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DESIGNING ANTITRUST REMEDIES FOR DIGITAL MARKETS

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1. CLEAR VISION

First step: the authority must possess a clear view of its objectives.

What is the role of antitrust in the country?

Who is protected by the antitrust laws?

- Competition, competitors, consumers, the competitive process or a subset of these?

What is the antitrust standard?

- General efficiency or consumer welfare?
- In Brazilian merger review, the consumer-welfare standard has been clearly written into the law. In abuse cases, the standard is not as clear, even though this standard has been widely used in CADE precedents.

What are the objectives of antitrust law in Digital Markets (DM)s?

- Fostering innovation is a clear aim.
- What about protection of privacy; distribution of wealth? Are/should these be considered?

2. RECOGNIZE THAT DIGITAL MARKETS ARE DIFFERENT

Second Step: Authorities must be responsive and attentive to the characteristics of digital markets.

Not all digital markets are equal

Not all data is equal

Not all tech-related abuse is equal

Market structures are different:

- Tipping, Network Externalities, economies of scale and scope
- Consumer behavior increases market power
- Zero Price does not mean free

Competition for the market and not in the market

Per se Legality:

- eliminating per se legality as it relates to innovation issues that stem from anything other than particular facts.
- Cost of inaction is higher than we thought a few years ago.

3. IDENTIFY WHAT IS BEING REMEDIED

Third step: identify the problem.

The anticompetitive strategies are still the same at their core (market foreclosure, exploitative conduct, RRC, input foreclosure, exclusive dealing etc.), but they are being *implemented* differently and demand new theories of harm.

- Consumer Manipulation
- Bottlenecks
- Self preferencing
- Closed architecture
- Data collection (resource dependency)
- Choice architecture
- Architectural Advantage
- Acquisition or exclusion of nascent / potential competitors (sometimes before they even reach the market)

As such, we need to update remedies and implement them differently as well.

A fine and an order to cease may be insufficient.

CONSUMER WELFARE STANDARD

Authority should be concerned with protecting the competitive process and access of competitors to the market;

Harm can be identified by change in price, supply and other non-price factors such as quality, variety.

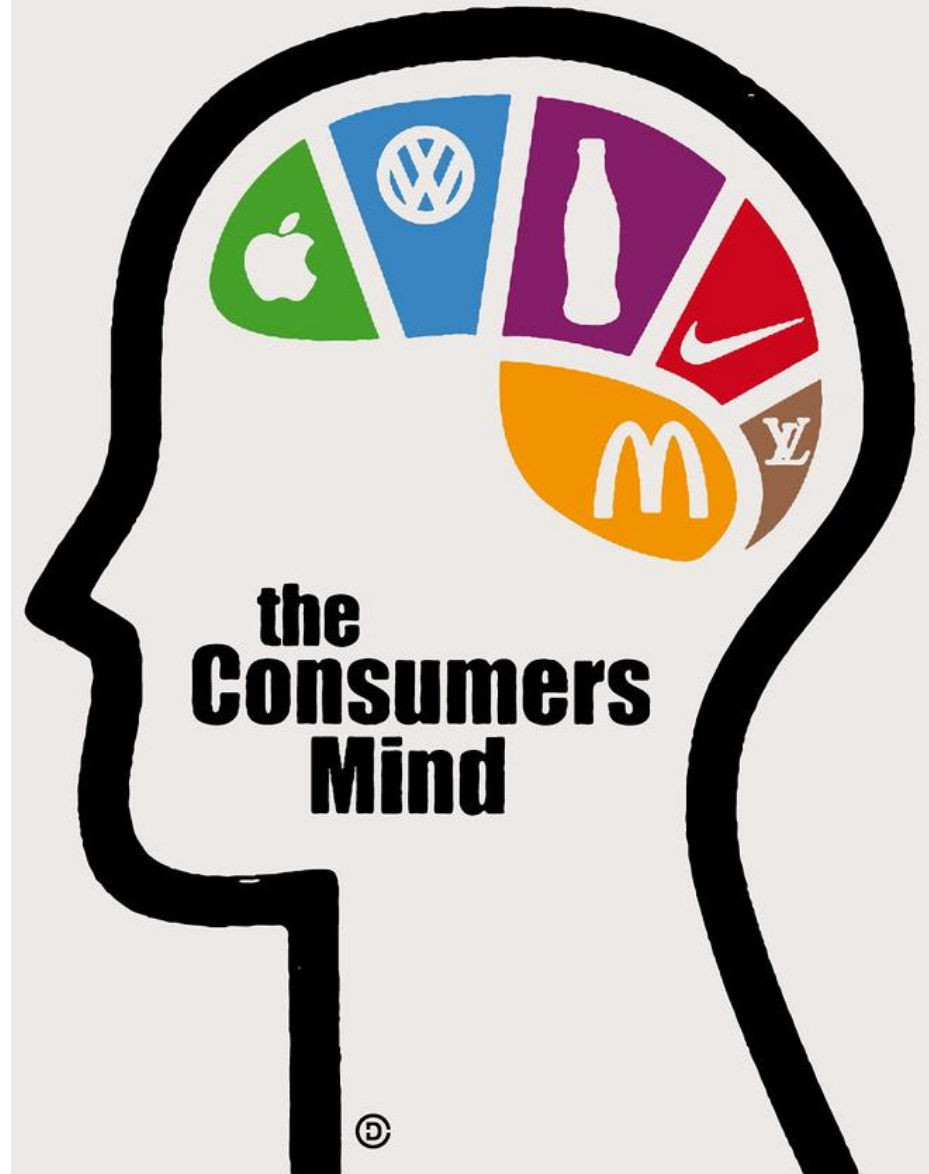
Need to update the standard:

