

Antitrust CHRONICLE

SPECIAL EDITION

The Digital Economy - 2019 Highlights

Joseph Simons

Julie Clarke

Heike Schweitzer & Robert Welker

Gregory J. Werden & Luke M. Froeb

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Hon. Katherine B. Forrest (fmr.)

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Augustine Peter & Neha Singh

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Letter from the Editor

Dear Readers,

2019 was, by any definition, a landmark year for international antitrust enforcement in the digital economy.

CPI published numerous articles on this subject during this critical year. These articles relate not only to ongoing enforcement activity and case law, but also touch on the studies and reports that regulators have commissioned this year to address the question of how to frame and conceptualize competition enforcement in this crucial sector.

Over the past year, we have published contributions from notable scholars, regulators, and practitioners who specialize in this industry, across the world. This special edition of the CPI Antitrust Chronicle recaps these valuable contributions, and in addition publishes an interview with Mr. Joseph Simons, the chair of the U.S. Federal Trade Commission, who, like our other contributors, is at the coalface of this vital frontier for antitrust enforcement.

This issue recaps developments from 2019, but the digital economy is here to stay. As practitioners, regulators and academics from around the world grapple with this challenge, CPI will continue to provide our readers with a comprehensive, balanced perspective on the evolution of law and practice.

As always, thanks once again to our panel of contributors.

Sincerely,

CPI Team¹



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¹ This Special Edition of the CPI Antitrust Chronicle features articles from the 2017-2018 Chronicles focused on the digital economy. CCIA sponsored some of the editions of the Chronicle featured in this collection. 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.

08 CPI TALKS... ...with Joseph Simons

In this month's edition of CPI Talks we have the pleasure of speaking with Mr. Joseph Simons, the Chairman of the Federal Trade Commission.

12 AUSTRALIA'S DIGITAL PLATFORM INQUIRY: WE'VE ONLY JUST BEGUN... By Julie Clarke

Between 2017-2019 the Australian Competition and Consumer Commission conducted a "world first" inquiry into digital platforms and their impact on media and advertising services markets. Its focus was Google and Facebook reflecting their "influence, size and significance" in Australia. Concluding that these platforms have market power, the *Final Report* makes a raft of recommendations traversing competition, consumer, privacy, media and broader public interest concerns. In the competition space, minor recommendations were made with respect to Australia's merger laws and processes and a targeted recommendation is made that Google remove default search and browser preferences from Android devices. The Report also calls for the establishment of a specialist ACCC branch tasked with pro-active monitoring and enforcement and armed with compulsory information gathering powers to conduct market inquiries and make recommendations to government. Many of the Report's recommendations call for further consultation, including the development of several "codes of conduct." It is clear that the focus on addressing the rise of the digital platforms in Australia has only just begun.

18 COMPETITION POLICY FOR THE DIGITAL ERA By Heike Schweitzer & Robert Welker

A number of recent reports and studies has discussed the need for competition law reform in the digital era, in particular with a view to exclusionary conduct by digital platforms and with a view to data access. While these reports share a common analysis, they diverge in their recommendations: Can we handle the new challenges on the basis of the existing set of competition rules? Do we need a new set of tests of abuse? Or do we need to shift from *ex post* competition law enforcement to *ex ante* regulation? In this article, we compare the reports. In particular, we discuss the need to shift from an effects-based analysis to "by object" prohibitions for dominant digital platforms, the need to promote data portability and interoperability, and the need for procedural reform, namely for a voluntary notification procedure for novel forms of cooperation. We conclude with some remarks on the need to adjust the enforcement style in light of the uncertainties of the digital era.

26 ANTITRUST AND TECH: EUROPE AND THE UNITED STATES DIFFER, AND IT MATTERS

By Gregory J. Werden & Luke M. Froeb

European enforcers have brought high-profile antitrust cases against the tech giants, and both activists and members of Congress are calling for action in the United States. This short note identifies ten hard-wired differences between the European and American enforcement regimes that make very it difficult for the U.S. antitrust enforcement agencies to emulate their European counterparts. This note also identifies a few other points of contrast between Europe and the United States that affect antitrust enforcement against tech giants going forward.

30 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 re-nomination 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.

35 THE ROLE OF MARKET DEFINITION IN ASSESSING ANTICOMPETITIVE HARM IN *OHIO v. AMERICAN EXPRESS*

By David S. Evans & Richard Schmalensee

This article shows that the Supreme Court reached the right outcome in *Ohio et al. v. American Express*. The District Court had found that American Express was a two-sided transaction platform that provided joint services simultaneously to cardholders and merchants. But it then chose, by adopting a single-sided merchant services market, to analyze the effect of the anti-steering provisions at issue solely on one side of these simultaneous transactions. That decision appears to have prevented the lower court from seeing that the plaintiffs' evidence of anticompetitive harm to merchants was weak. The District Court also decided that case law prevented it from considering the effect of the conduct on the other half of the transactions even at the second-stage of the rule of reason. The Supreme Court did not discuss the limitations of the plaintiffs' theory and evidence at length but simply and properly found that the plaintiffs had failed to prove antitrust injury to platform competition for transactions. This article also shows that criticisms of the Supreme Court decision seem to be based on the rejection or misunderstanding of the economics literature on multi-sided platforms on which the District Court, the Appeals Court, and the Supreme Court all relied.

44 BIG DATA AND ONLINE ADVERTISING: EMERGING COMPETITION CONCERNS By Hon. Katherine B. Forrest (fmr.)

The concept of big data has captured the public's attention primarily in regards to its privacy implications. However, the significance of big data in the competition sphere can no longer be ignored. Europe has been taking an increasingly aggressive stance in the big data realm — with multiple recent antitrust investigations into large technology companies and the passing of the European Union's General Data Protection Regulation in 2018 — but companies in the United States must now pay attention. This article takes a multi-layered approach to analyzing the competition ramifications of big data, asserting that big data itself has developed into a competitive force within firms. Big data has become, for many firms, a product in and

of itself, separate from the firms' traditional products or services, and firms often believe that any big data they come to possess they can utilize without consideration.

49 ONLINE ADVERTISING AND ANTITRUST: NETWORK EFFECTS, SWITCHING COSTS, AND DATA AS AN ESSENTIAL FACILITY

By Catherine E. Tucker

In this paper, I discuss some of the traditional sources of market power grounded in economics, and how they apply to online advertising markets. I discuss the idea that digital advertising has evolved technologies that are intended to dismantle many early network effects in online advertising. I then discuss how new digital technologies have evolved to reduce switching costs for advertisers. Last, I discuss briefly the question of whether data can be thought of as an essential facility for advertising.

53 PRIVACY AND COMPETITION: FRIENDS, FOES, OR FRENEMIES?

By Maureen K. Oehlhausen

The debate about data-rich tech companies has led to calls for changes to consumer privacy law, competition law, or both. Europe has adopted the General Data Protection Regulation, limiting the collection, use, and sharing of consumer data, which may raise competitive hurdles for some players. It also includes a data portability requirement, which may reduce lock-in and spur competition. Some have also advocated using competition law to impose new controls and obligations on entities that collect consumer data. U.S. antitrust law has considered data about and generated by consumers in merger cases and has even imposed data sharing as a remedy. There are calls to go further and treat consumer data as an essential facility and force big tech companies to share it. The essential facilities theory is in tension with the premises behind new privacy laws, which are that there is an abundance of consumer data and that consumers want less, not more, sharing of their data. This article explores the challenges and limits to these theories and the tension they create between reducing and widening access to consumer data. Can privacy and competition values live in harmony as friends, will some of these proposals make them enemies, or is it a bit of both?

57 DATA PROTECTION AND ANTITRUST: NEW TYPES OF ABUSE CASES? AN ECONOMIST'S VIEW IN LIGHT OF THE GERMAN *FACEBOOK* DECISION

By Justus Haucap

Many services on the Internet are seemingly offered for free. People do not have to pay for them, at least not with money. The present article argues that it is rather difficult to conceive what use of data would constitute an exploitative abuse of market power in these markets – the issue which has been at heart of the German investigation into Facebook's data combination practices. In particular, the question emerges as to what the appropriate benchmark for exploitative data abuse cases should be.

Requiring dominant firms to behave more like competitive firms would be rather absurd if small firms without market power violate privacy standards more often than larger firms. Moreover, if users are not aware of what kind of data is collected and how this data is used due to a lack of transparency, as has been suggested in the German *Facebook* case, this appears to be, by and large, a problem of asymmetric information which is not necessarily

related to market power. Overall, portraying excessive data usage as being analogous to excessive pricing is fraught with several difficulties. In contrast, it is easier to conceive that not granting third-party access to data may be an obstructive abuse of market power.

62 THE EU *GOOGLE* DECISIONS: EXTREME ENFORCEMENT OR THE TIP OF THE BEHAVIORAL ICEBERG?

By Amelia Fletcher

The recent EU *Google* decisions may represent a high-water mark for the use of behavioral economics in EU antitrust to date, but what do they imply for competition policy in the future? Do such cases represent the outer extremes of how far behavioral thinking can and should be taken? Or do they represent baby steps towards the more comprehensive incorporation of behavioral economics into competition policy thinking? This article highlights the widespread influence of behavioral economics across other areas of policy and discusses a number of directions in which competition policy could potentially be transformed. Noting the existence of an extensive literature in behavioral antitrust, it focuses on a number of aspects which have been given less attention to date.

68 CADE AND THE CHALLENGES OF THE DIGITAL ECONOMY

By Patricia Alessandra Morita Sakowski & Christine Park

CADE has been focusing considerable efforts to respond adequately to the challenges raised by the digital economy in the recent years. They include primarily institutional strengthening; domestic and international cooperation; and advocacy work. The first comprises training of its staff, bringing capacities in-house and the development of its analytical and enforcement tools. Cooperation with other government bodies that have significant interplay with competition enforcement in the digital economy has also been on the agenda, as well as international arenas to discuss the development of competition policy within the digital economy. CADE has also been conducting advocacy efforts, especially through studies conducted by its Department of Economic Studies. In this endeavor, more questions than answer arise, but CADE believes it has been on track in the search of possible answers and is eager to debate and refine them with other antitrust authorities, the academia and practitioners in the international arena.

72 THE EVOLUTION OF COMPETITION LAW IN DIGITAL MARKETS IN INDIA

By Augustine Peter & Neha Singh

In step with global developments, Indian markets have been rapidly changing, characterized by the adoption of new technologies and innovation in almost all sectors of the economy. With recent disruptive policies including demonetization and the thrust towards digitalization, e-commerce has seen sudden growth in India.

Online retail sales alone in India were expected to have reached U.S. \$32.7 billion by 2018, led by Flipkart, Amazon India, and Paytm Mall. With e-commerce projected to increase at a compound annual growth rate ("CAGR") of 44.77 percent as recently as 2016, and to reach U.S.\$ 63.7 billion by 2020, India is one of the world's fastest growing retail markets.

CPI TALKS

with

JOSEPH SIMONS¹

January 2020

In this month's edition of CPI Talks we have the pleasure of speaking with Mr. Joseph Simons, the Chairman of the Federal Trade Commission. Thank you, Mr. Simons, for sharing your time for this interview with CPI.

- 1. In the fall of 2019, fifty States' Attorneys General announced an antitrust investigation into Google, focusing on Google's advertising business, but potentially extending into other aspects of its activities. In 2013, the FTC closed an investigation into Google that would have focused on similar issues. In parallel, we understand that the FTC will look at similar issues relating to Facebook and Amazon. What are your views on the interplay between State enforcers, the FTC, and the DOJ in the digital economy? What are some of the ways in which the agencies are coordinating?**

I can't comment on any current investigations, but I'll note that the FTC has a long history of coordinating with our sister agencies on enforcement matters. The states, in particular, play a critical role in our investigations because they very often are closer to the conduct under investigation or may have closer ties with some of the individuals who are complaining about the conduct. We've worked closely with the states on past litigation matters such as the *Mallinckrodt* case, where Alaska, New York, Texas, and Washington joined our complaint and obtained a portion of the \$100 million settlement relating to charges that the company maintained its monopoly by acquiring development rights to a competing drug. And in our recent hospital merger challenges against *Advocate/North Shore*, Penn States Hershey/*PinnacleHealth*, and Sanford/*MidDakota*, we worked closely with the states.

In past cases, attorneys from the states have helped us identify witnesses, taken the lead in conducting interviews, helped de-

velop our thinking around legal theories, participated in depositions, and served as co-counsel when we go to litigation. They are critical partners that share investigative responsibilities and strengthen our ability to prosecute anticompetitive mergers and conduct. Finally, I should note that even when we aren't directly working with the states, states have, on their own initiative, submitted supportive amicus briefs in cases that we are litigating in federal court.

At the federal level, the FTC and DOJ typically will come to some mutual agreement on which agency will investigate a matter. We try to "clear" matters to one agency or the other in order to avoid duplicating investigations. Although recently, we have had some difficulty coming to an agreement on which agency should handle certain digital-market-focused conduct investigations, we are working together constructively to ensure any overlapping investigative work goes smoothly.

- 2. In parallel, enforcers worldwide (notably in Europe) have continued to adopt an interventionist approach in the digital economy, both in terms of recent cases (and various sector inquiries and recently-published reports, that suggest that this trend will continue or intensify). Do you believe that in the months and years to come we will see more convergence between international enforcers in their approach to the digital economy, or do you see a risk of greater divergence?**

Headlines may overstate differences in approach to digital matters. For example, this past summer, the competition authorities

¹ These remarks reflect my own views. They do not necessarily reflect the views of the Commission or any other individual Commissioner.

of the G7 countries, together with the European Commission, developed a [Common Understanding on Competition and the Digital Economy](#), which focuses on shared principles related to the value of innovation, sound competition analysis, competition advocacy, and international cooperation as keys to promoting the benefits of competition in the digital economy.

As for the U.S. and Europe, the transatlantic relationship is marked by deep and frequent engagement. Over the three decades since our U.S.-EU cooperation agreement, our interaction, with few exceptions, tells a story of convergence. The digital economy is unlikely to be different, as we are examining similar conduct (setting aside the EC's single market cases), testing similar theories, and usually coming to similar conclusions. The topics the Vestager-commissioned experts explored in the [Competition Policy for the Digital Era](#) report are topics we addressed during our year-long [series of hearings](#). Our hearings even had a [session](#) dedicated to understanding our respective approaches to platforms.

Moreover, differences in our courts' approaches to assessing multi-sidedness, or the quantum of effects necessary to find a single firm conduct infringement are not specific to the digital economy, and they are not a harbinger for greater divergence in the digital sphere.

Our shared vocabulary and analytical tools suggest an evolution that is more likely to be a continuing force for incremental convergence than an inflection point for divergence. Frequent exchange will allow us to narrow actual or potential differences as together we develop a better understanding of how these markets function. Although each jurisdiction naturally favors its own regime, we have much to learn from the experiences of others as we work to refine our respective approaches to enforcement in light of new learning and information about the digital economy.

3. What are your views on the role of "big data" for anti-trust enforcement in the digital economy, and how does it interact with other regulatory regimes? The notion of "big data" has implications for different types of regulation, beyond antitrust. Notably, the FTC enforces not only antitrust rules, but also certain aspects of Federal privacy rules (See, for example, the recent COPPA settlement with Google concerning advertising on YouTube), and international antitrust enforcers (notably the German Federal Cartel Office) are showing greater willingness to take data and privacy concerns into account in antitrust enforcement strictu sensu. How will the FTC balance these roles and rules going forward?

The use of data in commerce is not a new phenomenon. All firms gather and use data to some degree. Although firms have used data for a long time, data usage in commerce is becoming an increasingly important element of competition. Recent advances in technology have enabled firms to gather vast amounts of information about consumers and the marketplace. Commentators sometimes refer to such datasets as "big data." Harnessing big data can bring enormous benefits to consumers and be a significant driver of economic growth. Firms can use big data to create innovative products and services, develop sophisticated AI applications, and more efficiently market products and services to consumers. Health care providers can take advantage of big data to improve patient care, potentially saving many lives.

However, big data can also be an instrument of anticompetitive conduct that harms consumers. Antitrust enforcers must be vigilant to consider the effects of data on competition. Firms can use data to engage in exclusionary conduct by, for example, abusing their monopoly power to deny rivals access to data through exclusive agreements with suppliers of data. Mergers between firms in markets where access to data is an essential input may also lead to anticompetitive harm. Fortunately, antitrust enforcers at the FTC have the tools necessary to challenge anticompetitive conduct and mergers involving data.

The FTC has been active in enforcement of competition cases involving data. The FTC has had a number of enforcement actions where access to data was a central element of the case. The FTC has required remedies in [CoreLogic's acquisition of DataQuick Information Systems](#) (a transaction involving real property data) and in [Dun & Bradstreet's acquisition of Quality Educational Data](#) (a transaction involving educational marketing data). Most recently, the [FTC challenged a proposed merger between Fidelity National Financial and Stewart Information Services Corporation](#) (a transaction involving property title data), leading the parties to abandon the proposed merger.

Moreover, in 2019, the FTC launched a new division within the Bureau of Competition dedicated to antitrust enforcement in the technology sector. The Technology Enforcement Division specializes in antitrust enforcement in digital markets, including antitrust issues associated with big data.

