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EU Trends: Looking Back…Looking Forward

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

In Roman times, Janus was the god of beginnings and endings. For this reason, he was usually depicted as having two faces: one looks to the past, and the other to the future. But Janus was also the god of transitions. With the first term of Margarethe Vestager's tenure as Competition Commissioner coming to an end, and her second about to begin, in this edition of the CPI Antitrust Chronicle, we take a Janus-like look at enforcement trends in Europe, as we transition from one Vestager administration to the next.

Looking back: one article takes stock of Commissioner Vestager's first five years, and sets out her likely priorities during her second, historic term, with an enlarged mission to make Europe "fit for the Digital Age." Another identifies trends in the Commission's annual report for 2018, and their implications for future enforcement, particularly in digital markets. At the national level, another article evaluates the record of the Spanish competition authority as it celebrates its 30th anniversary, and identifies the challenges it faces ahead.

Looking forward: other authors tackle specific questions, learning from the past while plotting out a possible future: Based on its decades of experience, how should the Commission reform its vertical block exemption regulation to continue to be relevant for the third decade of the century? Should the Commission revive its past practice of interim measures in antitrust proceedings as a means to protect competition before fast-moving facts render a case moot? And should long-standing EU competition rules be adapted or modified for the digital age, and if so, how?

These articles reflect both the changes and continuity in European competition enforcement in a time of accelerating economic developments. We hope that they shed some light on the crucial competition issues European regulators will face in the months and years to come.

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

Sincerely,

CPI Team[1]

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

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The Vertical Block Exemption Regulation – Time for Boldness?

By Ian Forrester & Nathalie Leyns

The article reviews the early days of the European competition policy on vertical distribution and speculates that, some fifty years on, the latest revision of the block exemption regulation might usefully consider whether guidance or a formal exemption is preferable.

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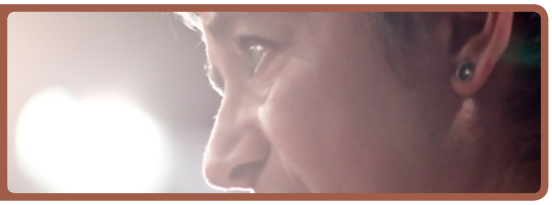

What Agenda for the Second Term of Commissioner Vestager?

By Mario Todino & Emilie Ry Schou

Margrethe Vestager has been nominated for a second term as Competition Commissioner, as well as Executive Vice President for digital. In her new role, Commissioner Vestager is likely to encounter two political challenges: the first stems from the potential clash between the role of unbiased competition enforcer, and industry-involved digital regulator; the second from increasing pressure for a reform to protect European Champions. Commissioner Vestager should moreover, in our view, strive to prioritize certain key areas to align the competition law toolbox with modern-day reality. For example, guidelines should be revised to address the complexities of innovation and digital markets, and the merger control regime should be tweaked to deal with killer acquisitions. In State Aid, the strict position on support interventions to distressed banks by deposit guarantee schemes should be revisited. Finally, from a procedural standpoint, the focus should be on tempering reliance on internal documents, aligning substantive with procedural convergence, and shortening antitrust investigations.

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Revival of Commission Interim Measures?

By Bo Vesterdorf

The article discusses the recent decision by the Commission to once again impose interim measures in appropriate anti-trust cases early during the investigation. This announced new policy has been followed up by announcing that interim measures could be decided in the Broadcom case. The article briefly discusses the legal conditions that must be met by the Commission and points out pros and cons in this regard. In particular, it is stressed that in view of the serious economic and perhaps irreversible market consequences such measures may have for an undertaking which at that point of time has not been found guilty of any infringement – and therefore is to be presumed innocent – such measures should only be considered in the most serious cases. It must be sufficiently demonstrated that an infringement is at least more likely than not and that it is clearly urgent to impose interim measures to prevent irreversible damage to competition.

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EU Competition Policy for the Digital Age - Key Developments and Emerging Trends

By Salomé Cisnal de Ugarte & Stelios Charitopoulos

On July 15, 2019, the European Commission published its Report on Competition policy for 2018. Published annually, this report provides a non-exhaustive summary of most important decisions as well as legislative and policy initiatives adopted by the Commission in the field of EU competition law during the previous calendar year. Yet, when viewed within the context of the recent renomination of Margrethe Vestager as Commissioner for Competition and recent political developments in the EU and global competition law trends, the report can provide significant insight into the Commission's future priorities. This article provides an overview of the Report and focuses on the most significant developments. It then explains how the Report fits within the broader context of competition policy and examines the trends that are likely to persist and develop under the Von der Leyen Commission and the expanded mandate of the soon-to-be Executive Vice-President Margrethe Vestager to lead the work on a Europe fit for the Digital Age.

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Shortcuts and Courts in the Era of Digitization

By Alfonso Lamadrid de Pablo

The era of digitization is one of many promises, but it is also defined by a certain anxiety and by our search for immediate, superficial, and effortless solutions to different problems. It is an era where we have been tempted to second-guess the established consensus, to skip steps and do away with previous rules and precedents. The law, in this era, is often seen as a tool to effect changes, but also as an inconvenient obstacle to easy fixes. This context may help explain many current debates, including the ongoing re-thinking of competition law and policy. This contribution offers critical comments on some of the premises underlying this recent thinking, focusing primarily on the Special Advisers' Report "Competition Policy for the Digital Era."

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The Spanish Competition Act: An Evaluation and Future Perspectives

By Beatriz de Guindos

The Spanish Competition Authority is celebrating its 30th birthday with a very positive balance, after a long way travelled and many challenges ahead. The integration of the independent regulatory bodies in a unique institution has raised a lot of synergies which are especially useful in the present context. The development of the digital markets and the way to face the challenges they pose to from competition authorities is still a hot topic worldwide. In parallel, CNMC is dealing with the amendment of the Competition Act – looking for the global consensus – and making efforts to preserve the effectiveness of our successful leniency program.

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Reflections on Consumer Trust and Competition in the Digitalized Economy

By Ania Thiemann & Sophie Flaherty

Recent work indicates that the current competition framework is flexible enough to be adapted to address the challenges arising from digitalization. Key features of the digital economy such as economies of scale and scope, network effects and the role of data, can provide significant advantages to incumbents and help market players gain, entrench, and exploit market power. The acquisition and use of data by digital platforms, for example, influences the competitive landscape, affecting consumer trust and competition for and in the relevant market. In terms of enforcement, completion authorities may need to consider new theories of harm, while traditional analytical tools will have to be modified for the digital world. At the same time, a more pro-active competition policy will be required to deal with fast-moving markets. Referring to recent EU reports and OECD work, this paper discusses the continued relevance of the consumer welfare standard and stresses the importance for enforcers to better understand how digital markets work. It analyses important supply and demand side considerations in digital markets and focuses on the application of these within two central areas, the use of data and digital mergers.

WHAT'S NEXT?

For November 2019, we will feature Chronicles focused on issues related to (1) **Consumer Welfare**; and (2) **Compliance**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2019, 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 CHRONICLES DECEMBER 2019

For December 2019, we will feature Chronicles focused on issues related to (1) **Global Digital Reports**; and (2) **Inequality**.

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 on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

THE VERTICAL BLOCK EXEMPTION REGULATION – TIME FOR BOLDNESS?

BY IAN FORRESTER & NATHALIE LEYNS[1]

1 Ian Forrester is a Judge of the General Court of the European Union and an Honorary Professor in European law. Nathalie Leyns is a Legal secretary of the General Court of the European Union. The speculative views and ideas expressed in this paper are entirely personal contributions to an important legislative process.

I. INTRODUCTION

For a young lawyer in Brussels in the 1970's or 1980's, the easiest and clearest advice on competition law would relate to vertical distribution. If one could imagine European competition law then as a tree, the branches representing joint ventures, technology licensing, abuse of dominance or even cartels were thin and scraggly, whereas the parallel trade branch was huge and well furnished with smaller branches.

More fines were imposed for breaches of the rules on parallel trade than for any other category of infringement. To a certain degree, cartels involving national champions enjoyed a milder climate. Although they were never tolerated, the enforcement priorities of DG IV tended to focus on easier targets. One can understand this phenomenon. An infant institution which could not count on the political support of Member States, and which was pursuing a new – and not particularly welcome – policy that threatened severe sanctions on successful businesses for pursuing classic capitalist policies (exclusive relationships, volume discounts, national as opposed to European market approaches) tended for understandable reasons to choose easy targets rather than over-ambitious ones.

The focus on cross border trade also corresponded to a higher political policy objective: achieving and encouraging the single market. The Treaty of Rome made elaborately detailed provisions on the elimination of governmental obstacles to trade (tariffs, certificates of origin, health and safety checks, and so on). Those were massive incursions on the regulatory freedom of the six Member States, and the proper reach of those incursions was hotly debated. DG IV understandably wished to avoid the creation of private contractual obstacles having an equivalent effect to the official ones whose removal had been a hardly won battle.

On the other hand, in the 1960's, a very high percentage of physical goods were handled by agents (commercial travelers with a car full of brushes, wine or cosmetics) or by exclusive trading relationships. These operators were a vital part of the daily commerce of a Europe of nation states. Parliamentarians, chambers of commerce, lawyers, and ministries spoke up for their interests. The status of agents was addressed in one of the so-called Christmas Messages in December 1962,[2] but exclusive distributors and supply agreements were covered by Regulation 67/67,[3] which became so celebrated that in the London Underground, adverts were posted asking (more or less) "Do you know the Do's and Don'ts of Regulation 67/67? If not, read the Economist."

The huge merit of that text was its great simplicity. Vertical distribution agreements on a territorially exclusive basis could be legal. However, that exclusivity had clear limitations. Resellers could be prohibited from looking for customers for the goods to which an agreement related, or from establishing a branch or warehouse outside the assigned territory.[4] By contrast, fierce penalties awaited those who hindered the resellers' right to accept orders from other Member States.

In the early case of *WEA-Filipacchi Music S.A.*,[5] Dr. Hartmut Johannes (a kind, learned and jovial teacher as well as an official of DG IV) encouraged a retailer in Paris to offer to sell Rolling Stones records in another Member State. Dr Johannes had been buying records for his daughter who lived in Belgium. He was told by the shop manager that such sales were forbidden by contract. The manager wrote and signed a short letter of complaint as requested by the Commission official and in less than nine months a fine of 60,000 units of account was imposed by the Commission. A succession of cases involving clothes, alcohols, construction materials, tennis balls, cars, hi-fi equipment, record players, and pharmaceuticals followed. In some cases, the accused company argued that the offensive contractual language had never been implemented, or that parallel trade actually occurred routinely regardless of the contractual terms, or even that the offending contract had been forgotten in a drawer when all the other parallel contracts were being corrected (*Toshiba TEG*[6]). Such arguments were nearly always unsuccessful. Gradually, business people got the message. Regulation 67/67 was thus a safe haven for those who organized exclusive distribution networks. Ignoring it could risk huge fines (huge, that is, according to the standards of the time). Toshiba TEG had to pay 2 million ECU in punishment for not having "cleaned up" one out of a dozen contracts. One of the parties in the *Pioneer Hi-Fi* decision[7] was fined 4,350,000 units of account for a more intentional infringement.

2 Commission Notice of December 24, 1962 on exclusive dealing contracts with commercial agents, OJ 139/62, pp. 2921-2922.

3 Regulation n° 67/67/EEC of the Commission of March 22, 1967 on the application of Article 85 (3) of the Treaty to certain categories of exclusive dealing agreements.

4 Article 2 of Regulation 67/67.

5 Commission Decision of December 22, 1972, 72/480/CEE, *WEA-Filipacchi Music S.A.* [1972] OJ L303/52.

6 Commission Decision of June 5, 1991, Case IV/32.879, *Viho/Toshiba* [1991] OJ L287/39.

7 Commission Decision of December 14, 1979, Case IV/29.595, *Pioneer Hi-Fi Equipment* [1980] OJ L60/21.

The heirs of Regulation 67/67 were rather more sophisticated. Regulation 1983/83[8] and Regulation 1984/83[9] established more complex rules dealing respectively with exclusive distribution agreements and exclusive purchasing agreements. Gradually, the diet of enforcement evolved, and European priorities better matched those of other antitrust authorities around the world. Technology licensing became a hot topic (Dr Johannes moved on to patent licensing).

The next versions of the block exemption were Regulation 2790/99[10] and its successor Regulation 330/2010[11] together with the Guidelines on Vertical Restraints,[12] which brought a radical change in the way vertical agreements were approached. The Commission's goal was to introduce a single regulation that would cover all vertical restraints in the field of distribution of goods or services. Individuals and businesses were expected to self-assess vertical agreements and decide for themselves whether they could benefit from a block exemption or not. The regulations established a presumption of legality for vertical agreements that fitted specifically listed criteria.

The furor which accompanied the Commission's renunciation in 2004[13] of its monopoly over the granting of exemptions pursuant to Article 101(3) (formerly 85(3) of the EC Treaty) somewhat overshadowed the more technical tweaking of the heir and successor of Regulation 67/67.

Some regretted the disappearance of a process whereby a business could request formal advice from the authority, but most welcomed the relaxation of a system where hundreds of notifications were filed not really to get clarification but to create the appearance of good faith legality. To some degree, the reform of the most recent block exemption regulation offers a similar choice between rigid specificity and flexible analysis in light of basic principles.

This paper will address this significant revision of the block exemption regulation and assess the merits or demerits of being more flexible and less prescriptive.

II. PROSPECTS OF A FLEXIBLE FUTURE?

Currently, selective distribution agreements are presumed to be legal, under narrow conditions. The market share held by each of the parties to the agreement on any of the relevant markets affected by the vertical agreement should not exceed 30 percent,[14] and the agreement should not contain any "hardcore restrictions" of competition in the sense of current Regulation 330/2010.[15]

Targeting vertical agreements for companies over a certain market threshold was intended to limit the possibility that companies having great market power could enter agreements substantially restricting competition. They could thus claim, in case of controversy, that they were entitled to believe in the availability of the block exemption and escape scrutiny of competition authorities' individual control.[16] This concern can be seen as a repetition of the concern at the time of the abandonment in 2004 of the old prescriptive regime: does certainty with a degree of rigidity deliver a more effective compliance than self-assessment with guidance?

The conventional wisdom in the 1970s was that businesses could not be trusted with too much freedom to maneuver. There was by no means consensus among manufacturers that permitting and even empowering "free riders" was fair or necessarily beneficial for consumers, since intermediaries took too much of the profit. Thus, the basic principle was easy to explain for the lawyers, but the client might be hesitant to accept it.

8 Regulation (EEC) 1983/83 of June 22, 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive distribution agreements.

9 Regulation (EEC) 1984/83 of June 22, 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive purchasing agreements.

10 Regulation (EC) 2790/1999 of December 22, 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices.

11 Regulation (EU) 330/2010 of April 20, 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1.

12 Commission Guidelines on Vertical Restraints, 2010/C 130/01.

13 Council Regulation (EC) 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ, L.1, 4.1.2003, pp. 1-25.

14 Under Regulation 2790/99, the market share threshold only applied to the supplier. The change brought by Regulation 330/2010 aimed at taking into account the increasing market power held by large distributors.

15 According to Recital 10 of Regulation 330/2010 and paragraph 47 of the Guidelines on Vertical Restraints, an agreement that contains a "hardcore restriction" is presumed to fall within article 101(1) TFEU.

16 Communication from the Commission on the application of the Community competition rules to vertical restraints, Follow-up to the Green Paper on Vertical Restraints, OJ C 365/3, November 26, 1998.

Nowadays, maybe it is time for a fresh approach. Greater market power does not automatically hinder inter-brand competition and have negative effects on competition, though of course it may. Additionally, a restriction on competition does not automatically amount to a restriction on the economic freedom of operators in the marketplace. Many vertical agreements do not have any anti-competitive effect. Is it worth reflecting once more on whether "free riders," who buy in a low price market and sell in a high price country where the local distributor has made costly marketing, necessarily confer advantage on consumers?

One may also reflect on whether the 30 percent market share threshold is an appropriate tool for distinguishing agreements that can automatically benefit from the block exemption and those that need an individual examination. A 30 percent market share threshold does not say much about the overall market situation. Perhaps a vertical agreement has anti-competitive effects when the parties have, or one of them has, a market share between 20 and 30 percent? There may be grounds for concern at 29 percent or no grounds for concern at 31 percent. Moreover, as recent practice makes clear, defining the "relevant market" of the goods or services can frequently be controversial and indeed technically very abstract. This type of analysis remains largely subjective. Whereas some categories of products or services appear to be clearly different from one another, in most situations an exact confident definition of the relevant market is liable to be hazardous.

Does the current block exemption system perfectly deliver legal certainty and equal treatment of competitors? The 30 percent market share threshold necessarily envisages a sharp distinction between competitors who may be similarly situated. Discouraging one company from using a distribution system available to its competitors on the same market for the sole reason that such competitors are below the market share threshold puts it in a position that might constitute a real disadvantage. Thus, a business that is nervous of infringing the law may elect not to enter a deal because its market share might be found too high. The bolder competitor might decide to go ahead and trust in its defenses if there were a challenge.

In the same spirit, why blacklist certain classic contractual provisions as hardcore restrictions such as resale price maintenance[17] which, in the absence of high market power, are not certain to have negative effects on competition and do not necessarily decrease consumer welfare? Maybe we should try to be more certain that such provisions produce negative effects on competition in the sense of article 101(1) TFEU. Of course, in many cases the imposition of resale price maintenance has a damaging impact on consumer welfare. In four recent decisions, the Commission imposed a total fine of more than 111 million euros on four consumer electronics manufacturers for imposing fixed or minimum resale price maintenance, as a result of which consumers faced higher prices for kitchen appliances, hair dryers, notebook computers, headphones, and other products.[18]

We wonder if there are really no cases where it might help a small supplier to make progress in the market place. Departing from the strict language of article 4 of Regulation 330/2010, the Commission itself presents a more relaxed attitude towards hardcore restrictions in the Guidelines on Vertical Restraints.[19] We are not commenting on the merits of those efforts to promote price competition, just noting that there might be situations where "safety," "luxury," or "public health" (examples at random) might indicate a different conclusion.

It is not our purpose to set a match to burn fifty years of jurisprudence. Achieving the common market is an important goal of EU competition policy and that will not change. However, there is no harm in considering afresh how traditional doctrines are best applied. Rigid certainty has confronted flexible common sense on many occasions in European law in many sectors. How to balance the conflicting arguments?

The same reasoning applies to internet sales restrictions. Online sales have constituted a major market development in the last twenty years and have led to a variety of selective distribution agreements. Whereas the first condemnations related to more simple and general prohibitions to sell via the Internet (*B&W Loudspeaker*,[20] *Yves Saint Laurent Parfums*,[21] *Yamaha*[22] and *Pierre Fabre*[23]), they were followed by the

17 The Commission's approach is very different from that of the U.S. Supreme Court in *Leegin* [*Leegin Creative Leather Products, Inc. v PSKS, Inc.*, 551 U.S. 877 (2007)], in which the Supreme Court overruled an earlier judgment which had held that resale price maintenance was *per se* illegal. The Supreme Court indicated that pro and anti-competitive effects of such practice deserve to be fully analyzed under a "rule of reason" standard, thus requiring the courts to analyze the actual effects of the restraint.

18 Commission Decisions of July 24, 2018, Case AT.40465, *Asus (vertical restraints)*, 2018/C 338/08; Case AT.40469, *Denon & Marantz (vertical restraints),* 2018/C 335/05; Case AT.40181, *Philips (vertical restraints)*, 2018/C 340/07 ; Case AT.40182, *Pioneer (vertical restraints),* 2018/C 338/11.

19 Guidelines on Vertical restraints, paragraphs 60 to 64, 106 to 109, and 255.

20 Commission's press release IP/00/1418, 6 December 2000.

21 Commission's press release IP/01/713, 17 May 2001.

22 Commission Decision of 16 July 2003, Case COMP/37.975, *PO/Yamaha*.

23 Decision of October 13, 2011, Pierre Fabre Dermo-Cosmétique, C-439/09, EU:C:2011:649.

recognition that certain internet sales restrictions could be adequate, proportionate, and justified in light of the nature of the products at hand.[24] The geographic "neutrality" of online sales is not easy to reconcile with exclusive territories, which are a traditional feature of how many luxury products are sold.

Again, it is not our purpose to say that perfumes are apt for luxury law and face creams are not. We suggest that each situation is best decided on its merits. If a platform ban (such as the ban on using Amazon or eBay for online sales) is not a hardcore restriction and can be justified by the desire to preserve the luxury image of the supplier's products, provided it does not equate with a total online sale ban (*Coty*), what about other categories of products and other types of online restrictions? The Commission recently fined the clothing company Guess 40 million euros.[25] Guess had imposed a series of restrictions on its authorized retailers of footwear, clothes and accessories, and had prevented them from selling the contract products online without obtaining a prior specific authorization from the company. It also restricted the retailers' ability to decide their resale prices and banned them from using the Guess brand names and trademarks as keywords in Google AdWords. The Commission found that Guess' restrictive practices prevented the retailers from being sufficiently "findable" online, seriously reduced their viability, and amounted to an unjustifiable ban on using trademarks and brand names for online sales advertising.

Vertical restraints can have both competitive and anti-competitive effects, depending on the context in which they are used and the goal they are supposed to achieve. We gently suggest that there should be less focus on whether specific restrictions are deemed illegal *per se* while others are always acceptable, and more on the effect they have on the market. The argument that platform bans and the prohibition on using comparison shopping sites should be considered as hardcore restrictions (*Adidas*,[26] *Asics*,[27] KVZ,[28] *Samsung*[29]) could be opposed to other decisions (less numerous) showing tolerance towards third-party platform bans for the sales of mechanical garden equipment (*Stihl*[30]), as well as cosmetics (*Caudalie*[31]) and sport products (*Nike*[32]) of a "luxury" nature. Now, these differences in approach could be explained by a thorough consideration of the business environment and its specificities in each country. According to the Commission, the results of its e-commerce sector inquiry indicate that there are important differences from one Member State to another in the incidence of online sales by retailers. In Germany, 62 percent of the respondent retailers indicate that they sell via online marketplaces, compared to 13 percent in Austria and Italy, and 4 percent in Belgium. In general, the proportion in other Member States is lower than one third of the retailers.[33]

It might be useful to reflect on why and how these big differences arise and consider whether competition enforcement should be adapted in consequence. Depending on the circumstances, and the importance of the role played by online marketplaces (where the goods are sold through an independent platform like Amazon or eBay) as sales channel, a third-party platform ban or a price-comparison site ban could still permit several other methods to sell online or, to the contrary, could amount to an illegal significant restriction upon online sales.