- Are innovation, privacy and convenience non-price factors or are they a dimension of quality?
- Should entry become a non-price factor?

Entry promotes competition and raises consumer welfare; but DMs have little entry:

- Myopic and inertial consumers
- Anticompetitive conduct
- Acquisition of the entrant

Can we assume harm to consumers if entry is impeded?



POSSIBLE REMEDIES

Remedies need to be designed on a case by case basis. What matters is designing problem-specific remedies that aim at eliminating the root of the problem.

- Data portability
- Interoperability
- Limit use of information
- Collect data: create a baseline and a database for monitoring
- Behavioral nudges
- Open standards
- Divestiture of data
- Change to market structures
- Divestiture of assets/previous acquisitions

If the issue is self-preferencing, for example, then the remedy should be to not allow consumer manipulation. (difference between IE and Shopping remedies in Europe)

Be aware that DMs remedies will most likely NOT lead to a fragmented market structure.

BEHAVIORAL OR STRUCTURAL?

There is a preference for “cleaner” structural remedies. However, in DMs this boundary is not as clear.

Brazil has imposed behavioral remedies in DMs

- OTA: prohibited certain MFN clauses;
- Banking and fintechs: cease anticompetitive bundling and exclusive dealing.

Brazil has imposed quality-related remedies in non-digital markets

- Kroton-Anhanguera – merger involving education

Behavioral might be more effective than structural in DMs, but ultimately lack of experience suggests that a case-by-case basis may be more prudent.



FOOD FOR THOUGHT

Role of **behavioral biases** is not sufficiently understood or taken into consideration in the antitrust world. We need to consider behavioral economics, as well as IO.

- Why aren't we using more behavioral economics?

Look at the **ecosystem** and not only the product

Mistakes will be made. Authorities need to acknowledge that they are inexperienced and remedies in DMs are difficult.

We need to leave room for perfecting remedies in the event that the remedy does not adequately address the problem.

Which means → the problem needs to be adequately and clearly **identified**.

Advocacy: increased interaction with **regulators**

Participation:

- Authority is ill-equipped to design a remedy without the input of the companies and third parties
- Provide incentives for parties to design remedies.

Will take **time**: requires a paradigm shift in remedy design and the extent to which authorities are willing to “intervene”



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THANK YOU