Regulating digital market competition in Africa: priorities, challenges and best practices.

Lessons learnt from other jurisdictions.

John Davies, Independent Economist, presentation to the ACF, Port Louis March 2024

John Davies is a Member of the UK Competition Appeal Tribunal (CAT) and an Independent Consultant. This presentation was prepared in a personal capacity and does not represent the views of the CAT.

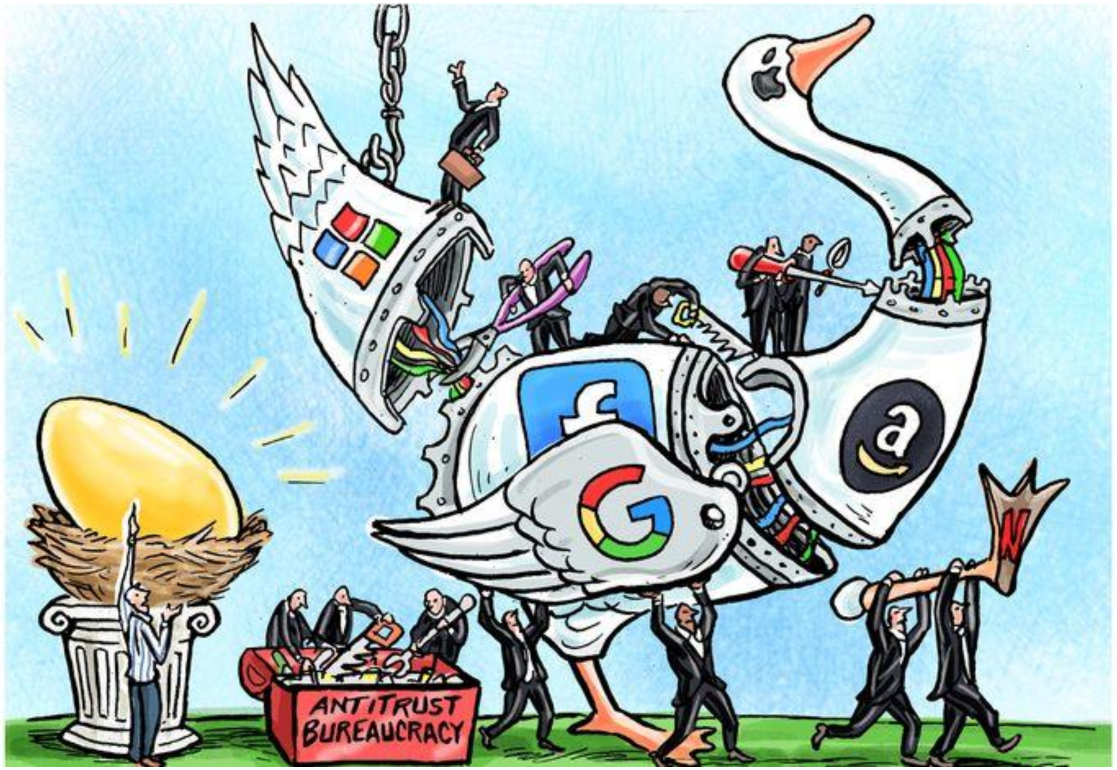
My background and declarations

2023 -	Member, Competition Appeal Tribunal and Independent Economist
2016 – 2023	Consulting economist, Head of London Office, Compass Lexecon
	• Advised Amazon during EC Article 102 investigation
	• Advised Spotify, Epic Games and others complaining about Apple App Store
	• Other relevant clients: Verizon, Qualcomm, Amazon Web Services
2011 – 2016	Head of Competition Division, OECD
2009 – 2011	Executive Director, Competition Commission, Mauritius
2003 – 2008	Chief Economist, Competition Commission, UK
1994 – 2003	Consulting economist, various firms

My topic: digital platform competition interventions in Europe

Are the tech giants:

‘geese laying golden eggs’ …..



… or just old-fashioned monopolists…?