Antitrust, however, is not the only concern arising out of misconduct involving big data. Firms may also harm consumers by collecting, using, or sharing data in a way that violates consumers' privacy. One of our major priorities at the FTC is to challenge deceptive or unfair practices under Section 5, or violations of other laws enforced by the FTC, relating to consumers' data. Recently, the FTC obtained a \$5 billion penalty on Facebook for violating an earlier Order that prohibited Facebook from misrepresenting how it shares and uses consumer data, and required it to take reasonable steps to protect consumer data.

The \$5 billion penalty is the largest consumer privacy related penalty ever obtained by any government. In addition to the penalty, Facebook agreed to sweeping new privacy restrictions and a modified corporate structure that will hold the company accountable for the decisions it makes about its users' privacy.

It is critical that firms collect and use data in a way that respects consumer privacy. Appropriate privacy rules must safeguard consumers. However, when enacting privacy legislation, Congress should consider how legislative choices in the privacy arena would also affect competition. For example, certain legislative choices could favor incumbents. Ideally, any new privacy laws will both protect consumers and promote competition.

4. More broadly speaking, what are your views on the interaction between antitrust enforcement and sector regulation as it relates to the digital economy? Leaving aside their merits, there are growing calls at a political level for greater intervention in this sector (see for example, the 2019 Congressional hearings into the activities of the large technology companies). Do you think the existing antitrust and regulatory toolkits are sufficient to deal with any problems identified, or do you believe additional legislative or regulatory rules are required to deal with problems unique to this sector?

Antitrust laws work in conjunction with other federal laws and regulations as well as with state laws and regulations. Antitrust laws focus on protecting competition and ensuring that markets remain free from impediments to competition. Other laws and regulations typically have broader social goals and priorities, such as promoting universal access, protecting the environment, ensuring the safety of workers and consumers, protecting privacy, and eliminating deceptive marketing practices. In general, federal antitrust laws apply across all sectors of the economy. Firms that operate in regulated sectors of the economy are generally not immune from antitrust enforcement. However, in some limited circumstances, sector-specific regulations may supersede antitrust enforcement.

Over the past several decades, the United States has reduced regulations in many sectors of the economy with the goal of eliminating impediments to competition in these sectors. Sectoral regulators have also increasingly promoted competition and free markets in pursuing broader policy objectives. I should also note that the FTC has an active ongoing advocacy program to encourage states to adopt laws and regulations (or revise existing standards) that enhance and promote competition. Indeed, many technology-enabled business models have challenged existing regulatory approaches and caused policymakers to adapt regulations to allow competition from newcomers. In addition,

the FTC engages with Congress to promote laws that are likely to enhance competition in the U.S. economy.

Current U.S. antitrust laws provide the tools necessary to address competition challenges in the digital economy. U.S. antitrust laws are sufficiently robust to handle competition problems as they arise. Over the years, antitrust laws have proven to be very flexible and resilient in enabling enforcers to challenge conduct that harms competition in a broad range of markets. These laws have proved themselves effective even as the economy evolved with technological progress. I do not expect this to change when it comes to enforcement of antitrust laws in the digital economy.

5. In parallel to the Congressional hearings discussed above, in the fall of 2018 and spring of 2019, the FTC held a series of hearings examining whether changes in the economy, business practices, and in particular digital technologies might require adjustments to the law, enforcement priorities, and policy. What are your views on the submissions made during this process? Do you foresee any outputs from this consultation in the near-to-medium term and what are some lessons learned so far?

As you note, last fall, the Commission commenced its *Hearings on Competition and Consumer Protection in the 21st Century*. These hearings underscore the unique role that the FTC plays in the development of sound competition and consumer protection policy. We asked for public comment on several questions and topics, and we are taking into account the submitted comments and public testimony as well as the FTC's experience, judicial decisions, and academic writings as we create our output.

We are planning to release several pieces of output. I expect we will be releasing output from our international hearing very soon. I previewed the content from that hearing in my speech at the Fordham University Conference on International Antitrust Law and Policy. Specifically, the output will discuss the broad interest in the following:

- Reauthorizing the U.S. SAFE WEB Act;
- Stronger information sharing and investigative assistance mechanisms;
- FTC's continued international leadership on competition and consumer protection issues;
- Expanded programs to build strong relations with counterparts; and
- FTC's role in formulating broader government policies that relate to competition and/or consumer protection and involve international issues.

We also are working earnestly on Vertical Merger Guidelines, and we have been coordinating with DOJ in that effort. We are drafting a guidance document on the application of the anti-trust laws to technology platform conduct, which we also plan to share with DOJ. Beyond that, we are drafting commentary on vertical and horizontal mergers — very similar to the Commentary on the Horizontal Merger Guidelines from 2006. We are conducting a review of the economic literature on “common ownership” or horizontal shareholding. We are developing a protocol for merger retrospective studies that will help us to identify good candidates for horizontal merger retrospective studies.

I should note that while the hearings created direct support for several pieces of output, they also are indirectly kindling other initiatives. For instance, our hearings on labor monopsony issues have partly inspired our interest in hosting another workshop on non-compete clauses in certain labor contracts. We are using this workshop, which we are hosting on January 9, 2020, to gain a better understanding of what support we would need to develop a rule relating to non-compete clauses in certain labor contracts. I wouldn't be surprised if our work on the hearings inspires other offshoots in our policy work. ■

AUSTRALIA'S DIGITAL PLATFORM INQUIRY: WE'VE ONLY JUST BEGUN ...

By Julie Clarke¹

December 2019

I. INTRODUCTION

Digital Platforms Inquiries are becoming so ubiquitous as to be almost pedestrian. Nevertheless, when announced in December 2017, the Australian Digital Platforms Inquiry (“DPI”) was touted as a “world first” for its focus on the media sector and its breadth of inquiry across competition, privacy, consumer protection and broader issues of public interest.

The genesis of the dpi was not lobbying from the Australian Competition and Consumer Commission (“acc”) or broader political concerns about the rise of major platforms. Rather, it lay in a political compromise; the government needed the support of a senator to pass changes to Australian media ownership law and that support hinged (in part) on the government agreeing to investigate the impact digital platforms on competition in the media and advertising market.²

So it came to be that Australia’s first significant public inquiry into digital platforms was focused squarely on the impact of platforms on “the state of competition in media and advertising services markets, in particular in relation to the supply of news and journalistic content.”³ As a result, digital platforms, in the context of the DPI, are defined narrowly as “online search engines, social media and digital content aggregators,” a distinct contrast to the broad-brush, digital-market-agnostic definitions which typically define digital platforms as digital businesses providing an online meeting place for different groups of users.⁴

II. SCOPE OF INQUIRY

A consequence of the more limited definition of digital platforms adopted by the DPI is that the focus of the inquiry was squarely on the two dominant players in online advertising and media aggregation in Australia; Facebook and Google.⁵ Although arguably narrow

in this respect, the DPI was also broader than many in that it was not restricted to assessing competition concerns; indeed, while many of the concerns identified in the DPI report stem from findings of market power, the recommendations directed toward competition law and policy are relatively modest. Part of the explanation for the breadth of focus is that the ACCC is a competition and *consumer* authority, so is accustomed to considering issues from a consumer protection perspective. But the terms of reference went further still, requiring investigation of, among other things, the impact of digital platforms on choice and quality in news and the impact of information asymmetry between platforms and consumers more broadly. Consequently, the ACCC’s investigation, analysis and recommendations traverse competition issues, consumer issues, privacy, copyright and other public interest issues, while recognising that they are all interlinked, at least to some degree.⁶ Its breadth in this regard has been described as world first or ground-breaking.⁷

The inquiry itself ran for 18 months, with a Final Report (the “Report,” or the “Final Report”) delivered in July 2019. Along the journey, the ACCC published an issues paper and a preliminary report, each of which attracted more than 100 submissions, a consumer questionnaire eliciting 260 responses and it engaged in numerous public and private forums and meetings. It also commissioned independent research and issued 60 statutory notices to compel production of information.⁸ Facebook

1 Associate Professor in Competition Law, The University of Melbourne.

2 The Hon Josh Frydenberg MP, The Hon Christian Porter MP, Senator The Hon Mitch Fifield, “ACCC Preliminary Report on Digital Platforms,” (Media Release, December 10, 2018).

3 The Hon Scott Morrison MP, “Inquiry into digital platforms,” (Ministerial direction pursuant to ss 95H(1) of the Australian Competition and Consumer Act 2010 (Cth), December 4, 2017).

4 *The House of Lords’ Online Platforms* report describes digital platforms as a “broad category of digital businesses that provide a meeting place for two or more different groups of users over the Internet”: House of Lords, *Online Platforms and the Digital Single Market* (HL Paper 129, April 20, 2016) 7.

5 The closest rival to Facebook (considered together with Instagram) in terms of time spent and unique audience was found to be Snapchat and Twitter, each with a fraction of the “time” share enjoyed by Facebook; ACCC, *Digital Platforms Inquiry: Final Report* (June 2019) 77 (“Final Report”). For Google, its share of search was found to be between 93-95 percent over the last decade, with its closest rival (Bing) enjoying no more than 4 percent during that time: Final Report, 66.

6 Final Report, 5. See also Rod Sims, “Insights and impacts of the ACCC Digital Platforms Inquiry,” (IIC Australian Chapter Half Day Seminar, February 11, 2019).

7 See also James Panichi & Marci Eccles, “Australia stakes claim to world’s first deep dive into Facebook, Google media impact,” (MLex, January 12, 2019, <https://mlexmarketinsight.com/insights-center/editors-picks/antitrust/oceania/australia-stakes-claim-to-worlds-first-deep-dive-into-facebook,-google-media-impact>).

8 Final Report, 3.

alone claims to have produced over 1608 documents, comprising 14,500 pages, consuming more than 10,000 people-hours.⁹ The Report itself runs to 623 pages.

The duration of the inquiry meant that between the time it commenced and the Final Report being delivered, a number of other reports were commissioned and reported, including the independent Furman report in the UK¹⁰ and Crémer report in the EU,¹¹ each of which were referenced by the ACCC in its Report.

III. THE HITS

The Report made 23 recommendations to government and, despite its media focus, many of the findings and recommendations apply to digital platforms generally or otherwise have industry-wide application.

The ACCC's essential conclusions are that Google and Facebook have substantial market power in relevant media and advertising markets and that this means markets are not functioning as well as they should. This is reflected in substantial imbalances in information and bargaining power for consumers, advertising and media organisations.

In determining how best to address this imbalance the ACCC noted the intersection between competition, consumer protection and data protection and privacy. It treaded lightly in relation to competition law and policy, but made more substantial recommendations in the areas of consumer protection and data protection and privacy. The Report also includes a significant suite of recommendations directly targeting media and the role of the platforms within the media and media advertising space, including with respect to copyright protection.

This note focuses on those recommendations most relevant to competition law and policy, while also touching on some of the more controversial recommendations around privacy and media.

IV. THE RISE OF THE PLATFORMS: MARKET POWER AND WHAT TO DO ABOUT IT

Chapter 1 of the Report is entitled “Rise of the digital platforms,” conjuring up images of a post-apocalyptic Rise of the Machines. After acknowledging the value provided by digital platforms, including the lowering of barriers to entry for a wide range of news sources, the Report churns out a plethora of statistics (e.g. “43 per cent of Australians used online sources as their primary news source in 2019;¹² Google and Facebook have collectively captured more than 80 per cent of growth in online advertising in the past three years¹³) to help support its conclusion that Facebook and Google do indeed have substantial market power in relation to online advertising and in their dealings with news media, and both have substantial bargaining power in dealing with news media.¹⁴ Their ubiquity has made them, in many cases, “critical and unavoidable partners.”¹⁵

Core contributing factors to the ACCC's findings of market power included:¹⁶

- the breadth and depth of user data collected; and
- the “considerable barriers to entry and expansion for search platforms and social media platforms that entrench and reinforce Google and Facebook's market power,” including those arising from “same-side and cross-side network effects, branding, consumer inertia and switching costs, economies of scale and sunk costs.”

The role of data in contributing to and maintaining market power featured prominently in the Report,¹⁷ with the ACCC observing that the collection of data enhances the services of the platforms which in turn attracts more users and advertisers in a “virtuous feedback loop.”¹⁸ It rejected the argument that advertising data held by the platforms was “not rare or unique” and that it was “replicable” and “not inherently valuable.”¹⁹ The “scale and scope” of data held by Google and Facebook and its “quality and accuracy

9 Facebook, “Facebook's response to the Digital Platforms Inquiry,” (September 12, 2019) 6 (that excludes voluntary engagement).

10 *Unlocking digital competition: Report of the Digital Competition Expert Panel (UK, March 2019)* (Panel comprising Jason Furman (Chair), Diane Coyle, Amelia Fletcher, Philip Marsden & Derek McAuley) (from September 2018-March 2019).

11 Jacques Crémer, Yves-Alexandre de Montjoye & Heike Schweitzer, *Competition Policy for the Digital Era* (“the Crémer Report”) (EU, April 4, 2019) (commencing April 2018).

12 Final Report, 345, citing C Fisher, S Park, JY Lee, G Fuller & Y Sang, *Digital News Report: Australia 2019* (News & Media Research Centre, University of Canberra, June 12, 2019) 13.

13 Final Report, 119.

14 For Google identified markets were “the supply of general search services” and “the supply of search advertising services.” Final Report, 8. For Facebook the markets were “the supply of social media services” and “supply of display advertising services”: Final Report, 9. The Report did not reach a conclusion about whether there was a market for “news referral services to media business” in which Google and Facebook enjoy market power, but opined that they “probably” did; Final Report, 58.

15 Final Report, 1.

16 Final Report, 58.

17 Final Report, 11.

18 Final Report, 11.

19 Final Report, 57.

cy,” make it particularly valuable and give them a “strong competitive advantage” which creates “barriers to rivals” and allows the incumbents to “expand into adjacent markets.”²⁰

Dynamic competition was also found to be insufficient to curb this market power. Although the ACCC acknowledged that dynamic competition may apply some degree of competitive constraint, Google was “substantially insulated” from dynamic competition and in the case of Facebook, any constraint offered by dynamic competition had been “tempered.” In each case, this was largely due to barriers to entry and expansion, advantages of scope and the “acquisition strategy” of the companies.²¹

A. MERGER REFORM

Having determined that the digital platforms have market power and that “strategic acquisitions” had contributed to this, the first two recommendations in the Report propose changes relating to how mergers are reviewed.

Australia’s merger law prohibits acquisitions that have the effect or likely effect of substantially lessening competition.²² The ACCC has long been concerned that this standard limits the extent to which they can successfully challenge mergers or acquisitions of small but potentially significant nascent rivals. Despite this, the ACCC stops short of recommending a change to the core test or to the burden of proof for merger assessment (although it does flag that it “may be worthwhile” to consider whether a “rebuttable presumption” should be introduced into Australia’s merger laws and is “considering whether it is appropriate to advocate” for such changes outside the inquiry).²³

Instead, the first recommendation is that additions be made to the list of factors a court must consider when determining whether the competition test has been satisfied with respect to a proposed acquisition. This non-exhaustive list currently includes a range of uncontroversial factors, such as the height of barriers to entry, the level of concentration and the degree of countervailing market power. The ACCC proposes that two factors be added to the list:

- “the likelihood that the acquisition would result in the removal from the market of a potential competitor” and
- “the nature and significance of assets, including data and technology, being acquired directly or through the body corporate.”

Although these factors can already be considered, the ACCC regards their inclusion in the mandatory consideration list as offering an important signaling mechanism, highlighting their significance.

In relation to potential competitors, the ACCC states that the recommendation is designed to address concerns about the acquisition of nascent competitors by a dominant platform.²⁴ Although acknowledging the need to balance this concern against the risk of deterring start-ups who might choose to invest or innovate in the hope of being acquired and preventing anti-competitive acquisitions, the ACCC considered the signaling benefits outweighed this risk.²⁵ Neither Facebook nor Google have objected to the recommendation, perhaps providing reliable evidence that it is unlikely to have a substantive impact on their “acquisition strategies,”²⁶ given the challenges of predicting the competitive impacts of the counterfactual in cases of nascent competition.²⁷ It would be surprising if the government did not accept this proverbial “low hanging fruit” recommendation.

Unlike the first recommendation, the second is not only industry specific, but directly targets Google and Facebook. It recommends they work with the ACCC to agree on a protocol to notify the ACCC of proposed acquisitions.

There is currently no pre-merger notification requirement in Australia; parties may and frequently do notify the ACCC of proposed mergers that may raise concerns and the ACCC may indicate that they will not be challenged; indeed, many deals are contingent on the ACCC indicating it will not challenge a merger.

Google indicated that it welcomes engagement on this issue, but expressed some caution;²⁸ Facebook does not support the recommendation,²⁹ pointing to a lack of evidence of a prob-

²⁰ Final Report, 11.

²¹ Final Report, 58.

²² *Competition and Consumer Act 2010* (Cth) s 50.

²³ Final Report, 109.

²⁴ The Report references the Furman and Cremer Reports in relation to these recommendations: Final Report, 106.

²⁵ Final Report, 106.

²⁶ Support is tempered by some caution that the application of the criteria must be supported by evidence: Google Australia Pty Ltd, “Digital Platforms Inquiry: Submission in response to the ACCC’s Preliminary Report,” (February 18, 2019) 17; Facebook, “Facebook’s response to the Digital Platforms Inquiry,” (September 12, 2019) 33.

