Rigorous empirical research on intellectual property

STUDENT CONTRIBUTION

FRAND to address competition issues posed by major digital platforms?

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Summary

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SUMMARY			
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Abstract

Major digital platforms (MDPs) such as App Store, Amazon e-commerce site, Google search engine, or Facebook have increasingly shown their significance in our daily lives. The convenience they bring, nonetheless, may distract us from noticing how they are capable of executing their powers to influence different markets or even politics on a global scale. While competition (antitrust) law struggles to deal with the advanced, cutting-edge nature of MDPs, some scholars and antitrust authorities have conceived of applying FRAND (or a quasi-FRAND model), which has proved considerably successful in the field of telecommunication standardization, as a regulatory measure to control unprecedented powers of MDPs. Having said that, to that end, certain complicated policy and technical issues must be analysed and addressed thoroughly.

Keywords

Digital platforms; Multi-sided platforms; GAFAM; FRAND; Antitrust; Intellectual property; Essential facilities doctrine; P2B Regulation

Summary

1. *Power of Major Digital Platforms*

"Digital platform" could be understood as an online mechanism that allows interaction of different user groups to generate values for at least one group. Google search, Amazon e-commerce site, Microsoft Windows, Facebook social network and Apple's App Store are digital platforms; and given their prominence and influence, they can be considered "major digital platforms".

MDPs have shown three forms of power:

- MDPs serve as a gatekeeper who control the market access.
- MDPs may leverage their "home advantage" to outperform their own business users in adjacent markets.
- MDPs collect and exploit a huge amount of data from every transaction conducted via their platforms, which later may either cause a huge

[1] Minh Hung Tao, 'FRAND to Address Competition Issues Posed by Major Digital Platforms?' (2020) European Competition Journal <http://doi.org/10.1080/17441056.2020.1834993>.

"information asymmetry" between MDPs and business users or function as a bottleneck for anyone wishing to launch competing platforms.

The execution of those powers is exclusionary in nature: it restricts competitors' access to necessary inputs and/or distribution channels along the value chain, or, at least, manipulates the conditions of such access, making it less profitable and advantageous for alien business users relative to their affiliated ones.

2. Competition Law Struggles to Address These Powers

This said, antitrust law struggles to address MDPs' powers. First, to say whether a company has a dominant position in the market, we must determine "relevant market" and then the company's "market power". "Relevant market" is determined on two dimensions: products and geography, and the products dimension is defined based on substitutable goods or services. For multi-sided digital platforms, however, products supplied on different sides are mostly non-substitutable, leading to a tricky question on how many markets need to be defined: one integrated market or two separate-product markets. Loose determination of "relevant market" entails hardship in assessing "market power". Moreover, estimating the "market share", a traditional parameter of "market power", seems challenging since the price, which can be measured quantitatively, may not reflect the true value of products and services in the platform economy. Second, the "rule of reason" analysis for acts of monopolization in the US or the "effect-based" analysis to abuse of dominance in the EU requires presence of anticompetitive effects, which will be considered in parallel with efficiencies. The interdependence among different sides of the market, once again, complicates the assessment as some acts that cause anti-competitiveness for a single-sided market such as "predatory pricing" may be judged otherwise for multi-sided digital platforms.

Meanwhile, the "essential facilities doctrine", which parties usually resort to when they seek for important access, has never been formally recognized by either the US Supreme Court or the EU's courts. Even if it actually exists, its indispensability element, i.e., "infeasibility of an alternative to the facility" (in the US) or "technical, legal or economic obstacles making it impossible/unreasonably difficult to replicate the facility" (in the EU), is a very strict requirement that may exclude MDPs from its domain.

3. FRAND Proposed to Apply to Major Digital Platforms

Acknowledging difficulties of antitrust law containing MDPs' powers, both the United Nations Conference on Trade and Development (UNCTAD) and the European Commission envisioned a framework that ensures "*a level playing field*" and "*open, fair, and non-discriminatory*" market for all businesses in the data economy. Many scholars such as Heim, Nikolic and Senator Warner literally suggest applying FRAND as a regulatory measure to major digital platforms.[2]

[2] Mathew Heim and Igor Nikolic, 'A FRAND Regime for Dominant Digital Platforms' (2019) 4iP Council; Mark R Warner, 'White Paper: Potential Policy Proposals for Regulation of Social Media and Technology Firms'

Heim and Nikolic appraise FRAND as a frequent remedy in antitrust cases involving abuse of dominance or merger in a diversity of sectors, and even suggest that MDPs adopt FRAND *ex ante* to foreclose any antitrust accusations. Since the MDPs' powers raise concerns about restricted access and discriminatory treatment, FRAND apparently sounds as a solution that exactly addresses these concerns, even though FRAND terms and conditions may vary from case to case.

4. Aspects to Consider when Applying the Proposed FRAND Model

To tailor FRAND as a regulatory measure to MDPs, first, we need a workable definition for "major digital platforms". Parameters like influence and prominence seem fine for research, but too qualitative and subjective for legislative purposes. On the other hand, if only digital platforms that hold a dominant position were to be subject to the FRAND model, it would lead us back to a burdensome task of assessing the market power of such digital platforms.

Second, we should be mindful of the possibility that FRAND would put targeted companies into awkward situations where they must behave inconsistently with profit-maximization incentives, e.g., to continuously share fruits of their investment with their competitors or treat their affiliated entity in the downstream market as if it were alien. Having said that, a well-applied FRAND model would supposedly allow the company to be fairly and adequately rewarded so that it would still be incentivized to innovate.

Third, the proposed FRAND would inevitably intervene MDPs' intellectual property rights (e.g., trade secrets associated with Google search algorithms or *sui generis* right to database associated with users' data collected by Facebook). However, a well-applied FRAND model would fairly reward IPRs holders (i.e., MDPs) as what have been going on in the field of SEPs.

Fourth, we may have to create a mechanism that is an equivalent of the *Huawei framework* in the SEPs context to ease imbalance between MDPs with "home advantage" and their business users.

Lastly, interpretation of FRAND would be a key issue as how it is in the SEPs area. Even though parties have been able to determine FRAND terms in bilateral negotiations in a vast majority of cases, there are ones where parties ended up in litigation, and courts have been gradually providing a framework of FRAND. So far courts around the globe have relied heavily on freely negotiated comparable agreements to determine FRAND. Nevertheless, as there are limited or no substitutes for MDPs, courts may need to rely on agreements in less comparable contexts.

5. Summary and Looking Forward

To summarize, the successful application of the proposed FRAND model requires, among others, a legal definition of MDPs, a proportional resolution to the IPRs

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<www.scribd.com/document/385137394/MRW-Social-Media-Regulation-Proposals-Developed> accessed 2 April 2020.

dilemma, and a protocol for FRAND negotiation in the MDPs context. The proposed FRAND model would also struggle to work without reliance on certain norms of antitrust law, meaning antitrust law needs to be improved as well. Even for digital platforms to voluntarily apply FRAND as a "safe harbour" to avoid antitrust scrutiny, antitrust sanctions must prove sufficiently powerful and deterrent beforehand.