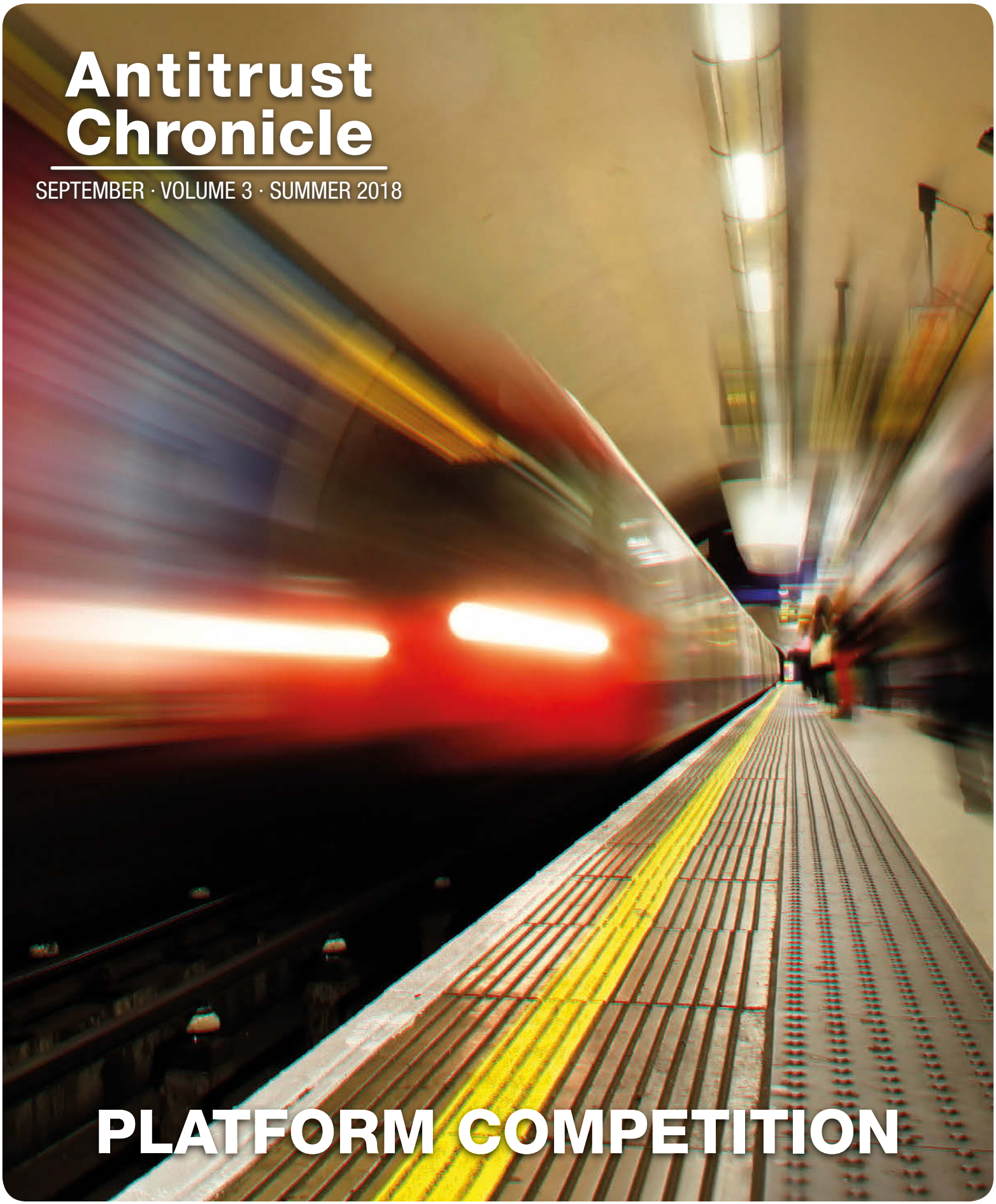

Antitrust Chronicle

SEPTEMBER · VOLUME 3 · SUMMER 2018

PLATFORM COMPETITION

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

It has been fifteen years since Rochet & Tirole published their influential article *Platform Competition in Two-Sided Markets*. The September 2018 CPI Antitrust Chronicle features articles on today's debates related to Platform Competition.

We are delighted to open the September Chronicle with an interview with **Thomas Kramler**, Head of the Digital Single Market Task Force in the European Commission's Directorate General for Competition. Before the year closes out, we expect to also have an interview (same questions) with **Bruce Hoffman**, Director of the Bureau of Competition at the U.S. Federal Trade Commission.

As the platform economy continues to evolve and grow, how should regulators, stakeholders, and the rest of us evolve and adapt? For instance, as one of this month's authors points out, "[a]s economies and societies continue to be transformed by the data revolution, privacy protections will continue to be paramount." Will other factors remain or become paramount? Will the trustbusters of tomorrow and their tools resemble those of yesteryear, or will they be a completely new breed?

We are also pleased to announce CPI's inaugural annual conference on "**Challenges to Antitrust in a changing economy**" that will take place on November 9, 2018 at Harvard Law School. This event, co-organized with CCIA, aims to generate an open and cutting-edge debate on competition law and economics in the tech industry. Confirmed speakers include: Bruce Kobayashi, William Kovacic, Einer Elhauge, Hal Varian, Diana Moss, Nancy Rose, Julie Brill, Greg Ip, Jonathan Baker, Rob Atkinson, and Michael Mandel, among others. Read the full program and register free online here.

Lastly, please take the opportunity to visit the CPI website and listen to our selection of Chronicle articles in audio form. A growing number of subscribers are getting their CPI fix on the go, rather than in the office; audio is an excellent option for this!

As always, thank you to our great panel of authors.

Sincerely,

CPI Team[1]

1 CPI thanks CCIA for their sponsorship of this issue of the Antitrust Chronicle. Sponsoring an issue of the Chronicle entails the suggestion of a specific topic or theme for discussion in a given publication. CPI determines whether the suggestion merits a dedicated conversation, as is the case with the current issue of the Chronicle. As always, CPI takes steps to ensure that the viewpoints relevant to a balanced debate are invited to participate and that the quality of our content maintains our high standards.

SUMMARIES

SUMMARIES

WHAT'S NEXT?

Our October 2018 Chronicle will feature articles from speakers at the **CRESSE Conference** which took place in Crete this summer.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In the remaining months of 2018, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLE NOVEMBER 2018 & DECEMBER 2018

The November 2018 Chronicle will focus on issues related to **Due Process & Antitrust**.

The December 2018 Chronicle will have articles that address issues related to **Multi-Sided Markets & Consumer Harm** and notably the recent Google Android decision in the EU.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers in any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

CPI TALKS…

…With Thomas Kramler

In this month's edition of CPI Talks… we have the pleasure of speaking with Thomas Kramler. Mr. Kramler is Head of the Digital Single Market Task Force in the European Commission's Directorate General for Competition.

Thank you, Mr. Kramler, for sharing your time for this interview with CPI.

1. Is the current antitrust framework well suited to deal with harm to innovation, especially in the context of the digital economy? Or put another way, how well do existing competition rules work in digital markets? Is there a need to adapt the rules?

The debate over whether competition law is capable of dealing with new market developments in innovative markets is as old as competition law enforcement. In 1958, when the competition provisions of the Treaty of Rome entered into force, the skateboard, and more importantly, microchips, which are today used in virtually every piece of electronic equipment, had just been invented. Evidently, the drafters of the Treaty of Rome could not have foreseen the technical developments that followed, such as the smartphone. However they wisely formulated Articles 85 and 86 of the Treaty (now 101 and 102 TFEU) in a manner that allows them to take into account technical developments and even turn them into a yardstick for the assessment of restrictions to competition under EU competition law.[1]

Every market is specific. The basic tools of European competition law (Articles 101 and 102 TFEU) have been crafted in a "technology neutral" way and can be applied to "new" or "old" markets alike. The European Court of Justice confirmed in *Telia Sonera*[2] that the application of EU competition rules cannot depend on whether the market concerned has already reached a certain level of maturity and that particularly in rapidly growing markets, quick intervention may be warranted to prevent harm to competition.

The history of EU competition law enforcement since 1958 shows that the basic EU competition rules are flexible enough to address technological developments. This is well illustrated by the examples of the *IBM* abuse of dominance case on mainframe interface information in the 1980s, which was settled in 1984, and the *Microsoft* interoperability abuse of dominance case, which was decided two decades later in 2004. Both cases addressed technological challenges of their time (mainframe and work group server interoperability) within the legal framework set out by the Treaty of Rome in 1958.

In the *Microsoft* case, the question of whether its refusal to supply interoperability information limited technical development, i.e., innovation by competitors in work group servers, was actually at the heart of the case and addressed extensively in the Commission's 2004 decision and the 2007 Court judgment. The case, which led to the emergence of an innovative open source competitor to Microsoft in the work group server operating system market, shows that EU competition law can effectively be applied to cases which concern innovation in technology markets.

EU competition rules as well as their application by the EU courts have therefore proved flexible enough to address technological developments. This does not, however, mean that antitrust enforcers should be complacent about new market developments. On the contrary: in order to remain relevant, the established enforcement principles need to be applied in the context of market realities and, where necessary, adapted in the light of these realities. Market features of digital markets, such as the growing importance of data and network effects and the provision of "free" services to consumers in two sided digital platform markets, can and must be factored into the assessment of conduct under EU competition law. The Commission's *Google Shopping* and *Google Android* decisions of 2017 and 2018 demonstrate this.

1 See the references to the "promotion of technical progress" in Article 101(3) TFEU and to "limiting the technical development to the prejudice of consumers" in Article 102 (b) TFEU.

2 See C-52/09, *TeliaSonera Sverige*, para. 108.

2. Do you think that the transatlantic antitrust differences, if any, will grow even more in light of the digital economy?

One should not overstate transatlantic differences when it comes to competition law enforcement. The overall goal, which is to protect competition in the interest of consumers, is shared across the Atlantic and there is a lot of very close cooperation between U.S. and EU enforcers and convergence in their approaches and outcomes for the vast majority of cases.

However, when it comes to monopolization/abuse of dominance cases, one has to acknowledge that the law on both sides of the Atlantic is somewhat different. Enforcement priorities might also differ, including in digital markets, and first and foremost, market conditions may be different. This can lead to different assessments of the need to intervene in certain markets.

More generally, I would say that the EU approach towards the actions of companies with considerable market power has, over time, been more skeptical than the U.S. approach. This is also reflected in EU case law, which refers to the "special responsibility" of a dominant undertaking not to allow its behavior to impair genuine, undistorted competition.[3]

3. Does the consumer welfare standard need to be changed to incorporate public policy considerations in light of the digital economy?

I would say that a consumer welfare standard interpreted in a way that takes into account not only price effects but also effects on competition in relation to other parameters, such as product quality and innovation, can fully cater for the challenges of the digital economy in terms of competition law enforcement.

Not to focus solely on price effects will be particularly important in two-sided digital platform markets where sometimes only one side pays and the other side is provided with a "free" service.

In such markets one should not readily assume that the side which receives the "free" service cannot be harmed through anticompetitive behavior in the absence of higher prices. Harm can also result from fewer available choices, a deterioration of product quality or an impact on distribution or product innovation.

In this respect, the EU courts have held that in two-sided markets, where the customers in those markets are not substantially the same, the restrictive effects of a measure in one market cannot be compensated by advantages for the other side, if the measure does not have any appreciable objective advantages for the first side.[4] In other words both sides need to benefit from the efficiencies of the measure in order to make it compatible with EU competition law.

A consumer welfare standard which takes into account factors such as impact on choice and innovation appears to be well suited for digital markets where many services are offered free of charge to consumers. On the other hand, EU competition rules appear less well suited to pursue policy objectives that go beyond ensuring undistorted competition to the benefit of consumers.

4. The OECD is studying whether the competition toolkit should be adapted to the digital economy. What are your views on this topic?

The work being done by the OECD on the toolkit is very much in line with the reflections and studies carried out on digital markets by many competition authorities around the world. Recently Commissioner Vestager decided to set up a panel of advisers from outside the Commission. Their objective is to seek input on what the key upcoming digital developments are that will affect markets and consumers, and on their implications for EU competition policy.

The panel is made up of Professors Heike Schweitzer, Jacques Crémer, and Assistant Professor Yves-Alexandre de Montjoye. They are working on a report on the future challenges of digitization for EU competition policy, to be delivered by March 31, 2019.

The Commission will also organize a conference on January 17, 2019 to discuss the topic with a broad variety of contributors. Additionally, the Commission is seeking contributions in particular from those stakeholders that are involved in or affected by the digitization of the

3 See C-413/14 P, *Intel*, para. 135.

4 See C-382/12 P, *MasterCard*, para. 242.

economy.[5] The conference and the report from the Special Advisers are designed to provide input to the Commission's ongoing reflection process and to identify the key upcoming digital challenges and their implications for EU competition policy.

5. How do you view the pressure on competition rules to increasingly absorb public policy objectives like privacy or data protection?

Competition rules and data or consumer protection rules are complements and not substitutes. The objective of increasing consumer welfare overlaps, but different tools are deployed. It would be a disservice to competition law enforcement if one were to expect that its tools can solve privacy or consumer protection issues meant to be tackled through the enforcement of laws specifically designed for that purpose.

Instead of overburdening competition law enforcement with pursuing policy objectives it was not meant to cope with in the first place, it would be wiser to rely on the cooperation of competition law enforcers with data and consumer protection authorities in order to ensure the complementarity of enforcement activities in digital markets.

6. Which of the many debates around relatively novel issues (like algorithmic collusion, privacy as a parameter of competition, etc.) would you consider as most relevant?

One should be careful with predictions, especially about the future. However, one trend that is likely to impact competition law enforcement is the use of Artificial Intelligence ("AI") by companies in order to adapt pricing or products. As AI needs (big) data to properly work, it is possible that disputes will arise between companies about access to valuable data, or companies may merge in order to get access to such data. In these cases, the assessment under competition rules would likely need to examine the competitive value of data, which is not without challenges for competition law enforcers.

5 More information is available at http://ec.europa.eu/competition/scp19/.

STRENGTHENING BUYER POWER AS A SOLUTION TO PLATFORM MARKET POWER

BY HUGH MULLAN & NATALIE TIMAN[1]

1 Natalie Timan is Director of Economics at the UK Competition and Markets Authority ("CMA"). Hugh Mullan is Assistant Director of Economics at the CMA. Views expressed in this paper are personal and do not represent the CMA.

I. INTRODUCTION

Online platforms play an important role in the development of the online world and open new market opportunities, notably for SMEs. Online platforms also bring benefits for consumers, for example by reducing search costs and making greater choice available. Almost half (42 percent) of SME respondents to a recent Eurobarometer survey on online platforms use online marketplaces to sell their products and services. Eighty-two percent of firms that sell online rely on search engines to promote their products and/or services.[2] As the European Commission notes, online platforms are now the main gateway to market for the majority of smaller businesses in the digital economy – be it online market places for small sellers, app stores for game developers, or online travel agents for hotels.[3]

This led the Commission to identify that many small, but also some larger businesses, have come to depend on platforms that provide such easy access to customers and markets. The Commission found that this dependency entails a certain imbalance of bargaining power between online platforms and their business users, causing friction in platform-to-business relationships, and giving scope to unfair behavior on the part of platforms.[4] This may indirectly lead to harm to consumers.[5] This reflects the growing concerns about the strong position of digital platforms.

A digital platform may acquire a position of market power for a number of reasons. As noted, they tend to act as a key gateway for businesses engaged in online sales or marketing. In addition, there may be powerful network effects at work. These mean that the value of the platform to one group of users, say online businesses, increases as the platform gains a greater number of other types of users, here online consumers, and typically vice versa. These effects will tend to create barriers to entry and favor incumbents, increasing the risk of increased concentration of markets in which platforms operate.

The increasing market power of some digital platforms has led to calls for greater regulation.[6] Here we discuss whether there may be more market-orientated solutions to platforms holding very strong market positions, or market power. In particular, we explore whether, and why, greater collective bargaining by user groups on platforms may temper the power of some digital platforms and lead to better outcomes.

II. EXAMPLES OF COLLECTIVE BUYER POWER FROM THE PROPERTY PORTAL, AUCTION HOUSE, AND PAYMENT CARD SECTORS

In order to motivate the discussion, we identify some examples where businesses selling through platforms have collectivized to exercise outside options when dealing with major platforms in what appear to be fairly concentrated markets. In particular, the launch of the "OntheMarket" platform by a collective of estate agents provides an example of how business users might respond to their reliance on powerful incumbent platforms to reach consumers using platforms to search for properties to buy.[7]

OnTheMarket claimed that:[8]

a) There were two major incumbents in the UK and estate agents felt obliged to list on both of them to reach consumers. This increased

2 Inception Impact Assessment, http://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5222469_en.

3 Ibid.

4 Ibid.

5 The Commission has listed a variety of issues which may arise due to this imbalance in power. The Commission concludes that, "In light of the increasing dependency of businesses users on online platforms to reach markets, these unresolved issues can have significant direct negative effects on a large number of EU business users, some of which may choose to disengage from online platforms. Where they hamper the business users' ability to reach markets, these issues can also indirectly harm consumers by leading to a more limited choice of products and services. In addition, the prevalence of these issues could have significant negative effects on the viability of the wider platform business model and the innovation that their ecosystems drive, including on potential new entrant platforms." Ibid.

6 Aside from the initiatives of the European Commission, there have been two recent reports from the UK House of Lords suggesting that further regulation of platforms may be required.

7 OnTheMarket launched in January 2015. In February 2018 it had an IPO and was admitted to the AIM market of the London Stock Exchange. It is the third biggest property portal in the UK in terms of traffic and competes with Rightmove and Zoopla.

8 See para 69 of the CAT judgment of July 5, 2017, http://www.bailii.org/uk/cases/CAT/2017/15.html#para64.

overall costs to estate agents. OnTheMarket described the incumbents as a duopoly who did not provide a rivalry which would benefit consumers and agents. It was claimed that the incumbents had increased listing fees, reduced the quality of service, and imposed adverse conditions on listing.

b) Following an initiative by one agent, a number of agents came together to create "a true competitor" to the incumbents. "Whilst barriers to entry are substantial and potentially insurmountable to non-agent ventures, a new portal owned by agents and run with the aim of improving service and reducing costs to them, their customers and the property seeking public can win through in the medium term."[9]

Another example of buyers coming together to launch a platform is TheAuctionRoom. This is an online bidding platform created by three auctioneers who had previously used the large platform ATG Media.[10] The launch of TheAuctionRoom provided auctioneers with an additional outside option. However, given that the CMA recently found that ATG Media is likely to have a dominant position in the market for the supply of live online bidding auction platform services to auction houses in the UK,[11] the extent to which the launch of the new platform improved the bargaining position of auctioneers is less clear cut. This illustrates that launching an alternative platform successfully is challenging and may not, therefore, provide a strong outside option when negotiating with an incumbent platform.

A final example of buyers coming together to exercise buyer power in relation to powerful platforms was seen in the context of debit cards. There are two major (four party) schemes for debit and credit cards, Mastercard and Visa. The CAT recently assessed the ability of merchants to influence the interchange fees charged by issuing banks under the schemes. In doing so, it noted an example of collective bargaining by retailers. The CAT pointed to the British Retail Consortium, a trade association representing retailers, successfully rejecting an *ad-valorem* pricing structure proposed by Mastercard.[12] Retailers were able to reject Mastercard's offer and, instead, go with the other major debit card provider, Visa. This illustrates how collective bargaining may be used to choose between existing platforms, which may generally be a more attractive way of exercising bargaining power than launching a new platform.

III. AN APPLICATION TO HOTELS AND ONLINE TRAVEL AGENTS

To further motivate the discussion which follows, we identify an example of an industry where there appear to be powerful platforms and no collective bargaining. In particular, we consider the service supplied to hotels by online travel agents, such as Booking.com and Expedia.

This is an interesting sector because: (i) it is highly concentrated, with Booking.com and Expedia (and the sites owned by the same corporate groups) tending to account for a large proportion of bookings on OTAs; [13] (ii) there has been a lot of recent antitrust scrutiny of this sector as well as consumer law concerns; and (iii) the hotel industry is a fragmented sector and, even though there are some large hotel groups, they account for a very small proportion of all hotels. Therefore, this sector might provide a good example of where the bargaining power of individual hotels is rather weak relative to the bargaining power of the OTAs.[14]

9 By coming together to create a new competitor, sellers were able to create an additional outside option, which in turn, should have helped their bargaining power.