EU Article 102 cases

Name	Description	Opened	SO	Decision	Appeals?	Fine	Remedies
Google Shopping	Self-preferencing, leveraging search monopoly into shopping search	2010	2015 and 2016	2017	GC upheld 2021, ECJ ongoing.	€2.4 bn	Internal separation, auctioned access to the 'shopping box'
Google Adsense	Exclusivity terms	2010	2016	2019	Ongoing	€1.5 bn	Ceasing conduct
Google Android	Bundling, requiring installation of search tools on Android screens	2015	2016	2018	GC upheld 2022	€4.3 bn	Phone OEMs free not to install Play; choice screens for browser and search.
Amazon	Self-preferencing, anti-competitive use of third party data	2019	2020	2022 (comts)			Refraining from conduct, equal treatment, monitoring trustee appointed.
Apple Music Streaming	Self-preferencing, restriction of customer choice?	2020	2021 and 2022	Mar-24		€1.8 bn	Removing 'anti-steering' provisions.
Google Ad tech	Dominant on some ad tech platforms, self-preferencing own ad exchange.	2021	2023	Ongoing			Structural?

E.C. has also pursued chip makers (Intel, Qualcomm) and been less successful on appeal.

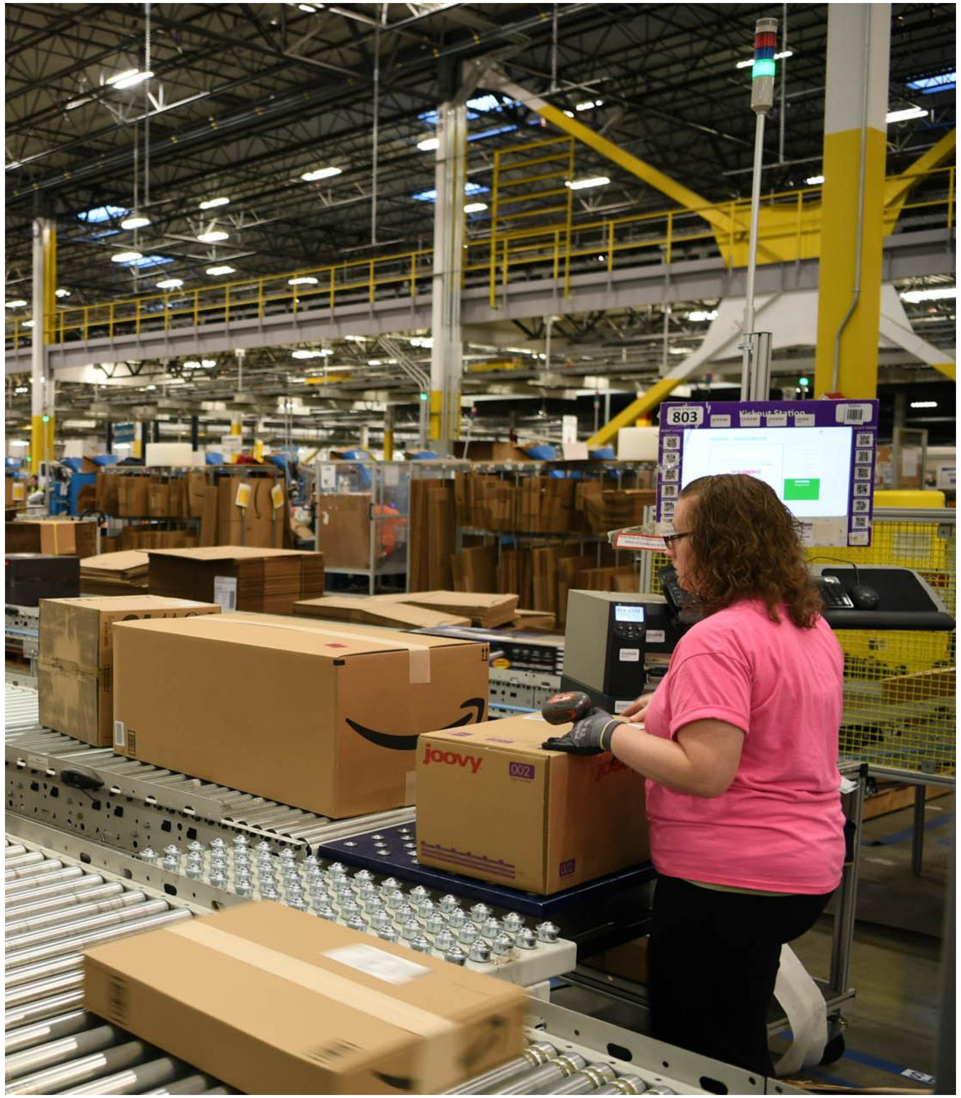
Amazon Marketplace (settled)

