THE ACHILLES HEEL TO NEWSPAPER MERGERS: PRODUCT MARKET DEFINITION

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I. INTRODUCTION

For more than a decade, the traditional newspaper business model has been under threat, with an ever rising exodus of readers and advertisers to online and other sources of media. Print copy and advertising revenues have plummeted and, while seeking to embrace the digital era, newspapers have generally struggled to make a profit. Added to their woes, however, is that merger control regimes have proved highly reluctant to accept any widening of the traditional definition of the product market in which they operate, maintaining high barriers to merger clearance and thus frustrating attempts by newspaper groups to rationalize costs through consolidation. This article takes a critical look at the approach of competition authorities to date, focusing on the UK.

Section II provides further background on the challenges facing the newspaper industry; Section III provides background on the UK's newspaper merger control regime and considers the most recent newspaper merger cases; Section IV considers select recent examples of newspaper cases in other jurisdictions; and Section V concludes with some suggestions on the way forward.

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II. A BRAVE NEW WORLD

For much of the 20th century, the newspaper industry enjoyed a privileged status as a primary source of news and advertising. Competition primarily came from within and not outside the industry. The growth of alternative media began to change this, and by the mid-2000s at an accelerated rate.[2] The primary driver for this decline is not in dispute. Over the past decade, internet connectivity has exploded, and has become an ever popular source of news. Nearly half (48 percent) of all adults in the UK now use the internet for news.[3] It has also been highly attractive for advertisers, using data and algorithmic tools to target advertising in a far more precise way than printed newspapers could ever achieve.

Newspapers have sought to adapt and establish their own digital presence, but digital has not made up for the loss of print revenues. The internet has blurred the boundaries between traditional platforms, with online broadcasters and newspapers increasingly competing against one another for audiences' attention. The internet has presented new ways to source, share and monetize news, in particular through intermediaries and social media. Facebook, Google, YouTube, Twitter and Google News now make up five of the top ten most widely used online news sources in the UK. Furthermore, while newspapers' digital readers are growing, there has been no step-by-step growth in advertisers. Estimates indicate that Facebook and Google capture up to 90 percent of digital advertising display growth in the UK and globally,[4] while classified advertising has diversified among major players and a range of specialist sites.

Local and regional newspapers have been hardest hit. Quality nationals have had some success with pay walls, with readers increasingly willing to pay for quality news in a new era of "fake" news. But the regional and local press have had fewer opportunities. They operate on smaller scales, have had to fight for relevance in an increasingly globalized news world (despite the important democratic platform they provide in many localities), and have been particularly affected by the loss of classified advertising, on which many have traditionally relied. In response, publishers have increasingly sought to reduce costs, either through staff reductions, closing titles (since 2005 there has been a net loss of around 200 local newspaper titles in the UK)[5] and consolidation.

III. UK NEWSPAPER MERGER CONTROL: FRIEND OR FOE?

A. The UK's Newspaper Merger Control Regime

Newspaper mergers have never been particularly straightforward in the UK. Up until 2003, newspaper proprietors required prior consent from the Secretary of State for Trade and Industry (as then was) before acquiring a newspaper (or newspaper assets) where the total daily paid-for circulation of the newspapers concerned would be 500,000 or more. In such cases the Secretary of State was obliged to refer the proposed acquisition to the Competition Commission ("CC") (as then was)[6] for a detailed review under a broad public interest test, before making a decision.

There were some exceptions to this rule, where the newspaper being purchased was not economic as a going concern or had de minimis circulation. Nevertheless, it resulted in a large number of often regional newspaper mergers being considered in detail by the competition authority only to be cleared with limited or no remedies.

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2 See Rt Hon Lord Justice Leveson, *The Leveson Inquiry: An Inquiry into the Culture, Practices and Ethics of the Press (Leveson Inquiry)*, November 2010, page 94. Between 1990 and 2011, circulation of national daily titles fell 37 percent and local and regional titles more than 40 percent. Between 2010 and 2016, national daily circulation has fallen a further 37 percent (Ofcom, *News consumption in the UK: 2016*, June 29, 2017 (*Ofcom News consumption Survey 2016*), page 26), and regional dailies have seen accelerated year-on-year decreases, most recently by 12.5 percent in 2016 (*Press Gazette*, "UK regional dailies lose print sales by average of 12.5 per cent: Wigan Post and The National are biggest fallers," February 23, 2017, http://www.pressgazette.co.uk/uk-regional-dailies-lose-print-sales-by-average-of-12-5-per-cent-wigan-post-and-the-national-are-biggest-fallers/). American newspapers have also lost 40 percent of their daily circulation over the last two decades (The Economist, "The Future of journalism: Funnel vision," October 28, 2017).

