

Three entitlement problems in digital markets and the distributive nature of antitrust

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Many conflicts that competition law faces in the digital economy can not only be understood as problems of competitive harm but also as issues of appropriation. Reviewing recent European case law, I identify three typical disputes over the exercise of property entitlements and explore how competition law shapes legal regimes of appropriation in digital markets.

Digital market disputes as problems of entitlement allocation

In order to draw the parallelism between the problem of competition and the problem of appropriation, this paper discusses cross-cutting entitlement conflicts in digital markets from selected case studies. Each conflict can be understood as a situation in which the current entitlement distribution is unclear or unsustainable. Like Coase's cattle and crops (and actually any conflict that law deals with), each issue can therefore be reduced to a simple question: to which party should the legal entitlement in dispute be allocated?

Competition law plays a role in the normative resolution of all three entitlement problems. The goals and reasoning of property law are therefore as relevant for each entitlement conflict as competition law's proper goals and reasoning. And in effect, perhaps more than purpose, competition law can be conceived as a system of entitlement allocation. Indeed, it is no news that during a period of technological advancement new markets require a definition of the initial allocation of entitlements, i.e. the emergence of new property rights or at least the tuning of existent ones to the new reality (Demsetz 1967: 350).

1. Access to software affected by network externalities

Some pieces of software, like operating systems, app stores or internet search engines, benefit from network externalities. Unlike a physical infrastructure network, software affected by network externalities is an exclusively intangible good. This means that these pieces of software are hard to replicate for competitors not so much because of supply-side costs or technological advantages but because of demand side properties like the uncertainty of the emergence of network externalities in multi-sided markets, tipping and winner-takes-all effects.

Competition law enforcement has identified some of these pieces of software. Indeed, there is a genuine run

towards its appropriation by digital firms, which is monitored by competition agencies. Our example is the *Google Android* case (Case 40099, *Google Android*, European Commission decision of 18 July 2018).

The *Google Android* case is about three different types of abusive conduct. We are interested in the set of questions around Google's anti-fragmentation agreements and the modified versions of the Android smartphone operating system (Android OS), the so-called Android forks. For the context, since Google acquired the developer of Android OS in 2005, it handles Android OS as an open-source project. Beyond creating its own versions of it, Google gives third party developers free access to the source code and allows them to create their own versions. However, through so-called anti-fragmentation agreements, Google obliged all the equipment manufacturers who wanted to pre-install on their mobile device certain Google proprietary apps, namely the Play Store and Google Search, to commit to not develop or sell any devices running on Android forks. This made Google's own version of the Android OS the only viable OS for hardware manufacturers, because smartphone users strongly value access to Google's proprietary apps. This is the critical point in the case.

The European Commission (EC), after having set out that Google has a dominant position in the market for general internet search services, licensable smart mobile operating systems and app stores for the Android mobile OS, decided that Google abused its dominant position by effectively hindering the development of Android forks that could become a competitive threat to its own versions. By preventing the installation of its proprietary apps on Android forks, Google impeded from prospering alternative Android OSs that could have promoted alternatives to the Play Store and to the Google Search engine. Google was fined and ordered to stop impeding hardware manufacturers from selling devices based on Android forks.

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The parties in the conflict are Google on the one side, the main developer of the Android ecosystem, and hardware manufacturers on the other side, which need to install an OS on their devices in order to sell functional smartphones. As Android is a widespread product that benefits from network efficiencies, hardware manufacturers could either install the Google version of Android and accept not to develop forks or create their own fork and accept not to get the Play Store and other Google proprietary apps. The entitlement in dispute concerns the control over forks and could be either distributed to Google or to the hardware manufacturers.

In the language of property, entitlement to be distributed concerns the capacity of a party to exclude the other from interacting with the common object. This means, independently of how it is distributed, the solution of the conflict will necessarily give one party the “power to control, to varying degrees, [other people’s] behavior in connection with the thing” (Perzanowski & Schultz 2016: Chapter 2, “Property and the Exhaustion Principle”, para. 22). This is precisely the exercise of a property right and it is why we can interpret the situation as a problem of appropriation. Under the hood of the competition case, the situation reveals itself as a dispute over Android OS access and modification rights.