²⁷ See, for example, John M Yun, “Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms,” (Prepared Statement before the United States Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights, Washington DC, September 24, 2019) 4-9.

²⁸ Google Australia Pty Ltd, “Digital Platforms Inquiry: Submission in response to the ACCC’s Preliminary Report,” (February 18, 2019) 17.

²⁹ Facebook, “Facebook’s response to the Digital Platforms Inquiry,” (September 12, 2019) 13.

lem necessitating an industry-specific regulatory response and observing that the ACCC already has considerable powers to review mergers, whether or not notified by the parties.³⁰

As with the first recommendation, concern has been expressed about the potential for the recommendation to “chill innovation and entrepreneurship,”³¹ and while those concerns may be overblown, industry specific regulations (even informal ones) are fraught, at least where there is a lack of evidence of a problem requiring regulatory redress. It is tough to predict how Australia’s conservative government will respond to the call for greater regulation without a solid evidentiary foundation.

B. NO NEW DIVESTITURE POWERS

Australia has provision for court-imposed divestiture remedies where merger laws have been contravened; as the ACCC rarely brings merger cases before the courts and even more rarely litigates over concluded mergers, resort to this power has not been made this century. Divestiture is not available for other competition law breaches. Calls by some, including News Corp, That Alphabet divest certain assets were firmly rejected in the Report. Despite “possible benefits” of some divestiture, the ACCC confirmed its view, expressed with some regularity, that, as a general rule, market structure is “best left to competitive forces” and that implementing structural reform “necessarily involves risks in design” and implementation, which is “particularly acute in digital markets.” In any event, the ACCC did not consider that the proposed divestitures would address the identified consumer and competition concerns.³²

C. NO CHANGE TO MISUSE OF MARKET POWER LAWS

As is the case in most jurisdictions, there is no prohibition in Australia on a company holding market power or in acquiring greater power, provided it is not done through anti-competitive means. Unilateral conduct having the purpose or effect of substantially lessening competition is prohibited.

The Report highlighted concern about the ability and incentives for digital platforms to exploit their market power, but (sensibly) makes no recommendation to change the core misuse of

market power law, which was overhauled in November 2017 to reflect a greater focus on competition concerns.

However, the Report does state that dominant firms “of course, have a special responsibility that smaller, less significant businesses do not have.”³³ The adoption of this distinctly European terminology is notable, particularly given that it has not been a feature of Australia’s misuse of market power law. There is no illumination of what is intended by this reference in the Report, but some guidance can be found in a speech by ACCC Chair, Rod Sims, who explained that he simply means that “conduct by a non-dominant firm that is benign, may become problematic when a dominant firm engages in the same behaviour.”³⁴ So much may be accepted, given competitive effects are market and context dependent. But Sims goes on, explaining that the ACCC considers that in the case of Google and Facebook this “special responsibility should go further” and this is reflected in some industry-specific recommendations.³⁵

One of those may be the recommendation for a pre-merger notification protocol. Another is reflected in the targeted requirement for Google to remove default preferences.

D. REMOVAL OF DEFAULT PREFERENCES

The ACCC recommends that Google provide Android device users with the ability to choose default search engines and browsers, arguing it will “improve consumer choice and be pro-competitive” by reducing “customer inertia as a barrier to expansion.”³⁶

The ACCC’s clear concern is default bias. The recommendation itself represents a shift from the preliminary report, which was not company-specific and simply recommended suppliers of operating systems or browsers be required to provide this choice. There are two explanations for this. The first is that the ACCC accepted a number of submissions suggesting an industry-wide requirement might entrench Google’s dominance and heighten barriers to entry for small rivals who could no longer benefit from default search or browser installation on some devices.³⁷ The second is that between the release of the preliminary report and the final report Google announced (in March 2019) that it would make these changes in Europe.³⁸ The recommendation

30 Facebook, “Facebook’s response to the Digital Platforms Inquiry,” (September 12, 2019) 38.

31 Final Report, 110.

32 Final Report, 117.

33 Final Report, 1.

34 Rod Sims, “Insights and impacts of the ACCC Digital Platforms Inquiry,” (IIC Australian Chapter Half Day Seminar, February 11, 2019)

35 Rod Sims, “Insights and impacts of the ACCC Digital Platforms Inquiry,” (IIC Australian Chapter Half Day Seminar, February 11, 2019).

36 Final Report, 110.

37 Final Report, 110.

38 Final Report, 111.

itself draws on these European commitments, arguing that the ability for Android users to choose default search engines and browsers should also be rolled out in Australia; failure to do so voluntarily is likely to result in the ACCC asking the government to compel them to do so.

In a blog response to the final report, Google identified this recommendation as one of two that raised “particular concerns.” It argued that the recommendation does not account for different Australian market conditions and laws, and is not accompanied by a justification for “focusing on Android when Apple’s iOS is the most-used mobile operating system in Australia ... and Microsoft’s Windows remains the most-used PC-based operating system.”³⁹

E. PROACTIVE MONITORING AND INVESTIGATION

The final (and arguably most significant) of the competition recommendations is that a specialist digital platforms branch of the ACCC be established to “investigate competition issues relating to digital platforms,”⁴⁰ including taking enforcement action, conducting inquiries and making recommendations to government.

This recommendation was prompted, in part, by the ACCC’s conclusion that digital platforms with substantial market power have the ability and incentive to engage in anti-competitive

leveraging behavior⁴¹ and that existing laws are insufficient to deal with this, including as a result of lack of transparency and the time taken to accumulate and assess relevant data. In addition, the investigatory and litigation timeframes might mean the remedy is too late to address the identified concern.⁴²

A specialist branch armed with compulsory information gathering powers would, it is argued, allow for increased visibility of problems and would improve consumer outcomes through greater transparency as well as acting as a catalyst for change by shining a light on bad practices. It would also develop the expertise of the ACCC in relation to digital platform markets and allow evidence to be build up over time and provide the ACCC with the flexibility to respond.

To combat concerns about lack of transparency associated with ad tech, in particular, the ACCC has further recommended a specific ACCC inquiry be conducted by the newly formed digital platforms branch into the supply of ad tech services and online advertising services by advertising and media agencies.⁴³

The creation of a specialist branch is not by itself controversial and is not unprecedented, but the ACCC further recommends that the branch be empowered by a ministerial direction to hold inquiries over a minimum of five years.⁴⁴ Ministerial direction brings with it a raft of compulsory information gathering powers not otherwise available to the ACCC. For this reason, it is perhaps not unsurprising that Facebook has pushed back on this aspect of the recommendation; while providing in principle support for a specialist branch, it has questioned the appropriateness of ongoing compulsory information-gathering powers, concerned about the “largely unconstrained nature of the public inquiry proposed” and noting the “intrusive, burdensome and costly” nature of the “highly coercive governmental power to compel the production of information and documents in circumstances where there is no reason to believe there has been any breach of laws.”⁴⁵ It is not alone in expressing these concerns.⁴⁶

V. CONSUMER PROTECTION

The Report makes two recommendations specific to consumer protection;

- a recommendation that unfair contract terms be prohibited and subject to pecuniary penalties;
- a recommendation that certain unfair trading practices be prohibited.

Both are industry wide recommendations.

Unfair contract terms in standard form consumer and small business contracts are currently rendered void by the Australian Consumer Law, but the ACCC considers that adding prohibition and the threat of penalties will provide greater incentives for compliance.

39 Melanie Silva, “Google on the ACCC Digital Platforms Inquiry,” (Googleblog, September 17, 2019, <https://australia.googleblog.com/2019/09/google-on-acc-c-digital-platforms-inquiry.html>).

40 Final report, 140 and recommendation 4.

41 Rod Sims, “Insights and impacts of the ACCC Digital Platforms Inquiry,” (IIC Australian Chapter Half Day Seminar, February 11, 2019).

42 Final Report, 139.

43 Final Report, recommendation 5.

44 Final Report, 140 and recommendation 4.

45 Facebook, “Facebook’s response to the Digital Platforms Inquiry,” (September 12, 2019) 6 (that excludes voluntary engagement) 45.

46 Business Council of Australia, *Submission to Treasury on the Digital Platforms Inquiry* (September 2019, p 4). See also John M Yun, Douglas H Ginsburg, Joshua D Wright & Tad Lipsky, “Comment of the Global Antitrust Institute, George Mason University School of Law, on the Australian Competition & Consumer Commission’s Digital Platforms Inquiry, Preliminary Report,” (George Mason University Law and Economics Research Paper Series, 19-04, January 22, 2019) 1.

In relation to unfair trading practices, the scope of what should be included is left for further consideration, but the Report suggests that it may extend to certain data-use practices.⁴⁷ In particular, consumers should be protected from “conduct that deprives them of a real and meaningful choice” including by “imposing extortionate take-it-or-leave-it terms to consumers who are in need of a service,”⁴⁸ suggesting a consumer (and perhaps small business) version of an exploitative practices prohibition, sans the requirement to demonstrate market power or anti-competitive impact.

VI. PRIVACY

The Report includes several recommendations relating to data privacy, including by strengthening the Privacy Act, particularly around notification and consent requirements, such as implementing pro-consumer defaults, enabling erasure of personal information and providing a right of direct action for individuals⁴⁹ and the development of a statutory tort for serious invasions of privacy. The Report also calls for broader reform of Australia’s privacy law in the form of a further review and development of an enforceable code of practice, developed by the Office of the Australian Information Commissioner (“OAIC”), “to enable proactive and targeted regulation of digital platforms’ data practices.”⁵⁰

VII. MEDIA-SPECIFIC RECOMMENDATIONS

Most of the remaining recommendations are targeted at media and journalism more specifically. The most notable and most controversial is recommendation 7, that designated digital platforms provide codes of conduct governing relationships between digital platforms and media business to the Australian Communications and Media Authority (“ACMA”). This is the second of the recommendations about which Google raises “particular concerns.”⁵¹ Google’s concern is unsurprising given the recommendation would require commitments on data sharing with news media business, early notification of changes to ranking or display of news content and negotiated revenue sharing in some cases designed to address the imbalance of bargaining power.

47 Final Report, 498.

48 Final Report, 499.

49 Recommendation 16.

50 Recommendation 18.

51 Melanie Silva, “Google on the ACCC Digital Platforms Inquiry,” (Googleblog, September 17, 2019, <https://australia.googleblog.com/2019/09/google-on-accc-digital-platforms-inquiry.html>). Although Facebook supports a code “in principle” it expresses concern about the proposed nature and application of the code: Facebook, “Facebook’s response to the Digital Platforms Inquiry,” (September 12, 2019), 6 (excluding1 voluntary engagement).

52 Sacha Molitorisz & Derek Wilding, “Digital platforms. Why the ACCC’s proposals for Google and Facebook matter big time,” (The Conversation, December 11, 2018).

53 Final Report, 116.

54 Final Report, 11 and 115.

55 ACCC, “Google allegedly misled consumers on collection and use of location data,” (October 29, 2019).

The privacy and media-specific recommendations, unlike more general consumer and competition recommendations, have been described as “extensive and dramatic” and “far-reaching and bold.”⁵²

VIII. WHAT NEXT?

In its Report, the ACCC flagged as a “future ACCC work” direction, the issue of data portability. Australia is in the process of implementing a “consumer data right” (“CDR”) to give consumers greater control over their data. The CDR will be rolled out sector-by-sector, commencing with banking. The ACCC effectively dodged consideration of data portability as a potential panacea for some of the concerns it identified, although it did observe that it thought it unlikely that in the markets it was considering data portability would “have a significant effect on barriers to entry and expansion in certain digital platform markets in the short term.”⁵³ However, it will consider this further in the context of its work on the CDR.⁵⁴

The ACCC has also pressed ahead with its ongoing investigations involving digital platforms, most notably commencing action against Google in October 2019 alleging that they misled consumers in relation to the personal location data that it collects, keeps and uses.⁵⁵ The effectiveness of the Australian Consumer Law in addressing many of the more egregious conduct of the platforms will be watched closely, particularly given the challenges associated with direct action under the competition provisions.

As to the fate of the Report, it is currently being considered by government, which conducted a further review of the Report’s recommendations throughout August and September 2019. A formal response is expected by the end of 2019.

Even if all or most are accepted, it is clear that many of the recommendations represent only the start of further program of consultation and inquiry designed to address the market power related concerns identified. The ACCC’s work relating to digital platforms has only just *begun*. ■

COMPETITION POLICY FOR THE DIGITAL ERA

By Heike Schweitzer & Robert Welker¹

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I. INTRODUCTION

The digital economy poses new conceptual challenges for competition policy. A number of recent reports and studies concur in this finding². In a novel way, the digital economy is characterized by extreme returns to scale, positive network externalities that can prevent a superior platform from displacing an established incumbent, and a novel role for data as a crucial input to many online services, production processes, and logistics, as well as key ingredient for Artificial Intelligence³.

Digital platforms have emerged as a new type of information intermediary – indispensable in particular for consumers as they make use of the manifold possibilities of the internet by searching for information, interconnecting with other users or transacting online with businesses. Frequently, these platforms do not charge monetary prices for their consumer-facing intermediation services, but rather monetize the usage and user data collected in the course of the provision of those services by offering targeted advertising to businesses on the other side of the platform. As a consequence, so-called “zero-price markets” have become more common, and have raised questions with regard to the proper methods to delineate and analyze them. Simultaneously, positive network effects that tend to promote concentration on platform markets can translate into concentrated positions with regard to the control over user and usage data – data which can frequently be put to multiple uses across a broad variety of consumer facing markets. Extreme returns to scale, network externalities and the new role of data can thus result in strong economies of scope as digital platforms expand the range of services they offer to their users and turn into digital ecosystems. Likewise, the Inter-

net of Things (“IoT”) is characterized by the interaction between products and complementary services, driven by data. Again, the control over data can lead to the evolution of closed ecosystems where consumer choice is limited to complementary services offered by the product provider upstream.

The market changes we are currently experiencing are far-reaching. What is more: developments take place at high speed.

The various reports and studies largely agree in their diagnostic analysis. Moreover, there is a shared apprehension that, concentration tendencies notwithstanding, in an environment characterized by intense innovation with a view, in particular, to data analytics and data as a product and service component, effective protection of competition is key.

This is true with a view to competition *for* the market: Where extreme returns to scale and positive network effects tend to feed a “winner takes all” dynamic in platform markets, protecting the remaining opportunities for entry and competition becomes more important, not less. Practices by dominant platforms that hinder rivals in their ability to attract users and

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² Cr mer/de Montjoye/Schweitzer, *Competition policy for the digital era. Report for the European Commission, 2019 (“Special Advisors’ Report”)*, available at <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>; Furman et al., *Unlocking digital competition, Report of the Digital Competition Expert Panel, 2019 (“Furman Report”)*, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf; Commission ‘Competition Law 4.0’, *A New Competition Framework for the Digital Economy, Report for the Federal Ministry for Economic Affairs and Energy, 2019 (“Competition 4.0 Report”)*, available at https://www.bmwi.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.pdf?__blob=publicationFile&v=3; Schweitzer/Haucap/Kerber/Welker, *Modernisierung der Missbrauchsaufsicht f r marktm chtige Unternehmen, 2018 (subsequently: Market Power Study)*, available at <https://ssrn.com/abstract=3262210> including a summary in English; Scott Morton et al., *Report of the Committee for the Study of Digital Platforms - Market Structure and Antitrust Subcommittee, 2019 (“Stigler Report”)*, available at <https://www.judiciary.senate.gov/imo/media/doc/market-structure-report%20-15-may-2019.pdf>. See also: Belgian Competition Authority, Authority for Consumers & Markets, Conseil de la Concurrence, *Joint memorandum on challenges faced by competition authorities in a digital world, 2019*, available at https://www.belgiancompetition.be/sites/default/files/content/download/files/bma_acm_cdcl.joint_memorandum_191002.pdf.

³ See Special Advisors’ Report, p. 2.

generate their own positive network effects, e.g. by impeding multi-homing or switching of consumers or by implementing even narrow MFNs, are suspect.⁴ It is also true with a view to competition *on* platform markets: Dominant platforms have a special responsibility to ensure free, undistorted and vigorous competition on their platform. Finally, strong, frequently data-driven economies of scope increasingly draw attention to the need to protect against anti-competitive leveraging of dominance across market boundaries.

The various reports somewhat differ in their more concrete suggestions for change: To what extent can we handle the challenges on the basis of the existing set of competition rules? Do we need a new set of tests of abuse? Or do we need to shift from *ex post* competition law enforcement to *ex ante* regulation?

In this brief article, we propose to focus on this debate. Firstly, we will discuss the need to adjust existing competition rules to effectively protect competition in digital settings (II); secondly, we will inquire into what this means in terms of rules of conduct for dominant platforms (III); and thirdly, we will discuss the need to promote interoperability, including data interoperability, more generally (IV). Some suggestions for procedural reform follow (V). We conclude with some remarks on changing paradigms with regard to enforcement styles (VI).

