



Platform regulation — ex-ante versus ex-post intervention: evolving our antitrust tools and practices to meet the challenges



By Alex Chisholm & Nelson Jung¹

INTRODUCTION

The rapid change in the economic environment, in particular the growth of the digital economy, poses challenges for competition authorities and policymakers alike: what are the key considerations that should inform the approach to intervention in such a fast moving sector?

Joseph Schumpeter showed that great historical waves of technological innovation clump together — canals, steam, steel and electricity, mass production and now — though he died too early to see it himself — Information Technology. In each epoch, the rules of the economy tend to be best adapted to the wave that has passed, not the wave that is breaking. It is the breaking wave that will bring with it tremendous new benefits to humanity, even if the merits of specific innovations and consumer behavior are often difficult to predict.

We are now seeing a wave of new innovations — ranging from Big Data methods of improving public health through epidemic detection to wearable technology such as life-logging cameras — and are presented with risks we have not encountered before.

As regulators, we have the responsibility but also the great historical privilege of playing an influential role in shaping the latest of these defining technological eras. We must realize that we are more likely to get it wrong if we act before we have evidence of harmful effects of disruptive technologies in digital markets. We must try to minimize the inevitable mismatch between how we have done things before



and the opportunities and risks of the new breaking waves. This article discusses how antitrust regulation ought to change and explains why the authors believe this period requires more ex post and less ex ante regulation.

It focuses on three general points:

First, blanket solutions should be avoided. Instead, an evidence-based assessment of potential adverse effects of specific industry features or practices should be carried out before either ex-ante regulatory or ex-post enforcement tools are deployed. In either case this should be closely targeted to the specific harm identified, and every care should be given to avoid disproportionate actions and unwelcome side-effects. In that respect, online platforms and the digital economy do not differ from any other sector: there is no need to reinvent the regulatory wheel;

Secondly, significant risks associated with premature, broad-brush ex-ante legislation or rule-making point towards a need to shift away from sector-specific regulation to ex-post antitrust enforcement, which is better adapted to the period we are in, with its fast-changing technology and evolving market reactions.

Thirdly, as regulators, policymakers, businesses and consumers, we all need to adapt our practices to harvest the benefits of new, disruptive digital business models while containing their potential costs and risks.

BLANKET SOLUTIONS A POOR FIT FOR THE STILL-EVOLVING WEB

A. The Diversity Of 'Online Platforms'

What do we mean when we talk about “online platforms” potentially giving rise to competition concerns?

First, is not clear that the size of a platform, measured by revenue or number of customers, is necessarily indicative of competition concerns. Success in winning customers is not cause for suspicion or condemnation and size is not equivalent to dominance. Where companies do hold a dominant position, they have a “special responsibility” not to abuse that position and to compete on the merits, and must expect especially watchful scrutiny by the authorities. But dominance itself is not illegal.

Secondly, is there sufficient commonality in the evolving eco-system of the web to enable us to judge whether certain business models should be subject to regulation or enforcement action? It is certainly a challenge to determine what characteristics the following online models uniquely share: communications and social media platforms; operating systems and app stores; audiovisual and music platforms; e-commerce platforms; content platforms (itself a diverse group); search engines; payment systems; sharing platforms. The list could go on.²

Different platform characteristics will give rise to different issues, and regulation must remain case-specific if we are to minimize the risk of applying the wrong rule to a novel situation. By way of example: if a platform is processing consumer data, you may be concerned that the company adheres to privacy



obligations regarding the processing of that data. At the same time, there might be a need to keep a watch on whether it acquires an unmatched advantage over rivals through its exclusive control over such data. However, not all platforms process consumer data; and most of those that do, are unlikely to have market power. To the extent that some do, an even smaller group may have the ability and incentive to abuse that power. As a result, the analysis must be situation-specific.

