11th EU-China Competition Week
20 October 2015
Shanghai

PLATFORM STRUCTURE AND ANTITRUST ANALYSIS

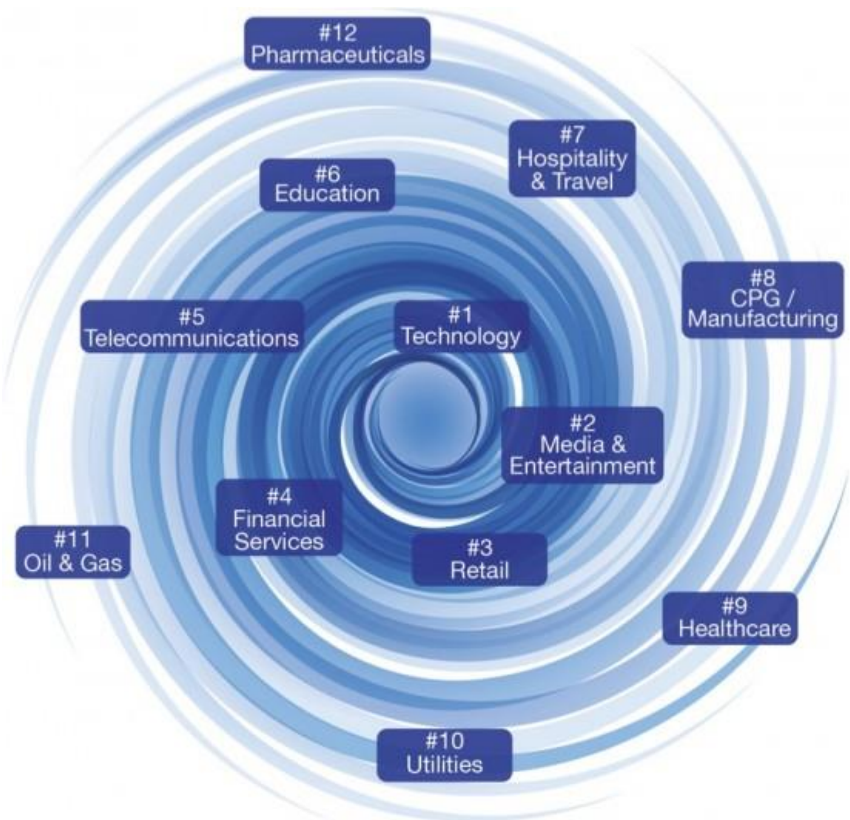
An economist's perspective

Antonio Buttà

Italian Competition Authority

The views expressed here are personal and do not necessarily reflect those of the Italian Competition Authority

Digital disruption is reshaping entire industries



Source: Global Center for Digital Business Transformation, 2015

- Digital content and retailing are two of the industries most affected by the disruptive impact of the Internet
- New intermediaries at the core of online value chains/ecosystems
  - Shape online distribution (horizontal dimension)
  - Shape the value chain vis-à-vis sellers/producers (vertical dimension)
- Two key economic forces at work
  - Market expansion (“creation”)
  - Cannibalisation (“destruction”)

Online distribution and platforms

- **Digital content**
  - Dematerialization: product → services
  - Completely new value chains
  - Platforms often part of larger digital ecosystems
  - New types of distribution agreements
  - Significant "destructive" effect on traditional distribution channels
  - Interaction with IPRs

- **Goods and services**
  - A new distribution channel for producers (which can also sell directly to consumers)
  - New geographic markets for distributors
  - New online sellers, but also "brick-and-click"
  - Platforms' key role as match-makers between sellers (producers/distributors) and consumers

- **Features of online platforms**
  - Provide services that can help markets to work smoothly (lower transaction/search costs, reduce information asymmetries, economies of scale, innovation)
  - Large opportunities to increase consumer welfare
  - Opportunities and threats for traditional sellers/producers (cannibalization, market entry)
  - Concentrated market structure and potentially significant market power
  - Network effects
  - Lock-in and switching costs

Vertical restraints and online distribution

- **Vertical restraints in online distribution**
  - **Platform-driven.** driven by online platforms (e.g. Booking, Apple, Amazon, …) that are defining their business-models. Often, across-platform (price) parity agreements.
  - **Producer-driven.** driven by producers that traditionally use brick-and-mortar distribution channels. Often, non-price restrictions to online sales.

