Platforms : how to deal with their bargaining power ?

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The power of the platforms creates new risks which has to be taken into account.

First of all, there is a competition concern : the most famous platforms have a large market shares. In Europe, we want to ensure access to this market to new entrants, specially new european entrants.
Secondly, there is a contractual concern : the biggest plateforms may use their bargaining power to obtain conditions they could not obtain without that power.

In my opinion, that is very important to distinguish these topics of concerns.

To sanction illegal practices committed by platforms, three ways can be envisaged :
- Firstly, it's possible to apply rules from antitrust law. In France, there is a combination between european law and national law.
- Secondly, it's possible to apply business contract law.
- Thirdly, it's possible to apply specific rules adopted for platforms issues. I will explain why, in my opinion, it is not the right way to deal with these issues.

1. Antitrust law

The goal of competition autorities is to grant an access to the market to new competitive platforms. The risk of forceclosure and monopolization is increased by the specificities of this market where there are some barriers to entry, for example the network effect and the switching-costs for users, which explain the famous « winner takes all » effect.

Three qualifications could be used to punish antitrust infringement and restore competition on platform market.

A) First, the abuse of dominant position.

In European [1] and french [2] competition laws, the qualification of abuse of dominant position is relevant to punish two kinds of abuses : exploitative and exclusionary abuses.

1) Exploitative abuses

An exploitative abuse could be defined as a practice which affects contractor's interest. This qualification could be used for excessive prices charged by platforms[3].

But, actually, it is very unusual in Europe and in France to punish the exploitative abuses, as competition authorities focuse on exclusionary abuses[4].

[1] Article 102 of the Treaty of the functionning of the european union.
[2] Article L. 420-2, al. 1 of commercial code.
[3] CJUE, 27 février 2014, *OSA*, C-351/12.
[4] See : Guidance on the Commission's enforcement priorities in applying Article 82 on the EC Treaty to abuse exclusionary conduct by dominant undertakings, *JOUE* 24 fév. 2009.

Why ? Because we consider that the most important is to protect the competitive process. And, normally, when the market is well protected against exclusionary practices, it is not possible to commit exploitative abuse.
This idea is relevant for the platforms concerns. If new entrants may potentially integrate the market and get some new market shares, the biggest platforms won't have the opportunity to charge excessive prices.

2) Exclusionary abuses
An exclusionary abuse could be defined as a practice which affects competitor's interests.
Based on article 102 of the Treaty on the functioning of the European Union, the qualification of abuse of dominant position requires three conditions.

(i) the dominant position. To determine if a platform holds a dominant position is not so easy. One of the reason to explain that, it is that, very often, the platform is active on a both-sides market for which the usual indications of dominance are not relevant.

(ii) the anticompetitive foreclosure.

- The foreclosure may take the form of a lock-in effect. There is lock in effects when the conduct of the platform is capable to bar competitors from the access to the market or limit their expansion.

For example : in the booking case, several national competition autorities had to intervene and to impose commitments to modify the contracts concluded with hotels. In these contrats, there was a clause, named parity clause of Most favour nation clause (MFN clause). With this clause, hotels are preventing from offering a lower prices than the prices offered by Booking, when there is a direct reservation or a reservation through another platform. The parity clause is

likely to reduce the competition on this sector as the clause leads to cement the dominant position of the leader Booking. Booking commits to modify its contractual terms[5].

Other example : the Amazon case involving practices on e-book sector [6]. Amazon imposed a clause, which required publishers to offer Amazon similar (or better) terms and conditions as those offered to its competitors and/or to inform Amazon about more favourable or alternative terms given to Amazon's competitors. Because, theses practices could constitute an infringement of article 102 (abuse of dominant position), Amazon offered to change its contractual terms and european Commission accepted these commitments.

- The anticompetitive foreclosure may also take the form of leveraging effets. Let's think about big firms who are on different markets. Because of their power on one market, they have the possibility to benefit illegal advantages on another market. They have the ability and incentive to leverage a strong market position from one market to another by some exclusionary pratices.

For example, in the Google case about Google shopping, the Commission concludes that Google abused of its dominant position by positioning more favourably, in its general search results pages, its own comparison shopping service compared to competiting comparison shopping service[7]. Google used its power on the market where it hold a dominant position (i.e the general search

[5] Aut. conc., n° 15-D-06, 21 avril 2015, sur les pratiques mises en œuvre par Booking.com BV, Booking.com France SAS, Booking.com customer service France SAS dans le secteur de la réservation hôtelière en ligne.
[6] Comm. eur., décision du 4 avril 2017, n° 40153.
[7] Comm.eur., décision du 27 juin 2017, n° 39740.

services) to foreclose the competition on an other market (i.e the comparison shopping services).