10 The Auction Room's website claims it is a "new search engine hub, portal and auction platform uniquely created by three of the top UK auctioneers for their buyers, with aspirations to be the best for live auction bidding in the UK. It is designed to deliver the experience of the true auction room atmosphere." https://www.theauctionroom.com/aboutUs.

11 See paragraph 3.2 of the CMA's decision to accept binding commitments offered by ATG Media in relation to live online bidding auction platform services, June 2017 https://assets.publishing.service.gov.uk/media/5954be5c40f0b60a44000092/auction-services-commitments-decision.pdf.

12 See paragraph 261 of the CAT's Judgment of July 14, 2016, in *Sainsburys v. Mastercard*.

13 It has been estimated that Booking.com and Expedia had respective shares of 44 percent and 18 percent of bookings through online travel agents in Europe in 2016 (European Online Travel Overview, 12the Edition). OTAs account for about 60 percent of online bookings for hotels and 40 percent of all hotel bookings in the EU. Table 1. Report on the monitoring exercise carried out in the online hotel booking sector by EU competition authorities in 2016. http://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf. We note that these figures only provide a snapshot of concentration amongst OTAs and do not seek here to make any assessment of the dynamics of this industry.

14 The British Hospitality Association summarized the situation from its perspective as follows: "it is no longer feasible for the majority of hospitality and tourism venues to operate without online sales, as most searches for hotel, restaurant and other bookings are made online. Venues must therefore make agreements with online platforms and are obliged to choose the largest platforms, since these are the ones visited by customers. They are visible on the first pages of a customer's search, venues own websites appearing several pages on. As a result, venues, in particular SMEs have little bargaining power and agreement terms

Hotels face a coordination issue. An individual hotel could threaten to leave one OTA (e.g. Booking.com) and offer their rooms only through the other OTA (e.g. Expedia) unless the hotel was offered a better rate by Booking.com. However, if the hotel does offer its rooms only through Expedia, then it will lose those customers who search for hotels through Booking and do not use Expedia, or the hotel's own website.[15] Therefore, the threat to switch may not be credible. In addition, hotels also face a size problem – any hotel or hotel group (even the largest groups) are small relative to total hotel bookings on an OTA. This means that an OTA may have little incentive to adjust its commission rate significantly to keep that hotel group.

If hotels could coordinate their purchases from OTAs, they would be better placed to credibly threaten to switch. If all, or a large proportion of, popular hotels coordinated to leave a particular OTA, then consumers who previously used only that platform would face a strong incentive to also switch OTA (or go directly to the hotels' own websites or possibly search across multiple OTAs). A loss of hotels on the platform, which in turn leads to a loss of consumers, would make it easier for more hotels to switch away from the platform (and less painful for the group that initially left), which would lead to yet more consumers leaving. This could be very damaging to the OTA. Therefore, the threat may be credible and powerful.

A credible threat to switch would strengthen hotels' bargaining power, and, in turn would allow hotels to push down commission rates (and/or secure better standards of service). To the extent that the hotel sector is competitive,[16] a reduction in commission would likely be passed through to some degree to consumers (either through lower prices as one would expect that commission rates are included in the price of hotel rooms, or in other improvements to the offering). The commission rates of the major OTAs range from 10 percent to 20 percent of the price of a hotel room.[17] Therefore, where the downstream market in which the sellers operate is competitive, the potential benefits to consumers could be great.

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are controlled by the online platforms, resulting in contracts which include 'parity clauses' and 'most favoured nations' clauses. A myriad of other concerns arise as a result of this platform/industry/customer imbalance. These include excessive commissions and lack of transparency on the part of online platforms, whose websites are often confusing and misleading for the customer, for example, in not providing the customer with key information about pricing, how ratings are awarded to venues, terms of booking and so on. The need for answers to these problems is pressing as the most powerful online platforms have grown in strength very rapidly, in control of the market and in wealth, giving them enormous resources to consolidate their position." BHA written evidence to the House of Lords EU Internal Market Sub-committee.

15 Customers that only use one OTA are said to "single-home," whereas customers that use more than one OTA are said to "multi-home." Hotels may need to multi-home in order to reach those consumers than single-home.

16 We have made no assessment in this article as to how competitive the hotel sector is. We simply note that it is fragmented and therefore provides a useful illustrative example.

17 In addition, the commission rates charged by OTAs have not fallen in recent years, despite the removal of wide price parity terms from OTA contracts with hotels which were believed, by competition authorities, to have sustained supra-competitive commission rates. Page 18. Report on the monitoring exercise carried out in the online hotel booking sector by EU competition authorities in 2016. http://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf.

IV. THE DETERMINANTS OF BARGAINING POWER[18]

The availability of credible alternatives (or outside options) is a key factor in determining which parties will hold a strong bargaining position.[19] In its market study on Digital Comparison Tools (which are digital platforms), the CMA identified three factors which affect the strength of a platform's bargaining position *vis-à-vis* the sellers on this platform: (i) the significance of platforms overall as a sales channel for these sellers; (ii) the significance of an individual platform to one or more sellers; and (iii) sellers' ability to replicate the sales they make on the platform on other sales channels, such as their own websites.[20] A seller's threat to delist from a platform will be less credible if it is more dependent on that platform and, therefore, the platform will hold a stronger bargaining position.[21]

A seller's position will be stronger if they are able to replicate sales on other channels (including other platforms, or the seller's own website), if they were to delist from the platform, or steer consumers to these alternatives. This, in turn, will depend on the extent to which consumers are willing to use these other channels and how cost-effective these other channels are.

For a given structure in the supply of platform services, a seller will tend to be in a stronger negotiating position the stronger its brand is in the eyes of consumers and the larger its share of supply.[22] Similarly, the threat of switching away to another platform may also be more credible (and, clearly, have a far greater impact on the current upstream supplier) when buyers can coordinate on whom they purchase from. In this way, discounts may also be achieved through more active negotiation by the buyer group. The accretion of buyer power, through greater concentration, is often recognized as a potential benefit.[23] Therefore, if the platform holds a strong bargaining position and a position of market power, collective bargaining by businesses using that platform may lead to benefits to both those businesses and the customers to whom those businesses sell.

V. PLATFORM MARKET POWER AND THE POTENTIAL BENEFITS OF COLLECTIVE BARGAINING

As explained above, the bargaining strength of any customer will depend on the number and strength of the credible outside options available to that customer. A specific challenge for sellers on platforms in exercising outside options and achieving greater bargaining power *vis-à-vis* platforms arises from the multi-sided nature of platforms, which display indirect network effects. These effects mean that for a platform to succeed it must attract both sides of the market. These effects will also tend to strengthen the position of established platforms with loyal consumers.

18 This article focuses on a type of countervailing buyer power that buyers might achieve through collective bargaining. It does not examine buyer power stemming from the aggregation of purchases from a number of buyers which may lead to reductions in the costs of supply of the upstream supplier (or platform) due to the realization of economies of scale, leading to discounts on larger volumes being purchased.

19 The CMA noted that "a significant factor affecting prices paid by consumers on DCTs is the outcome of the negotiation between DCTs and suppliers. This depends primarily on whether the DCT and the supplier have credible alternatives they can exercise if an agreement is not favorable to that party. This is closely linked to how strongly DCTs compete with each other (and suppliers' direct channels) and to the strength of competition between suppliers." See Paragraph 2.37, Digital Comparison tools market study, Paper E: competitive landscape and effectiveness of competition. https://assets.publishing.service.gov.uk/media/59e093f5e5274a11ac1c4970/paper-e-competitive-landscape.pdf.

20 Paragraph 2.42, Ibid.

21 For example, the CMA found that platforms were a more important sales channel in motor and home insurance than in broadband and credit cards and that this was consistent with commissions following an upward trend in motor and home insurance. The CMA also found evidence of high levels of concentration of platforms within some sectors and high levels of consumer brand loyalty, both of which would strengthen the negotiating position of the platform.

22 As the CMA noted, "In markets with a low concentration of suppliers, we would generally expect DCTs to have a stronger negotiating position because there are potentially many other suppliers a DCT can contract with. In addition, where suppliers are relatively undifferentiated, this is likely to strengthen a DCT's negotiating position." See Paragraph 2.39, CMA market study on DCTs, Paper E.

23 For example, the CMA's Merger Guidelines note how greater buyer power due to the merger may lead to benefits to the customers of the merged firm. "Where the merger firms purchase the same products, the merged firm may enjoy greater buyer power (or monopsony power) than the merger firms could previously exert individually. In many cases, an increase in buyer power is not likely to give rise to unilateral effects; and some of the benefits to the firm from its greater buyer power may be passed on to the merged firm's customers." Paragraph 5.4.19, Merger Assessment Guidelines. https://www.gov.uk/government/publications/merger-assessment-guidelines. The European Commission's guidelines on horizontal agreements also recognize the benefits of collective purchasing to strengthen buyer power. See paragraph 194 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114(04)&from=EN.

If consumers are content to search across different platforms (i.e. multi-home), then the seller would only need to list on one platform – safe in the knowledge that these consumers will search sufficiently to find their offer.[24] In this context, an individual seller's threat to switch from a platform may be credible, and collective bargaining may not be very important in strengthening their credibility.

Sellers can only credibly threaten to switch or delist from one platform if they can also steer consumers to the alternative platform. This is more difficult if consumers single home (i.e. use only one platform, rather than searching across multiple/all platforms). If these single-homing consumers represent an important source of demand for sellers, to whom they would not be able to appeal to if not on the platform, the sellers may consider it necessary to sell through a platform to reach these consumers. This may give the platform a degree of market/bargaining power in relation to the seller, as the latter cannot switch away from the former if it wants to attract these consumers. Therefore, the sellers are likely to multi-home (i.e. choose to list a given product/service across multiple platforms) due to the single-homing behavior of some significant groups of consumers. Although there may be multiple platforms offering a similar service, each platform may have market/bargaining power in relation to the sellers on that platform due to single-homing by an important group of consumers.[25]

This provides sellers with a coordination problem. A single-homing consumer who has built up a preference for using a particular platform is unlikely to switch to another platform in response to only a few sellers switching to that platform. Therefore, in order for sellers to exercise bargaining power through a credible threat to switch, they may need to coordinate amongst themselves such that a sufficient number of important sellers[26] switch, providing sufficient incentives for the consumers to also switch.[27]

Sellers could coordinate to threaten to switch to an existing platform, or to effectively sponsor entry by creating a new platform. Once the threat to switch to an alternative becomes credible, the balance of power should shift away from the incumbent platform, which in turn could lead to lower commissions for the seller.[28] Provided that the sellers pass these cost savings on to consumers and do not coordinate on any aspect of competition between them on the selling market, this collective bargaining could benefit both sellers and consumers.

The nature of indirect network externalities means that it is more challenging for sellers to credibly threaten to switch. On the other hand, if a credible threat exists, the exercise of this threat could be particularly damaging to the platform. A sufficiently large switch by sellers may cause the platform to become unsustainable and go into a "death-spiral": as switching by sellers induces switching by consumers, this induces further switching by sellers which induces further switching by consumers, and so on until the platform no longer has sufficient business to be sustainable.[29] In addition, this dynamic could also mean that those sellers who switched are left with no other option to whom to switch in future, having effectively shifted market power from one platform to another, at least over the long run. Such concerns may not arise in reality: not all sellers may wish to switch, so a death-spiral might not occur.

Furthermore, it is possible that switching consumers from one platform to another would transform the behavior of these consumers from being single-homing consumers to being multi-homing consumers. These consumers may then, as part of their normal search activity, consider offers across multiple-platforms. So long as search costs are not significantly increased, and benefits are passed onto consumers, this would be a positive outcome. It would mean the coexistence of two or more platforms is more likely, as it weakens the indirect network externalities. In doing so, it would reduce both the coordination problem faced by sellers (in response to single-homing consumers) and also remove the threat of a death spiral for platforms. Whether consumer behavior would actually be transformed in this way, over the longer term, is unknown.

24 This is a somewhat strict definition of multi-homing – consumers searching all platforms. In reality, some consumers may search more than one platform, but may not search all available platforms. Nevertheless, the arguments made here, regarding multi-homing consumers, are likely still to hold true (to a greater or lesser extent) if consumers visit multiple platforms.

25 As the CMA noted, "given that, in practice, a significant proportion of consumers single home, most suppliers choose to use multiple DCTs in order to get access to as many consumers as possible." See Paragraph 2.5, CMA market study on DCTs, Paper E.

26 The actual number of sellers switching need not be large if they are sufficiently differentiated and important in the eyes of consumers that they can affect the attractiveness of a platform.

27 Sellers multi-homing on platforms (in response to single-homing by groups of consumers) means that each seller is already on each platform. Switching does not necessarily mean moving to a new platform on which the seller was not previously listed. Rather, switching may mean no longer selling through a platform on which a seller was previously listed; instead, concentrating sales through an alternative platform.

28 Single-homing consumers suggests a lot of consumer inertia or resistance to switching from their current platform. A strategy to shift away from the platform only works if sellers can minimize the impact/overcome consumer inertia, which may mean some loss of profit or extra cost in the short term. The higher the proportion of sellers switching, the more these costs can be spread. In addition, the greater is the likelihood of switching consumers (and reducing these costs).

29 Indeed, the issue of such death-spirals has pre-occupied, and continues to pre-occupy, competition assessments of credit card interchange fees due to the network externalities arising there. For example, see the Court of Appeal Judgment, July 4, 2018.

The key point of this section is that collective bargaining may play an even more important role in relation to platforms than in other types of markets, due to network effects and the single-homing nature of many consumers. This is because the sellers on the platform need to ensure that they can bring the consumer side of the market along with them in order to have a credible threat of switching and to exercise some degree of bargaining power.

VI. POTENTIAL CONCERNS ABOUT GREATER COLLECTIVE BARGAINING BY USERS OF PLATFORMS

As explained above, collective bargaining can in certain circumstances benefit consumers and businesses that use digital platforms. However, it is important that when businesses come together to solve one type of coordination problem (such as not being able to switch to an alternative platform), this does not lead to coordination over any feature of competition between the businesses. Here, we discuss instances where greater collective bargaining by platform users may lead to consumer harm.

These theories of harm may include the following:[30]

a) Cooperation in the purchasing market may facilitate collusion in the selling market, which would be directly harmful to customers. There could be collusion on selling without cooperation in buying, but the latter could lead to the former. This might arise because, say, establishing the buyer group increases communication or transparency between the sellers on a platform. In particular, cooperation that leads to the sharing of private information could facilitate collusion in the selling market.

b) Cooperation by a subset of buyers may allow strategic behavior that harms the terms of supply for other buyers, which are not part of the group of cooperating buyers. This would, therefore, raise the costs of rivals and may weaken competition in the market in which the collective-buyers sell.

c) Platforms increase price competition by allowing consumers to search and compare across many providers selling through a platform.[31] If sellers were acting collectively when purchasing services from the platform, there may also be a collective realization that they would be better-off if all sellers chose no longer to list on the platform and thereby avoid the intensity of competition which listing on a platform may entail. Consumers would be made worse-off in the absence of platforms because they may face higher prices and would lose the ability to search and compare easily.

d) Cooperation in the purchasing market which lowers the price paid to the input suppliers may lead to the supplier being able to invest less in developing its products and, more generally, innovating.

The likelihood of harm in any case will depend on the specific facts of the case. However, these theories of harm are less likely to be significant concerns when the seller side is fragmented and more so when the platform side is concentrated and characterized by strong single-homing tendencies by many consumers. Indeed, we do not think that these theories of harm should lead one to ignore the potential benefits of collectivization of buyers in order to exercise buyer power. Buyer groups have always existed and have traditionally led to few concerns from competition authorities.[32] Moreover, we consider that there may be material benefits to customers if there is greater collectivization of buyers in response to significant market power in the input markets from which they purchase.

It is worth noting that it is not always clear who the (downstream) buyer is when assessing the commercial dynamics of platforms. For example, a hotel may be a purchaser of platform services from a powerful online travel agent, where collective bargaining might lead to an outcome that is more beneficial for consumers. Alternatively, one might characterize a hotel as a supplier of hotel rooms for sale through a

30 There are a number of other potential harms from buyer power, but they do not appear to be relevant when applied to users of platforms, particularly when the platform has a strong degree of bargaining power or market power.

31 The CMA found evidence in both its Digital Comparison Tools market study and its Private Motor Insurance market investigation that the price sensitivity of consumers on comparison sites is considerably higher than on other sales channels, which puts competitive pressure on the sellers listing on those sites.

32 It is worth noting that the ACCC's recent discussion paper considers a class exemption to allow small businesses and franchisees to collectively bargain without prior consent from the competition authority. The ACCC notes that it has "generally not had concerns about collective bargaining applications by groups of small businesses, but collective bargaining by larger businesses has greater potential to raise competition concerns (for example, by reducing competition and leading to consumers paying prices above competitive levels). For this reason, our starting point is that a class exemption for collective bargaining should only be available to businesses below a certain size." https://res.cloudinary.com/gcr-usa/image/upload/v1535039648/ACCC_class_exemption_dclioa.pdf.

(downstream) platform. In this scenario, collective bargaining by hotels might appear more like a seller cartel, agreeing on the terms of supply. This illustrates how upstream and downstream, buyer and seller, may not be obvious in relation to multi-sided platform markets. However, from an economics perspective this should not really matter. What matters is that the collectivization, which leads to increased negotiating power for the parties selling through the platform, is likely to bring net benefits to consumers. Tolerance of greater collectivization of groups using powerful platforms may well achieve these benefits.

VII. THE ISSUE AND OUR RECOMMENDATION

Online platforms bring clear benefits to their customers, for example, by opening routes to consumers that SMEs might not have otherwise had access to and by providing more choice to consumers with reduced search costs. Nevertheless, there is a sense that, in some sectors, digital platforms are gaining increasing power and that this places the third parties which use them at a significant disadvantage. This may lead to harm to consumers, either indirectly through the treatment of the businesses using the platforms or more directly through the exercise of market power in terms of the commissions and prices platforms charge to the businesses selling/advertising through them, which will be passed on to consumers.

One way of tempering stronger market power in platform markets is through increased buyer power on behalf of the businesses selling through a platform with market power. We have offered some examples of where this has been used before, whether through the use of trade associations as a collective negotiator or through sponsored entry on an alternative platform by businesses selling through platforms.

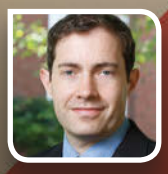
However, it also strikes us as surprising how infrequently this collective action seems to take place given the apparent strength of some platforms. This may well be down to the nature of the agreements with platforms, which are individually negotiated and often long term. However, it may also be down to the differing objectives of buyers, such that it is too hard to coordinate to establish a stable buyer group and negotiate an outcome beneficial to all buyers. This is likely to be the case particularly when there is diversity in the size of the businesses and when negotiations relate to commercially sensitive input prices, such as commission rates. When these businesses then compete with each other quite directly, the incentive to negotiate collectively may also be reduced.

Another reason why we may not see a lot of collective bargaining with platforms may be because of competition law concerns about businesses who are competitors cooperating as buyers. We have outlined a number of theories of harm which may arise in this respect, in particular where such cooperation would facilitate or support anti-competitive collusion. However, there is a distinction between these two practices and businesses will be aware of the differences (as illustrated by the long existence of legal buyer groups). Another possible concern is that cooperation by businesses selling through platforms could lead to reduced use of platforms or long-term damage to the platform model.

We think that collective bargaining by sellers using platforms may provide a beneficial counter-balance in cases where platforms hold a particularly strong position. Moreover, while greater regulation of platforms appears to be gaining greater support, it seems to us that in certain circumstances, increased collective bargaining by sellers in the presence of platform market power may provide an alternative, more market-orientated, response to such concerns.

AN INTRODUCTION TO THE COMPETITION LAW AND ECONOMICS OF "FREE"

BY BENJAMIN EDELMAN & DAMIEN GERADIN[1]



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I. INTRODUCTION

Many of the largest and most successful businesses today rely on providing services at no charge to at least a portion of their users. Consider companies as diverse as Dropbox, Facebook, Google, LinkedIn, The Guardian, Wikipedia, and the Yellow Pages.

