According to President Ronald Reagan, a government's view of the economy could be summed up in a few short phrases: If it moves, tax it. If it keeps moving, regulate it. And if it stops moving, subsidize it. The growth of many digital platforms appear to have them becoming on the verge of moving into the second category. This article questions whether regulation is the right approach for dealing with platform markets or whether the existing instruments of EU competition law (as set out amongst others in Regulation 1/2003), and consumer protection law provide for better means of controlling platform power.

As part of its Digital Single Market strategy, the European Commission in 2015 started a comprehensive analysis of the social and economic role of online platforms. The questions mainly focus on the lack of transparency and the relation between platforms and suppliers and traders. A specific example the Commission asks about is the “parity clause” obliging suppliers to maintain parity with their best offer in other sales channels which has been subject to investigations by many national competition authorities in the online hotel booking sector. The inconsistent national handling of these national competition cases triggered calls for the Commission to intervene – but the question is: should the Commission intervene with the instruments of competition law or with new regulation of platforms?

**Competition law or specific platform regulation?**

The sector inquiry might suggest the second alternative. The Commission’s roadmap for completing the Digital Single Market foresees the introduction of legislative proposals to reform the current telecoms rules, review of the Audiovisual Media Services Directive and the e-Privacy Directive as well as the establishment of a Cybersecurity contractual Public-Private Partnership.

While no decision has been taken yet it seems questionable how the concept of regulation will affect digital platforms, a term that is not legally defined and open to different concepts from an economic, legal and political perspective. The Juncker Commission pledged to follow a “Better Regulation” approach, which requires a fairly rigorous test before introducing new regulation. Some argue that “Better Regulation” should be read as “no new regulation”, in particular in dynamic digital markets where market failures are often transitory in nature, leading to false positives and the premature imposition of regulation.

The Commission’s understanding is different. Mr. Juncker’s agenda is more ambitious on big things, and smaller and more modest on small things. The Digital Single Market is a big thing and the Commission’s agenda aims at “creating the conditions for a vibrant digital economy and society.” Clearly market distortions may imperil these goals. However, competition law seems best suited to deal with these challenges. There are significant parallels between antitrust law and telecoms or media regulation, e.g. the concept of recognizing a dominant position or ‘significant market power’ – which is not unlawful per se – and the imposition of remedies to keep a dominant actor under control. Competition law nevertheless allows for more flexibility in dealing with emerging market players.

The mere possession of a dominant position does not in itself require any enforcement under competition law. Antitrust law does not positively define what competition on a market should look like, but rather defines which practices restrict competition. In contrast, regulation generally does not aim at maximizing the level of unrestricted competition but ensuring the replication of competition or maximum plurality for the recipients in markets where resources such as frequencies are limited. This naturally affects the perspective on the definition of markets: For instance, free-to-air television broadcasting, does not constitute a “market” from a competition law perspective as the audience does not pay for the program. Nevertheless, the audience share of a free-to-air program is of large relevance for media regulation dealing with plurality.
Network effects and “winner takes all”

One of the interesting questions the Commission will need to answer is whether it will focus on “bottleneck” platforms in the area of broadcast and video-on-demand or whether the review of the platform markets will span the currently much less regulated online world. Platform regulation might facilitate the replacement of the “winner-takes-all” online platform by a new dominant platform. While this could create more incentives for potential competitors to develop new platforms, the entrepreneurs or investors could also anticipate that the benefits of winning the market will be shorter. Thus, platform regulation could also create uncertainty and reduce the incentives to innovate.

Digital platforms are multifaceted, in some cases representing business models, in other cases technological platforms or enablers of other services. The very definition of what is a digital platform is fraught with difficulties making the creation of specific regulation perilous. The working definition in the Commission’s consultation questionnaire demonstrates the point:

Online platform refers to an undertaking operating in two (or multi-) sided markets, which uses the internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups. Certain platforms also qualify as Intermediary service providers.

The complexities of multisided markets make the diagnosis of market failures particularly difficult. As pointed out in a recent paper published by the French and U.K. competition authorities, both open and closed digital ecosystems can create pro-competitive and anti-competitive effects. No single model maximizes social welfare in all situations. Because of network effects, the emergence of a relatively small number of generalist platforms, with multiple niche platforms, may in fact be efficient. As pointed out by Howard Shelanski, policymakers need to be wary of false positives, i.e. concluding too hastily that certain new digital business models are anti-competitive and require a regulatory fix.