3 Ofcom, *News consumption Survey 2016*, page 7.

4 Enders Analysis, *News brands: Rise of membership as advertising stalls*, January 2017; The Economist, "Publishers are wary of Facebook and Google but must work with them," November 11, 2017.

5 Press Gazette, "New research: Some 198 UK local newspapers have closed since 2005," December 19, 2016, http://www.pressgazette.co.uk/new-research-some-198-uk-local-newspapers-have-closed-since-2005/.

6 On April 1, 2014 the CC and the Office of Fair Trading ("OFT") merged to form the Competition and Markets Authority ("CMA").

The Communications Act 2003 overhauled the system of prior consent. Newspaper mergers would instead be reviewed principally on competition grounds, subject to the same jurisdictional and substantive tests as any other merger, in accordance with the Enterprise Act 2002. Newspaper mergers therefore would only be notifiable where the UK turnover of the acquired company exceeds £70 million or the transaction resulted in a market share of 25 percent or more. With merger control under the Enterprise Act being a voluntary regime, a purchaser could complete a newspaper transaction without any prior regulatory approval and take the risk of the deal being called in for review up to four months post-completion.

The Communications Act still reserved power to the Secretary of State to intervene, albeit on a narrower "specified" newspaper public interest consideration (accurate presentation of news, free expression of opinion and/or a sufficient plurality of views in newspapers). The power only arises where a merger meets the above jurisdictional tests (or where just one of the parties has a 25 percent or more share of a market in a substantial part of the UK, under the "special" public interest regime), and to date the Secretary of State has not in fact exercised this power to intervene in any merger.

The above changes helped to streamline the regime, but before long new concerns arose, regarding the application of the regime to local and regional newspaper mergers. With the rapid growth of digital media, concerns arose about the competition authorities applying too formalistic an approach to market definition and not taking sufficient account of new competitive constraints. This was brought to a head by the Government's 2009 interim *Digital Britain Report* which called on the OFT to review the regime as applicable to local and regional media mergers.[7] While recognizing that the industry was facing very significant structural challenges, the OFT ultimately concluded that the regime was "evidence-based and is therefore already capable of reflecting market developments," as well as being "flexible" enough to take into account efficiencies and any failing-firm arguments.[8] Nevertheless, the OFT recommended introducing a process to enable it to ask Ofcom to provide a Local Media Assessment ("LMA") in any case where a local media merger raised *prima facie* competition issues so it could draw on Ofcom's greater specific sectoral knowledge.

B. Recent Newspaper Mergers

How reflective of market developments and flexible has the UK's newspaper merger regime proved to be? Since 2009, there have been four local/regional newspaper merger reviews by the UK competition authorities.[9] We consider three of those below.[10]

Kent Messenger Limited/Northcliffe Media Limited (2011).[11] The first case under the OFT's revised regime was Kent Messenger Limited ("KML")'s proposed acquisition of seven local weekly titles in Kent from Northcliffe Media Limited. The parties argued that non-print media should be included in the product frame of reference, on the basis of internal documents, examples of switching and independent reports indicating that advertising revenue in local newspapers had declined while online advertising had increased. Ofcom's LMA also supported this view, finding that other sources of media may be regarded as substitutes, the constraint from online in particular may have increased, and would likely become even stronger in the future.[12]

The OFT, however, did not consider the evidence to be "sufficiently compelling."[13] Third party responses did not "fully support" the parties' submissions, and the examples of switching, "though directionally helpful – were not sufficient in number or detail." On a cautious basis, the OFT decided not to widen the frame of reference beyond the supply of local weekly newspapers and advertising space.