Some business models offer free service to one side of a two-sided market — relying on the now-familiar logic that users come to the market to connect with each other, and that free service to one type of user can increase the number of such users, creating greater value (and ultimately allowing higher prices) for another type of users. Two-sided business models are not new. Consider nightclubs offering free admission to women (thereby justifying higher prices to men), and newspapers providing free copies to readers (with higher circulation calling for higher advertising prices). More recently, this approach has become prevalent for a wide variety of online services including search engines, social networks, and other online media.[2]

Free service, however, need not be limited to two-sided markets. First, some firms justify free service via the data they collect (such as email addresses and/or telephone numbers in return for free Wi-Fi). Such firms can then use this data commercially at some subsequent stage. Second, some firms provide free service as a trial to pull in users who might later pay for additional benefits. This "freemium" approach is widely used by all manner of apps and online services, from Dropbox to Pandora to LinkedIn. Third, some firms offer service for free, but simultaneously solicit donations. Donations are an intuitive strategy for a non-profit (e.g. Wikipedia), but some businesses now use this approach (such as The Guardian, an online news site). Fourth, other firms offer free service primarily because they operate with extremely low costs. Perhaps the best-known is Craigslist, which runs 700+ city-specific marketplaces serving more than a billion listings per year, yet has a skeleton staff of just 50 employees, retaining the limited features and simple design the site offered almost since inception. With limited costs, Craigslist offers almost all its listing services free of charge.[3]

Is free service a nirvana worthy of celebration? For consumers, it is easy to answer in the affirmative. At least in the short term, free services are often high quality, and users find a zero price virtually irresistible. Of course, long-term assessments could differ, particularly if the free service reduces quality and consumer choice. Furthermore, "free" service tends to be free only in terms of currency; consumers typically pay in other ways, such as seeing advertising and providing data, though these payments tend to be more difficult to measure. Meanwhile, on the paying side of a two-sided market, free service sometimes creates market concentration that, in turn, increases prices. If those costs are in turn passed through to consumers, the latter may plausibly end up worse off.

In this short paper, we examine the competition economics of "free" — how competition works in affected markets, what role competition policy might have and what approach it should take, and finally how competitors and prospective competitors can compete with "free." Our bottom line: While free service has undeniable appeal for consumers, it can also impede competition, and especially entry. Competition authorities should be correspondingly attuned to allegations arising out of "free" service and should, at least, enforce existing doctrines strictly in affected markets.

II. THE COMPETITION ECONOMICS OF "FREE"

Zero prices shift the way competition unfolds. In this section we begin by exploring the relevant aspects of competition in ordinary markets with positive prices, then turn to the distinctive effects of free services.

A. Competition in Markets with Positive Prices

Competitive dynamics in markets with free service are best understood by reviewing the fundamentals of competition in ordinary markets with positive prices.

2 See, e.g. Jean-Claude Rochet & Jean Tirole (2006). "Two Sided Markets: A Progress Report," 37(3) Rand Journal of Economics, 645 (2006).

3 *Sites*, Craigslist, https://www.craigslist.org/about/sites. Craig Newmark Founded Craigslist To Give Back, Now He's A Billionaire, Forbes, https://www.forbes.com/sites/ryanmac/2017/05/03/how-does-craigslist-make-money/. Posting Fees, Craigslist, https://www.craigslist.org/about/help/posting_fees.

In general, price is the most basic and most common form of competition. For one, producers regularly cut prices to increase demand, both through direct price cuts and through various discounts and rebates. Conversely, in the absence of barriers to entry, if a firm charges high prices, competitors constrain it by entering the market and bidding price down to the competitive level.[4]

Trade offs between price and quality further support well-functioning markets. Often, a rival can enter a market via a somewhat lower price at a level of quality equal to the incumbent, or via a sharply lower of price at a somewhat lower level of quality. Because some customers are willing to accept lower quality in order to obtain a substantially lower price, these strategies facilitate entry into all manner of markets — from low-cost airlines to discount electronics and beyond.

Indeed, even Christensen's well-known theory of disruptive innovation[5] crucially relies on positive prices. A Christensen disruptor begins by offering lower quality at a much lower price than incumbents. In this strategy, the disruptor then improves quality more quickly than incumbents do and also more quickly than market requirements, thereby taking market share from incumbents. Notably, it is lower prices that in the first instance draw customers to the disruptor.

In all these examples, positive prices crucially facilitate entry. A new entrant can try to offer a similar product or service at a lower price (a natural and widely-used entry strategy,) which in turn constrains the incumbents' strategy. Competitive prices result, to the benefit of consumers. Also, prices convey genuine information about the true cost of each good or service, facilitating allocative efficiency.

B. The Prospect of a Negative Price

In a market where a firm, for whatever reason, offers service at a zero price, any price competition would require competitors to embrace negative prices. Indeed, multi-sided markets sometimes feature negative prices. For instance, competing credit card issuers attract customers offering "points" or rebates. Similarly, competing hotel reservation services attract customers via free nights. Both card issuers and reservation services fund these benefits through fees paid by the paying side of the market.

Despite these occasional counter-examples, negative prices usually present important challenges to firms. If a firm pays a customer to take its product, the customer may discard it rather than use it, providing no benefit to users on the other side, no benefit to the firm, and only an exploitative claiming of the payment as a windfall. If a firm pays a customer to use a service, the customer may be able to feign use — even utilizing a software automaton to simulate human usage. For example, various services pay users to watch advertising videos and look at banner advertisements on computer screens,[6] but they face all manner of fraud, broadly from consumers who try to get paid without actually watching.[7] Additional concerns often result from reputation (a firm might look desperate if it pays customers to use its service), tax (an obligation to report payments to users), and other aspects of the law (such as prohibitions on doing business with those in disfavored countries).

Of the various firms that tried negative prices to compete with incumbents' free offerings, probably the best known is Microsoft Bing Cashback, which paid rebates to users who ran searches on Bing, clicked ads, and made purchases. Because payments required that users make purchases, Microsoft did not face the problem of falsified user activity such as "bots" running fake searches. Yet users nonetheless gamed the system. For example, a user might first decide what store she wanted to buy from, then run a Bing search to see an ad from that store, and finally click the ad to activate a rebate on a purchase she was already going to make. While Bing Cashback provided a windfall to savvy users, there was little evidence that it caused usage of Bing Search to increase more generally.[8] With Microsoft subsidizing the rebates, it was little surprise when the company ultimately ended the program.[9]

4 See OECD, Policy Roundtables, Excessive Pricing, 2011, at p. 33, https://www.oecd.org/competition/abuse/49604207.pdf.

5 Joseph Bower & Clayton Christensen, "Disruptive Technologies: Catching the Wave," Harvard Business Review, January-February 1995.

6 See e.g. ADmimsy, Inbox Dollars, Perk.tv, Swagbucks, Viggle.

7 See e.g. PTS Cheating Sites, https://www.facebook.com/PtcCheatingSites/, indexing such schemes.

8 Ben Metcalfe, "The real reason Bing Cashback is ending," Ben Metcalfe, June 4, 2010, https://benmetcalfe.com/blog/2010/06/the-real-reason-bing-cash-back-is-ending-we-all-scammed-the-fk-out-of-it/.

9 Yusuf Mehdi, "A Farewell to Bing Cashback," Bing Blogs, June 4, 2010, https://blogs.bing.com/search/2010/06/04/a-farewell-to-bing-cashback.

C. Competition in Markets with Zero Prices

In this section, we assess the benefits and challenges raised by zero prices. We show that while zero prices offer important benefits, they can also raise concerns for competition policy.

1. Benefits of Zero Prices

Markets with zero prices bring some important benefits to consumers. First, with prices set to zero, consumers avoid paying cash for a given offering. The size of the benefit can be substantial. Some users might be willing to pay hundreds of dollars per year for web search, social networking, video streaming, and other services. Yet these services are widely available without charge. This benefit is distinctively valuable to low-income consumers who can nonetheless use world-class search engines, online encyclopedias, and access global news content. With the growing concerns about inequality, helping low-income consumers is correspondingly attractive.

Second, if a service lacks any monetary charge, competition tends to focus on quality. When choosing between two free services, consumers favor the one with better quality. While that can create distortions (discussed in the next section), it also accelerates quality improvements and innovation, precisely because quality becomes the main, if not the only, parameter of competition. To the extent that consumers value the innovations, such as more accurate search results, rapid innovation is correspondingly valuable.

Third, zero prices may encourage users to multi-home by installing multiple apps and using multiple services. If the offerings in a given sector provide service at zero price, users can use or at least try several in hopes of finding the best one. Consider free online games, where most users experiment with multiple games before settling on those they prefer. In contrast, if service carried a charge, consumers would have an incentive to stick with what they already paid for, perhaps locking in an inferior incumbent. In this respect, zero prices can facilitate entry and stimulate competition.

Fourth, free service can play a useful role in a multi-faceted pricing scheme such as "freemium." When a firm offers basic service at zero price, along with one or more improved tiers at higher prices, the free version helps customers try the service and assess its quality and match. In charging positive prices for additional benefits, freemium services leave room for entrants to offer lower prices — preserving the entry strategy described in Section II.A.

Yet, despite the benefits, zero prices create important barriers to competition in certain affected markets. We turn to these concerns in the sections that follow.

2. Challenges Created by Zero Prices

a) Free service distinctively undermines paid business models

A first concern is that free services tend to undermine paid options. One might look, for example, at the experience in the news industry — where sites offering free online news have taken attention and market share from those sites that charge subscriptions, notably including most high-quality newspapers.

From one point of view, a shift to free services is innocuous and indeed efficient — rightly favoring those services that somehow manage to offer a good that users want (news) at a low or zero price. Yet subtleties within the environment may shift this interpretation. First, "free" news providers, such as BuzzFeed and Mashable, have notably different incentives for growth and monetization. A paid news site reasonably anticipates that an important "scoop" exclusive will cause more readers to subscribe, yielding a corresponding increase in revenue. This creates an incentive for distinctive, important journalism.[10] These important articles — based on extended research and investigative journalism — make readers better informed, and are likely to improve political accountability and society at large. But those are long-term benefits that neither readers nor sites are likely to internalize. In contrast, a free site can most readily increase revenue by producing click-bait articles more likely to attract readers — and less likely to have public benefits.[11]

10 See David Skok, "The current move to subscription models is a revolutionary shift for journalism," *Poynter*, April 27, 2017 ("Most of the publications seeing success with digital subscriptions rely on quality over quantity journalism."), https://www.poynter.org/news/current-move-subscription-models-revolutionary-shift-journalism.

11 For example, critics allege that the majority of free online news provider BuzzFeed's posts were click-bait. See Logan Rhoades, "A Full 63% of BuzzFeed's Posts are Clickbait," November 12, 2014, https://keyhole.co/blog/buzzfeed-clickbait/.

To the extent that free news services provide lower quality news and reduce the revenues of higher quality news providers, any positive externalities from free news are correspondingly reduced. An individual reader, considering only his or her private benefit from paying for news, would ignore the associated externalities. Thus, the market is likely to produce an inefficiently low level of quality.

Further distortions arise if consumers are in some way short-sighted or confused about the benefits provided by paid offerings. For example, paid search services might provide more accurate recommendations less tainted by commercial concerns. Paid information sites might protect readers from the distortions of advertising. By reducing tracking and associated information collection, all manner of paid services could increase privacy. We think these are important potential benefits, but recognizing their value requires consumers to think more carefully about future benefits, harms, and risks. In contrast, free service has a simple and straightforward appeal.

b) Free service combined with network effects may impede entry

While zero prices tend to prevent firms from competing on price, they invite competition on quality. In the best of cases this can push users towards products and services of distinctively higher quality. For example, with search engines all offering service for free, users had every incentive to switch to Google, foregoing various competitors in favor of a Google option they saw as superior. Similarly, Facebook eviscerated MySpace in part through changes that seem to have been genuine innovations (such as broader usage by more users, as well as improving some aspects of speed and security). Most observers found these differences to be important quality improvements.

Despite such advances, free service may present material impediments to competition. For one, many two-sided markets can provide benefits to one set of users at zero price thanks to revenue that comes from other users. An entrant typically cannot beat "free" by lowering prices because negative prices are often unfeasible, as discussed in Section II.B. Nor can an entrant easily find fee-paying customers on the other side, for lack of sufficient customers on the first side. In such markets, the combination of free service and network effects makes entry distinctively difficult.

The impact of free service on competition extends beyond advertising markets and into other information goods. Consider a rival maker of smartphone operating systems, assessing how to compete with Google Android. Given Android's zero price to both consumers and phone manufacturers, the entrant would quickly conclude its new offering must also be free. But Android enjoys all manner of positive network effects, most obviously the myriad apps users can run on Android phones. A user considering a rival OS would forego these apps and typically require some compensating payment for that loss. The entrant could pay users and manufacturers to accept its operating system by, for example, subsidizing handset equipment. But the users who respond to such offers are distinctively price-sensitive — they are the users who seek a subsidized handset and accept a narrower selection of apps. Such users are usually less valuable to app developers and advertisers, making the subsidy tenuous, or worse.

c) Free service invites overproduction on quality

Free service creates heightened barriers to competition in markets where advertisers' payments support free service to consumers. Suppose a given region had two "yellow book" directories of area businesses. One book charges high prices to advertisers and uses those revenues in part to fund a large book with durable paper, multiple indexes and cross-references, and large fonts. Another book charges low prices to advertisers, achieving similar net profit by foregoing those benefits. Any prudent consumer would choose the former book — realizing that he will see the same price for goods and services whichever book he uses to select a vendor, so he might as well choose the fancier book. This might be an efficient choice, as it gains benefits that, in aggregate, exceed the production costs of the fancier book. But it might also be inefficient, imposing high charges on advertisers and in turn driving up the prices of goods and services. Nor is this market structure in any way limited to telephone books; search engines and other online advertising share these incentives. We call this market structure "price coherence," and our analysis finds that markets with this structure systematically tip towards overprovision of benefits to customers, above the efficient levels, needlessly driving up final prices for goods.[12]

Notably, free service on one side of the market can even drive out rivals and push towards a single dominant firm. Returning to the "yellow book" example, notice the challenge faced by the second book publisher — facing little consumer adoption, and hence correspondingly lower ability to attract advertisers. Nor is it promising for the second yellow book to copy the product features of the first. Those require additional revenue, but advertisers will rightly decline to pay. In such a market, the most likely outcome is the continued decline and ultimately exit of the secondary publisher. This broadly tracks experience in online advertising markets, where dominant platforms have been stable for some time and where entrants and smaller firms have largely struggled.

12 Edelman, Benjamin & Julian Wright, "Price Coherence and Excessive Intermediation," (130:3) (2015) *Quarterly Journal of Economics* 1283.

d) Risk of deception or exploitation

A consumer paying for a good or service can directly assess the appropriateness of the fee relative to the value provided. But in markets with zero prices, consumers make no such trade-off. A service might collect outsized value from using customer data, showing ads, or making other use of a user's activity, and the user would not know it. From one point of view, if the user is not harmed by these activities, perhaps they have no reason to object. Yet there is some reason to think consumers would be alarmed if they knew, for example, how online tracking services collect and analyze their behavior. From this standpoint, users would be better served by transactions with explicit terms such as simple posted prices.

III. PLAUSIBLE STRATEGIES FOR ENTRANTS

Despite the challenges listed above, entrants do have some potential strategies available

First, an entrant could take the bull by its horns and seek to push through the problem. For example, with sufficient efforts to recruit consumers, a platform could try to overcome the supposed lack of consumers and the resulting advertiser hesitance to participate and to pay fees. Relatedly, with sufficient capitalization, a platform could accept its losses during a period of insufficient participation on the fee-paying side. For the very largest and best-funded entrants, these strategies seem to be possible, though with exceptional expense and risk. Consider Microsoft's decade-plus commitment to online search, at one point losing as much as $1 billion per quarter.[13] That said, this strategy requires exceptional funding, so it is limited to a small subset of potential entrants.

Second, an entrant could attempt to outcompete incumbents through sharply increased quality sufficient to induce switching, even if there is no financial incentive to switch. Indeed, Google arguably used this strategy as it entered a search market already crowded with incumbents like Yahoo and AltaVista. That said, such a sharp increase in quality is correspondingly unusual. Most potential entrants offer more modest benefits, especially at the outset. If entry is limited to those with the very largest advances, entry will be less frequent. In markets where scale is necessary to achieve quality, for example because large-scale operation yields data that improves quality, new entrants are particularly unlikely to outcompete incumbents on quality.

Third, an entrant could try to offer an entirely new service that does not directly compete with any incumbent, and thus is not hampered by the difficulty of undercutting a free incumbent. For example, at its launch, Twitter was quite different from all incumbents, and its main impediment to adoption was general user hesitance, not a specific incumbent's zero price. This strategy seems to be viable yet, like the others, also importantly limited. Only rarely does an entrant devise an entirely new type of offering, of broad interest, with potential far-reaching effects. If entry is limited to these unusually successful new firms, entry will be predictably rare.

Fourth, an entrant may find an opportunity when consumers tire of incumbents' service despite the appeal of "free." For example, after Facebook faced a series of scandals, including data broker Cambridge Analytica siphoning data of about 87 million users as well as Russian meddling and the spread of "fake news," some users indicated that they would leave the service.[14] Others, including EU Competition Commissioner Vestager, remarked that they would prefer a paid version of Facebook, rather than the current free version with its privacy and advertising-related problems.[15] Her instinct seemed to resonate with some users, and a confluence of disasters may occasionally threaten firms with free service. But entry will be infrequent if it is limited to situations when incumbents face a combination of multiple problems.

Fifth, an entrant may see an incumbent's free service, and respond not by trying to match, but by charging a positive price and eliminating whatever is unwanted or annoying about the incumbent's service. For example, in response to an incumbent offering free service thanks to advertising, an entrant charging a subscription can forego advertising. Netflix's positioning *vis-à-vis* YouTube broadly fits this pattern. In other circumstances, an entrant may offer its customers both free and paid service, typically the former with ads and the latter without. Spotify's free and paid services fit this approach. These subscription models sometimes get traction, but usually face significant challenges. Consider for example customer hesitation to pay money for offerings seen as new and unproven, as well as low signup rates when selling subscriptions.

Even where these strategies create opportunities for entrants, there are also doubts about the feasibility of these strategies in the face of

13 David Goldman, "Microsoft's Plan to Stop Bing's $1 Billion Bleeding," CNN Money, September 20, 2011, https://money.cnn.com/2011/09/20/technology/microsoft_bing/.

14 Deepa Seetharaman, "Facebook Shares Tumble as Growth Outlook Darkens," *The Wall Street Journal*, July 25, 2018.

15 Jorge Valero, "Vestager: 'I'd like a Facebook that I pay, with full privacy,'" *Euractiv.com*, June 27, 2018, https://www.euractiv.com/section/competition/interview/vestager-id-like-a-facebook-that-i-pay-with-full-privacy/.

today's large and entrenched incumbents. When Google unseated Yahoo and Altavista, those firms were much smaller in market capitalization, employees, scope of operation, user base, and every other dimension compared to today's tech giants. Any entrant seeking to oust a dominant tech firm today would face larger, better-organized, multi-product competitors that are therefore better positioned to respond and defend themselves.

IV. POLICY RESPONSES

Policy-makers have promising responses available if they seek to address the competition concerns associated with free services.

First, free service creates a heightened need for antitrust enforcement. Because entrants face additional challenges when entering markets with zero pricing, there is a particularly strong case to prevent dominant firms from erecting further barriers to entry or eliminating small rivals. For example, as early as 2014, we noted Android practices which on their face limited mobile device manufacturers' customizations and hence business models, while simultaneously hindering entry by competing apps and services.[16] But it took until 2018 for the European Commission to order Google to cease these practices. This delay allowed competition problems to worsen.

Second, policy-makers should take seriously the non-price harms that consumers may suffer. We acknowledge that it is difficult to put a dollar value on harms such as privacy degradation, reduced rate of innovation, or threats to democracy. But the lack of explicit prices does not mean the harms are any less real. Nor is it any surprise that the harms are not measured in dollars. In a world of consumers receiving services free of charge, key problems will almost always arise in areas other than the price. To fulfill their stated mission, competition regulators must consider these harms in earnest, not reject them out of hand.

Third, in some instances policy-makers might consider mandating positive prices. In general price regulation invites predictable objections, including the difficulty of setting prices. Price regulation would raise particularly acute concerns if it sought to disallow entire business models such as giving away one thing in anticipation of revenue elsewhere. We recognize these challenges. Nonetheless, certain circumstances may call for limited price regulation, and may also make this approach feasible. The EU's General Data Protection Regulation ("GDPR")[17] requires, for example, that when services ask users to agree to tracking, the consent be "freely given" with no detriment if the user declines.[18] Under GDPR, a user probably cannot be said to "agree" to Facebook's data practices if the only alternative was to forego use of Facebook altogether. On the other hand, if Facebook offered users both a free site with tracking, and a paid site with less or no tracking and less use of customer information, a user could plausibly be said to choose between those options. Thus, the GDPR consent process could effectively mandate an option for a positive price, while avoiding the most obvious objections to price regulation.