It becomes clear that the exercise of property rights has been shaped after the intervention of competition law, although not explicitly. The outcome of the EC case is that hardware manufacturers are granted access and modification rights and the right to sell modified versions of an OS that was and is still formally owned by Google. The *Google Android* decision shifted Google’s ownership position of Android OS a bit towards the more precarious end.

2. Limits to the appropriability of user data with network externalities

A certain amount of data collection and appropriation is inherent to the business model of many digital firms. For example, the data that Facebook collects from users ultimately permit the firm to provide their social network service for free. At the same time, much of firms’ output that emerges from data collection can also be conceived as a by-product of the data subject’s behaviour. Should collected data belong in the first place to the data subject?

As network externalities can also affect user data, the appropriation of user data can sometimes stand as a proxy for the capture of supplementary network externalities. In general, “a good exhibits network effects if the value to a new user from adopting the good is increasing in the num-

ber of users who have already adopted it.” (Varian 2017: 1).

One could be tempted to argue that network externalities are not a good, i.e. that there is nothing to appropriate or capture. But network externalities are more than a mere descriptive economic model. In digital markets, firms carefully design multi-sided markets with complex pricing structures in order to make network externalities come into existence. And firms have sometimes great struggles in doing so (Hagiu 2014: 5). The second entitlement problem is about the question of the extent to which they should be able to do so in the particular context of user data appropriation, especially when markets have tipped. Our example is the ongoing tale of the 2014 Facebook/WhatsApp merger, and in particular the question of whether automatic profile matching between Facebook and WhatsApp users should be allowed.

The EC authorised Facebook to acquire WhatsApp for USD 19 billion in 2014. At that moment, 70-90 % of WhatsApp’s active users were also using Facebook (Case M.7217 - *Facebook/WhatsApp*, Commission decision of 3 October 2014, paras. 165-166). Although Facebook submitted to the EC that matching the user profiles of WhatsApp and Facebook would be technically impossible, it did so in 2016 and in 2017 was fined by the EC. However, the merger approval was not revoked (Case M.8228 - *Facebook/WhatsApp*, Commission decision of 17 May 2017).

In 2019, the German Bundeskartellamt took up the same conflict, but on slightly different grounds. Its argumentation was based on a combination of competition law elements and data protection rights of users, arguing that users had no choice other than to accept profile matching when using the services, which led to a lower standard of privacy protection. Consequently, the Bundeskartellamt prohibited automatic profile matching (B6-22-16, Fallbericht vom 15. Februar 2019). Later, the Düsseldorf Higher Regional Court blamed the authority for the methodological mixture between competition and privacy aspects and cancelled the authority’s interim measures (Beschluss VI-Kart 1/19 (V), *Facebook v Bundeskartellamt*, 2019). Finally, the Bundesgerichtshof upheld the initial decision on provisional measures (Bundesgerichtshof, Beschluss des Kartellsenats vom 23.6.2020 - KVR 69/19). The decision on the merits of the case is pending.

The underlying entitlement dispute revolves around the exploitation of supplementary network externalities arising from matching two user bases. It is safe to say that if the Facebook and WhatsApp services are allowed to

integrate and to match profiles, additional positive data network externalities will arise, and Facebook would have even more accurate preference profiles of the users. What Facebook wanted to appropriate in 2014 was probably not WhatsApp as a business itself, nor its mere userbase, but the very possibility of capturing these supplementary network externalities. When it comes to the users, the dispute arises primarily from a privacy concern, i.e. a concern about the loss of control over personal data. This touches on the fundamental debate over whether personal data should only be protected by fundamental rights such as privacy rights or whether they should be instead protected by property rights. Indeed, some argue that personal data should become a tradable good owned by the data subject (Zech 2015). This, however, has brought up concerns about competitive harm, as it would probably foster the dominant position of data collecting firms on tipped markets (Petit 2020: 203).

3. Claims over digital content

Content arises when parties interact on a digital platform. It can also be affected by network externalities, but contrary to user data content is not only a by-product of human behaviour but a product of human work. Therefore, a special regime of appropriation is necessary.