Merger control will not be addressed in this piece.⁵ Nor will we address data access more specifically.⁶

II. "OPTIMAL COMPETITION RULES" IN THE DIGITAL ECONOMY: INSIGHTS OF DECISION THEORY FOR COMPETITION LAW

More than most other areas of law, competition law has been informed by decision theory insights on how to structure rules in light of error costs. In order to apply the broadly framed competition rules to specific cases, competition authorities and courts need to understand and sometimes predict the effects of complex business strategies on the competitive process, and ultimately on consumers. It is well understood that, in doing so, errors will occur: sometimes, conduct, agreements or acquisitions will be prohibited although they are in fact pro-compet-

itive (false positives/Type I-errors). Sometimes, harmful conduct, agreements or acquisitions will be allowed (false negatives/Type II-errors). Both types of errors may dampen competition, thus resulting in welfare loss.

Over the last 30 years, EU competition policy has been guided by two main goals: to reinforce the “fight against cartels”; and to reduce the number of “false positives” in other areas of competition law – i.e. to make sure that the cases pursued by the EU Commission are cases in which consumer harm can be shown. Under this so-called “effects-based approach,” the complexity of rules and the amount of case-specific information that competition agencies and courts have to take into consideration has consequently increased in cases of non-hard-core infringements.

The changes brought about by the digital economy have universally brought into view the costs that may accompany a policy that is, to a significant extent, focused on avoiding false positives: The EU Commission’s flagship digital cases – *Google Shopping*⁷ and *Google Android*⁸ – have promoted a better understanding of the dynamics of the digital economy. But the attempt to provide quantitative evidence of consumer harm case by case is time- and resource-intensive. The *Google Shopping* case in particular has been followed by a debate on how to remedy an abuse that has succeeded in driving out competitors.⁹

As important as the debate on improvements of the remedial regime in competition law is: the difficulties encountered in the remedial phase may in part flow from an attempt to reduce error costs in the decision-making phase by establishing more complex, more differentiated rules that require a more in-depth inquiry and more information. Ultimately, this may result in an increase in overall error-costs, in two different ways.

First, competition authorities are budget-constrained, and skilled enforcers are scarce human resources. Given that the enforcement capacities are fixed, any increase in complexity will lead to a decrease in erroneous decisions – but also to a decrease in the absolute number of cases that can be handled. This, in turn, leads to an increase in false negatives, as competition enforcers have to let potentially anticompetitive behavior slip through.¹⁰

4 Special Advisors’ Report, p. 5.

5 On mergers see Special Advisors’ Report, pp. 110 et seq.; Competition 4.0 Report, pp. 61 et seq.; UK Competition and Markets Authority, Ex-post Assessment of Merger Control Decisions in Digital Markets: Final report, 2019 (“LEAR Report”), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803576/CMA_past_digital_mergers_GOV.UK_version.pdf.

6 For that see: Special Advisors’ Report, pp. 73 et seq.; Competition 4.0 Report, pp. 33 et seq.; Schweitzer, GRUR 2019, 569.

7 European Commission, Decision of 27.6.2017, Case AT.39740 – *Google Search (Shopping)*.

8 European Commission, Decision of 18.7.2018, Case AT.40099 – *Google Android*.

9 Competition 4.0 Report, pp. 74 et seq.; Vezzoso, Android Remedies: Tearing Down the Wall?, CPI online, available at <https://www.competitionpolicyinternational.com/android-remedies-tearing-down-the-wall/>; Guniganti/Madge-Wyld, Google shopping remedies have had effect, Vestager says, GCR online, <https://globalcompetitionreview.com/article/1170666/google-shopping-remedies-have-had-effect-vestager-says>; Hoppner, CoRe 2017, 208.

10 Woodcock, The Indispensability of Per Se Rules in Budget-Constrained Antitrust Adjudication, 2017, available at <https://ssrn.com/abstract=2896453>.

Second, even where competition authorities intervene, more complexity leads to longer procedures. In the absence of interim measures, the anti-competitive conduct will negatively affect the competition for a longer period of time, and in fast-moving, dynamic markets, the harm to competition may be difficult to remedy. “Temporary” false negatives may therefore ultimately turn into permanent error costs, even where competition authorities intervene.

The general notion running through all the recent reports is that the error costs of false negatives in the digital economy, and in particular in digital platform settings, may be particularly high. The typical combination of extreme economies of scale and strong positive network effects can quickly lead to concentrated markets with very robust and durable market entry barriers, concentrated platform markets tend to translate into concentrated data control and thereby to self-reinforcing positions of dominance as well as to an expansion of market power across market boundaries. The welfare losses from competition law underenforcement may therefore be especially high, and quick, systematic and forceful intervention against anti-competitive conduct in order to protect the remaining opportunities for decentralized innovation and competition.

Overall, this argues in favor of more simple rules for conduct, and in particular of alleviating the requirement to show consumer harm on a case-by-case basis. This shift can be achieved by qualifying specific types of conduct as infringements “by object” instead of “by effect.” Efforts to reduce the “by object” box to types of conduct where pro-competitive explanation are, for all practical cases, almost inconceivable, ignore the error cost calculus. Rather, the “by object” box should include those types of conduct that will harm competition significantly with a significant degree of probability, and where pro-competitive justifications can reasonably be shown by the defendant. The analysis of what may qualify as an infringement “by object” should, furthermore, be guided by a proportionality test: where any pro-competitive rationale that may justify potentially anti-competitive conduct can also be achieved by other, less exclusionary means, the “by object” qualification may be justified.

In the recent reports, this issue is frequently discussed as a matter of introducing presumptions,¹¹ a shifting of the burden of proof, or a reduction of the standard of proof. These various concepts and terms have caused some confusion. Commentators have warned against reversals of the burden of proof or reductions of the standard or proof, as this would put the investigated firms into a difficult position and break with “core legal principles.”¹²

Yet, what is proposed here is not a conceptual novelty in EU competition law. The distinction between infringements “by object” and “by effect” is deeply engrained in the structure of Article 101 TFEU. Likewise, some tests of abuse under Article 102 TFEU have traditionally included an effects analysis, others have not.¹³ In U.S. antitrust law, some types of conduct are qualified as “illegal *per se*,” others fall under a “rule of reason” and require a more or less full-blown effects analysis.¹⁴ Deciding which type of conduct falls into one or the other box is part of the never-ending process of getting competition rules right in light of the error cost framework – a process in which competition authorities, courts and academics are constantly involved. What should be required – both in the abstract and case by case – is a coherent narrative of how a given type of conduct can lead to harm to the competitive process. What is not generally required under the basic principles of EU competition law is a positive proof of consumer harm, be it quantitative or qualitative.¹⁵

A turn away from a consumer harm criterion in the application of EU competition rules case by case – quite in line with settled case law – may be further recommended by the fact that innovation-based theories of harm will frequently figure prominently in digital cases. Given the dynamics of digital markets, as well as the fact that on the consumer-facing side of the platform, services are frequently provided “for free,” protecting competition in innovation will often be a core concern. Translating negative effects on innovation into consumer harm is, however, a methodologically complicated task. A plausible narrative concerning how a given type of conduct

11 Special Advisors’ Report pp. 50 et seq.; Stigler-Report, p. 72; Competition 4.0 Report, pp. 23 et seq.

12 Cf. “Vestager considers shifting burden of proof for big tech,” Global Competition Review of 31.10.2019, available at <https://www.lexology.com/library/detail.aspx?g=b7159a3d-ae2e-4e87-ba37-e59f9200c2c4>.

13 Ibáñez Colomo, CMLR 53 (2016), 709.

14 Hovenkamp, Florida Law Review 70 (2018), 81.

15 Cf. CJEU, Decision of 4.6.2009, Case C-8/08, ECLI:EU:C:2009:343 – T-Mobile Netherlands, paras 38 et seq.: “Article 81 EC, like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such. Therefore [...] in order to find that a concerted practice has an anti-competitive object, there does not need to be a direct link between that practice and consumer prices”; CJEU, Decision of 6.10.2009, Joined Cases C-501, 513, 515 and 519/06 P, ECLI:EU:C:2009:610 – *GlaxoSmithKline*, para 63: “[...] here is nothing in [Art. 81(1) EC] to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object. Secondly, [...] the Court has held that, like other competition rules laid down in the Treaty, Article 81 EC aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price [...]”.

will likely harm the competitive process will typically serve as a proxy for consumer harm.

A relaxation, and sometimes abandoning, of the need to show consumer harm will, however, result in a heightened burden for undertakings (and in the case of Article 102 TFEU, dominant undertakings), namely the need to come forward with an “efficiency defense.” In order to justify such conduct, they have to show (a) an efficiency rationale, (b) that consumers will benefit to a fair degree, (c) that the exclusionary conduct is indispensable for realizing those efficiencies and (d) that residual competition persists (Article 101 (3) TFEU). The CJEU has found that this efficiency defense applies to Article 102 TFEU as well.¹⁶ Where the “bar” for including specific types of conduct in the “by object” box is lowered, competition authorities and courts should seriously consider the merit of a pro-competitive rationale presented to them. The likelihood of succeeding with an efficiency defense would increase. In any case, undertakings must not be required (or allowed) to prove positive welfare effects as such – a form of proof that is outside of their realm of privileged knowledge. What is required is a plausible “narrative” of how the conduct at issue promotes, rather than harms, competition.

The parallel debate as to whether the “*standard of proof*” should be reduced is mainly limited to the realm of merger control. Here, the debate is whether to shift from a “more likely than not” standard for showing a significant impediment to effective competition to a “balance of harms” approach that takes into account not only the likelihood, but also the size of competitive harm.¹⁷ Others have proposed to introduce a presumption of illegality for acquisitions of start-ups by dominant digital platforms with strongly entrenched positions of market power.¹⁸

III. RULES OF CONDUCT FOR DOMINANT PLATFORMS

The business model of digital platforms is one of the “game changers” in the digital economy. In reaction to the emergence of digital platforms, many producers of consumer goods have reorganized their marketing and distribution channels, often to the benefit of competition and consumers.

At the same time, strong concentration in platform markets, the resulting “bottleneck” or “gatekeeper” positions of digital

platforms and the concomitant control over usage and user data with the potential to reinforce dominance drive many of the ongoing debates about competition law reform.

The *Special Advisor’s Report* for Commissioner Vestager has highlighted the fact that digital platforms are a special sort of intermediaries in that they set up fora or marketplaces, and thereby the rules and institutions through which their users interact.¹⁹ By designing the platform and framing the interactions, platforms become “regulators.” This “regulatory” function is inherent in the platform business model and can be highly beneficial. Platforms can solve a variety of coordination problems that otherwise complicate and sometimes impede interaction or otherwise create inefficiencies: by ranking information and offers according to perceived consumer preferences, they help consumers overcome the information overload of the internet and expand geographical market boundaries. Rating and recommendation systems, standardized contract terms and consumer-friendly dispute resolution regimes allow consumers to significantly reduce the transaction risks associated with information asymmetries and opportunistic behavior. Digital platforms thus address both the problem of adequately comparing and evaluating competing offers and the problem of (a lack of) trust between unfamiliar trading partners. In doing so, platform operators will normally have an incentive to maximize the overall value of transactions effected on their platform.

However, this need not always be true. Where platforms are vertically integrated, incentives may exist to steer customers to services offered by their subsidiaries. In other situations, platforms may steer customers towards the services of those firms who pay the highest commissions. In both cases, firms active on the platform no longer compete “on the merits,” but for the patronage of the platform. For users, the fact that the platform no longer ranks the matches according to their own preferences, but according to separate interests of the platform that are not aligned with their own, will typically not be visible. The platform’s regulatory choices will frequently be hidden in the algorithms and platform design and difficult to discern. This can be true for dominant as well as non-dominant platforms. It is for this reason that the P2B regulation²⁰ has established trans-

16 CJEU, decision of 15.3.2007, Case C-95/04 P, ECLI:EU:C:2007:166, para 86 – *British Airways*.

17 E.g. Furman Report, paras 3.88 et seq.

18 Stigler-Report, pp. 89 et seq.: “specific merger regulations should require merging firms to demonstrate that the combination will affirmatively promote competition.”; Australian Competition & Consumer Commission (ACCC), Digital Platforms Inquiry, Final Report, 2019, available at <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>, p. 199: “The ACCC considers it may be worthwhile to consider whether a rebuttable presumption should also apply, in some form, to merger cases in Australia. [...] it signals that, absent clear and convincing evidence put by the merger parties, the starting point for the court is that the acquisition will substantially lessen competition.”

19 Special Advisors’ Report, pp. 60 et seq.

20 Regulation (EU) 2019/1150 of 20.6.2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186/57.

parency rules²¹ for online intermediation services and search engines, irrespective of market power.²² Increased transparency can allow for increased competition between online intermediaries as long as the disciplinary force of competition is still intact. And it can be an important first step to detect anti-competitive conduct where it is not.

All recent reports agree that the ability of dominant platforms to steer competition poses specific threats to the competitive process that can require swift intervention in order to avoid the anti-competitive exclusion of competitors. There is a range of conduct that the reports unanimously view as suspect when adopted by dominant platforms: Self-preferencing by vertically integrated platforms,²³ the obstruction or prevention of multi-homing and switching,²⁴ the use of wide MFN- or best price-clauses²⁵ and certain forms of tying and bundling.²⁶ Conduct that restricts data mobility and/or interoperability may also constitute an abuse of dominance and will be addressed separately below (see IV, below).

All reports have therefore concluded that stricter conduct rules for dominant digital platforms – or for platforms with some specific sort and degree of market power – are required.²⁷ The *Furman Report* proposes a “code of conduct” for platforms with a “strategic market status,” a form of dominance²⁸ characterized by the control over “a gateway or bottleneck in a digital market, where they control others’ market access.”²⁹ Likewise, the *Stigler Report* proposes special conduct requirements for

platforms with “bottleneck power.”³⁰ The German Competition 4.0 Report has proposed to pass a new EU regulation, which specifies a set of conduct rules addressed towards dominant platforms. The recent draft amendment of the German Act Against Restraints of Competition proposes to introduce conduct rules for platforms that have “a paramount significance for competition across markets.”³¹ A study for the German Federal Ministry for Economic Affairs proposed to extend the prohibition to impede switching and multi-homing to platform businesses with some degree of market power *below* the threshold of market dominance in order to target *tipping-inducing behavior* in *highly dynamic markets* with tipping tendencies already before they tip.³²

The various reports agree that the need for a speedy intervention and the need for a comprehensive enforcement may require a shift to a set of more clear-cut conduct rules to be specified *ex ante* and swiftly enforced. *De facto*, this includes a move from infringements “by effect” to infringements “by object” (see above). Such a shift is, however, difficult to implement within the institutional set-up of competition law enforcement alone: the proposal that the EU Commission should provide *ex ante* guidance even before a relevant case law has emerged³³ will predictably be met with the criticism that it is assuming legislative powers.³⁴ A quick shift in rules may, therefore, require action by the legislator.

Any attempt to set conduct rules for digital platforms through legislation should, however, be closely aligned with the general

19 Material conduct requirements have not been implemented in the P2B regulation. There is a strong consensus that such rules should be limited to dominant platforms, see below.

20 Cf. Special Advisors’ Report, p. 69; Competition 4.0 Report, p. 49.

21 Furman Report, para 2.36; Special Advisors’ Report, pp. 65 et seq.; Competition 4.0 Report, pp. 50 et seq. See also Section 19a (2) (1) of the Draft Amendment of the German Act against Restraints of Competition. An unofficial English translation can be found at <https://www.d-kart.de/wp-content/uploads/2019/11/RefE-GWB10-dt-engl-%C3%9Cbersicht-2019-11-15.pdf>.

22 Stigler-Report, p. 93; Special Advisors’ Report, pp. 57 et seq.; Market Power Study, Executive Summary (English version) p. 3 and recommendation 5.

23 Furman Report, para 2.36; Special Advisors’ Report, pp. 55 et seq.

24 Stigler Report, p. 95.

25 For non-dominant platforms, most of the aforementioned business strategies can be manifestations of desirable aggressive competition. The use of narrow MFN clauses or the obstruction of multi-homing, for example, can safeguard investments into the platform. Product bundles, like Amazon Prime, may be attractive for consumers.

26 Cf. Furman Report, paras 2.25 and 2.27: “Platforms that achieve *dominance* can hold a high degree of power over how their users access the market, and each other.” [...] “Where a platform has this form of control, the Panel considers *it to have achieved strategic market status*, and the proposed code of conduct should apply” (emphasis added).

27 Furman Report, para 2.10.

28 Stigler Report, pp. 84 et seq. and pp. 93–95. However, it is unclear whether this bottleneck power is a special form of dominance or can also be present below the threshold of dominance.

29 Section 19a (1) of the Draft Amendment to the German Act Against Restraints of Competition. An unofficial English translation of the most important parts of the draft amendment is available on the D’Kart blog at <https://www.d-kart.de/wp-content/uploads/2019/11/RefE-GWB10-dt-engl-%C3%9Cbersicht-2019-11-15.pdf>.

30 Market Power Study, Executive Summary p. 3 and recommendation 5 (in English), pp. 59-64 (in German).

31 Belgian Competition Authority, Authority for Consumers & Markets, Conseil de la Concurrence, Joint memorandum on challenges faced by competition authorities in a digital world, 2019, available at https://www.belgiancompetition.be/sites/default/files/content/download/files/bma_acm_cdclc.joint_memorandum_191002.pdf, p. 4.