Regulation 330/2010 expires on May 31, 2022. The Commission has already launched a public consultation before deciding whether the current regime should be extended unchanged, revised or come to an end. Without arguing that it would be preferable to return to the system

24 Decision of December 6, 2017, *Coty Germany*, C-230/16, EU:C:2017:941; Guidelines on Vertical Restraints, paragraphs 52-64; See also F. Amato, "Internet Sales and the New EU Rules on Vertical Restraints," The CPI Antitrust Journal, June 2010 (2) for examples of national courts' decisions to declare selective distribution systems compatible with article 101(1) TFEU, such as different pricing of goods intended to be sold online or offline, the requirement to sell a portion of goods offline, the obligation to have at least one physical point of sale and exclusion of pure online retailers, and the prohibition of sales through an internet auction website.

25 Commission Decision, December 17, 2018, Case AT.40428 — *Guess*, 2019/C 47/04.

26 German FCO Decision of June 27, 2014, B3-137/12, Adidas, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2014/B3-137-12.html; On November 18, 2015, the French Competition Authority announced it closed its investigation after Adidas announced it had changed its online sales terms: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=606&id_article=2668.

27 German FCO Decision of August 26, 2015, B2-98/11 – *ASICS*, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Kartellverbot/2015/B2-98-11.html.

28 BGH, Decision of December 12, 2017, *KVZ* 41/17, http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&nr=80673&pos=25&anz=515.

29 Autorité de la Concurrence Française, Decision of July 23, 2014, n° 14-D-17 – *Samsung*, http://www.autoritedelaconcurrence.fr/user/avisdec.php?numero=14D07.

30 Autorité de la Concurrence Française, Decision of October 24, 2018, n° 18-D-23 – *STIHL*, http://www.autoritedelaconcurrence.fr/pdf/avis/18d23.pdf. Stihl was nevertheless fined for imposing obligations to either personally pick-up the product at the retailer's premises or to have the retailer hand-deliver them to the customers.

31 Cour de cassation française, Judgment of September 13, 2017, *Caudalie/eNova santé*, n° 16-15-067, https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000035573298&fastReqId=1430212509&fastPos=1; Court of Appeals, Paris, Pôle 1, ch. 8, July 13, 2018, n° 17/20787, *eNova santé/Caudalie*.

32 District Court of Amsterdam, Decision of October 4, 2017, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2017:7282.

33 Report from the Commission to the Council and the European Parliament, Final report on the E-commerce Sector Inquiry, 10 May 2017, COM(2017)229 final, paragraphs 39-40; Preliminary report on the E-commerce Sector Inquiry, Brussels, 15 September 2016, SWD(2016) 312 final, p. 9.

prior to the block exemption regulations, the strong economic diversity of the Common Market and constant innovation in a huge market may advocate for a less prescriptive regime in which the practical effects of a vertical restraint are pragmatically balanced.

One question continuously in dispute is whether companies could be trusted with the evaluation of the legality of their conduct. The old regime of a blanket prohibition coupled with an exemption regime was good for its day but needed to be discarded.

It should be borne in mind that it is impossible for any regulation to contain all possible cases, and that rules aiming at covering every possible scenario may become unnecessarily complicated. Why not consider that guidelines alone are capable of attaining the intended goal? Faced with complicated rules, businesses may be willing to live without knowing with certainty whether an agreement is consistent with article 101(1) TFEU.

III. A FINAL WORD

It will be clear from the foregoing that the European Commission has invested huge efforts in turning the competition rules to aid the integration of the common market. Its pursuit of this goal was a world first. It was called a civil religion. The U.S. authorities did not have as an enforcement priority economic integration or the removal of contractual barriers to trade between the states. The fines imposed were for their days enormous and the cases contributed to achieving a successful respect for the applicable rules.

Today, the market place has altered significantly. Online shopping is universal. Economic frontiers barely exist anymore (what rules might apply in the event of a Brexit are of course uncertain). Consumers know very well where products are the cheapest. They can choose to go to a local shop or to buy online. A common market in physical goods has largely been created. It is at least possible that the Commission's efforts over 52 years have achieved what competition rule making can hope to achieve.

In parallel, we may note that from 2004 the enforcement of competition rules has been shared with national courts and national competition authorities. This renunciation of the Commission's former monopoly of interpretation has permitted a richer case law to emerge. Yes, there will be divergences between the Commission and national authorities' or courts' appreciation of what constitutes an unlawful restriction of competition. There will also be changes of course and decisions which history will declare erroneous or imperfect. Gradually, however, the principles of sound competition law will emerge and will prevail, not through rule making but through self-assessment by intelligent business people who take account of the competition rules when arranging how to deliver goods or services in a Europe of 500 million people, always tempered by judicial oversight.

In an ideal world, the application of competition law principles by a competition authority to a complicated set of facts should be the same, whether there is a detailed block exemption regulation or not. The presence or the absence of a block exemption regulation ought to be a matter of convenience only and should not change the outcome of a case. The merit of a block exemption is that it shortens the process of examination of a competition problem. It should ideally go further than stating the obvious, while not being too cautious in offering reassurance. We await the new version – if any – with lively interest.

WHAT AGENDA FOR THE SECOND TERM OF COMMISSIONER VESTAGER?

BY MARIO TODINO & EMILIE RY SCHOU[1]

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I. INTRODUCTION

In an unprecedented move in the history of the European Commission, Margrethe Vestager has been nominated Competition Commissioner for a second consecutive term. Commissioner Vestager's renomination for one of the most coveted and, arguably, most demanding, Commission positions, is undoubtedly a testament to her achievements. In addition to an extension of her competition mandate, Commissioner Vestager has also been entrusted with the title of Executive Vice-President for a "Europe fit for the Digital Age."

The purpose of this article is to discuss the challenges that Commissioner Vestager will likely encounter, as well as the objectives that she should prioritize in her new powerful role within the Commission.

In particular, we argue that the two biggest challenges she will have to face in her new role are: (i) finding the right balance between enforcement and regulation in the high-tech industry; and (ii) resisting political pressure to introduce potentially disruptive changes to the EU merger control regime.

From a substantive standpoint, we advocate that Commissioner Vestager should pursue relatively minor reforms to refine, at the margins, the current enforcement system, such as (i) a reform of the merger control rules to tackle so-called "killer acquisitions"; (ii) new sectoral guidance concerning digital markets; and (iii) a review of the Commission's Notice on market definition to better reflect modern-day competitive dynamics.

From a procedural standpoint, we argue, first, that the Commission's increasingly heavy reliance on internal documents in merger control should be tempered. Next, we argue that once procedural convergence has been achieved with the ECN+ Directive, the Commission should prioritize substantive convergence, i.e. ensure that national competition authorities ("NCAs") consistently apply Articles 101 and 102 TFEU across the EU. Finally, we argue that, at a time when changes in the economy occur at a very fast pace, it is key for an effective enforcement agency to secure timely interventions, an objective that could be better reached by introducing deadlines to shorten the average duration of antitrust investigations, rather than by systematically resorting to interim measures.

II. COMMISSIONER VESTAGER'S FIRST TERM – THE LEGACY

Within the antitrust community, there is general agreement that the EU Commission's accomplishments during Margrethe Vestager's first term as Competition Commissioner are significant.

In merger control, new substantive standards have materialized: innovation has become a key competition parameter for the assessment of mergers, at the same level as price and output; the removal of a "close" competitor, rather than the closest competitor, is now sufficient for a merger to be blocked; and "gap" cases are no longer the exception.[2]

In antitrust, enforcement priorities have changed: effects-based analysis has been strengthened, also thanks to its endorsement by the Court of Justice ("ECJ") in the recent *Intel* ruling; and while cartel investigations have diminished in number, in tune with modern developments, emphasis is now on vertical restraints impacting e-commerce on the web, with algorithms, artificial intelligence ("AI"), and big data becoming the bread and butter of DG Comp. Reverse settlement deals in the pharma sector have also ended up on the radar screen.

In State Aids, the campaign against allegedly preferential fiscal regimes enjoyed by large multinationals is proving for the time being successful, in light of the recent judgments of the General Court.[3]

In the meantime, the EU enforcement toolkit has also been refined: procedural convergence is being achieved following the adoption of the ECN+ Directive, and now all NCAs are equipped with similar investigative and enforcement powers. New investigative techniques have been developed both in mergers (with more emphasis on requests for information, and internal documents, as well as prosecution of gun jumping and misleading information), and in antitrust (where DG Comp is using dedicated software to detect online cartels, and has set up a whistleblower desk).

Importantly, while, on the other side of the Atlantic, a vocal debate has unfolded on how to address perceived problems related to the development of the digital economy (spurred on by adherents of the so-called "hipster antitrust" and "neo-Brandesianism" movements), in Europe, Commissioner Vestager has taken significant enforcement action in a string of landmark cases against a number of high-tech players.

2 I.e. transactions giving rise to anticompetitive unilateral effects, despite the absence of the creation or strengthening of a dominant position as a result of the merger.

3 Cases T-755/15, *Luxembourg v. Commission*, and T-760/15, *Netherlands v. Commission*.

But, above all, Commissioner Vestager has been praised for enforcing competition rules impartially and with no deference, against businesses and Member States alike.

Finally, her accomplishments have been cloaked in a catchy narrative (based on the notion of "fair competition"), which has proved popular with the public.

Against this background, what are the challenges, and what should be the priorities of the newly re-nominated Commissioner? The impression is that she has more to lose than to win from a second term given the challenges ahead.

III. COMMISSIONER VESTAGER'S ROLE WITHIN THE VON DER LEYEN COMMISSION – THE POLITICAL CHALLENGES

A. Reconciling Enforcement with Regulation

The first significant challenge that Commissioner Vestager will face stems from the dual role she has been assigned: Executive Vice-President for a Europe Fit for the Digital Age, and head of antitrust enforcement.

Von der Leyen's mission letter, as addressed to Commissioner Vestager, articulates in some length the responsibilities that come with the digital role, namely overseeing digital taxation, coordinating work on AI, and upgrading liability and safety rules for digital platforms as part of a new Digital Services Act.

Although Sylvie Goulard had initially been designated by von der Leyen to oversee (among others) DG CONNECT, the recent rejection by the European Parliament of her nomination means that DG CONNECT may well ultimately fall under Commissioner Vestager's portfolio. Previously, on the other hand, some had considered that Commissioner Vestager's actual powers in digital affairs were likely to be limited to the realm of competition enforcement.[4] In any event, regardless of the scope of her mission in the digital area, there remains tension between these two potentially conflicting competences.

Enforcement, on the one hand, requires independence and impartiality when applying the competition rules, with consumer welfare as the sole and ultimate objective. An independent competition enforcer must take a quasi-judicial stance, and the less interference and influence from (possibly politicized) stakeholders, the better. On the other hand, the role of a regulator is to listen to all stakeholders and factor in all views, considerations, and vested interests prior to proposing a regulatory framework. Consequently, this dual mission entails, in and of itself, a potential clash between the role of unbiased enforcer, and industry-involved regulator.

Against this background, the question arises as to what Commissioner Vestager's real role should be in influencing any new regulatory framework for the digital industry. In other words, should Commissioner Vestager strive towards implementing new, pro-competitive regulation in order to tackle the "digital problem," if ever one exists, or should she continue to rely on the competition law toolbox, as she has done for the past five years?

On the regulation side, one example of a proposed *ex ante* regulatory "quick fix" is structural unbundling, similar to what was implemented in the energy and transport sectors. This solution is primarily envisaged for vertically integrated platforms which show or might show a propensity for "self-preferencing."[5]

4 Stolton, S. (2019), "Vestager the digital chief in name, but Goulard in practice," Euractiv, September 11, 2019, available at https://www.euractiv.com/section/digital/news/vestager-the-digital-chief-in-name-but-goulard-in-practice/.

5 Crémer et al (2019), "Competition Policy for the digital era," *European Commission*, p. 67.

One might query the actual merits of such measures in the first place, in terms of whether they would actually solve any supposed competition deficiencies in digital markets, given their characteristic network effects.[6] Other *ex ante* instruments, such as behavioral tools that would strong-arm large digital platforms with "gatekeeper" roles into sharing data from the outset, even before any alleged abuse has occurred, have also been proposed.[7]

We would recommend caution in embracing either of these regulatory stances. The digital industry is still young and the extent of the perceived problems is too uncertain to call for radical, and irreversible, *ex ante* regulatory changes, at least at this early stage. In-depth sector inquiries and consultations with industry stakeholders and experts are needed as a first step to conclude that real market failures exist, and, only then, to lay the groundwork for potential regulatory intervention. Failing this, the risks of elimination of potential or existing efficiencies and ensuing chilling effects in an industry that is still highly innovation-driven are too great to justify taking the regulatory plunge.

In the meantime, the existing antitrust rules should continue to act as the primary tool to address any competition issues identified in the digital sector, and it would be sensible for the Commission to devote most of its energy to this task. This is all the more so given that, as the past five years have shown, the competition law toolbox as it currently stands may be in need of some fine-tuning in order to better tackle the digital industry.

In this respect, in our view, priority should be given to either updating existing guidelines, or devising entirely new guidelines, in order to address the specificities of the Commission's practice in the digital sector and provide consistent guidance beneficial to all stakeholders: businesses and enforcers alike.

In this context, issues deserving clarification are plentiful, ranging from the complexities of defining multi-sided markets, to the role of data in competition law.[8]

One issue that should be handled with particular care is the interplay between personal data issues, on the one hand, and competition law issues, on the other. Competition enforcers should refrain from developing theories of harm based on the rather alien (to competition law) concept of misuse of data. Such developments would risk venturing into a battleground which has been, and should remain, reserved for data protection enforcers.[9] This is why the Commission should act with extreme caution when dealing with investigations bringing together elements from both worlds. Claims touching on the subject of data protection should, in our view, be promptly diverted to the relevant authorities, and DG Comp should resist the temptation of blurring the lines between these two legal worlds, as the German Bundeskartellamt did in its recently overturned *Facebook* decision.[10]

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6 These networks effects give these markets a "*winner-takes-all quality*" and, consequently, a not unlikely fallout is that one of the divested entities eventually surpasses its peers, and a new giant ultimately forms. See SMITH E. (2018), "The techlash against Amazon, Facebook and Google – and what they can do," *The Economist*, January 20, 2019.

7 The Dutch government, for example, has urged the Commission to consider implementing such measures. See "Regulate tech giants and create European champions, says Dutch government," *Stibbe*, June 6, 2019, available at https://www.stibbe.com/en/news/2019/june/regulate-tech-giants-and-create-european-champions-says-dutch-government.

8 The question of whether data concentration might pose a risk ex-post as the result of a merger was cursorily addressed in the context of the *Facebook/WhatsApp* and *Microsoft/Linkedin* merger clearance decisions, although the Commission ultimately found that no such risk existed. Commentators have speculated that the Commission may have refrained, in those decisions, from venturing into abstract assessments of an "innovation offence" in data markets given that there would always be Article 102 TFEU left as a fallback tool to regulate anticompetitive behavior based on (mis)use of data *ex post*. See Kinsella, S. (2016), "The innovation offence," Chilling Competition, November 14, 2016, available at https://chillingcompetition.com/2016/11/14/the-innovation-offence-by-stephen-kinsella/.

9 As we know from well-established case law, competition law and data protection law need to be kept at an arm's length from one another (see e.g. Case C-238/05, *Asnef/Equifax*, at para. 63: "*any possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resulted on the basis of the relevant provisions governing data protection*"). Partitioning these two areas makes sense from a purely procedural perspective: while the competence for competition enforcement lies with the Commission, the competence with respect to data protection in turn lies with the relevant data protection supervisory authorities. Consequently, if conduct pertaining to personal data were to be subjected to scrutiny from both angles, the ensuing risk of dual proceedings and fines would run counter to the rule of law and the principle of *ne bis in idem*. See Volmar, M. N. & Heldmach, K.O. (2018), "Protecting consumers and their data through competition law? Rethinking abuse of dominance in light of the Federal Cartel Office's Facebook investigation," European Competition Journal, October 17, 2018.

10 Case no B6-22/16, Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing, Bundaeskartellamt, February 15, 2019. Commissioner Vestager has, for now, publicly distanced herself from this decision. See WHITE A., PONIKELSKA L. (2019), "Germany's Facebook Order Will Be Studied by EU, Vestager Says," *Bloomberg,* February 8, 2019.

Finally, clear guidance about the suitability of behavioral remedies, such as mandatory data sharing and access, including data portability and platform interoperability, would also be of great value.[11] Such behavioral remedies remain, for the time being, arguably the better and more appropriate tool to address the intricacies of data-intensive markets.

B. Resisting Interference from Member States – European Champions

The second very delicate issue is how to handle the Franco-German push for a reform of the EU Merger Regulation ("EUMR").

Commissioner Vestager's prohibition, despite political pressure, of the attempted *Siemens/Alstom* merger,[12] triggered a strong reaction from certain politicians, and prompted some EU Member States to advocate for new rules aimed at creating "European champions," including a joint proposal by Germany and France to give the Council a veto over Commission merger decisions. These proposals find their justification in what has been labelled "the Chinese threat." European companies, so the argument goes, over time will not be able to compete against ever-larger Chinese giants, which benefit from generous state subsidies and lax antitrust enforcement in their home country.

A similar concern also resonates in von der Leyen's mission letter to Commissioner Vestager, where the President-Elect explicitly makes a link between competition rules and industrial policy.[13]

In our view, Commissioner Vestager should resist any such attempt. In particular, the solution that France and Germany are proposing risks undermining the integrity of the internal market. Granting the Council the power to overrule a Commission prohibition decision on grounds other than competition concerns could in fact pave the way for the approval of deals harmful to consumers, based only on vocal political sponsorship. And while Europe might well end up with larger companies, European consumers would in all likelihood over time pay higher prices in the absence of sufficiently significant competitive constraints.

This is why in our view, admittedly legitimate industrial policy concerns about the competitiveness of our industry should be addressed from a different angle: the focus of any EU initiative to protect/strengthen European industry should be on maintaining a level playing field here at home, in particular between European companies and third country businesses not subject to stringent EU State Aid and competition rules. In this respect, stepping up the level of scrutiny and screening of public subsidies received by third country companies operating in Europe should be the priority in order to ensure that any such subsidies are properly factored into the Commission's assessment of a merger impacting the EEA market (up to the point of becoming a legitimate ground for blocking a deal).[14] In fact, in her mission letter, von der Leyen also refers to this task.[15]

A second, relatively simple, adjustment to the Commission's current merger analytical framework would be the revamping of the Notice on market definition, in order to better reflect economic reality. In that context, for example, in order to better take into account the competitive pressure coming from credible newcomers (including Chinese players), the issue of when potential competition is likely to turn into a significant competitive constraint deserves to be wholly reconsidered; all the more that the Commission is applying a dangerous double standard in assessing potential competition, depending on whether it is used as a sword (by the Commission) or as a shield (by the parties). Indeed, in many recent merger decisions impacting innovation and the merging parties' pipeline products, the Commission has applied a stretched time frame of several years over which the potential for success of the merging parties' pipeline products is to be evaluated, while it continues to use a shorter timeframe (two years) to determine whether third-party potential competitors should be treated as credible future entrants capable of exerting a significant competitive constraint.[16] This discrepancy has no place in the EU merger control system, which is governed by a general principle of symmetry, including in the assessment of the "counterfactual" scenario.

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11 See Heim, M. (2019), "Modernising European Competition Policy: A Brief Review of Member States' Proposals," *Bruegel*, July 24, 2019, available at https://bruegel.org/2019/07/modernising-european-competition-policy-a-brief-review-of-member-states-proposals/.

12 Case M.8677, *Siemens/Alstom*.

13 "*[C]ompetition will have an important role in our industrial strategy. The competitiveness of our industry depends on a level playing field that provides business with the incentive to invest, innovate and grow.*" In that regard, Vestager is expected to continue to *"work with the Member States to make the most of Important Projects of Common European Interest."* See Ursula von der Leyen's Mission Letter to Margrethe Vestager, dated September 10, 2019:

14 In fact, the horizontal guidelines (36) and the case law of the EU courts (see, e.g. Case T-156/98, *RJB Mining*) state already that in assessing a transaction the Commission takes into account the financial strength of the merged entity relative to its rivals.

15 *"As part of the industrial strategy, you should develop tools and policies to better tackle the distortive effects of foreign state ownership and subsidies in the internal market."*

16 In Case M.7275, *Novartis/GSK*, the Commission assessed innovations that may or may not enter the market in five to seven years' time. In Case M.7932, *Dow/DuPont*, the Commission assessed innovations that may or may not successfully enter the market in ten years' time.

IV. WHAT SHOULD COMMISSIONER VESTAGER'S ENFORCEMENT PRIORITIES BE?

Aside from these challenges, in terms of priorities, we would recommend a limited number of reforms that would be relatively simple to implement.

A. Merger Control

In merger control, the most sensitive topics that deserve to be discussed are: (i) killer acquisitions; (ii) common ownership; and (iii) the new test of harm to innovation.

1. Killer Acquisitions

So-called "killer acquisitions" (whereby an incumbent acquires a smaller company with significant potential to undermine its market position) are becoming increasingly widespread in some industries.[17]

For the time being, absent a referral from a Member State, these acquisitions typically escape the purely turnover-based notification requirement under the EUMR.[18] This deficiency has arguably resulted in several potentially problematic transactions slipping through the cracks.

In order to address this issue, which, based on recent trends, is not expected to dissipate any time soon, the Commission could introduce transaction value-based thresholds, to operate in tandem with the existing turnover-based regime. Inspiration for such a reform can be taken from the model which has run in Germany and Austria since the second half of 2017.[19]

As to the merits of a regime targeting incumbents with a pre-defined "strategic market status" (as proposed by certain commentators),[20] in our view such an approach would be too radical, at least at this initial stage where regulatory caution is warranted and the risk of over-enforcement could have negative effects on the economy.

2. Common Ownership

In recent years, "common ownership" (i.e. simultaneous ownership of shares in competing firms, typically by institutional investors) has also appeared on DG Comp's radar.[21]

Dow/Dupont made EU merger control history as the first time common ownership formed part of DG Comp's substantive analysis, although as an "element of context" in the Commission's overall assessment of the transaction. [22] Since then, Commissioner Vestager has publicly stated that a problem might exist in this regard. However, no concrete measures have as yet been taken to address these situations, as the Commission is still assessing the extent of the problem, if one exists at all.[23]

On balance, given the lack of consensus in the economic literature on this topic, in our view a total reform of the merger control system in order to address upfront these (still relatively isolated) instances is not yet warranted.