Our example is a decision by the French Autorité de la concurrence (the Autorité) concerning a dispute between a group of press publishers and Google (*Décision n° 20-MC-01 du 9 avril 2020*). The case concerns the introduction of the so-called ‘neighbouring rights’ of press publishers of snippets of their work that are displayed on different Google websites.

For the context, Google and other search engines display snippets of online press articles. A snippet is a preview of the article that contains a hyperlink to the publisher’s website, the title of the article, the date, a few sentences and a thumbnail of the article’s photography.

EU Directive 2019/790 on copyright and related rights in the Digital Single Market created *sui generis* property rights for press publishers. Publishers of copyright-protected press publications are granted exclusive reproduction rights and rights to make the publications accessible to the public (art.15). These are the ‘neighbouring rights.’ The directive insists on the fact that “online content-sharing service providers” (read: Google) must secure an authorisation of the right holders in order to make the press publications available to the public (art.17). There is no further indication on the negotiation process or fair compensation. The legislator seemed to believe that it was sufficient to cre-

ate a property right and let free bargaining between press publishers and ‘online-sharing service providers’ play out.

This did not go well for the press publishers. Search engines represent most of the traffic that is redirected to the press publishers’ webpages. Therefore, Google has a strong bargaining position when it comes to obtaining the publishers’ authorisation to make the press publications available to the public. Google decided to no longer display snippets of the news content unless the press publishers granted Google the authorisation to do so free of charge, which most of them did (Autorité de la concurrence, 2020).

The case was brought to the Autorité by a group of French press publishers. Besides their complaints on the merits of the case, they requested interim measures to enjoin Google to renegotiate the compensation scheme in good faith. In the decision on interim measures, the Autorité stated that Google is susceptible to having a dominant position on general internet search services, given that it handles 90% of general search requests in France. By denying negotiations on the compensation for the licences, Google could have abused its dominant position. Interestingly, this is how the Autorité interprets the goal of the directive and the French transposition law: “the Autorité notes that, in the state of the investigation, [Google’s conduct] seems difficult to reconcile with the purpose and scope of the law, which aimed to redefine the sharing of value in favour of press publishers vis-à-vis platforms” (Autorité de la concurrence 2020). The Autorité, insisting on the financial difficulties of the press publishing sector, decided to enjoin Google to renegotiate in good faith the compensation for the license with the press publishers. The case on the merits is pending.

The entitlement in dispute between Google and the press publishers is the compensation for displaying. The case is not about the existence of the so-called neighbouring rights; these are positive property rights that the legislator has already created. Instead, the case turns on the exercise of this right. This entitlement dispute is about the very effectiveness of an already existing positive property right. If the Autorité decides in favour of the press publishers, and this seems likely, then it creates a positive market value for neighbouring rights. This would strengthen the ownership position of press publishers.

Raising awareness of the distributive nature of competition law

Although competition law has not been conceived as a tool to resolve individual entitlement disputes, it is a reli-

able instrument to localise them. Thanks to its sensitivity to the functioning of markets and to the distribution of economic power, competition law excels in identifying the assets that firms try to capture and to exploit in digital markets. This paper has found three of them: software, user data and digital content, all of which are affected by network externalities.

As the case studies show, the intervention of competition law in property rights is not unilateral. When it configures the conditions for access and exploitation of digital assets, it shapes strong and precarious regimes of appropriation. This flexibility is necessary. Markets can be crippled when unnecessary property entitlements are introduced or granted for too long (Hovenkamp 2013: 60), and also when necessary property entitlements are not introduced (Epstein 2009: 11). In addition, granting property entitlements can have no effect at all, as we saw in the third case study.

The definite response to the question of what should be regarded as an optimal initial allocation of entitlements remains a policy choice. According to Melamed and Calabresi, any entitlement dispute can be solved either in order to increase efficiency or in order to make a desired distributive outcome happen. The desired distributive outcome can tend to more equality, but also to more inequality between the parties of the dispute (Melamed & Calabresi 1972).

Competition deciders are therefore advised to take into account the long-term distributional implications of their choices. By shaping the capacity of companies to appropriate central digital goods, they also decide how the tremendous value arising from digital technology is shared throughout society.

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