Webinar #4 Platform: The Envelopment Strategy

Interview with Andreas Mundt (Bundeskartellamt) by Richard Whish QC (Hon) (King’s College London) and Amelia Fletcher (University of East Anglia)*

Andreas Mundt (President, Bundeskartellamt) has been interviewed by Richard Whish QC (Hon) (Professor, King’s College London) and Amelia Fletcher (Professor, University of East Anglia) in anticipation of the 4th Innovation Economics Conference for Antitrust Lawyers and their panel “Platforms: the Envelopment Strategy”.

Program here.
*Richard Whish QC (Hon):* Platform envelopment refers to the situation in which a platform owner moves into someone else’s market, combining its own functionality with someone else’s to form a multi-platform bundle. As a general proposition consumers can be expected to benefit from the new, improved product that comes about as a result of this process, in particular where it is ‘free’ at the point of use. How do we distinguish between platform envelopment that is pro-competitive and beneficial to consumers and cases in which there are serious harms to competition?

*Andreas Mundt:* At first sight, platform envelopment can seem to be beneficial for both competition and the consumer: A new competitor enters a market and consumers might prefer the ease of purchasing several goods or services from the same seller. In addition, due to economies of scope on the part of the platform, the price for a new bundled product might be lower than what the consumer had to spend before for two then separate services. However, this usually is only advantageous for consumers if they actually did use both of these products in the past.

But this is only part of the story. Besides creating a potential competitive advantage for the platform, envelopment can come along with practices such as pure bundling, limited compatibility or self-preferencing. In many cases this can be seen as the classical leveraging of market power, to the detriment of competition. In some instances, the newly created product as such might even offer no functional improvement over existing services at all. In fact, consumers might only use the newly added functionality because it is now part of a bundle. That can also reduce competitors’ incentive to innovate.

Envelopment might be particularly harmful if the addition of the new service not only has chilling long-run effects on the newly entered market but also strengthens the position of an already dominant platform in the original market. This could happen, for example, if consumer data gathered through the provision of a new service is added to an already existing trove of data. The competitive advantage of the incumbent already present might then increase even more due to its access to that data. In the end, as usual, the circumstances of the individual case matter.

*Richard Whish QC (Hon):* In so far as platform envelopment may give rise to concerns for competition, to what extent are our existing competition law tools, and in particular abuse of dominance provisions such as Article 102 TFEU, sufficient to address these concerns?

Under the current regime, at least bundling and tying can be considered abusive if it leads to anti-competitive effects. This approach has been successfully applied in several constellations – for example in the case of Microsoft’s envelopment strategy of including its Windows Media Player with Microsoft Windows.

In addition, Article 102 TFEU allows for the recognition of an essential facility, which could also be relevant in the context of envelopment. For example, in cases where an existing dominant platform creates a new bundle by adding a service in an adjacent market, and limits
access to interfaces, Article 102 might offer the possibility of mandating access to this interface for competitors when this is needed to ensure effective competition. Depending on the case, a similar logic might apply to access to data.

Richard Whish QC (Hon): A great deal of thought has been given to the issue of platform envelopment in recent years, as well as to other concerns caused by the increasing digitalisation of markets generally. Numerous reports have been commissioned and published and many market studies have been conducted by competition authorities around the world. Changes have been made, and are in contemplation, in many jurisdictions, not least Germany. How do you foresee the legal landscape changing in the years ahead?

In Germany, we are facing the upcoming 10th amendment of the German Competition Act. Currently, we are still at a preliminary stage: the draft bill was published and is being discussed right now.

One core element that is being discussed is a strengthening of abuse control vis-à-vis powerful “digital” companies. This includes the introduction of the concept of intermediation power, which takes into account that platforms can control access to upstream and downstream markets. The draft bill also stipulates that our national essential facilities doctrine be broadened to explicitly include data. Moreover, it includes adaptations with regard to the existing rules on the conduct of undertakings with relative or superior market power, with a particular view to platforms, data-driven dependencies and the risk of market tipping.

A completely new provision aims at introducing the notion of undertakings of paramount significance for competition across markets. Addressees could in particular be big platforms that hold a strategic bottleneck position “between” markets. Factors to be taken into account by the competition agency when assessing whether a company is of such paramount significance include dominance on one or several markets, vertical integration (for example of hybrid platforms), access to data, or more generally its role as a potential gatekeeper. Such companies could be subjected to additional (or more concrete) obligations regarding their behaviour – also on markets which are not yet dominated. For example, they might be prohibited from self-preferencing or making new envelopment endeavours, the anti-competitive use of data, and impeding interoperability or data portability.