7 BERR/DCMS, *Digital Britain: The Interim Report*, January 2009.

8 OFT, *Review of the local and regional media merger regime: final report*, June 2009.

9 There have also been two decisions concerning national newspapers during this period but neither contain any meaningful product market definition analysis due to an absence of competition concerns: *Completed acquisition by Northern & Shell Network Limited of CLTUFA Holdings*, November 19, 2010, and *Anticipated acquisition by Nikkei Inc. of The Financial Times Group*, November 16, 2015.

10 In the fourth case - Trinity Mirror plc's acquisition of the regional newspaper titles of Guardian Media Company plc (May 24, 2010) – due to an absence of competition concerns, the parties did not submit any evidence on the constraint posed by online and other media, and the decision does not contain any meaningful product market definition analysis, so we do not consider it here.

11 OFT, *Anticipated acquisition of seven local weekly newspaper titles by Kent Messenger Limited from Northcliffe Media Limited*, October 18, 2011 (*KML/Northcliffe*).

12 Ofcom, *Proposed acquisition by Kent Messenger Group of seven newspaper titles from Northcliffe Media Local Media Assessment* (*KML/Northcliffe LMA*), para. 4.30.

13 *KML/Northcliffe*, paras. 34-47.

On the basis of that narrow frame of reference, the merger would result in a monopoly in six local government areas of Kent. Finding that the parties were each other's closest competitors and that alternatives, including those outside of the frame of reference, would not pose a sufficiently close constraint on KML post-merger, the OFT considered that the merger gave rise to a realistic prospect of a substantial lessening of competition ("SLC") and consequently referred the merger to the CC for an in-depth review.[14]

The parties had sought to resist that conclusion by arguing that the relevant counterfactual should take into account the likelihood that, but for the merger, a number of titles concerned might close. The parties also sought to argue that any SLC would be outweighed by efficiencies. Both arguments received some support from Ofcom. Ofcom considered that there was a certain foreseeability that titles may exit in the future. Ofcom also acknowledged that the "merger may provide the opportunity to rationalise costs, maintain quality and investment, and provide a sounder commercial base from which to address long-term structural change."[15] But the OFT was not swayed by either argument. The OFT said that it was "unable to merely consider that the wider structural challenges facing the market, in and of themselves, indicate with a sufficient degree of certainty that any of the specific titles will exit the market."[16] The parties needed to provide specific evidence supported by financial and/or strategic plans that exit would be imminent, which they had not. As for efficiencies, the OFT did not consider that the parties' evidence was sufficiently compelling that any efficiencies would outweigh the SLC. The OFT also had regard to the fact that, in accordance with its decisional practice, "efficiencies will almost never justify a merger to monopoly."[17]

Within one month of the OFT's referral decision, Northcliffe announced the closure of two of the titles concerned in the merger, and soon after KML announced it was abandoning the proposed acquisition. According to KML, "[t]he costs and time required for a full Competition Commission review would be completely unreasonable for a business of our size and a deal of this scale."[18] The outcome of the case was severely criticized in the 2012 *Leveson Inquiry*, which recommended the Government to "look urgently as [to] what action it might be able [to] take to help safeguard the ongoing viability of this much valued and important part of the British press,"[19] although no formal steps were taken by the Government in response.

Northcliffe Media Limited/Topper Newspapers Limited (2012).[20] *KML/Northcliffe* was closely followed by Northcliffe's proposed acquisition of Topper Newspapers, a free weekly newspaper distributed in Nottingham. In this case, the OFT decided not to request an LMA from Ofcom, primarily because Northcliffe said that it would provide its own views/evidence on the application of the relevant customer benefits exception directly to the OFT. Part of Northcliffe's submissions on market definition referred to the internet making significant incursions in all key advertising categories, especially given the ability of online alternatives to offer targeted searches, including by location. Northcliffe also provided details of the competitive set in each category in the Nottingham area, as well as switching data.

However, as with *KML/Northcliffe*, the OFT proceeded cautiously and concluded that the evidence put forward was not sufficient to support widening the market definition: "in assessing the evidence put forward, the OFT has been unable to isolate such an effect from broader cyclical and structural factors such as the recession or a permanent "one-way" shift to greater use of the internet."[21] The OFT found that views from readers and advertisers were mixed. It also carried out a comparative yield analysis and concluded that online media did not appear to have impacted Northcliffe's yield data.