Given the significant differences between the business models of the main digital platforms, one must be skeptical a priori about the extent to which any type of broad-brush legislation or economic regulation could provide satisfactory outcomes across such a wide variety of different situations.

B. No 'Digital One Size Fits All' – The Need For An Evidence-Based Approach

1. Lessons From The 'Net Neutrality' Debate?

Some commentators suggested that the recent debate on “net neutrality” may offer some insights as to whether the Internet and its ecosystems, including online platforms, would generally benefit from a greater degree of regulation.

Following a recent vote by the European Parliament, the first European-wide rules on net neutrality that will become a reality across all Member States from April 30, 2016.³ The new rules seek to create legal certainty, avoid fragmentation in the European single market and are designed to preserve the openness of the Internet.

The Internet owes much of its success to the fact that it has been open and easily accessible.⁴ A degree of regulation guaranteeing such openness therefore appears justified to protect the quality, affordability and universal access to the Internet as an open and unrestricted environment and as an engine of innovation.⁵

We are now hearing increasingly vocal calls to extend the Internet “neutrality” concept from the infrastructure layer to cover other, higher layers. However, does a perceived gradual “platformisation” of the Internet with a patchwork of multi-sided platforms operating different business models with differing levels of openness necessarily imply a need for “platform neutrality”⁶ or other types of ex-ante regulation?⁷

We believe that the net neutrality debate offers only very limited lessons in respect of the pros and cons of online platform regulation. Evidence of specific issues relating to online platforms is required before regulation can be contemplated.

2. Insights From Recent Work In Digital Markets?

Our innate skepticism against broad-brush ex-ante regulation is reinforced by the recent work that the CMA has undertaken in digital markets. For instance, the CMA’s report on the economics of open and closed systems, prepared together with France’s Autorité de la Concurrence, confirmed that there is no “digital one size fits all”. The report showed that openness is not necessarily always good for competition, nor are closed systems always bad.⁸ For example, Apple’s AppStore “walled garden” approach may reassure



customers with quality and consistency, while Android's more open approach could allow for more entry and experimentation.

Similarly, in the CMA's competition work on price comparison websites we have also been careful to shape our interventions to reflect the particular circumstances of the markets concerned. Recent or ongoing CMA market investigations illustrate this: in Payday loans⁹ and Retail Banking,¹⁰ we wanted to encourage the development of price comparison websites; in Energy we have wanted to understand what could make them flourish; and in the Private Motor Insurance investigation we have sought to curtail certain contractual restrictions on competition, in particular "wide" Most-Favored-Nation clauses, which were found to give rise harmful effects.

The different approaches adopted in respect of each these examples illustrate that blanket solutions are not appropriate as they fail to capture the specific circumstances these business operate in.¹¹ Intervening without evidence that specific industry features or practices cause harm is putting the cart before the horse which rarely results in moving in the right direction.

C. When Might Online Platforms Give Rise To Economic Harm?

But are there not some common platform characteristics that might cause harm and that therefore can be tackled through common rules?

Online platforms exhibit fast-paced innovation and high rates of investment. However, the presence of network effects often makes it more likely that the "winner takes all". Once a market has "tipped", the platforms may have market power that could be used to discriminate against competitors or to the detriment of consumers and innovation.¹² Competition authorities should be concerned about the appearance of market power where it is sustained over a period of time and where there are significant barriers to customers switching or "multi-homing" that deter entry from more innovative or better platforms.

In the world of online platforms, barriers to switching may arise from a number of factors, including:

- Contractual restrictions imposed by the online platform. Examples include certain Most Favored Nation clauses or tying and exclusivity provisions;
- The inability of customers to transfer their reputation or profile to a competing platform, making consumers "invested" in a particular platform; and
- Proprietary data a dominant platform may have access to, for instance personal data or transaction history that is inaccessible to rivals and could in principle create an unmatched advantage.

There may well be specific instances where online platforms can raise legitimate competition concerns, in particular when consumers are locked into a single unavoidable system with very limited contestability from competing systems.

