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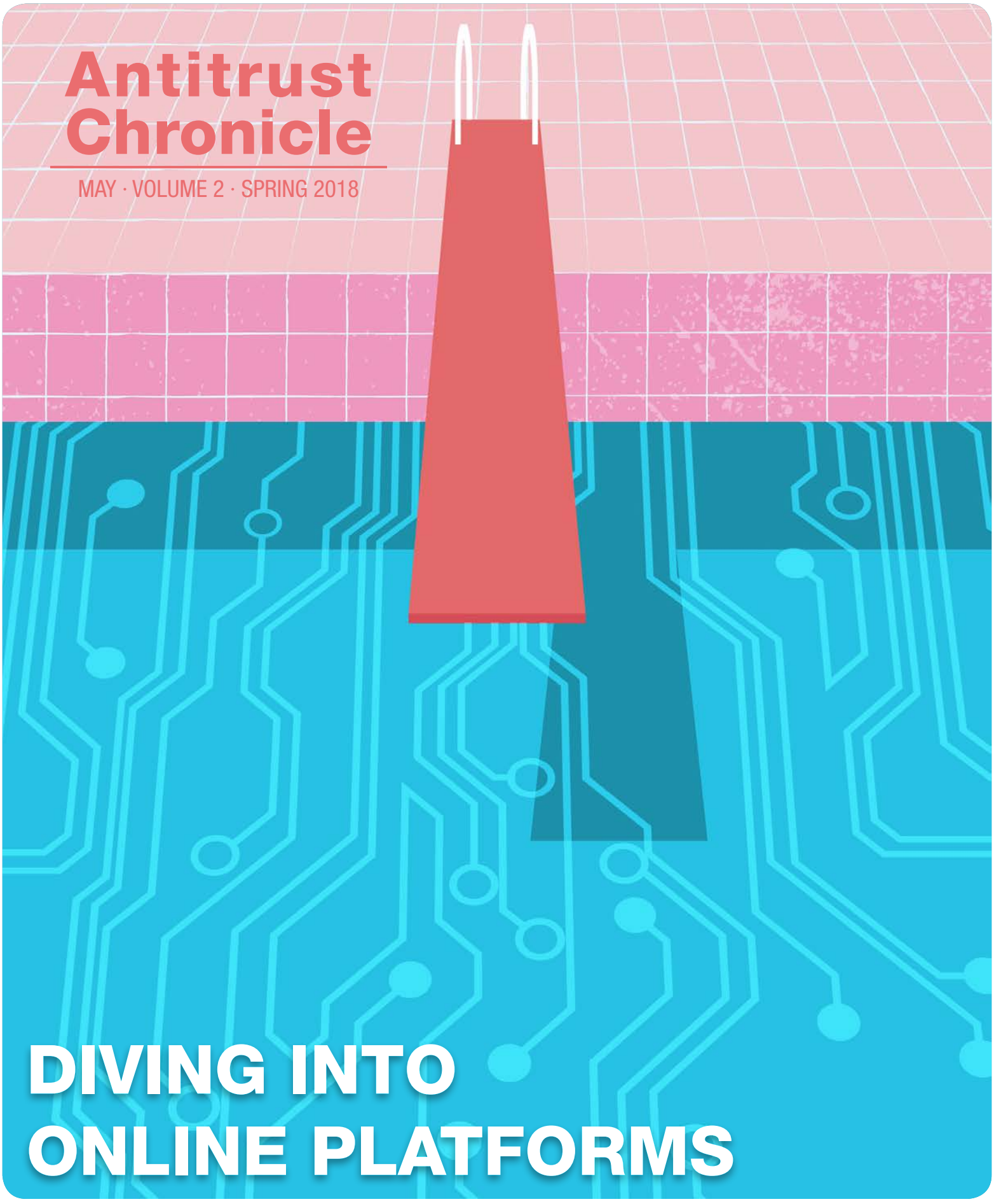

DIVING INTO ONLINE PLATFORMS

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

Online platforms remain an ever growing hot topic within the antitrust community around the world.

The rapid expansion of online platforms, such as ride hailing or accommodation sharing applications, has given rise to concerns from competition authorities and policymakers. This month's CPI Antitrust Chronicle focuses on the latest developments in the intersection of competition policy and online platforms, with articles from authors in Europe, the U.S. and China.

Where do things stand in these jurisdictions and what are some key takeaways? Online platforms have already been subject to antitrust review in merger and unilateral conduct cases and some lessons can be learned from these cases in different jurisdictions.

One thing seems clear, competition authorities around the world will increasingly need to identify and regulate issues related to online platforms while keeping public policy objectives, among others, in mind.

We are pleased to open this month's Chronicle with an interview with Massimo Motta, former Chief Competition Economist at the European Commission's Directorate General for Competition.

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

Sincerely,

CPI Team

SUMMARIES

SUMMARIES

WHAT'S NEXT?

Our June 2018 Antitrust Chronicle will feature articles from speakers at the **LeadershIP Conference: "IP, Antitrust, and Innovation Policy – Enabling the Fourth Industrial Revolution"** recently held in Washington D.C.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In the coming 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 JULY 2018 & AUGUST 2018

The July 2018 Antitrust Chronicle will feature articles from the members of the **CPI Editorial Advisory Board**.

Our topic for the August 2018 Chronicle will focus on recent developments related to **Vertical Mergers**.

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 Massimo Motta

Thank you, Professor Motta, for granting this interview to CPI.

1. How can economics best help inform digital platform market definition when users do not pay obvious prices?[1]

It is true that in markets where users do not pay a price (at least, explicitly) we cannot make use of such information as, say, cross-price elasticities and price correlations, and more generally an immediate application of the SSNIP test may not be possible: how can you ask whether a 5-10 percent increase of a hypothetical monopolist would be profitable, if the price is zero to start with? Nonetheless, one may ask similar questions. For instance, would a significant increase of the space occupied by (or the time we have to devote to watch) publicity in a website lead a small or large proportion of users to leave? And one may get a good feeling of possible competitive constraints by other products by investigating how users would behave if the product at issue were not available to them any longer – the kind of questions that customer surveys routinely ask when investigating market definitions in more standard industries.

In some digital markets there is not only the difficulty that users do not pay prices – at least, "traditional" prices – on one side of the market (but recall that there typically is another side of the market where merchants and advertisers do pay a price, and hence the usual tools can be applied) but also that the market is in continuous evolution, with new services and new technologies being developed.

For instance, in the *Facebook/Whatsapp* merger, the European Commission had to define the relevant markets when the services at issue were changing very fast. In particular, they had to understand the degree of substitutability between communication apps (such as Whatsapp) with telephone services (text messages, phone calls) on one side, and with social networking services on the other. To do so, they engaged in a detailed analysis of the services being offered, of the costs (if any) that customers had to incur in using those services, and the type of "experience" that users would have. All of this analysis was carried out at a qualitative level, and it is difficult to see how one could apply the SSNIP test in a direct way there, since Whatsapp (and most communication apps) at the time were neither charging prices nor using advertising.

However, sometimes there might be unexpected events that may help an authority make some more quantitative assessments of the substitutability among products. For instance, one day WhatsApp had a widespread four-hour service unexpected outage, and what users did in such circumstances may turn out to give hints at how they look at different products. In that particular case, the European Commission found that in the following 24 hours, competing communications apps (such as Telegram and LINE) gained millions of new users, information which was used to suggest low switching costs for users and low entry barriers. But had the data been readily available, the EC might have looked at how during those four hours users switched – if at all – also to traditional telephone services or to communication through social networks, to obtain some quantification of the substitutability between communication apps and alternative services. The message is that one can try to exploit exogenous events like the one which occurred to Whatsapp to identify to what extent customers switch to other services, and which ones...

2. Should competition authorities think differently about transaction platforms (like Visa) and non-transaction platforms like Google Search, Facebook, etc.? If so, how?

Probably I missed something, but I do not see any obvious difference between so-called transaction and non-transaction platforms. In both cases, they are two-sided markets, and I am not sure why a direct transaction between one side (e.g. the merchant) and the other (e.g. the card user) should make a difference. Perhaps in the case of transaction platforms it is easier and more transparent to see that there is a connection between the two sides, while in non-transaction platforms the connection is less obvious, but in both cases competition authorities should be equally aware of the interactions between the two sides when carrying out the economic analysis of the case.

1 Thank you to Elisa Mariscal and John M. Newman for contributing questions to CPI.

Of course there are also lots of other differences between more traditional transaction platforms and other digital platforms, from the much more pervasive role of data to the fact that digital platforms may have the potential to expand to adjacent services, to the rapidity of technological changes, but this is another story...

3. Companies can use personal data in different ways. It can function as the medium of exchange, much like currency. But it can also be used as an input to improve product quality, making it unlike currency. How does that impact your thinking on data-centric digital markets?

To a large extent, I would regard data as an asset. And like most other assets it can be traded, and can also be used to improve quality of products and services. Of course the fact that data often include sensitive and personal information does matter, and has important privacy implications. Also, the sheer amount of data collected by digital platforms is new and allow firms to engage in practices which would have been unthinkable a few years ago. In most cases, availability of data will probably lead to better and more targeted products and services, in others they may lead to competition concerns.

But still, data and information have always been available and have raised competition issues in the past as well. Consider for instance the French Competition Authority which ordered energy giant GDF-Suez to grant access to data it collected while it was a public monopolist. Firms in traditional markets also collect and value data about customers, and this can give them an edge over rivals. And such information may also allow a company to engage in principle in personalized price discrimination: if you have a long history about your customers you may anticipate how they would react to price changes, for instance, or know if they are valuable enough to try to win them back when they are approached by a competitor. Data also were at the heart of the *Nielsen* case in Canada: Nielsen was dominant and had exclusive contracts for scanner data with all the major supermarkets in the country, thereby making it very hard for competitors to challenge its position.

And in the recent discussion about data portability, some digital platforms argue that they would have intellectual property rights on the data they have collected and organized. In some cases there may be some truth in this, but I also see a parallel with the well-known *IMS Health* case, where at issue there was that company's copyright on how to organize a database. And in my opinion IMS's "brick structure" success was due less to its investments and much more to the fact that since it was the first company to offer data, everyone in the industry wanted to organize data in the same way...

4. Are digital platform markets characterized by stable market power, Schumpeterian creative destruction, or something in between?

Like for any other market, I do not think one can generalize. In some cases it may be possible to contest the dominant platforms, and – who knows? – what seems today an unassailable position may one day vanish because of a new firm with some brilliant technology we cannot imagine right now. But in general I do not believe that "competition is just one click away." The suggestion that Google, Facebook, Amazon may be inherently fragile giants, and that any small start-up today may likely replace them tomorrow, is a myth. These giant platforms can count, among other things, on powerful network effects, a huge data endowment, and deep pockets that protect their leadership. (And sometimes not even huge rivals can do much against them, think of Microsoft's vain attempts to challenge Google search market dominance).

It also worries me that, even if there were challengers which may in principle overcome those disadvantages, dominant platforms might take actions aimed at making sure that this will not happen. I am thinking of all the takeovers that these companies have been making in recent years: as soon as some small companies come up with some good technology and business ideas that might conceivably develop into something bigger and potentially dangerous, it will be swallowed up. Think of Google buying Waze, or Facebook buying Instagram and Whatsapp, for instance, but there have been dozens of such takeovers in recent years. Sure enough, there often is a trade-off in such mergers, since they may result in synergies (a small firm with a great technology but poor financial assets and marketing resources may never find the route to market without teaming up with a bigger firm), and may incentivize innovations (a start-up may expect monetization of its efforts come from being taken over). But still, it seems to me that antitrust authorities should become more daring and have a much closer look at some of these mergers. I am aware that so far, it is considered very hard to challenge a merger on the basis of potential competition, but the standards for using a potential competition theory of harm should be reconsidered if we do not want potential competitors to be eliminated before they can threaten dominant platforms. (And they could still be bought by larger companies, just not the one whose market they are more likely to threaten, as it was the case for Waze in digital maps and Instagram in social networks...)

And talking about actions which may thwart competitors, platforms may also engage in abusive conduct, and for this reason it is crucial that antitrust authorities keep vigilant. Let us also recall, for instance, that the European Commission has already fined Google in the *Shopping* case (Google appealed), and has been investigating its Android and AdSense practices.

5. Do you view a substantive difference in the approach to analyzing platforms from the U.S. and European perspective, or is this mostly driven by particular market circumstances and structure?

I think that the U.S. and European authorities somehow have a different attitude in general, not only with respect to digital platforms. Whether it is because of the impact of different "philosophical" backgrounds (the Chicago School in the U.S., the Ordo-liberal School in Europe), different objective market conditions (it may be more justified to rely on market forces in the U.S., where entry is easier and financial markets work better), or different institutional settings (the U.S. agencies need to convince the judges if they want to challenge a merger or stop a certain practice, and they may not go ahead with a case because they expect courts to be conservative), the European Commission has a more pro-active approach on abuse of dominance (or unilateral conduct) cases. As you know there have been many voices in the U.S. calling for a less "laissez-faire" approach (in particular, some think that lax antitrust policy may have contributed to growing market concentration), but for the time being the differences are there to stay.

6. Professor Motta, if there are any topics or issues that you would like to specifically discuss or address, you can do so here.

Just one last (probably obvious) thought: many potential issues related to digital platforms are not necessarily competition issues. So, when we worry about Google, Facebook & Co. having "too much" personal information about us or being potentially able to use their large datasets so as to bias political choices, we should not forget that it is mainly for data protection agencies or other regulators to intervene. And the same is true for other platforms such as Uber, AirBnB etc.: often they raise labor, fiscal, or local regulation issues which may be more for regulators or (local or national) governments than for competition authorities.

PLATFORMS, A CALL FOR DATA-BASED REGULATION

BY HENRI PIFFAUT[1]

1 Adviser to the Deputy Director General for mergers at DG Competition of the European Commission. The views expressed in the text are the private views of the author and may not, under any circumstances, be interpreted as stating an official position of the European Commission. This article is based on a longer research paper written during a fellowship at Harvard University in 2016/17.

I. INTRODUCTION

The public discourse on digital platforms has changed significantly from a naïve belief in their ability to solve any problem to blaming them for the many ills of modern societies. There is no day without a new call for regulation to be applied to this or that digital platform or to platforms in general. Those calls raise issues such as privacy, media plurality, non-discrimination, social exclusion, morality, etc. Yet, there have been few instances of actual regulation of platforms, through competition law enforcement to local regulation of ride hailing or accommodation sharing applications. Should there be a new type of regulatory setting to address issues raised by platforms?

First, I discuss what digital platforms are and what has been driving their development. Then, I turn to the issue of how to regulate platforms, when relevant.

In summary, digital platforms design and run data driven transaction environments. They are subject to complex dynamics due to their multisided nature. This calls for a new form of data-based regulation of platforms, where public policy objectives are attributed to platforms and their achievement validated through data analysis.

II. PLATFORMS ARE PLATFORMS

Platforms provide an environment for exchanges or interactions. In this paper, I call these "transactions," be they commercial or social.

Roughly speaking, transacting may take three forms: (1) direct contact between the two sides; (2) indirect contact where an intermediary takes over the role of one of the sides (reseller type of situation); or (3) via an intermediary, like a platform. There are many shades between those modes of transacting along who holds the property rights, who has contact with the other side or who bears the risks. All forms rely on data, algorithms and processing power. And all aim at addressing, in an optimal way, transaction costs. Platforms act as intermediaries and differ from other modes of transacting in at least three ways.

First, they design and regulate transaction environments. Platforms operate in many fields, though they systematically offer a dedicated environment to transactions. Platforms offer: (1) sharing usage of an expensive and underutilized asset, like Airbnb; (2) exchanging property rights, like eBay; (3) enabling better access to and better use of human capital (skills, knowledge, etc.) such as TaskRabbit; and (4) providing meeting points for social interaction such as social networks. Their design includes a set of rules that govern each step of interactions: who can join under what conditions, what information must be provided, the terms of transactions, rights and obligations, review systems, etc. Regulation enforces the rules.

This leads to the second difference to other forms of transacting: platforms are multisided, with transactions sides but also a "data side." No need to expand on the transactions sides. Although it is worth underlining that these can be social and not necessarily explicitly price driven (think of Tinder or Facebook). The data side is key and central. For sure, data is also important to some industries such as insurance or supermarkets. But in these it is not a central part of the transaction itself. Data is both an input and an output to platforms. As an input it allows transactions to proceed smoothly and efficiently through all their steps. Users' usage and preferences create datasets that make platforms more efficient but can also be monetized. Platforms can directly sell datasets to third parties. Keeping ownership of the dataset, they can generate revenues out of advertisements tailored to users' profiles at very granular levels. The intensity of platforms' reliance on the data side varies greatly from absence in the case of sharing economy platforms too strong for many social media sites, such as Facebook or YouTube.

A third difference is network effects. The demand from one side for platform services depends on the demand from the other sides. A potential member may choose to join in order to transact later because of the variety of possible partners for transacting. An important point to note is that the sign of the network externality between demands is not necessarily positive and may vary depending on the volume or types of users. For instance, access to a social network may decrease if too much space is devoted to advertisements or too much personal data is sold. Conversely, there are numerous instances of boycott from advertisers because they did not want to be associated to some content. Similarly, a marginal user may be deterred by the average use of the platform.

A platform offers a multisided environment that saves on, and internalizes, transaction costs.

Transacting can be broken down in two phases: (1) search and match; and (2) implement and enforce. For A and B to transact, they first need to find each other. Both public information, such as the Yellow Pages or a published price, and their own private information, such as their respective preferences, contribute to that search and match effort. If A and B agree on a deal, they match. Then the transaction is settled and

implemented. This provides information and rights to each side. Finally, an enforcement mechanism makes sure that there is redress in case of issues. Frictions, such as directly quantifiable costs, that lead to second best equilibria, such as incompleteness of contracts, limit the space of possible transactions.

Digitization makes transactions more tailor-made and each step more observable and verifiable. That creates opportunities for platforms to better address personal preferences and decrease transaction costs.

A platform seeks to optimize its modelling of both sides of the transaction to get the best possible matches, while minimizing the costs of providing transaction specific information. For instance, digital platforms will use past transactions, automatic information flow (like location data) instead of asking for manual input. User directed search requires input on the part of the user when this is essential for the selection and cannot be approximated by the platform. Direct assignment mechanisms fit situations where there is little private value, value that the platform cannot approximate. Matching can then be implemented in an automatic way. The same goes for time sensitive transactions.

Parties to the transaction can implement truthfully, cheat or withdraw from the transaction and transact elsewhere, activating an outside option. Platforms attenuate these potential losses by intermediating. They accumulate knowledge on either side of the transaction so that what would be private information in a bilateral transaction becomes public within the platform's environment, and helps to establish trust. Some categories of transactions are more prone to cheating and require an ad-hoc environment. A way for a transaction to take place nevertheless is to get a third party involved who would monitor the implementation and enforcement of the transaction and punish any cheater to a level where it becomes irrational to deviate from compliance. For that, the two sides of the transaction have to provide data to that third party and accept its authority when there are conflicts to adjudicate upon. In addition, rating systems allow for reputation mechanisms to build trust in possible counterparties. The provision of data aims to make the implementation of the transaction verifiable. The settlement and enforcement mechanism may also include commitment devices such as pre-payment to the platform and again rating systems. The transaction environment must also include a mechanism for checking that the data has not been tampered with or is complete enough. Sanctions must be credibly enforced, which requires a social consensus either implicit in the case of social constraint or explicit for a platform. The following factors contribute to transactions taking place: (1) socially accepted environment; (2) sharing of data on the implementation of transactions; and (3) low likelihood of cheating which goes hand in hand with high enough sanctions when found cheating. When transactions are repeated in a similar environment, the environment will be more stable, even when the counterparties are not necessarily the same. Digital platforms provide efficient environments to address those needs.

These mechanisms need to be constantly updated and adapted. They often can be prey to gaming. The platform can offer biased outcomes of searches because its incentives become misaligned. Feedback mechanisms can be manipulated by both sides. For instance, in a two-way feedback, both agents can agree (even implicitly) on inflated rankings. Since both sides are unlikely to transact again, and if they do they have private information on the quality of the other side, they both have an interest to rank higher since they know there is no gain in deviating. Both sides can also explicitly re-negotiate *ex-post*.

Information systems put in place by the platform enable the ability to identify cheating while enforcement mechanisms can help to compensate losses. Platforms also create internal regulations and enforcement mechanisms that drastically reduce the likelihood of events that can lead to losses. For instance, ratings help ensure that a possible partner is reliable.

The transaction cost gains offered by digital platforms attract transactions that either could not take place or would take place through vertical integration or reselling. On top of offering lower transaction costs, platforms can rebalance these costs between the two sides and increase the volume of transactions.

In summary, a platform:

- Provides an environment (a market design) for transactions to take place;
- Provides savings on transaction costs;
- Is multisided with inherent externalities; and
- In order to cover costs and possibly make a profit, can earn revenues through membership and transaction based fees, and data services.

There are two direct consequences, relevant to any regulatory effort. First, the terms and conditions offered by platforms to one side are interdependent with those to other sides. The main competition parameters set for one side take into account conditions on all sides in order to maximize the platform's objectives. Since digital platforms internalize transaction costs, the platforms can rebalance the costs between the sides

to a transaction and the data side. That also means that competitive conditions, including pressure from alternative platforms or offerings, on one side may constrain activities on another side. That makes more complex any assessment of market power or how to address a public policy issue.

