EXPLOITATIVE AND EXCLUSIONARY ABUSES IN DIGITAL ECOSYSTEM

Carlos Manuel Gonçalves de Melo Marinho
Judge of the Competition Chamber of the Lisbon Court of Appeal
Senior Expert in EU Law, Judicial Cooperation and e-Justice

Exploitative behaviour

Unilateral action by dominant businesses that distorts competition by directly causing harm to consumers rather than eliminating competitors.

Exploitative behaviour in the digital field

A dominant platform takes advantage of its market power to impose unfair terms and conditions producing, namely:

(a). Raised subscription costs;

(b). Unreasonably high fees;

(d). Restrictive contracts that limit user choices;

(e). Lack of transparency on data collection and usage practices.

Exclusionary abuse

It materialises when a dominant company uses its position to drive out competitors or make innovation impossible.

Exclusionary abuse in the digital field

(a). Exclusive agreements with key players in the market;

(b). Predatory pricing practices to drive competitors out;

(c). Designing closed ecosystems that make it difficult for other software (apps) or services to integrate.

Consumers

Negative impacts on consumers:

(a). Reducing freedom of choice;

(b). Unduly increasing prices;

(c). Violating the right to privacy.

Companies

As far as companies are concerned, exclusionary behaviours force them to compete and innovate in narrow and stifled markets.

Concerns

- Exploitative and exclusionary abuses are central concerns in the face of an ever-growing digital ecosystem that is permanently evolving and revealing unusual plasticity.

- Powerful technology companies are revealing their ability to dominate and manipulate the market.
- The scale and pervasiveness of this phenomenon turn exploitative and exclusionary abuses in digital ecosystems into critical and crucial issues that can have profound impacts on individuals, companies and society in general.

Methods

Exploitative and exclusionary abuses in digital ecosystems are critical and crucial issues, due to:

1. The scale and pervasiveness of this phenomenon;.
2. Use of intensive and cutting-edge technology;
3. Ubiquity ;
4. Large economic size of the ventures;
5. Scarcity of really relevant players.

Various forms

(a). Monopolistic behaviour;
(b). Price discrimination; and
(c). Data exploitation.

Tactics

Exclusionary abuses can be materialized through tactics such as:

(a). Anti-competitive mergers and acquisitions;
(b). exclusive contracts; and
(c). predatory pricing.

Consequences

The lack of competition generated by exclusionary behaviours can

1. Block technological innovation;
2. Prevent the creation of new services;
3 Reduce consumers choice;
4. Lead to higher prices;
5. Reduce the quality of products and services.

Article 102 of the TFUE

- Article 102 of the Treaty on the Functioning of the European Union (TFEU) contains a list of exploitative behaviours – similar illustration in Article 85 of the original text of the European Economic Community Treaty (Rome 1957).

- Investigations by the European Commission in this area have been rare due to:

(a). Concerns about the risk of market regulation;
(b). High burden of proof.

- Nevertheless, there has been a decisive shift in this domain given the growing role of national competition authorities in punishing exploitative behaviour, especially in the energy and pharmaceutical sector (generics).

- Importation of this tendency to the digital field: Bundeskartellamt's 2019 decision on Facebook’s terms of service and collection of data.

New approach needed

- Collaboration between legislators, regulators, industry stakeholders and civil society to develop solutions that can ensure that the digital area remains open, competitive, fair and respectful of rights.
- Many-sided approach:
  (a). Regulatory intervention;
  (b). Antitrust enforcement; and
  (c) Industry self-regulation.

The crossroads between competition and data protection

- The interaction between competition law and data protection law is important and omnipresent.

An advanced interpretative effort is required

- the import of a dynamic notion of digital discrimination that admits an exclusionary effect on equally efficient (as-efficient) competitors arising from privileged and monopolistic access to consumer data – see UK's Competition and Markets Authority (CMA) decision given on 27 September 2021 on the "Anticipated acquisition by Facebook, Inc. of Kustomer, Inc."

The birth of a brand-new construct of consumer data abuse

- As a stand-alone form of abuse under Article 102 of the TTFEU) in conjunction with some provisions of the Digital Markets Act – Regulation (EU) 2022/1925
- That look to strengthen the existing structure of competition law;
- Pursuing complementary objectives of fairness and contestability.

Ambiguous nature

- In the digital field, technology and innovation can serve both to generate development and to consolidate monopolies.
- The legal answers must have the notion of this ambiguous nature always present.

Difficulties

- Lack of preparation – the previous regulatory path and the judicial experience acquired have not provided us enough tools and criteria to deal with the new realities.
- Regulatory discontinuities – the abuse of consumer rights and competition infringements became difficult to predict;
- The difficulties become severe when we consider the use of Artificial Intelligence, a level at which legislative rarefaction is strong.

