

Breaking up is hard to do

Blog post by Global Counsel Chairman Peter Mandelson, 25 April 2018

I call it the Neil Sedaka question. Whenever I am in California, the conversation soon turns to whether, for the FANGs, in Sedaka's words, "breaking up is hard to do"? This issue has US tech entrepreneurs, corporates and investors in a state of high anxiety. This is no surprise. The legacy of Europe's Microsoft investigation in the 2000s and the IBM remedies in the 1980s have left a deep impression on the US tech community.

As I return to California next week, I will no doubt hear Sedaka's lyrical question on many occasions. I will have good news and bad news for my American friends. The good news, no, the FANGS and their friends will not be broken up by Brussels. The bad news, the European Commission has worked out how to inflict major behavioural remedies without having to impose a structural break-up of the businesses.

US tech leaders are making the mistake that they accuse many of the legacy businesses they have disrupted of making: they are expecting an analogue solution to a digital problem.

The radical measures which EU Competition Commissioner, (Super) Mario Monti imposed on Microsoft in 2003 to restrict the bundling of the Internet Explorer browser with the Microsoft Office package is now only one tool in the commission's armoury. The policy toolkit of Margrethe Vestager, today's EU Competition Commissioner, is much slicker than her predecessor's and is moving beyond traditional concepts of competition enforcement and increasingly drawing on legislative tools. While the European Commission is not known for its joined-up thinking, on this issue, it is taking a very sophisticated approach, reflecting a new industrial era.

Consider GDPR, the EU's new privacy law. With its enforcement date now a month away, you have a slew of US tech firms insisting that they will respect the principles and approach of the new rules, not just in the EU but across all their global markets - and they expect their users to demand this (even Facebook have said that, despite changing their T & Cs in light of GDPR, they intend to offer their users across the globe the same privacy rights as Europeans). Or take a look at the Commission's investigation into Apple's tax policies, while the Irish continue to fight this through the courts, there is no doubt that the days of the "double Irish" are coming to an end (consider how Snap make a virtue of their transparent and localised tax payment plans).

Don't forget the decision by the Commission to fine Facebook retrospectively after the acquisition of WhatsApp. In time, in my view, this move by Vestager will be seen as presaging the most radical review of competition law that we have known. No longer will turnover and market share be the key data points for competition investigations but, rather, another sort of data - big data, and access to it through which tech firms dominate particular markets.

Next up is the soon to be published review of tech platforms by the commission. This is principally targeted at Amazon Marketplace, the App Store and - included reportedly at the insistence of DG Competition - Google Search in a move against the “gatekeeper” role which they play in controlling the access of other businesses to the digital marketplace.

The US tech community is smart and creative. They are no doubt working out how to thrive in this new environment as they seek to do more business in Europe. But they need to move on from asking if the FANGS are going to be broken up and instead ask how they are going to be constrained and penned in by more sophisticated regulation. It is already happening, in front of their eyes.