Concerns about use of 3rd-party sellers' data ; plus self-preferencing ''Buy Box', including for sellers using Amazon logistical services.

Some complexities:

- EC focused on services to the seller side of online marketplaces (NB, FTC looking at 'online superstores').
- Amazon would argue downstream product market competition imposes constraint.
- Are 3rd party sellers consumers of Amazon services or competitors to Amazon?

Behavioural remedies for conduct, but market position unaffected.



Music streaming / app stores

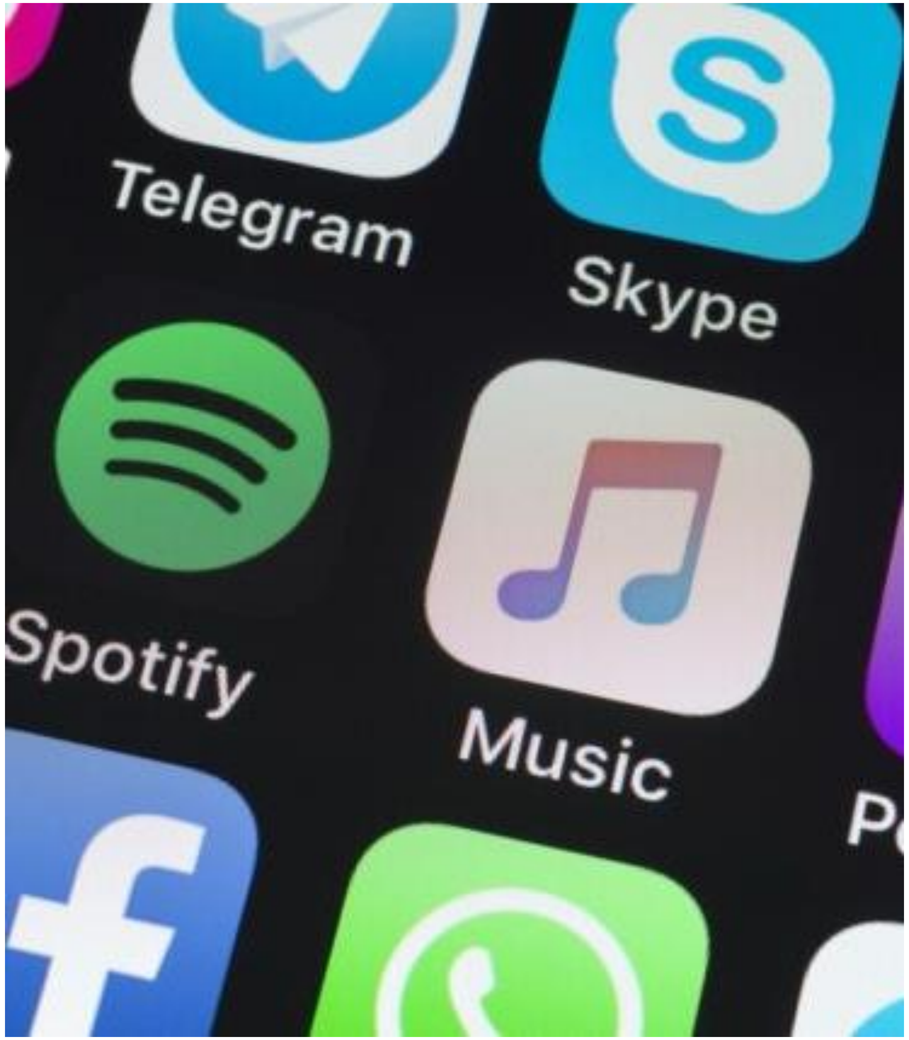
Concerns about Apple requiring 15/30% commission on subscriptions to music streaming within App Store

- ‘Anti-steering’ rules restrict apps’ ability to tell customers about alternatives
- Benefits Apple Music?