32 Cf. Competition 4.0 Report, p. 49.

competition law rules – as proposed by the Special Advisors' Report³⁵ and the German Commission Competition 4.0 Report.³⁶ Wherever we move from an effects-based analysis towards “by object” offenses, we should be particularly careful in framing the rules. Markets and business strategies are evolving quickly. While we may currently live in a state of under-enforcement with powerful digital platforms and ecosystems expanding their regulatory reach, a state of systemic over-enforcement would risk killing beneficial innovation. A shift towards “by object” offenses that is not based on a significant body of case law and experience must, therefore, be supplemented by a meaningful efficiency defense. Dominant firms must be able to set out and explain their business rationale (see above, Section II). This comes with a welcome side-effect, namely an increase of the transparency of business strategies in the digital world, where the lack of transparency is of particular concern: Digital platforms will have to lay open the “regulatory” choices that are implicit in their fora and marketplaces. For competition law enforcers, this provides an opportunity to learn more about the changing business strategies in highly dynamic markets and to adjust the rules of conduct where opportune to protect competition and innovation. Ultimately, such a “structured conversation” between digital platforms and enforcers has the potential to increase both competition on the merits and the public acceptance of the new intermediaries.

While the reports broadly agree on the need to enact more specific rules of conduct that either specify³⁷ or expand³⁸ the obligations following from Article 102 TFEU, there is significant divergence regarding the design of the enforcement regime. The Furman Report and the Stigler Report in particular have proposed to introduce a novel regulatory regime for digital platforms which is supposed to exist in parallel with competition law.³⁹ These regulatory regimes differ from the competition law instruments in several core aspects: they establish *ex ante* rules in the sense that specific conduct requirements can be imposed on undertakings *without* the need to show a *prior* infringement in

order to prevent anti-competitive conduct or to promote competition.⁴⁰ The discretionary power of such a regulatory body are significantly broader than those of a competition authority. At the same time, where a regime of specified competition law rules would apply to any dominant digital platform, the addressees of such a regulatory regime would need to be determined or selected *ex ante*. This is true also for the special regime now proposed by the German legislator for platforms⁴¹ with “paramount significance for competition across markets”:⁴² where the Bundeskartellamt finds that a platform meets the requisite criteria, it may then prohibit conduct that falls under one of five newly formulated conduct rules (self-preferencing; impeding competitors on markets where the platform may expand rapidly without being dominant yet; leveraging data power; impeding interoperability or data mobility; informing other companies insufficiently about the scope, quality or success of the own performance).

The regulatory proposals are typically informed by the example of the telecommunications regulatory framework, a cornerstone of which is the determination of markets subject to regulation because “significant market power” is present. Compared to telecommunications markets, digital markets are much more in flux, however. The determination of the addressees of regulation would then be actor-based instead of market-based. A sound theoretical concept for an actor-based regulation different from the concept of “market dominance” has not yet been established. For the time being, conduct rules addressed to dominant platforms therefore seem preferable. Where competition authorities remain competent to enforce these novel codes of conduct, the risk of charging the regulatory regime with additional, non-competition based rationales is kept at bay and an institutional fragmentation of competition-based enforcement powers is avoided.

IV. PROMOTING DATA PORTABILITY AND INTEROPERABILITY

An obligation to ensure interoperability and allow for swift and potentially real-time data portability are among the rules

35 Special Advisors' Report, p. 70.

36 Competition 4.0 Report, p. 50.

37 Competition 4.0 Report, p. 49.

38 Market Power Study, Executive Summary p. 3 and recommendation 5 (in English), pp. 59-64 (in German).

39 Furman-Report, para 2.16: “a pro-competition approach alongside conventional competition policy”; Stigler-Report, pp. 79 et seq.: “a valuable addition to antitrust enforcement.”

40 Similarly, the Belgian, Dutch, and Luxembourg Competition Authorities propose, in a joint memorandum, that the EU Commission should offer *ex ante* guidance on specific issues - and as *ex post* enforcement can nonetheless be too slow in fast moving digital markets, they propose the introduction of an *ex ante* intervention mechanism to prevent anti-competitive behaviour by dominant companies that are in a gatekeeper position, i.e. an instrument that allows for the imposition of remedies without a prior establishment of an infringement. See Belgian Competition Authority, Authority for Consumers & Markets, Conseil de la Concurrence, Joint memorandum on challenges faced by competition authorities in a digital world, 2019, available at https://www.belgiancompetition.be/sites/default/files/content/download/files/bma_acm_cdclc.joint_memorandum_191002.pdf, p. 5.

41 Undertakings which are “active to a significant extent on markets within the meaning of Section 18 (3a),” meaning “multi-sided markets and networks.”

42 An unofficial English translation of the most important parts of the draft amendment is available on the D'Kart blog at <https://www.d-kart.de/wp-content/uploads/2019/11/RefE-GWB10-dt-engl-%C3%9Cbersicht-2019-11-15.pdf>.

of conduct for dominant digital platforms that are most frequently mentioned in the recent reports on competition and digitization.⁴³

The importance of technical interoperability and data portability and interoperability extends beyond the platform setting, however: The evolution of the IoT will depend on the design choices made by core actors in the field with regard to technical and data interoperability. Depending on the choices made, we may see more of a competition between (closed) systems, or we may see a complex network evolve with competition between product and service providers across the network.

The IoT architecture will likely evolve around physical products that interact with other products and services and thereby potentially become platforms themselves. Yet, the firms who provide these products may opt for a “silo” model instead of a platform model. According to general principles of competition law, such a choice would be left to the product supplier as long as it is not dominant. Where the primary product market is competitive, the product supplier may, however, be nonetheless dominant on an aftermarket.⁴⁴ So far, the aftermarket doctrine has rightly been used with caution. Only if the conduct of the product supplier on the aftermarket is no longer disciplined by competition on the primary market or by possibilities of product users to switch to other products – i.e. only if the user lock-in is particularly strong and if reputational effects don’t act as effective constraints – would the existence of a separate aftermarket be accepted.⁴⁵

The Special Advisors’ Report has explained that the aftermarket doctrine may need an update in the data economy. Where digital ecosystems that evolve in the IoT are significantly driven by user data, the lock-in effect for users may be particularly strong, and it may extend to a broad variety of services and hence af-

termarkets. Also, user data can provide a competitive advantage not only in markets for secondary goods, but also at the time of the replacement of the primary product.⁴⁶

This may argue for a number of policy choices: To the extent that the IoT is based on – and perceived as – a shared infrastructure, a strong pro-standardization policy is in place. The standards should encompass both technical interoperability standards and standards for data exchange. A number of reports have supported “open standards” policies.⁴⁷

Within the competition law framework, a broader use of the aftermarket doctrine may be in place in the IoT context, in particular when it comes to enabling data portability and data exchange.⁴⁸

The German legislator is about to enact a broad right to data access for undertakings where their ability to offer complementary goods and services depends on such access.⁴⁹

Frequently, a well-functioning interoperability and data portability regime will, however, depend on sector-specific legislation.⁵⁰ In the course of the development of these sector-specific regimes, experience will need to be gained with a view to the design and necessary limits of such interoperability and portability rules.

V INCREASING LEGAL CERTAINTY

The far-reaching changes in business strategies and markets that are brought about by the “digital revolution” are accompanied by an increase in legal uncertainty. In particular, firms complain about a high degree of uncertainty with regard to the application of Article 101 TFEU to new forms of cooperation in the digital realm, e.g. with a view to data sharing, data pooling or joint platform ventures.⁵¹ Such uncertainty can negatively affect the willingness of firms to invest in innovation.

43 Furman Report, paras 2.48 et seq. and 2.68 et seq.; Stigler-Report, pp. 88 et seq., 92 and 96; Special Advisors’ Report, pp. 81 et seq. and 91; Competition 4.0 Report, pp. 38 et seq., pp. 40 et seq. and pp. 51 et seq.

44 For this concept see *Eastman Kodak v. Image Technical Services*, 504 U.S. 451 (1992). Cf. *C. Shapiro*, *Antitrust Bull.* 63 (1995), 483-511. For a discussion of the consequences of the Kodak case in Europe see Bell/Kramer, *Competition/Antitrust Challenges in Technology Aftermarkets*, available at <http://eu-competitionlaw.com/competitionanti-trust-challenges-in-technology-aftermarkets/#>.

45 Cf. Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, para. 56.

46 See Special Advisors’ Report, p. 90.

47 See in particular: Furman Report, paras 2.68 et seq.; Stigler Report, p. 89.

48 See in particular: Special Advisors’ Report, p. 102; Competition 4.0 Report, p. 40.

49 The draft amendment of section 20 of the German Act Against Restraints of Competition, a provision that expands the prohibition to abuse dominance on cases of superior bargaining positions (“relative market power”), reads: “Dependency in the meaning of paragraph 1 may also arise from the fact that an undertaking is dependent on access to data controlled by another undertaking for its own activities. The refusal of access to such data may constitute an unfair impediment even if there is not yet a commerce opened for such data.”

50 See in particular: Special Advisors’ Report, p. 74, p. 82; Competition 4.0 Report, p. 41, p. 52.

51 Competition 4.0 Report, p. 56, p. 58.

While the specification of conduct rules as discussed above can significantly promote legal certainty and the level of competition law enforcement and/or compliance within the realm of Article 102 TFEU, a rethinking of the legal instruments available to the EU Commission for providing quick legal guidance – both with a view to Article 101 and Article 102 TFEU – may likewise help.

Some instruments are already in place: Article 10 of Reg. 1/2003 allows for formal decisions declaring the inapplicability of Article 101 and/or Article 102 TFEU to specific conduct if such decision lies in “the community public interest”; in addition, a Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty [Article 101 and Article 102 TFEU] that arise in individual cases allows for the issuing of more informal “guidance letters.” Yet, neither of the two has been used in practice so far.

Against this background, the German Competition 4.0 Report has proposed the introduction of a voluntary notification procedure for novel forms of cooperation in the digital economy that provides for a quick decision.⁵²

In their joint memorandum, the Belgian, Dutch, and Luxembourg competition authorities propose to develop a “fast track commitment procedure” that could be based on a more proactive use of Article 10 of Reg. 1/03 and/or the Notice on informal guidance.⁵³

Neither of the two proposals argues in favor of a re-introduction of the exception system to Article 101(3) TFEU. The use of the “quick guidance” or decision procedure should be limited to clearly novel and relevant cases. Also, the use of this guidance or decision regime might well be available only for a fee. If well-designed, such a procedure could, however, support a quick and swift adaptation of competition rules to the digital era and become an important element of a good enforcement regime as it would help to bring relevant market information to the EU Commission more quickly.

VI. “PARTICIPATIVE ANTITRUST” – CONCLUDING REMARKS

The increase in legal uncertainty and the growing need for legal guidance may indicate a need for a different type of adjustment of competition law to the digital age: namely a shift in enforcement style. The competition law reform of 2004 has shifted competition law enforcement from a more interactive and co-operative style towards a more confrontational style, as the EU Commission is

no longer tasked with the review and approval of agreements under Article 101(3) TFEU, but started to focus on a “fight against cartels” and on major cases of abuse of dominance. In both settings, a more confrontational style continues to be justified.

However, the “digital revolution” comes with a broad variety of novel issues – novel both to the undertakings concerned as for competition authorities. In this context, competition authorities must find new ways to get access to information on market changes and changes in business strategies in a timely manner, and undertakings must be able to obtain legal certainty where their engagement in novel, potentially risky projects with major investments is at stake. In this early phase of the “digital revolution,” firms must be able to experiment with novel solutions. Getting competition rules right in such a setting may require a more intense exchange and shared search for solutions than would be required in a more stable and traditional market environment. Jean Tirole has called for a more “participative antitrust.”⁵⁴ He may have meant just this. ■

⁵² Competition 4.0 Report, p. 60, Recommendation 14.

⁵³ Belgian Competition Authority, Authority for Consumers & Markets, Conseil de la Concurrence, Joint memorandum on challenges faced by competition authorities in a digital world, 2019, available at https://www.belgiancompetition.be/sites/default/files/content/download/files/bma_acm_cdclcl.joint_memorandum_191002.pdf, p. 5.

⁵⁴ “A Nobel-winning economist’s guide to taming tech monopolies,” Interview with Jean Tirole of. 27.6.2018, available at <https://qz.com/1310266/nobel-winning-economist-jean-tirole-on-how-to-regulate-tech-monopolies/>.

ANTITRUST AND TECH: EUROPE AND THE UNITED STATES DIFFER, AND IT MATTERS

By Gregory J. Werden & Luke M. Froeb¹

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I. INTRODUCTION

The European Commission (“EC”) and some national competition authorities in Europe have taken on tech giants in high-profile cases, and more cases are in the works. Activists and members of Congress call for action in the United States, although their calls typically are vague about what action should be taken and by whom. Without criticizing any enforcement action, or the inaction of any enforcer, we explore how Europe systemically differs from the United States in ways that affect enforcement against the tech giants.

Our main point is that numerous hard-wired differences between the European and American enforcement regimes make it very difficult for the United States (“U.S.”) antitrust enforcement agencies to emulate their European Union (“EU”) counterparts. Generally speaking, we do not favor changes to the U.S. regime to eliminate differences, and we do not expect any of the differences to be eliminated, but we leave these policy issues for another day.

This short article describes what we see when we lift the hoods on the antitrust enforcement machines of the U.S. and the EC. We focus on the machinery deployed in a single area of enforcement — what outside the U.S. is called “abuse of dominance,” and what inside the U.S. is called “monopolization.” But we note that merger and cartel enforcement produce substantially similar outcomes in the U.S. and EC despite structural differences.

We identify ten meaningful differences between the European and American antitrust enforcement systems. In describing each of them, we start by characterizing the European system. Our characterization will be seen by many as overly simplistic, but we aim to capture some essential truth, and we believe that each characterization does so. No one characteristic is decisive, and some might not matter much, but all combine to make cutting-edge enforcement actions against the tech giants likely in the EU under circumstances in which a successful enforcement action would be most unlikely in the U.S.

We do not contend that the EC is targeting U.S. companies. EC enforcement can give that appearance because the tech giants are U.S. companies. The U.S. produces vastly more unicorns than Europe — start-up companies that hit \$1 billion in

valuation. And a few U.S. tech companies have grown to such proportions that they significantly affect several categories of data for the entire U.S. economy. Nor is our point that the EC has been protecting EU-based companies from competition. As in the EC’s case against Intel, the protected company can be a U.S. company.

The European system is driven by competitor complaints. A struggling competitor doing business in the EU and bumping up against an arguably dominant rival can seek to improve its prospects by complaining to the EC that its much-larger rival is abusing its position of dominance. Critically, the subject of the complaint need not be dominant in a market the complainant operates in, and we will come back to that. Some work must be done if a complaint is to be taken seriously, so there is a cost, but the market provides the lawyers and economists needed to effectively solicit government action. Casual empiricism suggests that complaining to the EC, although costly, is a good investment. Complaining can pay off in the U.S., but the U.S. antitrust enforcement agencies often leave it to the complainants to bring cases on their own. That has the potential to be a terrific investment because of the treble damages regime the U.S. has had since 1890, but investing in litigation under Section 2 of the Sherman Act is not the attractive investment it once was. For four decades, the courts have been tinkering with substantive and procedural law in ways that have made private monopolization suits more costly yet far less likely to succeed.

The European system is run by politicians. A major administrative department of the EC — a Directorate-General — is overseen by a Commissioner. Each of the 28 Member States appoints one, but the assignment of portfolios to Commissioners is within the power of the President of the Commission. Appointees

¹ Mr. Werden recently retired after 42 years with the Antitrust Division of the U.S. Department of Justice. Mr. Froeb is William C. Oehmig Chair of Free Enterprise and Entrepreneurship at Owen Graduate School of Management, Vanderbilt University. Mr. Froeb, but not Mr. Werden, has consulted for the tech industry. Neither author received any funding for this paper, which they initiated on their own.

tend to be political allies of the Member States' heads of government, and many Commissioners are career politicians. The Commissioner for Competition is among the most prestigious and powerful posts to which a Commissioner can aspire. Over the last few years, the incumbent has been Margrethe Vestager, a highly skilled politician and former member of the Danish parliament. The ultimate administrative decision-making body in an EC abuse of dominance case is the College of Commissioners, all 28 of these appointees. This decision-making structure seems calculated to elevate politics above technical merit. The Commissioners could not possibly familiarize themselves with the facts of every case, and just reading the proposed decisions would be a slog. Politics sometimes intrudes into U.S. antitrust enforcement, but the U.S. antitrust enforcement agencies most often are run by antitrust professionals.

The European system was conceived of as regulation, not as law enforcement. Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") use the phrase "shall be prohibited," which is legalese for "is prohibited." But that phrase also empowers an administrative agency. The EC, rather than the courts, does the prohibiting in Europe. EC regulation is light handed in many ways. For example, a prohibition decision in an EU abuse of dominance case states that a specific constellation of actions by the target company constitutes an infringement because it produces a certain result. The decision leaves it to the target firm to figure out how to make things right. In contrast, a contested court order in the U.S. contains a series of conduct mandates and prohibitions. Perhaps more fundamentally, conduct suppressing competition is not the only way to run afoul of Article 102 TFEU; an abuse can be "exploitative," e.g. excessive pricing, although such cases are uncommon. In both the EU and the U.S., it is rightly said that monopoly, without more, is not an offence, but that statement rings hollow in the EU because a monopoly has no right to charge monopoly prices. In the U.S., however, a lawful monopoly is free from any antitrust constraints on exploiting its power, e.g. by charging monopoly prices.