Yet the OFT did take online media into account in the competitive assessment, and in contrast to *KML/Northcliffe*, considered that online media, together with other factors, would provide a sufficient constraint to resolve any competition concerns from an otherwise concentrative transaction. Somewhat in contradiction with its market definition, the OFT said that "from a demand-side, there does appear

14 Ibid. para. 139.

15 *KML/Northcliffe LMA*, para. 5.55

16 *KML/Northcliffe*, para. 17.

17 Ibid. para. 125.

18 The Guardian, "Newspaper group withdraws takeover bid because of referral," October 18, 2011, https://www.theguardian.com/media/greenslade/2011/oct/18/local-newspapers-mediabusiness.

19 *Leveson Inquiry*, page 152.

20 OFT, *Anticipated acquisition by Northcliffe Media Limited of Topper Newspapers Limited*, June 1, 2012.

21 Ibid. para. 36.3.

to be a degree to which…local newspapers and other media may be considered substitutes."[22] The OFT also considered that demand-side substitutability with online media would be heightened by the indirect network effects arising from the two-sided nature of newspaper markets.[23] As a result the OFT had sufficient comfort to clear the transaction without referral for an in-depth review being required.

Daily Mail General Holdings Limited/the trustees of the Iliffe Settlement/Trinity Mirror plc (2013).[24] A year later, in 2013, the OFT reviewed a completed joint venture between Daily Mail General Holdings Limited, the trustees of the Iliffe Settlement and Trinity Mirror plc. As with *KML/Northcliffe*, Ofcom submitted an LMA, which re-emphasized the growing constraints from alternative media sources as substitutes to local newspapers, with such constraint likely to increase as online technologies evolve and the take up of mobile devices and smartphones in particular continues to increase.[25]

The parties also provided evidence (a handful of internal documents are quoted in the decision) to show that online media constrained their behavior. Again, however, the OFT recognized that there was some constraint, but concluded that it had not been provided with sufficient evidence to include online media in its market definition. As it did not find a competition issue, even on the narrow basis of print titles, the OFT did not consider it necessary to assess the extent of the constraint imposed by other media as part of the competitive assessment, and cleared the transaction.

Conclusions. The OFT has certainly demonstrated a commitment to an evidence-based approach. Yet the stringency of the evidential standard applied prevented future market developments – which are inherently harder to substantiate than current market conditions – from being fully taken into account. The closure of titles following *KML/Northcliffe* provides a clear example of the OFT getting it wrong. While more weight was attached to online subsequently, the OFT remained reluctant to set a precedent.[26] The fact that there have only been four local/regional newspaper merger reviews to speak of since 2009, and none in almost five years despite the continued worsening of market conditions in the industry, also suggests that the OFT's overly cautious approach may well have had a chilling effect on subsequent merger activity in the UK.

IV. APPROACH IN OTHER JURISDICTIONS

The question whether print markets should be widened to include online and other media has been the focus of debate in a number of recent newspaper mergers around the world, giving rise to diverging approaches. We consider a number of the most recent cases below.

Tribune Publishing Company and Freedom Communications Inc. (2016).[27] In 2016, Tribune, the publisher of the *LA Times*, successfully bid to acquire Freedom Communications, the publisher of the *Register* in Orange County and the *Press-Enterprise* in Riverside County, in the context of a bankruptcy auction. The DOJ filed a civil antitrust lawsuit against the Tribune to prevent the sale from proceeding. According to the DOJ the acquisition would give the Tribune a monopoly in markets, in respect of both readers and advertisers, for local daily newspapers in Orange and Riverside counties.

The Tribune lambasted the DOJ for "living in a time capsule, with a framework that predates the arrival of iPhones, Google, Facebook, and modern media outlets that are killing the traditional newspaper industry. It wasn't competition from the L.A. Times that forced the Register into bankruptcy. It was the Internet and related technology."[28]

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22 Ibid. para.119.

23 Ibid. paras. 10 and 124.

24 OFT, *Completed joint venture between Daily Mail General Holdings Limited, the trustees of the Iliffe Settlement and Trinity Mirror plc*, June 28, 2013.