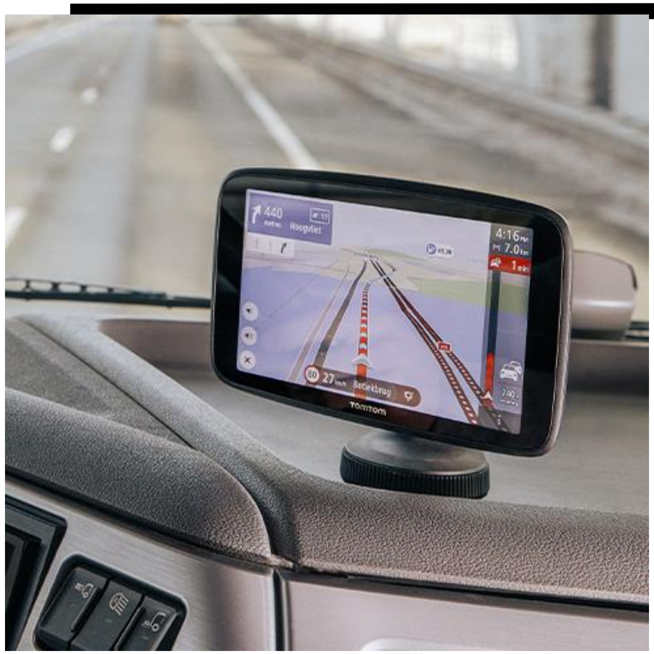
Some complexities:

- Is Apple dominant in a separate market for iOS apps, or does Android constrain it?
- Mobile apps just one channel for listening to music or paying subscriptions.

Remedies only for music streaming.

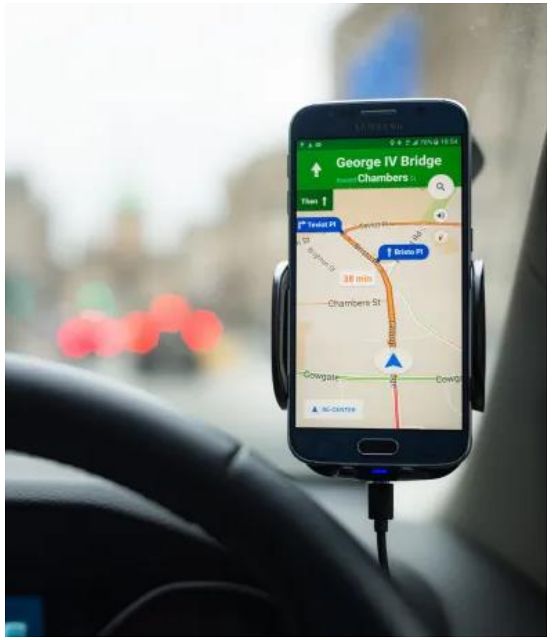


Satnav and Google Maps: Merger control in innovative markets



"Neither Google, nor Microsoft has developed its own map database covering the EEA. The same time-lag would apply as for existing providers of navigable digital map databases, which makes timely entry by such firms unlikely." *E.C. Case No COMP/M.4854 - TOMTOM/TELE ATLAS. May 2008.*

Google Map satnav available in Europe 2009, Tomtom sales declined immediately.



1. Hard to predict the future
2. When a GAFAM firm eliminates a commercial market with a free (or 'free' product, is that a good thing or a bad thing ??

Killer acquisitions? Buying nascent competitors?