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17 According to some commentators these acquisitions are recurrent in the pharmaceutical industry and now also in the digital industry. See e.g. Cunningham, Ederer & Ma (2018), "Killer Acquisitions," available at http://faculty.som.yale.edu/songma/files/cem_killeracquisitions.pdf.

18 Tech start-ups do not typically profit from and monetize their user base until a relatively late stage, although their value and overall potential (usually based on their popularity) are more easily discerned from the outset. For example, Facebook did not make a profit for the first five years of its existence.

19 DG Comp is currently assessing the merits of these regimes in order to address the problem of killer acquisitions. See in this regard the speech by Commissioner Vestager: "Merger Control: The Road Ahead," June 19, 2019.

20 Perez de Lamo, D. (2019), "Preserving Innovation Competition in the Digital Era: 'Killer Acquisitions'," *Competition Policy International*, available at https://www.competitionpolicyinternational.com/student-challenge-quadriptych-shaping-competition-policy-in-the-era-of-digitisation/.

21 I.e. situations where investors hold minority stakes in several companies active within the same industry.

22 Case M. 7932, *Dow/DuPont*.

23 The purported danger here is that investors with shareholdings in competing companies might be able to influence the decisions of those companies, particular in concentrated sectors such as airlines and pharma, which could in turn lead to higher prices. See Elhague E., "The Growing Problem of Horizontal Shareholding," (June 15, 2017). Antitrust Chronicle, Vol. 3, June 2017, Competition Policy International; Harvard Public Law Working Paper No. 17-36.

3. Harm to Innovation

A topic which has caused heated debate within the antitrust community at large is the way the Commission is currently approaching the problem of mergers potentially harming innovation.

As already discussed, under Commissioner Vestager, DG Comp has profoundly revised its traditional analysis of innovation and, ultimately, introduced what some authors have labeled "a novel theory of harm in EU merger policy."[24] Under this theory, the Commission does not look at harm to innovation in a specific product market where the merging parties are developing similar pipeline products, but adopts a general assessment of "harm to innovation," unrelated to a specific product market, and without considering potential anticompetitive effects on this basis.

In a new industrial era driven by technological progress, it is legitimate that protection of innovation should be a priority in the Commission's merger enforcement activities. But this should not occur to the detriment of legal certainty, which is a fundamental principle of the EU legal order. The problem with an open-ended theory of harm based on generic "harm to innovation" is that the Commission is left with a significant margin of discretion, while businesses struggle to predict the implications of their commercial choices. Not to mention that overly aggressive enforcement also has the potential to stifle innovation. This is why, at the very least, the Commission's recent practice in point needs to be streamlined, and set out in structured guidance delimiting the boundaries of this theory of harm.

B. Antitrust Enforcement

In antitrust, DG Comp's current course of action seems relatively steady, and does not require significant adjustments.

In recent years, abuse of dominance case law had been riddled with inconsistency as a result of clashes between the form- and effect-based approaches.

The ECJ's *Intel* ruling,[25] however, marks a definitive shift towards the effects-based approach, thereby harmonizing the analytical framework across rebates cases. Recent rulings by the ECJ have moreover upheld the *Intel* effects-based approach in non-rebate cases as well.[26] This is a welcome development in that it offers greater clarity in relation to the appropriate legal test and standard of proof, which will not only serve to guide DG Comp but, more importantly, NCAs across the EU.

And while the *Intel* analytical framework already reflects, by and large, DG Comp's own established practice in antitrust investigations dealing with unilateral conduct,[27] the coming five years will hopefully show a definitive shift towards an ever-more rigorous application of the effects-based analysis across the board, with support from the Chief Economist's Team.

Concerning cartels, as noted above, the past few years have shown a marked slowdown in enforcement at the EU level, concomitant with a boost in activity in some of the larger individual Member States, including France, Germany, Italy, and Spain.

This is likely not a reflection of a loss of interest in cartels on DG Comp's part. The recent development of new investigative techniques and tools, such as the eLeniency online tool, which allows whistleblowers to report cartel behavior directly online, is an indication that cartels will continue to be high on the Commission's agenda (as, in our view, they should).

Finally, with the e-commerce sector inquiry having revealed the prevalence of vertical restraints in the form of selective distribution systems, pricing restrictions and recommendations, and platform bans, DG Comp will likely continue to closely scrutinize this sector in the coming years. DG Comp is also likely to provide more guidance in its new guidelines on vertical agreements, due in 2022. [28]

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24 Petit, N. (2017), "Significant Impediment to Industry Innovation: A Novel Theory of Harm in EU Merger Control?," February 4, 2017, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2911597.

25 Case C-413/14, *Intel Corporation Inc v. Commission*.

26 See C-525/16, *MEO v. Autoridade da Concorrência*, para. 31.

27 For example, Commissioner Vestager has publicly claimed that the Intel judgment will not fundamentally change how the Commission currently analyses exclusivity rebates. See Aranze, J. (2018), "Vestager: No fundamental change from Intel judgment," *Global Competition Review*, January 25, 2018, available at https://globalcompetitionreview.com/article/1153099/vestager-no-fundamental-change-from-intel-judgment.

28 See Staff Working Document, "EU competition rules on vertical agreements – evaluation," *European Commission*.

C. State Aid

In the State Aid area, an issue deserving urgent reconsideration is the Commission's approach to voluntary support interventions put in place by statutory deposit guarantee schemes ("DGS") to banks in distress.[29]

After having cleared multiple massive bail-outs in favor of distressed banks in Germany, France, and the UK during the so-called credit crunch – on the ground that there was a systemic risk for the EU economy – from 2013 onwards, the Commission has radically changed its policy, and imposed a strict "burden-sharing" principle, i.e. distressed banks should no longer be rescued with taxpayer money (no bail-outs). It is rather for the banks' "owners" (shareholders and junior debt holders) to bear the losses first ("bail-ins").[30]

While this principle has theoretical appeal, its radical interpretation by the Commission has created significant disruption, especially in those EU countries where the banking system was imperiled following the credit crunch (leading to crises in both sovereign debt and the "real" economy). The Commission has in particular prohibited as illegal State Aid any voluntary support taken by mandatory DGS to avert failures of distressed banks, on the ground that such schemes act in the name of a public policy mandate and their interventions are approved by Central Banks, hence imputable to the State.

In its recent *Banca Tercas* ruling,[31] the General Court has entirely rejected this reasoning: when taking voluntary alternative support measures, DGS are rather trying to minimize in the first place the financial burden that affiliated banks of the DGS would bear should the bank go bankrupt and all depositors be entitled to reimbursement. And by approving these measures, the Central Bank is merely exercising its statutory mission to ensure the stability of the financial system, which has nothing to do with the State imputability of the measure. In light of the above, it would now be sensible for the Commission to review its intransigent position in relation to voluntary support interventions of DGS. At a time when the economy within the EU is showing signs of weakness, the stability of banks is paramount for the purpose of sustaining the real economy.

Still in the area of State Aid, an issue that has for the time being been off the radar screen, but could soon emerge, is the ever-increasing panoply of aid approved by the Commission. The State Aid rules have become so intricate and diverse that there is apparently the possibility, with very few exceptions, for Member States to grant lawful aid for any given industry or business, and not necessarily only the most meritorious ones. The question that may soon come up is *cui prodest*? Is there a risk of a competitive distortion in view of the fact that some EU countries have budgetary constraints while very few have significant resources to subsidize their industry? The Commission had better push for increasing the EU budget and boosting EU funded projects of Community interest.

D. Procedural Reforms

1. Tempering Reliance on Internal Documents in Merger Control

In the past five years DG Comp's merger clearance decisions have increasingly relied on internal documents in its assessment of the compatibility of a merger under the EUMR.

While use of internal documents can, and usually does, serve to guide DG Comp to a sound and fully-informed decision, the pitfalls of a too-heavy reliance on such documents, on the other hand, are numerous, ranging from abnormally prolonged merger reviews,[32] increasing cost to business, to the risk of potentially biased decisions colored by cherry-picked documents.[33]

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29 DGS are statutory funds which have been set up in every MS as a result of an EU Directive (Directive 2014/49/UE), having as primary mission the reimbursement of depositors in case of failure of a credit institution. However, DGS can also voluntarily provide alternative support measures in favor of a bank in distress to avert failure of the latter, to the extent there is a good prospect of restructuring the bank and the cost of the intervention for the banks feeding the DGS is lower than the cost of reimbursement of depositors.

30 The bail-in principle is also the inspiring principle of the Banking Recovery and Resolution Directive (Directive 2014/59/EU, "BRRD").

31 Joined Cases T-98/16, *Italy v. Commission*, T-196/16, *Banca Popolare di Bari SCpA v. Commission*, and T-198/16 *Fondo interbancario di tutela dei depositi v. Commission*.

32 "Stop-the-clock" decisions after making requests for internal documents are a not an uncommon occurrence, and unnecessarily prolong the duration of merger reviews. See in this regard Kuhn, T. (2019), "EC focus on internal documents: Time to rethink the architecture of the EU merger control process?"

33 To the extent that DG Comp is bound by the EUMR to make an overall informed assessment based on the evidence as a whole, information overflow from internal documents runs the risk of blurring DG Comp's vision in the context of this mission and inhibiting its ability to make a balanced assessment. In the same vein, a too-heavy reliance on internal documents might lead DG Comp down a path of cherry-picking those documents which best corroborate its thesis. See in this regard Kuhn, T. (2019), "EC focus on internal documents: Time to rethink the architecture of the EU merger control process?"

In our view, DG Comp should therefore, in the coming term, act with caution when dealing with internal documents, in order to safeguard merger control enforcement transparency and impartiality.

2. Procedural vs. Substantive Convergence

Procedural convergence is one of Commissioner Vestager's primary achievements during her first term. Following the adoption of the ECN+ Directive,[34] as it is colloquially known, NCAs across the EU are heading towards a common antitrust enforcement model, i.e. they will act as independent agencies endowed with adequate resources and powerful investigative and fining powers.

There are, however, areas of procedural competition law where harmonization is far from achieved. For instance, the ECN+ Directive fails to introduce a long-overdue one-stop shop regime for leniency applications, which would eliminate the fragmentation and risks resulting from the co-existence of multiple national leniency programs working in parallel.[35] Nor does the ECN+ Directive deal with the critical topic of interim measures.

In her mission letter, and perhaps in tacit recognition that procedural convergence has not yet been satisfactorily achieved, von der Leyen has tasked Vestager with the mission of facilitating cooperation with and between NCAs, as part of the overall objective of strengthening competition enforcement.[36] On that basis, the next Commission will hopefully push harder to close those remaining gaps in relation to harmonization of procedural competition rules.

More importantly, procedural convergence should go hand in hand with substantive convergence, i.e. uniformity of substantive standards when assessing similar conduct under EU competition rules across the EU.

In a world where every NCA applies the same substantive rules and imposes the same (hefty) fines, it is no longer acceptable that the same conduct can be treated (and fined) in a very different manner. Yet, there are clear signs that significant discrepancies persist in applying supposedly common substantive standards among NCAs across the EU. In the context of an investigation of a rebate scheme by a dominant firm, for example, is the as-efficient competitor test a necessary step to establish an abuse? Can a pure exchange of information with no evidence of an alteration of the commercial conduct taken by the market actors, be treated and fined like the most egregious cartel? And in the investigation of an alleged refusal to deal, should objective justifications such as well-documented technical constraints, be considered sufficient to rule out an infringement of Article 102 TFEU?

Apart from the general guidance provided through its notices and guidelines, the Commission has at the moment limited powers to oversee the investigations run by NCAs under Articles 101 and 102 TFEU. Regulation 1/2003 provides the Commission with two tools to oversee the consistent application of EU competition law, namely the consultation procedure on draft final decisions of NCAs (Article 11(4)), and the possibility to take over a case from NCAs (Article 11(6)).

However, while the Commission hardly ever exercises its authority to take over an NCA's investigation, and typically only when a case has an EU-wide interest, its supervisory role under Article 11(4) of Regulation 1/2003 appears to be largely ineffective in overruling flawed NCAs' decisions. According to Article 11(4), EU NCAs have a duty to inform the Commission of any imminent decision applying Articles 101 and 102 TFEU, with the latter being entitled only to advise the NCAs as to the direction to take in enforcing EU competition rules. However, under this procedure, the Commission does not have binding powers, and, even worse, the consultation process starts at the very end of the decision-making process, when the findings of the investigations have crystallized and there is little appetite to change the course of an investigation.

Accordingly, a solution would be to provide the Commission with the power to intervene at an earlier stage (e.g. when the Statement of Objections is issued), and provide binding opinions, although the latter amendment would require a legislative reform, something that admittedly may not be easy to achieve.

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34 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

35 See in this regard Case C-428/14, *DHL Express (Italy) v. Autorità Garante della Concorrenza e del Mercato*. In this case, the CJEU affirmed the independence of the EU and national leniency programs from one another in the context of a company having applied for leniency both at the EU and national level at different points in time, resulting in diverging decisions on the granting of immunity.

36 See Ursula von der Leyen's Mission Letter to Margrethe Vestager, dated September 10, 2019: "*You should focus on improving* […] *speeding up investigations and facilitating cooperation with and between national competition authorities.*"

3. Shortening the Duration of Antitrust Investigations or Resorting to Interim Measures?

Finally, the timeliness of antitrust investigations is another area where we still see room for improvement. The past five years have, unfortunately, not shown meaningful progress in this area. The Commission still struggles to conclude cartel or abuse of dominance investigations in a timely manner, no doubt as a result of the increasingly complex nature of the markets under scrutiny.

This is particularly problematic in industries that are characteristically fast-paced and prone to "tipping" quickly, and where speedy intervention therefore becomes crucial in order to restore competitive conditions before harm to competition, and consequently to consumers, becomes irreversible. For example, in the digital industry, some commentators have argued that the combination of the inherently fast-moving features of digital markets[37] with sometimes decade-long investigations,[38] has resulted in many of the big tech cases brought by the Commission to have been for naught, as the decisions have come too late to have any real impact on the competitive landscape.[39]

To address this problem, some commentators propose the use of interim measures[40] as a tool to swiftly correct market deficiencies resulting from anti-competitive behavior before they take on a more permanent form.[41] This solution is increasingly relied on by several NCAs,[42] many of which have urged DG Comp to make more use of this instrument in order to speed up the antitrust process.[43]

While interim measures can help in some instances, they are not a permanent, structural solution to the problem. First, there is an issue of effectiveness that should not be underestimated. The EU's interim measures procedure is time consuming in itself. The many procedural hurdles underlying their successful implementation significantly affect their ultimate timeliness, the result of which is that it can sometimes take several months, if not more, before interim measures are effectively in force. Second, and perhaps more importantly, an inflationary use of interim measures would inevitably entail lowering the standard of proof required to grant such measures and compress the right of defense of the parties in the administrative proceeding before the Commission.

Instead, a more balanced solution would, in our view, be to introduce (non-mandatory) deadlines in order to shorten the length of antitrust investigations. This is probably also more in line with what von der Leyen had in mind when she tasked Commissioner Vestager, in her mission letter, with speeding up investigations in order to strengthen competition enforcement.[44]

Such mechanisms are already in place in several Member States,[45] and have to date shown very few downsides. In fact, in our view, a deadline instrument would not only be conducive to more timely intervention in order to address competitive harm in dynamic industries without simultaneously running the risk of encroaching on fundamental rights, but would also significantly increase the transparency of investigations. In addition, because they would be non-mandatory, DG Comp would not be *per se* legally accountable for respecting these deadlines, and its activities would therefore not be significantly impeded by their existence. Instead, DG Comp would be encouraged to meet them, in a best efforts type of commitment.

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37 See Gerardin, D. (2019), "What should EU competition policy do to address the concerns raised by the Digital Platforms' Market Power?," available at https://www.competitionpolicyinternational.com/what-should-eu-competition-policy-do-to-address-the-concerns-raised-by-the-digital-platforms-market-power/.

38 The *Google Shopping* case, for example, lasted almost ten years from the date the first complaint was submitted to the Commission by Foundem, to the date the fine was imposed. See "TIMELINE - Google's decade-long antitrust battle in Europe," *Reuters*, March 20, 2019, available at https://www.reuters.com/article/eu-google/timeline-googles-decade-long-antitrust-battle-in-europe-idUSL8N2166ZH.

39 Toplensky, R. (2019), "Vestager revives dormant antitrust weapon against tech groups," *Financial Times*, June 27, 2019.

40 DG Comp has historically been reluctant to use interim measures in antitrust investigations; for a recent (pending) case, see June 26, 2019, *Broadcom*. The difficulty with imposing interim measures stems from the inordinately heavy burden of proof underlying this tool, whereby the Commission is required to prove a *prima facie* infringement. In more novel cases, such as those in the tech industry where the anti-competitive effects of the conduct are not as black-and-white as in other more clear-cut abuse cases, this has proven to be a quasi-impossible task.

41 See Gerardin, D. (2019), "What should EU competition policy do to address the concerns raised by the Digital Platforms' market power?," available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3257967.

42 France, for example, adopted interim measures in a total of 15 cases between 2007 and 2017. See Burnside A.J., Kidane, A. (2018), "Interim Measures: An overview of EU and national case law," *Concurrences,* available at https://www.concurrences.com/en/bulletin/special-issues/interim-measures-en/dominance/interim-measures-an-overview-of-eu-and-national-case-law.

43 Guniganti, P. (2019), "Interim measures help to keep antitrust relevant, says DG Comp official," *Global Competition Review*, 1 July.

44 See Ursula von der Leyen's Mission Letter to Margrethe Vestager, dated September 10, 2019: "*You should focus on improving* […] *speeding up investigations.*"

45 For example, the Italian, and to some degree the Spanish, antitrust systems use a deadline mechanism.

REVIVAL OF COMMISSION INTERIM MEASURES?

BY BO VESTERDORF[1]

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I. INTRODUCTION

From 2001 until now the Commission has refrained from using its powers under Article 8 of Regulation 1/2003 to take a decision imposing interim measures in any case. In a fairly recent comment to the press the current Competition Commissioner, Ms. Vestager, has announced that the Commission is considering making use of those powers again in appropriate new cases. This announcement has now been followed up by the Commission, which has opened an investigation into Broadcom and has sent a Statement of Objections to the undertaking seeking to impose interim measures against suspected exclusivity practices.[2,3]

In the recent press comment, the Commissioner said that it is a serious problem that investigations into many important antitrust cases are often protracted to the extent that once a final decision is taken – most often ordering the addressee to cease or change anticompetitive behavior – the order *de facto* becomes moot because the damage to competition has already happened or the market in the meantime has changed. In such cases, it is argued that it would be very helpful for the Commission to be able to impose interim measures early in the investigation in order to preserve the competitive situation and avoid irreversible negative impact on the market to the detriment of competition and thus consumers.

Much has already been said about the Commission's hesitation to adopt interim measures and the difficulties for the Commission in this regard.[4] In the following, I shall largely limit myself to some reflections of a judicial policy character and not discuss in much detail the legal conditions which the Commission must comply with when imposing interim measures.[5]

II. CONSEQUENCES OF INTERIM MEASURES

One of the first important things to remember when considering whether to impose interim measures is that they may, naturally depending on their form, impose very important burdens and obligations of the undertaking in question. Interim measures may have serious economic consequences but more importantly, they may have serious negative consequences on the undertaking's position on the market and they may indeed lead to even irreversible market changes. In other words, changes that cannot be undone even if the undertaking at the end of the investigation, or after judicial review by courts, is found not to have infringed competition law. This, in particular, may be so in cases where interim measures impose restrictions on or prevent the normal use of IP rights by its owner.[6] Furthermore, it should be kept in mind that such a new practice, if implemented rigorously, might have a chilling effect on innovation. Undertakings might hesitate somewhat before investing heavily in innovative technology if they come to fear that launching new products or practices in the market might be stopped dead almost from the get-go. Without the risk of interim measures, undertakings at least have a chance to recoup some of the investments, either because the investigation against them does not result in finding any anticompetitive infringement or before a final antitrust decision ordering a stop might be taken. Such considerations must be combined with the fact that under EU competition law and the case law of the courts any undertaking is considered innocent until proven guilty.[7]

This is the more so in view of the fact that interim measures are being considered to be imposed at an early stage of the investigation. At this stage, facts may not be completely and fully investigated, the situation of the market place and of competitors may also not be fully explored. Furthermore, the undertaking under investigation has not yet been given access to a full and complete file allowing it to examine and comment on all evidence against it, which means that the undertaking's rights of defense are curtailed. Fortunately, it appears from the Commission's administrative practice, from before 2001, that it is well aware of this. It therefore makes sure, as now seen in the *Broadcom* case, that the alleged infringer is heard before a decision is taken, by sending the undertaking a statement of objections which gives the undertaking the possibility to comment on all aspects of the case as it stands at that specific moment and, thus, also to inform the Commission of possible/likely negative consequences for the undertaking.

2 See Commission press release of June 26, 2019.

3 According to PaRR report of August 13, 2019, a number of complainants have asked the Commission to impose interim measures on Google to prevent alleged anticompetitive behavior by Google via its search tool.

4 To mention just some articles on this topic see: "Injunctive Relief as an Antitrust Violation or as an Enforcement Tool: An EU Antitrust Perspective," by Yves Botteman & Jean-Francois Guillardeau, CPI Antitrust Chronicle March 2013 (1), see also: "Interim Measures; An overview of EU and national case law," by Alec J. Burnside & Adam Kidane, e-Competitions, Concurrences # 86718.

5 For the sake of transparency, I should mention that I was the president who issued the order in the *IMS Health* interim measure case of 2001.

6 As was the case in *IMS Health v. Commission*, Case T-184/01, ECLI:EU:T:2001:200.

7 See Art. 48 of the Charter of Fundamental Rights on the presumption of innocence.

III. LEGAL CONDITIONS FOR IMPOSITION OF INTERIM MEASURES

In view of the above considerations, interim measures should only seriously be considered in cases where there is a very high and sufficiently demonstrable risk of irreversible damage to competition in general, and thus not just to complainant competitors. That this is clear follows, indeed, already from the seminal decision of the Court of Justice ("ECJ") in *Camera Care*.[8] In this case, the ECJ for the first time held that the Commission has the power to impose interim measures in competition proceedings. The ECJ held that interim measures may only be adopted if (1) indispensable to ensuring the effectiveness of any subsequent infringement decision and (2) necessary as a matter of urgency to avoid serious and irreparable harm to a competitor or the public interest. Furthermore, the ECJ stressed that such measures must be of a "temporary and conservatory nature and restricted to what is required in the given situation."