For digital markets in a dynamic stage of their development premature regulation does not seem favorable. Any ex ante regulation runs the risk of misinterpreting market shares or prices in assessing market power, in particular on two-sided markets where the price is often zero for the consumer. Ex post competition law enforcement allows for a more targeted individual assessment of the platform in question. The involvement of the competition law authorities’ economists in such investigations is another advantage as the investigation can focus on the concrete economic assessment of the respective platform market. Moreover, competition law provides for flexible instruments that have been tested in a variety of cases. For instance, the possibility of settling cases by accepting commitments of a platform is enshrined in many national competition laws and also in Article 9 of Regulation 1/2003 on the EU level. Commitments are intended to address the competition concerns identified by the authorities without establishing an infringement.

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Competition law commitments are de facto regulation

While commitments seem a suitable way to address platform markets outside formal regulation, it should be noted that they may de facto set standards for acceptable market behavior from the authorities’ perspective. Thus, the competition authority may act in a kind of regulatory fashion for which it lacks legal competency. There is a danger that individual landmark cases shape competition policy which should be left to the legislator. The antitrust regulators are well advised to strive for balance and cautiously make use of their powers in competition cases.

But there are also examples of a staggered antitrust investigation followed by regulatory actions. Following the Commission’s initial antitrust decisions in the Multilaterally Agreed Interchange Fees (“MIF”) cases in 2007 and 2010 (COMP/34.579 and COMP/39.398), the European Union introduced Regulation (EU) 2015/751 which as of 9 December 2015 capped interchange fees for card-based payment transactions. The legislative
process in this case benefitted from the experiences the Commission made in its competition law investigation – a different way to achieve “Better Regulation”.

**Protecting consumers against lock-in**

Another area of potential concern for regulators is the potential lock-in effect of certain platform strategies. Network effects will draw users to the platforms that have the highest number of other users. This can lead to a phenomenon where the large platforms are more and more successful simply because they have a large number of existing users. The question then is whether this phenomenon unduly harms innovation and competition from other service providers. The proponents of regulation argue that consumers are locked-in to the service environment of certain large platforms. Proponents of regulation believe that large platforms succeed because they are large, not because they are better. Some legislative proposals, including one in France, go as far as to require that users be able to port all their data, including all files that they have uploaded onto the platform and “associated usage data”, to competing service providers. These proposals will go beyond the portability of personal data required by the General Data Protection Regulation.

**Telecom regulation is not a good analogy**

The European Commission is not going so far, at least not for now. Wisely, the Commission is gathering evidence to determine whether the alleged market failures caused by platforms are in fact real. The skeptics of new regulation, including the authors of this article, point out that many users participate in multiple platforms (a phenomenon called multi-homing), and that switching costs are low compared to other situations where lock-in is a concern. Lock-in concerns are acute when the consumer must purchase a costly piece of equipment, and would have to buy a new piece of equipment if he or she changed service provider. In that situation, regulators may intervene to ensure that competing service providers can have access to the existing equipment so that the consumer does not have to buy a new one. Similarly, access regulations in the telecommunications industry are necessary to ensure that consumers are not tied to the service provider who happens to own the copper network connecting the person’s house. For most online service providers, none of these lock-in features appear to be present. Online service providers will naturally try to make their service environment “sticky” so that consumers will remain in the environment as long as possible. However, this is no different from practices that exist in many businesses in the offline world.

Platforms facilitate multisided business models of all kinds. Platforms have existed for many years in the offline world. Examples include trade fairs and newspapers. Digital platforms simply make transactions easier, thereby facilitating the emergence of multisided business models in new contexts.

When analyzed from a legal and economic perspective, platforms are simply a collection of services offered to two or more different groups of customers. The services that are offered on different sides of the platform are generally subject to different legal rules. Services on the platform must comply with applicable laws, including competition law, data protection law and consumer protection law. Where providers of platform-based services do not comply with law, they are sanctioned. Any initiative to create specific rules for digital platforms needs to be assessed rigorously in light of existing law. Where existing law provides a remedy, lawmakers should refrain from adding an extra layer.

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