disruption, it appears natural to ask if competition policy and antitrust enforcement can proceed evolving incrementally or need to veer into new trajectories.

In the search for the identity of modern antitrust in the digital age, a lesson can perhaps be drawn again from Vitangelo Moscarda whose first, ironic, "awareness" gained through introspective discovery consists in the knowledge of that which he definitely is not.

Indeed, it is important that the limits of antitrust law enforcement are made clear: competition law enforcement is more like a scalpel than a Swiss knife and as such it is not the right tool to address the whole set of issues raised by digital platforms, as many of these are not competition issues.

But this awareness needs not confine antitrust to a world of sophisticated minimalism. Rather, it is the first step that should contribute to shape the identity that antitrust enforcement should take in the promotion of public interest in the digital age: it is certainly the key institutional policy to deal with the challenges to competition that arise in the digital ecosystem and it is well equipped to do so.

In this perspective, antitrust authorities should be aware that the risks and costs of over-enforcement might be severe and that dynamic markets might be capable of delivering economic welfare in a better (and possibly unforeseen) way than antitrust authorities. However, the risks and
the costs of under-enforcement need also to be adequately considered. Above all, it is important that the “resolution” between what appear to be different views of the identity of antitrust is not solved as a matter of principle, but is approached in a real economically sound way. This means looking at a specific conduct, in its economic and legal environment, on the basis of the best economic tools available, without preconceptions on the virtues or failing of digital dynamic markets.

The economic tools available to antitrust authorities are adequate to achieve this aim, even though they clearly need to be somehow adapted to the new markets: economic analysis can and should be less path-dependent than case law. For instance, today, competition authorities are increasingly looking at markets where the monetary price is zero and therefore at issues related to quality, variety and innovation; dominance is also being defined in markets where consumers do not pay a monetary price and greater attention is paid to markets where data is important.

The antitrust toolbox thus seems sufficiently flexible to deal with the economics of digital platforms and the disciplining method of economic analysis in antitrust decision-making is key to the application of competition law to novel cases, especially in the digital sector.

This is important when antitrust authorities examine well-known forms of anticompetitive behavior, but also in complex digital markets that didn’t exist a few years ago: search platforms, e-commerce marketplaces, social networks. For instance, vertical agreements in complex digital ecosystems might be different from those in traditional linear value chains.

But it is even more so when agencies examine practices that do not have a clear brick-and-mortar counterpart and therefore might lack “experience” as an indicator to assess the capability and likelihood of anticompetitive effects and a careful assessment of the circumstances of each case is all the more necessary.

The need of competition law to confront itself with the key issue of dynamic competition, possibly with a new economic approach to the assessment of anticompetitive effects, is particularly key in merger control, as the acquisition of potentially disruptive start-ups by dominant incumbents can raise serious concerns for competition. The issue is not only about substantive review: we first need to make sure that merger control applies to transactions that, although of high-value, are taking place between companies that at the time of the operation are not generating high sales. This is important to ensure the effectiveness of antitrust checks in the digital sector, where acquisitions of start-ups and innovative companies by the big web operators might otherwise not be subjected to effective scrutiny.

Last but not least, antitrust enforcement in the digital sector increases the importance of assessing the impact of intervention (or non-intervention) ex post, in order to engage a positive feedback loop in antitrust practice. In fact, ex-post analyses are becoming more and more common and this is a trend that should be encouraged further.

So, on the one hand, antitrust authorities should not be hesitant to admit that competition law enforcement is not a tool that can serve any purpose and that not every perceived problem
arising in the digital arena is a competition problem. On the other hand, antitrust authorities should not be afraid to address also novel and possibly controversial issues, as long as they continue to employ the solid legal and economic framework of modern competition law.

Enforcement priorities need to be adapted to the transformations of the economy and society and, at the same time, need to be developed through robust theories of harm on the basis of careful legal and economic analysis. It is only by pushing, also somehow experimentally, the frontier forward – on the basis a solid analytical framework – that the identity of antitrust in the digital age can be shaped.