The European system is grounded in a skepticism of markets. Antitrust law in Europe was adopted at a time when several EU members had state-owned monopolies and most had a great deal of government control over their economies. The formation of the EU was a major step toward greater reliance on market forces, but it did not go all the way. The EU was created with a regulatory mindset, and its institutions were staffed by people who see their task as intervening in markets to garner greater benefits for consumers. Antitrust in the U.S. has varied over time with respect to the desirable extent of government intervention. A push in the direction of greater executive power created the Federal Trade Commission in 1914. And the 1960s and 1970s were a time of activist antitrust (in both Democrat-

ic and Republican administrations). But the prevailing mood for the past four decades has favored restraint. The great idea behind U.S. antitrust law was at the outset, and is now, that competitive markets serve the varied interests of the people, so U.S. antitrust law protects and preserves the competitive process. U.S. antitrust laws do not allow the government to tinker with the market when it might seem to be delivering less than it could, although some other laws do.

The European system lacks the process of U.S. court proceedings. EU antitrust enforcement has a lot of process; target companies have rights, which are respected. But these rights are quite different from the rights enjoyed by the targets of antitrust enforcement in the U.S. In some circumstances, Europeans legitimately argue that they protect defendants' rights better than the U.S. does. But in many ways the U.S. protects most what Europe protects least. Remedies and penalties that would be imposed by court order in the U.S. are imposed administratively in the EU, and they are imposed without an adversarial hearing, third-party discovery, or cross examination. This includes fines much greater than have ever been imposed by sentencing judges in U.S. antitrust cases. A right of appeal is granted, and it often is exercised, but conduct must be modified first. Critically, court review is not de novo in any sense; the courts do not go back to the raw evidence.

The European system lacks the burden of proof of an adversarial system. As a matter of form, the EC has a burden of proof, but that means little because the EC need not satisfy a neutral fact-finder that it has met its burden. The EC decides the meaning and sufficiency of its evidence. Judicial review can overrule the EC on the facts, but it does not take a fresh look to see whether the evidence proves what the EC has found. Most significantly, the courts grant the EC a margin of appreciation on the hard judgment calls, precisely where skeptical U.S. judges scuttle many plaintiffs. Plaintiffs lose a lot more often than they win in the U.S., and once they get past motions to dismiss, any loss results from the failure to carry a burden of proof. As in the Supreme Court's decision in *American Express*, a U.S. court is apt to assign the decisive burden to the plaintiff and to define it in a manner that makes it difficult to satisfy. The result was that *American Express* is free to engage in conduct known to increase fees paid by merchants. Credit card fees are much lower in Europe, where fees on some transactions have been directly regulated since late 2015, and fees on other transactions were capped earlier this year as a result of EC action under Article 101.

The European system does not impeach unsound theories. The U.S. litigation system aims to screen out half-baked and dead wrong ideas at the outset through application of the rules of evidence. For about 70 years, the prevailing test for admissibility of expert opinion in the U.S. was the general acceptance standard of *Frye*.

Since 1993 the test has been the reliability standard of Daubert. In the Internet Age, reliability screening is all the more important because half-baked and dead wrong ideas are so quickly and widely disseminated. Moreover, expert evidence admitted by a U.S. court is subject to impeachment through cross examination. Nothing appears to screen out unreliable expert opinion at the EC, and nothing appears to prevent unreliable theories from being credited in EC enforcement proceedings. This makes EU enforcement more susceptible than U.S. enforcement to political winds and passing fads.

The European system maintains a low bar for anticompetitive effects. While Europeans loudly reject the charge that their system protects competitors rather than competition, they do not meaningfully distinguish between the two in the way they assess anticompetitive effects. Sufficient proof of harm to competition is apt to be is that a competitor lost business or lost opportunities to get business. The contrast to the U.S. system is stark; a plaintiff alleging harm only to itself is apt to have its complaint dismissed for failing to allege antitrust injury. Furthermore, the European courts have held that Article 102 TFEU has no de minimis threshold. These decisions were initially read to hold that an immeasurably small impact on the marketplace is sufficient to warrant imposition of a huge fine and a prohibition decision that induces a product redesign or modification in a way of doing business. In any event, no materiality test has yet to be asserted by a European court.

The European system is receptive to leveraging theories. Leveraging theories are variations on the theme of extending monopoly from one market into an adjacent market. In the U.S., such theories are legally cognizable only when monopoly is actually threatened in the second market. It is sufficient in Europe that competition is “distorted” in the second market. Whenever a tech giant seeks to monetize a platform by offering a related service, it can easily be found in violation of Article 102 TFEU because its dominant platform is seen to treat its own related business more favorably than it treats an independent business competing with its related business. The EU, thus, discourages efficient vertical integration.

The European system does not recognize competition on the merits. As a concept, competition on the merits has had a central place in EU jurisprudence because it has provided the theoretical benchmark for defining abusive conduct. But references to competition on the merits appear to have been a rhetorical device. Neither the EU courts nor the EC has ever declared any particular category of conduct to be competition on the merits — not even introducing a new product. Product improvement is perhaps the area in which recognizing competition on the merits matters most. In the U.S., courts hold that any genuine product improvement is lawful competition on the merits, but the EU does not subscribe to that view. While the U.S. errs on

the side of caution when the conduct at issue provides tangible immediate consumer benefits, the EC is more confident in the accuracy of its judgment and evidences little fear of chilling legitimate competition from which consumers benefit.

These ten points of contrast between Europe and the U.S. do not guarantee different outcomes, but they do make different outcomes easy to understand. EC officials have not been inhibited in doing what they think best, but U.S. officials have been, and they will continue to be inhibited, even if they have a strong desire to act and a sound basis for action. Moreover, EC officials are inhibited, to some extent, if they desire to do nothing. The failure of the EC to act in a competition case must be explained in a published decision, which can be challenged by a third party. U.S. enforcers have no obligation to explain or defend inaction, except in congressional oversight hearings.

Since the 1990s, a major concern has been whether antitrust enforcement in the tech space is too slow to do much good, and this concern has merit. Several other points of contrast between the EU and the U.S. cause the impact of delay to differ between the U.S. and EU. From start to finish, a big case in the EU is likely much longer than a big case in the U.S., but remedial action is more front loaded. The EU approach has both upsides and downsides.

EC-style due process can take considerable time. For example, the EC started investigating Google in late 2010 but did not issue the shopping decision until mid-2017. Subsequent Google investigations have been shorter, but still took about three years. Major investigations by the U.S. antitrust enforcement agencies of the tech giants are reputed to be underway now, and past history suggests filing cases before the 2020 elections will be difficult. Of course, litigation of such cases to judgment would take years.

The court litigation that follows an EC antitrust decision takes even longer than U.S. antitrust litigation. The EC decision against Intel was announced in 2009. In 2014, the General Court upheld the decision without examining the EC’s assessment of the actual exclusionary impact of the impugned conduct. In 2017, the Court of Justice of the European Union ruled that the General Court should have examined the EC’s assessment of exclusionary effect, and sent the case back. There is no end in sight for the litigation. The ultimate decision could materially change the law, and Intel might even win. But Intel has had to comply with the EC’s decision for the past decade.

Lengthy court proceedings nearly always preceded imposition of a contested remedy in the U.S. The U.S. case against Microsoft holds the speed record for the trial in a big antitrust case. It was filed in May 1998, and Judge Jackson issued his remedy opinion in June 2000. But Microsoft did not have to be-

gin compliance pending appeal, and the appeals court rejected the remedy Judge Jackson crafted. On remand, the parties were pushed to compromise. Judge Kollar-Kotelly approved what they had come up with in November 2002, and the appeals court upheld her ruling in June 2004.

Another feature of European due process can cause remedies to make little sense when cases move slowly. A central feature of EC procedure is the statement of objections (“SO”). To protect the rights of target companies, EU law requires that they be served with a confidential SO detailing the EC’s concerns and the factual basis for them. An SO can be superseded, but a final SO fixes the facts on which the case proceeds, no matter how long it takes. In the EU case against Microsoft, key facts about media players were hopelessly out of date when Microsoft complied with the EC’s decision by offering a version of Windows without the Windows Media Player. That the key facts were no longer true was irrelevant in subsequent court proceedings.

The U.S. system has due process similarities to the European system, but the facts are not fixed as of the complaint; rather they are fixed as of the time of trial or the close of discovery. And most critically, the facts are fixed only for purposes of liability. Liability and remedy typically are closely connected in the U.S., and separate proceedings on remedy are atypical, but the imposition of remedy is a distinct judicial function in the U.S., governed by principles of equity adopted from English common law. In theory, and sometimes in practice, the court assesses the situation anew before ruling on remedy. If circumstances have materially changed from those of the liability determination, the changed circumstance are taken into account, which can have a profound effect on remedy.

One final note — one final point of contrast — is that judges in the U.S. were persuaded by Robert Bork that antitrust was unworkable without a single focus, which Bork called consumer welfare. Bork argued that antitrust was not enacted to address the myriad social issues that judges had invoked in their decisions, and at least that much of Bork’s argument has persuaded judges. This matters in the tech space because the cries for action invoke myriad social issues. The tech giants might raise a variety of legitimate social concerns, but only competition concerns are within the domain of antitrust. ■

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

By Dr. Salomé Cisnal de Ugarte & Stelios Charitopoulos¹

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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 capacitors for participating in a 14-year long cartel to coordinate future behavior and avoid price competition in the market for the supply for electrolytic capacitors.⁵ On July

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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 *Capacitors*, Commission decision of March 21, 2018.

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

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 Europe-

an 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.

Under the settlement procedure, on February 21, 2018, the Commission adopted three different decisions relating to a

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

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

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.

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 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.

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.

²⁰ Report on Competition Policy 2018, p. 21.

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.

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

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.

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.

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.

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 conducive 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. ■

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.

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

THE ROLE OF MARKET DEFINITION IN ASSESSING ANTI-COMPETITIVE HARM IN *OHIO v. AMERICAN EXPRESS*

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I. INTRODUCTION

In this essay, we argue that the Supreme Court reached the right outcome in *Ohio et al. v. American Express*.² We explain that the single-sided market definition adopted by the District Court, despite its finding that American Express (“Amex”) was a two-sided transaction platform as described in the economics literature, effectively prevented it from seeing how weak the plaintiffs’ case was.³ The Supreme Court did not discuss the limitations of the plaintiffs’ theory and evidence at length but simply and, we believe, properly found that the plaintiffs had failed to prove antitrust injury. Many criticisms of the Supreme Court decision seem to be based on the rejection or misunderstanding of the economics literature on multi-sided platforms on which the District Court, the Appeals Court, and the Supreme Court all relied.

II. THE DISTRICT COURT’S BACKGROUND FINDINGS ON THE CASE

The U.S. Department of Justice, together with the State of Ohio and other states, brought the case against American Express in 2010. Before addressing the merits of the plaintiffs’ lawsuit, the District Court provided some background on the payment card business and the use of anti-steering provisions as well as other issues.

When a purchase is made with a general-purpose credit or charge (“GPCC”) card, the merchant pays, to a third party, a fraction of what it charges the buyer. Most of that payment, the merchant fee, goes to the firm that issued the card: American Express in the case of American Express cards, and a bank in the case of Visa or Mastercard cards. Historically, Amex has had a “spend-centric” business model: it has focused on attracting consumers who are likely to spend heavily, in part by offering more generous rewards for using its cards than Visa or Mastercard issuers had typically done. It has financed its reward programs

by charging higher merchant fees than Visa or MasterCard. Visa and Mastercard issuers, in contrast, had “lend-centric” business models: they did not focus on attracting heavy spenders and made much of their money by lending to cardholders.

Despite the higher Amex merchant fees, and even though most Amex cardholders also carried one or more Mastercards and Visa cards, the Amex card was accepted at around 6.4 million U.S. merchant locations. But it was *not* accepted at around 3 million U.S. merchant locations that had chosen to accept Visa and MasterCard.⁴

Since the 1950s, Amex’s contracts with merchants that had chosen to accept its card generally prohibited merchants from using both price and non-price forms of what has come to be called “steering.”⁵ Steering via price would involve the merchant imposing special surcharges on purchases made with Amex cards rather than other GPCC cards.⁶ Non-price steering would involve the merchant trying in other ways — by pleading hard-

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2 *Ohio v. American Express Co.* 138 S.Ct. 2274 (2018). The U.S. Department of Justice was the lead plaintiff in the cases below. It decided not to join to the States in seeking certiorari, so the States are the plaintiffs in the Supreme Court case. After cert was granted, the Justice Department ended up filing a brief for plaintiffs and participating in oral arguments.

3 The argument that the plaintiffs’ case was fatally flawed is consistent with the discussion provided by Huang, Thu & Joshua H. Soven (2018) “More Old News than New News in American Express” *Antitrust Magazine* (Fall 2018).

4 *U.S. v. American Exp. Co.* 88 F.Supp. 143, 204 (2015).

5 *U.S. v. American Exp. Co.* 88 F.Supp. 143, 161 (2015). American Express was launched in 1958. At the time Diners Club was the dominant GPCC system in the US. See Evans, David & Richard Schmalensee (2005) *Paying With Plastic*, 2nd Edition, The MIT Press, at pp. 57-59.

6 There have never been restrictions on giving discounts from list price for the use of cash or other means of payment. The Amex contracts’ restrictions on steering via price did not bar surcharging relative to cash, checks, or debit cards, only relative to other GPCC cards.

ship, disparaging Amex, or posting “We Prefer Visa” signs — to persuade customers who carried and perhaps had presented their Amex cards instead to use a means of payment that was less expensive for the merchant. If they did so, customers would generally give up some standing in the Amex rewards program and possibly use a less preferred card from their standpoint. There were similar anti-steering provisions in Visa and MasterCard merchant contracts.

Beginning in the late 1980s, MasterCard and Visa mounted campaigns aimed at persuading consumers that their cards were more useful than Amex cards and persuading merchants to steer consumers toward their cards using non-price methods. These two campaigns together were effective: between 1990 and 1995, Amex’s share of GPCC volume declined from 25 percent to 20 percent. Amex responded by strengthening and enforcing the anti-steering provisions in its merchant contracts.

In 2010, the U.S. Department of Justice (“DOJ”) and several states charged that the restrictions on *non-price* steering in the merchant contracts of Amex, Visa, and MasterCard were unreasonable restraints of trade and thus violations of Section 1 of the Sherman Act. Independent class-action cases brought by groups of merchants challenged the restrictions on surcharging.⁷ The plaintiffs’ case thus had nothing to do with direct restrictions on price competition at the merchant level, and certainly nothing to do with discounts for cash or debit cards, despite some commentators’ claims to the contrary.⁸

An important theory of harm, in the case that was brought initially, was that the restrictions on non-price steering by the three leading systems unreasonably limited the ability of smaller GPCC systems, like Discover, to compete by charging low

merchant fees. Visa and Mastercard, which accounted for 68.3 percent of GPCC volume in 2013,⁹ agreed to drop their restrictions on non-price steering, thus greatly weakening the plausibility of that theory as applied to Amex alone.¹⁰ The plaintiffs nonetheless persisted, as did Amex, and a seven-week trial ensued during the summer of 2014.

III. THE DISTRICT COURT’S RULE-OF-REASON ANALYSIS

The District Court issued a 97-page decision in February 2015.

A. DISTRICT COURT FINDINGS ON AMEX AS A PLATFORM

At trial, experts for both sides described Amex as a two-sided platform. The court agreed, citing a number of works from the relevant economics literature. The judge noted the existence of indirect network effects between merchants and consumers on the two sides of that platform. This ready acceptance of the economic literature on multi-sided platforms is in marked contrast to the strenuous attacks on that literature that has appeared in later commentary on this case,¹¹ some of which we discuss below.

The judge went on to describe Amex as a two-sided *transactions* platform:¹²

...the two sides of the platform are brought together to consummate a single, simultaneous transaction, and the products provided by the platform are consumed in fixed proportions by the consumer and the merchant.

That finding became a key predicate of the Supreme Court’s decision.

7 The merchants’ suit against MasterCard and Visa was brought in 2005 and was finally settled in January 2019. Both networks now permit surcharging with disclosure requirements and limits on the charges: see Visa, “Visa Core Rules and Visa Product and Service Rules” at pp. 338-368, available at <https://usa.visa.com/dam/VCOM/download/about-visa/visa-rules-public.pdf>; MasterCard, “MasterCard Rules” at pp. 262-269, available at <https://www.mastercard.us/content/dam/mccom/global/documents/mastercard-rules.pdf>. In 2008, another group of merchants challenged all of Amex’s anti-steering provisions. Individual merchant cases and a putative merchant class action challenging Amex’s provisions were consolidated in 2011. In January 2019, the trial court ordered both parties to proceed to trial using the two-sided market definition in the Supreme Court Amex decision: Memorandum and Order, In Re: American Express Anti-Steering Rules Antitrust Litigation, 11-MD-2221 (NGG) (RER) January 14, 2019. On April 12, 2019, the individual merchant cases were dismissed with prejudice pursuant to a joint stipulation between the parties that settled the litigation on undisclosed terms. There is a pending motion to dismiss and compel arbitration of the class action. It seems that all of Amex’s anti-steering restrictions are still in force: American Express, “American Express US Merchant Reference Guide” at Section 3.2, available at https://icm.aexp-static.com/Internet/NGMS/US_en/Images/merchantpolicypdfs/US_RefGuide_NS.pdf. Complicating this picture, ten states and Puerto Rico had anti-surge laws in effect in 2016. Several of these have been voided as impermissible restrictions on commercial speech, and the validity of others is being litigated. See National Conference of State Legislatures, “Credit and Debit Card Surcharge Statutes” October 13, 2016, available at <http://www.ncsl.org/research/financial-services-and-commerce/credit-or-debit-card-surcharges-statutes.aspx>.