The power to impose interim measures recognized by the Court in that judgment has now been expressly laid down in Article 8 of Regulation 1/2003. This provision stipulates two legal conditions that the Commission must meet in order to be able to legally impose interim measures. *First*, it must be necessary in order to avoid the risk of serious and irreparable damage to competition and, *second*, it must be based on a *prima facie* finding of infringement. It is interesting to note that the article only refers to harm to competition and not to competitors. It is likely that the reason for this restriction, compared to the finding in *Camera Care*, is that the order by the President of the General Court (then the Court of First Instance) ("GC"), as confirmed on appeal by the President of the ECJ, expressly held that it is the need to protect competition rather than to protect particular competitors that is important. This is also supported by the fact that, under Article 8 of Regulation 1/2003, the Commission "acting on its own initiative" may take such decisions. This means that complaining competitors do not have a right to demand interim measures. They do, however, of course have the possibility of suggesting interim measures to the Commission and to try to convince it to do so.

IV. *PRIMA FACIE* FINDING OF AN INFRINGEMENT

Even though, as indicated above, I shall refrain from a detailed legal analysis of the two conditions to be met by the Commission when it wants to impose interim measures, I shall make a few brief remarks in this regard.

First, as regards the *prima facie* finding of an infringement, in the 1992 judgment in *La Cinq*[9] the Commission based its conclusion regarding the absence of a probable infringement on the fact that "an initial summary examination of the facts does not show that there has been clear and flagrant infringement (*prima facie* infringement) of Articles 85(1) and 86 of the Treaty." The applicant La Cinq had requested that the Commission should adopt interim measures against EBU which La Cinq accused of infringing competition law. The Commission rejected the request and the decision was brought before the Court of First Instance (now the GC). The GC annulled the Commission's decision finding that "the requirement of a finding of a *prima facie* infringement cannot be placed on the same footing as the requirement of certainty that a final decision" must satisfy. If that were so, it would seriously limit the number of cases in which interim measures could be imposed even if they were manifestly necessary to put a provisional stop to certain behavior at an early stage of the investigation. This would in reality frustrate the enforcement powers of the Commission. Thus, the GC found that the Commission had based its reasoning on an erroneous interpretation of the law.

In the later *IMS Health* case, the Commission argued in its defense of the decision imposing interim measures that the applicant, in order to obtain the annulment, would have to show that the Commission had made manifest errors of assessment of the two cumulative conditions, namely the existence of a prima facie case and urgency. Neither the GC nor the ECJ (on appeal) found any basis for that interpretation, stating, *inter alia*, that "nor is there any other convincing reason why an applicant should be required to demonstrate a particularly strong or serious stateable case against the validity of what, after all, constitutes a *prima facie* evaluation" by the Commission.

While, as it follows from *La Cinq*, the Commission's powers in this regard are not limited to "clear and flagrant cases," it is on the other hand also clear that the Commission needs to present evidence based on facts which makes a finding of an infringement at least more likely than not. The burden of proof lies with the Commission and in the light of the seriousness of such an intrusion in the rights of the undertaking in question, which is presumed to be innocent at this stage, the Commission must present sufficient evidence to demonstrate a reasonably high likelihood of the existence of an infringement.

If this, as I believe to be the case, is correct, it follows that it may be easier for an applicant who is asking the Court for interim measures against a Commission decision to establish that the first of the two cumulative conditions is fulfilled, namely the *prima facie* condition, than it is for the Commission to adopt interim measures. It follows, indeed, from well-established case law that the applicant only has to be able to convince

8 *Camera Care v. Commission,* Case 792/79R, [1980] ECR 119.

9 Case T-44/90, *La Cinq SA v. Commission.*

the GC or the ECJ that it cannot be excluded, without further and full examination of the case by the full court, that the Commission's decision is illegal for one or more reasons. However, for the Commission to adopt such measures it must convince the court (the judge hearing the interim measures case) that an infringement is at least more likely than not to take place.

V. URGENCY

As regards the second of the two cumulative conditions, urgency in order to avoid serious and irreparable damage to competition, it follows from the case-law of the court, and this is confirmed by my own experience as an interim measures judge at the GC, that this is by far the most difficult part for applicant undertakings to prove when they apply for interim measures against a final Commission decision ordering them to do or cease something.

In cases where the Commission wants to impose interim measures, this condition is, I would submit, easier for the Commission to establish. This assumption is based on the relatively wide margin of appreciation which the Courts have recognized that the Commission has in complex economic cases. In practice, this means that once the Court in a given case has found (1) that the procedural rules have been followed correctly; and (2) that the Commission has examined all relevant facts and the court has found the evidence to be solid, it will not substitute its own appreciation for that of the Commission. This also applies in Commission decisions imposing interim measures when brought before the GC for judicial review.

However, in spite of this margin of appreciation, and in view of the gravity of imposing interim measures on an undertaking which has not (yet) been found guilty of infringing the competition rules, it must be clear that the Commission must demonstrate clearly and convincingly why it is urgent to intervene before a final decision can be made. It must describe clearly what the exact risk to competition is. It would hardly be enough for the Commission to assert that in the absence of interim measures there is a serious risk that some competitors might choose to exit the market or see their market shares being reduced with the consequence that there is less competition. This would have to be substantiated by some kind of convincing evidence or economic expertise. It might be useful to be able to present evidence of the situation in the market prior to and after the alleged infringing behavior started and to demonstrate that the negative impact on the market is most likely to be a consequence of the behavior in question. In cases where there is only a limited number of competitors, perhaps two to four, urgency to avoid irreparable damage might probably also be demonstrated if adoption of interim measures is necessary in order to avoid that the competitors or one of them is eliminated if such elimination would lead to serious and irreparable damage to competition. Such evidence must be carefully examined by the judge if such a Commission decision is brought before the Court. If the judge finds the evidence unconvincing, either incomplete or factually wrong, the decision must be annulled, as one of the two cumulative conditions (prima facie case and urgency) is not met.

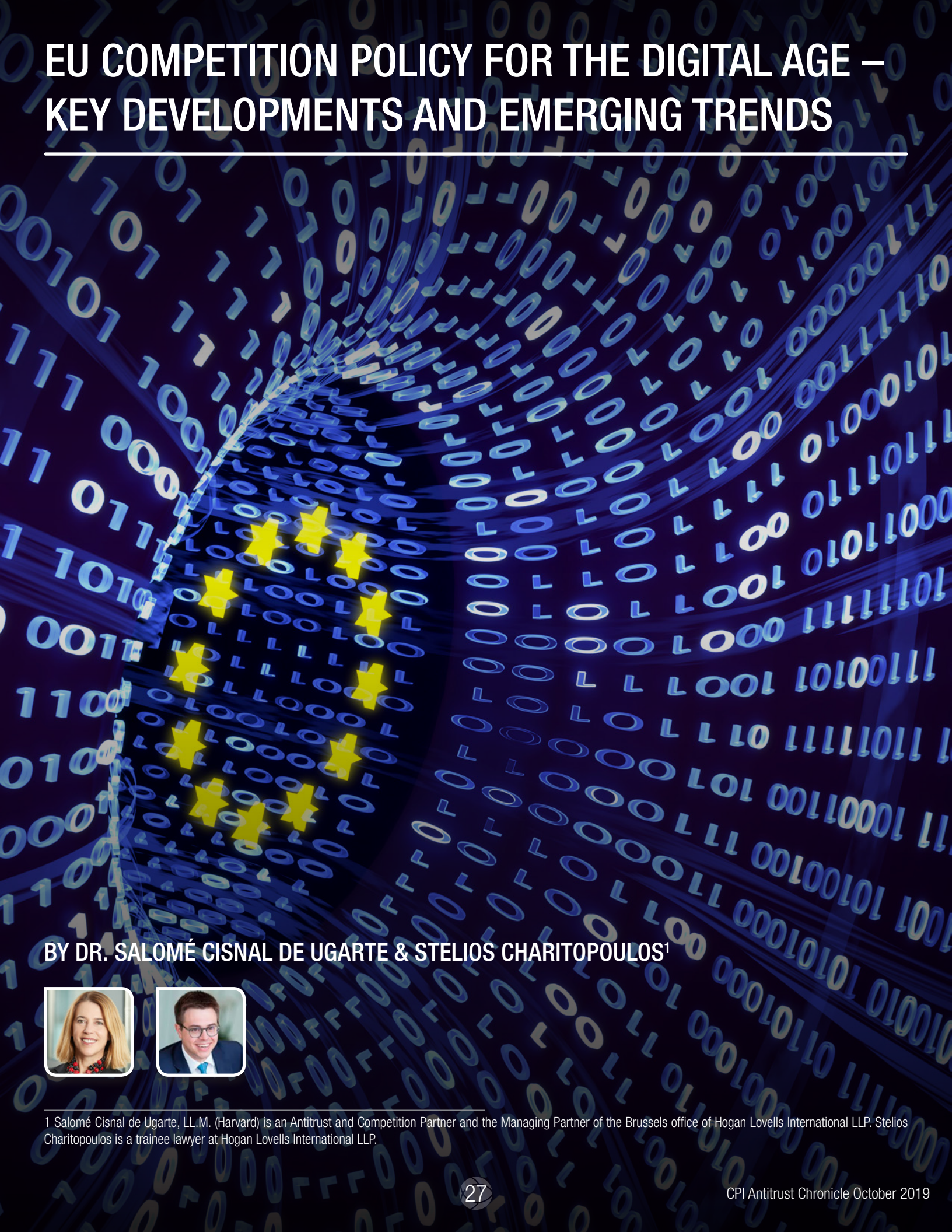
VI. CONCLUDING REMARKS

That there is a case for considering once again to impose interim measures in certain cases, most likely in multinational abuse cases in certain high-tech areas, appears to me to be well founded. This may constitute an effective tool to avoid that rapid market developments, in the time between the opening of an investigation and the final decision a number of years later, render the final decision ineffective and thus irrelevant except, of course, for the possible fine imposed for the infringement.

As appears from the Commission's own long-time hesitation to use its powers to impose interim measures and from the statements from Commissioner Vestager, it may in certain cases prove difficult for the Commission to demonstrate sufficiently clearly that the cumulative conditions for imposing interim measures decisions are met. It might well in view of this possible complication be useful for the Commission to consider other avenues to avoid the problem. Perhaps a kind of leniency approach might be useful, inviting the alleged infringer to cease or change the alleged infringing behavior against a promise of a certain non-negligible percentage reduction of the fine if an infringement is finally established. A specific legal basis for the Commission to introduce this possibility could be introduced or it might even be possible for the Commission to accord such a reduction in the fine simply based on valuable cooperation by the undertaking. In cases in which the undertakings realize that they run the risk of important fines and perhaps doubt that they could contest the Commission's appreciation of a likely infringement and the urgency condition if they ask the GC to annul a Commission interim measures decision, they might well accept to change their behavior and obtain a reduction of the fine.

However, as useful and perhaps even necessary the imposition of interim measures may appear, it is necessary to keep in mind that measures of this kind may have serious and perhaps even life-threatening, market-related, consequences for the undertaking which at that point of the investigation is to be considered innocent. The imposition of interim measures by the Commission should therefore only be considered in cases posing a clearly serious and sufficiently well-documented risk to competition in the relevant market and not just to competitors.

EU COMPETITION POLICY FOR THE DIGITAL AGE – KEY DEVELOPMENTS AND EMERGING TRENDS



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I. INTRODUCTION

On July 15, 2019, the European Commission (the "Commission") published its Report on Competition policy for 2018 (the "Report"). This report is prepared annually for the European Parliament, the Council of the European Union, the European Economic and Social Committee, and the Committee of the Regions. Once produced, it is debated in the European Parliament and is the subject of a non-legislative resolution. It presents an opportunity for the Commission to provide an update on the most important decisions and legislative and policy initiatives adopted in the field of EU competition law during the previous calendar year. It thus covers the entire range of competition policy issues, from cartels and investigations to mergers and State aid.

II. COMPETITION LAW IN THE NEW DIGITAL ECONOMY

The most extensive section of the Report deals with developments resulting from the digitization of the economy. The Report notes that this digital transition has profoundly transformed the entire economy, changing consumer attitudes and the way in which markets operate. However, it places particular emphasis on four specific challenges: (i) the treatment of data which are necessary to improve increasingly important algorithms and make them more "intelligent"; (ii) the growing market power of digital platforms, especially when they market their own products in the same digital marketplace; (iii) the need for competition law to assist in the creation of a well-functioning Digital Single Market so that Europe can take full advantage of the opportunities afforded by digital technology; and (iv) the need to ensure that new market players that have grown rapidly into major technology providers do not use their market power to foreclose new competitors. The overall policy objective is to ensure that the digital market serves the people of Europe and not the other way around.[2]

A. Competition Policy Fit for the Digital Single Market

To that end, in 2018, the Commission started a process of reflection to determine the best way for competition policy to serve consumers in the digital market. It appointed Professors Heike Schweitzer, Jacques Crémer and Assistant Professor Yves-Alexandre de Montjoye as Special Advisers and commissioned a report on "Competition Policy for the Digital Era" which was published on April 4, 2019. The report: (i) identifies the main features of digital markets; (ii) suggests the objectives that competition law should pursue; (iii) examines the role of merger control in balancing fair competition and support for innovation; and (iv) discusses the application of competition rules to digital platforms and data.[3] This report will inform the Commission's thinking as it seeks to develop competition policy to address the new challenges presented by the digital market.

B. Antitrust and Cartel Enforcement

In 2018, the Commission adopted a series of antitrust decisions relating to the digital market. On January 24, 2018, the Commission found that Qualcomm had abused its dominant position in the market for LTE baseband chipsets by making significant payments to Apple in exchange for the exclusive use of Qualcomm chipsets in iPhone and iPad devices.[4] Moreover, in the context of a global investigation involving the competition authorities of Brazil, Japan, Singapore, Taiwan, South Korea, and the United States the Commission fined eight producers of capacitators for participating in a 14-year long cartel to coordinate future behavior and avoid price competition in the market for the supply for electrolytic capacitators.[5] On July 18, 2018, the Commission also found that Google had abused its dominant position in respect of general internet search and fined the company €4.34 billion.[6] Finally, it also continued an investigation against the same company in respect of potential restrictions on the ability of certain third party websites to display search advertisements. The investigation was concluded on March 20, 2019 and Google was fined €1.49 billion.[7]

2 Report on Competition Policy 2018, p. 7.

3 Report on Competition Policy 2018, p. 8.

4 Case AT.40.220 *Qualcomm* (exclusivity payments) Commission decision of January 24, 2018.

5 Case AT 40136 *Capacitators*, Commission decision of March 21, 2018.

6 Case AT.40099 *Google Android*, Commission decision of July 18, 2018.

7 Case AT.40411 *Google Search (AdSense).*

C. Price Competition in E-commerce

The online commerce market plays a central role in the Commission's vision for a Digital Single Market. The Report notes the significant benefits afforded by e-commerce to both consumers and businesses. E-commerce has provided customers with unprecedented access to choice of goods and services and has allowed them to compare prices from all over Europe. Simultaneously, businesses can market their products and services to over 500 million Europeans through a single website.

The Commission conducted a sector inquiry in respect of e-commerce which was published on May 10, 2017. The final report highlighted the threat of resale price restrictions combined with automatic software facilitating price monitoring as well as cross-border sales restrictions in distribution agreements.[8]

Following the results of the sector inquiry, the Commission is particularly keen to protect price competition in the European online commerce market (which is now worth more than €500 billion per year) and ensure that it is not fragmented. On December 17, 2018, it fined the clothing company Guess approximately €40 million (with a 50 percent reduction to reflect the company's cooperation) for preventing cross-border sales advertising in distribution agreements.[9] Moreover, on July 24, 2018, the Commission adopted separate decisions in respect of Asus (Taiwan), Denon & Marantz, Pioneer (Japan) and Philips (the Netherlands) and imposed a total fine of €111 million for restricting the ability of retailers to determine their online resale prices independently.[10]

D. State Aid and the Commission's Digital Agenda

Finally, the Report illustrates how State aid rules can be used to further the Commission's "digital agenda" by enabling European governments to support broadband deployment. An estimated €500 billion in the form of private and public investments in infrastructure will be required within the next decade to achieve the Commission's Single Digital Market connectivity goals. In this context State aid rules play a crucial role in ensuring that public investments do not stifle private ones and that publicly-funded infrastructure is accessible to all operators. In 2018, in its first decision directly supporting its connectivity goals, the Commission approved a Bavarian project to install very high capacity networks in six municipalities.[11]

III. ENHANCING THE EFFECTIVENESS OF COMPETITION ENFORCEMENT

The Report also focuses on the Commission's efforts to streamline procedure in competition cases in order to improve the effectiveness and efficiency of its enforcement actions. The Report points to the updated guidance for companies regarding business secrets and other confidential information as well as the templates and guidance for the use of confidentiality rings in the context of access to file.[12] In addition to that, the Commission pursues specific policies to streamline the application of competition law.

A. Efficiency in Cartel Enforcement

To enhance the efficiency of cartel enforcement procedures, the Commission has introduced an Anonymous Whistleblower Tool that allows individuals with insider knowledge of competition law infringements to alert the Commission via a two-way encrypted messaging system.

The Commission also makes extensive use of the settlement procedure which in 2018 accounted for 75 percent of decisions adopted during the year.[13] In such cases, the relevant undertakings acknowledge their participation in the infringement and accept their liability in exchange for a reduction in fines. This allows the Commission to apply a faster, simplified procedure thus freeing resources for further investigations. To further encourage undertakings to take advantage of that procedure, the Commission published informal guidance explaining how companies can cooperate with anti-trust investigations in exchange for lower fines.

8 Report on Competition Policy 2018, p. 10.

9 Case AT.40428 *Guess,* Commission decision of December 17, 2018.

10 Cases AT.40181 *Philips*, AT.40183 *Pioneer*, AT.40465 *Asus*, and AT.40469 *Denon & Marantz*, Commission decisions of July 24, 2019.

11 Report on Competition Policy 2018, p. 12.

12 Report on Competition Policy 2018, p. 2.

13 Report on Competition Policy 2018, p. 4.

Under the settlement procedure, on February 21, 2018, the Commission adopted three different decisions relating to a cartel in the markets for the maritime transport of cars and the supply of car parts imposing a total fine of €546 million.[14] Finally, on September 18, 2018, the Commission opened an investigation into the potential collusion of certain car manufacturers in the development of emission cleaning system for passenger cars.

B. Efficiency in State Aid Rules

To enhance efficiency in State aid proceedings, the Commission has been pursuing a major reform package since 2012, the so-called State Aid Modernization. Within that framework, in 2014, the Commission introduced the General Block Exemption Regulation ("GBER") under which Member States do not have to notify certain less distortive aid measures to the Commission. According to the 2018 State Aid Scoreboard, since 2015, more than 96 percent of measures fell within the ambit of the GBER.[15] This allowed the Commission to focus on the more challenging cases and permitted more rapid implementation of the more uncontroversial measures.

C. Empowering National Competition Authorities

Finally, following the Commission's proposal, on December 11, 2018, the European Parliament and the Council of the European Union adopted the so-called ECN+ Directive. Once transposed into national law (by February 4, 2021), ECN+ will empower national competition authorities to be more effective enforcers of EU competition law by providing them with appropriate enforcement tools and resources to adopt decisions entirely independently. The Directive will also allow them to impose deterrent fines and to coordinate their leniency programs.[16]

IV. MERGER CONTROL AND THE SINGLE MARKET

Another area of interest in the Report is the application of merger control rules by the Commission. The Report notes that companies may expand either through organic growth or by entering into mergers in order to penetrate new markets, take advantage of economies of scale, or to combine complementary portfolios. While consumers may benefit from such mergers the Commission is vigilant to ensure that price competition, quality, choice, and innovation are preserved. The Report provides various examples of in-depth investigations in the agro-chemical and steel markets where extensive remedy packages worth billions of euros were required to obtain clearance.

A. Steel Market

In respect of the Steel market the Report emphasizes that merger control "goes hand in hand with decisive EU action to protect the EU's steel industry from unfair trade and distortions from third countries."[17] It appears, therefore, that the Commission is receptive to the concerns of the European steel industry. Indicatively, the Commission required an extensive remedy package to authorize the acquisition of Ilva by ArcelorMittal in order to ensure that European customers will have access to steel at competitive prices enabling them to compete with imported products.[18]

B. Transport Sector

The Report also highlights the crucial role of a competitive transport sector for a properly functioning Single Market and sustainable growth. In this context, on July 13, 2018, the Commission opened an in-depth investigation into the proposed acquisition of Alstom by Siemens. The Commission ultimately prohibited the acquisition over concerns that the transaction could lead to higher prices and restrict choice and innovation.[19]

The air transport market appears to occupy a particularly prominent place within the transport sector. Therefore, the Commission uses the full range of competition tools at its disposal to ensure that it functions properly. Indicatively, in 2018, the Commission opened an investigation into the market for airline ticket distribution services, adopted a series of merger decisions to facilitate the timely disposal of Air Berlin's assets

14 Cases AT.40009 *Maritime car carriers*, AT.40113 *Spark plugs*, and AT.39920 *Braking systems*, Commission decisions of February 21, 2018.

15 Report on Competition Policy 2018, p. 3.

16 Report on Competition Policy 2018, p. 3.

17 Report on Competition Policy 2018, p. 19.

18 Case M.8444 *AncelorMittal/Ilva*, Commission decision of May 7, 2018.

19 Case M.8677 *Siemens/Alstom*, Commission decision of February 6, 2019.

following its bankruptcy, and used the State aid rules to ensure that a fair market price is paid for airport concessions.[20]

V. OTHER SIGNIFICANT DEVELOPMENTS

The Report also addresses various ancillary topics which can provide meaningful insight into how the Commission's competition policy fits within the context of its other objectives.

A. Competition Policy in Support of the EU's Energy and Environment Objectives

One of the Commission's core objectives is the creation of a European Energy Union, i.e. a market where clean energy flows securely and unimpeded. The Commission uses competition law to further this objective. It, therefore, adopted a decision forcing Gazprom to remove obstacles to the free flow of gas in Central and Eastern Europe thus ensuring competitive prices.[21]

Additionally, the Commission applies State aid rules to support investments in renewable energy and energy-efficient plants,[22] in green and decarbonisation technology, and in improving the security of supply. Additionally, through the EU Emissions Trading Scheme (in respect of which a revised Directive was adopted in March 2019), State aid rules contribute towards achieving the EU's climate objectives.

