

Internet Platforms: *To Regulate or Not To Regulate?*

And How?

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What response do you expect?

- <https://vimeo.com/132076290>



The wrong word?

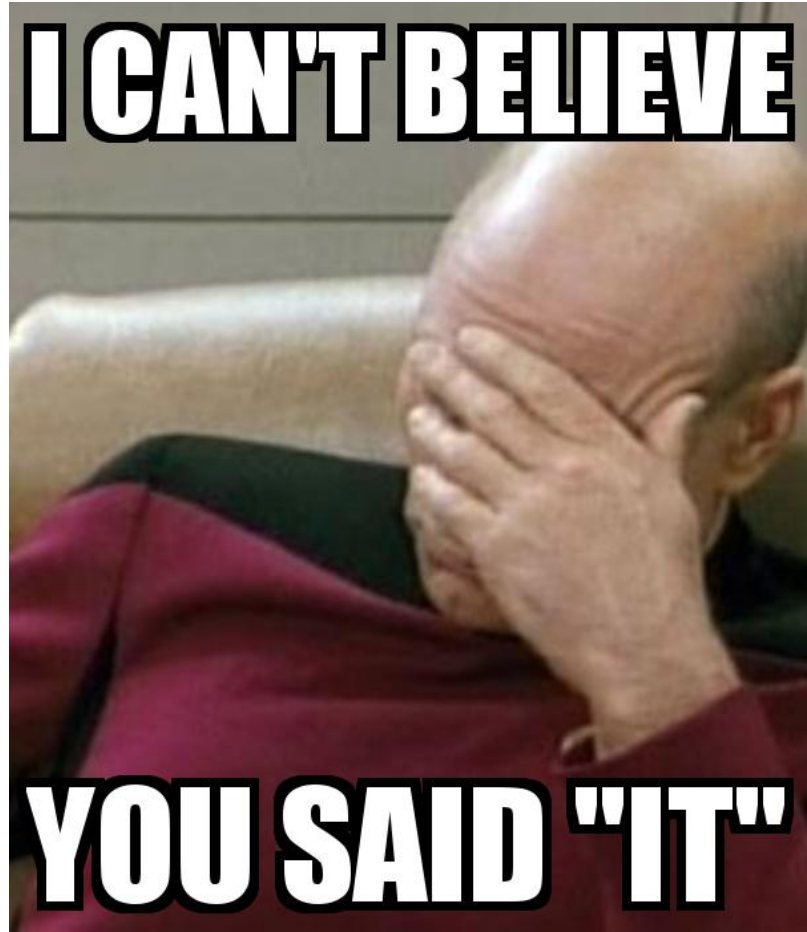
- *“Platform regulation is not a useful phrase”*
- *“In the end, we are all platforms in some form or another.”*

Theo Bertram, Google’s European public policy manager

Questions to the Commission

- You said: 'internet platform', what do you mean?
- Do you want regulation by competition law?
- Do you want ex ante regulation?

**YOU SAID: 'ONLINE
PLATFORM'?**



You said 'platform' in the DSM Strategy and you mean:

- Platforms enable:
 - consumers to find online information
 - businesses to exploit e-commerce
- Platforms include:
 - Search engines
 - Social media
 - E-commerce platforms
 - App stores
 - Price comparison websites
 - Mobility, accommodation, tourism, recruitment, etc. services

'Platform' in the DSM Strategy

- Platforms (in general):
 - Accumulate/control an enormous amount of personal data
 - Use algorithms to transform this into usable information
 - Have a multiplier effect in fostering new SMEs
 - Improve efficiency and consumer choice
- 'Some platforms':
 - Need 'further analysis' (regulation?) 'beyond the application of competition law in specific cases'

DO YOU WANT REGULATION BY COMPETITION LAW?

**I'M ONLY
RESPONSIBLE
FOR WHAT I SAY
NOT FOR WHAT
YOU UNDERSTAND**

Market power of platforms

- DSM Strategy says on 'some platforms':
 - 'Growing market power of some platforms'
 - Special 'way they use their market power'
- Not the possibility to raise the market price
 - Because (i) free services and (ii) prices too low or too stiff (parity clauses for exchanges)
- But the possibility to reduce the choice of consumers & customers
 - Not taking into account alternatives because lock-in effect on both sides
 - Inherent to platform because of (i) portability issue and(ii) 'one is preferred to several' or natural monopoly

Freedom of choice & competition

- Red line in competition law cases:
 - “ability to choose freely his sources of supply” (*Microsoft - tying*)
 - “customers were deprived of a choice which they would have otherwise had” (*Intel*)
 - The “commercial conduct (...) restricts dealers’ freedom of choice” (*Michelin I*)
 - Etc.
- Thus *choice opportunities and switching costs* should be prominent in the analysis

Freedom of choice & platforms

- Pre-requisite: highest possible transparency towards consumers/customers
 - Not there: many algorithmic tweaks and/or covert contractual clauses
 - Not there: information re use of data
 - When you pay by transferring personal data, the 'price' must be transparent
 - As individual consumers cannot assess this 'price', supervision by specialised entity (consumer body? DPA?)
 - Offer of 'paid' privacy-enhancing alternative?

