

SHORTCUTS AND COURTS IN THE ERA OF DIGITIZATION



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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, prudence, 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.

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CPI Antitrust Chronicle October 2019

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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

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

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.

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).

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.

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

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.”

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

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.

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.

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.”

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.”

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 60 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 1/2003¹⁸ 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 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?

15 M. Van der Woude, “Judicial Control in Complex Economic Matters,” *Journal of European Competition Law and Practice* (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.

20 M. Van der Woude, “Judicial Control in Complex Economic Matters,” *Journal of European Competition Law and Practice*, (forthcoming).
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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 aftermarket*” 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 definition²⁴ 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

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

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 rules 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

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. CPI Antitrust Chronicle October 2019

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 depending 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

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, *MEQ*, 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.

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).

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 procompetitive³⁴ 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

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

³³ The Report even adds at pp. 7 and 68 that where self-preferencing has benefitted a platform’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).

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.

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.

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.

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.”

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.

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