However, both ex-ante regulatory and ex-post enforcement tools are likely to result in disproportionate actions and unwelcome side-effects if they are not carefully targeted at the specific harm. To achieve such carefully targeted intervention, there is no need to discard the competition playbook simply because platforms in the digital economy operate "online." Competition authorities have ample experience in applying competition enforcement tools to two-sided platform markets in an "offline" environment.¹³



Newspapers, for instance, show that network effects in two-sided platform markets do not necessarily result in dominant positions and are not necessarily a cause for concern in themselves. Indeed, the presence of network effects has sometimes been found to contribute to “protecting” consumers from price increases, for example in the newspaper industry where the need to attract a large circulation for advertisers was found to constrain the potential for increases in cover prices.¹⁴

As to the sustainability of perceived market power, giants that, despite their size, are themselves not necessarily immune from being toppled over. MySpace and Bebo, if you remember them, serve as useful reminders of how short-lived perceived dominance can be.¹⁵ If the digital markets in question are contestable, or if they are competed for at regular intervals, then market power held by online platforms is more likely to be transitory – and the opportunity to achieve interim rents may spur innovation.

D. Shifting Emphasis Of Regulation From Ex-Ante To Ex-Post

What if, despite all the difficulties in identifying a group of businesses that can be usefully categorized and treated as “online platforms”, and challenges in identifying common and predictable patterns of harm, we nevertheless were to heed calls for economic regulation of digital platforms?

In terms of the timing of any intervention, three types of risk can be observed: (1) acting prematurely, (2) inadvertently ossifying evolving market structures, and (3) acting too late. In our view, the most significant risks arise from premature broad-brush ex-ante legislation or rule-making in markets that are still rapidly evolving.¹⁶ Let’s consider these risks and the policy implications flowing from them in more detail.

1. The Risk Of Acting Prematurely

The potential costs of ex-ante regulation should be carefully considered. Premature ex-ante regulation cannot only impose substantial direct compliance costs, but can also reduce potential competition. This is very topical in light of the ongoing efforts to optimize communications regulation.

Considering an example from outside of regulation: the European Court of Justice’s (“ECJ”) landmark “right to be forgotten” ruling of May 2014.¹⁷ The ECJ found in the particular case that a person’s right to data protection could not be justified merely by the economic interest of the search engine. Since then Google has processed over 300,000 requests relating to over a million URLs. Unlike Google, with all its financial strength can well afford the considerable additional resources needed to process all of these cases, many smaller companies and potential entrants would likely not be able to sustain these additional compliance costs, and may therefore be held back from mounting a competitive challenge.

Leaving aside costs of compliance, protecting consumers by virtue of ex-ante regulation is inherently difficult in digital markets where consumer preferences evolve fast and in a less predictable manner. It is, therefore, important not to be over-confident in identifying the preferences of consumers and deciding what is in their interest. For example, in the trade-off between security and convenience, most policy-makers and regulators would tend to place a strong emphasis on the former, wishing to protect consumers from fraud and privacy abuses. Consumers themselves, however, have consistently shown a strong preference for convenience. Sometimes just one less click has been enough to cause consumers to prefer one app over another, more secure app. The analogue world often offers a very imperfect guide to consumer preferences in digital markets that continue to evolve apace. As a consequence, even with the best intentions, the



preferences that regulators ascribe to consumers at one point in time may not necessarily reflect those preferences that they hold or will hold in the future.¹⁸

2. The Risk Of Ossifying Evolving Market Structures Through Codification

If ex-ante regulation is applied too early it risks protecting early innovators from a following wave of more welfare-enhancing disruption caused by subsequent innovators. To put it another way, if the new digital giants — once innovative firms — get entrenched in their positions as a result of ex-ante regulation and do not face credible threats due to the higher barriers for new entrants, they will also tend to pass up opportunities to innovate and invest. Today's plucky innovators are tomorrow's sleepy incumbents who'll soon be calling for — or willingly succumbing to — regulation to protect their rents. Ex-ante regulation may, as a consequence, entrench the incumbent's position by imposing regulatory hurdles that the newcomers have to face.