In the second Google case involving Android practices, the Commission concludes that the restrictions imposed by Google to the Android device manufacturers constitute an abuse of its dominant position[8]. Because the Google's strategy is to leverage a strong position from the general search engine market to the mobile internet market.

(iii) Third condition : the conduct shall take <u>other means that competing on the merits</u>.

That's the most difficult criteria to handle.

In the Google Cases, the Commission concluded that Google's practices - tying practice and the favourable positioning – fall outside the scope of a « normal competition on the merits ».

But this conclusion is to be discussed now by european court of justice. What is a normal competition on the merits ?

In my opinion, we will have to distinguish the practices which develop a lock-in effects and the practices with leveraging effets. The priority is to intervene to limit the leveraging effects. Because, very often, the lock-in effects is basicly the result of a normal competition based on the merits.

<u>B) Abuse of economic dependance</u>

In french law, there is a specific rule in antitrust law which prohibits the abuse of economic dependance. We expected this qualification to be useful when the undertaking does not hold a dominant position but his contractors are in an economic dependance from him.

[8] Comm. eur., décision du 18 juillet 2018, n° 40099.

But this mechanism simply doesn't work. It is not possible to characterise the economic dependance because of its definition. In general, practices do not harm sufficiently the competition on the market.
Anyway, I think that it was a very bad idea to define the abuse of economic dependance as an antitrust practice because it is not. It shall be treated as a contractual practice.

C) Vertical restraints

Sometimes, contractual terms imposed by platforms restrict competition on the market. These vertical restrictions are dealt as an anticompetitive agreement and prohibited by article 101 of the european Treaty.

For example, contractual terms imposed by manufacturers can prevent distributors from exploitating the e-commerce and finally can bar platforms from the access to the market. In that case, platforms are not the infringing undertaking but the victim of the restraint.

I shall speak about the Pierre Fabre and Coty cases. To summarize, European court of justice prohibits, as an infringement of article 101 TFUE, the clause imposed by manufacturers which bans on internet sales[9]. Such a clause falls within article 101 of the Treaty because it limits the developement of e-commerce, what is bad for european digital economy. Distributor shall always have the opportunity to sell on their own web site.
But, European court considers that some reasons may justify the clause by which a manufacturer prohibits distributors from using a third-party platform as Amazon[10]. If manufacturers are able to prove that the clause pursues some

[9] CJUE, 13 oct. 2011, aff. C-439/09, Pierre Fabre.
[10] CJUE, 6 déc. 2017, aff. C-230/16, Coty Germany GmbH.

objectives as preserving the luxury image, this clause may be legal, even if there is an anticompetitive effect, because conditions provided for by the block exemption could be met.

2. Business contract law

The practices by which platforms use their power to obtain excessive contractual conditions could fall within the scope of business contract law. These rules are adopted to ensure there is a proper contractual balance. The aim is not to safeguard the functioning of the market.
If Amazon or Google ask for excessive conditions, it is more appropriate to apply these rules than to apply antitrust law which pursues a different goal.

A) Commercial law

First af all, there are, in the french commercial code, some provisions edicted for the imbalance which affect business relationships. This part of the code is called : « droit des pratiques restrictives de concurrence ». If we try to translate, it is « restrictive competitive practices ». But please, let's try not to confuse with antitrust law. The restrictive competition practices are prohibited without the caracterization of any anticompetitive effect.
Article L. 442-6, I, 2° commercial code[11] :
I. - Any producer, trader, manufacturer or person recorded in the trade register who commits the following offences shall be held liable and obliged to make good the damage caused:
(…)
2° Subjecting or seeking to subject a trading partner to obligations that create a significant imbalance in the rights and obligations of the parties.

[11] Traduction accessible sur Legifrance, issue des travaux de M. Fillastre, A. Kyeremeh, M. Watchorn.

To be applied, 3 criteria have to be met :

- a business relationship ;
- a significant imbalance in the rights and obligations of the parties ;
- a subjection of a partner to this other partner.

The assessement of the imbalance might concern the price. French Cour de cassation decided that this provision may lead to prohibit an excessive price. And the Conseil constitutionnel has just confirmed the constitutional validity of this interpretatation[12].

It is important to know that proceedings about article L. 442-6 of commercial code are brought before the court by the victim, by the Public prosecutor's office or by the minister of economic affairs. In general, victims don't want to initiate a proceeding because of their partnerships with platforms. It's why most famous proceedings about platform's practices are brought to the court by the minister of economic affairs.