The DMA

- DMA can appear as an auxiliary option versus conventional methods of competition law – for allowing the emergence of innovative and unique presentations of exploitative and exclusionary practices – see the 25 March 2024 non-compliance EU Commission investigations against Alphabet, Apple and Meta.

- In Recital 3 of the DMA, the EU legislator, showed full knowledge of the new problems emerging in digital markets that consist in:

(a). The ability of the gatekeepers to connect many business users with many end users through their services, which, in turn, enables them to leverage their advantages;

(b). Access of the gatekeepers to large amounts of data, from one area of activity to another;

(c). Control by gatekeepers over whole platform ecosystems;

(d). Deep structural difficulties to challenge or contest by existing or new market operators, irrespective of how innovative and efficient those market operators may be;

(e). Strong compression of contestability;

(f). Absence of, “or reduced access to, some key inputs in the digital economy, such as data”;

(g). A “small number of large undertakings providing core platform services have emerged with considerable economic power.

The intersection of guardianships – DMA and DSA

- There is an intersection of guardianships between DMA and DSA – Regulation (EU) 2022/2065.

- Such crossroad gives coherence to the global EU system and enhances the complementarity of responses.

- Both Regulations are centred in the protection of human rights which calls for the protection of the right to privacy, to the absolute personal control of personal data, dignity, data protection and security.

- This generates a common approach to the emerging risks of Artificial Intelligence, namely at the levels of consumer rights and data protection.

- DMA looks for the compliance with Union data protection and privacy rules and principles and stresses the importance of the consent – Article 13(5) – protecting consumers' economic rights, such as freedom of choice, in parallel to the protection of privacy.

- DSA focus on a reinforced level of consumer protection – the safety and trust sought for are mainly centred on online navigation.

- The DSA is relevant to deal with AI since it wants to cut down the risk of loss of human control in the face of decision-making processes based on algorithms and machines.

- Both, the DMA and the DSA seek to proscribe harmful and discriminatory practices, introducing ethical and finalistic concepts searching for balance (impartiality), clarity, expanded inclusion and individual justice.

Defences, exemptions and exceptional circumstances

- We often find justifications that appeal to commercial or technical considerations.
- In Google Shopping (case T-612/17) exclusively private interests were rejected and attention was drawn to the need for the company to demonstrate the existence of efficiency gains that work to the benefit of consumers (see paragraph 442).
- This line of jurisprudence leaves out the possibility of successfully evoking defence arguments situated outside competition law (see paragraph 444).

- In Case C-252/21 - *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social)*, we find that the conditions for the performance of a contract do not function as an automatic acceptable defence.

- In DMA, traditional defences based on efficiency disappear – not only exceptional circumstances that are beyond the possible control of the gatekeepers and that could actually put their economic viability at risk.

- Acts and measures that are suitable for protecting the integrity of the hardware or operating system provided by the gatekeeper are permitted, as long as such measures are fully justified and prove necessary and proportionate – see Article 6(7) second and third paragraphs.

- May be accepted and validated if they are unquestionably necessary to guarantee the functioning of the IT support structure, both at the hardware and software level.

- All technical arguments not related to absolutely necessary elements are discarded.

Other acceptable reasons

- Those relating to public interests such as public security and public health “laid down in Union law and interpreted by the Court of Justice” – Article 10 of the DMA and recital (67).

Suspension

- The Commission may suspend, in whole or in part, a specific obligation – Article 9.

For this to happen
- The gatekeeper has to demonstrate;
- In a reasoned manner;
- That the fulfilment of a specific obligation imposed in Articles 5, 6 or 7 would jeopardise *"the economic viability of its operation in the Union"*;
- Due to exceptional circumstances placed beyond its control.

- At the public health and public security levels – evaluation on a case by case basis is required – (recital 67).

Preventive remedy in DMA
- Reporting, prior notification and auditing obligations.

Imposition of fines
- Criteria established in Article 30 of the DMA;
- Periodic penalty payments – Article 31.

Reopening of proceedings
- Recitals (66) and (75) and Article 25(2)(a);
- Article 25(2)(a).

Conclusions

- The concept of "abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it" remains functional for dealing with practices that are, in essence, clearly abusive – eg. self-preferencing, tying, FRAND terms of access to data, and leveraging;

- But there are areas in the functioning of digital markets where such a concept may already prove to be inadequate and ineffective – algorithmic price fixing and the use of artificial intelligence, acts that, certainly, do not depend on any position of domain.

- In such a context, access to appropriate technology is sufficient for the illicit to occur, and possession of a position of control and supremacy is not required.

- Here, the competition theory of economic dependence will, apparently, have to be replaced by another that recognizes the opposition between the interests of consumers and private data holders and those of companies operating in the market.

- In such a framework, investigation, inspection, imposition of behaviours and structural measures will have to stop being focused on signs of “domination” and start to have global incidence and stand on indiscriminate surveillance.