Fourth, policy-makers might be increasingly skeptical towards mergers and acquisitions — seeking more and smaller firms, the better to facilitate entry. Indeed, an independent Waze would have been the most obvious competitor for Google Maps. Likewise, an independent YouTube would have been a strong competitor for the time users spend at both Google and Facebook, while an independent WhatsApp could have offered users at least an alternative to Facebook's messaging feature, if not more of Facebook's services, with much less privacy concerns thanks to WhatsApp's (then) paid service with no advertising or tracking. Sometimes, as with Waze, the competition concern is apparent on the face of a proposed transaction. At least as often, the problem is less obvious at the outset. But when a firm's "free" service reinforces its dominance, and when such a firm seeks to acquire another, experience calls for heightened concern. Policy-makers should be correspondingly skeptical.

Fifth, policy-makers could insist that traditional remedies remain available. Historically, consumers could sue for privacy violations and other harms. These days, in the U.S., arbitration clauses and class action waivers grant firms practical immunity, preventing the threat of such suits from constraining the practices of powerful firms. The European Commission seeks to address similar concerns through its proposed regulations protecting business users of online intermediation services.[19] Policy-makers can restore an appropriate balance, for example by disallowing litigation waivers as a condition of approving large transactions or as part of a regulatory settlement for prior violations.

16 Benjamin Edelman, "Secret Ties in Google's 'Open' Android," February, 13, 2014, http://www.benedelman.org/news-021314/. See also Benjamin Edelman & Damien Geradin, "Android and competition law: exploring and assessing Google's practices in mobile," 2 (2016) European Competition Journal, 159.

17 Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), O.J. 2016, L 119/1.

18 GDPR Article 7.4.

19 Proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services, Brussels, 26.4.2018 COM(2018) 238 final.

V. CONCLUSION

While free service offers important advantages, it may also raise competitive concerns including undermining paid business models, creating barriers to entry, inviting overproduction in quality, and risking deception or exploitation. Rivals have limited counterstrategies, and there is good reason to think that affected markets will see less competition as a result. Our bottom line is that these factors call for a strict application of competition rules to achieve the benefits of competition.

PUBLIC INTEREST JOURNALISM, THE INTERNET, AND COMPETITION FOR ADVERTISING

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I. INTRODUCTION

The advent of the Internet and of new Internet-based platforms and social networks has profoundly changed the competitive landscape for traditional publishers of "public interest journalism" or, more generally, quality journalism. Consumers now have access to virtually unlimited online content, of which quality journalism is one of many options. But despite clear gains for consumers, there has been widespread concern about the long run impacts of the changes now underway on the future of the medium, and of journalism more broadly. In this article, we investigate how recent trends towards digitalization have affected the provision of public interest journalism in Australia, how they might play out in the future and the scope for public policy responses.[2]

II. WHAT IS PUBLIC INTEREST JOURNALISM

There is no commonly accepted definition for what constitutes public interest journalism: we define it broadly as journalism that confers large positive "externalities" on the public, and where these public benefits extend beyond whatever monetary payment the journalist or publisher might earn from publishing an article. Public interest journalism would certainly include investigative reporting, and can perhaps best be described as a subset of quality news journalism. The future of public interest journalism is therefore tied to future trends in the provision of quality news content.

Viewed in analytical terms, the essence of public interest journalism is that it focuses on situations where power can be abused, be it by government, business or society more generally. By exposing these abuses — whether they involve corruption, coercion or simple error — public interest journalism does not only right an immediate wrong: it also helps deter the kind of conduct at issue. Additionally, a vibrant and effective media that has the incentives and ability to identify, investigate and publicize abuses of power strengthens the community's trust in our system of government.

Because its impacts are so pervasive, the benefits of public interest journalism far exceed the economic rewards that newspapers, broadcasters, and other sources of content obtain from investing in it. It is therefore understandable that the financial strains which many segments of the traditional media have experienced in recent years would raise fears that public interest journalism will become ever harder to fund, reducing its level, both relative to the past and compared to the level which is in the best interests of the community.

In examining whether those fears are justified, it is important to start by noting that the "digital disruption" which has helped cause those financial strains has brought far-reaching gains to Australian consumers, and consumers of journalism more broadly. Access to content has become vastly easier and the range of content that can be accessed has exploded: if consumers have a complaint, it is more likely to be about "information overload" than about a paucity of content. This is, moreover, an area where the "death of distance" is not mere hyperbole, with instant accessibility to news from around the world yielding especially large benefits to all Australians but especially to the millions who have close personal, social, and economic links overseas.

Whether or not the supply of quality or public interest journalism is in decline, and the role of the Internet in bringing this about, is not as straightforward as is commonly assumed. In Australia, as is the case in most developed economies, the circulation and readership of print newspapers has generally fallen for many years, although some publications have fared better than others. Yet these changes are reflective of a long-term trend that commenced well before the Internet became widespread, beginning with the decreased use of public transport, where people read newspapers while commuting, and the rise of the television evening newscast.

There have also been frequently cited significant job losses in the traditional print media, yet there are no direct links between the provision of quality news content, on the one hand, and the number of journalists working in Australia on the other. Historically, that number has varied considerably year-on-year, and it is not the case that the number of journalists in Australia is particularly low today, or even that it has consistently declined in recent years. Also, traditional newspapers are transitioning from a pre-Internet world in which they were effectively protected from competition, including by regulation, distribution costs, and geographic markets, to one where competition for audiences of online news and non-news content is intense. In such a context, it is inevitable and indeed essential that traditional newspapers make efficiencies in order to compete and remain viable.

2 This short article summarizes the results of a larger study prepared on behalf of Google in the context of a recent Senate Enquiry on the future of Public Interest Journalism. Green Square Associates: Impact of news aggregators on public interest journalism in Australia; May 2018. In press: available on request from the authors.

Particularly given the changing dynamics of the online news environment, there is also a distinction to be made between public interest journalism and the organizations that produce it. Historically, most, although by no means all, quality journalism has been produced by traditional (quality) newspapers. However, new models for producing and funding quality journalism are emerging and more may emerge.

III. COMPETITION IN THE TRADITIONAL AND NEW MEDIA

The vast amount of news and other online content has intensified competition among news publishers, as well as competition for consumers' attention and time more generally. An increasing number of consumers, particularly younger people, now prefer to access news online, and the Internet offers diverse new platforms and channels whereby news can be accessed. Online-only news businesses have entered the Australian market, while time-saving innovations such as search engines and news aggregators assist consumers in discovering news content. For consumers, this has brought about an unprecedented level of choice and variety in news content, as well as convenience in terms of the channels via which news can be accessed.

The role of the Internet as a low-cost distribution channel has led to the dismantling of the geographic monopolies and other barriers to entry that historically shielded traditional print newspapers from competition. At the same time, the Internet has generated an enormous expansion in the supply of advertising space, and has thus disrupted the traditional business models for newspapers. These trends have enabled new online players to emerge, but have also contributed to a substantial reduction in the main source of funding for traditional media: revenues from classified and display advertising. These competitive forces are superimposed on an environment in which consumers' time and attention is increasingly scarce; even without new online competitors for the news space, the Internet would still have presented great challenges for traditional media.

IV. ECONOMICS OF QUALITY JOURNALISM

From an economic perspective, theory alone does not offer clear predictions as to how the Internet and its range of new technologies for accessing online content will affect the future production of quality and public interest journalism. As is often the case with two-sided markets, where agents compete for two or more types of purchasers, models yield ambiguous results, and are sensitive to the calibrations adopted.

What is clear, however, is that digitalization has brought many gains to media itself. The costs of producing and distributing content have been greatly reduced, as electronic distribution replaces the printing and cumbersome physical delivery of newspapers; and all media make extensive use of information technology and advanced communications in gathering, investigating and checking stories, as well as in converting raw information into "news." Productivity advances have occurred at every stage of the content production process, with public interest journalism (which involves finding, collating, and testing large volumes of information) benefiting more than most forms of content.

In many respects, the Internet has enabled traditional newspapers to achieve potentially significant reductions in the costs of producing news. Historically, more than half of the costs of producing a typical newspaper (for instance, in the U.S. or in Germany) related to the costs of physically producing the paper, including the costs of raw material such as paper and ink, as well as the costs of physical distribution (OECD 2010).[3] In contrast, the costs of content creation and editorial work only amounted to around 24 percent of costs for a German newspaper and 14 percent for a U.S. newspaper. For newspapers, the trend towards online publishing will eventually all but eliminate print production and distribution costs. The Internet can also be expected to affect at least a share of the costs of producing quality news content, including the costs of investigative journalism, for instance costs relating to accessing documents or to checking and verifying primary news and facts. The ability to transfer digital content across the Internet has also enabled cost reductions from greater sharing of news content across metropolitan and regional newspapers. One of the by-products of these cost reductions is a substantial reduction of entry barriers and therefore a more diverse media landscape. New publishers of news have been able to establish themselves without incurring the large upfront costs of setting up print operations and distribution channels. Innovative revenue models are also emerging.

It is equally true, however, that the shift to a connected world has greatly intensified the competitive pressures on the media. By lowering barriers to entry, digitalization has allowed both the emergence of new forms of content — such as blogs and online videos — and encouraged convergence between previously separated markets. In addition to competing more directly with each other, Australian newspapers must now compete for readers with publications overseas, while Australian broadcasters risk losing their viewers to competitors located tens of thousands of kilometers away. Equally, thanks to the development of their websites, high quality public broadcasters such as the ABC and the BBC, which previously did not compete directly with newspapers, now do, offering for free what commercial suppliers want (and ultimately need) to charge

3 Organization for Economic Co-operation and Development, 2010. The evolution of News and the Internet, 11 June.

for. At the same time, competition for "eyeballs" has increased as time-poor consumers have an almost unmanageably rich menu of online options from which to choose; getting consumers interested in news has become a far tougher challenge.

It is not only rivalry over consumers that has become more intense. Competition for the advertising dollars that have traditionally funded the bulk of the costs of newspapers and other producers of public interest journalism has intensified. Like consumers, advertisers now have a much broader range of options for reaching audiences. Moreover, as more and more activities move on-line, "eyeballs" can be reached through an ever-greater range of platforms, breaking down any barriers that might once have insulated media advertising from other marketing channels. In choosing among those options, advertisers naturally place a substantial value on the ability to accurately target audiences, gauge their reactions and assess their return on investment. The technology that underpins the new digital platforms has provided the ability to tailor and measure advertising far more effectively than the traditional mass media could.

Dramatic changes have then taken place on the revenue side of quality journalism. To a greater or lesser extent, both traditional and new media are "advertiser-supported" and operate a "two-sided" business model.[4] Platforms that operate in two-sided markets serve and compete for two distinct groups of customers who "need" each other in some way; the platform provides the means of enabling members of the two groups to capture the benefits from having access to one other. For media platforms, the two customer groups are readers or audiences, on the one side, and advertisers, on the other. In the case of newspapers, the platform creates content, the content attracts readers or audiences, who in turn attract advertisers who effectively pay for most (or all of) the content. The same fundamental relationship generally exists for online platforms, where the use of both the infrastructure and the search, aggregation, and content services that are offered to consumers without a direct charge are paid for by advertising revenues.

Increased competition for readers, and the better "targeting" of specific segments of consumers facilitated by the internet, have resulted in the decline of traditional newspaper readership and a loss of print advertising revenues for these organizations. In addition, the widespread availability of news and other specialized content on the Internet has undermined the business model of traditional news organizations, which relied on cross-subsidizing the production of news with revenues sourced from other types of content. Twenty years ago, a reader interested in, say, sports, would have to buy an entire newspaper, consisting of a bundle of news (including on local, state or national politics, international affairs, and many other topics), even if none of that other content interested them. Today, a reader who is interested in sports or any other topic can visit one of many specialized websites, which may additionally offer more in-depth or up-to-date information; he or she is no longer obliged to buy a newspaper or even visit a general news site.

By the same token, 20 years ago, an advertiser wishing to purchase ad space had a limited number of options: a small number of national and regional newspapers, magazines, radio stations or television channels. Moreover, given limited advertising "real estate," that advertising was expensive. Today, the Internet has vastly expanded the space in which advertisers can reach consumers, advertisers can buy advertising cost-effectively (directly or through aggregators), in different and innovative formats (including photos and videos), and at a scale that suits their requirements. As the geographical monopolies held by traditional newspapers in terms of consumers and advertisers have been eroded, their most important sources of revenue – classified and display advertising – has migrated to online marketplaces and other online media.

All of these trends are apparent in the declining share of advertising revenues directed to traditional print media (newspapers and magazines), and the rapid growth in online advertising. In nominal terms:

- advertising expenditures in print media have fallen consistently from a peak of around $6.2 billion in 2005; as of 2016, print media expenditures were around $2 billion, and are expected to fall further; while

- digital advertising expenditures in Australia were zero until 2001, but grew to $7.4 billion by 2016 (from around $6 billion in 2015), and continue to climb.

4 Evans, D.S. and Schmalensee, R., 2005. The industrial organization of markets with two-sided platforms (No. w11603). National Bureau of Economic Research.

V. FUTURE OF QUALITY AND PUBLIC INTEREST JOURNALISM

Over any longer-term time horizon, the availability of quality or public interest journalism in Australia – as provided by the private sector media and specifically newspapers – requires that a sufficiently large subset of consumers is either prepared to pay directly for content, or is sufficiently interested in that content to attract adequate advertising revenues. There are some indications that at least a share of the audience is willing to pay for news content, although in Australia that share is undoubtedly lessened by the presence of public sector broadcasters and other private publishers, who offer their news content free of charge and who compete aggressively for online audiences with traditional (private sector) media.

Given the scale and pace of these changes, it is hardly surprising that the traditional media have struggled to adjust, with newspapers experiencing particular difficulties. Nor is it surprising that adjustment has been uneven, with some suppliers adjusting better than others. Nonetheless, focusing on those newspapers that seem to be best at navigating the new environment, we find that the strategies they have adopted have three key elements:

- First, the most successful publishers have harnessed technology to drastically reduce costs and improve quality. Computer-aided forms of investigative journalism are now widespread — for example, the recent exposés of the Panama and Paradise papers relied on online coordination within a global consortium of newspapers and on the types of database searches of which only national governments used to be capable. Quality improvements also apply to the services those publishers provide advertisers, for instance by working with platforms such as Google to make available highly detailed information about segment demographics and the behaviors of their readers.

- Second, they have placed greater emphasis on increasing subscription revenues, notably by expanding online sales, which reduces their reliance on advertisers and simultaneously makes them more attractive to advertisers. Properly managed pay-walls are critical in this respect, not only in motivating consumers to subscribe but also in restoring papers' control over the "bundle" of content consumers can access — to that extent at least partially reversing the unbundling of newspaper content which the emergence of digital platforms initially induced.

- Third, the most successful publishers have given increased prominence to unique content, thereby differentiating their offering from the enormous range of material the World Wide Web makes available. While that unique content can take many forms, those publishers who target the higher quality end of the market show every sign of viewing in-depth analysis and reporting as being a crucial part of their unique offering to readers.

That is not to downplay the disruptiveness of the current transformation. As with every major structural change, it will impose substantial costs — just as the development of very high speed printing presses reshaped the newspaper industry early in the twentieth century, eliminating many smaller papers and rewarding those that could secure scale economies; and just as the development of broadcasting and the shift from public transport to commuting by car reduced newspapers' circulation and led to the disappearance of evening papers (or at least of those that charge a price). But it would be foolish to consider increased productivity, subscription focused business models, and the shift from "me too" reporting to unique content — which together have led to a shrinkage in the size of some news rooms — as harbingers of the impending extinction of public interest journalism.

Looking forward, new online-only sources of quality and public interest journalism are likely to enter the market. In addition to the online-only news organizations that have set up business in Australia, business models that focus on local or investigative journalism have also been established overseas, with some seeming more viable than others.

VI. POLICY IMPLICATIONS

Whether public interest journalism is currently "undersupplied" relative to a "social optimum," or whether the advent of the Internet will reduce the availability of public interest journalism, cannot be established with any degree of certainty. The emergence of successful new online-only publishing and payment models suggests that public interest journalism is not inevitably tied to the success of traditional (print) newspapers, and that there is a distinction to be made between public interest journalism and the organizations that have traditionally produced it. At the same time, the incentives for all media organizations to differentiate their product are likely to create a continuing role for public interest journalism in the product offering of content providers, especially those targeting the higher quality end of the product spectrum.

Any substantial reduction in the availability of public interest journalism would most likely occur in small markets, for instance in regional parts of Australia, where local publishers also face significantly more competition, including for advertising, than was historically the case. But

even in small regional markets poor outcomes are not inevitable. Australian media organizations are investing and expanding into these markets to attract and build audiences. More sharing of journalistic infrastructure across regional news publications or other media such as regional television may also enable cost savings that make smaller publications more viable. The recently passed Broadcasting Legislation Amendment (Broadcasting Reform) Bill 2017 will similarly enable savings from scope economies. There are also international lessons to be taken from publishers that have built successful business models that cater to small markets.

In any case, there are no simple policy solutions that would address a shortfall in public interest journalism, if it were thought to exist. There is no way of rolling back the forces of the Internet that have disrupted traditional publishing models (and to do so would ignore and potentially threaten the tremendous consumer and social benefits that technology has delivered). Market interventions in Europe have not been successful, while measures whereby the Australian Government becomes the arbiter of what constitutes worthwhile journalism will almost certainly raise concerns about political preferences and conflicts of interests:

- Mandated copyright payments have been tried and have failed in Europe. The effect of mandating some form of copyright payment in Germany and Spain was to either entirely eliminate news aggregation services for consumers, or to skew the competitive landscape to the disadvantage of smaller aggregators.

- The Australian Government provides a public subsidy (of around $1.3 billion in 2016-17) to the public sector broadcasters, some share of which supports public interest journalism. One way of increasing the effectiveness of that funding would be to make it more contestable, for instance by allowing other media organizations to bid for the provision of news and journalism services. But direct measures to subsidize public interest journalism create the potential for a conflict of interest, since decisions about the extent of any subsidy and which organization(s) would receive it would be in the hands of those who might themselves be the target of investigative journalism, and who might then have their own motives for (not) selecting one candidate organization or another.

- The alternative to offering *ex ante* public subsidies would be to offer *ex post* awards for investigative journalism achievements. Here too, there are potentially serious incentive problems, given that those who would appoint, say, a decision-making board, may select board members with a similar political outlook or interests. An aggressive, independent publisher may then risk not being favored in any selection process.

Concerns around the heavy burden that Australia's defamation laws place on publishers was a consistent theme throughout the Senate Enquiry hearings. Australian law limits the defenses available to journalists, and the costs involved in defamation matters can easily run into the millions of dollars, prohibitive for publishers without substantial resources. One option therefore worth considering is to reform Australian defamation laws with a view to mitigating some of the significant costs and risks encountered by journalists and publishers of investigative journalism. Any legislative reform of this type would potentially be far-reaching and would have to be carefully considered. Yet if there exists a policy concern about the extent of open debate regarding matters of public interest, there may be a case for reviewing the balance of interests between protecting reputations, on the one hand, and the public interest in bringing to light potential malfeasance, on the other.

PLATFORM POWER AND PRIVACY PROTECTION: A CASE FOR POLICY INNOVATION

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I. INTRODUCTION

Antitrust debates regarding competition in data-driven markets, particularly those dominated by digital platforms, have run headlong into issues of privacy. This was inevitable.

At the heart of the platform business model is the collection and use, for commercial gain, of unfathomably large amounts of personal information. Such information is the *sine qua non* of privacy concerns.[2] Given their increasing power as information gate-keepers and intermediaries across swathes of the digital economy, it is barely surprising that platforms find themselves in the line of fire for modern-day privacy concerns.

Public engagement with, and intellectual discourse on, the intersections between antitrust and privacy policies have been fueled by the Cambridge Analytica scandal. As an episode that saw the harvesting of personal information from millions of Facebook users for the purposes of electoral manipulation, it pushed the power of platforms and privacy protection, along with their political implications, onto front pages around the world.

Much of the antitrust debate surrounding privacy has been focused on whether and how to nest[3] privacy into antitrust. Broadly speaking, the debate appears divided between two camps.