Second, a digital platform must constantly adjust its conditions on each side to maximize its objective. Maximizing the presence of one side on the platform is worthless. Each side must be met in due proportion by users from the other sides. The dynamics can be particularly complex and subject to critical junctures. For instance, when a platform starts operating, because it is under financial constraints, it acts like a ship against the wind, seesawing its offering to ignite membership from all sides and use.[2] The dynamics can be symmetrical: a platform can lose what it gained with a spiraling effect. Two qualifiers, though. With size comes better information and better ability to meet the demand from various sides. Also, with size, the financial constraints can be loosened. Both aspects may better equip an established platform to fight against a downward spiral. It follows that barriers to entry possibly caused by network effects are affected by the intensity of the financial constraint and the quality advantage caused by size.

III. GREAT BENEFITS, AND GREAT DANGERS; BUT WHEN IS THERE A CASE FOR INTERVENTION?

A. Benefits and Dangers

Digital platforms have created opportunities to transact that did not exist before and today represent a significant part of our daily life and of global GDP. Among other factors, platforms provide a foundation of new social links, modes of transportation, access to information, and additional sources of revenue for citizens. In many ways, they are comparable to providers of club or public goods. They supply digital environments that address transaction costs, benefit to all, and are not exhausted by use. There are however saturation issues like limits on computation, bandwidth or negative network effects that limit attractiveness of a platform, which makes the platform more like a club good. And, obviously a platform objective is not necessarily to maximize welfare.

The daily drip of news is filled with reports on issues raised by, or attributed to, digital platforms. To quote only a few, they range from privacy issues, exclusion of businesses from ecosystems, spreading of prejudices, exploitation, to social exclusion. Criticisms brought against digital platforms trace their origins to three main trends.

First, platforms create private rules that regulate relationships among individuals or between individuals and firms instead, or on top, of public regulation. This causes a sense of unfairness for those who do not benefit from the same level of public regulation because their interaction is not caught by previous categorizations (for instance, what is the status of drivers in ride hailing applications) or from those who continue benefiting from protection from public regulation but cannot compete on a level playing field (like taxis).

Second, platforms bring drastic changes to economic and social relationships. They tend to create new types of communities with their rules, accepted norms and beliefs. By standardizing a number of transactions they amplify issues. This has positive effects by bringing greater numbers of people together but can also be very divisive and destabilizing for society. Think of the spreading of motivated reasoning, the echo chamber to social prejudices, the divisiveness of social media, the exclusion of those who do not belong, etc. On the economic front, digital platforms and their economics are changing the usual boundaries of firms; the nature of the relationship between employees/suppliers and firms; and spaces in which firms compete.

Finally, platforms raise new public policy issues. Those are intrinsically linked to the new role platforms play in digitizing society. Such new issues include protecting privacy, new systemic risks with intermediated assets, or new economic and social power based on big data and wider geographies than that of the regulator. As illustrated by the 2007 financial crisis, systemic risks are compounded when organizations self-regulate and there is limited supervision.

These trends pose direct challenges to the position of citizens and of regulators. Citizens are more and more defined by their private digital data, without necessarily controlling it or knowing its full extent. In parallel, regulators have to face a new reality made of prevalence of private regulation, international economic power and big data. That raises the question of how to adapt their regulations to both the new issues and the new environment.

2 Evans & Schmalensee, "Failure to Launch: Critical Mass in Platform Businesses," Review of Network Economics 9.4; 2010.

B. What, When and How?

A regulatory setting typically includes an issue to address (what), a set of criteria to determine whether there is a need for regulation (when) and then a set of rules that should apply if the test is met (how and to whom). In the following I try to show what digital platforms change to the classic approach to regulation.

First, it is always sound to start by stressing the obvious: what issue? It could be a new issue created by a platform design like the spread of "fake news." More often it has been an existing issue but where the emergence of a platform makes past regulation obsolete like taxis and ride hailing. The issues for the initial regulation remain (say consumer protection, traffic, pollution), but the regulation must be redesigned. There is no reason to regulate platforms by default. An identified public policy issue must have emerged first. For many issues, the exercise is greatly facilitated by digital platforms' reliance on data. That allows testing possible issues ... if and when the data is available.

Analyses of possible negative effects of platforms share a similar pattern. They start from some anecdotal evidence that there is an issue (say racial discrimination out of rating system), then try to validate the existence of this issue through exhaustive data analysis, and finally make a recommendation to platforms: to test and adjust mechanism design according to some key public objectives to achieve (say redesign and test the rating mechanism so that racial discrimination is not facilitated by the system).

That does not mean intruding into the inner workings of the platform. For instance, a researcher in discrimination created by facial recognition systems states:

> I definitely understand companies want to keep their algorithms proprietary because that gives them a competitive advantage, and depending on the types of decisions that are being made and the country they are operating in, that can be protected. When you're dealing with deep neural networks that are not necessarily transparent in the first place, another way of being accountable is being transparent about the outcomes and about the bias it has been tested for. Others have been working on black box testing for automated decision-making systems. You can keep your secret sauce secret, but we need to know, given these inputs, whether there is any bias across gender, ethnicity in the decisions being made.[3]

This points to a recurring theme in AI, algorithms and Big Data: public policy (in that case, ethical) concerns and a level of transparency (accessible data) should be embedded in the development of those processes so that whenever there is an issue it can be debated and possibly addressed. That would bring two advantages: (1) identification could take place earlier than too late; and (2) corrective actions would likely be more proportionate and less disruptive to digital platform businesses.

That requires that the data be made available and somebody would be able to run the tests. Identification cannot be the role of the platform. Its incentives are not necessarily aligned with public interest. However, it should not be the sole role of a regulator (if one exists, has access to data and has the capability to conduct tests). But rather be open to "crowdsourcing" from the academics or the public. That requires some sort of obligation on platforms to be structured in such a way that they can make data available to regulators and for public debate. Such data would cover, for instance, outcomes when testing how the platform functions against a public interest objective.

Second, once an issue has been identified, when to intervene? For some of the businesses operated by digital platforms (like ride hailing) or for some of the issues (like privacy), there is a regulatory setting already in place. For many, if not most, there is none. In that case, the examination of issues is forced into pre-existing regulatory settings that may include competition laws. Competition law applies to anticompetitive conduct but as opposed to other industries, it is not clear that findings of market power should be a starting point for imposing regulatory obligations. For telecoms or energy, the European change to the regulatory regime saw the industry open to competition while regulation was imposed to make sure that the benefits of competition be passed on to consumers. In those cases, there were natural monopolies that gave rise to market power that could be leveraged in various ways. Issues arose notably because of the need to access the natural monopoly. Market power was used as a natural proxy for the need for regulation. In addition, sufficient levels of competition could discipline incentives to lower quality of services offered to customers.

For digital platforms, the picture is radically different. To begin with, issues of market power are less clear cut. There is no natural monopoly, but positions of power that have been built in and are often transitory. They originate in barriers to entry created by data and financial constraints, algorithms and IP. It is not inconceivable that the dynamics of multisided markets may undo them. Granted, some platforms have created their own ecosystems where third parties develop applications (platforms) that run on top of the platform. There might be issues of

3 Tucker, "'A white mask worked better': why algorithms are not colour blind," *The Guardian*, May 28, 2017.

access or exclusion through vertical integration that competition law would have to deal with. Market power is also more complicated to find in multisided markets. For instance, a platform may be disciplined on one side through a competitive constraint on another side. The constraint may come from a competitive data side like advertisers (think of the effect of recent boycotts on YouTube policies) or a binding outside option on the supply or demand transaction sides. Moreover, disciplinary effects of competition on non-price factors may not be very strong. Platforms tend to differentiate their transaction offerings in order to maximize their volume of usage. And, non-price factors are not always visible.

It follows that market power is probably a poor proxy for intervention. Even without market power, public policy issues may emerge out of the operation of platforms. Market forces may not be effective to discipline platforms on public policy issues, and therefore regulation should be considered when serious issues are objectively identified.

Third, when considering platforms, regulation should acknowledge that they are market designers and that they run on the basis of and produce data. That should enable smart regulation. This is what I call a data savvy regulation. Regulation should apply to platforms as subjects. Platforms dynamically evolve. A regulatory shock can generate negative dynamics either in favor of alternative platforms or of other forms of organization such as vertical integration or reselling. If the platform has the discretion of allocating the sharing of the increase in costs, it will choose the profit maximizing one. If instead the regulator imposes the obligation on one side, the platform could still do some rebalancing but the social cost of monitoring the implementation by users would likely be much larger than if taken over by the platform. A platform has potentially the infrastructure and data required to check implementation, can allocate responsibilities and can address many of the principal – agent issues that would plague a regulator – user relationship. In addition, the platform may have a higher incentive to achieve implementation of the obligation since its reputation has a high value.

That has implications for the architecture of platforms. Code is regulation as Lessig declared back in 1999[4] but the converse is also true. The design choices when developing a platform have direct consequences on the way it can regulate the matching it enables and on the issues it may give rise to. Implementing a regulatory obligation can be very expensive and disrupting if the regulation and the platform design are not consistent with one another. There are interesting parallels with the finance industry where financial companies structure the market through their common choices for a number of financial markets. Regulators have to then make a choice between abiding by the structure and then "trust" platforms (banks) or imposing structural changes (like what followed the 2007 financial crisis and its aftermath). Ideally, public policy issues should be known beforehand so that when a platform is built and expands, it does so in a way that would allow regulatory testing and action.

As for the financial industry, the best cure is probably not to prescribe a mode of organization but rather some degree of transparency on the resilience of platforms *vis-à-vis* pre-determined public objectives. That could take the form of access to data and of simulations to satisfy compliance to some predefined standards.

The intensity of involvement of the regulator should depend on the nature of the issue. As a private regulator, the platform is best placed to address an issue that negatively affects its users within its operation, under supervision by the regulator. In that case, it is only an extension of existing processes. Think of non-discrimination between hosts and guests on an accommodation application. The regulator then must make sure to provide incentives that processes are put in place and that observable and verifiable data is available to monitor compliance. Coordination between the user and the regulator will help ensure compliance by the platform. This is of paramount importance for issues that negatively affect the interests of the platform, like, say, privacy issues. Finally, for issues that affect a population broader than only users (say air pollution for ride hailing), the regulator may have to be involved in a more intrusive way.

When a public objective has been assigned to a platform, regulators should not just sit happily waiting for the platform to exert self-regulation prowess. By definition, if a regulator had to intervene, there was no self-interest for the platform to implement those objectives in the first place. This creates an incentive for it to cheat. On top of that, the regulator's diagnostic and cure depend largely on the data it received from the platform. This raises the question of the representativeness and overall quality of the data. Since most often the public policy at stake is impacted by the usage of the platform, which points to the importance of defining the information that is generated by a user. There is a strong intersection with privacy issues in that regard.

For a system to be regulatory friendly with platforms, information must be made public, not private. That applies to the analysis of outcomes with the platform's data but also to findings made by platforms. Since they are so heavily based on trust. This touches on another danger of regulating sophisticated or black box animals: if the regulator has to understand the inner functioning of the business, it will fail. The degree of complexity is now too high. Think of the self-attainment of objectives by banks until the 2007 crisis under their regulatory regime at the time. Such an approach is only tenable if information is freely available. For instance, Uber has agreed to provide New York City with data but that data is kept confidential.

4 Lessig, "Code and Other Laws of Cyberspace," Basic Books, 1999.

IV. CONCLUSION

This discussion points to a prerequisite for any regulatory regime: openly test the issue, use the platform data, make outcomes public to allow others to test ideas and adaptations, conduct experiments and use the collective intelligence instead of sticking to proprietary private data. Even though platforms are differentiated, allowing more competition should lead to more pressure on the non-price aspects of their operations out of which public policy issues may emerge. Nevertheless, the effects of competition on externalities generated by platforms can be ambiguous. One possible suggestion, in line with the European GDPR, would be to grant a right to their personal data (meant in an extensive way) to users: it would favor portability, emergence of alternative platforms, and allow easier testing.

DATA COLLECTION IN ONLINE PLATFORM BUSINESSES: A PERSPECTIVE FOR ANTITRUST ASSESSMENT

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I. INTRODUCTION

There has been growing attention to the role that data and data analytics are playing in the online world. The current public debate is associating the collection of massive amounts of data by large online platforms to extraordinary clout on the public at large and almost unassailable dominance among economic actors. The reality is of course more complex – and less dramatic. This article focuses on the impact of data on the value creation opportunities of online platforms and consequently on their organization and on the relation with their users. It proposes to include the analysis of platform business models in the antitrust analytical framework to better evaluate the extent of market power and distinguish genuinely abusive market behavior from the normal conduct of business in a new technological environment. This entails an understanding of the interrelations existing among diverse services and users interacting on a platform. This article leaves aside societal choices, such as whether there should be specific levels of privacy or media diversity. Instead, it argues that it is important to understand how different online platform businesses turn large amounts of collected information into new and better services to assess the terms and conditions of their relations with users and their impact on markets.

II. THE ROLE OF DATA IN ONLINE PLATFORM BUSINESSES

Online digital platforms in this article refer to businesses built on a technology and related set of standards that allow the aggregation of content and services on a digital support that interconnects users for the purpose of communicating, transacting or content sharing. This includes platforms such as Amazon, Google Android, Facebook but also less diversified ones such as Paypal, Uber, YouTube or Booking. Online platforms rely on communication and information management technologies to generate new services and improve existing ones. Successful platforms often significantly reduce the search costs, transaction costs, and information costs of service delivery compared to their offline equivalent.[2] Information collection and management, together with instant and large scale interconnection, lead to a significant increase in the set of counterparty options easily accessible by users.

Data play an important role in the quality and profitability of platforms' services. Data are used by platforms for many productivity enhancing purposes such as predictive analysis of customer or market behavior, service customization, targeting of offers, or to improve the relevance of contextual information in media services. Because data can be a powerful driver of efficiency and profitability, the collection and optimal management of data can be an important component of platform activity that impacts the entire business organization. This is the case of many online services such as advertising, shopping, search, content sharing, holiday planning and preventive healthcare.

Data analytics, the capacity to extract actionable information from data, is becoming an important source of competitive advantage.[3] Sophisticated data analytics facilitate better decisions on such matters as optimal market segmentation, the identification of individual customer needs, optimal pricing, the design of new products and services, and even business model innovation.[4] These practices enhance firm performance and profitability and provide a competitive edge for those businesses that know how to exploit these opportunities. Examples of data driven service improvements range from Amazon's personalized product recommendations, LinkedIn targeted posting of job vacancies, or real traffic information used by Google for navigation.

Access to data clearly determines the opportunities for businesses to exploit the benefits of data analytics. When a platform benefits from a large amount of users who perform a variety of activities, data will be abundant and there will be many opportunities to use it to the platform's advantage. This naturally raises the question whether a new service without any initial self-generated data can succeed in markets populated by data rich incumbents.

Access to data is not normally at the root of an online platform's success. For that, an online platform business must provide real value that motivates user engagement. Immediate access to data may not be a necessary condition to design a new successful online service proposition. Although big data analytics are important to some online platform services, not all efficiencies on platforms are generated by large scale user generated data and a platform may attract users with other features not significantly impacted by big data optimization.

2 Goldfarb & Tucker, *Digital Economics*, No. w23684, National Bureau of Economic Research, 2017.

3 Kiron et al., "Analytics: The Widening Divide," *MIT Sloan Management Review* 53.2 (2012): 1. The French competition authority's report on online advertising for example also recognizes that "targeting effectiveness" is an important dimension of competition in that sector.

4 Davenport, Big Data at Work: Dispelling the Myths, Uncovering the Opportunities. Boston (USA): Harvard Business School Publishing Corporation, (2014); Akter & Fosso Wamba, "Big data analytics in E-commerce: a systematic review and agenda for future research," *Electronic Markets* 26.2 (2016): 173-194.

A winning proposition can consist of a superior usage of public information, a superior management of individual information, or the successful reduction of the costs linked to the provision of a service. For example, health tracking devices and their associated applications succeed by providing convenience to the users in the management of their own individual data. Once such online services grow, they will indeed gain access to large data inflows that open the doors for new applications. But these are not necessary for take-off.

For those services that rely on user data aggregation, several strategies can be used to attract users at the start of their lifecycle. They include promoting usage among technology enthusiasts, rewarding the first users, and behavioral tactics such as "gamification," the practice of presenting an interface as a game. Different strategies will be chosen depending on the type of user participation needed for growth. A marketplace platform is more likely to use financial rewards while a service requiring high levels of user engagement will adopt more behavioral strategies.[5] Experimental studies have validated the positive impact of gamification and service design on user engagement in some contexts.[6] Waze for example used an attractive design and features reminiscent of games and social networks to successfully build from scratch a route recommendation service based on real time traffic information collected from its users.[7] Passively collected data was later used for targeted advertising based on user travel information.

In addition to access to data, technical skills and tangible capital are also needed to develop big data capabilities. Managerial and organizational capabilities are similarly important and, for instance, managerial inertia has been identified as a factor inhibiting big data analytics capabilities in some firms.[8] Providing a company with access to data is therefore not a guarantee of platform success. In addition, depending on the type of data analytics needed, an online service can use data brokers and independent data analytic services for data based optimization.[9] It is therefore not a general truth that access to user generated big data is a necessary condition for online platforms' success and, in all certainty, it will not be a sufficient condition either.

Competent application of data analytics is no doubt an important factor for the performance of many online digital platforms. But the relative contribution of data analytics to the value generation and success of the platform will vary depending on the nature of the services provided. Similarly, the extent to which data usage is at the source of a platform's competitive advantage will vary across activities and businesses.

Understanding what different types of users value in a platform is an important step when assessing the role of data and data analytics in the performance of an online service. Such an assessment can only be properly made with a case specific empirical analysis of the characteristics driving users' valuation of the service. Assuming without validation that access to data is the defining factor for market performance (or market power) or that it represents the most important barrier to entry in the provision of a particular activity may lead to ineffective intervention by regulators.

Whether or not data collection and analytics are the main drivers of platform success, the incorporation of data collection as part of the value creation proposition will undoubtedly impact many of the platforms' decisions relating to the design of the business, its internal rules, and the terms and conditions of its contracts. The next section explores the impact of data driven services on the governance of platforms' businesses and on their users.

5 Nielsen, Participation Inequality: Lurkers vs. Contributors in Internet Communities, October 9, 2006, https://www.nngroup.com/articles/participation-inequality/.

6 Hamari, Koivisto & Sarsa, "Does Gamification Work? — A Literature Review of Empirical Studies on Gamification," Proceedings of the Annual Hawaii International Conference on System Sciences, (2014), https://www.researchgate.net/publication/256743509_Does_Gamification_Work_-_A_Literature_Review_of_Empirical_Studies_on_Gamification.

7 Users on Waze appear on the map with the name and accessories of their choice, are visible to each other, and accumulate points and visible titles as they increase their participation.

8 Mikalef et al., "Big data analytics capabilities: a systematic literature review and research agenda," *Information Systems and e-Business Management* (2017): 1-32. Ransbotham, Kiron & Kirk Prentice, "Beyond the hype: the hard work behind analytics success," *MIT Sloan Management Review* 57.3 (2016).

9 "Data Brokers: A Call for Transparency and Accountability," Federal Trade Commission, May 2014.

III. IMPACT OF DATA DRIVEN PLATFORM MODELS ON ITS GOVERNANCE AND USERS

Every successful platform will have access to a large body of user data that it can use to develop additional services or to optimize the services they already offer. In that sense, successful platforms may benefit from a virtual loop: success in one service leads to a large data collection potential which leads to more efficient services and so on, as long as the platform also has the technological and commercial capabilities to support this. The possibility of a positive loop generated by data has raised concerns that access to large data collection can become a source of market power and unassailable incumbency.[10] We first look at how the efficiency gains from data may affect a platform's business model and then look at the impact on final users and businesses.

A. Impact on Platform Organization

Once data analytics have become part of the platform's value proposition, this will affect how platforms run their services and how they relate to its partners and users. Platforms that can extract a lot of value from data analytics will put a lot of effort into traffic generation through the acquisition of new users and the inducement of repeat visits. Because the ability to track users on a platform by itself generates useful data, the platform owner will be interested in attracting users even when they do not transact or generate monetary benefits on the service's sites or applications they visit. Therefore they may provide incentives for engagement in terms of free services and low prices beyond what is justified by the profitability of any one particular service. In doing so, platforms take into account the positive externality that users generate with their traffic and engagement on the whole platform business by way of the data collected. The extent to which platforms incentivize user traffic beyond the transactional aim will be affected by the extent to which it can monetize the behavioral data obtained either by improving the quality or relevance of its services or by developing new services. Targeted advertising is an example of such services as is targeted advice in healthcare or financial services.

The literature on two-sided markets provides a framework to analyze how a service requiring the matching of two parties takes into account the value generated by any additional adopter on the valuation of users on the other side of transactions.[11] This framework explains how service providers choose prices in order to maximize total value created by incentivizing those users whose positive impact exceeds their personal valuation of the service.