B. Level Playing Field in the Area of Taxation

The Commission also deploys the State aid rules to preserve confidence in the Single Market by ensuring that competition on the merits is not skewed by unfair tax advantages. This is achieved by reviewing the tax treatment of certain undertakings as well as by investigating individual tax rulings in Member States.

C. Fostering a Global Competition Culture

Finally, according to the Report, the rising number of global market players and value chains necessitates worldwide cooperation between competition authorities and the creation of common standards and procedures. The Commission strives to be a leading force in international cooperation. On a bilateral level, the Commission negotiates the inclusion of competition State aid provisions in the various Free Trade and Association agreements with third countries. In 2018, it continued negotiations with Chile, Mexico, Mercosur, Azerbaijan, Tunisia, Indonesia, Andorra, Monaco, and San Marino. It also started negotiations with Australia, New Zealand, Kyrgyzstan, and Uzbekistan and signed an Administrative Arrangement with Mexico.

VI. THEMES AND TRENDS

The Report provides significant insights into the Commission's future priorities. In order to fully understand their significance the Report must be viewed in the context of recent political developments in the EU and global competition law trends. In respect of the former, the announcement of the make-up of the Von der Leyen Commission is particularly informative as the current Competition Commissioner and soon-to-be Executive Vice-President Vestager has obtained an expanded brief which except for the competition portfolio includes responsibility for ensuring that Europe is "fit for the Digital Age."

A. Markets that Work for Consumers

A central theme that emerges from the Report is that the Commission wishes to ensure that markets work for consumers and not the other way around.[23] Such rhetoric is connected to the need make sure that competition policy not only materially benefits consumers but that it is also plainly seen to be being doing so in order to foster trust and confidence in the Commission's work. This means that the Commission is likely to prioritize cases with obvious benefits to consumers.

20 Report on Competition Policy 2018, p. 21.

21 Case AT.39816 *Upstream gas supplies in Central and Eastern Europe*, Commission decision of May 24, 2018.

22 In 2008, the Commission approved 21 such schemes.

23 Report on Competition Policy 2018, p. 7.

B. Focus on Digital Markets

The Report makes clear that the application of competition law in the Digital Market was a priority for the Commission in 2018. This focus will certainly persist and will likely be reinvigorated in the foreseeable future and at least throughout the mandate of the new Commission. The incoming Executive Vice-President Vestager's expanded brief is likely to have a significant impact on this. In her Mission Letter, the President-Elect asks Vestager to "focus on maintaining [the EU's] digital leadership where [it] has it, catching up where [it] lags behind and moving fit on new-generation technologies."[24]

In this context, an area of particular interest is likely to be the treatment of data due to their crucial role in most digital technologies and especially new-generation technologies. This is specifically recognized as a challenge in Report and is also addressed in the Mission Letter. The latter requires the incoming Executive Vice-President to coordinate, within the first 100 days of the new Commission's mandate, Europe's approach to "how we can use and share non-personalised big data to develop new technologies and business models."[25] Although this responsibility is derived from Vestager's mandate to make "Europe fit for a digital age," the latter is intended to have a broad application and will likely affect competition policy.

A connected issue is interaction between competition and data protection law in the treatment of big data. Until now, these two issues were treated separately even though sometimes the dividing line was blurred. With Vestager's enlarged brief and considering the absence of direct enforcement powers in respect of privacy law, the Commission might become more tempted to blur the line further.

The Report strongly underlines the benefits of the sector inquiry into e-commerce.[26] Simultaneously, the Mission Letter includes a requirement to consider whether to launch sector inquiries into "new and emerging markets that are shaping our economy and society," a description which fits neatly with the Single Digital Markets or certain markets within that. Therefore, it is likely that the Commission will launch a sector inquiry in respect of the Single Digital Market at some point "in the first part of [Vestager's] mandate."[27]

Sector inquiries use the targeted tools available in individual investigations to gather information on entire markets and sectors. Therefore, they can be particularly useful as the information collected can form both the basis both for policy development and for launching individual investigations into specific infringements. In this case, a sector inquiry might allow the Commission to start monitoring certain nascent markets involving new-generation technology from a very early stage. In this fast-moving environment, this will be a rare opportunity for the Commission to develop a coherent competition policy from the start.

Notably, this focus on Digital Markets is a global trend. The UK's Competition and Markets Authority ("CMA") recently set up a Data Unit while a distinct Digital Markets Unit with powers to review mergers and impose remedies has also been announced by the UK Government. The CMA also recently completed a market study (the equivalent to a sector inquiry) into online platforms and digital advertising. This study included an examination of the control exercised by customers over their data and the market power of digital platforms. The CMA has since described the results of that study as forming the "core" of its Digital Market Strategy.[28] Equivalent studies have also been conducted by the French Competition Authority and the Australian Competition and Consumer Commission.[29]

However, while the focus in relation to developing policy and collecting information will likely be on the Digital Market for the foreseeable future, it should be noted that, in the short term, the vast majority of merger reviews and anti-trust investigations are likely to relate to the more traditional industries.

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24 Mission Letter to Margrethe Vestager, Executive Vice-President-designate for a Europe fit for the Digital Age, p. 4.

25 Mission Letter to Margrethe Vestager, Executive Vice-President-designate for a Europe fit for the Digital Age, p. 5.

26 Report on Competition Policy 2018, pp. 10-11.

27 Mission Letter to Margrethe Vestager, Executive Vice-President-designate for a Europe fit for the Digital Age, p. 5.

28 The CMA's Digital Markets Strategy, July 2019, p. 10.

29 ACCC Preliminary report on the Digital platforms inquiry of December 10, 2018 and Autorité de la concurrence Opinion no. 18-A-03 of March 6, 2018 on data processing in the online advertising sector.

C. Industrial Policy and Merger Control

Finally, the Report indicates that the Commission sometimes uses competition enforcement to achieve its wider objectives. In most instances, such as in relation to its energy and tax policies, this is fairly uncontroversial. However, when it comes to the EU's industrial policy, there appears to be a tension between the EU's political wish to support European champions and DG Competition's stated aim of preserving a level playing field conductive to innovation and investment. As demonstrated by the prohibition of the Alstom/Siemens transaction, that tension is usually resolved in favor maximising the perceived benefit for competition. It remains to be seen whether the inclusion of a responsibility to "co-lead [the EU's] work on a new long-term strategy for Europe's industrial future"[30] in the incoming Executive Vice-President's brief will shift this balance.

30 Mission Letter to Margrethe Vestager, Executive Vice-President-designate for a Europe fit for the Digital Age, p. 5.

SHORTCUTS AND COURTS IN THE ERA OF DIGITIZATION

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1 Partner (Garrigues, Brussels). Co-author of Chillin'Competition. As a practicing lawyer, the author of these lines represents a number of clients, including digital platforms, that would be directly or indirectly affected by the recommendations contained in these Reports and who might have different views about them. The views advanced in this short paper are exclusively my own and have in no way been asked for, paid for or supervised. I am grateful to Pablo Ibáñez Colomo, Kevin Coates, Mark English & José Luis Buendía for their comments on an earlier version.

I. INTRODUCTION AND CONTEXT

The era of digitization is one of many promises, but it is also defined by a certain anxiety, and a sense of loss of control and direction. Technological progress has enabled the appearance of solutions offering effortless, immediate and often superficial means to address our impulses, whether noble or not. It is also an era characterized by disintermediation, the diminished role of expertise, the second-guessing of established consensus, a tendency to skip steps and do away with previous rules and precedents and a vision of the law as an inconvenient obstacle. It is an era of easy, frictionless, fixes.

The thinking on, and enforcement of, competition law is often intimately connected to this context. Competition law is arguably one of the areas of least importance when it comes to the major societal challenges posed by digitalization. Attention, however, has at times focused on competition law as a sort of miraculous tool that would right all wrongs. There also seems to be a desire for enforcement that does not find obstacles in its way, and that offers a sense of control and instant reward.

The use of the competition rules, like the use of technology, can have mixed implications, virtues and perils. Ensuring that both live up to their promise requires a complex balancing exercise, prudency, responsibility, and consensus. These, in turn, require prior careful and open reflection. In this context, the idea of entrusting a Report to three independent Special Advisers before advancing a reorientation of the competition rules was a very sensible initiative on the part of the European Commission ("the Commission"). Similar publicly-driven efforts are also commendable to the extent they are aimed at spurring an objective debate on the role, potential and limitations of competition enforcement.

The Report "Competition Policy for the Digital Era" ("the Report") is open-minded and expressly encourages an exchange of views on its proposed recipe of "vigorous enforcement" facilitated by adjustments and modifications to established tests and principles. This short paper is intended to contribute to this exchange of views with some non-exhaustive critical comments.

In my view, the first question to ask is whether there is consensus about competition problems (or rather, a competition law blind spot) in digital markets. If the answer is affirmative, we then need to ask whether we can address those problems while preserving the benefits flowing from digitization. When engaging with these questions we need to reflect on how to keep competition law relevant without compromising general principles of law, the lessons from experience and the sensible guidance provided by the Courts over the years. These are the questions dealt with below.

II. THE PREMISES: IS THERE EVIDENCE OF SYSTEMIC PROBLEMS JUSTIFYING AN INDUSTRY-SPECIFIC APPROACH?

The Report and other similarly-timed initiatives seem to share a common goal of suggesting that there is evidence-based consensus about the special dangers posed by digital markets and the need to act, and act now.[2] Public opinion – and many individual opinions too – have certainly shifted, perhaps generating something of a natural snowball effect,[3] and the similarly-timed publication of these reports may suggest some kind of consensus among experts.

As lawyers or economists we should, however, be trained to look for the evidence. Does the Report provide evidence of the existence of systemic competition problems inherent and exclusive to digital markets? My impression is that it does not, but the reader is encouraged to search for it in the Report.

The Report eminently points to alleged structural evidence as the justification for its proposals, specifically "*extreme returns to scale*," "*network externalities*," and "*the increasing role of data*" (Chapter 2). The underlying premise is that these features create "*stickiness*" of market power that, in turn, makes large incumbent players "*very difficult to dislodge*."[4]

2 The Special Advisers' Report was published in April 2019; the UK Furman Report was made public a few weeks earlier, in March 2019. The German Competition Law 4.0 Report and the Report from the Chicago Stigler Committee on Digital Platforms were both published in September 2019; the BEUC Report was made public in October 2019.

3 See e.g. F. Scott Morton's honest statement to The New Republic: "I actually have had the same opinion about antitrust enforcement I think for quite a while (…) I was just not as willing to say it as publicly because so few other people seemed to share it," available at https://newrepublic.com/article/153785/radicalization-fiona-scott-morton.

4 The Report at pp. 3 and 36 acknowledges that there is little empirical evidence of the efficiency cost of this difficulty.

Regardless of whether dislodging incumbents should be the role of competition enforcement, the truth is that those economic features are far from new, and far from exclusive to digital markets. Competition law has a wealth of experience dealing with returns to scale and all sorts of relevant inputs across very different industries.

Sectors like telecoms, energy, transport, or even finance also exhibit the same and arguably stronger characteristics. Their specificities have normally been accounted for via different degrees of regulatory oversight, not by sector-specific competition law rules. Enforcement experiences in those sectors show that scrutiny and timely enforcement are certainly needed, but that changes to the law are not required. Competition law has always played a key role in these sectors without ever benefitting from the "adaptations" suggested in the Report. What is then so unique about digital markets? What makes competition more vulnerable in them?

The Report places great emphasis on network effects. Network effects are a positive externality with a very negative press. Network effects, like traditional economies of scale and scope, have been at the core of competition enforcement and academic research for many years now, both in the digital and non-digital world. If anything, our understanding of network effects would seem to have led to a more nuanced approach. The lessons from the past are that in the presence of these features, one should not jump to conclusions too quickly, in either direction.[5]

Today we know that network effects have mixed, ambivalent, effects on competition. We know that there are circumstances in which they increase the risk of markets tipping, thereby creating or strengthening market power. But we also know that network effects create platform value for users;[6] that they can be offset by a lack of technical barriers to switching, diminishing returns or differentiation; and that their existence, relevance and net effect is to be assessed in detail and on a case-by-case basis.[7] The Report acknowledges that, in practice, the relevance of network effects "depends on a number of factors, including the possibility of multi-homing, data portability and interoperability." But while these must be necessarily examined in each specific case, the remainder of the Report seems to be premised on the assumption that network effects are strong and prevalent throughout the digital sector, to an extent that would even justify the modification of rules, including the allocation of the burden of proof.

The situation is no different as regards data. The Report notes its relevance as a "*key input*" whose importance will continue to increase. Data may indeed be an input, big data may be a big input. But then again its competitive significance, like that of any other asset/input, can only be assessed on a case-by-case basis, as the Report itself recognizes. There does not appear to be a systemic competition law issue involving data (and at any rate certainly not one exclusive to digital markets compared to, say, insurance), and there do not appear to be genuine competition problems currently falling under a blind spot.

All in all, therefore, are digital markets so different and are market failures so pervasive that we need to craft new rules or tools or apply stricter standards? Do we have reasons to anticipate that markets are likely to be monopolized absent intervention? The Report arguably does not put forward enough evidence to substantiate these claims, and neither do other parallel initiatives.

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5 See e.g.Case C-67/13 P, *Cartes Bancaires,* EU:C:2014:2204, paras. 78-79, Judgment of December 11, 2013, , Case T-79/12, *Cisco Systems Inc. and Messagenet SpA*, EU:T:2013:635, paras. 75-84. Commission decision of October 7, 2011, Case COMP/M.6281, *Microsoft/Skype,* paras. 91-92, 130 and Commission decision of October 3, 2014, Case COMP/M.7217*, Facebook/WhatsApp, paras.*127-140. See also *Ohio v. American Express Co.*, 585 U.S. (2018).

6 In these same CPI pages, Nobel Prize winner Jean Tirole underlined the "insufficient attention paid to efficiency considerations related with usage externalities"; J.C. Rochet & J. Tirole, "CPI Introduction to the Symposium," (2007) 3(1) 148. See also H.J. Hovenkamp, *The Antitrust Enterprise, Principle and Execution*, (Harvard University Press, 2005), p. 281:("These same features that make networks attractive also create the opportunity for anticompetitive practices"); M. Schanzenbach, "Network Effects and Antitrust Law: Predation, Affirmative Defenses, and the Case of U.S. v. Microsoft," (2002) 4, *Stanford Technology Law Rev* 3 ("network competition also provides some unique pro-competitive justifications for practices that have traditionally received antitrust scrutiny, such as tying, exclusive dealing, and low-pricing strategies," concluding that "network effects can be a double-edged sword"); G.L. Priest, "Rethinking Antitrust Law in an Age of Network Industries," (2007) 4 *Yale Law & Economics Research Paper* No 352, p. 4 ("[M]any practices in the context of networks that may seem puzzling become understood when the need to correct for positive network externalities is taken into account"); S.F. Ross, "Network Economic Effects and the Limits of GTE Sylvania's Efficiency Analysis," (2001) 68 *Antitrust Law Journal* 951: "Firms that produce goods with network effects can engage in conduct that promotes efficiency, in the sense that the resulting product is cheaper, intrinsically superior in quality, or that the product's greater use by others increases each consumer's utility. The same conduct can simultaneously have significant exclusionary effects because the conduct makes it even more difficult for new entrants to overcome the fact that so many consumers now use the dominant firm's product"; W.H. Page, "Microsoft and the Limits of Antitrust," (2009) Journal of Competition Law & Economics, University of Florida Levin College of Law Research Paper No 2009–40, p. 9: "The very existence of network effects makes certain practices that resemble antitrust violations socially beneficial "; W. J. Kolasky, "Network Effects: A Contrarian View," (1999) 7 George Mason Law Review 578: "Network effects may well exhibit unique characteristics, but these characteristics do not all point in one direction. Network effects will as often provide a valid precompetitive business justification for conduct as they will a reason for holding otherwise lawful conduct unlawfully." See also A. Lamadrid, "The double duality of two-sided markets," *Competition Law Journal* 14, 1 (2015).

7 Commission decision of October 3, 2014, Case COMP/M.7217*, Facebook/WhatsApp,* para. 130: "The existence of network effects as such does not a priori indicate a competition problem in the market affected by a merger. Such effects may however raise competition concerns in particular if they allow the merged entity to foreclose competitors and make more difficult for competing providers to expand their customer base. Network effects have to be assessed on a case-by-case basis."

Of course, this does not mean that digital markets should be insulated from enforcement. On the contrary, competition authorities should stay vigilant and objectively apply the full force of the law to any violations; if digital markets are really plagued with violations, then we would see a legitimate increase in the number of enforcement actions.

Experience shows that the application of the competition rules can have a decisive influence in many sectors without any need to bend the law or create it anew. The successful liberalization of the telecoms sector, traditionally dominated by incumbents enjoying significant advantages, is a testimony to the virtues of competition enforcement and of the positive influence that can be exerted by competition authorities. The Commission's recent enforcement track-record in the digital field suggests confidence in its ability to tackle competition problems with its current tools. Calls for the lowering of standards, on the contrary, may arguably suggest little confidence in the legal basis on which certain cases may have been brought and decided. It arguably may not be prudent, for example, to craft a new policy on self-favoring before the EU Courts have a chance to rule on it and provide guidance.

This brings us to some crucial questions and to what is perhaps the elephant in the room: could the Reports' suggestions be implemented absent an overhaul of the case law? The Commission can certainly advocate to push the law in one direction (ideally defining clear boundaries in the process) through cases or policy statements,[8] and it is not wrong *per se* for the Report to point to that direction. The Report, however, fails to note that even if the Commission can advocate for changes, it cannot implement them unilaterally (except to impose limits on the exercise of its discretion).[9] Pursuing some of its recommendations would require pushing the law outside of the boundaries set by the EU Courts, traditionally criticized for being too deferent to the enforcers.

III. COURTS AS OBSTACLES VS. COURTS AS GUARANTEES

Debates on the alleged shortcomings of competition law in the digital world often feature a criticism of the courts of the alleged harm caused by their adherence to precedent and of their slow pace.[10] The Report does not engage in criticism of the courts (like the Stigler Report in the U.S.),[11] nor does it explicitly recommend lowering the standards of judicial review (like the Furman Report in the UK).[12] It does, nonetheless, include certain recommendations that would imply overtly defying or ignoring settled EU case law and reducing the scope for judicial review.

Indeed, while falling short of recommending a revision of the Treaty Rules,[13] the Report concludes that "the specific characteristics of platforms, digital ecosystems and the data economy require established concepts, doctrines and methodologies, as well as competition law enforcement more generally to be adapted and refined." Quite remarkably (see next section below), the Report calls for "modifications of the established tests, including allocation of the burden of proof and definition of the standard of proof."

These proposals raise inevitable issues, not all of which are addressed in the Report, a salient one being that the Commission cannot unilaterally impose "modifications of the established tests." Ultimately, some of the modifications suggested in the Report could only be effective if Courts accepted to abandon their earlier case law in order to embrace them.

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8 The Commission has already done this before, for example in the Guidance Paper on Article 102, albeit arguably in the opposite direction.

9 See Case Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v. Commission*, EU:C:2005:408, para. 211.

10 See e.g. G. Sitaraman, "Taking Antitrust Away from the Courts," ("the antitrust agencies have been surprisingly timid in response to this challenge, and when they have tried to assert themselves, they have often found that hostile courts block their ability to foster competitive markets […]. Courts – made up of non-expert, unaccountable judges – set much of antitrust policy. This report provides a set of recommendations to take antitrust away from the courts – to restructure the antitrust laws and agencies in order to enhance the government's ability to enforce antitrust laws more effectively and more transparently.")

11 Final Stigler Report, p. 31: "Antitrust law and its application by the courts over the past several decades have reflected the now outdated learning of an earlier era of economic thought, and they appear in some respects inhospitable to new learning. Antitrust enforcement better suited to the challenges of the Digital Age may therefore require new legislation"; p. 85:"there have been few antitrust challenges to exclusionary conduct since the government's 1998 case against Microsoft, and courts have in several instances been hostile to such cases and have imposed daunting proof requirements on plaintiffs. Apparent under-enforcement is in part due to courts' reliance on so-called Chicago School assumptions that do not have a sound theoretical or empirical basis," p. 99 "Revisions to the law may have little effect to the extent that judges see antitrust cases only rarely and have difficulty understanding the economic underpinning of antitrust law," p. 120: "The United States is very far behind the frontier in antitrust enforcement, both because courts have taken a conservative view of what constitutes anticompetitive conduct and because agencies have not yet developed expertise in digital competition cases."

12 UK Furman Report, pp. 105-107. The UK report takes the position that a "appeals systems can contribute to the competition authority's risk aversion," that "the competition authority should have an appropriate margin of appreciation to reach decisions on digital cases that are likely to be particularly complex and may require elements of expert judgment" and that full merits review "risks undue incentives to challenge decisions, in markets where a prolonged case may irreparably damage a smaller company."

13 The Report acknowledges that "competition law doctrine has evolved and reacted to various challenges and changing circumstances case by case, based on solid empirical evidence." It considers, accordingly, that "the basic framework for competition law, as embedded in Articles 101 and 102 of the TFEU, continued to provide a sound and sufficiently flexible basis for protecting competition in the digital area."

One could perhaps see the proliferation and timing of this and other reports as attempts to provide support to policy changes, hoping that this might ease their acceptance and trigger a shift by the EU Courts. Regardless of whether this may or may not have been a relevant consideration, the EU Courts have arguably traditionally shown an important degree of isolation to outside influences and *zeitgeist*, taking instead a long term view and, for the most part, ensuring the stability of the discipline and legal certainty.[14]

Intriguingly, the Report claims that "the case law has also raised awareness of the need to adjust the analytical rules, methodologies and theories of harm to better fit the new market reality." But in fact, while showing a flexible approach and granting competition authorities an ample margin when it comes to complex economic assessment, the case law has if anything raised awareness about where red lines lie.