8 See, for instance, Hovenkamp, Herbert (2019) “Platforms and the Rule of Reason: The American Express Case,” *Columbia Business Law Review* (forthcoming) at pp. 1, 35, 43, 45, 77-78.

9 *U.S. v. American Exp. Co.* 88 F.Supp. 143, 188 (2015).

10 Nevertheless, the District Court found that Amex’s restrictions on non-price steering, the only restrictions at issue in the case, by themselves “...render it nearly impossible for a firm to enter the relevant market by offering merchants a low-cost alternative to the existing networks.” The testimony from Discover on which this finding apparently rested, however, referred to a period in which MasterCard and Visa also had restrictions barring both price and non-price steering. *Id.* at 213-214.

11 See Evans, David S. & Richard Schmalensee, “Two-Sided Red Herrings,” *CPI Antitrust Chronicle*, October 2018.

12 *U.S. v. American Exp. Co.* 88 F.Supp. 143, 155 (2015).

Having found that Amex was a two-sided platform, the judge faced a critical choice that has been discussed at some length in the academic literature: whether to define a single market linking both sides of the platform, or to carry out the analysis working with two closely coupled markets.¹³ He chose to describe the GPCC business as consisting of two markets, one involving Amex and merchants and the other involving Amex and consumers. He then decided to limit consideration to the merchant side of the business in the first step of the rule-of-reason analysis and thus to consider initially whether Amex's policies in that market had unreasonably restrained competition.¹⁴ As we will discuss below, he also decided that he could not consider any pro-competitive benefits from the consumer market in the second step of the rule-of-reason analysis.

This single-sided market approach basically precluded the court from considering the implications of its own finding that Amex was a two-sided transaction platform. It had to view the facts of the case through a lens that distorted the business reality the court itself had emphasized.

B. THE CHOICE OF MARKET DEFINITION AND THE RULE-OF-REASON TO TWO-SIDED PLATFORMS.

In principle, the conclusions of an *economic* analysis of the effects of a challenged practice by a two-sided transactions platform should be the same whether based on consideration of a single platform market or two closely coupled markets corresponding to each side. Unfortunately, the conclusions of a *legal* analysis under the three-step structure of rule-of-reason analysis in U.S. courts can depend critically on this choice of market definition. In particular, the single platform market definition allows consideration of all the relevant evidence and accounts

for the business realities surrounding platform competition, while the side-specific platform market definitions suppress this evidence and distort business reality.

Under the rule-of-reason, plaintiffs have the initial burden of showing that challenged conduct harmed competition. If they do so, the defense has an opportunity to demonstrate pro-competitive benefits. In principle, if both sides meet their burdens, the finder of fact must balance pro- and anti-competitive effects. As a practical matter, however, if plaintiffs succeed at the first step, defendants have a very difficult task.

The *American Express* case illustrates why. First, it isn't clear that the court could consider the other side-specific market in the second-stage of the rule-of-reason inquiry. The trial court judge noted that pro-competitive benefits on the consumer side, in "a separate, though intertwined antitrust market," could not be used to offset anti-competitive effects on the merchant side.¹⁵ Second, after finding that a practice is anti-competitive in the first stage, courts seldom give much weight to pro-competitive benefits in the second stage. In this case, the judge essentially ignored the tight linkage between the two markets he had defined: Amex's pro-competitive justifications for its conduct are not discussed until the last 14 pages of the 97-page District Court opinion.¹⁶

When a challenged practice clearly has effects on both sides of a two-sided transactions platform, as in this case, to exclude either side of the platform in the first step of the analysis is to bias the result.¹⁷ After all, the output (transactions consummated by both sides), the price of that output (paid by both sides), and the profits earned (contributed by both sides) necessarily depends on both sides. Once a court has found that a business

13 A useful overview of that discussion is provided by Wright, Joshua D. & John M. Yun (2019) "Burdens and Balancing in Multisided Markets: The First Principles Approach of *Ohio v. American Express*," *Review of Industrial Organization* 54(4), pp. 717-740. See also Affeldt, Pauline, Lapo Filistrucchi, Damien Geradin & Eric Van Damme (2014) "Market Definition in Two-Sided Markets: Theory and Practice," *Journal of Competition Law and Economics* 10(2) pp. 293-339 and, for a different view, Katz, Michael & Jonathan Sallet (2018) "Multisided Platforms and Antitrust Enforcement," *Yale Law Review* 127(7), pp. 2142-2175.

14 After excluding debit cards and other forms of payment from the relevant market, the trial judge found Amex had a 26.4 percent share of GPCC transactions volume. Despite this relatively small share he found that Amex had sufficient market power to affect competition and proceeded to analyze the effects of the challenged conduct. *U.S. v. American Exp. Co.* 88 F.Supp. 143, 207 (2015). We take market power as given for the analysis below even though one could quarrel with the court's finding. For example, the court found that Amex's cardholders' loyalty was "...critical to the court's finding of market power..." even though that loyalty was, at least in large part, purchased by Amex through its generous rewards program. The Court of Appeals disagreed, holding that there is no reason to intervene because of market power that depends on rewards and prestige: *U.S. v. American Exp. Co.* 838 F.3d. 179, 204 (2016).

15 *U.S. v. American Exp. Co.* 88 F.Supp. 143, 229 (2015). It seems unsettled whether under U.S. case law it is possible to consider the benefits from a related market. Several eminent law professors who filed an amicus brief in support of the plaintiffs before the Supreme Court said it was not appropriate to do so. The U.S. Department of Justice seemed sufficiently uncertain about this that they advocated that the Court find that those benefits could be considered. See "Brief of 28 Professors of Antitrust Law as Amici Curiae Supporting Petitioners" *State of Ohio, et. al., v. American Express Company, et. al.* (2017) No. 16-1454 (SCOTUS); "Brief for the United States in Opposition" *State of Ohio, et. al., v. American Express Company, et. al.* (2017) No. 16-1454 (SCOTUS).

16 Justice Breyer, in dissent, would have allowed the benefits from the interlinked market to be considered in the second step of the rule-of-reason. He then noted the likely futility of that defense: "A Sherman Act §1 defendant can rarely, if ever, show that a pro-competitive benefit in the market for one product offsets an anticompetitive harm in the market for another." *Ohio v. American Express Co.* 138 S.Ct. 2274, 2302 (2018) (Breyer, J., dissenting).

17 We have argued elsewhere that there is no reason to presume that this bias always works against the defendant since the anti-competitive harm could be felt on the side that is ignored. See Evans, David & Richard Schmalensee (2018) "Applying the Rule of Reason to Two-Sided Platform Businesses," *University of Miami Business Law Review* 26(2) pp. 1-15.

is a two-sided transaction platform, it makes no economic sense to ignore the consequences of the challenged conduct for half of the parties to the joint transaction. And in the case of transactions platforms, the most natural way to take into account the impact of the challenged conduct on both sides of the same transaction is to define a single market for the service of connecting the two sides.¹⁸ Doing otherwise means, as a practical matter, the court ignoring pro-competitive benefits for the other interlinked side or putting little weight on this evidence.

C. WHAT THE DISTRICT COURT MISSED FROM RELYING ON A SINGLE-SIDED PLATFORM MARKET

In this case, it is instructive to suppose that the trial court had decided to take a serious look at the consumer side of the platform in the first step of the analysis and that Amex had fully availed itself of this opportunity. Amex could have made a good argument for the facial reasonability of its anti-steering provisions in light of general business practice. As one commentator asked, rhetorically, when the DOJ complaint was initially filed,¹⁹

[T]he larger question is whether ... American Express, or any firm, could possibly violate the Sherman Act by telling agents that are distributing its services as well as the services of its competitors that once the customer has expressed a clear preference to use its service rather than a competing offering, the agent must accept the consumer's preference.

In addition, if the District Court had been able to look at the platform as whole, Amex might have been able to make its free-riding argument more persuasive. After all, why would a merchant decide to accept the Amex card and then to try to persuade customers not to use it rather than simply not accepting the card unless accepting the Amex card generated incremental

business? That incremental business must have resulted from investments by Amex, on which some merchants who wanted to engage in non-price steering wished to ride free.²⁰

Amex could have gone on to note that it is common for two-sided platforms to restrict the behavior of participants on one side in order to benefit those on the other side. For instance, OpenTable terminates the accounts of diners who are no-shows four times in a 12-month period.²¹ This rule is an inconvenience to diners but clearly benefits restaurants. Similarly, Amex's restrictions on non-price steering by merchants clearly benefited its cardholders: it freed them from being hassled to give up rewards in order to lower merchants' costs. Or from just being hassled when they'd like to pay and get out of the store. These restrictions enabled Amex to offer a more attractive product by ensuring what it called "welcome acceptance."²²

Experience abroad provides additional support for the direct consumer benefit from rules that restrict merchant steering. Australia and the United Kingdom both prohibited card networks, including American Express, from forbidding merchants from imposing surcharges which is the leading price-based steering method.²³ Both found that, of the merchants who surcharged, some did so opportunistically.²⁴ The surcharges sometimes greatly exceeded the fees merchants paid. Most troubling, some online merchants imposed these fees at the end of the check-out process as an extra fee—a practice known as "drip pricing." Having persuaded the consumer to go through the purchase process and enter their payment details, the merchant anticipates that the surcharge at the end won't dissuade them for completing the purchase.²⁵

Australia revised its regulations to limit the surcharges so they could not exceed merchant fees.²⁶ The United Kingdom has prohibited merchant surcharging altogether.²⁷ Puerto Rico and

18 For a more detailed discussion of this point, see *Id.*

19 Brown, Thomas P. (2010) "U.S. v. American Express, et al.—Failing To Make Something Out Of Nothing" *Lydian Journal*, available at https://www.pymnts.com/assets/Lyidian_Journal/LyidianJournalNovemberTomBrown.pdf.

20 On this point, see the discussion by the Court of Appeals, *U.S. v. American Exp. Co.* 838 F.3d. 179, 204 (2016).

21 OpenTable, "what is your no-show policy?" available at https://help.opentable.com/s/article/What-is-your-no-show-policy-1505261059461?language=en_US.

22 *U.S. v. American Exp. Co.* 88 F.Supp. 143, 156 (2015). This point was accepted by the Supreme Court: *Ohio v. American Express Co.* 138 S.Ct. 2274, 2289-90 (2018).

23 Reserve Bank of Australia, "A Guide to the Card Payments System Reforms" September 2010, available at <https://www.rba.gov.au/publications/bulletin/2010/sep/7.html>.

24 Reserve Bank of Australia, "Review of Card Payments Regulation" May 2016, available at <https://www.rba.gov.au/payments-and-infrastructure/review-of-card-payments-regulation/conclusions-paper-may2016/>; Office of Fair Trading, "Payment surcharges: Response to the Which? Super-complaint" July 2012, available at https://webarchive.nationalarchives.gov.uk/20140402220446/http://www.offt.gov.uk/shared_offt/super-complaints/OFT1349resp.pdf.

25 See Amelia Fletcher, "Drip pricing: UK experience" Presentation to the FTC, May 21, 2012, available at https://www.ftc.gov/sites/default/files/documents/public_events/economics-drip-pricing/afletcher.pdf.

26 Reserve Bank of Australia, "Review of Card Payments Regulation" May 2016, available at <https://www.rba.gov.au/payments-and-infrastructure/review-of-card-payments-regulation/conclusions-paper-may2016/>.

27 GOV.UK, "Card surcharge ban means no more nasty surprises for shoppers" January 13, 2018, available at <https://www.gov.uk/government/news/card-surcharge-ban-means-no-more-nasty-surprises-for-shoppers>.

ten U.S. states have passed legislation that prohibit merchants from imposing surcharges.²⁸ Under the single-sided market approach, a court could not consider the possibility that American Express was prohibiting surcharges to protect its cardholders from opportunistic behavior, nor could it consider any consumer benefits that this protection provides.

To address the charge that its restrictions on non-price steering nonetheless constituted an unreasonable restraint of trade that reduced consumer welfare, Amex would stress that payment systems compete for *transactions*, which requires them to cater to both merchants and consumers. It would point to the many merchants that had elected not to accept the Amex card because of its high merchant fees as evidence that price competition is alive and well in the GPCC card business. It would remind the court that it did not restrict merchants' ability to offer discounts for cash, checks, or debit cards and that their ability to charge more when more expensive payment systems were used — to surcharge — was not an issue in this case. The only competition that was suppressed by the Amex restrictions at issue was merchant jawboning aimed at the customers of a firm with a 26.4 percent share of GPCC transactions' volume.

All of these arguments go to the heart of the question that should have been before the court at the first stage of the rule-of-reason — did the practice restrict competition among two-sided transaction platforms? — but couldn't be considered under the single-sided definition adopted by the District Court in this or similar cases.

D. THE DISTRICT COURT'S EVIDENCE ON ANTITRUST INJURY IN THE SINGLE-SIDED MERCHANT MARKET

Plaintiffs stressed evidence that Amex had market power and that the anti-steering provisions restricted one form of non-price competition which some merchants testified that they would have employed but for those restrictions. And, as noted above, the District Court was somehow persuaded that the Amex restrictions on non-price steering had, by themselves,

²⁸ See *supra* note 7.

³⁹ See *supra* note 10.

³⁰ On what follows in this paragraph, see *Ohio v. American Express Co.* 138 S.Ct. 2274, 2288 (2018). The District Court also noted that in the absence of surcharging or discounting, the cost of Amex's merchant fees is paid by all consumers at merchants that accept Amex cards, even those consumers that don't use Amex cards. It argued that this could result in a regressive subsidy from poor consumers who use cash to rich consumers who use Amex cards: *U.S. v. American Exp. Co.* 88 F.Supp. 143, 216-7 (2015). The claim that GPCC cards result in cash users subsidizing card users (and poor people subsidizing rich people) is often made by commentators on *American Express* as well as by the plaintiffs. The point isn't as obvious as it may seem at first blush. Merchants incur significant costs from handling cash, after all, and cash-intensive and card-intensive users seem likely to tend to patronize different merchants. The unpublished paper by Schuh, Stavins & Oz, which is often cited in support of the cash/poor subsidy point demonstrates the fragility of the evidence on this point. See, Schuh, Scott, Oz Shy & Joanna Stavins "Who Gains and Who Loses from Credit Card Payments? Theory and Calibrations" *Presentation at the Joint ECB/OeNB conference on The Future of Retail Payments: Opportunities and Challenges, May 12-13, 2011* at Slide 18, available at https://www.ecb.europa.eu/events/pdf/conferences/ecb_oenb/Presentation_Schuh.pdf?42499b9ccf32f21fae815637eea2caf1. They find no cross-subsidy if the merchant pass-through rate is 50 percent or less, which is within the range of pass-through rates found in the literature, and report results based on 100 percent pass-through. For an overview of evidence on pass-through rates see Chang, Howard, David Evans & Steven Joyce (2015) "The Impact of the U.S. Debit-Card Interchange Fee Regulation on Consumer Welfare" *Journal of Competition Law and Economics* 11(1), pp. 23-67.

³¹ *U.S. v. American Exp. Co.* 88 F.Supp. 143, 238-9 (2015).

made it "nearly impossible" for Discover or other systems to compete on the basis of low merchant discounts.²⁹

The rest of plaintiffs' evidence relied on by the District Court seems to add little economic substance to this.³⁰ Plaintiffs stressed that Amex had increased its merchant discounts substantially over the 2005-2010 period with only a slight decline in merchant acceptance, though these increases were in response to earlier increases by MasterCard and Visa. Amex was selling a differentiated product in a concentrated market, and generally offering higher consumer rewards, so price differences and price changes are hardly symptoms of competitive breakdown. Plaintiffs were unable to persuade the trial judge that Amex charged supra-competitive prices, or that it earned supra-competitive profits, or that its merchant fees were above those of Visa and MasterCard. So, in the end, plaintiffs did not provide any quantitative evidence showing a *causal* link between Amex's more stringent enforcement of its ban on non-price steering and any change in market competition.

Perhaps a trial court that considered both sides of the platform in this fashion in the first step of the rule-of-reason analysis would nevertheless have found that Amex's restrictions on non-price steering constituted an unreasonable restraint of trade and that consumer welfare was on balance reduced by it. But we think that looking at the interlinked consumers and merchants together, in a single platform market, would more likely have revealed just how weak the DOJ's case was and would have led to a decision for Amex by the District Court. In the actual world, the District Court found that Amex had violated Section 1.³¹

IV. MARKET DEFINITION FOR TWO-SIDED TRANSACTION PLATFORMS AND ANTI-TRUST INJURY ON APPEAL

In 2016 a three-judge panel of the Court of Appeals for the Second Circuit unanimously reversed the District Court, largely on the grounds that the correct product market definition was GPCC transactions:

The District Court's definition of the relevant market in this case is fatal to its conclusion that Amex violated §1.³²

It held that by looking only at services to merchants, plaintiffs had not established antitrust injury in the relevant antitrust market, the market for transactions. The Second Circuit then declined to have the full court reconsider the panel's decision.