In one corner are those who see complementarities or synergies between antitrust and privacy policy goals. This is a view premised on a broad conception of antitrust, most commonly associated with doctrine in the European Union ("EU"), but also with the so-called "New" or "Neo-Brandeis" school that has emerged in the U.S.[4] It is underpinned by a commitment to state intervention for the promotion of pluralist aims of antitrust, including those of a political and social orientation, not just an economic one.

In the other corner are those who regard antitrust and privacy as largely occupying different and disconnected policy terrains. This is a view premised on a narrower conception of antitrust, generally associated with the approach promulgated by the Chicago school, particularly in the U.S.[5] It is underpinned by a commitment to self-correcting markets in the singular pursuit of economic efficiencies that serve consumer welfare.

In analyzing the antitrust-privacy interface, it may be useful to distinguish between these two approaches by reference to a model of policy consistency on the one hand and a model of policy separation on the other. Both have their limitations. A separatist model, promoting regulatory silos, risks conflict between antitrust and privacy policies in dealing with personal information or consumer data. In particular, strengthened privacy protection may undermine competitive forces.[6] A consistency model, promoting regulatory integration, may reduce this conflict. However, it risks being at the expense of policy experimentation as policymakers remain bound by entrenched frameworks that fail to realize the potential of data in a digital economy.[7]

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2 That said, as a concept, "privacy" extends beyond a concern with keeping personal information private (it extends to behavioral privacy for example). It is also notoriously difficult to define and varies according to time and place. See e.g. Robert C. Post, *Three Concepts of Privacy*, 89 GEO L.J. 2087 (2001).

3 James C. Cooper, *Privacy and Antitrust: Underpants Gnomes, The First Amendment, and Subjectivity*, 20 GEO. MASON L. REV. 1129 (2013).

4 See Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9(3) J. Euro Comp L. & P. 131 (2018). Further, see the collection of articles in *Hipster Antitrust*, Antitrust Chronicle, COMPETITION POLICY INTERNATIONAL (April 2018). There may be some irony in the fact that, based on his concerns about the effects of concentrated economic power on a free society, this school takes its name after the same former U.S. legal scholar and Supreme Court associate justice who co-authored the seminal article on privacy, capturing essential tenets of that right as reflected in European privacy doctrine (see further below): Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4(5) HARVARD L.R. 193 (1890).

5 See e.g. Richard Posner, *The Chicago School of Antitrust Analysis*, 127 U. Pa. L. Rev. 925 (1979).

6 An effect being identified in relation to the General Data Protection Regulation introduced in Europe in May 2018. See e.g. Daniel Lyons, *GDPR: Privacy as Europe's tariff by other means?*, AEI IDEAS (Jul 3, 2018), http://www.aei.org/publication/gdpr-privacy-as-europes-tariff-by-other-means/.

7 While beyond the scope of this article, the adoption of different models across jurisdictions also has implications for international data trade. See Filippo Maria Lancieri, *Antitrust Enforcement in Big Data Markets: What is the role of privacy and antitrust cultures?*, (Jan 2017), https://www.researchgate.net/publication/321638142_Antitrust_Enforcement_in_Big_Data_Markets_What_is_the_Role_of_Privacy_and_Antitrust_Cultures. There are additional related questions regarding processes of global policy convergence. See e.g. Colin J. Bennett, *The European General Data Protection Regulation: An instrument for the globalization of privacy standards?*, 23 INFORMATION POLITY 239 (2018).

Part II of this article maps the contours of these two models, as they are played out in arguments concerning whether and how to embed privacy within antitrust. Part III explains how these approaches relate to differences in the underlying values associated with privacy and antitrust, and points to the relevant legal and institutional frameworks in the EU and the U.S. as reflecting those values. Part IV proposes a third way, a model based on policy innovation, exemplified by Australia's introduction of a comprehensive consumer right to data. Part V briefly concludes the argument.

II. POLICY CONSISTENCY VS POLICY SEPARATION

There are various arguments that have been made in support of incorporating privacy into antitrust analysis reflecting a model of policy consistency.[8] One of these involves treating privacy as a non-price element of competition. This characterization allows for privacy degradation to be treated as a reduction in quality and, on that basis, as harmful to consumers notwithstanding that, in many instances, prices (at least in monetary terms) for platform services are zero. In addition, information asymmetries between data subjects and data holders are a matter for concern on the grounds that they may facilitate consumer exploitation as well as price and, conceivably, behavioral discrimination. In turn, such discrimination is pointed to as aggravating inequality, which for some falls within the compass of antitrust-related concerns. More broadly there is general acceptance of the view that, at a certain scale, data and its uses are a source of market power that may foreclose entry. Economies of scale and network effects are key in this analysis. However, concerns are not limited to the economic implications of power in markets. The political, social, and cultural impact of so-called "data-opolies" is at issue too, and greater privacy protection (with its attendant restrictions on data extraction and mining) is identified as having the potential to ameliorate such impact.

In contrast, consistent with a model of policy separation, the relevance of privacy concerns in the antitrust arena is resisted while issues associated with the operationalization of privacy in an antitrust context are raised also.[9] While conceding some merit to the argument that privacy may be characterized as a non-price (quality) element of competition, challenges are identified in relation to measuring quality effects and making trade-offs between data extraction at the expense of privacy and targeted advertising (or even innovation more broadly) to the benefit of consumers. While not necessarily discounting information asymmetry as a consumer protection concern, exploitation and discrimination are seen to be outside the purview of legitimate antitrust harm theories. Foreclosure arguments are discounted on the grounds that data is non-rivalrous, and consumers multi-home. Moreover, cases of successful new platform entry (as well as cases of failure) over time are routinely pointed to as evidence against data facilitating unassailable competitive advantage. More generally, it is argued that allowing antitrust enforcers to consider privacy would inject an undesirable level of subjectivity into enforcement decisions. Risks of false-positives and the associated chilling of innovation are often articulated in this line of reasoning. Relatedly, based on the view that privacy is fundamentally a non-competition concern it is seen as a matter for legislatures, not antitrust agencies and courts.

The divergence in these approaches may be better understood if we appreciate that they reflect underlying differences not just in the way antitrust goals are conceived, but in the way privacy goals are conceived as well. Looking beyond the technocratic arguments, it appears that the divide lies ultimately between the view that antitrust and privacy share basic foundational values and the view that they are founded on values that are quite separate and distinct.[10]

The point is most readily made by contrasting EU and U.S. values as they relate to power in the context of both antitrust and privacy, and is borne out by an examination of the legal and institutional manifestations of those values.

8 For a representative sample of sources for such arguments, see Maurice E. Stucke, *Should We Be Concerned About Data-opolies?*, 2 GEO. L. TECH. REV. 275 (2018); Peter Swire, "Submitted Testimony to the Federal Trade Commission Behavioral Advertising Town Hall," (Oct 18, 2007), https://www.americanprogress.org/issues/economy/news/2007/10/19/3564/protecting-consumers-privacy-matters-in-antitrust-analysis/; Pamela Harbour & Tara Koslov, *Section 2 in a Web 2.0 World: An Expanded Vision of Relevant Product Markets*, (2010) Antitrust L.J. 769-97; Wolfgang Kerber, *Digital markets, data, and privacy: competition law, consumer law and data protection*, 11 J. Intell. Prop. L. & Pract. 856 (2016); Nathan Newman, *The Costs of Lost Privacy: Consumer Harm and Rising Economic Inequality in the Age of Google*, 40 WM. MITCHELL L. REV. 850, http://open.wmitchell.edu/cgi/viewcontent.cgi?article=1568&context=wmlr; Frank Pasquale, *Privacy, Antitrust, and Power*, 20 GEO. MASON L. REV. 1009 (2013).

9 For a representative sample of sources for such arguments, see Geoffrey Manne & Ben Sperry, *The Problems and Perils of Bootstrapping Privacy and Data into an Antitrust Framework*, (2015) 2 ANTITRUST CHRONICLE 3; Samson Esayas, *The Idea of 'Emergent Properties' in Data Privacy: Towards a Holistic Approach*, 25 (2) Int J. L. & T. 139 (2017); D. Daniel Sokol & Roisin Comerford, *Does Antitrust Have a Role to Play in Regulating Big Data?* in Roger Blair & Daniel Sokol (eds), CAMBRIDGE HANDBOOK OF ANTITRUST, INTELLECTUAL PROPERTY AND HIGH TECH (2016); Noah Phillips, *Keep It: Maintaining Competition in the Privacy Debate*, (Remarks for Internet Governance Forum, July 27, 2018), https://www.ftc.gov/public-statements/2018/07/keep-it-maintaining-competition-privacy-debate.

10 In turn these foundational values are derived from fundamental socio-cultural norms shaped by historical experience and political tradition, full discussion of which is beyond the scope of this article. See e.g. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity versus Liberty*, 113 YALE L.J. 1151 (2004).

III. THE ANTITRUST-PRIVACY INTERFACE: A QUESTION OF VALUES

In a model of policy consistency, most prominently displayed in Europe, power in and of itself is a problem that warrants intervention, whether in the context of privacy or antitrust.

Through a privacy lens, this is because privacy violations are regarded as violations of personal dignity, respect, and autonomy or self-determinism, concerns which are deeply rooted in the history of European armed conflicts and the continent's intellectual tradition.[11] Preserving image and reputation in the interests of personal dignity mean that the powers of the free press and the free market have to be curbed. Moreover, as a reaction against hierarchical class structures of earlier centuries, dignity is to be afforded to all members of society regardless of their socio-economic standing.[12] This is a function of values associated with egalitarianism, or comparative fairness.

Through an antitrust lens, in Europe (but also in the U.S. according to the Neo-Brandeisian school), power is problematic for reasons that include its propensity to generate exploitation or unfairness.[13] It follows that attention must be given to market structure as much as to market conduct. In the latter case, consideration may be given to economic efficiency and harm to consumer welfare. However, in the former case, concentration of power is to be curtailed in its incipiency or dismantled *ex-post* not only on economic grounds (so as to remove threats to the competitive process) but also on the grounds that such power spawns inequality and is insidious to the workings of a liberal democratic society. Competition on the merits is not to be "fenced out by power, privilege or favoritism."[14]

It follows that in both the privacy and antitrust spheres, underlying values support a strong role for government in regulating relations between private actors. That much is evident in the relevant legal and institutional frameworks.

In Europe, privacy and data protection enjoy a status as fundamental human rights.[15] These inalienable protections are implemented through a formidable legal framework, as contained most recently in the General Data Protection and Regulation Directive ("GDPR"),[16] and supported by a powerful institutional apparatus.[17] Updating and extending a 1995 Directive, the GDPR enshrines a series of rights for data subjects and imposes significant obligations on data controllers and processors. It establishes a range of accountability and compliance mechanisms and threatens onerous sanctions in the event of breaches.

EU antitrust doctrine applies largely formalistic criteria, as distinct from economic effects or efficiency-based reasoning, in imposing liability on dominant undertakings. It imposes "special responsibilities" on such entities and has socially oriented elements that include bans on "excessive prices" and price discrimination, as well as the view that unfair trading practices may constitute an abuse of a dominant position. Competition authorities in this jurisdiction have a long track record of bringing and defending such cases before the courts and of imposing massive fines, not infrequently accompanied by behavioral and sometimes structural remedies.[18]

In contrast, under a model of policy separation as applies in the U.S., power in and of itself is a concern for privacy but not for antitrust (at least not according to the Chicago school, which may be facing serious challenges but still stands as the basis for antitrust jurisprudence and agency practice over the last 30 years).

In the privacy realm, it is largely the power of the state that is at issue. Such power needs to be restrained so as to prevent unjustified incursions on civil liberties. Suspicion of government authorities and their intrusion into private affairs, into the sanctity of one's own home es-

11 See e.g. Robert Kagan, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER 11, 58-62 (2003).

12 James Q. Whitman, *On Nazi 'Honour' and the New European Dignity* in Christian Joerges & Navrak Singh Ghaleigh, DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM IN EUROPE AND ITS LEGAL TRADITIONS 243, 251-262 (2003).

13 See Ariel Ezrachi, *EU Competition Law Goals and The Digital Economy*, Aug. 8 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3191766.

14 Eleanor Fox, *Monopolization and abuse of dominance: Why Europe is different*, 59(1) ANTITRUST BULLETIN 129, 132 (2014).

15 European Convention on Human Rights (art. 8); European Charter of Human Rights (arts 7 & 8).

16 REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of April 27, 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) 2016.

17 See Paul Schwartz, *The EU-US Privacy Collision: A Turn to Institutions and Procedures*, 126 HARV. L.REV. 1966 (2013).

18 See generally Pinar Akman, THE CONCEPT OF ABUSE IN EU COMPETITION LAW: LAW AND ECONOMIC APPROACHES (2012).

pecially, are the foundation on which much of American privacy doctrine and thinking has been built.[19] Hence the regulatory focus is primarily on relations between public and private actors. Extensions of EU-style privacy into private-private relations face significant obstacles associated with the value of the free market and the value of the free press. If privacy is to be protected in this realm it is largely as a consumer protection measure so as to prevent or ameliorate market failures emanating from information asymmetry.[20]

In the antitrust realm, power *per se* is not problematic given that it may be derived from efficiency. Firms that win market power by virtue of competing effectively are not to be stripped of their rewards for fear of eroding or removing incentives for efficiency, seen as being in the interests of consumer welfare (defined in terms of surplus as distinct from any broader notion of welfare or wellbeing). Rather it is the exercise of market power with the effect of excluding rivals in the absence of any efficiency justification that is of concern. It follows that in this context, but only on limited grounds, state intervention in private-private relations (or the market) may be warranted. Intervention motivated by other concerns, particularly of a fairness or distributive character, are eschewed as misplaced, tantamount to social as distinct from economic policy, and as likely to undermine the coherence and effectiveness of antitrust doctrine.[21]

Hence, in the case of privacy there appears to be a strong basis for legal protection, but only or predominantly against the state. In the case of antitrust, the argument for legal intervention is much weaker. Again, the underlying values as they relate to power are evident in the relevant legal and institutional frameworks.

The U.S. right to protection from state intrusion into citizens' private lives stems from and has been extended in jurisprudence invoking the Fourth Amendment of the Constitution (enshrining rights against unlawful searches and seizures). Efforts to import privacy protections in private relations from Europe are invariably countered by another fundamental set of rights in the U.S., namely the rights to freedom of speech or of the press, under the First Amendment. In the setting of the free market, information or data is regarded as an asset and hence may be traded as a freely alienable right. Unlike in Europe and many other parts of the world, there is no federal omnibus legislation governing privacy, but rather a mosaic of federal and state statutes and regulators that are sector-, activity-, and/or data-specific.[22] The closest version of a general federal privacy regulator takes the form of the Federal Trade Commission, but its jurisdiction is limited to dealing with privacy as a consumer protection or fair trade issue. Consistent with this mandate, its primary concern has been with systems of notice and consent. It also relies heavily on soft law or co-regulatory approaches, and has no rule-making authority or power to fine.[23]

In antitrust, since the 1970s and under the intellectual hegemony of the Chicago school, a *laissez-faire* attitude to structural concerns has meant that concentration through merger activity has met with minimal resistance. The predominant focus of enforcement has been on so-called hard-core cartels. Faith in markets and business judgment, particularly associated with the pursuit of efficiencies, together with an imperative to avoid false-positives, have resulted in almost absentee enforcement of monopolization claims. Rule of reason tests have been favored over *per se* liability standards in relation to any conduct other than the most obvious horizontal restraints. Price discrimination has been neglected on the basis that it reflects distributive concerns. Consumer harm has been conceptualized predominantly in terms of price effects, and there has been a general insistence on measurability or quantification for the purposes of harm assessment.[24]

As policymaking and associated laws and institutions generally reflect deeply ingrained social and political values and traditions, the EU-U.S. divergence in relation to the antitrust-privacy interface is perhaps not surprising. As models of policy consistency and policy separation, the merits and demerits of each would be open to debate and views inevitably will differ, again reflecting the values underpinning them. However, presenting the two models as a binary choice (as so often is the case in discourse about a transatlantic divide on a wide range of issues) would be a mistake. It would also be a lost opportunity. Is there another way?

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19 See Jeffrey Rosen, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA 5 (2000).

20 See further Julie Brill, *The Intersection Between Consumer Protection and Competition in the New World of Privacy*, 7(1) COMPETITION POLICY INTERNATIONAL (Spring, 2011).

21 See e.g. Mauritz Dolmans & Wanjie Lin, *Fairness and Competition Law: A Fairness Paradox*, CONCURRENCES (No. 4, Nov, 2017), https://www.concurrences.com/en/review/issues/no-4-2017/articles/fairness-and-competition-law-a-fairness-paradox.

22 See Franz-Stefan Gady, *EU/U.S. Approaches to Data Privacy and the 'Brussels Effect': A Comparative Analysis*, Geo J. Int. Affairs 12 (2014).

23 See generally David A. Hyman & William E. Kovacic, *Implementing Privacy Policy: Who Should Do What?* (Feb 13, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3123115.

24 See e.g. Maurice Stucke & Ariel Ezrachi, The Rise, Fall, and Rebirth of the U.S. Antitrust Movement, HARV BUS REV. (Dec 15, 2017); Joshua Wright, *Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust*, 78 ANTITRUST L.J. 301 (2011).

IV. POLICY INNOVATION

Recent developments in Australia point to an alternative model, based on policy innovation. The Australian government has proposed introducing a new "Consumer Data Right" ("CDR").[25] It is presented as a policy reform to drive competition and innovation or, even more ambitiously, to advance and secure the future welfare of all Australians in a digital economy.[26] In effect, the reform is concerned with facilitating data portability and transfer to enable consumers to use their data to compare and switch between product and service providers, ensuring that consumers have more information and choice while giving businesses greater incentives and capacity to compete.

Similar reforms have been implemented in other countries in specific sectors,[27] and the GDPR, which is economy-wide, also provides for data transfer.[28] However, in aspects of both its substantive provisions and its institutional arrangements, the Australian model is arguably first-of-its-kind. The following facets of the reform are especially noteworthy in this respect:

First, "consumers" are to include not just individuals, but also businesses irrespective of size.

Second, "consumer data" is to be defined broadly, including data that identifies and is identifiable with the consumer, whether provided directly by the consumer, collected in the course of actions taken by the data holder or held by the data holder even if created by others.

Third, the right is essentially that of consumers to have access to and control over their data, enabling them to have it transferred by the data holder to an accredited third party at their direction, and in a form that is digitally practicable.

Fourth, both the nature of the data and the form in which it would be transferable are to be based on an outcomes-focused principle, namely that it should include the data and in the form that a competing business would need in order to make a reasonable offer for the consumer's patronage. Subject to that principle, it is recognized that types of data will vary between sectors and that technological change will affect the nature of data that is generated over time. Hence there will be an industry data-specification process that enables the relevant industry to agree on the types of data that will be covered, as well as mechanisms for transfer and security protocols.

Fifth, the emphasis on creating an inalienable right of control steers (deliberately) away from a right of ownership (a property right), which would be alienable and is arguably nebulous in any event, as it would be practically difficult if not impossible to exercise.[29] Furthermore, it is a right of *joint* control of data as an asset shared by data holders and data subjects, one of the implications of which is that, unlike the GDPR, the CDR does not extend to a right to deletion (the so-called "right to be forgotten"). While sharing control with data holders, data subjects are empowered to limit aspects of data use in ways that may most concern them (for example, on-sale of data without disclosure or consumer consent).

Sixth, the CDR is to apply economy-wide. While this is important in creating incentives for all private enterprises to act on the privacy concerns of consumers, application of the new law is neither automatic nor immediate. Rather, it is recognized that in certain respects the reform is experimental and that there may potentially be significant transition and set up costs. Hence, adopting a scalable risk-based approach, it is to

25 See https://treasury.gov.au/consumer-data-right. The proposal is based on recommendations made by the Productivity Commission, *Data Availability and Use*, Inquiry Report (May, 2017), http://www.pc.gov.au/inquiries/completed/data-access/report.

26 In part, the basis for this broader ambition, is that the reform is concerned also with greater sharing and release of public sector data (not discussed in this article). See Australian Government, Department of Prime Minister and Cabinet, *New Australian Government Data Sharing and Release Legislation*, Issues Paper for Consultation (Jul. 4, 2018), https://www.pmc.gov.au/resource-centre/public-data/issues-paper-data-sharing-release-legislation.

27 In banking in particular, see e.g. Open Banking Goes Live – What Will it Mean for Consumers? (2018), https://www.consumersinternational.org/news-resources/blog/posts/open-banking-goes-live/.