Where ex-ante regulation is introduced, for instance by mandating greater compatibility between platforms, it risks harming innovation by locking in existing standards and discouraging or preventing more disruptive, “radical” innovations. The evolution of digital markets has been particularly difficult to predict. Recent changes include e-commerce morphing from auction-sites to more broadly embedded social media services; the rapid transformation of payment and communication systems; and a plethora of innovations in the incompletely-solved problem of search on mobile devices. But there's one innovation we haven't seen yet: the crystal ball informing us reliably of the impact of future innovations in digital markets. In its absence, we cannot know which ex ante interventions are free from the risk of inhibiting further welcome innovations.

The risks of getting it wrong show that we need a shift from broad-brush ex-ante regulation to ex-post antitrust enforcement, which is better adapted to responding to the rapidly changing innovative markets online platforms operate in. As Director-General Johannes Laitenburger has rightly pointed out, competition law focuses on “specific business practices” in digital markets. Ex-post tools have the inherent advantage of being more targeted and proportionate by examining the extent to which actual harm may have occurred based on empirical evidence on a case-by-case basis.

E. Evolving The Ex-Post Enforcement Toolkit: The Need To Adapt Our Practices

However, a shift from ex-ante regulation to ex-post enforcement requires competition authorities, policymakers, businesses and consumers alike to adapt their practices in a collective effort to ensure the challenges brought by online platforms are addressed effectively.

1. Competition Authorities

As competition authorities, we need to:

First, ensure we do not act too late. Investigations, even where litigated through the courts, should not take 10 years to complete, and arrive only when the market has changed beyond recognition. This means considering opportunities for expedited action, including interim measures to prevent harm arising while we investigate, as well as means to achieve earlier outcomes through commitments or settlements.



Second, acknowledge that there are certain, familiar antitrust concepts that may not take sufficient account of the nature of digital markets and so should not be transposed across to them without careful consideration. The “essential facility” doctrine, for instance, was developed in the context of infrastructure assets that are difficult to replicate. Concepts applying to ports cannot simply be copy-pasted into the digital world, or specifically to online platforms, where the potential source of market power is not generally derived from big infrastructure requirements and high fixed costs. Equally, an analysis that focuses on revenues can ignore the true nature of the economic value provided, where this lies in customer relationships or consumer data.¹⁹

Third, look for opportunities to test and design remedies at an early stage to ensure they work in the real world and in a cost-effective manner. Online business models tend to be flexible, constantly evolving business models and have an abundance of data that can help improve remedy design.

Fourth, provide better protection for commercial complainants. It is vital that complainants are not afraid to come to the competition authority for fear of retaliation from a dominant platform.

Fifth, we need more and earlier international joint working. We must exploit synergies in very similar cases that are simultaneously being taken across multiple jurisdictions. For a recent example, consider the family of cases brought by multiple E.U. competition authorities in relation to hotel online booking. We also need to try to avoid a patchwork of potentially inconsistent regulatory or enforcement approaches.

2. Policymakers And Regulators

There are also many useful steps that policymakers and regulators may wish to consider:

First, establish a minimum set of rights, including around privacy for consumers. Clear rules in such cases can avoid disputes and distrust. They also embed more fundamental rights, relating to citizenship, which do not lend themselves to ex post economic assessment in the way that questions of market power and commercial behavior do.

Second, set clear standards around data protection by businesses. The ECJ’s recent ruling declaring the “safe harbor” data agreement invalid leaves many companies scrambling to overhaul their Internet operations with no effective regime.²⁰ Complex digital infrastructure decisions affecting thousands of businesses and millions of consumers should ideally not be left to judges.