In this regard, the EU Courts have mostly insisted on the need for the Commission to relax reliance on presumptions, assess all relevant elements and, in sum, respect the correct allocation and application of the burden of proof.[15]

IV. TAMING COMPLEXITY BY BURDEN SHIFTING

The Report recommends to "err on the side of disallowing potentially anticompetitive conduct, and impose on the incumbent the burden of proof for showing the pro-competitiveness of its conduct." It supports the proposition that "even when consumer harm cannot be precisely measured, strategies employed by dominant platforms aimed at reducing the competitive pressure they face should be forbidden in the absence of clearly documented consumer welfare gains" and suggests that platforms should "bear the burden of proving that self-preferencing has no long run exclusionary effects on product markets." To be sure, the Report does not recommend shifting the burden of proof in all scenarios, only regarding certain digital platform behavior.

The implementation of this advice would create an intended imbalance between enforcers and plaintiffs on the one hand, who would not need to "*precisely measure*," let alone establish, anticompetitive effects, and defendants on the other, who would need to "*clearly document*" welfare gains.[16] The outcome of this imbalance is not difficult to imagine: in over 6o of EU competition enforcement no unilateral practice or merger has ever been cleared on the basis of a successful objective justification/efficiencies defense. In addition, it is unclear how one could balance pro and anticompetitive effects if the latter are not properly identified.[17] Plainly put, on this point the Report does not propose to rewrite the Treaty, but it proposes to undo the presumption of innocence and to, thus, void Article 2 of Regulation 1/2003[18] alongside settled EU case law.[19] What is more, it proposes to do so only in relation to certain companies, markets or practices. This raises a number of fundamental issues.

First, shifting the burden of proof in a quasi-criminal context is unheard of in jurisdictions subject to the rule of law and would set a first and dangerous precedent. Would the European Court of Human Rights ("the ECtHR"), the EU Courts and Courts from Member States ever accept overturning the presumption of innocence? In the most unlikely scenario that they did, how could one confine ripple effects beyond digital platforms, and indeed beyond competition law?

As observed by General Court President van der Woude:

> [W]here the contested conduct of the public authorities is repressive in nature, it is hard to conceive, at least in free democratic societies, that citizens and firms can be condemned on the basis of estimates, approximations or guesses, even if they are informed

14 Opinion of AG Kokott in Case C-23/14, *Post Danmark II*, EU:C:2015:343 para. 4: "the Court should not allow itself to be influenced so much by current thinking ('Zeitgeist') or ephemeral trends, but should have regard rather to the legal foundations on which the prohibition of abuse of a dominant position rests in EU law."

15 M. Van der Woude, "Judicial Control in Complex Economic Matters," *Journal of European Competition Law and Practic* (forthcoming): "in the exercise of their judicial review, the Union Courts attach considerable importance to the burden of proof, which under Article 2 of Regulation 1/2003 rests upon the Commission"; "Starting with Articles 101 and 102 TFEU, the most complex question is undoubtedly the one that relates to the restriction of competition caused by the conduct under scrutiny. As mentioned above in the introduction, this question can rarely be answered in the abstract, but will most often require a contextual analysis of the type prescribed by the Court of Justice in Delimitis and Cartes Bancaires in the field of Article 101 and in Intel as regards Article 102."

16 Similar proposals have been made, for example, in the Stigler Report, p. 98 "Perhaps most importantly, antitrust law might be revised to relax the proof requirements imposed upon antitrust plaintiffs in appropriate cases or to reverse burdens of proof."

17 Case C-413/14 P, *Intel*, EU:C:2017:632, para. 140: "That balancing of the favourable and unfavourable effects of the practice in question on competition can be carried out in the Commission's decision only after an analysis of the intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking."

18 Article 2 of Regulation 1/2003: "Burden of proof. In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article [101](1) or of Article [102] of the Treaty shall rest on the party or the authority alleging the infringement."

19 Case T-321/05, *Astrazeneca*, EU:T:2010:266, para. 852; upheld in Case C-457/10, *Astrazeneca*, EU:C:2012:770, para. 199.

ones. Uncertainty must then be balanced against the requirements of the presumption of innocence […]. [T]his balance is struck by relying on legal concepts, such as the burden of proof.[20]

Second, should we shift the burden of proof only for "*digital markets*," only for "*platforms*" or only for "*certain platform conduct*"? Is there a common definition for these? The Report appears to limit this suggestion only for "highly concentrated markets characterized by strong network effects and high barriers to entry," but at times reads as if this would only apply to "*platforms*." And it fails to discuss whether the proposal should also be extended to other highly concentrated markets characterized by barriers to entry in the form of, e.g. IP rights or traditional (offer-side) economies of scale? Does it make sense to apply competition law differently depending on the markets, the companies or the business models at issue?

Third, shifting the burden of proof effectively means that enforcers or plaintiffs could do away with an effects analysis and would not need to meet any established thresholds of effects. One would not need to worry about proving "indispensability," "anticompetitive foreclosure," "causality" or even an "appreciable effect on competition." These concepts, which have been at the core of legal discussions for decades, would simply cease to be relevant.

Such an outcome would certainly make enforcement easier by eliminating its main hurdle and the only guarantees against arbitrary decisions. For this very same reason, it would be particularly worrying and counterproductive in an area that, if anything, is characterized by the ambiguity of competitive effects.[21] Doing away with an effects analysis, let alone a meaningful one, would open the door to greater confusion between more competition (which necessarily harms competitors' interests) and harm to competition.

V. MARKET POWER

The Report is premised on the observation that market boundaries in the digital world are diffuse, change rapidly and may be complex to delineate. In view of these characteristics, the recommendation is to place "less emphasis on analysis of market definition, and more emphasis on theories of harm and identification of anti-competitive strategies."

The recommendation may have some appeal given the traditional and inherently inaccurate in-or-out nature of market definition, but would seem problematic in the context of proposals aimed at turning the screw only on "*dominant platforms*."[22] To the extent that one proposes to relax substantive standards, one should arguably be particularly strict and thorough when it comes to market definition and identifying dominance.[23] This appears to have been the Commission's practical enforcement approach, at least traditionally. There is already considerable uncertainty regarding unilateral conduct; the relaxation of dominance standards coupled with that of substantive standards would not seem advisable from a legal certainty standpoint. It would facilitate enforcement, but at the cost of potential arbitrariness.

Somewhat contradicting the observation about unclear boundaries and decreased emphasis on market definition, the Report advances the idea that narrow "*ecosystem-specific aftermarkets*" may need to be defined. This may read as support for the Commission's practice of defining such markets in the mobile space, but it may entail ignoring the constraints originating from inter-platform competition or the other side of a multi-sided platform. EU case law offers enough guidance on these questions, both at the stage of market definition[24] and at the stage of competitive analysis. On the latter point, EU case law on franchising or selective distribution reveals that a prima-facie legality rule is appropriate for practices that discipline intra-brand/platform competition to foster inter-brand/platform competition.[25]

20 M. Van der Woude, "Judicial Control in Complex Economic Matters," *Journal of European Competition Law and Practice,* (forthcoming).

21 See *supra* note 6.

22 The Report's view is that "to the extent that they are disciplined by competition, no far-reaching general rules would be needed. We feel that imposing far-reaching conduct rues on all platforms, irrespective of market power, could not be justified, given that many types of conduct –including potentially self-preferencing- may have procompetitive effects" (p. 6). Some of the Report's proposals concerning the shifting of the burden of proof also rely on a previous market definition; see e.g. "in a market with particularly high barriers to entry and where the platform serves as an intermediation infrastructure of particular relevance, we propose that (…) it should the burden of proving that self-preferencing has no long run exclusionary effects" (p. 7). In addition, the Reports refer in several passages to a "presumption in favour of a duty to set more demanding regimes of data access "*confined of course to dominant firms*" (p. 9) and describes the "killer-acquisition scenario" as one concerning acquisitions of small start-ups by "*dominant platforms*" (p. 10).

23 See A. Lamadrid "The Elephant in the Courtroom: it's the dominance, stupid," Chillin'Competition, June 8, 2017.

24 The case law shows that inter-brand/platform competition and indirect constraints are relevant for the assessment of market definition, and that the analysis should ultimately center on whether an undertaking is capable of profitably maintaining prices above (or quality below) the competitive level, not necessarily on the choices available to customers . See e.g. Case T-310/01, *Schneider,* EU:T:2002:254.

25 See P- Ibañez Colomo, "A Contribution to 'Shaping Competition Policy in the Era of Digitisation," p. 13

The Report also posits that the assessment of market power "must take into account insights drawn from behavioral economics about the strength of costumers' biases towards default options and short-term gratification." The EU Courts' view on this topic has become increasingly nuanced, and wary of sweeping assumptions about users' independence and autonomy. In *Cisco*, for example, the General Court did not take into consideration any consumer inertia or bias towards pre-installed software and limited its analysis to that of "*technical or economic constraints*" to switching.[26] In the recent Facebook interim measures ruling, the Higher Regional Court of Dusseldorf held that consumers alleged biases or indifference should not matter as long as their decisions are ultimately free, uninfluenced and autonomous.[27]

VI. ONE-SIDEDNESS AND PLATFORMS

Chapter 3 of the Report contains a specific discussion on platforms, albeit these are effectively the focus of the entire document. The Report endorses the Commission's characterization of platforms as "key enablers of digital trade," but does not contain a discussion about how this role may foster competition, increasing opportunities and competition across markets.[28] Similarly, the Report does not explain in what ways online platforms are to be treated differently to offline ones (e.g. supermarkets), but is built on the premise that in some markets (absent multi-homing, interoperability or differentiation) there might be room for a limited number of players. The Report appears to assume that this is normally the case when it comes to online platforms, and focuses on two dimensions of competition: competition "for" the market and competition "in" the market. Its recommendations target online platforms generically, regardless of their business models or of other considerations.

Competition for the market. While admitting that a "*case-by-case analysis is always required*," the Report posits that any action by a dominant player that raises rivals costs or hinders their ability to attract a critical mass of users without constituting competition on the merits "*should be suspect*." Framed this way, the proposal could sound sensible (provided the correct threshold of effects is applied).[29] It is necessary, however, to ascertain what the Report understands by "*suspect*" and by "*on the merits*." The Report's discussion regarding two categories of practices offers alternative interpretations.

In the case of MFNs and best price clauses, the Report observes that these may have "*both pro- and anti-competitive consequences*" to be assessed case-by-case, but still recommends "*strict scrutiny*." If by "*strict scrutiny*" the Report means special attention and care or prioritization under the current rules, then this does not appear to raise any flags; these are indeed clauses that do not lend themselves to superficial analyses.[30]

Concerning practices that restrict or make multi-homing less attractive, the Report again advocates for a "*case-by-case analysis*" and for a "*suspect*" treatment. In this case, however, the Report verbalizes that any such conduct "*should be suspect and such firm should bear the burden of providing a solid efficiency defense*." This interpretation of "*suspect*" and "*on the merits*" goes beyond being zealous under the current standards and would also imply reversing the burden of proof along the lines described above. In contrast, the Report's reference to the role that data regulation can play to promote portability and interoperability seems more reasonable and in line with current legislative initiatives.

Competition on the platform- Platforms as regulators? The Report relies on economic literature pointing to the role of platforms in setting rules for their users to interact. It recognizes that the setting of rules is not problematic *per se*, and that different architectures and business models encourage innovation and competition and have allowed platforms to generate large efficiencies. This is correct and welcome: economic literatures tells us that the role of platforms is precisely to set rules in order to balance different interests, and that platforms thrive or fail depend-

26 Case T-79/12, *Cisco Systems Inc. and Messagenet SpA*, EU:T:2013:635, paras. 73, 79-89.

27 See e.g. A. Lamadrid, "The suspension of the Bundeskartellamt's Facebook decision- Part I: What the Order actually says," Chillin'Competition, September 3, 2019.

28 The UK Furman Report does contain a more nuanced discussion about the "*substantial benefits*" and the "*greater competition*" linked, in some cases, to the digital economy and platforms, e.g. at p. 3: "The digital economy has benefited consumers by creating entirely new categories of products and services. Many of these products and services are high-quality with low prices, in many cases a monetary price of zero. It has also benefited businesses by lowering the cost of starting a business and scaling up through cloud computing, access to platforms, and digital comparison tools. In some areas this has facilitated greater competition, enabling more entry of new businesses, growth of existing businesses, and facilitating multi-homing and digital comparison tools that allow users to make better-informed choices to switch between businesses or use multiple platforms simultaneously"

29 The case law has made clear that not every practice by a dominant firm that raises rival costs is necessarily anticompetitive; see e.g. Judgment of April 19, 2018, *MEO*, Case C-525/16, EU:C:2018:270, para. 26.

30 The Report nevertheless goes on to suggest that "*If competition between platforms is sufficiently vigorous, it could be sufficient to forbid wide MFNs while still allowing narrow MFNs. If competition between platforms is weak, then pressure on the dominant platforms can only come from other sales channels and it would be appropriate for competition authorities to also prohibit narrow MFNs*" (p. 56). While the reference to the relevance of "inter-platform competition" is welcome (and would have also been welcome in other contexts), the Report's logic is unclear in this regard. Its observation that MFN clauses may have both pro and anti-competitive effects appears to recognize that these clauses may address well-identified free riding problems and that, therefore, a "by object" characterization would be unwarranted as regards both "wide" and "narrow" MFNs.

ing on the choice of their architecture, balance of incentives, modularity, level of integration and openness.[31] Thus, by setting rules, platforms don't "*act as regulators*"; rather, they compete in the way platforms are expected to.[32]

The Report, however, considers that "because of their function as regulators, dominant platforms have a special responsibility" to "ensure a level playing field." Relying on this logic, the Report proposes to extend the conditions under which self-preferencing may be considered abusive. The proposal is that such practices will not only be anticompetitive in "*essential facility*" scenarios but also when it is likely to result in a leveraging of market power and is not justified by a pro-competitive rationale. In this regard, the Report proposes that platforms should "bear the burden of proving that self-preferencing has no long run exclusionary effects on product markets."[33] These far-reaching suggestions (which target concerns already addressed in the recent EU Platform to Business Regulation) raise several concerns.

The idea of platforms as regulators would seem to imply that any vertically-integrated firm (e.g. a supermarket, a pay-TV operator or a mobile phone company) acts as a regulator and could, by the same logic, be subject to similarly wide neutrality obligations. This may make little sense, and it would contradict the established idea that vertical integration is procompetitive[34] and with the principle that competition law is business-model agnostic. Companies everywhere – dominant or not – logically favor their own services when they buy and sell goods or services. Vertical integration is everywhere, and asymmetric treatment is in the very nature of multi-sided platforms and in the very essence of the competitive process. Hampering their ability to promote their services absent evidence of indispensability would unduly interfere with the freedom to decide crucial elements of their business policy.

As EU law stands, there is no support for the idea that platforms should necessarily be required to guarantee "*a level playing field*"[35] or to subsidize less-efficient competitors, sharing on equal footing advantages due to the superior skill, foresight, industry, investment or risk. A careful balance between the protection of the competitive process, the freedom to conduct business and the incentives at play (on the part of both the dominant company and competitors)[36] is already reflected in the case law of the EU Courts.[37] While the case law would arguably benefit from certain clarifications, in line with its incremental evolution, there certainly does not appear to be evidence or arguments to justify its overhaul.[38]

31 See E. Garcés Tolón, "The Dynamics of Platform Business Value Creation," *CPI Antitrust Chronicle,* August 2017 and the literature cited therein.

32 In this regard, EU case law has also made it clear that rules or restraints do not necessarily equate to restrictions of competition (see e.g. Case C-309/99, *Wouters,* EU:C:2002:98, para. 97). In fact, like the competition rules themselves, platform rules are often necessary to preserve and foster competition. The Report further observes that platforms generally have incentives to write good rules to make their platform more valuable (pp. 61-62).

33 The Report even adds at pp. 7 and 68 that where self-preferencing has benefitted a platforms's subsidiary, "*remedies might need to include a restorative element*," an idea that would also appear to be at odds with the case law.

34 See e.g. P- Ibañez Colomo, "A Contribution to Shaping Competition Policy in the Era of Digitisation," p. 9..

35 Under EU case law, moreover, the notion of equality of opportunity has only arisen with regard to (i) cases concerning the application of Article 106 TFEU (where it is for the State to ensure a level playing field); and (ii) indispensable inputs controlled by former State monopolies; see Judgment of the CJEU of October 14, 2010, *Deutsche Telekom*, C-280/08P, EU:C:2010:603, paras. 231, 234, 255 and Judgment of the General Court of March 2, 2012, *Telefónica,* Case T-336/07, EU:T:2012:172, para. 204.

36 See P. Ibañez Colomo, "Indispensability in Article 102 TFEU: from Commercial Solvents to Slovak Telekom and Google Shopping," (forthcoming): "On the one hand, firms may be less inclined to invest and innovate if it appears that rivals would reap the fruits of their efforts. On the other hand, firms may quickly learn that the profitable strategy is to request access from a vertically-integrated rival, instead of investing in the development of an input or platform. Thus, imposing a duty to supply may in the long run lead to less, rather than more, competition."

37 Case C-7/97 *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*, EU:C:1998:569, paras. 37-41. See also Opinion of AG Bronner in Case C-7/97 *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*, EU:C:1998:264.

38 For a comprehensive discussion see See P. Ibañez Colomo, "Indispensability in Article 102 TFEU: from Commercial Solvents to Slovak Telekom and Google Shopping," (forthcoming).

VII. DATA

The Report considers data as one of the distinct features of digital markets and builds on the premise that the competitiveness of firms requires timely access to relevant data. It contains a discussion about the consequences of the economics of data for competition policy, while noting that its significance for competition will depend on a number of case-specific features. In many aspects the Report essentially echoes previous reports and debates on this topic,[39] but it also features some novel proposals.

In particular, the Report suggests that "*a more stringent data portability regime*" and "*more demanding regimes of data access, including data portability*" can be imposed on dominant firms, even if the authors would appear to have some preference for sector-specific legislation with a wider scope. The Report also deals with data sharing agreements, noting that even if frequently pro-competitive, they may give rise to competition concerns in certain circumstances. Its call for a scoping exercise of the different types and consequences of data pooling arrangements with a view to providing guidance are sensible. The Report's suggestion to provide orientations in the form of guidance letters and no infringement decisions under Article 10 as an alternative or in addition to revisions of Guidelines and Block Exemption Regulations is particularly on point and could desirably be extended to other areas.

The Report also takes a careful approach regarding data access under Article 102 TFEU, cautioning that data will seldom be indispensable to compete and "*public authorities should then refrain from intervention*" suggesting that market-based solutions or a regulatory regime may be preferable.

VIII. CONCLUSIONS

The Special Advisers' Report is a thoughtful and useful exercise that will trigger necessary discussions. While it is to be commended for advising against amending the Treaties or reformulating the goals of competition law, implementing its proposals would require overturning settled EU case law on a number of fundamental issues. This is particularly the case as regards its recommendation to reverse the burden of proof in certain circumstances. The Report does not appear to contain sufficient evidence to justify a case law overhaul at odds with recent trends and that would compromise essential features of the European law enforcement and judicial review system.

To the extent that a number of the proposals featured in the Report are at odds with EU case law, it is moreover unclear how they could be implemented in practice. The Commission has no powers to state what the law is, in the same way that the Courts do not formulate competition policy, and only decide on the legal arguments raised before them in each specific case.

Admittedly, many of the questions dealt with in the Report are at the core of cases currently pending before the EU Courts. These cases might offer an opportunity to address some of the modifications advocated by the Report (regarding, *inter alia*, the allocation and operation of the burden of proof, the threshold of anticompetitive effects, the legal status of self-favoring, the assessment of dominance, the definition of ecosystem specific aftermarkets, or the assumption of user bias).[40] In a way, the Report makes explicit what is implicit in some of the Commission's recent enforcement practice.

As can be seen, the Report is not so much of a comprehensive mapping exercise of possible competition problems but rather a navigation exercise that suggests the shortest and easiest routes to get to the intended destination. It arguably does not establish the existence of problems, but seeks to facilitate solutions in case such problems exist. But what if the problem does not really exist? What if intervention is counterproductive or has unintended consequences? Can the desire to fight giants mislead us into fighting windmills, and with the wrong tools?

Digital markets certainly deserve competition scrutiny and attention. One cannot rule out the scope for possible anticompetitive practices or deny that there is a role for competition enforcement. It may, however, be contradictory to argue that there is scope for obvious anticompetitive practices in the digital sector, but then recommend that their existence and anticompetitive potential be presumed, not shown on the basis of evidence. If a practice is truly anticompetitive, the evidence will be there.

39 For the authors' personal views on these, see A. Lamadrid & S. Villiers, "Big Data, Privacy And Competition Law: Do Competition Authorities Know How To Do It?," Competition Policy International, January 2017.

40 The Report, at p. 125, explains that it has factored in the "the extensive investigation and analysis, along with the discussions that have accompanied the intervention of the European Commission in cases such as Microsoft (2004), Google Shopping (2017) and Google Android (2018), including the contributions of the defendants."

For all of the discussion regarding the alleged blind spots of competition law, the reality is that the current rules have not failed us. They are flexible and capable of addressing a competition problem when there really is one. If competition law does not do more, it is perhaps because there are valid reasons not to. Competition law has been corrected, overcorrected and corrected again. The boundaries and limits set by the case law are not capricious, but the (mostly thoughtful) result of the incremental distillation of knowledge acquired over the years and across all sectors. This is why competition enforcement in Europe has been a story of success, and this is why our substantive standards have achieved a level of stability and international convergence unthinkable in other areas of the law. That rules may discipline our impulses is not a reason to change them, but to cherish them. That is precisely what they are there for. One should arguably not change the rules just to make winning easier.

This debate is likely to intensify in the coming months and years. Any eventual overturning of recent decisions in the digital field will likely be used to point to the alleged shortcomings of competition law, to call for new powers and new rules.[41] From this standpoint, advancing far-reaching theories of harm may appear as a win-win situation for regulators. This attitude – which would be based on a fallacy – could have a hopefully positive side, but very mixed implications.

It would be based on a fallacy because when an experiment fails, it is only the tested thesis that has to be called into question, not the result of the experiment or the whole discipline.

The hopefully positive consequence is that public authorities may come to realize that alleged gaps in competition law cannot be used as an excuse not to work on real solutions to major societal issues by means of appropriate public policies.