28 In the U.S., Senate Intelligence Committee Vice Chairman, Mark Warner, has produced a set of policy proposals for regulating large digital platforms which include U.S. adoption of GDPR-style legislation with its right relating to data portability. See Sen Mark R. Warner, *Potential Policy Proposals for Regulation of Social Media and Technology Firms*, White Paper (DRAFT), https://graphics.axios.com/pdf/PlatformPolicyPaper.pdf. Not surprisingly the proposals are attracting much comment, including scathing critique from commentators of the Chicago-persuasion. See e.g. Kristian Stout, Senator Warner's retrogressive proposals could lead to arbitrary and capricious interventions that would harm entrepreneurs and consumers, *Truth On the Market* (Aug. 10, 2018), https://truthonthemarket.com/2018/08/10/senator-warners-retrogressive-proposals-could-lead-to-arbitrary-and-capricious-interventions-that-would-harm-entrepreneurs-and-consumers/.

29 Cf. Luigi Zingales & Guy Rolnik, *A Way to Own your Social Media Data*, New York Times (Jun. 30, 2017), https://www.nytimes.com/2017/06/30/opinion/social-data-google-facebook-europe.html. It also steers well clear of debates as to whether consumers should be paid for their data. See e.g. *What if people were paid for their data?*, (Apr., 9, 2018) The Economist, https://medium.com/@the_economist/what-if-people-were-paid-for-their-data-8df63f021e38.

be rolled out sector-by-sector, starting with the banking sector, to be followed by telecommunications and energy. This will not only enable the system to be industry-customized and reduce upfront costs but will facilitate consumer education in one sector that should then be more readily transferable to others, as well as allowing for the policy to be refined as lessons are derived from the implementation experience.

Finally, consistent with competition being its primary rationale, the new regime makes the Australian competition authority, the Australian Competition and Consumer Commission, the lead regulator. The Commission is to have responsibilities over the approval of data-specification agreements and standards, accreditation of data recipients, handling complaints about, and taking enforcement action in response to breaches of the CDR rules. In the event of liability, significant penalties would apply.

At the heart of this model is a basic distinction drawn between privacy and competition as each relates to consumer data. While privacy focuses on managing data use by *others*, the CDR focuses on enabling consumers *themselves* to control its use. In essence, the distinction is between limitation or aversion of a threat (to which privacy policy is directed) and opening up and spreading of opportunity (to which competition policy is directed). Drawing the distinction allows for the narrative surrounding data to be changed, from one concerned with harms to one concerned with benefits.

At the same time, the proposed reform does not alter, or in any way erode, existing protections for personal information under privacy laws in this jurisdiction. Indeed, in several respects, the new right strengthens privacy protections in establishing greater transparency and choice for consumers in controlling how their information will be used, providing for the mandatory accreditation of data recipients, ensuring there are standards for data transfer and security set by a Data Standards Body, allocating a strong role for the Australian privacy regulator in advising on and enforcing privacy protections, and providing a range of avenues for consumers to seek meaningful remedies for breaches, including external dispute resolution and direct rights of action.

In broader terms, the CDR reform is motivated by what is seen as a modern-day imperative for government and private enterprises in a digitally transformed economy, namely to ensure that there is a "social license" for data collection and use. Social license is to be derived from community acceptance and trust in providing data and allowing for its use, to the benefit of the economy and society as a whole.[30] In this sense, the proposed CDR is more than a competition, consumer protection, or even privacy reform. The need to build social license in these areas is based on growing evidence of citizen-consumer distrust in technology generally, in data handling practices specifically, and an associated increasing distrust in societal institutions. This distrust creates a risk for data holders: there will be a tipping point where the balance of willingness tips away from data supply to data restriction and where government steps in to regulate in ways that may too tip the balance towards restriction. Such tipping would be to the detriment of businesses that profit from data collection and use, but also to the detriment of progress and innovation that benefits consumers and the community generally.

The CDR aims to alter this direction, building trust by ensuring that consumers, as the source of the data from which we all benefit, have greater influence over how value is created and extracted from it, as well as ensuring that there are robust institutional and governance arrangements supporting it.[31] The values underpinning and embedded in the model could be characterized as social – shared control and shared benefit – but the outcomes undoubtedly will be economic. Moreover, "the social" and "the economic" will be mutually reinforcing. The trust engendered by greater consumer control over data and confidence in "the system" facilitating this control should contribute to an ongoing support for data-sharing initiatives and active participation by individuals in the data eco-system. If data is shared and used in trusted, protected, and inclusive ways, this will drive even more value that can, in turn, create more trust, inclusion, and control. The full value of data will be unlocked.

30 See Productivity Commission, *Data Availability and Use*, Inquiry Report (May, 2017), chp 4, 177-178, http://www.pc.gov.au/inquiries/completed/data-access/report.

31 See Productivity Commission, *Data Availability and Use*, Inquiry Report (May, 2017), chp 5, 192, http://www.pc.gov.au/inquiries/completed/data-access/report.

V. CONCLUSION

The privacy debate is not a passing fad. As economies and societies continue to be transformed by the data revolution, privacy protections will continue to be paramount, and digital platforms are likely to continue to be a hotbed for such concerns. Policymakers will have to confront pressing questions over how best to protect privacy while at the same time promoting competition.

Policy responses are shaped by societal values. In the EU there is an alignment in the values associated with both competition and privacy, allowing for consistency in policy responses. In the U.S. there is less alignment and, in some respects, misalignment, allowing for potential conflict. Drawing on an innovative Australian model, this article proposes a different approach. Taking a page out of both the U.S. and EU books, it treats privacy concerns as distinct from competition but also recognizes the possibility of policy responses that have positive mutually reinforcing effects on both.

THE TRAGEDY OF THE SUCCESSFUL FIRM

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I. INTRODUCTION

How can a firm know with certainty which business plans are safe for it to pursue to find success? The answer is that it cannot. For all its voluminous case-law and reputation as the most active competition law enforcement jurisdiction in the world,[2] the EU has yet to send firms a cohesive message about the boundaries within which they can conduct themselves shielded from antitrust liability. As a result, like Odysseus caught between Scylla and Charybdis, ambitious firms are forced to choose between cripplingly safe choices and the risk of competition enforcement action.

Nowhere is this dilemma more pronounced than in cases involving on-line platforms and platforms in general, because even two decades after the emergence of the first serious body of literature on platform theory,[3] novel business models still surface frequently and have yet to be fully assessed. The two recent decisions on *Google Search*[4] and *Google Android*[5] did little to clarify the boundaries of acceptable business conduct, and instead further entrenched the chronic fogginess of European competition law. This observation is without prejudice to the outcome of the cases. One can agree or disagree with the findings of the Commission, but it is hard not to notice the missed opportunity to provide concrete guidance on what firms, and indeed those that revolve around platform business models in particular, can do to stay outside of enforcers' hunting grounds. It is one thing to say that the tests and standards of competition law are wrong, and another to say that they are vague. The latter is arguably more pernicious because not only does vague not equal right, it also raises uncertainty.

I focus here on four areas that the European competition law apparatus must address if it is to guide innovative firms toward success without fear of undue punishment. Firstly, it must acknowledge and actually use the properties and special characteristics of platform ecosystems in its case-law reasoning. Secondly, it must either properly define or scrap the concept of special responsibility altogether. As it currently stands, the concept only serves to justify conclusions that cannot be adequately supported by a theory of abuse, without adding any substantive elements to the analysis. Thirdly, firms need to be told what abuse of dominance means in a non-circular manner (unlike current practice) so they may have a chance to steer away from it. Ideally, the concept will be tied to terms that have discoverable and, even better, quantifiable content. Lastly, the European competition law apparatus must settle on one or more goals for competition law, and for every instance of abuse it must explain which one of these goals was infringed and in what way. The current practice that adopts one goal but in effect safeguards another is confusing and a threat to legal certainty. The two-sided nature of platform business models further complicates the attribution.

What is argued here is not the merits of European competition law standards, but rather the *lack of clarity* surrounding them. While it would be ideal to get all rules and standards right, a first step must be to attempt to at least clarify them, even if it is done in a controversial manner. The platform economy, in all its innovativeness and malleability, needs clarity more than anything else so that firms know the rules of the game and can adapt accordingly.

II. THE SYSTEMIC NATURE OF PLATFORM ECOSYSTEMS

Platform ecosystems in digital markets may present novel features or features that are uncommon in other sectors of the economy, and therefore an elevated measure of attention is required to acknowledge them. Of those, I identify two: firstly, that digital platform ecosystems are often structured as large technical systems that comprise multiple highly interconnected parts, so that changes in one part may have unanticipated consequences for other parts and the general operation of the system as a whole.[6]

Evidently, successful firms are more likely to bear this kind of systemic quality due to the correlation between size and complexity. For competition law purposes, it is important to acknowledge that, because of the high degree of interdependency, pervasive control over the system may be required to achieve the necessary amount of planning and coordination, otherwise the system risks collapsing under the weight of its own complexity. Sub-optimal performance of ecosystems such as *Symbian* and *i-mode* can indeed be attributed partly to the lack of central

2 Mike Konczal, "Meet the World's Most Feared Antitrust Enforcer," *The Nation* (February 15, 2018).

3 See Geoffrey G. Parker & Marshall W, Van Alstyne, "Internetwork Externalities and Free Information Goods," *Proceedings of the 2Nd ACM Conference on Electronic Commerce* (ACM 2000) http://doi.acm.org/10.1145/352871.352883; Jean-Charles Rochet and Jean Tirole, "Two-Sided Markets: A Progress Report," (2006) 37 The RAND Journal of Economics 645.

4 Case AT.39740, *Google Search (Shopping)*, June 27, 2017.

5 Case AT.40099, *Google Android*, July 18, 2018.

6 Konstantinos Stylianou, "Systemic Efficiencies in Competition Law: Evidence from the ICT Industry," (2016) 12 Journal of Competition Law and Economics 557, 560–562.

coordination.[7] Competition law, in investigating abuse and in designing remedies, should take into account this kind of systemic quality so that it at least correctly appreciates what this control and systemic coordination is contributing, and what will be lost if the system is broken by means of antitrust enforcement.[8]

Secondly, digital platform ecosystems may present novel business models that appear *prima facie* anticompetitive, but that require a closer inspection to appreciate their necessity within the ecosystem and their contribution to the economy. This is particularly true in platform systems where certain components are offered for free and where the distribution of cost recoupment sources may change over time. Under those circumstances, tying elements together or controlling the conditions of access to certain elements helps apportion risk and cost, both of which are essential considerations for firms.[9] The lack of such enabling arrangements will likely result in higher costs and risks for product and service development. This may be an acceptable possibility for competition law, but it is important to at least recognize the trade-off.

The *Android* case illustrates that quite well. Google's business model is one that has allowed cheaper, broader and faster innovation by giving away Android and Play for free, but cost recoupment and risk management take place by channeling users toward the revenue-generating Google Search, and by keeping users as engaged as possible in the Google ecosystem so that if value moves from one component to another, as it is to be expected in digital markets, the firm can still maintain a healthy balance between revenue-generating sources and free subsidized activities.[10] However, these justifications were not enough to convince the Commission, which requested the dismantling of that business model.

It took many years to appreciate the pro-competitive justifications of vertical and even horizontal restraints as normal business practices. As Judge Easterbrook would put it "wisdom lags far behind the market."[11] The fact that the Commission only recently completed a sectoral inquiry on platform regulation[12] shows that we are still deciphering how platforms operate. The hope is that the Court and the Commission will make clarity in the special characteristics of platforms, as uniquely complex systems, a top priority for their immediate next steps.

III. THE SPECIAL RESPONSIBILITY OF FIRMS

Under European competition law, dominant firms have a special responsibility "not to allow their conduct to impair the genuine undistorted competition on the common market."[13] The concept features prominently in cases that revolve around platform business models, including both *Google* cases and the *Microsoft* case.[14]

The core utility and appeal of the special responsibility obligation is obvious: conduct that may be innocuous when performed by a small firm can have different effects when undertaken by a dominant firm.[15] The idea is that dominant firms by their very size and influence on the market already distort competition,[16] and therefore should not be allowed to engage in behavior that would be otherwise acceptable for fear of further distorting competition.

Despite the initial appeal, the special responsibility obligation has proven controversial because it prevents dominant firms from com-

7 Takeshi Natsuno, *The I-Mode Wireless Ecosystem* (John Wiley & Sons 2005) 68; Richard Tee & Annabelle Gawer, "Industry Architecture as a Determinant of Successful Platform Strategies: A Case Study of the i-Mode Mobile Internet Service," (2009) 6 European Management Review 217.

8 Richard N. Langlois, "Modularity in Technology and Organization," (2002) 49 Journal of economic behavior & organization 19, 26; Carliss Young Baldwin & Kim B. Clark, *Design Rules: The Power of Modularity* (MIT Press 2000) 260; Stylianou, *supra* note 6, 562–569.

9 Konstantinos Stylianou, "Exclusion in Digital Markets," (2018) 24 Michigan Telecommunications and Technology Law Review 181, 243–251.

10 Geoffrey Manne, "The EU's Google Android Antitrust Decision Falls Prey to the Nirvana Fallacy," (*Truth on the Market*, July 18, 2018) https://truthonthemarket.com/2018/07/18/the-eus-google-android-antitrust-decision-falls-prey-to-the-nirvana-fallacy/.

11 Frank H Easterbrook, "The Limits of Antitrust," (1984) 63 Texas Law Review 1, 5.

12 Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy (September 24, 2015 to January 6, 2016) http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=10932.

13 Case T-286/09, *Intel Corp. v. Commission*, [2003] ECLI:EU:T:2014, para 114. See also Case 322/81, *NV Nederlandse Banden-Industrie Michelin v. Commission*, [1983] ECR 3461.

14 *Google Shopping, supra* note 4, para 331.

15 Antonio Bavasso, "The Role of Intent under Article 82 EC: From 'Flushing the Turkeys' to 'Spotting Lionesses in Regent's Park,'" (2005) 26 European Competition Law Review 616.

16 Case C-333/94P, *Tetra Pak International SA v. Commission*, [1994] ECR II–5951, para 24.

peting on the same level playing field as other firms, even when that means increased efficiency, and because it punishes firms once they have achieved success for the same practice that was legal before they reached that point.[17]

Criticism notwithstanding, the Commission and the Court of Justice firmly stand by the concept of special responsibility. At a minimum then, they are burdened with their own special responsibility to clarify the scope and meaning of the concept so that firms know what is allowed once they become dominant. Otherwise, it is almost inevitable that a dominant firm will at some point infringe competition law, considering the combination of the Court's opinion that "as a result of the mere presence of a dominant undertaking competition is weakened,"[18] and the special responsibility of dominant firms to not further weaken competition. It is worth asking then, what a dominant firm can do to compete.

The proper demarcation of the special responsibility obligation is long overdue, and the available guidance over the past thirty years has been more confusing than it has been helpful. We know, for example, that the special responsibility "must be considered in light of the specific circumstances of each case,"[19] including the degree of dominance, the magnitude of the competitive harm, the objective being pursued, and the means employed to achieve the objective.[20] And we also know that as part of their special responsibility dominant firms have an obligation to "behave in a way that is proportionate to the objectives they seek to achieve."[21]

Yet even with these pointers it remains unclear what the special responsibility adds to the concept of abuse. Assume for a moment that the Commission and the Court ignored the existence of the special responsibility obligation. How would its reasoning be different? It would still need to establish market power, identify abuse, and examine potential justifications and effects, just as in current practice. The conflation of the concept of abuse with that of special responsibility offers — at present — nothing specific absent which the Commission and the Court could not reach the same conclusions. It is therefore prudent to either discard the concept of special responsibility or to cohesively delineate its prescriptive content.

IV. EXPERIMENTATION WITH NEW BUSINESS MODELS AND THE NON-CIRCULAR DEFINITION OF ABUSE

Regardless of any special responsibility, but exacerbated by the existence of it, dominant firms only violate competition law if they abuse their position, not by simply holding a dominant position. The Commission and the Court go to great lengths to substantiate the abuse element in case-law, but their starting point is vague, which taints the entire analysis based thereupon.[22] This leaves firms with innovative business models in the dark regarding which practices may be considered abusive, and the only way to find out is *ex-post*, after they have been challenged by the Commission.

The *Google Android* case is the most recent example of that. In choosing a novel business model, whereby Google recoups the costs of maintaining the platform not from OEMs or consumers but from advertisers through tying Play with Google search,[23] Google had no guidance on whether such a practice could constitute abuse. And while no amount of guidance could result in certainty, the EU's existing approach to the concept of abuse is completely vacuous. Notice again, that the problem is not the outcome of the case, but rather the *ex-ante* guidance on what could have been an (il)legitimate business model.

At the heart of the problem is that the concept of abuse is defined circularly by means of a reference to harm to competition. For example, in an early attempt to distinguish between normal competition and abuse, the Court in *Continental Can*, after looking at "the spirit, general

17 Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (New York : Oxford University Press 2011) 175–177; Rafael Allendesalazar, "Can We Finally Say Farewell to the 'Special Responsibility' of Dominant Companies?," *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart Publishing).

18 *Tetra Pak*, *supra* note 16.

19 Joined cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge Transports and Others v. Commission*, EU:C:2000:132, para 114; Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB*, EU:C:2011:83, para 84.

20 See Case T-321/05, *AstraZeneca v. Commission*, [2010] ECR II–2850; *Compagnie Maritime Belge Transports*, Id.

21 Joined Cases T-191/98 and T-212/98 to T-214/98, *Atlantic Container Line AB and others v. Commission* [2003] ECR II-3275, para 1120.

22 Einer Elhauge, "Defining Better Monopolization Standards," (2003) 56 Stanford Law Review 253.

23 Manne, *supra* note 10.

scheme and wording of Article 86" [now 102],[24] opined that "the provision is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure."[25] Therefore — the Court continued — abuse can occur when "an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition."[26] The evident problem with this formulation is that the Court never explains what effective competition is or what it means for dominance to substantially fetter competition. Moreover, an attempt to define abuse by looking only at the outcome says little about the distinction between abusive and normal business practices, because even perfectly legitimate business practices can substantially fetter competition, if for example they are superior to their competitors'.[27]

A few years later, in what is now a staple excerpt from the Court's body of antitrust case-law, the Court linked normal competition to abuse and defined the latter as "recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators" with "the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."[28] Without further guidance from the Court, it is this passage that best exemplifies the circularity of defining abuse as the opposite of normal competition and vice versa; the key element of what constitutes normal competition is missing, and this is really all that matters.

This definition was reused in many subsequent Court decisions, notably in *AKZO* and *Irish Sugar*, where the Court unhelpfully expanded on the concept by stating that "Article 86 of the Treaty [now 102] prohibits a dominant undertaking from eliminating a competitor and thereby reinforcing its position by having recourse to means other than those within the scope of competition on the merits."[29] Similarly to previous cases, invoking competition on the merits, (a synonym for normal competition) without elaborating on what qualifies as such, does little to shed light on what is allowed and what is not. Subsequent cases, including *Google Shopping*, add little clarity by linking abuse to indirect harm to consumers through "impact on an effective competition structure."[30]

It should be evident that the definitions of what constitutes abuse of dominance are of limited help to firms that want to experiment with new business models that have not been tested in court before. The intense scholarly debate on the topic is not much more illuminating either.[31] It is now the task of enforcers to adopt one or more meaningful tests of the available definitions or devise their own, which, however, should provide enough guidance for firms to *pro-actively*, rather than *ex-post facto*, be able to rely on.

V. PLATFORMS AND THE CORRELATION BETWEEN ABUSE AND THE GOALS OF COMPETITION LAW

One final area that platform business models have complicated for competition law is that of its goals and purposes. Competition law has always faced an existential crisis about what its purpose is in the economy and society, and the two-sided nature of platforms comes to perplex the inquiry because its economic activity inextricably combines suppliers and consumers — two opposite, but complementary poles.

If firms are to consider the boundaries of legality set by competition law, they need to know what competition law has set out to achieve in the first place, so that they can then try to compete in a way that honors those goals. Of the various goals that competition law has been argued

24 Case 6/72, *Euroemballage Corporation and Continental Can v. Commission*, [1973] ECR 215, para 22.

25 Ibid [26].

26 Ibid.

27 Case C-209/10, *Post Danmark A/S v. Konkurrencerådet*, 2012 E.C.R. 172, paras 21-22.

28 Case 85/76, *Hoffmann-La Roche & Co. AG v. Commission*, [1979] ECR 461, para 91.

29 Case T-228/97, *Irish Sugar plc v. Commission*, [1999] ECR II-2969, para 111 (citing Case C-62/86 *AKZO v. Commission* [1991] ECR I-3359, para 69).