Third, clarify responsibilities around consumer protection. The regulatory framework should ensure that online platforms provide clear information on how they operate,²¹ and what their responsibilities are, so consumers can make informed choices.²²

Fourth, ensure that market analysis is alive to the growing importance of content as a key differentiator, not only in the competitive battle between telecoms operators, fiber, cable and satellite companies, but increasingly as a key customer recruitment and retention tool for the internet-based digital platforms.



Fifth, seek out opportunities for removing obstacles to cross-border trade, particularly by standardizing regulatory requirements. The EC sector inquiry into e-commerce may provide opportunities here.

Finally, consider deregulation. If policy makers were to seek to avoid every hypothetical consumer harm through pre-emptive ex-ante regulation, they would likely prevent many best-case scenarios entailing significant consumer benefits from ever coming about.²³ Policymakers and regulators should be open to the idea that a review of existing regulation and its suitability in the context of online platforms may actually result in a withdrawal of such regulation - creating a reasonably level playing field by “leveling down” as opposed to “leveling up.”

The benefits brought about by certain online platforms may provide good arguments for pursuing a deregulatory approach. For instance, they can expand the range of options and information available to consumers, by facilitating reputational feedback mechanisms, thereby potentially reducing the problem of asymmetric information between producers and consumers. This could lower or even remove the need for regulation, allowing more scope for market competition to fix problems.

This holds for all of the Digital Single Market agenda and the authors hope that both the European Commission and BEREC will keep this deregulatory opportunity firmly in mind in the review of the EC Electronic Communications framework.²⁴ The bar for introducing new forms of communications regulation — such as has been proposed to deal with oligopoly industry structures — must be a high one.²⁵

3. Businesses

At the same time, businesses also need to play their part in ensuring ex-post enforcement works better than ex-ante regulation. In particular, they should:

First, improve the transparency of the information available on how they operate. The amount of public information about the workings of digital platforms is low. Is it any surprise, then, that these platforms continue to arouse suspicion? Also, being transparent in representing the options available, such as how to transfer data collected, to consumers who want to switch.

Second, take more responsibility for satisfying consumers that their legitimate concerns about privacy and data protection are being fully respected.

Thirdly, look for opportunities to grow by innovation. For example, much of the focus of our biggest telecoms operators has been on managing the cash-flows that sustain their debts acquired through spectrum purchases and M&A. A lot of attention has been given to pricing structures, consolidation and cost control, and regulatory bargaining, rather than break-through technologies and services.

4. Consumers

Last but not least, consumers will also need to continue adapting:

First, by being engaged and proactive. Consumers need to recognize the benefits of switching between platforms or search engines. Keeping providers on their toes can be a powerful tool we all have at



our disposal as consumers. This also includes switching to a provider who is transparent and reassuring about the use of personal data — the “currency” consumers use to pay for apparently free services.

Second, by providing effective feedback. A recent petition in London relating to transport regulation is an interesting example of proactive consumer engagement: more than 130,000 people signed up within a matter of days. We need consumers to continue to help guide policy-makers, regulators and competition authorities on where they see their best interests.

CONCLUSION ON ANTITRUST LAW VERSUS SECTOR-SPECIFIC LEGISLATION

In summary, we do not face a binary choice between antitrust and sectorial regulation - instead they must complement each other. Competition authorities and communications regulators must work together to update and adapt our practice to tackle the challenges they face effectively. The costs of premature, unmeritorious interventions are likely to be very high, given the positive impact of welfare-enhancing innovations. A necessary shift towards the use of reinvigorated, ex-post tools will allow for more evidence-based, and therefore more targeted and proportionate, enforcement. The digital platforms should be judged and treated according to how they behave, and how this affects consumers.