25 Ofcom, *Local World: Local Media Assessment*, April 11, 2013.

26 Similar reluctance has also been displayed in closely related fields. See e.g., CC, *Review of undertakings given by hibu plc (formerly Yell Group plc) in relation to its Yellow Pages printed classified directory advertising services business*, March 15, 2013. Hibu plc's Yellow Pages printed classified advertising directory had been subject to some form of price cap and related undertakings since 1996. In 2013 the CC finally decided to remove the undertakings in view of competition from online services. While acknowledging that online services are regarded as a "good substitute" from the advertiser's point of view (para. 5.17), the CC resisted drawing any formal conclusions on expanding the market definition.

27 See Complaint, *United States v. Tribune Publishing Company*, No. 16-CV-01822 (CD Cal March 17, 2016), and Order, *United States v. Tribune Publishing Company*, No. 16-CV-01822 (CD Cal March 18, 2016).

28 Los Angeles Times, "U.S. files suit to block Tribune purchase of O.C. Register parent," March 17, 2016, http://www.latimes.com/business/la-fi-freedom-tribune-auction-20160317-story.html.

The DOJ's market definition, however, was upheld by the Central District Court of California, on the basis that the Tribune had not sufficiently demonstrated that consumers consider online content or advertising reasonably interchangeable with print newspapers. Yet notably, the DOJ had not provided any specific evidence to substantiate its market definition approach either, other than to make general references to the different product characteristics of print and online news sources.[29]

Seven West Media/Sunday Times and Perthnow.com.au (2016).[30] In 2016 the Australian Competition and Consumer Commission ("ACCC") unconditionally cleared the acquisition by Seven West Media ("SWM" – owner of various print and online media in Western Australia, including a paid daily, a paid Saturday paper and a free online news site) of a paid Sunday newspaper and free online news site in Western Australia from News Corporation.

The ACCC left open whether print and online news were part of the same market on the consumer side, but considered them to be separate on the advertiser side. Nevertheless, the ACCC considered online and other alternative media on both sides of the market as part of the competitive assessment.

On the advertiser side, the ACCC considered that, in view of the responses from advertisers, while no one single alternative form of advertising would replace the constraint News Corporation's media imposed on SWM, the range of advertising alternatives including TV, radio, as well as online, would "collectively" impose sufficient constraint. On the reader side, while finding that the parties' newspapers were close competitors, the ACCC considered that online, radio and TV would give a sufficient range of news choices for Western Australians. The ACCC also considered that new advertising opportunities on the advertising side of the market would discipline SWM on the consumer side: "in the face of growing competition from alternative advertising opportunities, the need for SWM to maintain readership levels in order to ensure advertising revenues would constrain SWM and likely limit its ability to increase prices to consumers or decrease quality as a result of the transaction."

News Corporation/APN's Australian Regional Media Division (2016).[31] In 2016 the ACCC also reviewed News Corporation's proposed acquisition of APN's Australian Regional Media Division. Both parties were the largest newspaper publishers in Queensland and Northern New South Wales, overlapping in the supply of paid regional and free community newspapers and their associated websites.

The ACCC left the market definition open on the consumer side as it had done in the *SWM* case. On the advertiser side, however, the ACCC did not expressly state a conclusion. Taking into account the results of an extensive consultation with readers and advertisers (including more than 600 small businesses and advertising agencies that advertised in the parties' publications), the ACCC ultimately cleared the transaction, on very similar grounds to the *SWM* case, in view of the "collective" constraint posed by TV, radio and online.

Particularly notable about the ACCC's approach, in contrast with the UK cases discussed above, is its readiness to draw on general market trends, whether or not fully substantiated by specific evidence, concerning, in particular, the growth of digital media at the expense of print media, and the prospect that "where an industry is growing rapidly, this may facilitate new entry and expansion and erode the market shares of established incumbents."[32]

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29 The DOJ's formalistic approach also appears to have prevented the tie-up of the Chicago Sun-Times and tronc Inc. (owner of Chicago Tribune) in May 2017. The DOJ required Chicago Sun-Times to seek alternative purchasers through a public sale process in view of the fact that a sale to tronc Inc. would raise "significant antitrust concerns." See further DOJ, "Department of Justice Statement on the Closing of Its Investigation into the Possible Acquisition of Chicago Sun-Times by Owner of Chicago Tribune", July 12, 2017, https://www.justice.gov/opa/pr/department-justice-statement-closing-its-investigation-possible-acquisition-chicago-sun-times.