Similarly, an online platform will also design users' terms of participation in order to maximize the total value generated on the platform and will do so by incentivizing the participation of those users that provide the most value beyond their own personal benefit.[12] User types that provide the most useful data will therefore be particularly incentivized to participate. Models that take into account data-induced positive externalities can therefore be useful to explain the terms and incentives offered to particular types of users of a platform. Conduct aimed at incentivizing data collection such as preferential placement or the offer of free services is often efficient in this context.

The possibility to recombine different types of data for new or better services may contribute to the decision to develop and efficiently integrate new services on the platform. The ability to recombine collected data from various sources may also allow platforms to expand into new services. Online platforms may integrate the provision of data analytics services to third parties inside or outside the platform. Google or Facebook for example integrate data driven advertisement serving on their platform. The integration of new data intensive services by a platform might be done for reasons of efficiency or because the platform might be trying to protect its monetization and appropriation mechanisms with the usage and control of its data. Tying as a strategic competitive practice aimed exclusively at protecting market share or preventing entry is also a possibility.[13]

10 For example, the 2017 amendment of the German Competition Act made access to personal data a criterion for market power (§ 18(3a)).

11 Rochet & Tirole, "Platform competition in two-sided markets," *Journal of the European Economic Association* 1.4 (2003): 990-1029; Evans & Schmalensee, *The Industrial Organization of Markets with Two-Sided Platforms*, No. w11603. National Bureau of Economic Research, 2005; Rysman, "The Economics of Two-Sided Markets," *Journal of Economic Perspectives* 23.3 (2009): 125-43.

12 Some online platforms may be maximizing growth rather than monetized value. For an analysis of platform ecosystem governance see for example Schreieck, Maximilian, Manuel Wiesche, and Helmut Krcmar. "Design and Governance of Platform Ecosystems-Key Concepts and Issues for Future Research." *ECIS*. 2016

13 Farrell & Weiser, "Modularity, vertical integration, and open access policies: towards a convergence of antitrust and regulation in the internet age," *Harv. JL & Tech.*17 (2003): 85.

Platform governance decisions as represented by platform rules, terms, and conditions are driven by objectives that may not fully align with that of the various platform users and notably its business users. The next section discusses this tension, which helps explain the origin of many complaints of platform behavior and possibly some of the regulatory drive initiated in certain jurisdictions.[14]

B. Impact on Platform Final Users

The very wide adoption of data driven platforms seems to indicate an overall positive welfare effect on users. There were 3.8 billion users of the internet worldwide in 2017 and 2.8 billion of these were active social media users with an annual growth rate of 21 percent. Social media penetration is 66 percent in the U.S. and 49 percent in Europe.[15] E-commerce adoption and expansion are also significant with online sales representing 10 percent of global retail sales in 2017 with a growth above 20 percent globally in the past few years.[16] The usage of digital platforms for an increased number of applications has been steadily growing even as more information about the extent of data collection and the uses made of data have become public. The latest privacy breach scandals appear likely to result in behavioral adjustments rather than a complete demise of the advertisement supported business model, which relies heavily on data collection.

Online services are in general affordable and overall attractive due to the lower transaction costs, lower search costs and user-friendly interfaces that they provide. The engagement incentives provided by online platforms for the purpose of collecting behavioral information have also certainly contributed to affordability including the provision of free services. Some empirical evidence supports the claim that targeting facilitated by data analytics seems to have increased the relevance and quality of products promoting user engagement and platform profitability.[17] Data collection may have also facilitated the development or quality of complementary services on platforms.[18] Yet, the full impact of algorithmic targeting and pricing is yet to be evaluated.[19]

Few people doubt the overall value contribution of successful online digital platforms. The question that has preoccupied regulators seems to be whether users are well served on each and every service offered to them on digital platforms and in particular whether the data collection activity is contributing to the degradation of some services.

The regulatory concern is that a lack of alternatives – or high switching costs – in the provision of a given service may lead users to accept a higher level of data collection than they would otherwise choose. Regulators have looked at the degree of market power of some online platform services to assess the possible excessive nature of their data collection. But the link between market power and the allegation of abusive data collection has not been easily established as similar practices are adopted by different types of companies with various degree of market penetration. In Germany, where possible excessive data collection by Facebook is being investigated, regulators are focusing on the legal admissibility of the contract terms under civil or privacy law.[20] At the EU level, the focus of the scrutiny is currently on the quality of the information provided to users regarding the collection and usage of their data.[21] In fact, although privacy is considered a factor of competition, there is little conclusive evidence on how much users are willing to pay, in monetary terms or otherwise, for keeping certain levels of privacy and whether they are willing to forego the experience of personalized targeting.

14 "Proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services," COM(2018) 238 of April 26, 2018.

15 Digital trends 2017 – The Next Web – https://thenextweb.com/insights/2017/01/24/digital-trends-2017-report-internet/.

16 https://www.emarketer.com/Report/Worldwide-Retail-Ecommerce-Sales-eMarketers-Estimates-20162021/2002090.

17 Pathak, Garfinkel, Gopal, Venkatesan & Yin, Empirical Analysis of the Impact of Recommender Systems on Sales, Journal of Management Information Systems, 27:2, 159-188, (2014).

18 Facebook's recent announcement of an online dating service is but one example.

19 See for example Chen, Mislove & Wilson, "An empirical analysis of algorithmic pricing on amazon marketplace," *Proceedings of the 25th International Conference on World Wide Web.* International World Wide Web Conferences Steering Committee, 2016.

20 "Background Information on Facebook Proceedings," Bundeskartellamt, December 2017 - https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2017/Hintergrundpapier_Facebook.pdf?__blob=publicationFile&v=6.

21 "Proposal for an EU Regulation on promoting fairness and transparency for business users of online intermediation services," of April 26, 2018 EC 2018/0112 (COD).

C. Impact on Businesses

A perceived lack of fair competitive environment has been a bigger concern for businesses competing with or using platforms. Online platforms tend to offer attractive terms for their online services, which puts pressure on competitors outside the platform. The attractive terms resulting from the internalization of users' positive externalities will create challenges for competing firms that do not extract benefits from data collection or from any other positive side-effect of traffic. These firms may have difficulties matching some of the attractive conditions offered by online platforms for similar services.

Standalone businesses often chose to join a platform in order to benefit from the platform's efficiencies. This is the case when retailers join an online marketplace such as Ebay or Amazon to increase their reach and benefit from the lower transaction costs. Joining a platform involves the acceptance of its rules and conditions that may be designed to enhance the platform's overall value. Participating businesses may find that these terms are not optimal if they do not sufficiently benefit from the platform's overall success. Unhappiness of suppliers about platform pricing has been manifest in the pricing of e-books and in the case of hotel platforms MFN clauses in several European countries. Both cases were analyzed by antitrust regulators without going into the specificities of the concerned platform's business model and value generation process.

Regulators in the EU have noted with some concern the decreasing share of revenue obtained by traditional providers along the value chain of particular online services.[22] Service providers with the ability to engage users and with the know-how to collect, analyze, and monetize data are gaining a more prominent role on online platforms. Rent sharing may be adapting accordingly with those actors less able to produce such value obtaining a lower share of revenue. Some participating businesses have expressed uneasiness about the participation terms they face on platforms and have become wary about their relative performance in the value chain.

To the extent that online services need data to increase the quality and profitability of their services, obtaining access to such capabilities becomes important. Whether such capabilities are provided on equal terms by the platform, whether they can be contracted to a third party, or whether participating businesses can develop and diversify to build their own will impact business performance and the likelihood of success inside or outside a platform. This is more so in those services where data analytics are a source of competitive advantage. Assessing the barriers to data-generated business intelligence is therefore an important element to establish the relative competitive position in some data intensive markets.

Abuses of market power and anticompetitive behavior cannot be excluded when examining platform conduct. But the analysis of platform conduct and performance needs to take into account the technological reality and value generating process of particular online platforms in order to assess the intent of online platform businesses. This is particularly so in the analysis of the role and impact of data collection.

IV. ANTITRUST ASSESSMENT OF DATA INTENSIVE BUSINESS MODELS

The above discussion illustrates some aspects of the disruption brought about by the increased role of data for online platform-supported businesses. Two questions are particularly important for market regulators when considering whether ownership or usage of a large dataset presents antitrust issues. The first question is whether access to data provides an online platform with the sufficient market power to be able to impose detrimental terms to its users. The second question is whether business users on a platform are put at a competitive disadvantage with a competing platform service because of a lack of access to the whole platform data and data analytics capabilities.

A. Data, Market Power and Abuse

Academic literature initially centered on network effects as the source of possible platform market power. These network effects have been studied with models of consumer behavior where users' preferences depend on the number of a particular type of users (often their own) on a platform.[23] Lately, the role of data, as well as the increasing returns to scale and higher efficiency that they generate, have been highlighted as a potential barrier to entry. The reply to this assertion is not generic but rather requires a case specific analysis.

22 See for example the concern about traditional media on page 5 in the European Commission Communication on "Tackling online disinformation: a European Approach," COM(2018) 236 of April 26, 2018.

23 Biglaiser & Crémer, "The value of incumbency in heterogeneous platforms," (2016), https://www.econstor.eu/bitstream/10419/130450/1/cesifo1_wp5829.pdf; Caillaud & Jullien, "Chicken & egg: Competition among intermediation service providers," *RAND journal of Economics* (2003): 309-328.

It has become common practice to describe the quality and relevance of data according to parameters of volume, velocity, variety and value.[24] But data is also differentiated by the nature of the information it contains and the range of its possible uses. Not all data is useful for the provision or enhancement of a given service. The relevance of the data for the provision of the service being analyzed is a first step in the assessment of data as a barrier to entry.

A given type of information may also be susceptible to collection from many different sources in which case access to one source will not present by itself a barrier to entry.[25] Location data for example are collected by multiple apps on a phone but also by some car manufacturers.[26] The ubiquity of some types of data and the fact that most data are non-exclusive, and non-rival, suggests that in many applications the real handicap for a firm is not the lack of access to particular data but rather a potential lack of capability by the firm to collect, store and analyze useful data.[27]

But there may be instances where a platform has access to a unique type of data generated under unique circumstances. For example, this could occur in the case of data generated by wearables such as a smart watch or certain historical data that cannot be replicated. The question would then be whether any particular market cannot be served without access to this particular dataset or whether it can be provided with another combination of data. Also relevant is the question of whether a firm with a quality proposition could nonetheless enter and grow its own data. The extent to which such new entry is possible will depend on the possibility to attract the first users without the benefit of much user data, on the extent of the returns to scale for data, and the minimum scale needed for operational efficiency. It will also depend on whether potential new users are "locked in" another service because of the personal data and content they have committed there. If the portability of previously committed content is important for the users' decision to migrate to the new service or to multi-home, then the feasibility of such portability will be a factor in the determination of barriers to entry. Finally, the role that other factors of competition play in the success of a particular service should also be taken into account in the assessment of barriers to successful entry.

Economies of scope in data have an ambiguous role on entry. Large online platforms are characterized by the ability to collect large quantities of diverse data that they can use for the provision of a variety of services. In this way, in those markets where returns to scale are very important, they may benefit from economies of scale at the onset of any new service provision and in this way translate the benefits of incumbency from one service to the next. But by this same token, large platforms may be in a good position to enter markets already occupied by a successful incumbent. Lateral entry into a market by way of diversification is common in the online world and is a source of vigorous rivalry. Evidence of entry by diverse platforms into messaging systems, video streaming, payment services or e-commerce indicates that platform to platform competition is currently quite rivalrous and generates innovation.

Entry by specialized players may be hindered by the favorable terms given to users on platforms due to a more diversified business model and a stronger ability to monetize on non-paying traffic and data. Platforms' low prices are sometimes being described by competing businesses as predatory. A key question for the assessment of such conduct is whether in fact this below cost pricing increases the profitability of the overall platform through feedback effects. If the conduct is profitable only through the exclusion of competitors, the conduct may indeed be predatory. If the conduct is profit maximizing, for example through the monetization of user traffic, taking these positive externalities into account may lead to accepting the conduct as legitimate. This is akin to an acceptance of a multisided market framework for the analysis of online platform behavior. Under such a framework, all of the platform's derived efficiencies count for the analysis of a particular conduct. A standalone player may then be found to be a less efficient provider, maybe due to lack of economies of scope, and may be required to compete with superior quality or other types of efficiencies, possibly through partnerships.

When businesses decide to join a platform, the privileged access by the platform's own competing service to platform's user data may lead to a characterization of unfair competition. For example, in its Amazon Home Services proposition, Amazon tells participant free-lancers that their services will be advertised to Amazon's customers based on their browsing activity and at the time of relevant sales. Buyers purchasing furniture, plumbing items or electronic devices will be offered local help for assembling, repair, or installation on the spot. Some argue that such privileged use of information by a platform-provided service may represent a barrier to fair competition for rival providers of such intermediation

24 Rubinfeld & Gal, "Access barriers to big data," *Ariz. L. Rev.* 59 (2017): 339.

25 Id.

26 "Big Brother on Wheels: Why your car company may know more about you than your spouse," Washington Post, January 15, 2018 https://www.washingtonpost.com/news/innovations/wp/2018/01/15/big-brother-on-wheels-why-your-car-company-may-know-more-about-you-than-your-spouse/?noredirect=on&utm_term=.c46a557ea128.

27 Tucker & Wellford, "Big Mistakes Regarding Big Data," (December 1, 2014). Antitrust Source, American Bar Association, December 2014. https://ssrn.com/abstract=2549044.

services. In this case, one would want to look at whether the data in question is unique and necessary for the success of the service. For example, the information on customers' purchases may be available from other sources such as payment systems. Yet speed and timeliness of the information, combined with instant access to the consumer, can play a role in the profitable use of the information. In this particular case, rivals to Amazon Home Services do not seem to have been displaced, indicating that access to the user information of one of the largest retailers available may not be determinant for success in local home services intermediation. The relevance of the information at stake in determining the success and viability of a service is a case by case empirical question.

When the efficiencies provided by a particular set of data seem determinant for the provision of a particular service, the question for regulators becomes whether access to such data should be granted to all business participants of the platform on equal terms. Access to the data may not be necessary if competitors observe and can replicate targeted offers.[28] But where such observation is not possible in the same conditions, the question remains about whether the data providing a competitive edge should be shared. Open access may not be efficient for the materialization of efficiencies related to data and data analytics. Instead, integration or a privileged partnership may be necessary to materialize and appropriate these efficiencies. Close partnerships or integration can be optimal if the efficiencies necessitate joint investment and development. This is particularly the case in environments of rapid technological change requiring coordination for smooth interaction.[29] The complex technical standardization necessary for joint exploitation of data by some services may also be a factor of integration. Transaction costs and issues of incentives and appropriation may not make it efficient for a platform to replicate this privileged relation with several competing services at the same time.

The incentives by firms (absent compulsion) to grant access to their data will depend on the role of data in their business model. If the exploitation of a particular dataset that it collects is at the core of its business model, an online platform will be unlikely to share it. On the other hand, if granting access to data spurs the development of complementary applications that enhance the value of the platform, access will indeed seem likely. Optimal decisions as to whether to grant or deny access to an asset is well described in the industrial organization economic literature. The information systems literature has also usefully analyzed the organization of a complementary innovation in the digital space.[30]

B. Incorporating Platform Business Models for Value Creation in Antitrust Analysis

In light of the above, a proper understanding and assessment of the conduct of an online platform regarding the collection, usage and protection of its data requires a case specific analysis that builds on an understanding of the dynamics at stake in a given platform's business model.

In particular, when assessing platform conduct, one should first understand the value proposition of the online platform including the mechanisms through which value is generated and appropriated. How is value being generated on the platform? How are the interdependent participants being incentivized for value maximizing behavior? How is the platform monetizing the value it creates? How are the benefits being allocated across platform users? This requires the analysis of the value generated on platforms including through the diverse use of data. It also requires the understanding of the various interdependencies on the platform across users and services and how these interdependencies are managed. The incentive mechanisms that internalize the diverse externalities across users must also be understood as well as the diverse forms of value contribution that users can provide. Only then, can one perform an informed analysis of whether a particular conduct has efficiency motivations or whether instead it can only be explained by an anticompetitive motive.

For the assessment of market power, the role of access to any particular data in the success of a service must be empirically scrutinized rather than assumed.

Similarly, in light of the diverse possible explanations for a particular conduct on a complex online platform, alleged harm should be demonstrated or at least properly described in a way that allows empirical scrutiny. Assuming harm from an alleged anticompetitive motive assigned to a specific conduct simply is not good practice in cases of such complex assessments.

28 Rubinfeld & Gal, "Access barriers to big data," *Ariz. L. Rev.* 59 (2017): 339.

29 Riordan & Williamson, "Asset specificity and economic organization," *International Journal of Industrial Organization* 3.4 (1985): 365-378.

30 See for example the literature on boundary resources in Ghazawneh & Henfridsson, "Balancing platform control and external contribution in third-party development: the boundary resources model," *Information Systems Journal* 23.2 (2013): 173-192 and Eaton et al., "Distributed tuning of boundary resources: the case of Apple's iOS service system," *MIS Quarterly: Management Information Systems* 39.1 (2015): 217-243.

V. CONCLUSION

Data has taken center stage in the regulatory scrutiny of platforms. Yet, many of the assertions regarding the role it plays in solidifying market power and in marginalizing businesses from fair competition are based on generalizations that have not been tested empirically. Much of the anxiety surrounding data rich business models may in fact stem from new value generation (and rent) for sectors of the economy that can use cutting edge technology and commercial know-how to collect, process, and deliver information in useful ways. Yet, thus far regulators have been unreceptive to examining the synergies and efficiencies generated by online platform technologies and business organization. Taking into account such efficiencies is necessary to better identify genuine anticompetitive behavior. Condemning practices without a proper assessment may only interfere with the optimal development of promising technologies to the long-term detriment of business' users and businesses. A better understanding of value creation in the context of data driven competition might both help focus enforcement and invigorate traditional businesses to develop the re-orientation they need for long-term success.

SILICON VALLEY RHETORIC: THREE MYTHS DEBUNKED

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I. INTRODUCTION

Critics have called Uber many things: "horrible,"[2] "parasitic,"[3] a "never-ending PR disaster."[4] Uber, on the other hand, prefers to call itself a "ridesharing platform," part of the broader "sharing economy."[5] But in December 2017, the European Court of Justice called Uber what it actually is: a transportation-services company.[6]

To a tech outsider, someone not immersed in the constant buzz-speak bubbling out of Silicon Valley, the ECJ's *Uber* decision was a non-event. It was as if a court had declared that General Motors builds cars. But the *Uber* decision *was* an event, one that garnered headlines in the *New York Times*, *Guardian*, and elsewhere across the globe.

What made such a seemingly straightforward decision so newsworthy? It was perhaps the first high-level official rejection of Silicon Valley Rhetoric.[7] Modern tech firms are unrivaled, at least in the business world, in their verbal ability to conceal and disguise what they do. Their self-descriptions, which often traffic in libertarian and techno-utopian tropes, have for years been remarkably successful at insulating tech giants from legal and critical scrutiny.

Take, for example, "ridesharing." Uber scrupulously refers to itself as facilitating "ridesharing" — by my count, more than seventy of its digital press releases include the term. But, as any five-year-old could tell you, Uber's business model has nothing to do with sharing.[8] Drivers charge passengers for rides. Uber charges drivers a percentage of the take. The concept of "ridesharing" was first developed and implemented by small, community-based non-profits.[9] In that context, the term made sense. But when employed by a multibillion-dollar, for-profit entity, it becomes rhetoric — language designed to persuade, not to inform.

Understanding what businesses actually do, instead of what they say they do, is of utmost importance in many areas of law and policy. But perhaps nowhere is the need for clarity more acute than in the fields of antitrust and competition law, tasked as they are with understanding how firms and markets function.

Unfortunately, the antitrust enterprise has not been immune from Silicon Valley Rhetoric. And the oxymoronic "sharing economy" is just the tip of that ugly iceberg. This paper unpacks three more myths crafted by tech giants and the often-breathless reporters and analysts who cover them. They are the Myth of the Garage, the Myth of Free, and the Myth of Constant Disruption. On their own, these myths might seem benign. But when they infect antitrust discourse and decision-making, they have the potential to cause massive societal welfare harms.

2 Cracked, *Why Uber Is Terrible* (Sept. 9, 2015), https://www.youtube.com/watch?v=Og3PjvcR1Pc.

3 Bond-Graham, *Uber and Lyft Get a Lot of Hype—But Ridesharing Is a Parasitic Business Model*, CounterPunch (Oct. 22, 2013), https://www.alternet.org/labor/uber-and-lyft-get-lot-hype-ridesharing-parasitic-business-model.

4 LaFrance, *Uber Did What?! A Field Guide to the Company's Ongoing PR Nightmare*, The Atlantic (Apr. 24, 2017), https://www.theatlantic.com/technology/archive/2017/04/ubers-pr-nightmare-a-field-guide/523269/.

5 See, e.g. Uber Newsroom, *Work On-Demand Opportunities Shape Maryland* (Mar. 5, 2016), https://www.uber.com/newsroom/work-on-demand-opportunities-shape-maryland/; Uber Newsroom, *Uber Announces Partnership with ECPAT-USA* (Apr. 20, 2016), https://www.uber.com/newsroom/ecpat-usa/.