¹ Alex Chisholm is the Chief Executive Officer of the Competition and Markets Authority (“CMA”) in the United Kingdom. Nelson Jung is the Director of the Mergers Group at the CMA. The CMA is the U.K.’s national competition agency, the successor body to the Office of Fair Trading and the Competition Commission. The authors are very grateful to a number of colleagues at the for their contribution to this article, in particular Paul Tregear, Robert Ryan, Tony Curzon Price, Mike Walker, Simon Constantine and Ida Sundstrom. The views expressed are personal to the authors and all errors, omissions, and opinions are their own. This article is an expanded version of a speech given by Alex Chisholm at the Bundesnetzagentur in Bonn in October 2015.

² European Commission, “A Digital Single Market Strategy for Europe,” communication from the commission to the European parliament, the council, the European economic and social committee and the committee of the regions, COM (2015) 192 final, Brussels, May 6, 2015, [A Digital Single Market Strategy for Europe COM\(2015\)192 final](#).

³ European Commission, “Bringing down barriers in the Digital Single Market: No roaming charges as of June 2017” Strasbourg, October 27, 2015, [http://europa.eu/rapid/press-release_IP-15-5927_en.htm](#); European Commission, “Roaming charges and open Internet: questions and answers,” Brussels, June 30, 2015 [http://europa.eu/rapid/press-release_MEMO-15-5275_en.htm](#); European Commission, “Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012,” COM (2013) 0627 final, September 3, 2013, [http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1447864542922&uri=CELEX:52013PC0627](#).

⁴ Any content provider has had the opportunity to test its ideas and their relative value in the marketplace. The required investment and therefore barriers to entry, for instance the costs associated with buying a domain name, renting a space on a server and implementing its application or software, have been relatively low. As a result,



new services have been made available to consumers: browsing, mailing, Peer-to-Peer (P2P), instant messaging, Internet telephony (Voice over Internet Protocol “VoIP”), videoconference, gaming online, video streaming, etc. This development has taken place mainly on a commercial basis without any regulatory intervention.

- ⁵ However, even the strongest supporters of the net neutrality regime will admit that it will inhibit some business models, for example involving paid-for performance enhancement, from evolving, which may have been welfare-enhancing.
- ⁶ One of the first to use the expression ‘platform neutrality’ was the French National Digital Council (Conseil National du Numérique), which published a detailed report on this concept in June 2014, following an earlier request from the Ministry of the Economy and Digital Affairs as well as the Secretary of State on Digital Affairs See Conseil National du Numérique (2014), “Platform Neutrality: Building an open and sustainable digital environment,” Opinion No. 2014-2, of the French Digital Council, Paris (www.cnnumerique.fr/wp-content/uploads/2014/06/PlatformNeutrality_VA.pdf). The French and German governments explicitly called on the European Commission to establish regulation for essential platforms, invoking neutrality as one of the attributes of such platforms’ future conduct. See “Europe’s demands on Google mount,” *Financial Times*, November 26, 2014, www.ft.com/intl/cms/s/0/66b5149e-758a-11e4-b082-00144feabdc0.html#axzz3WpR2sSn7. The debate also surfaced in the United States last year, when Blackberry CEO John Chen officially complained that Netflix had not made movies available for Blackberry phones, and invoking platform neutrality – or ‘app neutrality’ – as a much-needed remedy, Karl Bode, “No, ‘App Neutrality’ Is Not A Thing,” *Net Neutrality*, February 13, 2015, www.techdirt.com/blog/netneutrality/articles/20150122/08093329777/no-app-neutrality-is-not-thing.shtml.
- ⁷ Andrea Renda, “Antitrust, Regulation and the Neutrality Trap: A plea for a smart, evidence-based Internet policy,” *Centre for European Policy Studies*, no. 104 (2015). In rejecting the need for any such neutrality requirements, Renda suggests that the “European Commission seems to have been pervaded by a neutrality delirium.”
- ⁸ Competition and Markets Authority, *The Economics of Open and Closed Systems*, December 16, 2014, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/387718/The_economics_of_open_and_closed_systems.pdf.
- ⁹ Competition and Markets Authority, *Payday Lending market investigation*, Final report published February 24, 2015, <https://www.gov.uk/cma-cases/payday-lending-market-investigation>.
- ¹⁰ Competition and Markets Authority, *Retail Banking market investigation*, November 6, 2014, <https://www.gov.uk/cma-cases/review-of-banking-for-small-and-medium-sized-businesses-smes-in-the-uk>
- ¹¹ David Evans and Richard Schmalensee, “The Antitrust Analysis of Multi-sided Platforms,” *National Bureau of Economic Research*, (2013). Evans & Schmalensee note that competition analysis of multi-sided platforms needs to take account of all of the sides of the platform and indirect network effects between them. Any analysis or policy rules that ignore this complexity are prone to commit serious errors.
- ¹² For example the Commission is currently carrying out investigations into Google regarding alleged abuse of dominance. It is the Commission’s preliminary view that Google is abusing a dominant position, in breach of European antitrust rules, by systematically favoring its own comparison shopping product in its general search results pages in the European Economic Area. The Commission is concerned that users do not necessarily see the most relevant results in response to queries, to the detriment of consumers and rival comparison shopping services, as well as stifling innovation. The Statement of Objections alleges that Google treats and has treated more favorably, in its general search results pages, Google’s own comparison shopping service ‘Google Shopping’ and its predecessor service ‘Google Product Search’ compared to rival comparison