Around 500 acquisitions by ‘GAFAM’ over 10 years, some at high premium over market value. Average age of targets 6 years. E.g.

- Facebook / WhatsApp
- Facebook / Instagram
- Google / YouTube
- Microsoft / Skype

Concerns: nascent competitors / killer acquisitions?

- Studies suggest only a small proportion directly anti-competitive
- Could be pro-competitive and innovative: rewarding start-ups.

Maybe some long run, reinforcing dominance?

Some personal, tentative and initial conclusions…

Debate is often too crudely between:

- ‘Tech bros’ supporting these companies, regardless
- Some ‘neo-Brandesians’ for whom ‘bigness is bad’.

These are not oil monopolies or cement cartellists. GAFAM are innovative and fiercely competitive in many ways, particularly against each other. But is dynamic competition between just five giant (US) companies enough?

Remedies exceptionally difficult, even for pure competition problems and still more so when considering other social objectives.

Requires a new regime for intervention, on top of competition law.

Possible policy responses

1. Business as usual
    - Investigate abusive conduct, try to prevent concentration through merger control.
    - Possible tweak: lower thresholds / proof standards

2. Ex-post market / sector investigations:
    - ‘Harm’ not limited to conduct, so goes beyond ‘standard’ law.
    - CA must have power to intervene, compel information provision etc
    - Behavioural remedies as sector-specific regulation or structural remedies.
    - Requires very high trust in competition enforcement institutions

3. Ex-ante regulations:
    - Identify a set of firms to which they apply
    - Establish set of prohibited behaviours
    - Enforcement mechanism?
    - Monitoring effectiveness?
    - Procedures for updating?

EU solution: the DMA

Identify ‘Core Platform Services’. List of 10 broad services, including search, intermediation platforms, video sharing, browsers, operating systems…

Define Gatekeepers (quantitative criteria): 6 so far (GAFAM + TikTok), covering 21 Core Platform services:

- Alphabet: Google Maps, Google Play, Google Shopping, Youtube, Google Search, Chrome, Google Android, Google
- Amazon: Amazon Marketplace, Amazon,
- Apple: App Store, iOs, Safari
- ByteDance: TikTok
- Meta: Meta, Facebook, Instagram, WhatsApp, Messenger, Meta Marketplace
- Microsoft: LinkedIn, Windows PC OS

Note that a ‘tech giant’ with a small share is EXCLUDED: e.g. Microsoft Bing.

EU solution: the DMA

Article 5 ‘self-enforcing obligations’. **THOU SHALT NOT…**

… use data from a third party to compete with that third party; combine data between CPSs, prevent users informing customers of alternatives, prevent users offering better terms elsewhere, bundle the CPS with other services etc…

Article 6 ‘obligations that are susceptible to being further specified’. **THOU SHALT DESIGN AND PROPOSE UNTO THE EC A MECHANISM TO**:

…avoid self-preferencing; enable the gatekeeper’s software to be installed; allow competing software to be installed (including by-passing app stores); allow interoperability; allow access to search engine data on reasonable terms etc…

Article 6 obligations raise questions of how to monitor compliance.

UK solution: the DMCC

Designation: following investigation and public consultation, as having Strategic Market Status (SMS) in relation to one or more digital activities.

- The CMA expects to start 3 to 4 SMS investigations within the first year of the new regime coming into force.

For designated firms:

- Targeted ‘conduct requirements’ (codes of conduct). CMA can investigate suspected breach and impose interim measures.
- Pro-competitive interventions, possibly around 4 months, to intervene.
- Requirement to notify mergers.
- Penalties for breach of enforcement orders.
- Right of appeal.

What's next?

We have different models but not much evidence yet to judge between them. This will change.

In US antitrust cases: will courts will accept agencies 'new' perspective?

In EU, how will compliance be monitored, does 'contestable' require actual competition?

UK experience with DMCC: initial decisions and court challenges, in the CAT.

Still early days…

(bad) AI art produced using OpenArt (Meta), using Chrome (Google) on a Microsoft laptop.

Thank you

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