6 Press Release No. 136/17, Court of Justice of the European Union, "The Service Provided by Uber Connecting Individuals with Non-professional Drivers Is Covered by Services in the Field of Transport" (Dec. 20, 2017).

7 E.g. Bershidsky, *European Ruling Buries Uber's Platform Myth*, Bloomberg View (Dec. 20, 2017), https://www.bloomberg.com/view/articles/2017-12-20/european-ruling-buries-uber-s-platform-myth.

8 Rampell, *What Preschoolers Can Teach Silicon Valley About "Sharing"*, Wash. Post (May 15, 2014), https://www.washingtonpost.com/opinions/catherine-rampell-paying-for-your-fair-share-in-an-app-based-economy/2014/05/15/007da348-dc66-11e3-8009-71de85b9c527_story.html?noredirect=on&utm_term=.7dcb5e9040fd.

9 Codagnone & Martens, "Scoping the Sharing Economy: Origins, Definitions, Impact, and Regulatory Issues," Inst. for Prospective Tech. Studies Digital Econ. Working Paper 2016/01 (20160).

II. THE MYTH OF THE GARAGE

Antitrust scholars have often repeated the blanket claim that digital markets have far lower barriers to entry than their offline analogues.[10] Multiple U.S. courts have done so as well.[11] The narrative — the myth — is that a few hackers working in a garage can quickly, cheaply, and easily disrupt an entrenched digital incumbent. The implications for competition policy are clear: a hands-off approach is best.

Like most myths, this one contains a kernel of truth: Google, Microsoft, Amazon, and others got their start in actual garages.[12] But these firms did not *become* giants in their respective garages. Untold billions of dollars in sunk costs, several years, acquisitions of direct rivals, leveraging of proprietary datasets — the story of their growth is the story of overcoming substantial barriers to entry.[13] Alcoa, a monopolist of an earlier time, likewise started in a garage.[14] It was nonetheless able to dominate an industry for decades. Humble historical origins do not indicate that entry is easy in the present.

Moreover, the proper focus is not merely on whether *any* entry can occur. Antitrust and competition analysts instead focus on the likelihood of entry that would provide a meaningful competitive check on existing market participants.[15] In many digital markets, meaningful entry is quite difficult and uncertain, extremely costly, and surprisingly time-consuming.

Consider, for example, Google Maps, the leading online map application. Google developed Maps over a period of several years by acquiring several smaller firms (at considerable cost) including Waze, a direct horizontal rival with access to a unique treasure trove of self-reported user data; developing and building specially outfitted camera cars; collecting more than twenty petabytes (21.5 billion megabytes) of street-view images from around the world; using computer-vision techniques to transform satellite and aerial imagery into three-dimensional building shapes; combining multiple sources of place data to identify the locations of bars, restaurants, and shops, as well as clustered "areas of interest"; extracting Android users' location data to determine how busy a given bar or restaurant is in real-time and estimate customer wait times; and more.

In theory, a few programmers working in a garage could develop a rudimentary online mapping service using public data that would "compete" in some sense with Google Maps. But would their entry act as a meaningful competitive constraint on Google? Even Apple, with all of its unique competitive advantages, has struggled mightily to gain traction against Google Maps. The shortcomings of Apple Maps are well-recognized, enough so that characters from the sitcom *Silicon Valley* mocked a fictional new product by condemning it as "Apple Maps bad."[16] Four years after Apple Maps was launched, nearly 70 percent of Apple's own smartphone users still identified Google Maps as their preferred map application.[17]

Digital markets do not exist outside previous human experience. They are not uniformly more competitive due to uniformly lower entry barriers.[18] Like the term "ridesharing," the Myth of the Garage may have innocent origins — but it has become a rhetorical weapon. It should not be the grounds for Silicon Valley firms to receive uniquely favorable treatment from courts or regulators.

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10 E.g. Sokol & Ma, *Understanding Online Markets and Antitrust Analysis*, 15 Nw. J. Tech. & Intell. Prop. 43, 48 (2017); Posner, *Antitrust in the New Economy*, 68 Antitrust L.J. 925 (2000).

11 See, e.g. *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 416 (E.D. Pa. 2002), *rev'd on other grounds*, 539 U.S. 194 (2003); Shea *ex rel. Am. Reporter v. Reno*, 930 F. Supp. 916, 929 (S.D.N.Y. 1996).

12 Hendricks, *6 $25 Billion Companies That Started in a Garage*, Inc. (Apr. 2, 2018), https://www.inc.com/drew-hendricks/6-25-billion-companies-that-started-in-a-garage.html.

13 Newman, *The Myth of Free*, 86 Geo. Wash. L. Rev. (forthcoming 2018).

14 Alcoa, *Our History*, http://www.alcoa.com/global/en/who-we-are/history/default.asp.

15 See U.S. DOJ/FTC, Horizontal Merger Guidelines § 9 (2010).

16 Heisler, *HBO's Silicon Valley Reveals the Worst Insult You Can Give a Product: 'Apple Maps Bad'*, BGR (May 19, 2015), http://bgr.com/2015/05/19/silicon-valley-hbo-iphone-4-apple-maps-zune-windows-vista/.

17 Sterling, *New Survey Says Google Maps Favored by Nearly 70 Percent of iPhone Users*, Search Engine Land (June 15, 2016), https://searchengineland.com/new-survey-says-google-maps-favored-nearly-70-percent-iphone-users-251955.

18 See Stucke & Grunes, Big Data and Competition Policy § 10.05 (2016) ("The reality is that entry analysis for data-driven markets, as in other markets, will likely be fact-specific.").

III. THE MYTH OF FREE

For years, firms like Google and Facebook successfully controlled the narrative around their products' cost to consumers. Their message? Facebook's sign-in slogan sums it up nicely: "It's free and always will be."

The modern consensus goal of antitrust law is promoting consumer welfare, the surplus of benefits received over costs incurred. If digital platforms are "free," antitrust scholars and courts have concluded, there can be no harm to consumer welfare.[19] The benefits are infinite in relation to the costs.

Recent months have seen an increasing awareness that consumers do, in fact, pay to use seemingly free digital services. And we pay dearly. As I have argued elsewhere,[20] consumers exchange some of their most valued assets — time, attention, personal information — to gain access to these products.

In public, tech firms reiterate the Myth of Free. But in fine print and in court, they insist on contractual protections that can attach only where each side both gives and receives something of value. Apple's user terms of service, for example, contain the following provision:

> You can acquire Content on our Services for free or for a charge, either of which is referred to as a 'Transaction.' Each Transaction is an electronic contract between you and Apple . . . .[21]

Tech firms regularly insist that courts enforce the onerous provisions buried in such user agreements. YouTube, for example, has successfully persuaded courts to enforce blanket liability waivers, shortened limitations periods, and the like against a number of users.[22] (These users were, for the most part, video uploaders like Nasim Aghdam, the woman who recently opened fire on a crowd at YouTube's California headquarters.) If digital products were truly free, such provisions would be unenforceable for lack of consideration.

Antitrust and competition laws are properly concerned with marketplace exchanges like these.[23] Consumer welfare is not unequivocally increased by zero-price business models.[24] Yet, all too often, antitrust and competition enforcers have behaved as if these business models are nothing but good for consumers. The rare U.S. enforcement actions in digital spaces (for example, the FTC's 2017 lawsuit to block the proposed merger of DraftKings and FanDuel), have generally focused on markets where users pay obvious prices.[25] Tracing back at least to the U.S. DOJ's failure to anticipate consumer-welfare harm following the broadcast-radio merger wave in the late 1990s,[26] enforcement in zero-price markets has been markedly lax. Dominant tech firms have repeatedly been allowed to acquire direct rivals (think Facebook–Instagram, Google–Waze, or Zillow–Trulia). Some of these deals escaped scrutiny in part because the relevant product(s) were supposedly free.[27]

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19 E.g. *Kinderstart.com, LLC v. Google, Inc.*, No. C 06-2057 JF(RS), 2007 WL 831806 (N.D. Cal. Mar. 16, 2007); Bork, *Antitrust and Google*, Chi. Trib. (Apr. 6, 2012) http://perma.cc/XRB2-W4JE; Manne & Wright, *What's an Internet Monopolist? A Reply to Professor Wu*, Truth on Mkt. (Nov. 22, 2010), http://perma.cc/L4UF-UC7K. For an excellent critique of Bork's rhetoric, see Leslie, *Antitrust Made (Too) Simple*, 79 Antitrust L.J. 917 (2014).

20 See Newman, *s*upra note 13; see also Newman, TED[x] "Free: The World's Most Dangerous Price."

21 Apple Inc., *Apple Media Services Terms and Conditions*, https://www.apple.com/ca/legal/internet-services/itunes/ca/terms.html (last visited April 24, 2018).

22 See, e.g. *Darnaa, LLC v. Google, Inc.*, No. 15-cv-03221-RMW, 2015 WL 7753406 (N.D. Cal. Dec. 2, 2015); *Song Fi, Inc. v. Google Inc.*, 72 F. Supp. 3d 53 (D.D.C. 2014).

23 Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. Pa. L. Rev. 149 (2015).

24 See Stucke & Grunes, supra note 18, at § 1.26.

25 Complaint, *In re* DraftKings, Inc., No. 9375 (F.T.C. June 19, 2017).

26 See Newman, *Foundations,* supra note 23 (summarizing empirical findings of post-merger increases in attention costs).

27 See, e.g. The Economist, *The Techlash Against Amazon, Facebook and Google—and What They Can Do* (Jan. 20, 2018), https://www.economist.com/news/briefing/21735026-which-antitrust-remedies-welcome-which-fight-techlash-against-amazon-facebook-and ("One reason that Britain's Office of Fair Trading was relaxed about Facebook's Instagram purchase was that it saw Instagram as a 'camera and photo-editing app', not a social network, and thus unlikely to ever be 'attractive to advertisers on a stand-alone basis'. Clearly they lacked imagination.").

"Free," in this context, is not free in a meaningful sense. It is a myth, another example of Silicon Valley Rhetoric being carefully deployed to mislead legal analysts and decision-makers. Antitrust and competition enforcers would do well to follow the ECJ's lead in its *Uber* decision. Think of these exchanges as "exchanges," and these markets as "markets" — that's exactly what they are.

IV. THE MYTH OF CONSTANT DISRUPTION

Silicon Valley firms — and anti-enforcement scholars — often repeat the refrain that "competition is just a click away." [28] Proponents of this narrative commonly point, for support, to Facebook's "disruption" of MySpace and Google's "disruption" of Yahoo.[29] This vision of constant disruptive innovation traces its roots to Schumpeterian "creative destruction," a favorite notion among the Austrian School. Posner and others invoked it to describe digital markets.[30] Again, the implications for antitrust and competition enforcers are clear: digital markets may appear to be dominated by entrenched monopolists, but the next wave of disruptive innovation is just around the corner. A "hands-off" approach is appropriate, since the market will quickly redress any false negatives.

But is competition really "just a click away" in digital markets? As with the Myth of the Garage, this platitude turns out to be a half-truth at best. In a technical sense, of course a user can click her way from one search engine, social network, or online retailer to the next. But in reality, the cost of that click can be much higher than many antitrust analysts have previously imagined.

Firms like Google, Apple, and Facebook are masters at creating ecosystems that minimize the cognitive costs of switching among different functions — so long as the user remains within the ecosystem. A user may find it relatively easy, for example, to click from Google's search engine to Google's email service (Gmail), then to Google's video-sharing platform (YouTube), then to Google's map application (Google Maps), and so forth. But those are not the "clicks" the anti-enforcement crowd invokes. They are *intra*brand clicks. The sort of click that would matter — an *inter*brand click from one search engine to another — entails a level of cognitive burden that is relatively much higher than what is required to simply click around within Google's ecosystem.[31]

Lack of data portability raises users' switching costs higher still. To illustrate, consider a given social-network user. At the outset, the user makes her choice among the available networks based on a range of quality and price considerations.[32] But once a user starts to use one service, that service becomes a repository for her photos, conversations, status updates, contacts, and more. Unless her data is portable across platforms — and it generally is not — she cannot easily switch to a different social network, even if she otherwise prefers to do so.

And, of course, all of this assumes that viable alternative competitors remain in the market. In some digital markets, antitrust and competition authorities have allowed dominant incumbents to acquire their nearest rivals. After Facebook, the next most popular social network is Instagram — which was acquired by Facebook in a deal the FTC cleared without conditions. After Zillow, the next most popular online real-estate portal is Trulia — yet it, too, was acquired in a deal the FTC cleared without conditions.[33]

With all of that in mind, it's worth revisiting the archetypical examples of digital "creative destruction": Facebook and Google.

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28 See, e.g. Brody et al., *Here's How Washington Could Really Unfriend Facebook*, Bloomberg Tech. (Apr. 12, 2018), https://www.bloomberg.com/news/articles/2018-04-12/here-s-how-washington-could-really-unfriend-facebook-quicktake ("Google is fond of saying competition is just 'one click away.'"); Manne & Wright, *Google and the Limits of Antitrust: The Case Against the Case Against Google*, 34 Harv. J.L. & Pub. Pol'y 171, 195 (2011) (Google-funded research).

29 See, e.g. Sokol & Ma, supra note 10, at 48 ("Yahoo leapfrogged AltaVista and Google leapfrogged Yahoo."); Swire & Lagos, *Why the Right to Data Portability Likely Reduces Consumer Welfare: Antitrust and Privacy Critique*, 72 Md. L. Rev. 335, 358 (2013) ("MySpace replaced Friendster as the dominant social network, only for Facebook to later usurp MySpace's position as the market leader.").

30 Posner, supra note 10 ("The gale of creative destruction that Schumpeter described . . . may be the reality of the new economy."). In fact, a close reading of Schumpeter suggests that he was not nearly as opposed to government intervention—particularly in the form of competition law—as his adherents tend to be. See Waller, *Antitrust and Social Networking*, 90 N.C. L. Rev. 1771, 1802–03 (2012).

31 Candeub, *Behavioral Economics, Internet Search, and Antitrust*, 9 I/S: J. L. & Pol'y for Info. Soc'y 407, 408 (2014).

32 See Swire & Lagos, supra note 29, at 338 ("[U]sers start to use one service, such as Facebook, and then find it costly or technically difficult to shift to another service, even if they prefer the other service.").

33 See generally Newman, *Complex Antitrust Harm in Platform Markets*, CPI Antitrust Chron. (May 2017) (arguing that the *Zillow–Trulia* merger may have harmed competition in the digital real-estate portal market and in local realtor markets).

Facebook did supplant MySpace as the largest social network — in April 2008.[34] Facebook has now occupied its dominant perch for a decade. To put that time period in context, consider that this "disruption" occurred when Lehman Brothers was still a viable entity and Miley Cyrus was able to cause a controversy by merely baring her shoulders in a photo shoot.[35]

Google was already the world's second most popular search provider by 2000.[36] That same year, Yahoo (then the most popular) announced that it would begin using Google as the search engine for Yahoo's web portal,[37] effectively making Google the dominant global search provider. This episode of "disruption" occurred nearly twenty years ago, before iPods, before Enron, before 9/11, before Napster was shut down. There are today legal adults who have never been alive at a time when Google was not the world's largest search provider.

These anecdotes, still cited to support the narrative that digital markets are epicenters of creative destruction, are becoming increasingly creaky with age. Modern digital spaces are often characterized by entrenched and unchecked dominance, not continuous waves of creative destruction. Yet only hardcore cartel activity has drawn serious antitrust scrutiny, and even then civil-enforcement cases have been brought where (arguably) in any other industry criminal charges would have been likely.[38]

V. IT'S TIME FOR REALITY-BASED ANTITRUST

The ECJ's rejection of the "ridesharing" myth was, at long last, a break in the clouds. In other areas of law, courts and scholars have been swept up in the excitement of a new technology, only to eventually gather their wits and realize that the tech industry does not create products outside the realm of previous experience — and therefore not outside the reach of existing law.[39] At one time, for example, serious scholars of conflicts of law (private international law), argued that "cyberspace" was a new and different place that existed beyond the reach of governments. But the modern consensus correctly rejects that view. Interactions among persons and firms occur in the real world, even if facilitated by an Internet connection.[40]

Digital products are exchanged in markets that, just like their offline counterparts, display varying levels of entry barriers and competition. Surprisingly often, barriers to entry are high and competition is feeble. Given the importance of digital markets to modern economies, the relative lack of antitrust and competition in digital oversight in this area is concerning. Antitrust and competition authorities would do well to reject Silicon Valley Rhetoric, in favor of reality-based analysis.

34 Arrington, *Facebook No Longer the Second Largest Social Network*, TechCrunch (June 12, 2008), https://techcrunch.com/2008/06/12/facebook-no-longer-the-second-largest-social-network/.

35 The world has changed. See generally Spanos, *Miley Cyrus' 10 Biggest Scandals*, Rolling Stone (May 8, 2018), https://www.rollingstone.com/music/lists/miley-cyrus-10-biggest-scandals-w481179.

36 Hormby, *The Rise of Google: Beating Yahoo at Its Own Game*, LowEndMac (Aug. 15, 2013), http://lowendmac.com/2013/the-rise-of-google-beating-yahoo-at-its-own-game/. Google was already the largest search engine in terms of pages indexed. Google, *Google Launches World's Largest Search Engine* (June 2, 2000), http://googlepress.blogspot.com/2000/06/google-launches-worlds-largest-search.html.

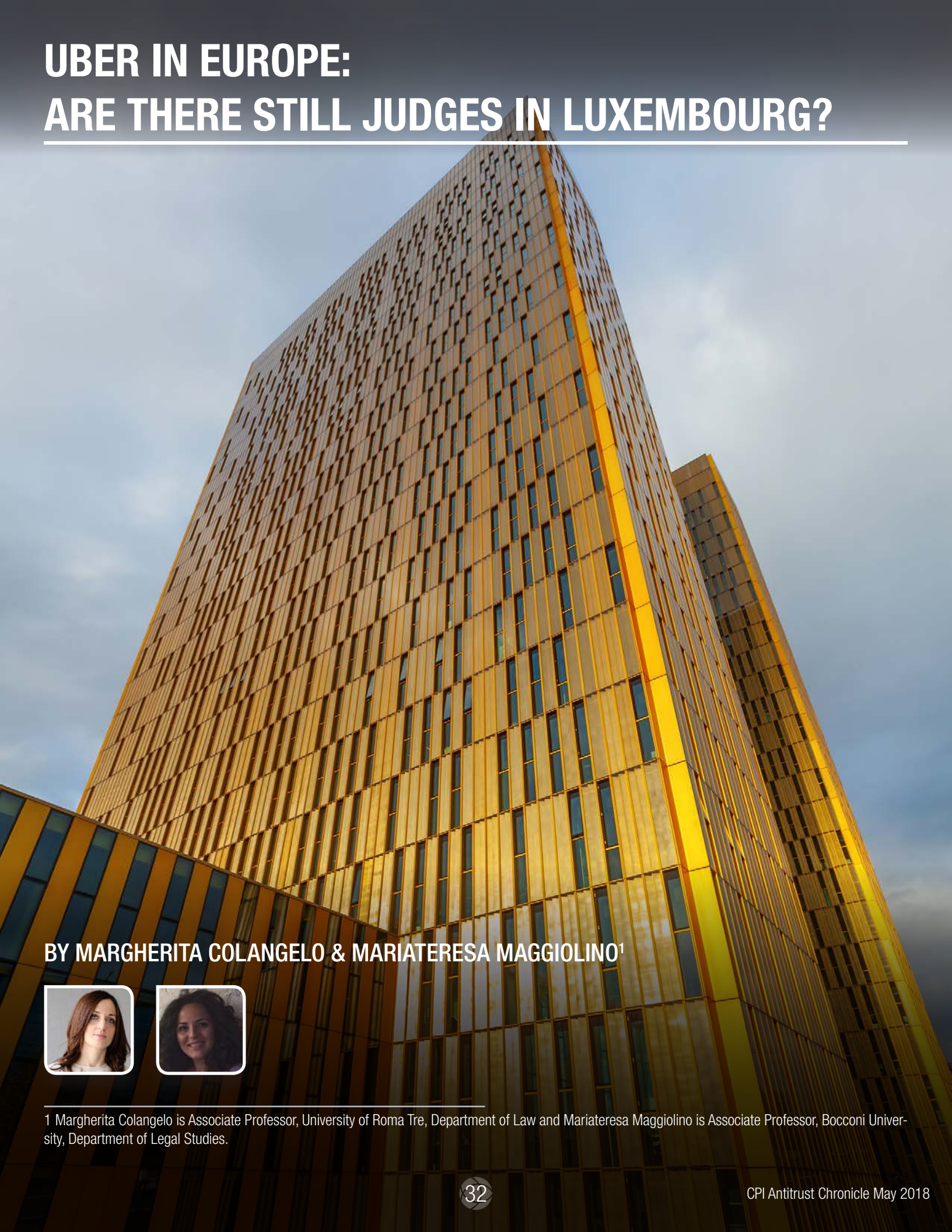
37 Google, *Yahoo! Selects Google as Its Default Search Engine Provider*, (June 26, 2000), http://googlepress.blogspot.com/2000/06/yahoo-selects-google-as-its-default.html.