shopping services (http://europa.eu/rapid/press-release_MEMO-15-4781_en.htm) . Google has responded to the Commission's Statement of Objections.

- ¹³ The competition implications of network effects in two-sided markets have been examined for some time. By way of example, Liebowitz and Margolis found that network effects and the tendency towards a natural monopoly in networked industries are often over-estimated, Stan J. Liebowitz and Stephen E. Margolis, "Network Externalities (effects)," in *The New Palgrave's Dictionary of Economics and the Law* (London: MacMillan Reference Limited, 1998).
- ¹⁴ See for instance the OFT's decision on the anticipated acquisition by Northcliffe Media Limited of Topper Newspapers Limited of 16 July 2012, where the presence of network effects in two-sided market was a contributing factor to a clearance decision, in particular paragraphs 126 and 127: "Were Northcliffe to raise the cover price of The Post, it is likely that its circulation would fall resulting in both its fixed costs having to be met by the remaining readers or by advertisers [...] due to the presence of indirect network externalities, declining circulation would make it harder for Northcliffe to raise revenue from advertisers. As a result, Northcliffe would not have the ability or incentive to reduce profitably the output of this title."
- ¹⁵ Alex Chisholm, "Giants of digital: separating the signal from the noise and the sound from the fury" (CRA Competition Conference, Brussels, December 10, 2014); Justus Haucap and Ulrich Heimeshoff argue that it is not possible to generalize about competition in online markets and that there is insufficient evidence that Google's and Facebook's strong market positions will be long lasting, whereas eBay appears to have held a dominant position for over a decade: see Justus Haucap and Ulrich Heimeshoff, "Google, Facebook, Amazon, eBay: Is the internet driving competition or market monopolisation," *International Economics and Economic Policy* 11, (2013); see also the OECD paper on the digital economy roundtable (2012) which notes that certain market features militate against the appearance of tipping points in the digital economy, including diminishing returns to scale and congestion effects. The paper indicates that these features as well as low switching costs and per-transaction charges weaken the competition-suppressing network effects of cross-group externalities. As such, it argues that network effects have to be assessed on a case-by-case basis to determine their competitive implications, at <http://www.oecd.org/daf/competition/The-Digital-Economy-2012.pdf>.
- ¹⁶ Nicholas Economides commented that regulation carries high risks in industries characterized by highly innovative firms in "Antitrust Issues in Network Industries," *The Reform of EC Competition Law* (2008).
- ¹⁷ Case-131/12, *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González*, May 13, 2014,
- ¹⁸ For further discussion, Competition and Markets Authority, *The commercial use of consumer data: report on the CMA's call for information*, June 17, 2015.
- ¹⁹ This is illustrated by Google paying nearly \$1bn for the crowd-sourced travel-mapping app Waze, which generated little revenue at the time. See the OFT's merger control decision of 11 November 2013 regarding the completed acquisition by Motorola Mobility Holding (Google, Inc.) of Waze Mobile Limited, ME/6167/13. Note that in turnover-based merger control the focus on revenues means that some potentially anticompetitive mergers could fall below the regulatory radar, whereas the United Kingdom is able to examine such transactions under its share of supply jurisdictional test. A further illustration is the EC investigation into the Facebook/WhatsApp merger, where the Commission analysed to what extent potential data concentration issues could hamper competition in the online advertising market. Case No COMP/M.7217, *FACEBOOK/WHATSAPP*, 3 October 2014, http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf.