30 *Google Shopping, supra* note 4, para 332.

31 For a summary, see OECD, "Competition on the Merits (Report DAF/COMP(2005)27)," (2005).

to serve are efficiency,[32] consumer welfare,[33] the process of competition *per se*,[34] as well as other non-economic goals like fairness, freedom, and equal opportunities.[35] While all of these goals sound positive, they are not necessarily aligned. For example, in the *Google Shopping* case the Commission emphasized fairness and equality of opportunities, but did not prove reduction of consumer welfare, which other jurisdictions place a premium on. By prohibiting Google from promoting its own comparison shopping results, the Commission protected other comparison shopping websites (i.e. equality, fairness), but not necessarily the interests of consumers (i.e. consumer welfare).

The multitude and disparity of competition goals makes the link between them and any alleged abuse non-obvious and therefore necessary to affirmatively identify. The risk here is that enforcers claim to apply competition law to achieve one goal, but in reality they apply it in a way that achieves another, or they mix up multiple goals, making it impossible in the end to infer which goal of competition law the alleged abuse runs afoul of. Without the specific link between goal and abuse, it is impossible for firms to know *ex-ante* the type of competition they can engage in.

Platform business models further complicate the situation because platforms serve the interests of two different sides at the same time. Should both sides be taken into account when settling on the appropriate goals of competition law and the potential violative conduct thereof? And if so, which goal should be assigned to each side (if different)? This is not a moot question; its latest manifestation was in this year's *American Express* case, where the Supreme Court, in siding with Amex, acknowledged that Amex's anti-steering provisions may raise merchants' fees, but do not overall raise prices beyond competitive levels in the credit card market taken as a whole, which includes merchants and consumers (the two sides).[36] Not only do both sides need to be considered, but each side may be served by different interests. Clarity on what competition law aims to achieve is paramount in pointing to the interests that are, in turn, to be protected. As Bork famously stated "Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals? Everything else follows from the answer we give..."[37]

VI. CONCLUSION

Alan Greenspan described antitrust as "a world in which the law is so vague that businessmen have no way of knowing whether specific actions will be declared illegal until they hear the judge's verdict—after the fact."[38] While a measure of uncertainty will always remain this is no excuse to shirk an effort to define, as best as possible, these key concepts and tools of competition law. As the platform economy is still being deciphered, clarifying the areas identified herein likely poses the most pressing points on which the Commission and the Court should focus their energy.

32 See e.g. Robert Bork, "Legislative Intent and the Policy of the Sherman Act," (1966) 9 Journal of Law and Economics 7.

33 See John B. Kirkwood & Robert Lande, "The Chicago School's Foundation Is Flawed: Antitrust Protects Consumers, Not Efficiency," in Robert Pitofsky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (Oxford University Press 2008).

34 See Eleanor Fox, "The Efficiency Paradox," in Robert Pitofsky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (Oxford University Press 2008).

35 *Google Shopping, supra* note 4, para 331.

36 *Ohio v. American Express Co.*, 585 U.S. _ .

37 Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books 1978) 50.

38 Alan Greenspan, "Antitrust," in Ayn Rand (ed), *Capitalism: The Unknown Ideal* (Penguin 1986).

ONLINE PLATFORMS AND ANTITRUST: EVOLUTION OR REVOLUTION?

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I. INTRODUCTION

The rise to prominence of multi-sided online platforms ("online platforms")[2] in our economy has generated a heated debate over the role of antitrust in addressing perceived competition problems that might be caused by the high degree of market power enjoyed by some of these platforms. Amazon, Facebook, and Google, to cite but a few large online platforms, are today considered in some of the antitrust literature and the non-specialist press as posing antitrust risks. Google itself has already been the addressee of two infringement decisions by the European Commission, both under appeal. Understanding whether or not these claims are true depends on the correct antitrust analysis of the problems perceived. And here comes a new challenge: do digital platforms call for a different antitrust analysis or even different antitrust rules, or are the existing tools sufficient for addressing the new challenges policy makers and enforcers face when dealing with such markets? The debate can be driven by an interventionist agenda, as in Germany, where new antitrust rules are advocated in order to intervene more effectively in digital markets, or by a non-interventionist one, which highlights the inadequacy of traditional tools to capture the complexity of multi-sided online markets, thus calling for caution against intervening too hastily based on an inadequate understanding of the economic phenomena.

This article discusses whether existing antitrust tools are suitable for dealing with online platforms by focusing on three examples, namely (1) market definition and market shares; (2) barriers to entry; and (3) the role of innovation as a safe harbor or as a defense.[3]

II. MARKET DEFINITION AND MARKET SHARES

Market definition in digital markets has become a hotly debated issue, and rightly so. The evolving nature of such markets, their special features (including the fact that they are two- or multi-sided) or the fact that services are often provided for free or — as some argue — at no observable price, certainly make market definition more challenging. However, the issue would become much less pressing if market definition were properly understood for what it is and has always been: a tool to determine whether an undertaking has market power and whether the conduct under review has anti-competitive effects. Market definition is *a* tool — by no means *the only* tool — to address one, albeit undoubtedly important, aspect of the problem of market power and anti-competitive effects: the short-term competitive constraints that customers and suppliers exert on a product. The rub is that market definition has become, in practice, a short cut to finding market power and anti-competitive effects: once a market is defined, then it's possible to "calculate" the market share of an undertaking, a group of undertakings, or of merging parties. Once the market share is "calculated," then, if the market share is "high," it becomes much easier for a competition authority to infer market power and anti-competitive effects and much more difficult for undertakings to rebut a case made against them. Therefore, although not many of the sophisticated competition authorities today would equate a given market share with market power and market power with anti-competitive effects, the fact remains that the battle for market definition may well be decisive or, at least, may significantly either reduce or increase the chances of establishing or refuting an infringement case. If market definition was understood once again as what it actually is, a tool for identifying short-term demand- and supply-side competitive constraints on a product, then at least some of the drama would fade away. Market definition would become what it should be, just one element among the overall evidence needed to find market power. The other elements are well known and well-rehearsed in economic and legal literature: barriers to entry and expansion, and countervailing buyer power.[4]

Another, very practical, reason for being cautious about market definition and for playing down its prominence in competition analysis is of course that the art of market definition is prone to a significant risk of error. Consider, for example, the Commission's analysis in the *Facebook/WhatsApp* merger. The Commission defined an EEA-wide or global market for consumer communication apps for smartphones. It then went on to note that traditional electronic communication services (e.g. mobile telephony and text messaging) could be in the same market and so could offer services on other devices.[5] But then, do we have an EEA-wide market or a global one? One that includes mobile telephony and text messages or one that is limited to consumer communication apps? These permutations are hugely significant and can make a real difference to a case. But possibly even more interesting is the approach to "calculating" market shares. Facebook's proposal was to use app reach, that is, the

2 For a definition of "platforms," in particular with regard to their multi-sided nature, see R Nazzini, "Online Platforms and Antitrust: Where Do We Go from Here?" [2018] Italian Antitrust Review 5, 6 – 7.

3 For more examples of how competition law may apply to complex cases in the digital ecosystem, see, e.g., R Nazzini, "The Evolution of the Law and Policy on Tying from Classic Leveraging to the Challenges of Online Platforms," (2017-2018) 25 Journal of Transnational Law and Policy, forthcoming; R Nazzini, 'Unequal Treatment by Online Platforms: A Structured Approach to the Abuse Test in Google' in D Gerard, M Merola and B Meyring (eds), *The Notion of Restriction of Competition: Revisiting the Foundations of Antitrust Enforcement in Europe* (Louvain-la-Neuve, Bruylant 2017) 281; R Nazzini, "*Google* and the (Ever-stretching) Boundaries of Article 102," (2015) 6 Journal of European Competition Law & Practice 301.

4 R Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (Oxford, OUP 2011) 342- 358.

5 Commission's decision of October 3, 2014 in Case No COMP/M.7217 *Facebook/WhatsApp*, paras 20 – 34 and 36 – 44.

percentage of users on a representative panel who used the app over a 30 day period. Other market participants proposed looking at monthly minutes of use, but no reliable data could be collected. Nor was there any reliable data on messages sent, messages received, and individual vs. group messages.[6] This double uncertainty over market definition and the "calculation" of market shares should caution against any form of overreliance on these indicators of market power and any inference on anti-competitive effects drawn from these crude structural tools.

Does this mean that competition authorities should do away with market definition and "calculation" of market shares? This may be over-ambitious. When the DG Comp Economic Advisory Group on Article 102[7] suggested that this could be done in abuse of dominance cases, the proposal quickly, and unfairly, became one of the least popular ever made in competition enforcement in the European Union. Old ways die hard. But if good old market definition is here to stay, at least I would suggest:

- Considering all plausible market definitions
- Taking full account of feedback effects of any price increase or degradation of quality on one side of the market on the other side or sides of the market
- Analyzing the competitive pressure on the platform under investigation regardless of formal market definition and market shares
- Verifying whether the evidence of anti-competitive effects is consistent with the existence of substantial and durable market power by the platform
- Rejecting any inference market share = market power = likely anti-competitive effects
- Focusing on evidence of restriction of competition and anti-competitive effects on the market. In the absence of such evidence, no infringement can be established regardless of market definition and market share.

III. BARRIERS TO ENTRY

In antitrust analysis, barriers to entry and expansion play a key role. Size does not matter if markets are open and contestable and any undertaking with a sound business model and appropriate resources can enter the market and compete on the merits.

In digital markets, disruptive innovation is particularly relevant. Competition is not only competition in the market, that is, competition by players in relation to given products and technologies, but could be competition from innovators that introduce a new product or alternative technology which may eventually replace the previous ones and render them obsolete. When such successive innovation cycles are observable in the market, then even high market shares may simply be a transient phenomenon. The European Commission explained this concept eloquently in *Facebook/Whatsapp*:[8]

> The Commission notes that the consumer communications sector is a recent and fast-growing sector which is characterised by frequent market entry and short innovation cycles in which large market shares may turn out to be ephemeral. In such a dynamic context, the Commission takes the view that in this market high market shares are not necessarily indicative of market power and, therefore, of lasting damage to competition.
>
> [. . .]
>
> The consumer communications apps market has been characterised by disruptive innovation. For example, BlackBerry launched the first successful smartphones with integrated consumer communications app and had a very significant market position. However BlackBerry Messenger was available only for BlackBerry smartphones and lost importance with the emergence of multi-platform apps once Android and iOS devices gained a larger part of the smartphone market … WhatsApp itself was launched in 2009, when the shift of users of consumer communications services from PC to smartphone started, and today it has approximately 600 million active users.

6 Case No COMP/M.7217 *Facebook/WhatsApp*, paras 95 – 100.

7 J. Gual et al, *Report by the EAGCP "An economic approach to Article 82"*, July 2005, http://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf.

8 Case No COMP/M.7217 *Facebook/WhatsApp*, paras 99 and 116.

Similar market dynamics can be found with respect to LINE and WeChat, which were both launched in 2011 and each of which has now more than 400 million active users worldwide.

Of course, disruptive innovation is not an article of faith and cannot become a pretext for a non-interventionist agenda. Relying on disruptive innovation as a competitive constraint requires evidence that the market dynamics are characterized by innovation cycles and that this does in fact exert competitive pressure on the incumbents. This may or may not in fact be true for each individual case. When it is true, however, then heavy-handed competition intervention aimed at solving perceived problems may do more harm than good. *Primum non nocere, deinde curare*. A maxim as needed in medieval medicine as in 21st Century competition policy.

Evidence does indeed suggest that barriers to entry in online markets are not necessarily significant. The success of WhatsApp in messaging services, Facebook's success over MySpace in social networks, Google's success over Yahoo! and AltaVista in search, would appear to show that innovative companies can quickly gain market share and displace less efficient incumbents. This is also due to the ease with which consumers can switch to new apps, platforms, and services. Apparently, Pokémon Go reached 40 million users within weeks of launch and in July 2016 iPhone users were spending more time on Pokémon Go than on Facebook. Reaching so many customers in such a short time would be unthinkable outside the "digital space", which has opened up enormous opportunities for innovation, entry of new competitors, and expansion of existing suppliers into new sectors.

This does not mean, of course, that competition enforcement becomes irrelevant in digital markets. On the contrary, competition enforcement has a key role to play in policing these markets to keep them open and contestable by intervening timely and robustly against any conduct that raises entry barriers and excludes competitors, not on the basis of superior efficiency, but as a means of preserving market power and slowing down innovation and growth. Commentators have pointed to data and so-called Big Data as potentially being a barrier to entry. The fact that online platforms rely on data in their business models and may obtain a vast amount of data that they can process at incredible speed is not, in itself, a matter of concern. Quite the contrary, the benefits of this new data-driven economy are enormous. Furthermore, precisely because of the new opportunities unleashed by the digital economy, obtaining and using data has become much easier and cheaper today than it was in the past. In *Google/Double Click*, for example, the merged entity would obtain data sets from Google and Double Click, thus being able to match data from both data sets. However, there were several competitors that ran both a search engine and ad service and, furthermore, data could be purchased from third parties.[9] In *Facebook/WhatsApp*, the merged entity could collect data from WhatsApp in order to improve targeted advertising on Facebook. However, the amount of data available to competitors remained considerable.[10] In *Microsoft/Yahoo!*, combining data from both search engines would improve services and allow the merged entity better to compete with Google.[11]

On the other hand, in *Bazaarvoice/Power-Reviews* in the United States of America, a merger was reversed on application by the Department of Justice because it would have substantially lessened competition in "ratings and reviews platforms" used by retailers and manufacturers in the United States by eliminating Bazaarvoice's closest competitor. Although the focus of the analysis was not data or Big Data, one of the key findings was that the parties' network connecting retailers and brands and the parties' combined datasets would not have been replicable by competitors either organically or by M&A. As more manufacturers purchased the parties' platform, it became more valuable to retailers because it allowed them access to a greater volume of ratings and reviews. And the more retailers used the platform, the more valuable it became to manufacturers because it allowed them to share their reviews with a greater number of outlets through "syndication." Network effects were crucial to the decision to order the divestiture of the acquired business.[12]

Thus, data and Big Data may or may not be a barrier to entry in given circumstances. Careful analysis is required before conclusions are drawn in any individual case.

9 Commission's decision of March 11, 2008 in Case No COMP/M.4731 *Google/DoubleClick*, paras 359 – 366.

10 Case No COMP/M.7217 *Facebook/WhatsApp*, paras 180 – 189.

11 Commission's decision of February 18, 2010 in Case No COMP/M.5727 *Microsoft/Yahoo! Search Business*, para 192.

12 All the key documents in the case, including the memorandum opinion and the judgments of the court, are available at https://www.justice.gov/atr/case/us-v-bazaarvoice-inc.

IV. INNOVATION

Firms must be able to innovate even if innovation excludes competitors. But how to define "innovation"? And are there exceptions — that is, could innovation be detrimental to competition?

As to the first question, a working definition of innovation could be coextensive with dynamic efficiency: innovation is the introduction of new production processes or new or improved products that shifts the supply and demand curves so as to increase social welfare. From this definition, the answer to the second question follows: as a general principle, there should be no exceptions to the rule that innovation is presumptively pro-competitive and cannot be prohibited under competition law. This is, however, and somewhat bizarrely, not the position taken by EU competition law: under Article 101(3) improvements to technical and economic progress that also restrict competition are allowed only if certain conditions are fulfilled, namely if a fair share of the resulting benefits is passed on to consumers, if the restrictions to competition are proportionate to the objective pursued, and if they do not result in the elimination of all competition in the products or services concerned.[13] A similar test applies under Article 102[14] and in the review of mergers.[15] This is, at first sight, surprising, if not shocking: competition authorities and courts appear to be able to evaluate innovation under a broad proportionality test and prohibit improvement in technical and economic progress if, to their judgment, the restrictive effects on competition are not outweighed by the benefits.

If we were starting with a clean slate, perhaps a different rule would be more in line with the objectives of competition policy, which is to maximize social welfare and productivity growth in the long term.[16] It would be possible to establish a safe harbor, that is, a presumption of lawfulness, for conduct that is genuine innovation, regardless of any balancing test. Under such a safe harbor, conduct could still be prohibited when innovation is not genuine innovation but has no other purpose than to exclude rivals. It is important to note that the test cannot be only "intention to exclude rivals" — all innovation is carried out with the "intention to exclude rivals" in one way or another. A necessary limb of the test is that conduct is not "genuine innovation" — this should require proof that the conduct is not of any material benefit to consumers and that it is therefore only aimed at excluding competitors. A classic objection to this approach is that competition authorities and courts should not "second-guess" the market on innovation: they should not be the ones to judge whether innovation is "genuine." However, this cannot mean that it is sufficient for an undertaking simply to state that something is an innovation to escape all antitrust liability. Competition authorities and courts must be able to verify whether the safe harbor applies in the first place, which means that they must be able to verify whether the conditions for application of the "safe harbor" are met. This would still be a significant change to the current legal position under EU law, which regards innovation as a possible defense to a *prima facie* infringement case.

However, even under EU law, it is possible to adopt a more or less restrictive approach to defenses based on dynamic efficiency. At one end of the spectrum, undertakings can be put to the strict test that their conduct fulfills all the conditions necessary to establish the relevant defense. On the other hand, a competition authority or court could recognize that the importance of innovation in fostering social welfare, productivity and economic growth is such that the law cannot require the adoption of less efficient alternatives simply in order to keep rivals afloat. In *Streetmap.eu Ltd v. Google*, Roth J in the English High Court, having ruled that technical improvements in the quality of goods can be a defense to an abuse of dominance case, went on to say that, where efficiency is a technical improvement, proportionality does not require adoption of an alternative that is much less efficient in terms of greatly increased cost or which imposes an unreasonable burden on the dominant undertaking (at the very least in a case where there is no suggestion that the conduct impugned was likely to *eliminate* competition).[17]

In the end, the difference between dynamic efficiency as a safe harbor or as defense may be somewhat abstract. It is obvious for the undertakings concerned to plead that their conduct is dynamically efficient and adduce sufficient evidence to substantiate their pleading. There is no difference, up to this point, between the safe harbor and the defense approach. However, under the safe harbor approach, provided that the

13 Art 101(3) TFEU.

14Under Art 102, see, e.g., Case T-201/04 *Microsoft Corp v. Commission* [2007] ECR II-3601, para 709 and Case C-209/10 *Post Danmark A/S v. Konkurrencerådet* ECLI:EU:C:2012:172, paras 41 and 42.

15 Commission's decision of July 13, 2011 in Case No COMP/M.6342 *UPM/Myllykoski and Rhein Papier*, para 167 and Commission's decision of February 1, 2012 in Case No COMP/M.6166 *Deutsche Boerse/NYSE Euronext*, paras 1133 – 1342.

16 My view is that the objective of competition policy should be to prohibit conduct that, by reducing market rivalry, is detrimental to long-term social welfare understood as the sum of the surplus of producers and consumers in the long term reflecting not only purely economic welfare but also societal preferences and values: R Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (Oxford, OUP 2011), 11 – 50 and 317 – 318.

17 Streetmap.eu Ltd v. Google Inc [2016] EWHC 253 (Ch), paras 142 – 176 (Roth J).

safe harbor is pleaded and sufficient evidence to substantiate the pleading is adduced, it is then for the competition authority or claimant to prove that conduct is not "genuine innovation." Under the defense approach, it is for the undertakings concerned to prove that, or at least to discharge an evidential burden to the effect that, the conditions of the defense are established. In practice, the problem lies in the burden and standard of proof or evidential burden. Provided that (1) the burden/standard of proof or evidential burden are not so strictly interpreted and set so high that they cannot reasonably be met, on the understanding that businesses cannot be expected to have knowledge that goes beyond a reasonable assessment of own demand and opportunities for growth; and (2) businesses are not required to incur additional burdens or choose less efficient alternatives for the purpose of helping or not damaging rivals, then the defense approach can also be sensibly applied and be consistent with a competition policy that truly fosters economic growth and productivity and contributes to the maximization of the opportunities that the digital economy brings about for businesses and consumers alike.