38 See *United States v. Apple Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013) (holding that Apple and several book publishers conspired to fix the prices of ebooks), *aff'd*, 791 F.3d 290 (2d Cir. 2015); Complaint, *United States v. Adobe Sys., Inc.*, No. 1:10-cv-01629 (D.D.C. Sept. 24, 2010) (alleging that Adobe, Apple, Google, Intel, Intuit, and Pixar conspired to refrain from soliciting employees from one another).

39 See, e.g. Johnson & Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1367 (1996).

40 See, e.g. Andrews & Newman, *Personal Jurisdiction and Choice of Law in the Cloud*, 73 Md. L. Rev. 313 (2013).

UBER IN EUROPE: ARE THERE STILL JUDGES IN LUXEMBOURG?



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I. INTRODUCTION

Since its advent, Uber has been on the receiving end of criticism and fierce opposition from incumbent operators in the taxi industry. In some ways resembling the conventional antitrust struggle between incumbents and mavericks, traditional operators have been lobbying governments to impose bans and restrictions on Uber activity and have brought several lawsuits merging together many issues, ranging from questions pertaining to labor law to problems connected with unfair competition laws, consumer protection, or regulation.

In general, the common claim that Uber would unfairly compete with traditional operators is based on the consideration that it does not comply with the rules and requirements imposed on the taxi industry by regulation, which, with some degree of variations across countries, is typically very pervasive and may include licensing and performance requirements for the drivers and the taxi companies, financial responsibility standards, maximum number of operators, and even maximum rates on the basis of various methodologies.

In Europe, the numerous cases raised at the national level have led to diverging solutions, with courts and regulators operating in an uncertain and unknown field with regard to the proper legal qualification of Uber's services and the rules to apply. In the meantime, after lawsuits in many countries, Uber cannot operate, at least with regard to some services, with UberPop (whereby users connect to drivers that do not hold any professional taxi/chauffeur license) and UberBlack (where the app links consumers to private licensed professional drivers operating services with rental cars) being the most controversial. Due to the lack of clarity on the legal treatment to be applied to Uber, some national courts have asked for guidance from the European Court of Justice ("CJEU"), which issued its first preliminary ruling on the matter in December 2017.

II. THE *UBER SPAIN* RULING

The case originates from the request sent in August 2015 by the Juzgado de lo Mercantil No 3 (Commercial Court) regarding an action brought by a taxi trade association, asking the court to declare that Uber Spain's activity, operating in Barcelona, Madrid and Valencia in the form of UberPop would constitute an act of unfair competition and to order it to cease its conduct.[2] The core issue of the questions referred by the national court to the CJEU is whether Uber's activity falls within the scope of Directives 2006/123[3] and 2000/31[4] as well as the provisions of the Treaty on the Functioning of the European Union ("TFEU") on the freedom to provide services, i.e. whether the nature of Uber's activity amounts to "transport services" that should fall under the transport regulation or rather "information society services," and therefore be subject to a different set of rules.

The Court has based its assessment on the analysis of the services provided by Uber, distinguishing between the two main constituents of its activity, (1) the intermediation service which enables, through a smartphone application, the transfer of information concerning the booking of a transport service – provided for remuneration – between the passenger and the non-professional Uber driver; and (2) the separate transport service. Similar reasoning was applied by the Advocate General ("AG") Szupnar in his Opinion, where he defined the activity of Uber as a composite service, i.e. comprising electronic and non-electronic elements: according to the AG, as the former service is not the main one and is not economically independent of the latter, and considering that Uber imposes numerous terms and conditions in the contract covering both the taking up and the pursuit of the activity and the conduct of drivers when providing services, in addition to setting the final price, these elements would exclude Uber services from being classified as information society services within the meaning of the Directive 2000/31. Rather, Uber should be considered a "genuine organiser and operator of urban transport services," i.e. a traditional transport service.[5]

In reaching the same conclusion, the Court gives crucial relevance to the following main points, i.e. that the intermediation service provided by Uber is based on the selection of non-professional drivers using their own vehicle, that it is essential for both the drivers and the users (being "an application without which (i) those drivers would not be led to provide transport services and (ii) persons who wish to make an urban journey would not use the services provided by those drivers"), and that Uber exercises decisive influence over the conditions under which the transport service is provided by the drivers and a certain control over the quality of the vehicles, the drivers and their conduct. According to the Court, given the electronic nature of the intermediation, the service provided by Uber would generally fulfil the criteria of an information society

2 CJEU, Judgment of December 20, 2017, *Asociación Profesional Élite Taxi v. Uber Systems Spain SL*, C-434/15, ECLI:EU:C:2017:981.

3 Directive 2006/123/EC of the European Parliament and of the Council of December 12, 2006 on services in the internal market, OJ 2006, L 376/36.

4 Directive 2000/31/EC of the European Parliament and of the Council of June 8, 2000 on certain legal aspects of information society services, in particular electronic commerce in the Internal Market, OJ 2000, L 178/1.

5 See the Opinion of the AG Szupnar delivered on May 11, 2017 (arguing, at paras. 57-60, that, even if some similarities exist, Uber cannot be assimilated to other intermediation platforms, such as booking platforms).

service.[6] However, the elements mentioned above imply that the service carried out by Uber is more than that and must be regarded as forming an integral part of an overall service whose main component is a transport service, so that it must be classified as "a service in the field of transport," subject to the common transport policy.[7] However, the Court concludes that as currently non-public urban transport services and services that are inherently linked to those services, such as the intermediation service provided by Uber, have not given rise to the adoption of measures based on that policy, Member States have the task of regulating the conditions under which such services are to be provided in accordance with the general rules of the TFEU.[8]

The reasoning of the CJEU is in some ways in line with the criteria indicated by the Commission in its 2016 Communication on a European agenda for the collaborative economy, where it has identified some key elements to be met by collaborative platforms as indicative of the fact that they should be considered as providing, in addition to the information society services, the underlying service too (such as the transport service).[9] In the latter case, they could be subject to the relevant sector-specific regulation, including licensing requirements generally applied to service providers. Such criteria include the fact that the platform sets the final price to be paid by the user as well as other key contractual terms and that it owns the key assets used to provide the underlying service. Even though Uber does not properly belong to the category of collaborative platforms and no reference appears in the decision, it seems that the first two points also play a crucial role in the Court analysis in *Uber Spain*.[10]

This decision has, arguably, dissatisfied scholars who support the different approach and recall the necessity of giving primary importance to the main features of "matchmaker" platforms such as Uber, which create value by enabling interactions between distinct categories of users rather than by performing transport activities.[11] According to this view, the application of taxi regulations to Uber would eliminate most of the key efficiencies related to the platform itself, identified mainly as the ability to match demand and supply, and the dynamic pricing system.[12] From another perspective, other commentators have welcomed the *Uber Spain* judgment to the extent that it focuses on the decisive influence exercised by platforms over the underlying service as a substantive element preventing regulatory arbitrage by digital companies.[13]

The stance taken has then been reiterated by the Court in a recent judgment regarding Uber France and the application of a French law laying down criminal penalties for the organization of a system for putting customers in contact with persons carrying passengers by road for remuneration using vehicles with fewer than 10 seats without authorization.

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6 See paras. 35-39 of the Judgment.

7 This criterion is in line with the case-law of the Court (see Judgment of October 15, 2015, *Grupo Itevelesa and Others*, C-168/14, EU:C:2015:685).

8 See paras. 34 et seq. of the Judgment.

9 European Commission, Communication, *A European agenda for the collaborative economy*, COM(2016) 356 final, June 2, 2016.

10 See De Franceschi, "*Uber Spain* and the Identity Crisis of Online Platforms," 1 *EUCML* 1, 2 (2018).

11 See Geradin, "Online Intermediation Platforms and Free Trade Principles – Some Reflections on the Uber Preliminary Ruling Case," in Internet - Competition and Regulation of Online Platforms, in Ortiz (Ed.), *CPI* 2016 (affirming that UberPop would fit with the definition of information society service). See also Id., "For a Facts-Based Analysis of Uber's Activities in the EU: Addressing Some Misconceptions," *CPI Antitrust Chronicle* September 2017 (arguing that the qualification as "information society service" would be more appropriate and allow Member States to regulate these services to ensure public interest, while protecting Uber and other online intermediation platforms from regulatory requirements that would unduly interfere with their freedom to provide their services); and Id., "Should Uber be Allowed to Compete in Europe? And if so How?," *CPI* (2015).

12 Id., "For a Facts-Based Analysis of Uber's Activities in the EU," at 11 (arguing that, (1) Uber's platform solves problems related to the strict limitation on the number of licenses creating an imbalance between supply and demand at certain times of the day or in certain circumstances; and (2) Uber's dynamic pricing creates efficiency by increasing the price of rides (surge pricing) when demand exceeds supply, hence increasing the number of drivers while decreasing the number of riders, whereas the rigid regulation of taxi rates causes frequent imbalances between supply and demand).

13 See Hacker, "UberPop, UberBlack, and the Regulation of Digital Platforms after the Asociación Profesional Elite Taxi Judgment of the CJEU," 14(1) *European Review of Contract Law* 80 (2018) (referring to digital companies pretending to act only as intermediaries but substantially providing a service without being subject to the same rules as those that provide the service in traditional formats, and arguing that the CJEU judgment creates a level playing field between digital and traditional ride-hailing companies). In general, see Fleischer, "Regulatory Arbitrage," 89 *Texas L. Rev.* 227 (2010) (defining "regulatory arbitrage" as a perfectly legal planning technique used to avoid taxes, accounting rules, securities disclosure, and other regulatory costs, by exploiting the gap between the economic substance of a transaction and its legal or regulatory treatment). On regulatory arbitrage in the sharing economy, see Calo & Rosenblat, "The Taking Economy: Uber, Information, And Power," 117 *Columbia Law Review* 1623, 1645 (2017).

It is worth mentioning that these judgments relate to the UberPop service, whereas the reference for a preliminary ruling on Uber Black is still pending.[14]

III. UBER AND ANTITRUST LAW

The now much-criticized Chicagoan antitrust scholars have always believed that competition is better off when markets are open to new entrants. Indeed, among the many positive changes that they can trigger, new entrants may also determine a technological leap in the development path of an industry – a forward jump that may be hugely beneficial not only for consumers, but also for the very same incumbent/legacy firms, because they may take the opportunity to evolve towards similar new technologies. The advent of Uber, as well as the choice by many taxi driver associations to develop their own platforms and mobile applications, has the merit of exemplifying and confirming this textbook conviction. In the U.S., where proper antitrust issues have also been the subject of judicial inquiry, the Court of Appeals for the Third Circuit has acknowledged this as recently as two months ago.[15]

Namely, in 2018, the Third Circuit rejected all claims by the appellant taxi association against a 2016 Pennsylvania state legislation authorizing operation of Transportation Network Companies ("TNCs") in Philadelphia. The Taxi Association alleged that Uber entered the market illegally, operated at a lower cost, and was close to achieving monopoly power, by failing to comply with the regulation and hiring drivers from traditional operators. However, not only has the Court found that the appellants failed to set forth a plausible claim, without alleging any evidence of the elements necessary to affirm an attempt to monopolize within the meaning of Section 2 of the Sherman Act, such as the harmful effects on competition, the specific intent to monopolize, and the dangerous probability of achieving monopoly power, but it has also affirmed clearly that "Uber's presence in the market created *more* competition for medallion taxicabs, not *less*, and thus Uber's so-called 'predation' – operating without medallions or certificates of public convenience – does not give rise to an antitrust injury."

In its conclusion, the Court recalled a previous case brought before the Seventh Circuit on the legitimacy of an ordinance of the city of Chicago applying specific rules to TNCs and challenged by taxi and livery companies,[16] reiterating that appellants have no right to exclude competitors from the taxicab market, even if those new entrants have failed to obtain medallions or certificates of public convenience. The quoted judgment appears particularly indicative, as Judge Posner argued that different rules applied to TNCs are justified by the fact that their services are different and not interchangeable with taxi services (such as "dogs and cats"), concluding that: "when new technologies, or new business methods, appear, a common result is the decline or even disappearance of the old. Were the old deemed to have a constitutional right to preclude the entry of the new into the markets of the old, economic progress might grind to a halt."[17]

In summary, the entrance of Uber in the market for transportation services does not – and should not – raise any antitrust concern.

Both the Uber experience and the *Uber Spain* ruling do have something to teach the antitrust community.

In the first place, the Uber experience exemplifies the *liquid* competition that may occur in the platform economy. Once a platform has proved to be successful, nothing prevents its owner from using it to offer the most diverse services. It has not taken much for Uber to diversify its service from the delivery "of people" to the delivery of food; and many believe that, by collecting data about transportation, Uber aims to become the world leader in logistics. Thus, future antitrust law should deepen its understanding of the competitive harm – if any – that conglomerate firms may bring about across relevant markets. In addition, it cannot be either myopic or slow: it needs to endorse a forward-looking attitude, at least in attempting to understand the rationale of these new businesses, and it must be rapid, at least when it finds it necessary to intervene in these markets that are very prone to fast changes and whose boundaries are blurring.[18]

Furthermore, it is true that Uber produces information efficiencies by allocating the optimal vehicle, by assessing the quality of drivers and consumers, and by creating a reputation mechanism. However, Uber is also in a position to use the data it collects from drivers and users

14 Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on June 19, 2017, *Uber BV v. Richard Leipold*, Case C-371/17.

15 *Philadelphia Taxi Association, Inc. v. Uber Technologies, Inc.*, 17-1871 (3rd Cir. 2018).

16 *Ill. Transp. Trade Ass'n v. City of Chicago*, 839 F.3d 594, 597 (7th Cir. 2016) (Posner, J.), cert. denied sub nom. *Ill. Transp. Trade Ass'n v. City of Chicago, Ill.*, 137 S. Ct. 1829 (2017).

17 Id., at 596-597.

18 See Kovacic, "Antitrust in high-tech industries: improving the federal antitrust joint venture," 19 *Geo. Mason L. Rev.* 1097, 1102 (2012) (observing that, "[t]he antitrust system pedals furiously on a bicycle to catch up with industry developments that speed ahead in a formula one car").

to manipulate their behavior. As a rule, antitrust law does not enquire as to whether economic agents are well informed or aware of their choices, because cases of information asymmetries traditionally fall within the scope of consumer protection law, disclosure regulation, and unfair competition.[19] However, since information is a product, antitrust law could be used to prosecute firms which, by exploiting their unilateral or aggregated market power, produce and distribute little information of bad quality,[20] by representing false options and alternatives, for example. On the contrary, antitrust law should not be used to prosecute the case of a platform charging prices which equal consumers' willingness to pay or using profiling to better persuade its customers. These remain, at most, issues of consumer protection law.[21]

In the second place, although it discusses the characterization of Uber's economic activities, the ruling of the CJEU in *Uber Spain* offers interpretative hints in relation to the Uber pricing algorithm.

In recent years the Uber pricing algorithm has raised two main genuine antitrust concerns. First, as alleged in *Meyer v. Uber*,[22] the Uber pricing algorithm could accommodate a hub-and-spoke form of collusion[23] between the platform – the hub – and the drivers – the spokes.[24] Indeed, though the horizontal element of this conspiracy would be quite difficult to prove,[25] there is room to maintain that the platform and the drivers could agree to use the Uber pricing algorithm as a communication tool, with the ultimate goal of charging cartel prices. Second, it is true that – as maintained elsewhere[26] – no kind of collusion occurs when two or more drivers charge the same price suggested by the Uber pricing algorithm that mimics the functioning of the market. Yet, one could argue that Uber drivers are colluding because, by sharing the same pricing indexes, rules, and instructions,[27] they track one another's pricing more readily.[28]

However, there is a further and more radical argument which displaces these two concerns. Consider, indeed, that these concerns hold true provided the Uber platform and the drivers are deemed to be independent undertakings within the meaning of EU competition law. In contrast, if they were all characterized as parts of the same single economic agent, there could be no form of collusive agreement among them.

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19 See, e.g. the Opinion of the AG Henrik Saugmandsgaard Øe, delivered on September 21, 2017, *F. Hoffmann-La Roche Ltd and Others v. AGCM*, C-79/16, EU:C:2017:714, paras. 156-157, which recites that, "the concerted communication of misleading allegations … is, by its very nature, harmful to the proper functioning of normal competition, so much so that an examination of its effects on competition is not necessary. … where an examination of the content of the allegations in question reveals that they are misleading, the concerted communication of those allegations impairs the quality of the information available on the market and, consequently, adversely affects the decision-making process of those who create the demand for the two products concerned."

20 See Patterson, *Antitrust law in the new economy: Google, Yelp, LIBOR, and the control of information* (Cambridge: Harvard University Press, 2017). In particular, the author analyzes the cases of the firms which, like Google, Yelp, Amazon and Standard & Poor's, provide people with the information that they use to make their consumption and investment decisions: "Although some consumers may continue to use multiple sources of information, many will not. Therefore, the products that Google or Amazon list with the lowest prices, or the products with the best reviews, are quite likely to be purchased more often than are other products. (…) As a result, shoppers may look only to that single source, making information providers like Google and Amazon critically important gatekeepers in their information markets" (at 33-38).

21 On consumer protection issues, see Calo & Rosenblat, supra note 13 (militating for a stronger intervention on the part of consumer protection law).

22 See *Meyer v. Kalanick*, 200 F. Supp. 3d 408, 408 (S.D.N.Y. 2016) also commented by Passaro, "How Meyer v. Kalanick Could Determine How Uber and the Sharing Economy Fit into Antitrust Law," 6 *Mich. Bus. & Entrepreneurial L. Rev.* 2 (2018).

23 See *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939) where, thanks to the multiple addressees of the letters bearing the multilateral invitations to collude made by the hub, a picture theatre, each of the "spokes," that is the movie distributors, knew that the proposed cartel was under consideration by their horizontal rivals. Furthermore, see Orbach, "Hub-and-Spoke Conspiracies," 15 *Antitrust Source* (2016), Arizona Legal Studies Discussion Paper No. 16-11, available at: https://ssrn.com/abstract=2765476, and Klein, "Antitrust Analysis of Hub-and-Spoke Conspiracies," (2017), available at: https://ssrn.com/abstract=2909341.

24 Stucke & Ezrachi, "How Pricing Bots Could Form Cartels and Make Things More Expensive," *Harvard Business Review* (2016), available at: https://hbr.org/2016/10/how-pricing-bots-could-form-cartels-and-make-things-more-expensive.

25 Indeed, to ascertain whether a form of hub-and-spoke collusion exists, enforcers must establish whether the "spokes" know about their respective practices, that is, about the horizontal dimension of the conspiracy. Otherwise, a court would characterize the case as an example of parallel vertical agreements, whose anticompetitive nature is much more difficult to prove – see, *Kotteakos v. United States*, 328 U.S. 750 (1946), where the Court did not find any evidence of the horizontal relationship among the "spokes."

26 Colangelo & Maggiolino, "Uber: A New Challenge For Regulation And Competition Law?," 1 *Market and Competition Law Review* 47 (2017).

27 See, e.g. CJEU, Judgment of March 19, 2015, *Dole Food and Dole Fresh Fruit Europe v. Commission*, ECLI:EU:C:2015:184; European Commission, Case AT.39861 – *Yen Interest Rate Derivatives*, February 4, 2015; *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 134-35 (1969); or *Va. Excelsior Mills, Inc. v. FTC*, 256 F.2d 538, 540 (4th Cir. 1958).

28 Areeda & Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and their Application* (New York, Aspen Publishers, 2006, 3rd ed.), § 2025(d).

Uber Spain does not tackle this issue directly. Yet the Court has observed that, "Uber exercises decisive influence over the conditions under which [the] service is provided by […] drivers. […] Uber determines at least the maximum fare by means of the eponymous application [… and …] it exercises a certain control over the quality of the vehicles, the drivers, and their conduct."[29]

Therefore, there is room to argue that in the market for transportation services, Uber drivers, subject to the decisive influence of the platform and to its daily instructions, do not pursue a commercial interest divergent from, or in conflict with, the strategic interest of Uber itself. Consequently, those drivers and the platform could be deemed to be parts of a single economic agent, that is, of an undertaking within the meaning of EU competition law. This holds even if Uber drivers were not deemed Uber employees, because the doctrine of the single economic agent provides for a number of natural or legal persons to make up a single undertaking[30] when there is one entity, such as the Uber platform, which exercises decisive and effective influence over other entities, such as the drivers.[31] Conclusively, then, since agreements are supposed to pull together interests that do not naturally converge, no form of collusion should be considered possible among the drivers themselves or between the drivers, on the one hand, and the platform, on the other, because they are already parts of the same undertaking representing one single center of economic interests.

IV. CONCLUDING REMARKS

The awaited decision of the CJEU in *Uber Spain* was expected to provide useful guidance not only with reference to Uber services, but also to be indicative of the treatment to be applied to platforms in general. Someone could complain about this ruling, by pointing out that the judgment is based on a legalistic question – that is, the exact legal classification of the services offered by Uber – and observing that, by qualifying Uber's activity as a transportation service, it runs the risk of stifling the new technology and business model introduced and developed by Uber, against the interests of both the market and consumers. However, the ruling addresses a substantive issue, providing criteria aimed at distinguishing between platforms offering mere intermediation services and those which are at the same time matchmakers and effective controllers of the supplied underlying service.