-
- ²⁰ See this month's ruling of the European Court of Justice regarding the transatlantic Safe Harbour agreement in Case C-362/14, *Maximillian Schrems v Data Protection Commissioner*, 6 October 2015, <http://curia.europa.eu/juris/document/document.jsf?docid=169195&doclang=EN>, see also "Europe's costly judgment on data protection," *Financial Times*, 7 October 2015, <http://www.ft.com/cms/s/0/7b5a672e-6d09-11e5-aca9-d87542bf8673.html#axzz3oAXtkl63>.
- ²¹ For instance, the law requires consumers to be given "material" information (information they require to make an informed transactional decision). Failure to do so could be a misleading omission contrary to Regulation 6 of the Consumer Protection from Unfair Trading Regulations 2008.
- ²² The speed at which technology is changing - and the rapid emergence of novel online business models - present challenges to the application of many existing and traditional regulatory frameworks. Issues relating to online platforms encompass not just competition law, but many other regulatory regimes, including intellectual property rights, taxation, employment, cybersecurity, consumer protection and data protection.
- ²³ Adam Thierer, *Permissionless Innovation: The Continuing Case for Comprehensive Technological Freedom* (Virginia: Mercatus Center at George Mason University, 2014). Christopher Koopman, Matthew D. Mitchell, Adam D. Thierer, "The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change," *The Journal of Business, Entrepreneurship & the Law* 8 (2014); MaryAnne M. Gobble, "Regulating Innovation in the New Economy," *Research-Technology Management* 58, no.2 (2015).
- ²⁴ European Commission, "Public consultation on the evaluation and the review of the regulatory framework for electronic communications networks and services," September 11, 2015, <https://ec.europa.eu/digital-agenda/en/news/public-consultation-evaluation-and-review-regulatory-framework-electronic-communications>.
- ²⁵ This refers to how a number of electronic communications markets have evolved so that only a small number of multi-functional operators are now competing, offering broadband, TV, fixed and mobile telephony packages, based on some combination of fibre, cable, copper and wireless networks. Some commentators have questioned whether new ex ante powers may be needed to deal with such concentrations. However, both economic literature and empirical observations show how oligopolistic competition can be effective – one reason why there is no presumption against this form of competition in the rest of the economy. BEREC's recent report on oligopoly analysis and regulation found that not all oligopolies raise competition issues and therefore oligopolies are not necessarily always problematic such that they require regulatory action, see http://berec.europa.eu/eng/document_register/subject_matter/berec/reports/5042-draft-berec-report-on-oligopoly-analysis-and-regulation. The report notes that oligopolistic market settings are only of concern when they contribute to a non-competitive market outcome, resulting in significant consumer harm/welfare loss, thus requiring regulatory action to address evident or potential market failures. In any event, in assessing the case for new regulation, we should not downplay the potential of existing competition tools to tackle such issues.