The implications could be mixed, because they would depend on the regulatory approach chosen. A regulatory approach would certainly enjoy greater legitimacy than the stretching of competition law, and it would in principle not put at risk general principles of law. At the same time, and unlike in competition law, when it comes to regulation, evidence is not a prerequisite, and its sufficiency is not subject to control. A wrong regulatory approach driven by instincts instead of evidence may have much more perverse effects. There is actually much that regulation could learn from competition law enforcement.[42]

Against this background, one would counsel against radical moves in any direction, also because law and history often move like pendulums, and a hard push might eventually hit back harder. We hopefully are all in favor of competition enforcement,[43] and share an interest in making sure it is fit for every market in order to achieve the right result. If this is the case, we should trust authorities and Courts, because they have earned it. We should facilitate "vigorous" and well-targeted enforcement by giving them more resources and demand that they be put to good use. We should not encourage them to overturn the case law, but to move within its flexible boundaries, to think about meeting burdens, not shifting them, and to reason through, not around. The opposite would certainly simplify their task, but at a cost to legal principles which might be too high a price.

41 The recent suspension of the German Facebook decision has been presented as a "*wake-up call to legislators: If you want to regulate Google, Amazon, Facebook & Co., the existing tools are not enough* (…) "*A new version of the Antitrust Act is currently pending in Germany. This is an opportunity to change the legal bases.*" R. Podszun quoted in https://techcrunch.com/2019/08/26/facebook-succeeds-in-blocking-german-fcos-privacy-minded-order-against-combining-user-data/. Similarly, politicians have observed that a possible annulment of the European Commission's Apple decision would revive calls for tax harmonization ("Politically, this will have very big consequences ([…]) If Apple wins the case, the calls for tax harmonization in Europe will take on a different dynamic, you can count on that.") MEP S. Giegold quoted in https://www.bloomberg.com/news/articles/2019-09-16/apple-takes-on-eu-s-vestager-in-record-14-billion-tax-battle.

42 For the author's own view, see A. Lamadrid "Regulating platforms: A competition law perspective," Chillin'Competition, November 24, 2015.

43 See P. Ibañez Colomo, "Against the footballization of competition law: how to advance the general interest and avoid polarization," Chillin'Competition, September 18, 2019.

THE SPANISH COMPETITION ACT: AN EVALUATION AND FUTURE PERSPECTIVES

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I. INTRODUCTION

The Spanish Competition Authority is celebrating its 30th birthday with a very positive balance sheet. A long way travelled and many challenges ahead. The integration of the previous independent regulatory bodies in a single agency has brought about a number of useful synergies in the present context. But the development of the digital markets and how to face the challenges they pose to competition authorities is still a hot topic worldwide. In parallel, the CNMC is dealing with the amendment of the Competition Act – looking for global consensus – and making efforts to preserve the effectiveness of our successful leniency program.

II. THE SPANISH COMPETITION AUTHORITY: 30 YEARS FOSTERING COMPETITION

Spain already has a long history of antitrust enforcement. The application of antitrust law is constantly evolving, and, in parallel, the agency tasked with preserving, guaranteeing, and promoting competition has evolved over time, as it strives for the optimal institutional structure.

In 1989, a nationwide enforcement system was implemented, based on the existence of two specialized administrative bodies, to fight against practices that stifled competition and to review mergers: The Service for the Defence of Competition, as an examining body, and the Court for the Defence of Competition, as a decision-making body.

In 2007, a new antitrust law was enacted to reinforce existing mechanisms and endow the Spanish competition system with additional instruments, such as the implementation of the leniency program. The result was the creation of the National Competition Commission ("CNC"), a unique and independent agency that combined the Service and the Court for the Defence of Competition, keeping the functional independence between assessment of cases (via Investigation Directorate) and final decisions (adopted by the "Council").

Further, in 2013, the Parliament decided to unify the independent sectoral regulators with the competition authority, in order to provide legal certainty and institutional confidence, taking advantage of the economies of scale derived from the existence of similar supervisory functions and procedures. Thus, the National Commission on Markets and Competition (the "CNMC") was created, combining the National Competition Commission with myriad agencies, namely the Telecommunications Market Commission, the Railway Regulation Committee, the National Postal Sector Commission, the Airport Economic Regulation Commission, and the State Council on Audiovisual Media.

In short, the Spanish antitrust authority has had 30 years of experience during which, under different structures and empowered by successive regulatory frameworks, it has sought to foster effective competition.

The creation of the present institution, the CNMC, faced some resistance and criticism from law firms and consultancy boutiques that dealt with competition and specific regulatory issues separately, as they-had to adapt to the new model. However, in our view, it is fair to recognize that the integrated model, if existing synergies are successfully achieved, can be more effective than simple coordination between previously independent regulators. The experience of these six last years has shown that such synergies are indeed possible (as evidenced by the joint work of the different Directorates in merger control in the fuel sector, or in the process of the liberalization of passenger rail transport are some clear examples).

This does not imply that any such change is easy, or that the institution's potential is always fully exploited, especially considering that the integrated model has been very challenging, for instance, when combining labor and civil servants that came from very different working cultures and that had very different job promotion perspectives. Nevertheless, having overcome the initial hurdles inherent to such an institutional integration, our assessment is positive and we are confident that we can continue to benefit from the advantages of a single agency in the future if we pursue the aforementioned synergies.

As regards the application of antitrust law, the CNMC carries out its activities from a dual perspective: (i) enforcement (by the Competition Directorate); and (ii) advocacy (by the Advocacy Department). Under this structure, competition policy is enforced both ex post (by opening disciplinary proceedings against anticompetitive behavior, or challenging administrative decisions that restrict competition), and ex ante, (by preparing reports and recommendations, or enforcing merger control). We believe that the key to successful public antitrust enforcement lies in a balanced approach between both strategies.

III. DIGITAL MARKETS: A GLOBAL CHALLENGE FOR COMPETITION AUTHORITIES

In a constantly changing economy, with increasingly globalized markets and breakneck technological advances, the CNMC faces constant challenges to adapt to these developing markets and render its actions as effective as possible. Many of these issues are currently being debated in international forums, where there is broad agreement as to the main concerns of all competition authorities worldwide.

At a global level, our main challenge is clearly dealing with digital markets in a coherent and consistent way worldwide. Our challenge is not only to address the dynamism of these markets with the appropriate instruments, but also to do it jointly and coherently with all competition enforcers. Digital players operate in a world without borders.

There is currently an intense international debate on whether the current competition policy instruments to deal with new markets are fit for purpose. While some experts defend the effectiveness and sufficiency of traditional tools – tailored as needed depending on the markets in question – others call for significant modifications to adapt to the new environment.

This debate is especially controversial in terms of merger control, given the surge of business structures and models that have a great bearing on the markets, and yet are beyond the scrutiny of antitrust authorities in most jurisdictions.

In this regard, in Spain we have always defended our market share threshold in merger control. So far, this has been shown to be a very valuable tool for digital merger operations. Mergers such as *Facebook/WhatsApp* or *Apple/Shazam* met the Spanish merger notification threshold based on market shares. The CNMC was therefore able to refer them to the European Commission for an EU wide assessment and not only in the Spanish market. At a national level, the market share threshold has allowed for the review of six platform mergers in the last years, which did not fulfil the turnover notification threshold.

The debate, however, not only focuses on how to prevent certain transactions from evading antitrust authorities' oversight, but also on how to adequately and effectively analyze their market effects, and to implement any requisite remedies. Thus, the question often arises as to the appropriate role of merger control and to what extent antitrust authorities should intervene in the markets. Present circumstances render it particularly complex to strike the right balance between the public and economic interest. As a result, prudence is seen as the best alternative.

In the framework of this discussion, the debate surrounding so-called "national champions" has emerged strongly. It is probably due to the geopolitical context we are living in right now, but experience has taught us that we should keep industrial policy apart from antitrust rules, which are based on a rigorous and objective assessment. Other instruments (industrial policy, commercial policy, etc.) must play their role to achieve a level playing field. However, competition policy tools, namely antitrust and merger rules, by their nature, must be insulated from any influences that could put at risk the impartiality of the assessment.

The decision of the European Commission in the *Siemens/Alstom* case has been discussed at length internationally, and also criticized in some forums. Obviously, everyone is mindful of the need to defend European industries, but we have to be sure of which instruments and agencies are best suited for this. Spain defended the stance of the European Commission, not only because we firmly believe that competition policy must be separate from industrial policy, but also because, in this particular case, the main "victims" were Spanish markets and companies that are also part of Europe's industry and, therefore, also warrant protection.

In conclusion, at present, international cooperation among competition authorities is more relevant than ever, to share experiences regarding our future endeavors, and work together on the best solutions to understand economic structural changes and how best to address together the new challenges in an effective way.

IV. TEN YEARS OF THE COMPETITION ACT IN SPAIN AND THE NEED FOR AMENDMENT

Focusing on Spain, one of our immediate challenges in competition policy is the amendment of the Competition Act to transpose the recently approved ECN+ Directive. The Ministry of Economy and Business, responsible for this transposition, opened a public consultation on this subject in July. Spanish legislation already includes most of the legal provisions required by the Directive, although Spain would still need to apply some legal changes to comply with ECN+. Among these would be the possibility for the CNMC to choose not to pursue complaints on the basis of the agency's priorities, taking into account the public interest, and to increase the maximum level of the fines for abuse and vertical restraints cases.

At present, Spanish competition law requires a detailed assessment of each and every complaint received by the Competition Directorate. Taking into account the limited resources, the short procedural deadlines, and the increasing complexity of the cases, the CNMC has welcomed the new legal provision allowing for the prioritization of cases, as it will allow for a more efficient use of public resources. However, the establishment of priorities and the internal procedures for their approval are still under discussion.

Regarding the independence of the CNMC in relation to the Government, although all CNMC workers are subject to the internal code of conduct, and other legislation governing civil servants, some minor amendments must be made in our Law to fully comply with the Directive. Nevertheless, the main relevant amendment required in relation to the independence of the Authority is the economic independence. Though the CNMC already has its own budget, the human resources policy is dependent on the Ministry of Finance. For instance, the CNMC is not allowed to create or modify its own job posts, which hampers the adjustment of the current structure in light of its real needs.

Finally, another provision required by the ECN+ Directive that must be transposed to the Spanish Act, and that has been very welcome by the Authority, concerns the limitation of periods for the imposition of fines. According to this article, the period for the imposition of fines shall be frozen for as long as another competition authority is investigating the same conducts or there are proceedings pending before a review court. Regretfully, the CNMC has in the past been unable to impose sanctions for certain conducts because the Spanish deadline had been reached while the European Commission was deciding the referral of a case. In the same way, we have lost the possibility of reopening a case that has been dismissed by the courts for a formal defect, due to the limitation period.

In parallel with the ECN+ Directive, in 2017 we launched a broad consultation with stakeholders (including competition lawyers, academics, and regional competition authorities) to evaluate the effectiveness of the Spanish legislation, 10 years after its entry into force. The Competition Act has been a huge success for detecting, sanctioning, and restraining anticompetitive conducts, and also for preventing mergers affecting competition in the markets. Part of the success of this Law lies at least in its drafting process, since the preliminary approval of a White Paper submitted to public consultation, and the majority support of every political group, ensured its high technical quality, and its favorable reception by experts. However, in these ten years, markets have changed and experience has revealed some shortcomings that should be amended in our Competition Act.

During this consultation, there has been agreement at every meeting and seminar as to the need to initiate an amendment process, taking advantage of the requirement to transpose the ECN+ Directive into national law.

Two of the issues on which there is unanimous support are: (i) the opportunity to incorporate the settlement procedure into our system, given that such procedures have proven to be highly effective in neighboring jurisdictions; and (ii) the possible extension of deadlines in especially complex cases.

The settlement procedure allows for the closing of a case, with companies recognizing their responsibility for an infringement in exchange for a reduced fine. This can be of significant help in expediting our cases and, above all, in reducing the amount of litigation against CNMC decisions. In the Spanish jurisdiction, since we already have a very short fixed deadline (18 months), the settlement procedure would not have a great impact on the duration of the proceedings – as may occur in other jurisdictions – but rather in the reduction of the complexity of the assessment and of the handling of procedures.

All stakeholders agree about the convenience of including the settlement procedure in the Spanish Act, but there are still ongoing debates on the technical details. For instance, the scope of the procedure: if only cartels or other infringements, such as vertical restraints or abuses of dominant position, should be open to settlements. The deadline to ask for a settlement within the procedure (i.e. whether it could occur before or after the statement of objections) or the possibility of having hybrid cases, combining both the settlement procedure and the ordinary procedure, are also under discussion.

With regard to extensions, the time periods involved in Spain are considerably shorter than those applied in other jurisdictions, especially as regards merger control. We are proud of our unique 18-month statutory deadline for antitrust investigations and of our one-month deadline for merger assessments, which enhance effectiveness and legal certainty.

However, it is true that it would be desirable to agree to extend this deadline in particularly complicated cases so as to ensure that companies are able to fully defend their interests within a reasonable time period. Having a maximum deadline that is known to the parties, although unusual in neighboring countries, is something that companies and the community of antitrust lawyers have always viewed very positively in terms of legal security and certainty, so the idea is not at all to remove such deadline but to make it more reasonable for all.

In addition to this, the CNMC is also considering other additional amendments to the Competition Act regarding inspections and the sanctions for individuals.

Currently in Spain, in case there is a risk of an objection to a dawn raid, the CNMC can ask for a search warrant from the court in the area in which the raided company is located. Dawn raids are usually carried out simultaneously in different premises, which usually involve different provinces and, consequently, different courts. Since the scope of action of the CNMC is national, it would be desirable and more efficient to centralize such requests in a single national court.

Finally, although the Competition Act has, since 2007, a legal provision allowing the Spanish Competition Authority to impose sanctions on individuals, this provision has not been applied until recently. The Spanish Supreme Court has upheld only a few months ago the first decisions imposing sanctions against individuals in cartel infringements, so we believe that we should make full use of this tool and reinforce its effectiveness. From our experience, we firmly believe in the deterrent effect of these individual fines, but the maximum amount set in the 2007 Act (EUR 60,000) has clearly become insufficient, and needs to be updated accordingly.

V. PRESERVING THE EFFECTIVENESS OF OUR LENIENCY PROGRAM

Another challenge facing the Spanish antitrust authority at present is that of preserving and enhancing its leniency program. This program was launched in Spain in 2008, and it has worked extraordinarily well. Proof of this is the number of leniency applications presented (more than 100), and consequently, the increase in the number of cartels identified and sanctioned since then. In fact, the Spanish leniency program has been used as a benchmark by the European Commission in its report on the impact of the ECN+ Directive as an example of an effective instrument that, when adopted in Spain, led to a substantial change in the performance of our antitrust authority.

We must preserve the advantages of this program, especially with the expected increase in claims for private damages. As a result, we are working to enhance incentives for leniency applicants. In this regard, European legislation has already established that leniency applicants are not jointly and severally liable for the damages that are recoverable in damage compensation procedures, and that they are also exempt from debarment from public procurement. These provisions have been successfully transposed into our national legislation. The exclusion from public procurement was included this year for the first time in a CNMC decision, specifically in the case of Railway electrification with fines totaling EUR 118 million imposed on 15 companies and 14 executives. This practice will surely be applicable to companies which are being investigated in our ongoing cases involving bid rigging in public tenders.

We are also firmly convinced that stepping up our *ex officio* detection efforts feeds back into the leniency program. This is one of the areas in which the Competition Directorate is working hard. The increased risk of detection stemming from the enhanced *ex officio* investigations is a clear incentive for companies and managers to resort to the leniency program, as evidenced by the events of recent months. Our whistle-blower mailbox is also proving very useful in triggering some investigations that have resulted in the initiation of formal proceedings, without harming the informants who wish to remain anonymous.

To this end, in 2018, we created the Economic Intelligence Unit, which is part of the Competition Directorate, but with its own technical and human resources, devoted exclusively to *ex officio* detection and to enforcing the whistle-blower program.

Finally, the Competition Directorate is going to great lengths to identify and fight antitrust practices in tenders (bid rigging), especially in public procurement, due to the direct impact this has on the economy and on taxpayers. It is unacceptable for public budgets to bear cost overruns in contracts at the expense of illicit gains by certain companies engaging in bid rigging.

We are also working on *ex post* analysis to prove the benefits for markets and consumers of dismantling cartel activity related to public procurement. For instance, in 2011, 15 envelope manufacturing companies that had been allocating public tenders since 1977 were sanctioned. As a result, in the first tender that was offered after that decision, manufacturers submitted bids that were up to 30 percent lower, which shows the enormous cost overruns that are associated with manipulating public contract bids.

In this sense, we are enhancing our coordination with national, regional, and local governments by, on the one hand, offering the training they need to help them identify signs of collusive behavior and, on the other hand, setting up coordination mechanisms with contracting committees and awarding authorities, so as to identify in a timely manner any awarding process that may be manipulated. The Competition Directorate is also working to improve access to information on tenders in order to optimize the monitoring of every sector.

We hope that the efforts to amend and update our Competition Act, to preserve our effective leniency program and to get the new Economic Intelligence Unit up to speed in its *ex officio* detection work, will bear its fruits and allow us to continue fostering competition in Spanish markets for at least another 30 years.

REFLECTIONS ON CONSUMER TRUST AND COMPETITION IN THE DIGITALIZED ECONOMY

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I. INTRODUCTION

Digitalization has disrupted traditional markets while bringing many benefits to consumers. Easier access to goods, services and information is stimulating commerce, boosting travel and facilitating communication. However, the use of data provided by consumers—whether in exchange for services or collected directly or indirectly by web services—is leading to growing concerns about consumer safety and privacy, on the one hand, and market entry and competition, on the other. One emerging issue is the need to bolster consumer trust in digital markets; and the way active and adequate competition policies can contribute to this. Of mounting concern is the fact that some markets are increasingly dominated by a single platform, partly owing to the intrinsic nature of digital markets where economies of scale and network effects are a vital factor. This dominance is coupled with the fact that users often have limited understanding of how their data are used, hampering transparency for consumers and businesses alike. While these concerns need addressing, policy makers are wary of clamping down on market players with regulation for fear of stifling innovation.

The global competition community is seeking ways to address this conundrum. On June 5, 2019, the G7 competition authorities released a joint statement, noting their common understanding on "Competition and the Digital Economy." The statement explains the benefits of the digital economy for innovation and growth,[2] and reaffirms the need for competition law enforcement to "[safeguard] trust in digital markets and [ensure] that the digital economy continues to deliver economic dynamism, competitive markets, consumer benefits, and incentives to innovate."[3]

Moreover, two recent European reports, namely the European Commission's Special Advisers' report on *Competition Policy for the Digital Era* (the "Crémer Report"[4]) and the UK's *Unlocking Digital Competition, Report of the Digital Competition Expert Panel* (the "Furman Report"[5]) (together, "the Reports") highlight some of the competition concerns in digital markets. The Reports identify a number of supply-side aspects common to digital platforms, which may restrict competition and market entry, such as network effects, economies of scale and scope, and the control of consumer data. These features provide significant advantages to incumbents and are likely to assist in the attainment, entrenchment, and exploitation of market power. Such effects are amplified by demand-side considerations common to digital markets, such as consumer biases (risk aversion, the "endowment effect," anchoring, and so on),[6] which undermine switching or multi-homing, and lock in consumers.

Prevailing online business models, such as multi-sided platforms and zero-priced markets, have consequences for the application of competition law and policy. The Reports conclude that the existing competition framework remains broadly relevant, but that it can and should be adapted to meet the challenges from the digital economy, and to continue to encourage competition and innovation for the benefit of consumers. Close collaboration with consumer protection and privacy enforcement regulators will be essential, given the complementary role of privacy and consumer protection laws in addressing potential harms associated with digital platforms and promoting consumer trust in digital markets. This is a point also made by the OECD's Competition Committee, most recently in a roundtable discussion on financial technology ("FinTech").[7]

This article will consider some of the recommendations from the Furman and Crémer Reports designed to enhance competition law enforcement in digital markets, adding insights from ongoing OECD work on the digital economy. After a discussion of some of the key features of digital markets that require an adaptation of standard competition analysis, we consider the use of the prevailing "consumer welfare" standard. Next, we discuss demand-side considerations in digital markets, which can be a determining factor in entrenching the power of incumbents. Finally, we analyze two key issues highlighted by the Reports: the impact of data on competition, and digital mergers.

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2 For example, digitalization has created new investment and business opportunities, offered new products, improved the quality of goods and services, and decreased costs. We note that various digital services such as price comparison tools specifically help to increase competition.

3 OECD, *Common Understanding of G7 Competition Authorities on Competition in the Digital Economy*, Paris, June 5, 2019, available at https://www.ftc.gov/system/files/attachments/press-releases/ftc-chairman-supports-common-understanding-g7-competition-authorities-competition-digital-economy/g7_common_understanding_7-5-19.pdf.

4 J. Crémer et al, *Competition Policy for the Digital Era* (April 4, 2019), available at https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

5 UK Digital Competition Expert Panel, *Unlocking Digital Competition, Report of the Digital Competition Expert Panel* (March 13, 2019), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

6 OECD, *Use of behavioural insights in consumer policy*, OECD Science, Technology and Innovation Policy Papers (February 2, 2017), available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/CP(2016)3/FINAL&docLanguage=En.

7 See OECD, *Digital disruption in financial markets*, June 5, 2019, available at http://www.oecd.org/daf/competition/digital-disruption-in-financial-markets.htm. Such cooperation is being initiated. For example, in 2019, the Italian Competition Authority ("AGCM") released a joint report with the Italian Data Protection and Communications Authorities.

II. KEY FEATURES OF DIGITAL MARKETS

There are three key characteristics of the digital economy: extreme returns on scale, network externalities, and the role of data, which in combination have led to several highly concentrated markets, where it is difficult to dislodge incumbents. As with large-scale industries, there are significant advantages associated with size. The average variable cost of serving additional customers is very low, which provides an advantage to incumbents that have already incurred the necessary fixed costs and established themselves in the market. Thus, incumbents have a significant competitive advantage. Further, large economies of scope favor the development of so-called "ecosystems." This is reinforced by strong network externalities in these markets, which exist when participation on each side of a platform depends on participation on the other side. Such externalities can make it difficult for a new entrant to displace or even compete with an established incumbent. The Reports note that the extent of this incumbency advantage may be dependent on the degree to which multi-homing, data portability, and data interoperability are possible in a given market. Finally, the ability of large platforms to acquire and use data help them to obtain and maintain market power.

The Furman and Crémer Reports acknowledge that vigorous competition, where a large number of firms compete in a single market, will typically not be feasible in the digital economy. The specific features of the online economy tend to produce "winner takes most" markets (a tendency which itself forms part of the incentive to enter this sector). While, in the recent past, sustained market power was constrained by dynamic competition, which led to more rapid turnover, the Reports note that large dominant companies have become more entrenched in digital markets. In this light, the Reports acknowledge that more needs to be done to protect competition *for* the market, through both enforcement and proactive regulation. Competition authorities must prioritize gaining a better understanding of how digital markets work, in order to better adapt competition law concepts and methodologies to address specific issues in such markets.