The main problems arise with regard to the effect of such a ruling, which in practice happens to be *de facto* a ban on Uber's activities (at least in the form of the most controversial service, UberPop).[32] Therefore legislators, who have proved to be not ready to address the regulatory challenges posed by disruptive technologies, should make a commitment to rethink the existing rules applied to incumbent operators and to establish proper measures to regulate the new business models introduced by platforms.

In other words, old regulations do not fit with new, disruptive technologies, which would be best served by a critical review of the existing framework for the entire industry. As a matter of fact, the CJEU in *Uber Spain* concludes that the issue should be thrown back to Member States, which may legitimately regulate companies such as Uber. Thus, one should not ask whether Uber should also be subject to the outdated rules currently applied to taxi operators but rather, one should ask whether, given the positive changes introduced by Uber, and given the current imbalance between established operators and new ones, a complete reform of the existing provisions for all private operators offering transport services should be introduced and how measures able to take into account the efficiencies derived from the platform economy could be designed.[33]

29 See para. 39 of the Judgment.

30 See, e.g. Judgment of July 19, 2012, *Alliance One International and Standard Commercial Tobacco v. Commission/ Alliance One International and Others*, Joined Cases C-628/10 P and C-141/11 P, ECLI:EU:C:2012:479, para. 42 and the case-law cited.

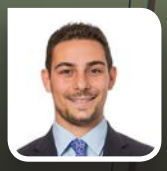
31 See, *mutatis mutandis*, CJEU, Judgment of September 26, 2013, *The Dow Chemical Company v. Commission*, C-179/12 P, ECLI:EU:C:2013:605, para. 55 for the importance of formal and actual control by a parent company over its incorporated subsidiaries to hold all of them part of a single economic unit.

32 See Hacker, supra note 13 (arguing that the ride-sharing model has essentially been buried in the EU by *Uber Spain*).

33 Among the various proposals, see Edelman & Geradin, "Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies like Airbnb and Uber?," 19 *Stanford Technology Law Review* 293 (2016) (suggesting a new form of regulation retaining the efficiencies of Uber but also guaranteeing more safety and quality, a better distribution of information, and no discrimination).

UBER HAS AN ANTITRUST LITIGATION PROBLEM, NOT AN ANTITRUST PROBLEM

BY NICK PASSARO[1]



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I. INTRODUCTION

Uber is roughly a decade old since its humble beginnings as an idea to help people get rides when they struggled to hail taxis. Today Uber has become a staple of transportation globally, aiding both those in need of rides, as well as those in need of a convenient way to earn some extra income. The app connects those that have cars and time with those who need rides, and it has faced many legal challenges since its inception. Perhaps its legal struggles are due in part to this unique business model that operates in what many refer to as the sharing economy.[2] Among those legal challenges are allegations of antitrust violations.

The antitrust claims against Uber have been numerous, but rely on surprisingly few theories of antitrust violation. Some of these cases are still pending, but many have been disposed of early on through motions to dismiss and voluntary dismissals. One common thread among these varying claims is that none has been analyzed and decided on the merits by a judge past the motion to dismiss phase.

This article will canvas the several alleged types of antitrust violations, describe the extent to which the merits of those arguments have been analyzed, and analyze those arguments independently on the merits.

II. ALLEGED UBER VIOLATIONS

A. Price Fixing

1. Facts

The Uber app allows riders to hail a ride for a given price and have a driver fulfill that ride for that price. The price is generated by Uber's price algorithm, which aims to mirror actual demand in real time. Uber has acknowledged (and actively defended in labor disputes) the position that the drivers are not Uber employees, but independent contractors that choose to use the app. Therefore, Uber results in thousands of independent sole proprietorships operating in the same market and seeking the same consumers, and all charging the exact same prices. This has led to price fixing allegations by consumers and competitors. The most thorough discussion of these claims came in *Meyer v. Uber*.[3]

In that case, although it had not been specifically mentioned in the complaint, Judge Rakoff found that plaintiffs had sufficiently pled a hub-and-spoke conspiracy, and denied defendant's motion to dismiss.[4] However, after being appealed to the Second Circuit on arbitration issues, and remanded back to the Southern District of New York, the case was sent to arbitration, barring an appeal by the plaintiffs on the antitrust theory. Therefore, while the claim passed muster under a motion to dismiss, the appeal was decided on an arbitration issue rather than the merits of the antitrust arguments.

2. Legal Analysis

A hub-and-spoke arrangement exists where a firm (the hub) organizes collusion among upstream or downstream market firms (the rim) by interacting with each rim firm individually (spokes) in order to artificially preserve or grow its market share or profits. To succeed, plaintiffs must have direct evidence of, or enough circumstantial evidence to infer a horizontal agreement.

The plaintiffs in *Meyer* alleged that Uber orchestrated this collusion among thousands of drivers. This already represents a sharp deviation from historic hub-and-spoke arrangement cases. For example, *Interstate Circuit, Toys "R" Us*, and *Apple (ebooks)* all involved merely six to ten "rim" firms. However, with technology drastically changing over recent years to facilitate mass communication, the sheer number of alleged conspirators may not be enough to find that such a large conspiracy could not exist.

2 The sharing economy refers to the emergence of peer-to-peer services that allow owners to give access to their property to strangers during the time the owner does not wish to use it. Peer-to-peer markets allow small suppliers to compete with traditional providers of the same good or service, making it easy for buyers to engage in convenient, trustworthy transactions. Einav, Farronato & Levin, National Bureau of Economic Research, NBER Working Paper No. 21496 (2015).

3 See *Meyer v. Kalanick*, 174 F. Supp. 3d 817 (S.D.N.Y. 2016); *Swink v. Uber Technologies, Inc.*, 4:16-cv-01092 (S.D. Texas, April 22, 2016).

4 See *Meyer v. Uber*, No. 1:2015-cv-09796-JSR, Doc. 37 at 22-23 (S.D.N.Y. Mar. 31, 2016).

Other key distinctions between *Meyer* and historic cases relate to the purposes of the vertical "spoke" agreements and with whom they were made. In *Interstate Circuit*, *Toys "R" Us*, and *Apple (ebooks)* it was clear that the "hub" made the agreements to curtail competition. Interstate Circuit did not want to continue losing money to cheaper second-run theaters, so it went to every major studio to get them to stop giving those theaters film. Toys "R" Us did not want to lose sales to cheaper wholesale stores, so it went to every major toy manufacturer to get them to stop selling to those stores. Apple wanted to ensure it would be able to successfully enter the ebooks market by going to every major publisher to get them to make Amazon, which was selling at a lower price than Apple wanted, to adopt the same pricing structure as Apple (the agency model). Uber lacks these nefarious motives and cannot be said to be agreeing with all of the major players in the "rim" market, as was the case in those cases. Uber offers its app to any driver who wants to use it, along with the price algorithm, which is part of the product. There is nothing to stop any potential Uber driver from joining a competitor, going out on their own and pricing however they like, or simply declining the "offer" to become a driver. This is in stark contrast to the historic cases where there was a finite group of major players in the "rim" market that were *all* approached to make the deal.

Lastly, the drivers in Uber lack the interdependence that was central for courts inferring agreements among "rim" firms in those historic cases. Evidence demonstrated that in each of those cases, the same agreement was presented to every major firm in the "rim" market, and that it would only make economic sense for *any* of them to agree if *all* of them agreed. An Uber driver has no stake in whether another person, potentially hundreds of miles away, also becomes an Uber driver. While the app, and therefore each driver, may find greater success when there are more drivers (which could help convince more riders to use the app), drivers do not agree to Uber's terms because they know everyone else will too. They likely do it for numerous, unrelated reasons such as flexible extra income that would be difficult and costly to achieve independently from the app's reputation for safety, fair pricing, and reliability.

B. Avoiding Regulation (Sherman Act § 2)

1. Facts

Uber's insistence in labor law proceedings that its drivers are not employees, but rather independent contractors, not only opened the door for a claim of price fixing among the drivers, but also a monopolization claim by giving Uber the allegedly unfair competitive advantage of avoiding regulations. These claims exist not only because the drivers are not employees, but generally because Uber's unique and novel business structure often puts it outside the definition of many local regulations that govern traditional ride service-providers.

The most thoroughly discussed example of this type of claim against Uber is *Philadelphia Taxi Association, Inc. v. Uber Technologies, Inc.*[5] Plaintiffs alleged Uber had an anticompetitive advantage by avoiding costly regulatory compliance, but the Eastern District of Pennsylvania dismissed the first and second amended complaints for failure to demonstrate antitrust injury.[6] The Third Circuit affirmed this decision, finding that plaintiffs failed to properly allege any of the elements of an attempted monopolization claim.[7]

2. Legal Analysis

As the Third Circuit rightly held, Uber's non-compliance with costly regulations to which it believes it is not subject does not constitute grounds for an attempted monopolization claim. For the advantage to be anticompetitive, Uber must at least be subject to the regulation it is allegedly avoiding. Every regulation is not required to apply to every competitor in a market, and while Uber may have competitive advantages over its competitors, that does not make such advantages anticompetitive. For example, a company that is organized in a way that has advantageous tax benefits compared to a competitor cannot be said to violate the Sherman Act in an attempt to monopolize the market based on that conduct alone.

If a future court were dissuaded by the above argument in a case with different circumstances, the elements of a monopolization claim would be to Uber's avail. An attempted monopolization claim under Section 2 of the Sherman Act requires proof of (1) anticompetitive conduct; (2) a specific intent to monopolize; and (3) a dangerous probability of achieving monopoly power.

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5 *Philadelphia Taxi Association, Inc. v. Uber Technologies, Inc.*, 218 F. Supp. 3d 389 (E.D. Pa. 2016); compare to *Malden Transportation, Inc. v. Uber Technologies, Inc.*, 2017 U.S. Dist. LEXIS 213023 (D. Mass. 2017).

6 *Philadelphia Taxi Association, Inc. v. Uber Technologies, Inc.*, 218 F. Supp. 3d 389 (E.D. Pa. 2016); *Philadelphia Taxi Association, Inc. v. Uber Technologies, Inc.*, 2017 WL 551593 (E.D. Pa. Mar. 20, 2017).

7 *Philadelphia Taxi Association, Inc. v. Uber Technologies, Inc.*, 2018 WL 1474373 (3rd Cir. Mar. 27, 2018).

For the first element, plaintiffs would presumably point to Uber's alleged violation of regulations to satisfy the first element. However, in *Philadelphia Taxi Ass'n*, the Third Circuit found that plaintiffs had failed to demonstrate anticompetitive conduct because "the elimination of medallion taxi competition did not constitute anticompetitive conduct," so it is likely plaintiffs would also need to demonstrate reduced options or quality of service in the area.[8]

The second element requires a specific intent to monopolize, not to be confused with a lawful "intent to compete vigorously."[9] Rather, such intent involves "a specific intent to destroy competition or build monopoly."[10] Unless it were demonstrated through evidence that this was Uber's intent, it is unlikely a court would be willing to infer it simply because Uber declined to incur the costs of complying with a regulation that it arguably was not subject to. The Third Circuit in *Philadelphia Taxi Ass'n* reasoned that knowledge of the regulation Uber was allegedly violating was not enough on its own to constitute a specific intent to monopolize.[11]

Lastly, the third element requires a dangerous probability of achieving monopoly power. In considering this element, the Third Circuit looks to factors such as significant market share, barriers to entry, strength of competition, development of the industry, and elasticity of demand, with market share being the most significant factor.[12] The claims using this theory thus far have typically come from taxi services, which harms their arguments as to market power. The only way avoiding regulations gives Uber a competitive advantage that could possibly be anticompetitive is if competitors *are* subject to those regulations, otherwise avoiding them could not be anticompetitive. These taxi plaintiffs therefore need to be part of the same market as Uber to make their claim. However, when the market is extended to taxi services, Uber has a far lower market share compared to the market for app-based ride-share services, which makes it less probable they could monopolize that broader market.

To avoid this low market share problem, a plaintiff would have to find a regulation that applied to them but not Uber so they could state their claim, but not admit that a broad group of transportation services compete in the same market as them and Uber. For example, if the regulation were somehow applied to a competing app-based ride-share service, but not Uber, the market could reasonably be app-based ride-share services where Uber could arguably be said to have market power, *and* avoiding the regulation gives them an anticompetitive advantage within that market over the competitor plaintiff. However, this hypothetical regulation simply does not exist. Even if it did, there would need to be clear evidence avoiding the regulation allowed Uber to dominate the market because the Third Circuit in *Philadelphia Taxi Ass'n* specified that vague claims that Uber's conduct would raise barriers to entry and drive out competition were insufficient to allege the third element.[13] Thus, without more, a Section 2 claim supported by allegations that Uber is avoiding regulations is doomed to fail on the merits.

C. Predatory Pricing

1. Facts

Predatory pricing allegations have been the most popular antitrust claims brought against Uber recently, most of them coming from taxi companies.[14] While there have been an abundance of these sorts of claims, there has been a drought in successes, as none have been able to get past a motion to dismiss. That being said, almost all of the cases are still pending and may eventually be decided on the merits.

The cases vary in jurisdiction, but the claims are fairly similar. The allegation is essentially that Uber is pricing below cost to gain market share and drive the plaintiffs out of their respective markets. Opposing parties' arguments as to potential merits of these cases have been that conclusory statements that Uber is operating below cost, charges less than a taxi, and is losing money as a company were insufficient to defeat a motion to dismiss in *Malden*, and that a failure to properly allege anticompetitive effects warranted granting the motion to dismiss in *Miadeco*.
Legal Analysis

8 See id at *4-5.

9 *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993).

10 *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 626 (1953).

11 *Philadelphia Taxi Association, Inc.*, 2018 WL 1474373 at *5.

12 See *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 318-19 (3rd Cir. 2007).

13 *Philadelphia Taxi Association, Inc.*, 2018 WL 1474373 at *6.

14 *Malden Transp., Inc. v. Uber Technologies, Inc.*, 2017 U.S. Dist. LEXIS 213023 (D. Mass. 2017); *Miadeco Corp. v. Uber Technologies, Inc.*, No. 1:15-cv-20356, Doc. 120 (S.D. Fla. Mar. 30, 2017); *Miadeco Corp. v. Uber Technologies, Inc.*, No. 1:15-cv-20356, Doc. 120 (S.D. Fla. Mar. 30, 2017); *A White and Yellow Cab, Inc.*, No. 4:15-cv-05163, Doc. 114 at 14 (N.D. Cal. Mar. 5, 2018); *Ariekat v. Uber Technologies, Inc.*, CGC-17-557728 (Cal. Sup. Ct. Mar. 24, 2017); *Friendly Cab Company, Inc. v. Uber Technologies, Inc.*, RG-17-858247 (Cal. Sup. Ct. April 27, 2017).

The elements of a predatory pricing claim are (1) defendant's prices are below an appropriate measure of its costs; and (2) a dangerous probability of recoupment.[15] Uber ought to prevail should any of these cases proceed to be decided on the merits because it is unlikely plaintiffs will be able to satisfy the first element, and perhaps even more unlikely they can satisfy the second.

First, no plaintiff thus far has overcome a motion to dismiss, so it is unclear that any have presented sufficient evidence demonstrating Uber is pricing below costs. In *Malden*, even if plaintiffs had evidence to support some of their conclusory allegations, they would still not satisfy the first element. Evidence that Uber is losing money overall and that their prices are below the competing taxi companies would not show that they are pricing below cost. However, even if plaintiffs in one of these cases were to present sufficient evidence that Uber was pricing below cost, they would still fail to satisfy the second element.

In *DeSoto*, the plaintiffs claimed that Uber's large source of venture capital funding would allow it to price below cost until competitors were forced out of the market, at which time it could charge supracompetitive prices. Uber responded to this claim in its pending motion to dismiss, arguing that barriers to entry in the ride-hailing market are so low, that a new entrant would quickly appear to undercut the overcharge, thus defeating the purpose of such a scheme. Uber appears to have it right.

Newer companies such as Lyft, Via, Wingz, Juno, and others have sprung up recently in cities around the world and have been directly competing with Uber.[16] While it is unclear without reliable financial data if these companies are thriving or merely surviving, they are at the very least capable of the latter. This serves as evidence in Uber's favor regarding both elements of predatory pricing.

First, it makes it all the more unlikely that Uber is not pricing below cost. If new companies see the opportunity to profitably enter the market, clearly they believe they can offer at least a similar product at a similar price, which would be impossible to do profitably if Uber were pricing below costs. As for the second prong, these new entrants demonstrate that Uber would not be able to recoup the losses of predatory pricing by charging supracompetitive prices. Uber's argument in its motion to dismiss in *DeSoto* that new entrants would appear on the scene should it try to recoup was perhaps understated. There are new entrants already on the scene perfectly capable of preventing Uber from profitably recouping by maintaining competitive prices.

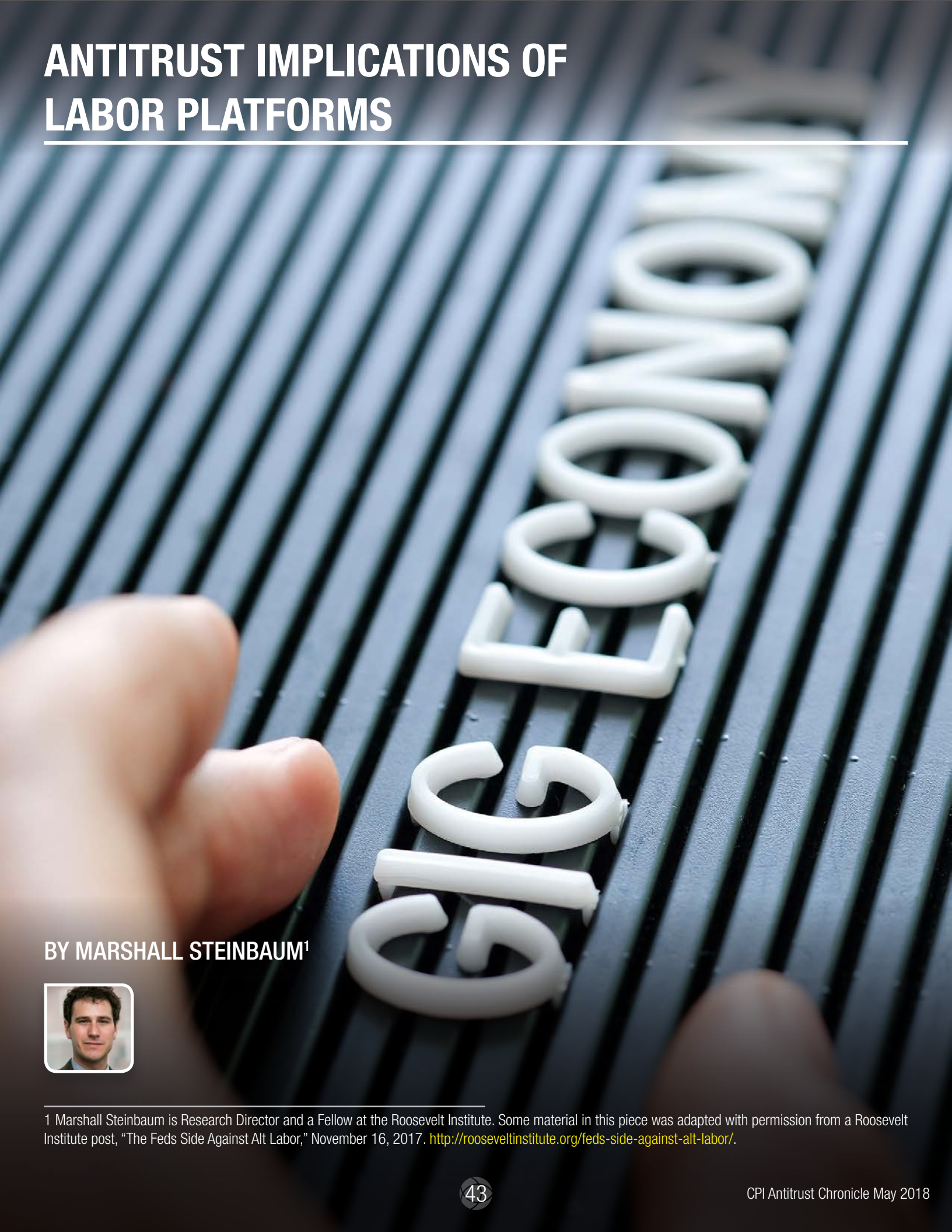
III. CONCLUSION

Uber has defended allegations of anticompetitive conduct spanning several theories and across jurisdictions across the country. That being said, the theories thus far have not passed muster for the most part. Uber has strong arguments on the merits for each of these claims, and it is likely plaintiffs would have a tough time arguing the merits should they survive a 12(b)(6) motion. Thus, Uber does not have an antitrust problem, despite having a clear antitrust litigation problem.

15 *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-24 (1993).

16 Arata, "9 New Rideshare Apps to Try," *Nerdwallet*, available at: https://www.nerdwallet.com/blog/loans/9-new-ride-share-apps/.