The proposed amendments take up recommendations from several national and international reports such as the German “Commission Competition Law 4.0”, the Furman Report and the report by the Special Advisers to Commissioner Vestager. It will be interesting to see in how far similar proposals on platform regulation close to and in the spirit of competition law that have been made in other jurisdictions, both on the national and European level, will be implemented in the near future.

Amelia Fletcher: Germany has been in the vanguard of making assertive competition interventions in the digital arena, but clearly these are global issues. Do you see a
pathway through toward a more coordinated international approach to addressing them?

It is true that digital technology is transforming the economy on a global scale. New services rapidly change existing industries almost everywhere, raising new issues with respect to competition law and related policy areas in many countries. This makes it so important to keep engaging in a close exchange with other competition agencies. We have cooperated successfully for many years in multilateral fora such as the ICN, the ECN, or – just recently – the G7. At the same time, we engage in bilateral cooperation, for example when co-authoring a conceptual study on algorithms with our French colleagues, and also in our casework, for example together with our British colleagues when dealing with the price parity clause that Amazon had imposed in its Marketplaces. In the latter case, the joint actions of the two national authorities led to Amazon’s abandonment of its price parity clauses EU-wide. We will certainly continue working closely together in various ways, in particular in the digital arena.

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Interview with Alexandre de Cornière (Toulouse School of Economics) by Gregor Langus (Compass Lexecon)*

Alexandre de Cornière (Assistant Professor, Toulouse School of Economics), has been interviewed by Gregor Langus (Senior Vice President, Compass Lexecon) in anticipation of the 4th Innovation Economics Conference for Antitrust Lawyers. Alexandre de Cornière is a speaker in the 4th Panel on “Platforms: The Envelopment Strategy”.

Program here.
Gregor Langus: In its Google Search Decision, the EC held that Google harmed competition by more favourable positioning and display, in Google’s general search results pages, of Google’s own comparison shopping service compared to competing comparison shopping services. Yet, your research shows that such favouring can have ambiguous effects. What are the trade-offs involved? Under what conditions could Google’s conduct be procompetitive?

Alexandre de Cornière: Google granting favourable positioning to its own comparison shopping service is part of a broader category of practices that have been referred to as self-preferencing or own-content bias. Google is not alone here, as other vertically integrated platforms (Amazon, Apple, etc.) have been using such strategies in one form or another. (By the way one of Google’s favourite argument is that everyone does it: tech rivals, but also brick and mortar stores. Let’s not enter into this debate.)

I have worked on this topic from a theoretical point of view\(^1\), and indeed we find that it may sometimes be pro-competitive. An important factor for the pro-or anti-competitiveness of self-preferencing is the business model of the firms that operate on the platform. For instance, if firms compete in prices, the favoured firm will tend to increase its price, thereby harming consumers. If firms compete in qualities (and get revenue from advertising), the favoured firm will invest more than in a neutral environment, by virtue of economies of scale. Of course in each case there is at least partial foreclosure of rivals, so that even with quality competition consumers may be harmed on net. The precise condition for the conduct to be pro-competitive (even in environments with both price and quality competition) depends on the parameters of the model, which would not be readily observable in practice. But intuitively, the conduct is more likely to be pro-competitive when horizontal differentiation is low and investment is very reactive to scale economies.

The dichotomy between price and quality competition has some other interesting implications. We show that various policy actions, ranging from increased mandated transparency to a break-up of the platform, tend to work well (in theory) in environments with price competition, but not so much with quality competition. Putting things together, this means that when firms compete in prices, self-preferencing is bad but we have several policy options that are effective. Under quality competition, self-preferencing is sometimes good and sometimes bad for consumers, but in the latter case the policy options that have been put on the table don’t really work.

Because it is difficult to imagine a policy that would treat firms differently depending on whether competition is mostly in prices or mostly in qualities, my interpretation of these results is that the paper provides a framework to think about the type I and type II errors that any intervention (or lack thereof) is bound to entail in this context.