III. CONSUMER WELFARE STANDARD

The consumer welfare standard underpins the application of competition law in the EU. In other words, the overall goal of competition law should be to ensure that consumers benefit. Both the Furman and Crémer Reports stress that the consumer welfare standard remains appropriate, despite criticism by proponents of a more "structural" approach.[8] The Furman and Crémer Reports argue that the notion of "consumer welfare" encompasses all relevant consumers, including business users, and is not limited to end-consumers. This may be particularly relevant for competition in digital markets, where large marketplace platforms also serve businesses and act as "regulators" or "gatekeepers" for transactions. As such, businesses may be affected by a given platform's potentially anti-competitive practices, such as "self-preferencing," i.e. the practice of proposing one's own services or products before or on more advantageous terms than those of competitors.

Along with specific regulatory regimes that exist in some jurisdictions, competition law may be an appropriate framework to pursue certain forms of unfair business practices, including business-to-business conduct where "consumer protection laws typically do not apply." Likewise, "data privacy provisions often extend only to natural persons," as noted in the OECD *Implications for E-commerce* Background Note, as these tend to focus on final consumers.[9] In some cases, competition law enforcement, such as merger control, may therefore be appropriate. Secondly, the consumer welfare standard is not limited to price and quantity considerations. Any type of negative effect can be considered. In the digital economy, quality considerations such as service, innovation, and privacy may be more relevant as a measure of consumer welfare, especially in multi-sided platforms and zero-price markets.

The Furman Report stresses the importance of dynamic considerations and the possibility of using "some structural presumptions."[10] The Reports highlight some of the difficulties in applying the current tools to digital markets where quality is often the determinative factor.[11] The OECD also recognizes the difficulties in evaluating quality factors, noting the current lack of an agreed framework among enforcers.[12] As regards determining the existence of an abuse of dominance, the Crémer Report highlights possible changes to the standard of proof (in terms of likely error costs) and notes that it is difficult to calculate the expected impact on consumers. Both Reports discuss the possibility of moving away from requiring precise measurement of consumer harm, suggesting that practices that seek to reduce competitive pressure should be forbidden unless the dominant platform can demonstrate clear consumer welfare gains.

8 Furman Report, *supra* note 5, p. 87. Criticism of the consumer welfare standard has come mainly from the U.S.

9 OECD, *Implications for E-commerce, Secretariat Background Note*, p. 46, available at https://one.oecd.org/document/DAF/COMP(2018)3/en/pdf.

10 Furman Report, *supra* note 5, p. 87.

11 For example, when defining the market, the SSNIP test is less relevant in zero price markets.

12 OECD, Policy Roundtables: *The role and measurement of quality in competition* analysis (2013).

IV. DEMAND-SIDE CONSIDERATIONS

Another (and trickier) aspect of digital markets is the consumer response to the techniques employed by platforms. As highlighted by the OECD, this means that demand-side analysis is just as important as supply-side considerations.[13] The specific characteristics of digital markets influence consumer behavior, helping sustain and reinforce the market power of incumbent dominant platforms (see Box 1). The Crémer and Furman Reports also recognize the influence of consumer bias in entrenching incumbents' market power, and suggest the use of certain remedies, such as data portability and interoperability requirements (which facilitate switching), to help address consumer inertia.[14]

A. Behavioral Responses may Lock in Consumers

The UK's Consumer and Markets Authority ("CMA") and the OECD examined how demand-side behavior can be analyzed by identifying how consumers access, assess, and act on information, and noted that good market outcomes "depend on a functioning demand side."[15] In addition, when customers face challenges such as "barriers to accessing relevant information on price or quality, barriers to switching, barriers to searching or comparing between suppliers or where they face barriers to understanding the choices on offer, suppliers may be able to exercise greater market power than they otherwise would."

13 See the roundtable discussion on the topic, available at http://www.oecd.org/daf/competition/consumer-facing-remedies.htm

14 We note that the Stigler Center (University of Chicago) report on digital platforms provides extensive discussion on consumer biases.

15 OECD, *Designing and Testing Effective Consumer Facing Remedies – Background Note by the UK CMA* (2018), p. 6.

Box 1. Examples of consumer behavioral biases[16]

Choice/information overload: When faced with either complex products or a bewildering array of choices, consumers can sometimes ignore possible choices, walk away from markets, or "choose not to choose". Consumers can also rely on relatively simple "rules of thumb" or "heuristics" to make decisions.

Default and status quo effect: Presenting one choice as the default option can induce consumers to choose that option. The power of default options is related to the status quo effect, where consumers have a strong tendency to keep using the default option, since the disadvantage of leaving it looms larger than any advantages of leaving.

Endowment effect: Consumers often demand much more to give up an object than they would be willing to pay to acquire it. The value of a good for consumers increases when it becomes a part of a consumer's endowment.

Anchoring: Consumers "anchor" decisions around information that they think is the most important. Consumers may fail to adjust their perception of the value of the offer sufficiently, even when additional information is provided to them, since they are hesitant to move far from the anchor point.

Framing: Consumers are influenced not only by the content of the information provided by suppliers but also by how the information is presented. Presenting an option in a certain way may induce consumers to evaluate their choices from a particular reference point.

Priming effect: When consumers are repeatedly exposed to certain objects, for example, through publicity, certain attributes can play an undue role in consumer decisions. Priming can influence preferences by making certain dimensions salient that would otherwise have been considered to be less important.

Overconfidence: Consumers tend to think that they are more likely to experience an outcome from some action that is better than the average expected outcome. For example, many drivers think that they are safer than the average person, and when consumers are told that 20% of customers will benefit from a particular product, they tend to expect that they will be part of that 20%.

Hyperbolic discounting / myopia: Consumers' perceived discount rates tend to rise steeply the shorter the time period being considered. This means that consumers tend to treat the present as if it were more important than other time periods. This explains outcomes such as low retirement savings in the absence of compulsion.

Time-inconsistency: While traditional economic models assume that consumers behave in a time-consistent way, i.e. that they are able to make decisions knowing their long-term interest and resist short-term actions that go against that, in reality, choices are not consistent across time periods. Consumers may face a conflict between short-term urges and long-term interests.

Fairness: Consumers are generally concerned that market transactions should be fair to other consumers and are often concerned about the conditions of supply (e.g., labor conditions, or use of environmental resources). This means that consumers are concerned not only about their own interests.

Social norms: Consumers are often guided by the values, actions, and expectations of a particular society or group. For example, when people are made aware of what others are doing, it can reinforce individuals' underlying motivations.

Source: Kahneman et al (1991), OECD (2006), OECD (2007), OECD (2010), UK OFT (2012a), McAuley (2013), Oxera (2013), Shafir (2008), Behavioural Insights Team (UK) (2014)

Consumers in digital markets do not seem to display the rational utility-maximizing decision-making that is assumed in traditional economic models.[16] Consumers have biases such as the "present bias," which makes switching difficult (i.e. preferring what they already have rather than what they may get in future). In concrete terms, this means, for example, that consumers are more likely to shop on websites where they already have an account. Network effects also mean that users tend to stay on social networks where they already have a large number of contacts, rather than seeking out potentially better options (in terms of quality, price, or privacy protection, for instance). Behavioral aspects may lead to sub-optimal consumer outcomes and decrease consumer trust in platforms, while increasing the "stickiness" of the incumbent's market power.

16 OECD, *Designing and Testing Effective Consumer Facing Remedies – Background Note by the UK CMA* (2018), p. 10

Given the strength of network effects in digital markets, consumers are highly reliant on their peers to assess gains and losses. Digital market players may exploit this behavior through platform design.[17] It is therefore recommended that enforcers should also consider demand-side intervention and remedies. The OECD notes four main categories of potential demand-side remedies in this context: (i) disclosure remedies; (ii) "shopping-around" remedies; (iii) switching remedies; and (iv) outcome control remedies.

The OECD roundtable on *Designing and Testing Effective Consumer Facing Remedies* identified how trust is essential to the effectiveness of demand-side remedies, especially in data-driven markets. To ensure that customers are willing to share data with third parties—for instance in order to obtain better or more innovative products and services—they need to have sufficient trust in market rules and regulations, and in market participants.[18] Hence, the CMA's "Open Banking" remedies, for example, require customers to be prepared to provide account information to third-party intermediaries to be effective. This willingness in turn is influenced by whether customers feel their data is secure and whether they have control over its use.

Trust in institutions and data security is therefore of the utmost importance for the well-functioning of policies such as the UK's Open Banking initiative. However, such success also requires close cooperation not only between competition authorities, but also with data protection and consumer protection regulators. The next section will consider how the two Reports address data and merger issues that can prevent consumers from taking full advantage of digitalization.

V. NOTABLE RISKS IN DIGITAL MARKETS AND CONSUMER-FACING REMEDIES

A. Data Considerations

The Crémer Report acknowledges competing considerations when it comes to data.[19] Data are an input for the provision of services and can create efficiencies, enabling innovation and the improvement of services and products, for example through customization. The ability to obtain, store and use data is thus a key competitive factor. Lack of access to specific data can therefore be a barrier to entry for new entrants. The way such data are used can also be a source of mistrust for consumers in digital markets, raising consumer protection concerns based on obvious market information asymmetries.

In the EU, the enforcement of abuse of dominance rules (Article 102 TFEU) tends to target "exclusionary" conduct, focusing on the workability of the competitive process and indirect consumer harm. However, "exploitative" abuse of dominance cases, such as the German Facebook investigation, which looked at whether Facebook breached data protection provisions, suggest that data concerns could, potentially, be addressed by competition authorities as exploitative abuses.[20]

In addition, as flagged by the Furman and Crémer Reports, issues relating to the use of algorithms (for instance to match competitors' prices), and individual price discrimination, require further attention and monitoring.[21] In the EU, privacy concerns have been addressed by regulatory responses such as the General Data Protection Regulation ("GDPR"), and consumer law continues to evolve to adapt to digital market concerns. As stressed by the Reports, this is an area where cooperation with privacy and consumer protection bodies is key. The OECD has highlighted that the goals of these agencies are often aligned in terms of consumer welfare, promotion of market trust, and consumer choice,[22] but that the pro-competitive effects of data should not be stifled by over-zealous policymaking.

To support competitive market structures, the Reports, especially the Furman Report, recommend that competition authorities engage in proactive regulation, as ex-post assessment is too slow and insufficient to effectively address competition issues in digital markets. One possibility is to use the essential facilities doctrine to facilitate data access. This is however not a point on which all jurisdictions have reached agreement.

17 The OECD explains that platforms may directly or indirectly induce exclusivity, for example through contractual terms that prevent a user from participating on a platform if they participate on a competing platform (direct) or through price structures that make it unattractive for a user to multi-home (indirect) (see *Rethinking antitrust tools for multi-sided platforms*, OECD, 2018, pp. 114-115).

18 UK Background Note, *supra* note 17, pp. 39-40.

19 Crémer report, *supra* note 4, Chapter 5.

20 We note that Facebook recently won its appeal to the Higher Regional Court of Dusseldorf (August 2019) but that the German Cartel Office has said it will appeal this decision.

21 See, e.g. Furman Report, *supra* note 5, p. 23. See also, OECD, *Personalised Pricing in the Digital Era, Background Note by the Secretariat*, November 28, 2018 https://one.oecd.org/document/DAF/COMP(2018)13/en/pdf.

22 OECD, *Big Data; bringing competition policy into the digital era (Executive Summary with Key Findings)*, p. 5 available at https://one.oecd.org/document/DAF/COMP/M(2016)2/ANN4/FINAL/en/pdf.

The Reports emphasize how large platforms have accumulated valuable datasets, and discuss whether the scope of such data acquisition is now an insurmountable barrier to entry. The Furman Report proposes the creation of a "Digital Markets Unit" within the CMA. One of its proposed functions would be to promote "greater personal data mobility and systems with open standards where these tools will increase competition and consumer choice,"[23] in the mold of the UK's Open Banking initiative. Consumer control over user data favors trust and thus participation in the market. The Unit's other functions would include an agenda to secure open access to "non-personalized and anonymized data," and therefore encourage market entry and competition.

B. Merger Control in Digital Markets

Ensuring effective merger control in digital markets can help promote consumer trust, whether by blocking mergers or imposing (consumer facing) remedies where necessary.[24] Both the Crémer and Furman Reports encourage the prioritization and revision of merger control regimes in digital markets. The Reports raise the particular concern that potentially anti-competitive mergers whereby incumbents buy start-ups with promising technology or business models (so-called "killer acquisitions") will escape assessment or be cleared unconditionally because they fall below current merger notification thresholds.

There is also the specific concern of mergers motivated by access to or acquisition of so-called "Big Data," given its substantial value and its impact on a firm's ability to attain, sustain, and potentially abuse market power. Rival firms with their own datasets could otherwise act as a competitive constraint on dominant platforms or companies. The Reports discuss whether existing merger rules adequately capture potentially problematic transactions, and split their assessment of mergers into two key aspects, which we discuss below.

1. Identification of Mergers and Notification Thresholds

In the UK, there is no compulsory pre-merger notification process, and the Furman Report did not recommend any change to the voluntary regime generally. However, it did recommend that large digital platforms be required to notify intended acquisitions.[25] The Crémer Report makes no recommendation for a change to notification thresholds for mergers. However, it notes that certain jurisdictions, such as Austria and Germany, have already introduced notification thresholds based on transaction value, and proposes to monitor their effects.[26] Given the high monetary value of such acquisitions, such provisions will likely capture Big Data or technology mergers that would not otherwise meet turnover thresholds.[27] For example, Facebook's 2014 acquisition of WhatsApp had a transaction value of USD 21.8 billion, compared with WhatsApp's 2013 revenue of USD 10.2 billon.[28] The Crémer Report nonetheless stresses the importance of legal certainty and ensuring that an appropriate threshold is set, in order to ensure the proper functioning of the merger control regime, and to avoid unnecessary administrative and transaction costs.

2. Substantive Assessment

More importantly, in line with recent OECD work,[29] the Crémer and Furman Reports agree that assessment of digital mergers should also (and especially) consider non-price parameters, such as privacy protection and data. Further, the Reports suggest that competition authorities should take a more rigorous approach to harm to potential competition.[30]

23 Furman Report, *supra* note 5, p. 5.

24 An example of consumer facing remedies can be seen in the commitments by Microsoft to secure EU clearance for its acquisition of the professional social networking site, LinkedIn whereby, for a period of 5 years, Microsoft undertook to safeguard manufacturers' and distributors' choices as to whether or not to preinstall LinkedIn on Microsoft Windows, and to ensure that, if preinstalled, it could be removed by users. Such remedies can help address demand side concerns.

25 We note that this has also been recommended by the recent Australian Competition and Consumer Commission ("ACCC") Digital Platform Inquiry.

26 These provisions are applied in addition to existing turnover provisions, with a view to ensure that high value mergers concerning undertakings with high potential but low turnover are caught by the merger control regime.

27 It is said that the German provisions would now capture the Facebook/WhatsApp merger (transaction value of USD19 billion), which although reviewed by the EU Commission, was not captured by the EU merger notification thresholds. As explained by the OECD, "such transaction thresholds could help enable competition authorities to identify pre-emptive acquisitions intended to displace potential disruptive innovators (some of which may be data-driven innovators)." See OECD, *Big Data: Bringing Competition Policy to the Digital Era*, 2016, p. 20.

28 See Alison L. Deutsch, *WhatsApp: The Best Facebook Purchase Ever?*, Investopedia, June 25, 2019, available at https://www.investopedia.com/articles/investing/032515/whatsapp-best-facebook-purchase-ever.asp.

29 OECD, *Big Data: Bringing Competition Policy to the Digital Era*, 2016, p. 18.

30 Similarly, The ACCC Digital Platform Inquiry recommends reform to the Australian Competition and Consumer Act 2010 to explicitly allow the ACCC to consider: "(a) the likelihood that an acquisition would result in the removal of a potential competitor, and (b) the amount and nature of data which the acquirer would likely have access to as a result of the acquisition," when assessing the likely competitive effects of a merger.

While the Crémer Report does not recommend changing the EU's current significant impediment to effective competition ("SIEC") merger control test, it does recommend greater scrutiny of whether incumbents have an overall strategy to prevent competition (including in broader ecosystems). In particular, there is a need for the development of new theories of harm. It has been suggested that the burden of proof should be on merging parties to show that efficiency gains offset any adverse effects on competition, though without presuming that such mergers are anticompetitive.[31] The Furman Report went further and recommended reforming the standard of review, proposing a "balance of harms" approach, which would look not only at the likelihood of a merger leading to anticompetitive harm, but also its potential extent.

The CMA, in its Digital Markets Strategy, considers that the current UK merger control standards are still "fit for purpose."[32] That said, the CMA is currently reviewing its merger assessment guidelines,[33] and has recently undertaken an ex-post assessment of mergers in digital markets. A united position on whether substantive merger assessment tests need further amendment has yet to be agreed among EU competition authorities.

VI. CONCLUSION

Recent and on-going work on digitalization in the EU and by the OECD highlights the importance of understanding how digital markets work and their impact on the economy and consumers. This work is supported by ongoing market studies by competition authorities to improve the understanding of digital markets and identify appropriate policy responses.[34] In particular, there may be a benefit in carrying out competition assessments of laws and regulations to determine whether they unnecessarily restrict innovation and growth in digital markets.[35] While most competition agencies agree that there is no need to overhaul the existing competition framework, it is nonetheless clear that competition authorities should adapt their tests and tools to the challenges of digital markets and large platforms, and in particular consider alternative theories of harm. They also need to adapt their enforcement methodologies to include demand-side remedies, to help better protect consumers and build trust in digital markets. Finally, the sheer speed of developments means that competition authorities need to take a proactive approach, such as establishing specialised units and equipping themselves with the necessary digital tools. For instance, the essential facilities doctrine could be employed to allow new entrants to gain access to key data to support a competitive environment. Solid competition enforcement and pro-consumer policies could increase consumer trust, encouraging legitimate consumer market participation and increased innovation.

31 Crémer Report, *supra* note 4, p. 124.

32 CMA, *The CMA's Digital Market Strategy*, July 2019, p. 9.

33 See, e.g. UK Government, *Call for Information: Digital Mergers*, available at https://www.gov.uk/government/consultations/call-for-information-digital-mergers.

34 Enforcement action was initiated thanks to the EU Sector Inquiry into E-commerce (2017), conducted as part of the EU Digital Single Market Strategy. In July 2019, the UK announced that it would conduct a market study into Online Platforms and Digital Advertising.

35 The OECD is currently updating its Competition Assessment Toolkit to consider digital issues.

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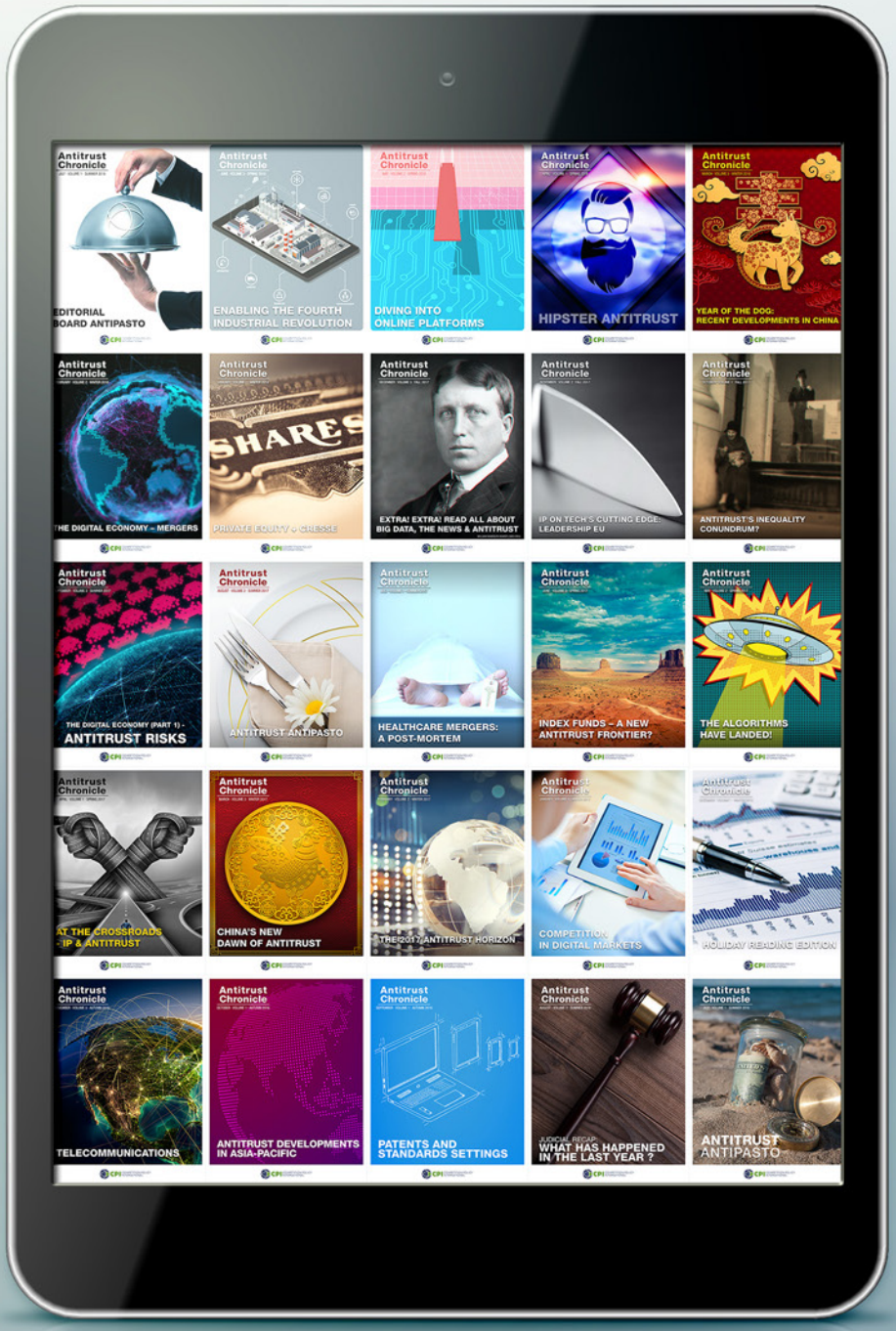


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