ANTITRUST IMPLICATIONS OF LABOR PLATFORMS



BY MARSHALL STEINBAUM[1]

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I. INTRODUCTION

Contra Robert Bork, the antitrust paradox that characterizes the history of competition policy in the United States is contained in the contrasting first two sections of the Sherman Act. On the one hand, since *Addyston Pipe*, *any* restraint of trade between two or more parties is illegal and potentially subject to criminal sanction under Section 1. On the other, since *Standard Oil*, monopolization — the control of trade by a single party — has been subject to the Rule of Reason — legal recognition that one party's power over commerce might be pro-competitive and hence requires some sort of balancing test. If you want to escape liability under the Sherman Act, just make sure you amass enough power in one place. Only little people violate the antitrust laws.

Of course, it's not so simple: the treatment of various vertical restraints of trade as *per-se* illegal versus subject to the Rule of Reason has varied over time, as has the jurisprudence of the Rule of Reason itself. But right now, almost 20 years post-*Microsoft*, we are in probably the most permissive regime *vis à vis* unilateral conduct that we have had since the government lost its case against U.S. Steel in 1920. This embraces both the size and market share of dominant firms, as well as their freedom to impose price- and non-price restraints on trading counterparties. Meanwhile, if antitrust law retains anything, it is a hostile stance toward horizontal agreements among like-situated parties. It is in this context that the modern labor platform, typified by Uber, has been allowed to grow up and prosper.

The antitrust treatment of labor platforms has remained an under-the-radar issue, sitting as it does on the border of labor and antitrust law and thus not an obvious subject of scholarship or policy interest by those engaged more fully in either area. On the one hand, the foremost policy issue raised by labor platforms is, not surprisingly, labor: who counts as an employee, how much control can a platform exercise over its workers and continue to evade its statutory obligations as employers? On the other hand, the antitrust treatment of the labor platforms themselves has been near-nonexistent, with the sole exception of several private actions, one of which, *Spencer v. Kalanick*, is discussed below. Where the antitrust authorities have been more active is in restricting the ability of workers to bargain collectively, which they consider to be a horizontal restraint and hence a *per-se* violation of Section 1 of the Sherman Act.

This contrasting treatment: light touch for the platforms themselves, heavy hand for the workers organizing against it, must be understood not only in light of the evolution of diverging jurisprudence under each section of the Sherman Act, but also in light of broader economic trends that are themselves the result of a weakening antitrust enforcement regime. The labor market is increasingly characterized by employer power to unilaterally dictate wages and working conditions, very much including non-price contract terms such as mandatory arbitration clauses and whether a worker will be classified as an employee or an independent contractor.[2] The phenomenon of the "Fissured Workplace" has been documented by David Weil, and the rising prevalence of the similar concept of "alternative work arrangements" was tracked in a paper by Lawrence Katz and Alan Krueger.[3] In specific instances we know that workers re-classified as independent contractors suffer sizeable wage penalties,[4] that low-wage workers increasingly do not benefit from the historic firm-size wage premium thanks to the threat of outsourcing,[5] that workers who work (as employees) for companies with concentrated buyers are paid lower wages,[6] and that overall, inter-firm earnings inequality has been a major component of the overall increase in income inequality — and that inter-firm inequality is *not* caused by rising dispersion in firm-size fixed effects, but rather in increasing segregation of low-wage workers into low-paying firms.[7] All of these phenomena are irreconcilable with a model of a competitive labor market in which a sufficient number of job offers equates workers' wages with their marginal productivity — instead, the balance of power has steadily shifted to the employer's side.

2 Benmelech, Bergman & Kim, "Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?," *NBER Working Papers*, no. 24307 (2018); Azar, Marinescu & Steinbaum, "Labor Market Concentration," *NBER Working Papers*, no. 24147 (2017).

3 Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Cambridge, MA: Harvard University Press, 2014); Katz & Krueger, "The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015," *NBER Working Papers* 22667 (2016).

4 Dube & Kaplan, "Does Outsourcing Reduce Wages in the Low-Wage Service Occupations? Evidence from Janitors and Guards," *ILR Review* 63, no. 2 (2010): 287–306.

5 Bloom et al., "Inequality and the Disappearing Large Firm Wage Premium," *American Economic Review Papers & Proceedings*, (2018); Cosic, "Wage Distribution in Large and Small Firms," *International Labour Review*, (2017); Cobb & Lin, "Growing Apart: The Changing Firm-Size Wage Premium and Its Inequality Consequences," *Organization Science* 28, no. 3 (2017): 429–46.

6 Wilmers, "Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers' Wages, 1978 to 2014," *American Sociological Review* 83, no. 2 (2018): 213–42.

7 Song et al., "Firming Up Inequality," *Working Paper*, (2016).

The divergence between antitrust jurisprudence and the facts on the ground is not a mere coincidence, unfortunate or otherwise. The premise of labor law is that with the control inherent in the employment relationship comes certain responsibilities on the part of the employer: to pay a minimum wage, to demand no more than maximum hours of work, to provide health, workers' compensation, and unemployment insurance, for example. In the era of the Fissured Workplace, what employers have increasingly realized, and availed themselves of, is their ability to exercise control without fulfilling their responsibilities, by formally erecting the boundary of a firm between employer and worker. This weakening of the labor law regime has been widely recognized by scholars and policy-makers; what has not been widely-recognized is the equivalent and commensurate weakening of antitrust law that enables employers to continue to exercise control despite the boundary they've erected. Relationships between firms, or between employers and non-statutorily-employed workers, is the realm of antitrust, and what our current antitrust regime has allowed is for firms to control the behavior of less-powerful counterparties, while it has heightened the scrutiny on those less-powerful counterparties who seek to resist that control.

Two antitrust cases concerning Uber represent this contrasting antitrust treatment for labor platforms and the workers who work for them. *Meyer v. Kalanick* asserts that in operating an app that coordinates price-setting among hundreds of thousands of ride-sharing drivers, Uber's business model violates both Sections 1 and 2 of the Sherman Act. *Chamber of Commerce v. Seattle* challenges the city's grant of collective bargaining rights to Uber drivers despite their continued status as independent contractors, in purported violation of Section 2. The former case was recently all but ended when the District Court sent it to arbitration, pursuant to the Second Circuit's reading of the expansive jurisprudence of the Federal Arbitration Act, while the Chamber of Commerce's case is currently before the Ninth Circuit, appealing a lower court's ruling in favor of the defense on a motion to dismiss on the grounds that the state action exemption shields Seattle's conduct. But even these seeming barriers to resolving the issues on the merits implicate larger policy questions about how antitrust will operate in the gig economy. And since the United Kingdom ruled that Uber drivers are in fact statutory employees, the questions have international policy significance as well.

II. *MEYER V. KALANICK*

In early 2016, an Uber customer, Spencer Meyer, sued the CEO on the grounds that he'd been victimized by a price-fixing conspiracy among the CEO and its drivers.[8] The company itself was later joined to the case by a motion of the defense, and since the substance of the case concerns Uber's business model, it's reasonable to refer to it as the defendant.

The employment classification of rideshare drivers has been a matter of controversy since Uber started entering major metropolitan markets around the country.[9] Its business model relies on the independent contractor classification for its drivers so that it does not have to pay for or insure their cars or provide minimum wage or overtime. In many jurisdictions, drivers and state authorities sued to force Uber to reclassify drivers as employees, based on longstanding statutory tests for whether a business's control over workers creates an employment relationship. Those classification suits have largely settled in Uber's favor — the company has been able to retain the independent contractor classification for its drivers, in exchange for small concessions and settlements.

The substance of Meyer's complaint is that since Uber does not employ its drivers, its price-setting, and specifically its price coordination through surge pricing, amounts to a violation of the Sherman Act, whether through a multilateral conspiracy or through unilateral action. The whole premise of the case is that if Uber is not an employer of its drivers under labor law, then it should not be able to set and coordinate prices among those independent contractors and evade liability under antitrust.

The focus on surge pricing in Meyer's complaint draws attention to conduct that would seem to be in violation of the consumer welfare standard, since on its face it reduces consumer surplus. In its defense, Uber has now commissioned two papers, one showing that it increases consumer surplus under conditions of high demand elasticity by its efficient matching algorithm that ensures more demand is met, the other one showing that long run driver supply elasticity is high enough that raising prices eventually equalizes driver wages and thus, by implication, benefits consumers.[10] Both findings are designed to indicate that Uber's pricing strategy increases consumer surplus, which would be a core element of its defense if it were to be forced to defend itself in a Rule of Reason context.

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8 For more on this case, see Steinbaum, "Uber's Antitrust Problem," *The American Prospect*, (2016), available at: http://prospect.org/article/uber%E2%80%99s-antitrust-problem.

9 For an overview of the classification issue, see Greenhouse, 2015. "Uber: on the Road to Nowhere," *The American Prospect*, (2015), available at: http://prospect.org/article/road-nowhere-3.

10 Cohen et al., "Using Big Data to Estimate Consumer Surplus: the Case of Uber," NBER Working Papers # 22627, (2016); Hall et al., "Labor Market Equilibration: Evidence from Uber" (2017), available at: http://john-joseph-horton.com/papers/uber_price.pdf.

In making the case that Uber is violating the Sherman Act, Meyer had a favorable precedent to work with from the *Apple ebooks* case prosecuted by the Justice Department in 2013. The DOJ alleged that an agreement between Apple and a consortium of publishers to erect an ebook platform to compete with Amazon was a hub-and-spoke conspiracy, and thus *per se* illegal. Had it instead been treated as a series of vertical agreements along a supply chain, it would have been subjected to the Rule of Reason following *Leegin Creative Leather Products v. PSKS.* Similarly, if the conspiracy of Uber and its drivers is hub-and-spoke, then it doesn't matter whether surge pricing increases or reduces consumer welfare — it violates the Sherman Act under the *per se* rule.

In this sense, the plaintiff in that case is turning the "antitrust paradox" referred to in the first paragraph of this article against Uber, since it cannot avail itself of the more favorable jurisprudence of Section 2 without risk that it might trigger labor law liability if it permits itself to be seen as a powerful monopoly, whether that monopoly is pro- or anti-competitive under antitrust. This points to a legal weakness unique to the labor platforms, as against other powerful tech sector platforms like Google, Facebook, or Amazon — at least the way the law currently stands, those firms can cop to their dominant market shares in the markets where they compete and claim to be benefiting consumers. Uber has thus far tried to do that as well, and thus far it has gotten away with it. Indeed, it has waged a campaign in state legislatures to immunize its business model from risk under labor law,[11] and it may eventually want to do that with one stroke at the federal level.[12] With those safe harbors from labor law liability in hand, Uber will be free to avail itself of the Rule of Reason in any defense to a theoretical monopolization or monopsonization case, making it unlikely such a case would ever be brought.

Spencer v. Kalanick survived a motion to dismiss in district court and the district court also voided Uber's mandatory arbitration clause. But that issue was appealed to the Second Circuit, and in August 2017 that court overturned the lower court's ruling. Thus, this past March, the district court was forced to send the case to arbitration. Of course, there could be a public antitrust case along similar lines against Uber, but there appears to be no indication that such a case would be forthcoming. Because it markets itself as displacing traditional taxi companies that have enjoyed local monopolies, it appears that the agencies consider Uber's business model to be pro-competitive and hence are loath to challenge it, on the theory that that would be "interfering" in the technological displacement of one business model with another.

III. *CHAMBER OF COMMERCE V. SEATTLE*

In 2015, the city of Seattle granted collective bargaining rights to drivers for ridesharing and taxi companies classified as independent contractors. The context is that in the aftermath of the resolution of most employment misclassification claims in favor of Uber, drivers have sought some of the rights and benefits historically associated with employment even in their current situation as contractors — including the right to negotiate collectively with their employer outside the process of formal unionization enshrined in federal law in the National Labor Relations Act. That federally unprotected status, so-called "alt labor," is what the Seattle ordinance aims to carve out for rideshare drivers.

Alongside the legal right to collective bargaining and a voice on the job comes an exemption from federal antitrust laws, which outlaw collusion in the interest of promoting competition throughout the economy. In the first 10 years after the Sherman Act was passed in 1890, it was deployed against workers organizing against their bosses, rather than against the monopolies for whom it was intended. In response, the Clayton Act bestowed an exemption from antitrust law on labor organizing in 1914. When federal labor policy was regularized in the 1930s and early 1940s, collective bargaining rights became one of the many emoluments of statutory employment. That means that both collective bargaining and the antitrust exemption for it are among the labor rights workers no longer have access to in the era of the "Fissured Workplace."[13]

In November 2017, the Federal Trade Commission voted 2-0 to join the Justice Department's Antitrust Division in an amicus brief to the 9th Circuit Court of Appeals, siding with the Chamber of Commerce against the City of Seattle's grant of collective bargaining rights to independent contractors working as drivers for Uber, Lyft, taxis, and other ride-sharing companies.[14]

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11 Borkholder et al., "Uber State Interference: How Transportation Network Companies Buy, Bully, and Bamboozle Their Way to Deregulation" (National Employment Law Project, 2018).

12 Harris & Krueger, "A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker," *Hamilton Project Discussion Paper*, (2015).

13 Weil, 2015. *The Fissured Workplace: How Work Became So Bad for So Many and What Can be Done to Improve It.* Cambridge, MA: Harvard University Press, 2014. Katz & Krueger. 2016. "The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015."

14 Amicus brief of the FTC and DOJ in "Chamber of Commerce of the United States of America and Rasier, LLC, v. City of Seattle, et al.," available at: https://www.ftc.gov/policy/advocacy/amicus-briefs/2017/11/chamber-commerce-united-states-america-rasier-llc-v-city.

In their brief, the FTC and DOJ claim that "we take no position on whether or not the drivers covered by the challenged statutes are employees or independent contractors or how federal labor law may apply to this matter." The agencies contend that collective bargaining by independent contractors (as opposed to workers classified as employees) is not immune from antitrust challenge, which would relegate it to a *per se* violation of the Sherman Act. By claiming that collective bargaining by non-employees is illegal on its face and by writing this amicus brief in this case, the agencies implicitly contend that each and every Uber driver is an independent business rather than an employee in economic terms — siding with Uber in its labor law claims, despite the agencies' declarations to the contrary.

The stated aim of the brief is to restrict the application of the "state action" antitrust exemption. A recent paper by the American Antitrust Institute explains in detail how the state action exemption has been overused to protect anti-competitive conduct by quasi-official bodies, a subject about which the FTC recently won a Supreme Court case, *North Carolina State Board of Dental Examiners v. FTC*.[15] With this brief, the federal agencies are saying that the grant of regulatory authority made to the Seattle municipal government extends only to the consumer-facing side of the taxi and ridesharing business, not to the relationship between those companies and their drivers. As such, the drivers are exposed to full antitrust liability for bargaining collectively.

But as *Meyer v. Kalanick* illustrates, Uber itself fixes prices for its consumers. And since they aren't bound by any mandatory arbitration clause, the federal agencies could have sued Uber on those grounds — exactly the same ones they use to argue that collective bargaining by drivers is *per se* illegal. Following *Leegin v. PSKS*, the agencies might claim that Uber's price-fixing is subject to the Rule of Reason because it is vertical, and therefore the sort of Rule-of-Reason-motivated evidence brought forward in the two Uber-commissioned studies is convincing on the merits of whether Uber's price-fixing is pro- or anti-competitive. But if they did want to challenge Uber, they would have the favorable ruling in the *Apple ebooks* case.

The choice on the part of FTC and DOJ to use the Sherman Act against the drivers, and not against Uber, thus seems to reflect a policy choice that the greater threat to competition comes from drivers negotiating collectively with powerful companies and not from those powerful companies exercising their power, either in the market for their drivers or with respect to consumers, among whom they price-discriminate. In that sense, they are coming to the opposite conclusion to the Seattle city council in passing their ordinance to allow collective bargaining by drivers, in the hope of regulating the employer-worker relationship to the benefit of employees because Uber enjoys the greater bargaining power. The federal agencies' attempt to overturn the Seattle municipal authorities' policy judgement in this matter thus implicates the crucial element at the heart of the state action exemption: federal policy preempts state policy, but in matters of competition, there's a jurisprudence that exempts state decisions to restrict competition to serve other ends. In this case, a restriction of competition in the form of driver collective bargaining could be seen as pro-competitive since the market is monopsonized. In fact, Seattle definitely does see it that way, and if the federal agencies disagree, they could challenge the ordinance on the merits (as may happen in the district court if their amicus brief carries the day in the Chamber of Commerce's appeal of the defense's previously-granted motion to dismiss).

Another irony of the agencies' brief is that in its defense against allegations of employment misclassification, Uber claims not to be an employer in the market for drivers — directly at odds with the competition authorities' intervention on its behalf in this case. The FTC-DOJ brief says,

> The State of Washington's for-hire transportation laws do not clearly show that the State intended to displace competition in the *driver services market* [italics in original]. State law permits municipalities to regulate transportation services provided to consumers… Although it authorized displacement of competition in the provision of transportation service, the State has not acted 'in [the] particular field' at issue here… The State did not 'affirmatively contemplate anticompetitive conduct' in the market for driver services, which is distinct from the consumer service market.

This language makes it clear that the DOJ and FTC believe that Washington state law acts to displace competition in the consumer-facing side of ridesharing and taxi services, but not on the driver-facing side. Unfortunately for that argument, in its defense against employment misclassification, Uber itself contends that it does not operate at all on the consumer-facing side of the ride-sharing market. Instead, Uber's presentation of its business model is that it is a software company that licenses an app to drivers that enables them to provide ridesharing services to customers. If that is the case, then according to Uber, the state's grant of regulatory authority over ridesharing to the City of Seattle shields driver collective bargaining from antitrust scrutiny, since everything drivers do in the ridesharing market is consumer-facing. At the very least, it is incoherent to argue that Uber drivers are independent contractors (as the DOJ and FTC do, by claiming that their collective bargaining violates the Sherman Act) and that their collective bargaining is not protected by the state action exemption, given Washington's statute.

15 Stutz, "State Occupational Licensing Reform and the Federal Antitrust Laws: Making Sense of a post-*Dental Examiners* Landscape," (2017), available at: http://www.antitrustinstitute.org/sites/default/files/Occupational%20Licensing%20White%20Paper.11.6.17.pdf.

The market structure the DOJ and FTC contemplate is that Uber is a platform: It provides ridesharing services to customers, and it purchases labor from drivers. Given that, the brief does not make sense unless Uber drivers are employees — in which case the entire ordinance is unnecessary, and collective bargaining by those employees is shielded by the labor exemption.

What this illustrates is simply that Uber, and many other powerful tech companies, have a chameleon-like quality that they use to avoid all types of regulation: labor and antitrust, in this case. Their real business model is the regulatory arbitrage that those alternative configurations represent. Figuring out how not to be bound by regulations that your competitors must abide by isn't innovation, and yet, it appears to be the core contribution of the tech sector to the U.S. economy.

IV. CONCLUSION

Finally, to return to the economic question at the core of these two cases: Antitrust jurisprudence, as currently constituted, mostly assumes that labor markets are inherently competitive, so restrictions on competition like collective bargaining would "distort" them to the benefit of workers. It also assumes that anything that benefits consumers in the form of lower prices is pro-competitive, and hence that price- and wage-setting by Uber represents economic innovation being passed along to the market and should thus be shielded from antitrust scrutiny.

In fact, increasing economic evidence shows that labor markets are monopsonized — by powerful companies like Uber.[16] When employers have discretion over wage-setting, they restrict their labor demand to be below the competitive level to lower the market wage and increase their profits. And under those circumstances, empowering workers on the other side of the market likely raises wages and increases employment. Thus, underlying the questionable legal reasoning in the DOJ-FTC brief is a questionable economic theory. And in a world in which firms have wage-setting power in the labor market, it isn't true that maximizing consumer welfare on its own makes the economy competitive. In fact, it is quite possible that welfare on each side of the market might be in tension, and the existing antitrust bias in favor of protecting consumers lets powerful platforms engage in predatory pricing and erect vertical restraints that lower prices while maximizing buyer power to extract surplus from their supply chains, including workers.[17]

Labor market monopsony thus presents antitrust enforcers with a policy problem their existing tools and approaches are ill-suited to solve. And to return to the point of the introduction, that is no coincidence: employer power and discretion over wages and terms of employment is the outcome of an overall legal regime, and specifically an antitrust regime, that excuses market power on the part of dominant employers, empowering them to exercise control without responsibility, while scrutinizing any form of countervailing power on the part of workers. And this, in turn, arises out of an ideology that assumes market power either doesn't exist or is equally distributed on both sides of the labor market. Neither assumption is borne out by the empirical evidence.

16 For a longer discussion of labor market monopsony and review of the evidence, see Steinbaum, "Antitrust in the Labor Market: Protectionist, or Pro-Competitive?" *ProMarket*, (2017), available at: https://promarket.org/antitrust-labor-market-protectionist-pro-competitive/.