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A number of commentators and several high-profile policy reports have suggested that, when it comes to digital markets, digital platforms in particular, the balance of enforcement error cost has changed due to market specifics - network effects and high barriers to entry. Suggestions have been made that, going forward, the dominant platforms should carry the burden of proof for their potentially harmful conduct. Do you agree with this view? Is there certain conduct and a set of circumstances that you would highlight as particularly likely harmful?

To answer this, let me make the distinction between merger control and abusive conduct.

On the merger front, there have been a flurry of unchallenged acquisitions by Big Tech firms. Some of them have been problematic in my opinion: Google’s acquisition of DoubleClick, and Facebook’s acquisition of WhatsApp and, to a lesser extent, of Instagram. But I suspect that the vast majority of these acquisitions are not of the “killer” type, and actually allow for some services to quickly reach billions of consumers, generating consumer surplus. Moreover, the perspective of buyout and “acqui-hires” is a key force behind start-up investments. I am therefore skeptical that a dramatic shift to stricter merger control would be desirable. Shifting the burden of proof so that platforms have to prove efficiencies in the first place is too risky, as we don’t seem to have a clear view of the kinds of efficiency gains that agencies would accept. However, I very much favor lowering the thresholds for notifications and a shift away from the “more likely than not” standard of weighting pro and anti-competitive effects of the mergers, towards a standard that would consider the expected welfare impact.

One important caveat that I would add is that we don’t have much data to base our opinions on. The FTC’s recent decision to require data from Big Tech’s acquisitions should enlighten us regarding the effects of these mergers.

Regarding potentially abusive conduct, I am much more concerned by the perspective of under-enforcement, in particular when it comes to exclusive dealing, and practices limiting interoperability and multi-homing. For such practices, I believe the costs of under-enforcement are particularly large. If we opt for a reversal of the burden of proof, it would have to be restricted to a narrow set of practices though, as new products and business models shouldn’t be hampered by broad legal uncertainty. I wouldn’t include bundling or (potentially) predatory pricing in this group for instance. In any case, I think that such issues should be tackled by a sector-specific regulator rather than by competition authorities.

**Competition policy has traditionally focused on price, quality, and choice. Increasingly also on innovation. This seems complicated enough. Yet, some commenters and enforcers are trying to move the bar higher still and have argued that the enforcers should incorporate personal data and privacy concerns into the assessment. In fact, the German competition authority already found Facebook guilty of exploitative abuse of dominance on the grounds that Facebook's conduct resulted in the loss of user control over the use of their personal data. Is the interest of antitrust enforcers in privacy**
Concerns justified in your view? In what circumstances / contexts? When, if ever, should privacy be left to specialized fields of law, such as data protection law or consumer protection law?

Competition in dimensions other than prices is very important, especially in the digital economy where many products are free, and so I welcome efforts to try and incorporate these into the decision process. Privacy is one such dimension. But privacy is a complicated issue. First, stronger privacy comes at a cost: lower incentives for firms to compete for consumers’ attention and data, because their monetization opportunities would be constrained. The use of data by firms can also allow them to offer better, more personalized products, and privacy restrictions would prevent this. Are we as a society willing to pay this cost?

In my mind, one important difference between privacy and price competition is the heterogeneity of tastes: some consumers are very concerned about protecting their privacy, whereas others are willing to share a lot of information in order to get better products, and a blanket limitation of how much and what kind of information can be collected would be misguided.

At the moment, we don’t really have any competition on the privacy dimension. Some relatively niche firms (like DuckDuckGo) have made it a central part of their strategy. Others (like Apple) also emphasize it, but their business model was never about data/advertising in any case. Why isn’t there more competition on the privacy front? One answer would be that there is competition, and consumers have chosen: they mostly don’t care. I don’t believe that is the case. Instead, what I see is a market where it is extremely complicated to have any idea about who collects what kind of information, so that such competition is impossible.

I believe that the solution lies in a standardization effort: firms should be given a score based on their data collection policy (say from 1 to 5, depending on the amount of data collected, whether it is used only for the purpose of the transaction, how long it is stored, with whom it is shared), and consumers should have the option to parameterize their browser so as to only allow websites with a score above a chosen threshold (or to trigger a warning whenever a firm exceeds the chosen level). This would pave the way for effective competition on the privacy dimension, as consumers would quickly become aware of which firms charge a higher “data price”. Only then could competition policy really have an effect on privacy. Before then, asking for instance whether a merger will reduce incentives to compete in privacy is almost pointless.

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