Downsize market dominance and enable fair competition

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Regulation of market dominant platforms

EMMA and ENPA represent the vast majority of European news outlets. Newspapers and magazines provide European citizens with a multitude of professional journalistic and editorial online portals and digital offerings. The press represents and has always represented the basis of independent and pluralistic formation of opinion across Europe. A healthy, pluralistic, independent press sector and a healthy democracy are part of the same DNA.

Increasingly, market dominant platforms decide if, where how and if citizens can use and access these journalistic and editorial offerings. Network effects, automated and data-based learning effects and high switching costs have led to the emergence of market dominant, almost monopolistic platforms, that have entrenched their position their position on the market. This is the case, for instance, for search engines, video-sharing, browsers and mobile operating systems (which are dominated by Google and Apple), but also social networks and instant messaging services (dominated by Facebook).

These three companies have now secured permanent and exclusive access to a vast majority of citizens by establishing quasi-monopolies in key areas of our digital daily lives. If such market dominant platforms would also provide editorial media services, host and curate them, they would wield considerable power over the formation of opinion in the Union. In fact, in the end, these platforms now decide which media or content is accessible and under which conditions. They determine, if and how the selected media or content is available, visible, findable and accessible.

In this situation, it is absolutely necessary to safeguard the freedom of journalistic and editorial media against market dominant platforms, already before any market abuse or abuse of dominant position has been determined by competent competition regulators.

Saturation and absorption of markets by platforms represent a significant risk for financing professional quality journalism. Network effects and user engagement provide access to massive amounts of bundled and concise user data, which in return gives these market

dominant companies relevant and obvious advantages – especially in the advertising market. One of the consequences is an enormous gap in the creation of value with professional digital journalism.

The threat that this situation represents for the availability and diversity of information, for the free and independent formation of opinion of individuals, as well as for freedom of expression and press freedom is considerable. Furthermore, these market dominant platforms also increasingly endanger the European citizens' freedom in conducting their day to day lives, as well as their decisions and activities (e.g. with purchases of products and services, choice of the workplace, hotel or flight reservations, etc.). This is achieved by exploiting their monopoly on user access and engagement and thereby gaining dominance on neighbouring markets. Dominant platforms systematically disable competition and significantly reduce the range and variety of products and services.

Policy response must be faster, more determined and more comprehensive.
Recent decisions of the European Commission in competition cases against Google are leading the way and mark a decisive step in the right direction. However, it is these decisions that have shown that we are still missing effective enforcement – abusive practices have not yet been put to a halt.

Considering the ever-increasing importance of technology – and especially artificial intelligence (AI) – to the formation of opinion in our society, regulation is urgently needed.

8 points which regulatory authorities and legislators in the EU have to address regarding market dominant platforms:

1. **A comprehensive right for all legal publications and offerings to <u>have non-discriminatory</u> access to market dominant digital platforms:**

   - A robust and enforceable prohibition of preferential treatment of own products and services and of undue hindering of competitors and other market players by market dominant platforms.

- An imposed "principle of equal treatment" regarding the accessibility and findability of third-party content and offerings. Future regulation must ensure that the parameters, which determine accessibility and findability on platforms, including artificial intelligence, must be non-discriminatory.

- Swift enforcement of *effective* remedies in ongoing competition cases by adequately equipped – including technically – authorities. In addition, the enforcement of preliminary injunctions by authorities in cases of market abuse by market dominant platforms must be facilitated.

- Requisite rules on anticompetitive behaviour are warranted. It must be ensured that market dominant platforms cannot misuse their position in order to circumvent and avoid industrial or intellectual property rights. Any exclusion, censoring, discrimination or unfair treatment against legal content providers must be prohibited.

2. Introducing a level playing field in data protection rules:

- Unlike today's realities, data protection rules and regulations should not entrench the competitive advantages of big-tech companies and thereby ultimately favour them. Currently, the market dominant tech-giants' "log-in" models give them an unfair competitive advantage when collecting and processing user data.

- Access to the data of market dominant companies should be granted. Companies, which have obtained a market dominant position through their massive collection of data should be legally required to grant access to market relevant data to competitors in order to allow fair competition.

- Exceeding a certain market dominance, the bundling and clustering of data assets by such companies must be prohibited. A general prohibition of aggregation of data collected through, for instance, the usage of different services or different devices will curtail the massive data collection. As such, it would limit the possibility of detailed tracking and profiling. The acquisition of external third-party data sources by market dominant platforms must also be prohibited.

3. **Reducing existing market power of market dominant platforms through the following:**

- Introducing an objective unbundling regulation of market dominant platforms equivalent to the 2010 proposal of the German monopoly commission. Accordingly, cartel authorities should – under certain requirements (e.g. single dominance in a specific market or oligopolistic market dominance) – be able to proceed with unbundling regardless of market abuse.

- Introducing an asymmetrical, sectorial regulation, which would allow a specialised supervisory authority to impose adequate obligations and requirements on platforms with specially consolidated market power in order to stimulate competition and prevent abuse. To ensure this, the existing legal framework for electronic communication services could be extended to online-intermediaries. Platforms, which boast significant market power in certain intermediary markets and for which general competition law is insufficient, could be subdued to specific standards and provisions, such as mobile or telecommunications service providers (e.g. access, equal treatment, transparency and unbundling).

- Effective abuse control through new regulation, tailored to market dominant platforms in the form of an ex-ante control. Such a measure could create the necessary prerequisites in order to prevent so-called enveloping, i.e. the successive entering of new markets by dominant platforms by taking advantage of network effects or through abuse of market power, in the future.

4. **Obligation for dominant platforms to license their services:**

The operator of a market dominant search engine should be legally required to license his proprietary search engine to third parties. All advertising activities and customer relations would be run directly by the licensee. The 1956 consent decree against the Bell System, where the firm was obligated to license all its patents royalty free, led to one of the major innovation waves in recent economic history. It is said to have laid the foundation for the creation of the Silicon Valley. This decision – in modified form – could serve as an example.

5. **Adequate liability for dominant platforms**:

   Dominant platforms should be liable for third party content to an extent, which takes into account their respective intermediary role. In particular, they should be liable for third party content, if the originator has evaded effective law enforcement through anonymity or by omitting to indicate an identifiable address or a responsible person for its content.

6. **Introducing a quantitative limitation on advertising or a limitation of advertising time for market dominant platforms**, as well as clear and unmistakable identification of advertisements.

7. **Facilitating the finding of market dominance by introducing, for example, a quantitative threshold**:

   The regulation of platforms must take into account the incredible diversity of platforms. If market dominance cannot be determined beyond doubt, a quantitative threshold should be taken into consideration. This threshold would be limited to platforms where market dominance or relevance on recipient markets can be ascertained beyond reasonable doubt. If it can be assumed, that the flexible terminology of market dominance is too case-specific or too unreliable, the average number of users or similar quantitative thresholds have to be used when they can indicate a relevance over recipient markets. For instance, a percentage of relevant users could be considered. However, an absolute number of users could also be used as regulatory threshold.

8. **A fiscal level playing field: tax law should not entrench competitive advantages of big tech companies and therefore give them preferential treatment.**

For additional information please contact:

Ilias Konteas
EMMA-ENPA Executive Director
Ilias.Konteas@magazinemedia.eu
Ilias.Konteas@enpa.eu