V. CONCLUSION

The digital economy has created unimaginable growth opportunities for businesses and consumers and has the potential further to improve social welfare, living standards, and productivity. Competition has an important role to play in helping market players deliver these benefits to the economy. The main task of competition enforcement is to ensure that markets remain open and competitive and that new entrants and innovative undertakings have a fair opportunity to compete with incumbents on an equal footing. To accomplish such a task effectively, competition policy should develop and apply analytical tools that, while consistent with the existing legal framework, rise to the challenges and opportunities created by the new, dematerialized, highly dynamic, innovation-driven digital environment. This does not require enacting new antitrust rules or revolutionizing the way in which such rules have been developed and applied so far. But neither would it be wise to apply competition law to online platforms without taking into account the specificities of the market phenomena under review. Legal tools and concepts such as market definition and market share, barriers to entry, and innovation "safe harbors" or "defenses" should and will continue to play a significant role in the antitrust analysis of online platforms, but need to evolve and adapt to the new requirements of the digital economy. Costly mistakes, both in terms of failure to intervene when required and erroneous interventions, will be the price that we will all pay if this does not happen at the speed that the pace of economic development requires.

TWO-SIDED VS. COMPLEMENTARY PRODUCTS

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I. INTRODUCTION

In his dissenting opinion on the recent U.S. Supreme Court decision in *Ohio et al. vs American Express*, Justice Breyer seems to call for a clarification, from Filistrucchi et al.,[2] on the distinction between products sold by two-sided platforms and complementary products. Indeed, a great part of the discussion among the consenting and dissenting opinion centers on this distinction. The question that the U.S. Supreme Court debated is however not new and has been lingering in economic circles. In fact, it has often been the case in the past years that colleagues working in different fields have (often wrongly, but not always) commented to me that two-sided markets were like markets for complementary products.

Without taking any stance on whether the alleged behavior by American Express should or should not have been deemed illegal, I aim to clarify here why and to what extent two-sided platforms are different from platforms selling complementary products. I will also explain why the distinction is relevant in assessing firms' behavior for the purpose of competition policy.

II. WHY TWO-SIDED PLATFORMS ARE DIFFERENT FROM FIRMS SELLING COMPLEMENTARY PRODUCTS

According to the economic literature, a two-sided platform is a firm that sells two different products or services to two groups of consumers, while recognizing that the demand from one group of consumers depends on the demand from the other group and, potentially, *vice versa*.

For example, online directories sell search services to customers looking for information and listing services to customers interested in listing their business, house, and so on... They are well aware that the larger the number of listings, the higher the demand for searches and the larger the number of searches the higher the demand for listings. Similarly, producers of video game consoles sell consoles to users and both license the right to develop software and sell software development kits to video game developers. A console is more valuable to users the more video games are available. Similarly, video game developers are willing to pay more if there are more video game players and *vice versa*.

In other words the demands on the two sides of the market are linked by *indirect network effects*[3] and the platform recognizes the existence of (i.e. internalizes) these indirect network effects.

So far, the definition would indeed apply also to a firm selling complementary products, whose demand for one product, by definition, increases with the sales of the complementary product.

Typical examples of complementary products are the inkjet printer and the ink cartridge. Clearly, the more printers a firm sells the higher the amount of ink cartridges it can expect to sell. A profit-maximizing firm prices accordingly and often sets a lower price for the printer hoping to boost sales of cartridges and thus recover the profits foregone on the printer's side.

Similarly, in a two-sided market, a newspaper publisher or a TV broadcaster may respectively set a low cover price to readers or a low subscription fee to viewers in order to boost demand of advertising slots from advertisers and recoup profits foregone on the readers' or viewers' side.

2 "The majority relies on an academic article which devotes one sentence to the question, saying that "a two-sided market [is] different from markets for complementary products [e.g., tires and gas], in which both products are bought by the same buyers, who, in their buying decisions, can therefore be expected to take into account both prices." Filistrucchi, Geradin, Van Damme, & Affeldt, "Market Definition in Two-Sided Markets: Theory and Practice," 10 J. Competition L. & Econ. 293, 297 (2014) (Filistrucchi), *Ohio et al. vs American Express*.

3 Demand is characterized by an indirect network effect as consumers' willingness to pay for a product depends on the number of consumers (or the quantity bought) of another product.

A first difference between two-sided platforms and firms selling complement products is that in the case of two-sided platforms one (albeit only one) of the links between the demands may be negative.[4] In other words, demand from one customer group may decline with higher sales to the other group of customer, in a sort of substitutability.[5]

For instance, it is well-known that TV viewers typically dislike advertising, as it interrupts the programs they watch and are not targeted to individual tastes. Hence, holding constant the price paid by viewers to watch a TV channel, the higher the amount of advertising on the channel the lower the demand from viewers. Indeed, in the TV market, a broadcaster can either set a high fee to viewers or broadcast a high amount of advertising: the two typical business models in the TV market are the Pay TV one in which viewers pay a subscription fee and bear little advertising, or the free TV one in which viewers do not pay a fee but bear a lot of advertising.[6]

Hence, one might be tempted to conclude that a two-sided platform is just a more general case that includes the case of a firm selling complement products. One, however, would be wrong.

In fact, a second and more important difference is that, according to the definition of a two-sided platform,[7] the buyers of the two products do not internalize the links between the two demands, which are therefore, to this regard, called *externalities*.

So that, whereas the provider of an online directory knows that the higher the number of listings the higher the demand for searches and the higher the amount of searches the higher the demand for listings, searchers do not consider that by searching on the directory they increase the value of a listing nor are they interested in the fee for a listing. Similarly, whereas a producer of video game consoles knows that video game developers value consoles that have more users and that users value consoles that have more games, users do not take into account that by buying a console they increase the value of the console to game developers nor do they care about the royalties paid by video game developers.

In fact, here lies the crucial difference between a two-sided platform and a firm selling complement products: the two products sold by a two-sided platform are bought by different customers unlike complementary products that are bought by the same customer. It is exactly because each customer buys only one of the two products sold by the platform that buyers typically do not internalize the indirect network effects. In the case of complement products, both products are bought instead by the same buyer who, in his buying decision, can therefore be expected to take into account both prices. [8]

When you consider buying an inkjet printer, if you are not too naïve, you will ask not only the price of the printer but also the price of the cartridges. The salesman would probably expect such a question. On the other hand, it would surprise the news agent if you also asked, in addition to the price of the newspaper, the price of an advertising slot in the newspaper. He is not likely to know it. Knowing it would not increase his sales as his customers do not buy advertising slots on the newspaper.

As discussed in Filistrucchi et al. (2014) and recognized by the U.S. Supreme Court, in cases involving two-sided platforms the distinction between two-sided *transaction* and *non-transaction* platforms is crucial.[9] This distinction is important because it highlights a fundamental difference in the pricing strategies available to platforms and, therefore, in the way these firms compete.

4 Intuitively, it cannot be the case that the two demands faced by a two-sided platform are linked by two negative indirect network effects, because in that case the platform would be unable to profitably compensate both customer groups for the unwanted interaction with the other group. The firm would have no reason to choose a two-sided business model.

5 Interestingly, since it cannot be that both indirect network effects are negative, while a situation similar to two-way complementarity is possible, one similar to two-way substitutability is not.

6 See Emilio Calvano & Mihele Polo, 2016. "Strategic Differentiation by Business Models: Free-to-Air and Pay-TV," CSEF Working Papers 438, Centre for Studies in Economics and Finance ("CSEF"), University of Naples, Italy, revised November 7, 2017.

7 See, for instance, Evans D.S., 2003, "The Antitrust Economics of Multi-Sided Platform Markets," Yale Journal of Regulation, 20(2): 325-381.

8 See also J. D. Rochet & J. Tirole, "Platform Competition in Two-Sided Markets," 1(4) J. Eur. Econ. Assoc. 1990-1029 (2003).

9 This distinction was originally proposed by Filistrucchi (2008), who used however the terms "two-sided markets of the media type" and "two-sided markets of the payment cards type." It was later renamed as above by Damme et al. (2010).

Two-sided non-transaction platforms are characterized by the absence of a transaction between the two sides of the market and, even though an interaction is present, it is usually not observable by the platform, so that the platform is unable to set a per-transaction or per-interaction fee or a two-part tariff.[10]

Examples of two-sided non-transaction markets are traditional media markets: newspaper publishers, for instance, set access prices on both sides.

Two-sided transaction platforms are instead characterized by the presence and observability of a transaction between the two groups of platform users. As a result, the platform is not only able to charge a price for joining the platform but also one for using it, i.e. it can charge a two-part tariff.[11]

An example of a two-sided transaction platform is a payment card company,[12] which sells the services of a card to buyers and that of a point-of-sale ("POS") terminal to shops

While two-sided non-transaction markets are characterized by *membership externalities* (or indirect network effects), two-sided transaction markets are characterized also by *usage externalities*.

Membership externalities arise from joining the platform (buying a newspaper or placing an ad in a newspaper, holding a payment card or having a point-of-sale terminal, listing your product at an auction or attending an auction), while usage externalities arise from using the platform (paying or accepting payment with a card, selling and buying a product at an auction). The value of joining the platform depends on the number (or more generally the demand) of customers of the other side. The benefit of using the platform similarly depends on the demand for usage by the other side.

For instance, assuming that a customer holds a card and a shop has the corresponding point-of-sale terminal, even if this customer wants to pay by card, the merchant has to be willing to accept that card for that particular transaction and *vice versa*. Once again, these externalities are not internalized by the users of the platform, i.e. the cardholder and the merchant. For instance, suppose a given merchant would benefit from being paid by card because she would not need to go to deposit cash and she would not have to face the risk of being robbed (or, at the opposite, would not benefit from being paid by card because of having to pay a transaction fee). A cardholder would not take that into account when offering to buy in cash or by card. He would only consider his own convenience.

When the platform is a transaction one, the link between the two customer groups is in some sense stronger because of the additional usage externality. In fact, when a transaction is needed to use the services of a platform, one member of each customer group needs to agree in some way with one member of the other group in order to use such services. The platform cannot sell its usage services unless both customers buy them.

Indeed, Justice Breyer, in his dissenting opinion, was correct to observe that in the case of payment card companies, which are two-sided transaction platforms, "the services resemble complements because they must be used together for either to have value." Still, the products are not complements in an economic textbook sense because they are not bought by the same customers.

It is true that, as observed above, demand for the products on one side may decline with a rise in the price on the other side. Yet, typically, there is no individual customer that finds the two products complementary because no customer wants to consume both. For instance, in the case of an online directory for hotels, it may be the case that demand from travelers will decline with an increase in the price charged to hotels for the listing services. However, no traveler wants to list his hotel.

10 A two-part tariff is a tariff (i.e. a price) which is composed of a fixed part, independent of usage, plus a variable part, that depends on usage. A traditional example were the tariffs of fixed phone lines (before the appearance of flat tariffs): they included a subscription price (the fixed part) plus a price per minute (the variable part).

11 Note however that the fact that a two-part tariff can be charged does not necessarily imply that it will be charged. Indeed both or either of a membership fee and a per-transaction fee can be charged. In fact, the crucial point is that a per-transaction fee can be charged. For example, for most payment cards in Europe and the U.S., cardholders pay at most an annual fee, while merchants pay a two-part tariff.

12 Other two-sided transaction platforms are the markets for payment cards, virtual marketplaces, auction houses and operating systems.

Consider the case of a heterosexual nightclub. The owner knows that success of the evening will depend on getting both men and women on board. She will take into account that men would find the evening more attractive the more women they find in the club. Similarly, at least to some extent, women will like the evening more the more men are around. In such a situation, irrespective of income differences between men and women, the owner may find it profit maximizing to differentiate prices of entry tickets between men and women.[13] No customer, neither man nor woman, will buy both entry tickets, because for no single customer are the two entry tickets complements. Except, in one special case: when a couple wishes to enter the nightclub. Only then, the couple may reason as a single customer and find the two entry tickets complementary.

Importantly, it is exactly because the entry tickets are not complements that raising the ticket price to one customer group, lowering it to the other group will change the mix of men and women present in the nightclub, and thus determine the commercial success of the evening. Even more, it is only because of this feature that the market is two-sided.[14] If all customers were couples, and they were ready to split the total price paid to enter according to some rule independent from the price of the two entry tickets, it would make little sense for the owner of the nightclub to price differentiate.

III. WHY TWO-SIDED PLATFORMS RESEMBLE PLATFORMS SELLING COMPLEMENTARY PRODUCTS

For all the reasons mentioned above, two-sided markets are inherently different from markets for complementary products. So why then do even economists sometimes say that two-sided markets are like markets for complement products? Are they simply wrong?

Remember that two-sided platforms take into account or *internalize* the network effects between the demands they face.

As a first result, we already observed that they know that by changing their price to one group of customers they will influence also the demand from the other group of customers, even if they hold constant the price charged to the latter group. When demand for the product sold to one customer group declines (rises) with an increase (decrease) in the price charged to the other group, there is a similarity with the case of complementary products.

A second, more important consequence of the internalization of the network effects, is that, under some conditions, competing two-sided platforms selling substitute products may behave (e.g. price) as firms in one-sided markets that sell complementary products. Consider two competing platforms that sell on each side of the market substitute products. One would expect prices on each side to be strategic complements and quantities on each side to be strategic substitutes. It may be the case that, at least on one side, products sold by the two platforms become complements once network effects are internalized by the platforms. If this happens, quantities will become strategic complements and prices will become strategic substitute.

In general, it is the sign and the size of the own and cross network effects, together with their internalization, by the platforms that determines whether the firms behave as in the case of complementary products. When this happens economic theory predicts market outcomes that will appear counterintuitive if one starts from the assumption that products on each side are substitutes.[15]

Consider two competing TV stations offering content to viewers and advertising space to advertisers. Keeping fixed the amount of advertising, TV channels are substitute for viewers. Assume also that keeping fixed the number of viewers, advertising on one channel is a substitute for advertising on the other channel and *vice versa*. It may be the case that, once one allows broadcasters to take into account the network effects, products sold by the two platforms become complements once network effects are internalized by the platforms. As a result, if one TV station reduces its amount of advertising, the other might do so too. In addition, entry by an advertising financed competitor might increase advertising on existing channels.[16]

13 In Southern Europe this often leads to the typical two-sided pricing strategy in which women do not pay or are even subsidized (with a first free drink) and men are charged a higher price.

14 Filistrucchi, L., Geradin D., Van Damme E., 2013, "Identifying Two-Sided Markets," World Competition, vo. 36(1), 33-59.

15 See, for instance, Boffa, F., Filistrucchi, L., "Optimal Cartel prices in Two-Sided Markets," NET Institute Working Paper No. 14-19.

16 See, for instance, Reisinger, Ressner & Schmidtke, 2009, Journal of Industrial Economics.

Hence, to some extent, it is correct to say that "two-sided markets are like markets for complementary products." More precisely, it is correct, under certain conditions, when referring to firm (pricing) strategies. Yes, this a different sort of complementarity than the one Justice Breyer seems to have in mind in his dissenting opinion.

IV. WHY THE DIFFERENCE BETWEEN TWO-SIDED PLATFORMS AND FIRMS SELLING COMPLEMENT PRODUCTS MATTERS FOR COMPETITION POLICY

Yet, even when firms in two-sided markets behave as firms selling complementary products, welfare consequences may be very different. The reason lies once again in the fact that customers on the two sides are different and that, as a result, the two consumers' welfare may not move in the same direction.

Consider for instance the case of an inkjet printer. Assume (just to simplify the argumentation) that each customer needs to buy one printer and 10 cartridges. Suppose the price of the printer declines by 10 dollars and the price of each cartridge increases by 1 dollar each. Then the total price paid by each customer will not change and consumers' welfare will not change.

Consider instead the case of a pay-per-view TV station offering a soccer match. Assume (just to simplify the argumentation) that there are 100 viewers buying one match subscription and there is only one advertising slot at half time that can be sold to a unique advertiser. Suppose that the price paid by the viewers declines by 10 dollars and the price paid by the advertisers increases by 1000 dollar. On the one hand, the two price changes will have effects on different customers: the viewers will enjoy the price reduction, while the advertiser will bear the price increase. On the other hand, advertisers will benefit from the likely increase in the number of viewers, while viewers may also enjoy a reduction in the length of the advertising due to the increase in the advertising price. In this case, the viewers' welfare is likely to increase, while advertisers' welfare may rise or decline.

When consumers' welfare moves in opposite directions, competition policy needs to take a stance on which customer group, if any, should be given more consideration. For instance, in the assessment of a merger in the EU, should it give more weight to the welfare of one customer group, should it give equal treatment to the two customer groups and sum up their consumers' welfares or should it consider the two consumers' welfares incomparable and require each customer group to benefit from the merger?

All of this is not an issue in markets for complement products, in which there is only one customer and, hence, one consumer's welfare. But in a two-sided market it is likely to be crucial for the decision to be taken.

Hence, to this other extent, it is not correct to say that "two-sided markets are like markets for complementary products." More precisely, it is not correct, except in very special circumstances, when referring to welfare effects of firms' (pricing) strategies, even when such (pricing) strategies are similar to those used by firms selling complementary products. Blurring the distinction between two-sided platforms and firms selling complement products may end up hiding fundamental choices of competition policy that antitrust authorities, courts, and legislators should be taking explicitly.

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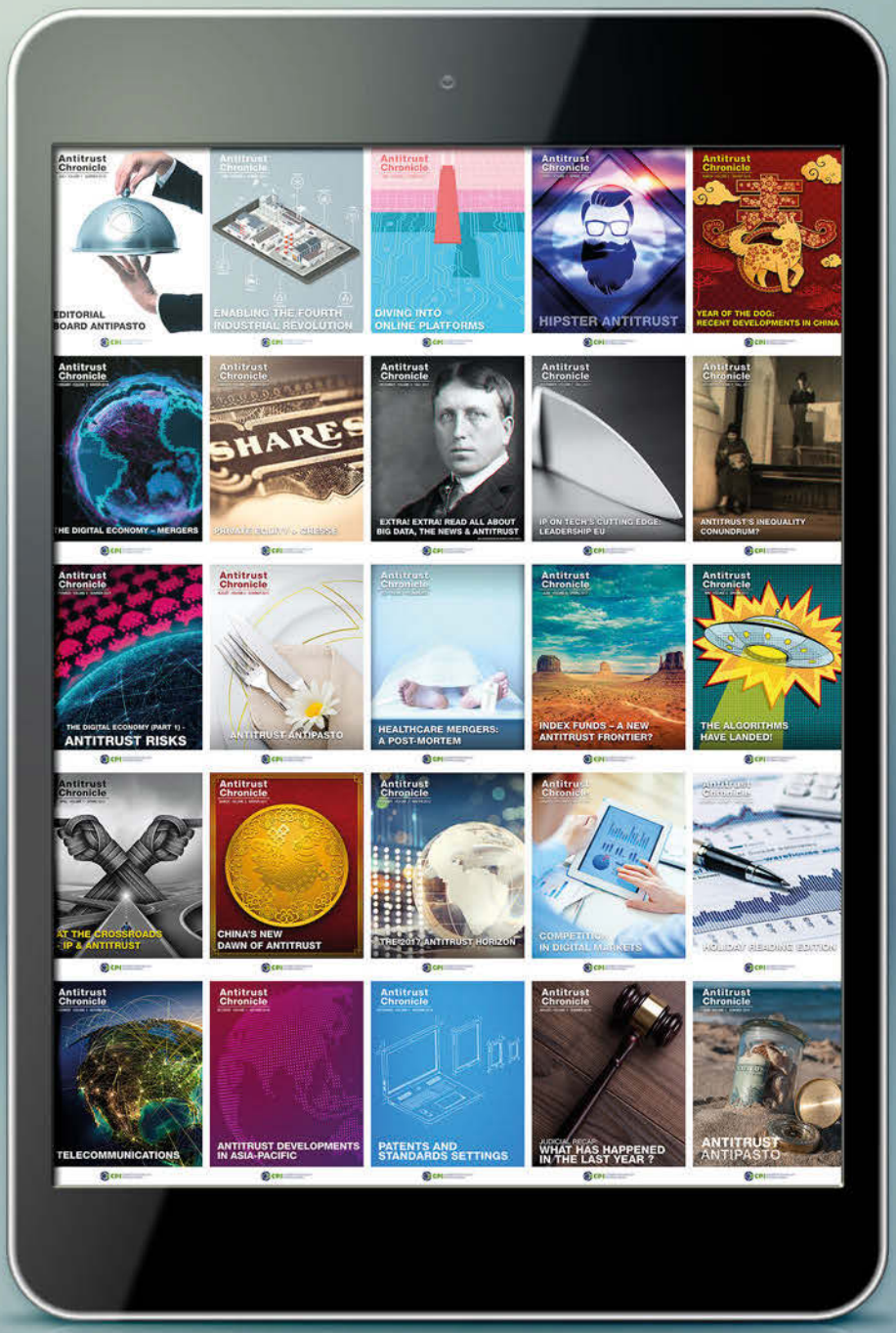


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