To factor in personal data control?

- 15/7/2015: “Until today (...) they are evaluating market dominance by ignoring the value of, for instance, apparently free-of-charge services where nothing is free of charge”
 - Giovanni Buttarelli referring to DG Comp (European Data Protection Supervisor to *Politico*)

Relation between competition & privacy issues/authorities?

- Example: 2012 integration of privacy policies of 60 Google services into one (and aggregating the personal data)
 - Improve user experience, but allegedly enhance market power too
 - Only addressed by DPAs
 - Regulatory difficulty/gap
 - Similar for interface between competition and IP (patent offices)?

Need of holistic approach as 'special responsibility'?

- Competition cases (EU or national):
 - Abuse of platform position:
 - Self-preferencing: *Google Shopping*
 - MFN and other clauses: *Booking.com*
 - Standard Essential Patents / FRAND: *Google/Motorola*
 - Refusal to licence / tying: *Microsoft*
 - Etc.
 - State Aid:
 - *Apple & Amazon* tax cases (involving IP)
- Other challenges to law: privacy, copyright, etc.

**DO YOU WANT EX ANTE
REGULATION?**

**What
Do You
Really
Want?**

DSM Strategy

- Platforms:
 - Need 'further analysis' (regulation?) 'beyond the application of competition law'
 - Transparency
 - Platform usage of the information collected
 - Relations between platforms and suppliers
 - Obstacle to platform portability
- Intermediaries:
 - Further analysis too: « the Commission will analyze (...) whether to require intermediaries to exercise greater responsibility and due diligence in the way they manage their networks and systems – a duty of care »
- Distinction between platforms and intermediaries?

DSM Strategy suggestions

- For the unfair players:
 - Competition law, not case law (against e-commerce restrictions and geo-blocking)
 - Consumer protection (against abusive ToU)
 - Tax (against BEPS-Base Erosion Profit Shifting)
 - Data protection (against privacy violations)
 - Copyright (against unfair content aggregation)
- + For the bad players:
 - New liability rules (against illicit content online)
 - Cybersecurity standards (against cybercrime or illicit surveillance)
- + To support online operators: incentives

What regulatory mix?

- Privacy: “right to be forgotten”: CJEU, 13 mai 2014 (*Google Spain*)
- Regulation by fundamental rights + courts:
 - Applicability of EU Data protection law: if the advertisers of one country are targeted (‘doing business’)
 - Balance between fundamental rights beyond application of data protection directive
- Regulation for the compliance:
 - Auto-regulation? 1,027,495 URLs and 282,508 requests treated by Google on July 13, 2015
 - Risk that Google = “sole judge”
 - Input by data protection regulators:
 - Guidelines of Article 29 Working Group
 - Need for online adjudication system

The right regulatory mix?

- Content aggregation and copyright: need to scale up legislation and regulation
- No the right approach:
 - National anti-snippets (Google) laws: Germany (2013), Spain (2014)...
 - National case law:
 - *Copiepresse v. Google (BE)*: success (2011), but difficult implementation – settlement in Dec. 2012
- Regulation by CJEU: still very limited
 - CJEU, 5 June 2014, *PRCA* (browsing and caching allowed)
 - CJEU, 13 Febr. 2014, *Svensson* (hyperlinking)
- Regulation by contracts for UGC
 - *Financial Times* (13 oct. 2014): « YouTube pays out \$1bn to producers by selling ads on copyrighted videos »
 - Since Content ID (2007,) choice between « take down » or « monetization »

Concluding words on 3Q

- Online platforms:
buzzword or specific
issue?
- Need to factor in
consumer choice and
privacy in competition
analysis
- Need to go beyond
regulatory silos



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Thanks for your attention

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Do we want more competition, new regulation or more compliance?

- More competition:
 - Better for competitors and consumers
 - But might reduce regulatory compliance: race to the bottom or to the top?
- New/better regulation:
 - Better for all operators and users
 - But might reduce competition
- More regulatory compliance:
 - Better for society
 - For the winners or all operators?