30 ACCC, *Seven West Media Limited - proposed acquisition of The Sunday Times publication and website from News Limited*, September 15, 2016, http://registers.accc.gov.au/content/index.phtml/itemId/1198464/fromItemId/751046; and Statement of Issues, August 4, 2016.

31 ACCC, *News Corporation - proposed acquisition of APN News & Media Limited's Australian Regional Media division – ARM*, December 8, 2016, http://registers.accc.gov.au/content/index.phtml/itemId/1200083/fromItemId/751046, and Statement of Issues, October 6, 2016.

32 Statement of Issues, para. 27.

NZME/Fairfax (2017).[33] The New Zealand Commerce Commission ("NZCC")'s approach in the proposed merger of Fairfax and NZME contrasts markedly with the above ACCC cases. The NZCC prohibited the transaction in view of the fact that the parties would together control nearly 90 percent of daily print newspaper circulation in New Zealand. While accepting that there "was a real chance the merger could extend the lifespan of some newspapers and lead to significant cost savings," the NZCC did not consider this would outweigh the adverse effects of the merger on advertisers or on the quality and plurality of news in a "modern liberal democracy."[34]

The NZCC's views on the appropriate level of media plurality fit for a modern liberal democracy are a focal point of the parties' ongoing appeal, which they consider amounted to unlawful institutional mission creep.[35] Also subject to the appeal and a lynchpin to the NZCC's monopoly finding, is its market definition approach.[36] The NZCC refused to depart from the traditional approach of defining separate markets for print and online advertising and news services. Its primary grounds for doing so were the different characteristics of online and print platforms and that "suppliers of advertising inventory on the same platform are likely to have a stronger constraining effect on each other than those on a different platform," which also held true on the reader side of the market.[37]

We consider that such an approach is questionable. The relevant question for the purposes of a market definition assessment is not the *relative* strength of a constraint *per se*, or whether two products simply have different characteristics, but whether the constraint provided by a product is sufficient to meet the SSNIP test. It also stands in noticeable contrast with the ACCC's approach, which readily appreciated, at least on the advertising side of the market, that "modes of delivery which superficially look very different may nonetheless be viewed as alternative advertising options for advertisers."[38]

V. CONCLUSION

The European Commission has recently urged competition authorities, in the context of examining digital markets, to move away from a purely "static, short-term" approach and to more fully embrace a "dynamic perspective" taking into account "longer-term effects, potential effects, and counterfactual effects."[39]

Newspaper mergers and the assessment of the competitive constraints posed by online and other media are a case in point. The above cases indicate that competition authorities, not just in the UK, have tended to take an overly-cautious and formalistic approach, all too ready to jump on the high market shares to which the traditional market definitions give rise. While the rigorously evidential approach of the UK competition authorities in particular, is commendable, the stringency of its evidential standard has meant that in practice the increasing popularity of online media has not been taken into account directly in the competition assessment. A more pragmatic approach that places greater weight on reasonably foreseeable market developments – especially in the case of an industry that has now evinced the inexorability of certain structural trends for more than a decade – is long overdue.

33 NZCC, *Determination: NZME Limited and Fairfax New Zealand Limited* [2017] NZCC 8 (*NZME/Fairfax*).

34 Ibid. para. X43.

35 Mlex, "Comment: Decision on media concentration prompts democratic soul-searching by New Zealand's regulator," October 23, 2017, http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=930346&siteid=202&rdir=1.

36 Notice of Appeal, *NZME Limited v. Commerce Commission*, May 26, 2017.

37 *NZME/Fairfax*, paras. 241-243, and 534 et seq.

38 *SWM*, para. 51. During the course of the NZCC's investigation, the parties brought the aforementioned ACCC cases to the NZCC's attention, but the NZCC ultimately dismissed them as turning on different facts.

39 Johannes Laitenberger, Director-General for Competition, European Commission, speech: "EU competition law in innovation and digital markets: fairness and the consumer welfare perspective," October 10, 2017, http://ec.europa.eu/competition/speeches/text/sp2017_15_en.pdf.