For example, the Expedia case. As you know, Expedia is an online booking hotel platform, as Booking. Expedia imposed parity clause, the same clause as Booking and some rebates. The expedia Case is different from the Booking case as it is dealt with under commercial law et not under antitrust law. Minister of economic affairs initiated the proceeding. The Court of appel of Paris decided, in 2017, that conditions of article L. 442-6 are met[13].

- This case concerns business relationship, between a platform and the hotels.
- the hotels are subjected on Booking's power, i.e. they are forced to give their agreement because it is necessary in order to be attractive on the market.

[12] C. constit, 2018-749 QPC, 30 nov. 2018, *Concurrences* 2019/1, obs. C. Grimaldi.
[13] CA Paris, 5-4, 21 juin 2017, RG n° 15/18784.

- these contrats are imbalanced. Several clauses imposed obligations to the hotels (best prices, best availibilites, garantees, unilateral decision about the ranking of the hotels) without any sufficient counterpart.
Disavantage for consumers are not proven. This practice didn't lead to an increase in prices. But it doesn't matter for the judge who has to apply provisions from commercial law and not antitrust law.
Finally, in this case, the Court of appeal decided that the excessive clauses are void. Judges imposed to Expedia to modify its contracts. And judges imposed a fine of one million euros.

There is a currently proceeding initiated by the minister for Amazon's practices. Jugdes will have to decide if the contractual terms imposed to the distributors infringe or not article L. 442-6, specially the possibility for Amazon to break off the relationship with the distributors without any minimal notice period.

B) Contract law

Secondly, the contract law. In 2016, France adopted new provisions for contract law. There is now, in the french code civil, a new article 1171 which provides : « any term of a standard form contract which creates a significant imbalance in the rights and obligations of the parties to the contract is deemed not written »[14]. Careful : this article may be used only for non negociated contract and the assessment of the imbalance shall not concern the price.

[14] Traduction issue des travaux de J. Cartwright, B. Fauvarque-Cosson et S. Whittaker.

3. Sectorial approach in national and european law

More recently, french parliament adopted specific provisions to deal with specific sectors's issues.

First example : the transport sector. Since 2016, new article L. 420-2-2 of the french commercial code prohibits practices of transport's platform which have for effect to ban drivers from being referenced on several intermediation platforms. The goal is to prevent Uber from monopolizing the market : drivers shall remain free to be referenced on several platforms. It is possible to critizise this new prohibition : if the pratice constitutes a vertical agreement or an abuse of position dominant, no need to adopt a specific provision. The general provisions should be used[15].

Second example : the online hotel booking sector. Since 2015, new article L.311-5-1 french tourism code prohibits the clause imposed by a booking platform which limits the freedom of a hotel to offer lower prices or rebates to direct customers. The price parity clause is deemed unwritten.

In my opinion, the issue with the sectorial approach is the incompleteness. It doesn't make sense to prohibit a price parity clause and not an availibility parity clause. And it doesn't make sense to provide rules for transport or hotels sectors and nothing for the other sectors for which intermediation platforms still exist. I think about the home-delivery of meals sector which grows up very fast in my country.

Many other options exist :

[15] See also : A.-S. Choné-Grimaldi, « Une nouvelle pratique anticoncurrentielle passée (presque) inaperçue », *D.* 2017, p. 1255.

First option : doing nothing. Because general rules about anticompetitive agreement and abuse could be sufficient. In my opinion, in that case, Competition autorities should prior intervene to impose fine for leveraging effects.

Second option : provide some specific rules for platforms, I mean general rules for every platforms. That is the current idea of european Commission. In april 2018, a proposal for a new regulation on promoting fairness and transparency for business users of online intermediation services has been published[16]. The main goal is to increase transparency : users of online services shall be informed on general policies. In my opinion, the goal is not ambitious enough, as it concerns only the access to the terms and conditions imposed by platforms and doesn't concern the content of these terms and conditions. But anyway in France article L. 442-6 still ensures a minimum contractual balance between rights and obligations of the parties.

Third option : expand the criteria of the anticompetitive practices. For example, expand or remove the criteria of the dominant position. Except Google on the search engine market, many platforms don't held a dominant position. Nevertheless, they have a strong power on their markets. It might be possible to adopt a new rules prohibiting abuse pratices committed by key operators which lead to a decrease of competition on the market.

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[16] Brussels, 26 avril 2018, COM(2018) 238 final.