17 Khan, *Amazon's Antitrust Paradox*, Yale Law Journal 126 (3), (2017).

PROMOTE OPENNESS OR STRENGTHEN PROTECTION? APPLICATION OF LAW TO DATA COMPETITION IN CHINA

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I. INTRODUCTION

User data is playing an increasingly important role in companies' business models in response to China's rapid development in the digital economy. Since Chinese online platforms are data-driven, data conflicts between various platforms have gradually attracted public attention. Even if the Anti-Monopoly Law of the People's Republic of China ("AML") has not been directly applied to data conflicts, the concept of "data monopoly" has gradually been taken seriously in both theoretical and practical circles. In July 2017, Mr. Guofeng Sun, head of the Financial Research Institute affiliated with the People's Bank of China, indicated that financial companies shall be prohibited from monopolizing data to achieve an information monopoly, becoming an "isolated information island," when promoting the development of high quality companies.[2] "Open access to big data" was also heatedly discussed during the "Two Sessions" held in 2018.[3] Nevertheless, there is no consensus with respect to whether there is data monopoly in China and whether the law shall play a role in this regard. In the opinion of Jack Ma, board chairman of Alibaba Group ("Alibaba"), it is "too naïve" to prevent data monopoly in China, since data is flowing, even if information is not.[4] Since 2016, there have been several data disputes concerning online platforms in China, such as the case initiated by Sina Weibo against Maimai for illegally scraping information in 2016 and the dispute between Cainiao and SF Express in 2017.[5]

It remains unclear whether the goal is to promote openness or strengthen the protection of data, especially personal information controlled by powerful online platforms, in the Chinese legal environment. On the one hand, whether data concerning personal information controlled by certain online platforms shall be open to the public so as to maintain effective competition would become a major problem for the Chinese competition authority. On the other hand, with enactment of the Network Security Law of the People's Republic of China ("Network Security Law") and other new laws and regulations, Chinese authorities will likely attach greater importance to protection of data concerning personal information, while infringement of user privacy will also attract attention of all walks of life. There might be more clashes between the AML requiring open access to data as competitive elements and other laws and regulations protecting personal information.

II. ANTI-MONOPOLY RULES PROMOTING OPENNESS OF COMPETITIVE ELEMENTS

On the basis of legislation and the practice of China's AML, the possibility for data (including personal information) obtained by a certain company, especially online platforms, to be considered as important competitive elements, cannot be excluded.

A. Concentration – Input Foreclosure

Article 28 of the AML authorizes the authority for AML enforcement to prohibit concentration which is able, or has the possibility, to eliminate or restrict competition. Furthermore, Article 7 of the Interim Provisions on Assessment of the Impact of Business Operator Concentration on Competition enacted by the Ministry of Commerce ("MOFCOM") in 2011 lists elements which must be taken into account when analyzing market entry barriers. Besides, the Provisions of the MOFCOM on Imposing Additional Restrictive Conditions on the Concentration of Business Operators (for Trial Implementation) released in 2014 also explicitly list acceptable commitments for conditionally-cleared concentrations, including but not limited to requiring the business operators to make available their respective networks, platforms and other infrastructure. In reality, M&A as well as re-structuring in the Chinese digital economic sector have happened from time to time in recent years. In early 2018, acquisitions of Eleme by Alibaba as well as Meituan's acquisition of Mobike have also attracted public attention, one of the most important aims was data integration. The Chinese competition agency will likely pay more attention to data foreclosure during anti-monopoly review in the future. Accordingly, the rules mentioned above are ready to provide a legal basis.

From the perspective of China's merger control practice, even though no case directly concerning data (input) foreclosure has be found yet, several conditionally cleared cases reflect the competition authority's concern with input foreclosure. Accordingly, behavioral remedies with respect to open access to input have been required. In 2014, MOFCOM conditionally cleared Microsoft's acquisition of Nokia's devices and services business. In the end, Microsoft was required to continue licensing its SPEs under fair, reasonable and non-discriminatory conditions as already promised to Standards-setting organizations.[6] There is the possibility for MOFCOM to regard data concerning personal information as an essential input and require the undertaking concerned to open data access to third parties in the future.

2 Available at: http://finance.ifeng.com/a/20170715/15531939_0.shtml.

3 Available at: http://tech.sina.com.cn/i/2018-03-06/doc-ifxipenn7202082.shtml.

4 Available at: http://tech.cnr.cn/techgd/20170629/t20170629_523825156.shtml.

5 Zhang & Gong, "The Economic Characteristics of Data Competition in China's Digital Economy," *CPI Antitrust Chronicle*, March 2018.

6 Available at: http://fldj.mofcom.gov.cn/article/ztxx/201404/20140400542415.shtml.

B. Abuse of Market Dominance – Refusal to License

In certain cases, if refusal to license data were analyzed from the perspective of anti-monopoly law, it may concern the controversial issue of essential facility. Article 17(3) of the AML prohibits undertakings with dominant market positions from refusing to trade with counterparts without justifiable reasons. Even if the "essential facility" principle is not explicitly listed, there is still space left for the Chinese competition authority to apply this principle. Article 4 of the Provisions for Administrative Authorities for Industry and Commerce on Prohibiting Abuses of Dominant Market Positions promulgated by the State Administration for Industry and Commerce ("SAIC") in 2010 explicitly forbids undertakings with market dominance from refusing to trade with counterparties by rejecting the counterparties' request to use essential facilities. Furthermore, the criteria to determine an "essential facility" are also clearly presented. Besides, the Provisions on Prohibiting the Abuse of Intellectual Property Rights to Eliminate or Restrict Competition released in 2015 by SAIC also explicitly make clear the applicability of the essential facility principle to intellectual property rights ("IPR"). In March 2017, the MOFCOM integrated drafts of the anti-monopoly guidelines against abuse of IPRs drawn up by three Chinese competition agencies and solicited public opinions, explicitly mentioning the essential facility principle.[7]

Chinese competition agencies have already dealt with several abuse cases concerning refusal to deal in practice, but excluding data refusal. Abuse of dominance via refusal to deal by Chongqing Southwest No. 2 Pharmaceutical Factory Co., Ltd. ("Chongqing Pharmaceutical") was punished by the Chongqing branch of SAIC in 2016. In this case, the relevant undertaking refused to offer an input called "phenol Active Pharmaceutical Ingredient" ("API"), which is irreplaceable for preparations containing phenol. In the end, the authority required Chongqing Pharmaceutical to terminate the illegal conduct and imposed fines. As for fights for data between online platforms in China, for those entering judicial proceedings, the plaintiffs only turned to the AUCL instead of the AML. This might partly be explained by the huge burden to be born with respect to the definition of the relevant market, recognition of market dominance and other complicated issues. However, there would be increasing data conflicts between giant online platforms, including whether the essential facility theory is applicable to data disputes, while the AML would still be an important legal instrument.

III. OTHER LEGAL MEANS TO STRENGTHEN PERSONAL INFORMATION PROTECTION

A. AUCL

Before enactment of the AML in 2017, the 1993 AUCL was actually a combination of *sensu stricto* anti-unfair competition law and anti-monopoly law. In 2017, the Chinese legislature amended the 1993 AUCL, deleting the types of conduct which should have been categorized as monopolistic conduct, to achieve coordination with the AML. Article 12 of the 2017 AUCL was designed to target unfair competitive conduct in the internet industry, which does not regulate conduct in relation to data directly, but acts as a miscellaneous provision: "A business operator shall not use technical means to carry out any activity that obstructs or disrupts the normal operations of online products or services lawfully provided by other business operators through affecting users' choices or otherwise."

We cannot conclude that the 2017 AUCL pays great attention to personal information protection only from the relevant provision itself. In practice, whether protection of personal information would be strengthened depends on how administrative authorities and courts would explain the AUCL – whether pubic interest or personal interest shall prevail. Nevertheless, there is no consensus in the Chinese theoretical and practical circles. Within the Chinese law community, some IPR scholars contend that the main function of the AUCL is to provide miscellaneous provisions for IPR protection, which means that the AUCL belongs to the IPR system. Others contend that the AUCL bears more characteristics of private law. In contrast, economic legal scholars hold that the AUCL shall be categorized to the public legal system, which means that it will focus more on the maintenance of market competition mechanisms for public interests. The controversy here originates from the unclear expression of Article 2 of the 1993 AUCL (Definition and Principle), which was not made clearer by the 2017 AUCL.

We consider that application of the AUCL will be more closely connected with strengthening personal information protection for two reasons below. First, Article 2 of the 2017 AUCL introduces "consumer" as a new kind of subject whose rights and interests shall be protected. In other words, the new AUCL is placed to provide more protection to consumers. Since personal information is an essential part of consumer rights and interests, the relevant authority will gradually pay more attention in this regard. Second, from judgements made by Chinese people's courts through applying the AUCL to cases concerning data, we find the trend of stronger protection provided to personal information. For example, in the *Sina Weibo v. Maimai* case, the court established a triple authorization principle – "user authorization" + "platform authorization" + "user authorization." Consumers' freedom of choice shall be respected and protected. In reality, before the 1993 AUCL was revised, Chinese courts had applied the "Definition and Principle" provision to disputes in internet and other innovative industries. With promulgation of the revised AUCL,

7 Available at: http://fldj.mofcom.gov.cn/article/zcfb/201703/20170302539418.shtml.

when it comes to data competition issue, courts could choose between the internet-specific sub-miscellaneous provision of Article 12(4) and the broader miscellaneous provision of Article 2. If analyzing from the perspective of private law, it is possible that protection of personal information will prevail access to it in certain cases.

B. Law on Protection of Consumer Rights and Interests

Law of the People's Republic of China on Protection of Consumer Rights and Interests ("Law on Protection of Consumer Rights and Interests") was enacted in 1993, and amended in 2013 on a large scale. One of the most prominent changes was the introduction of the internet consumption provision (Article 29), setting guidelines for business operators to collect and make use of personal information. Besides, the Opinions on Strengthening Protection of Consumer Rights and Interests in Internet Consumption enacted by the SAIC in 2016 further point out that illegal conduct which might infringe rights and interests of consumer information shall be prohibited. In recent years, various branches of SAIC have also investigated several cases concerning the leak and misuse of consumer information and punished relevant undertakings. We believe that the authorities will continue to focus more on enforcement in this area.

C. Network Security Law

In order to maintain network security, safeguard cyberspace sovereignty, national security and public interests, and promote the sound development of economic and social information technology, the Network Security Law was enacted in late 2016. The Network Security Law draws a border around network operator's use of personal information from the perspective of network information security, to name Articles 41-44 as typical examples. The enactment of the Network Security Law has attracted attention from many different circles, while a series of supporting rules have also been under discussion since then, such as the Information Security Technology: Personal Information Security Standards (BG/T 35273-2017)("Standards") enacted by China National Standardization Commission and officially enacted on January 24, 2018. The Standards provide detailed compliance guidelines for collecting, conserving, employing, sharing, transferring, disclosing and any other conduct concerning information processing at the state level. It is predicted that the Network Security Law will play a pivotal role in China's digital economy in the future.

D. Other Laws and Regulations to Come

1. Personality Rights Section of the Civil Code

In recent years, the Chinese legislature has tried every effort to draft the *Civil Code*. In November 2017, the release of the Personality Rights Section (Draft) triggered widespread controversies. The relevant legal basis is Article 111 of the General Rules on the Civil Law of the People's Republic of China ("General Rules on the Civil Law"). As a whole, the Personality Right Section (Draft) treats personal information as an object of privacy rights, establishing personal information protection in the mode of "*ex-ante* restriction on application scope + authorization," which is obvious over-privatization of personal information, in our opinion. The Civil Law Working Group affiliated with the Chinese Academy of Social Sciences challenges that, "Whether such kind of legislation mode has fully, completely and systematically reflected changes to application scenarios of personal information in modern society and a new relationship between personal rights and public interests? It is well worth deep analysis." Furthermore, the Civil Law Working Group stated:

> In today's information era, personal information is neither object of private right nor part of property right deriving from personality right, but has become invaluable resources which shall be shared between the state, companies and individuals. Therefore, personal information legislation shall not be restricted to protection of personal rights and interests or private rights, but pay extra attention to the balance of individual and public interests during exploring information assets, and better place the public goods role played by personal information in promoting individual comprehensive development and social advancement. It is not only in line with the whole trend, but also a must for Chinese legislation to adapt to the big data era.[8]

From our perspective, future development of the Personality Rights Section of the Chinese Civil Code will have a non-negligible effect on the application of anti-monopoly law to online platform data concerning personal information. If sticking with the draft released in November 2017, emphasizing private rights attributed to personal information, there might be conflicts when applying essential facility theory to data conflicts during antitrust enforcement.

8 Civil Law Working Group: Reform of Legislation Mode concerning Personal Information Protection in the Big Data Era, "To Go with Civil Law" WeChat Public Account.

2. E-Commerce Laws

In recent years, China has also drafted e-commerce laws to protect the rights and interests of various parties participating in e-commerce activities, regulating market order and promoting sound development of e-commerce. In accordance with the second review of the draft of E-Commerce Law released by the Standing Committee of the National People's Congress in November 2017, e-commerce refers to "business activities of commodity or service transactions via information networks such as the Internet." E-commerce operators shall abide by relevant laws (such as the Network Security Law) and certain rules (Article 21 of the E-Commerce Law) when collecting and using individuals' personal data. Article 61 emphasizes the importance of balance between protection of e-commerce user information and promotion of public use of e-commerce data. Since huge amounts of data produced during the process of e-commerce directly concern personal information, the E-Commerce Law to be promulgated will probably restrict the AML's requirement to open access to data. For example, will consumers be able to request deletion of their personal data, access to which are required to be open to third parties by the anti-monopoly agencies, on the basis of the right to delete?

IV. CONCLUSION AND OUTLOOK

A. Potential Conflicts with Respect to Application of Various Laws to Data Competition

1. Conflicts between Legislative Goals of Different Branches of Law

With the development of the digital economy, the competitive and strategic resources role played by data will become increasingly prominent, which is usually closely connected with personal information. There is the possibility for the Chinese competition authority to require undertakings to open access to data in merger control and abuse of market dominance cases. From the perspective of the Chinese anti-monopoly legislation and practice, there is a relevant legal basis and enforcement possibility.

Both the application of the AUCL to data competition and amendment to and enactment of the Law on Protection of Consumer Rights and Interests and Network Security Law are characterized with stronger personal information protection. From the published draft of the Personality Rights Section of the Civil Code and E-Commerce Law, we could also find a trace of emphasis on personal information protection. Therefore, the rules mentioned above would unavoidably conflict with the requirement to open access to data brought by application of the anti-monopoly law to data competition in specific cases. To name the potential conflict between the Network Security Law and the AML as an example, if an online platform were required to open access to data concerning consumer data on the basis of "essential facility," then restrictions on personal information use stipulated by the Network Security Law might be breached.

Overall, the potential conflict mentioned above reflects controversies between public and private rights protected by different branches of law, namely effective competition mechanism and personal information, including privacy rights. Since an effective competition mechanism to be maintained by anti-monopoly law will finally be reflected in the upgrade of consumer rights and interests, the conflicts in application of the law could be explained as conflicts between short-term consumer rights and long-term consumer rights, as well as direct consumer rights and indirect consumer rights. There is an urgent need to rethink how to protect personal information in the modern digital economy.

2. Conflicts Arising from Enforcement of Different Branches of Law

First, there might be conflicts in enforcement practice between different administrative departments and ministries. To name the Network Security Law as an example, the main administrative enforcement body is the Cyberspace Administration of China ("Cyberspace Administration"). With enactment of the Network Security Law and consecutive supporting rules to come, the Cyberspace Administration will have an increasingly important position. The relationship between the Cyberspace Administration and competition agencies is, accordingly, well worthy of attention. For example, when it comes to conduct of a specific online platform, anti-monopoly authorities may require it to open access to data, while the Cyberspace Administration would pay more attention to protecting user data and personal information. It would make online platforms confront contradictory regulation requirements. Second, the current Chinese anti-monopoly judicial mechanism would also have an effect. There is no independent competition judicial tribunal in China, and anti-monopoly cases are heard by IPR tribunals. In reality, the Chinese IPR circle has also tried to explore data issues from their perspective. In the first version of the General Provisions of Civil Law (consultation draft), "data information" was stipulated under "IPR," which was strongly opposed by the majority of experts. In the final version, one cannot find "information" or "data" in the IPR section. This legislation process also reflects the close and complicated relationship between data and IPR. Since the training obtained by Chinese IPR judges from school or during work mainly focuses on IPR or civil laws and regulations, private rights will probably prevail when there is conflict between personal data rights and public interests in a case concerning anti-monopoly issues.

B. Enforcement Conflict Resolution and Relevant Challenges

1. Upgraded Status of Competition Policy

The status of competition policy in China has been continually upgraded in recent years. In 2013, the Decision of the CPC Central Committee on Several Major Issues about Comprehensively Deepening Reform put forward during the 3rd Plenary Session of the 18th CPC Central Committee clearly states that, the "Market shall play the decisive role in resources allocation. Monopoly and unfair competition shall be prohibited." Chinese authorities have also tried to make competition policy play a more important role in the Chinese economy by establishing a "fair competition review system." To be more specific, the State Council released the Opinions on Establishing Fair Competition Review System during Market System Construction in 2016.[9] In 2017, the three Chinese competition agencies, together with the Legal Office of the State Council and the Ministry of Finance published the Implementing Rules of Fair Competition Review System (Trial).[10] Acting as the key of competition policy, the AML will play an increasingly important role in the construction of the Chinese market economy. Whether the AML will prevail when contradiction arises between the AML and other branches of law still remains to be seen.

2. Consideration of Other Branches of Law during AML Enforcement

a) Concentration

On the one hand, the Chinese authorities could take effects which might be brought by other branches of law into account appropriately in anti-monopoly review. Whether a concentration would foreclose data as an input will depend on whether the undertaking to be established has the ability, incentive and viability to foreclose. When analyzing foreclosure ability, the authorities shall weigh the importance of laws and regulations aimed at protecting personal information, such as the Law on Protection of Consumer Rights and Interests and the Network Security Law. The decision on whether to constrain or restrict the consolidated undertaking's ability to foreclose an input will influence the competition agency's judgement on potential anti-competitive effects. That is to say, potential conflict between enforcement of anti-monopoly and other branches of law could be avoided if protection of personal information is duly taken into account when reviewing a concentration.

On the other hand, the defense rights of undertakings must be fully respected. In certain cases, undertakings may defend themselves from the input foreclosure concerns (from the perspective of personal information protection) so as to maintain the public interest. In this situation, the competition authority must make an assessment, determining whether closed access to data is in line with the public interest in the sense of the anti-monopoly law, and whether it is persuasive enough to constitute an effective defense in the anti-monopoly legal system.

b) Abuse of Market Dominance

As for suspected abuse of market dominance, the AML authorizes relevant undertakings to put forward "justified reasons" to defend themselves. Article 8 of the Provisions for Administrative Authorities for Industry and Commerce on Prohibiting Abuses of Dominant Market Positions provides some references on how to define "justified reasons." The competition authority shall fully respect a defense put forward by relevant parties in certain cases with respect to their refusal to license specific data to determine whether it is justified, including whether denial of access to personal information is also legally justified from the perspective of competition policy. As for the final remedies, even if relevant undertakings are required to open access to data, authorization of users could be requested if it concerns personal information.

c) Influence of the Competition Authority Structure Reform

It has been ten years since the AML came into force in 2008. In early 2018, significant changes were made in the central government departments. In March 2018, the State Council Institutional Plan was ratified by the 1st Session of the 13th National People's Congress. The State Administration for Market Regulation ("SAMR") was established, combining the competences of the SAIC, the General Administration of Quality Supervision, the Inspection and Quarantine, the Price Supervision and the Anti-Monopoly Bureau under the National Development and Reform Commission, the Anti-Monopoly Bureau under MOFCOM and the Office of Anti-Monopoly Commission under the State Council. The SAMR is directly affiliated with the State Council, and the commencement ceremony was held on April 10, 2018. The new arrangement for competences, structure and staff should be released by the end of September 2018. Even if news of detailed plans for specific anti-monopoly law enforcement agencies under the SAMR has not been heard of till now, the combination of *ex-ante* review of concentrations and *ex-post* regulation of anti-competitive agreements and abuse of market dominance, as well as investigation rights of price-related and non-price-related monopolistic conduct,

9 Available at: http://www.gov.cn/zhengce/content/2016-06/14/content_5082066.htm.

10 Available at: http://www.gov.cn/xinwen/201710/5234731.htm.

means a lot, compared with the division of anti-monopoly enforcement competence between the three competition agencies before. The SAMR will also keep the competence of anti-unfair competition and consumer protection which the SAIC was in charge of before.

On the one hand, the structural reform could eliminate potential conflicts at certain administrative enforcement stages to some extent. On the other hand, the structural reform only plays a limited role in resolving legal conflicts. First, it would bring no direct difference to the court when balancing private and public rights when applying the AML and AUCL. Second, legal enforcement power of the Network Security Law is not within the competence of the SAMR and it remains unclear whether it would be competent to enforce the E-Commerce Law. Potential conflicts in this enforcement aspect cannot be ignored, either.

To sum up, how to coordinate open access to, and protection of, data is the basic issue for the modern digital economy. In order to predict the future development of anti-monopoly enforcement in China's digital economy, full consideration must be taken of China's current legal system, and relevant legislative and enforcement trends. This paper tries to analyze the relationship between two trends – open access to, and stronger protection of, data – from a non-negligible perspective. Acting as a globally significant digital economy, China must make full use of the potential of its digital economy so as to better enjoy various rights and interests brought by the digital economy while maintaining a proper balance. However, it is no easy task and also one of the most challenging obstacles for competition jurisdictions all over the world.


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