Theories of harm	Possible efficiencies
Restrict entry at the retail level Soften competition between retailers Facilitate collusion	Horizontal externalities and free-riding Specific investments and the hold-up problem Vertical externalities and vertical coordination problems

- **Are competition concerns and efficiencies different in the online world?**
  - Competition concerns and efficiencies may differ as they may differ according to the type of product, level of trade, market/sector under investigation
  - The impact of the Internet on possible efficiencies can go in different directions
  - No general presumption that online and offline are intrinsically different

Vertical restraints under EU competition law

- **Article 101**
  - applies, among others, to vertical agreements
  - whether a vertical agreement actually restricts competition and whether in that case the benefits outweigh the anti-competitive effects will depend on the market structure. In principle this requires an individual assessment under article 101
- **Block exemption regulation provides a safe harbor when**
  - there is no significant market power either upstream or downstream (market shares < 30% for both supplier and buyer)
  - the vertical agreement does not contain hardcore restrictions
- **Hardcore restrictions**
  - the agreement is presumed to fall within the scope of Article 101(1) TFEU and to fail to meet the conditions of Article 101(3)
  - the exemption of hardcore restrictions is still possible on a case-by-case basis. There is no per se prohibition
- **Article 102**
  - may apply to vertical restrictions imposed by a dominant company

Exclusive/selective distribution

- **Companies can operate exclusive/selective distribution systems**
  - **Exclusive distribution**: each distributor is allocated a specific territory or a specific group of customers to which it can actively sell its products. Active sales can be subject to restraints, but passive sales must always remain free.
  - **Selective distribution**: distribution system where the supplier undertakes to sell the goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria. Can restrict active and passive sales to non authorised distributors. Cannot restrict active of passive sales to end users by retailers.

- **The difference between active and passive sales**
  - **Active sales** mean actively approaching individual customers or actively approaching a specific customer group or customers in a specific territory through advertisement in media, on the internet or other promotions specifically targeted at that customer group or targeted at customers in that territory.
  - **Passive sales** mean responding to unsolicited requests from individual customers including delivery of goods or services to such customers.

- **In principle, every distributor must be allowed to use the internet to sell products**
  - **Using a website to sell products is considered a form of passive selling**

Exclusive/selective distribution and online restraints

- **Restraints considered hardcore restrictions**
  - Outright ban of on-line sales
  - Agreements preventing costumers located in another territory from viewing a website or being rerouted to the website of the online retailer which has been assigned that exclusive territory
  - Agreements requiring the retailer to terminate an Internet transaction once the credit details of the customer show that he\she is located outside the retailer's exclusive territory
  - Agreements limiting the proportion of on-line sales against off-line sales
  - Agreements containing higher wholesale prices for goods to be sold on-line compared to the price for the goods to be sold off-line

- **Restraints non considered hardcore restrictions**
  - suppliers do not necessarily have to supply on-line only distributors: the suppliers may require that its distributors have one or more brick and mortar shops or showrooms as a condition for becoming a member of its distribution system
  - suppliers may require that customers do not visit the website of a retailer through a site carrying the name or logo of a third party platform (i.e. marketplace platforms ban)
  - suppliers may, in the context of selective distribution, impose quality standards on the use of a website to resell goods, just as equivalent standards may be imposed on the appearance of a physical shop. This does not mean that the standards have to be identical due to differences in distribution modes.

Final remarks

- **Does the Internet have a disruptive impact on the antitrust analysis of vertical restraints?**
  - Online vertical restraints fit within the traditional framework for assessing vertical restraints
  - Same issues (externalities, free-riding, specific investments, etc.)
  - Need, as usual, an assessment on the basis of a case-by-case analysis
  - In general, similar legal presumptions can apply to both online and offline restraints
- **It is important to have a consistent framework for assessing online and offline vertical restraints under competition law**
  - Clear connection between online vertical restrictions and offline retailing
  - Often retailers operate both offline and online
  - Need to avoid the risk of distorting distribution strategies
- **Competition concerns 2.0**
  - Competition between online intermediaries/platforms (often, high degree of market concentration)
  - Competition between online and offline distribution outlets
  - Competition between goods/services (inter-brand vs. intra-brand competition)
  - Need to distinguish between real competition problems and tensions deriving from industries adjusting to the disruptive impact of the Internet (e.g. issues related to buyer power)
- **Efficiencies 2.0**
  - Need to preserve market efficiency and consumer welfare deriving from innovation
  - Likelihood and size of online free-riding needs to be properly assessed. It cannot be presumed that externalities are one-way (online retailers free-ride on offline retailers)
  - The nature and characteristics of the product/service are key