The State plaintiffs appealed, and the Supreme Court granted certiorari in 2017. It issued its decision in June 2018.³³ In that decision, the majority began, almost exactly as the District Court and the Court of Appeals had done, by defining two-sided platforms and indirect network effects, citing much of the relevant economic literature, and concluding that Amex is a two-sided platform:

As the name implies, a two-sided platform offers different products or services to two different groups who both depend on the platform to intermediate between them.³⁴

This description of two-sided platforms has been criticized as being over-inclusive, notably by Justice Breyer in dissent,³⁵ and some have argued that it would enable almost any business to claim special treatment because it is two-sided.³⁶ Like the District Court and the Court of Appeals, however, the Supreme Court majority cited relevant studies in the economics literature with more systematic, and less-inclusive, definitions. The literature cited by the Supreme Court includes a 2008 paper of ours, for instance, that offers a less-inclusive definition that is widely accepted in the economics literature:³⁷

Two-sided platforms serve two distinct groups of customers who need each other in some way, and ... provide a common (real or virtual) meeting place ... *to facilitate interactions between members of the two distinct customer groups.*"

This context and the lower court decisions demonstrate that the majority was not departing from the now-voluminous economics literature on this point. That literature is entirely consistent with the proposition that, even though multi-sided platforms are increasingly important, many businesses, large and small, are not multi-sided.

Like the District Court and the Court of Appeals below, the majority went on to find that Amex operates a transaction platform, with indirect network effects running in both directions, providing a joint product simultaneously to two parties engaged in a transaction.³⁸ And like the Court of Appeals, it found that given this finding it was appropriate to define a single relevant market for GPCC transactions, rather than two different markets for merchant services and consumer services.³⁹ As with the Court of Appeals, it also found that the plaintiffs' evidence on antitrust injury was compelling wanting.

Given that market definition, the Supreme Court found that evidence on merchant fees, on which "plaintiffs stake their entire case," was "unpersuasive" absent more.⁴⁰ The majority noted the lack of evidence of supra-competitive pricing of transactions and cited the District Court's finding that there was no reliable evidence on Amex's transactions' prices or profit margins, nor conclusive evidence about whether Amex charged more than its competitors.⁴¹ The Court also took note of evidence that Amex's price had increased from 2005 to 2010, but it found, properly, that an increase in price by a single firm, not found to have engaged in supra-competitive pricing, during a period of output growth did not establish an anti-competitive effect. It went on to point to evidence of vigorous competition among networks. It affirmed the judgment of the Court of Appeals.

It is worth repeating that this outcome was largely dictated by the findings of the District Court. There wasn't any dispute among the parties that Amex was a two-sided platform, the District Court found that it was a transaction platform, and the

32 *U.S. v. American Exp. Co.* 838 F.3d. 179, 196 (2016).

33 *Ohio v. American Express Co.* 138 S.Ct. 2274 (2018).

34 *Id.* at 2280.

35 *Id.* at 2298-2300 (Breyer, J., dissenting).

36 See, e.g. Sagers, Chris (2018) "Ohio v. American Express: Clarence Thomas Sets Sail on a Sea of Doubt, and, Mirabile Dictu, It's Still a Bad Idea," Pro Market, June 27, 2018, available at <https://promarket.org/ohio-v-american-express-clarence-thomas-sets-sail-sea-doubt-mirabile-dictu-still-bad-idea/>.

37 Evans, David & Richard Schmalensee (2008) "Markets With Two-Sided Platforms," 1 *Issues in Competition Law and Policy* 667, emphasis added. See also Evans & Schmalensee, *supra* note 11, and the studies cited in note 13, *supra*.

38 *Ohio v. American Express Co.* 138 S.Ct. 2274, 2280 (2018).

39 *Id.* at 2287.

40 *Id.* at 2287.

41 *Id.* at 2288.

District Court didn't cite credible evidence that would establish that the anti-steering provisions had caused antitrust injury. The Supreme Court decision was not like *Athena*, full born from the head of Zeus. It was the logical outcome of the District Court's findings but for the trial judge's decision to ignore the consumer side of the two-sided transaction platform.

V. CRITICISMS OF THE SUPREME COURT'S *AMERICAN EXPRESS* DECISION

The Supreme Court's conclusion that the facts in *American Express* should be viewed through the lens of a single market for transactions, which we have endorsed above, seems to have attracted the most hostile commentary. In dissent, Justice Breyer argued at length that it is simply wrong because it aggregates complements — services to merchants and services to consumers — rather than substitutes.⁴² The majority's market definition has been described by prominent commentators as “incoherent” and “economic nonsense.”⁴³ In contrast, the economics literature generally indicates that a single-market lens may be more appropriate for use in some cases involving two-sided platforms, depending on fact patterns and analytical convenience.⁴⁴

The *American Express* majority has *not* erred in treating complements as if they were substitutes for purposes of market definition. Rather, it has defined a market for the product, GPCC transactions, that is produced by the card systems by combining merchant-side and consumer-side complements in *production*. Antitrust markets of this sort are hardly novel. Left shoes and right shoes are plainly not substitutes in consumption. Rather, they are complements in *production*. They are combined to produce the product of interest to both suppliers and demanders: pairs of shoes. Similarly, engines and brakes are complements in production that are combined, along with other complementary inputs, to produce automobiles, potentially a relevant antitrust product market.

Justice Breyer said in the oral argument that the two sides were just like “nuts and bolts” and in his dissent like “tires and gasoline.”⁴⁵ Professor Carlton, who has made the same point in earlier writing, has another analogy:⁴⁶

Steel and rubber are used to make a golf club, but it would make no sense to claim that steel and rubber are in one market.

But there is nothing obviously wrong with defining a market for golf clubs, which, as Professor Carlton notes, are produced by combining the two complementary inputs he mentions along with other inputs. These comparisons, and the complement point, seem to willfully ignore a voluminous literature on two-sided platforms that, since the early 2000s, has recognized that the two-sides aren't just ordinary complements.

The definition of “transaction market” adopted by the District Court and quoted above emphasizes fixity of proportions as well as simultaneity.⁴⁷ Fixity of proportions is central to the examples in the preceding paragraph and other similar examples, as well as to the production of GPCC transactions. It is hardly irrelevant, as the Supreme Court majority said, that “...credit cards determine their market share by measuring the volume of transactions they have sold.”⁴⁸ The plaintiffs used those same shares which of course are exactly the same from both sides of the two-sided transaction platform.

The Supreme Court found that the plaintiffs “have not carried their burden to prove anticompetitive effects in the relevant market.”⁴⁹ Justice Breyer in dissent argued that as a legal matter, market definition was unnecessary if “proof of actual detrimental effects” on competition were at hand.⁵⁰ We have argued above that the evidence for “actual detrimental effects” presented to the District Court was weak when considered on one-side of the platform and incomplete by refusing to consider the other side of the platform.

42 *Id.* at 2297-2301 (Breyer, J., dissenting).

43 These descriptions are from Tim Wu (2019) “The American Express Opinion, Tech Platforms & The Rule of Reason” *The Journal of Antitrust Enforcement* (forthcoming) and Hovenkamp, *supra* note 8, respectively.

44 See the articles cited in note 13, *supra*. Justice Breyer cites us (Evans & Schmalensee, *supra* note 37) for the proposition that in some cases it is appropriate to ignore linkages between the two sides of a platform (*Ohio v. American Express Co.* 138 S.Ct. 2274, 2300 (2018) (Breyer, J., dissenting)). We still agree with that proposition, but *American Express* is not one of those cases.

45 Transcript of Oral Arguments at 22, *Ohio v. American Express Co.*, 138 S.Ct. 2274 (No. 16- 1454); *Ohio v. American Express Co.* 138 S.Ct. 2274, 2298 (2018) (Breyer, J., dissenting).

46 Carlton, Dennis (2019) “The Anticompetitive Effects of Vertical Most-Favored-Nations Restraints and the Error of *Amex*” *Columbia Business Law Review* 2019(1) pp. 93-106 at pp. 93, 105.

47 Note 12, *supra*.

48 *Ohio v. American Express Co.* 138 S.Ct. 2274, 2286 (2018). The District Court found that transactions' volume was the best indicator of market share: *U.S. v. American Exp. Co.* 88 F.Supp. 143, 189 (2015).

49 *Ohio v. American Express Co.* 138 S.Ct. 2274, 2287 (2018).

50 *Id.* at 2296 (Breyer, J., dissenting), citing *Indiana Federation of Dentists*, 476 U.S., at 460-61, 106 S.Ct. 2009.

Apart from the facts in this case, we believe that as an economic matter, it is essential to consider market definition and, more fundamentally, market power in Sherman Act rule-of-reason cases, even if market boundaries are often blurry and market power often eludes quantification. The use of “direct evidence” to prove anti-competitive effects in *American Express* illustrates why.

In discussing proof of actual detrimental effects, for instance, Justice Breyer noted that American Express raised its merchant fees 20 times in five years without losing appreciable market share.⁵¹ Since Visa and MasterCard were also raising their merchant fees over the same period, it seems at least plausible that the JCB card, which issued cards in several U.S. states until 2018 but had a trivial share of GPCC card volume,⁵² also raised its merchant fees. Is that fact, taken alone, à la Justice Breyer without the market context, proof that the JCB card’s conduct had actual detrimental effects on competition?

Justice Breyer also pointed to testimony from numerous merchants that they would have engaged in steering but for Amex’s anti-steering restrictions.⁵³ Suppose the JCB card’s merchant agreements also had anti-steering provisions to which some merchants objected. Would that constitute evidence that those agreements had had anti-competitive effects sufficient for a Sherman Act Section 1 violation? If the JCB card had market power, perhaps. But without more than the quantum of market power that comes from selling a differentiated product, a firm’s unilateral conduct simply cannot have any appreciable impact on competition in a relevant antitrust market. JCB’s hypothetical anti-steering provisions may be a restraint of trade in the literal sense, but without market power they simply could not be an unreasonable restraint of trade, the requirement for an antitrust offense. Thus, if *Ohio v. American Express* imposes a new requirement to consider market-level effects when attempting to prove anti-competitive effects from direct evidence, as some commentators have argued,⁵⁴ we do not think this is a bad development.

If nothing else, *Ohio v. American Express* stands for the proposition that the now well-established economics of multi-sided platforms cannot be ignored in antitrust litigation. The Supreme

Court and the Court of Appeals followed the District Court and found that Amex was a two-sided transactions platform, and all three decisions cited some of the voluminous relevant economics literature in support of those findings. Aside from how to treat market definition it doesn’t appear that the basic economics was controversial at all.

Nonetheless, Justice Breyer complains that “The phrase ‘two-sided transactions market’ is not one of antitrust art ...”⁵⁵ This seems to be correct but, in light of the history of antitrust law and policy, irrelevant. At the time the Sherman Act was enacted, and for quite some time after, modern microeconomics and industrial organization theory, including game theory, hadn’t even been developed. “Barriers to entry” was not a term of antitrust art from 1890 until sometime after the concept emerged in the economics literature in the 1950s, and the hypothetical monopolist (or SSNIP) approach to market definition was unheard of in antitrust litigation from 1890 until the publication of the 1982 merger guidelines. Over the decades, antitrust lawyers and courts have proven able to incorporate new developments in economics in pursuit of more economically rational antitrust outcomes.

Despite the volume of economics literature on multi-sided platforms that has been produced over nearly two decades, Professor Hovenkamp argues that multi-sided platform theory may be something of a fad, the implication being that courts should curb their enthusiasm for it.⁵⁶ The analytical value of multi-sided platform theory is not seriously disputed among economists, however, and economic research on multi-sided platforms shows no sign of slowing after nearly two decades.

Finally, some have argued that taking the multi-sided platform literature seriously will dramatically weaken antitrust enforcement.⁵⁷ Taking the correct economics into account may complicate at least some cases. But the argument for weakened, rather than more accurate enforcement is an argument that courts will be persistently confused by defendants, despite plaintiffs’ best efforts at adducing relevant economic evidence of harm to competition. In the end the case against American Express failed because the plaintiffs didn’t have any credible

51 *Id.* at 2293 (Breyer, J., dissenting).

52 See Wikipedia, “JCB Co., Ltd.” available at https://en.wikipedia.org/wiki/JCB_Co.,_Ltd.

53 *Ohio v. American Express Co.* 138 S.Ct. 2274, 2296 (2018) (Breyer, j., dissenting).

54 See, e.g. Kully, David & Joseph Vardner (2018) “Vertical Restraints after Amex: Quietly Imposing New Burdens on Section 1 Plaintiffs” *Antitrust* 33(1), pp. 31-36.

55 *Id.* at 2298 (Breyer, J., dissenting).

56 Professor Hovenkamp, *supra* note 8, argues that the economic theory of multi-sided platforms may follow the trajectory of contestability theory and recede into relative obscurity. We think this very unlikely: contestability theory rested on very strong assumptions and was controversial from its inception, while the economic theory of multi-sided markets is much more robust and has been almost universally accepted among economists.

57 Compare, Wu, *supra* note 43, and Evans, David & Richard Schmalensee (2018) “Ignoring Two-Sided Business Reality can also Hurt Plaintiffs” *CPI Antitrust Chronicle* (April 2018). Professor Wu’s argument is distinct from that advanced by Kully & Vardner, *supra* note 54, which has nothing to do with two-sidedness.

evidence of harm to competition. Vertical restraints can harm platform competition, and when they do, plaintiffs should be able to demonstrate that with quantitative and qualitative evidence.

In light of the substantial and growing economic importance of multi-sided platforms, it is hard to see a responsible alternative to taking seriously the economic literature that helps understand their unique characteristics. Professor Jean Tirole, Nobel Prize-winning economist and co-author of pioneering work on two-sided platforms (which he calls two-sided markets) has described essential elements of the necessary, if difficult, path forward.⁵⁸

Regulators, then, will need to refrain from mechanically applying traditional principles of competition policy. When it comes to multi-sided platforms, these principles simply are not applicable in many cases. New guidelines for adapting competition policy to two-sided markets would require that both sides of the market be considered together, rather than analyzed independently, as competition authorities still sometimes do. This will require care and a new analytical approach. But this is better than misapplying traditional principles or simply treating these sectors as legal no-go zones for competition authorities.

Sound antitrust policy has always focused on market-specific competitive realities rather than just applying abstract theory. In markets with multi-sided platforms, new learning has made it clear that competitive realities often differ fundamentally from those in ordinary single-sided markets. New tools may well be necessary to apply traditional principles appropriately in markets with multi-sided platforms, but there is no reason to abandon those principles. ■

58 Jean Tirole “Regulating the Disruptors” *LiveMint*, January 1, 2019, available at <https://www.livemint.com/Technology/XsgWUgy9tR4uaoME7xtlTI/Regulating-the-disrupters-Jean-Tirole.html>. Professor Tirole’s pioneering work on multi-sided platforms was cited in all three *American Express* decisions.

BIG DATA AND ONLINE ADVERTISING: EMERGING COMPETITION CONCERNS

By Hon. Katherine B. Forrest (fmr.)¹

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I. INTRODUCTION

The informational capabilities and utility of Big Data — defined as large data sets capturing broad and deep information — are fundamentally altering the theory and practice of competition policy and law. While there is nothing novel about restrictions on inter-firm exchange of competitively sensitive information, Big Data allows for advertent and inadvertent sharing at scales not previously available.

We have long known that horizontally competing firms cannot share customer or pricing information with impunity. This has always been so — and has long informed antitrust policy and practice. We also have known that firms in possession of unique or essential inputs may be subject to particular competition law scrutiny; or how firms with what one may characterize as market power may act in certain contexts may also be subject to particular scrutiny. Big Data provides tools and capabilities for firms that enable efficient conduct, but also may disadvantage rivals. The landscape enabled by Big Data has revealed emerging competitive concerns.

It is now clear that Big Data has fundamentally altered the scale and velocity of information acquisition and the analytic capabilities to manipulate it.² Firms with vastly expanded informational access have an enhanced ability to use such access to create competitive efficiencies as well as use it for more questionable competitive interactions. The breadth of information now available adds a critical new dimension to our analysis of such interactions: the tried and true frameworks of price and output are inadequate to present a comprehensive understanding of competitive conditions and/or firm conduct. The competitive implications of Big Data are real — and may go unrecognized by firms having particularly deep access. Firms may perceive their

access and ability to manipulate vast data sets as simply a fortunate development — the march of technological progress. And, without malice aforethought, such a firm may engage in conduct that runs afoul of basic principles of antitrust law. This is becoming especially clear in the online advertising arena, where Big Data and advanced analytics have had an enormous impact. Indeed, in the fall of 2018, multiple antitrust investigations into Amazon's business practices were opened in Europe, and there has been increased scrutiny of large technology companies in the United States.³

Setting policy or advising clients in this emerging competitive environment requires a multi-dimensional approach — one that takes into consideration that informational access allows for firm-specific economic efficiencies, but may also lead to conduct that can have the effect of manipulating market dynamics. This article offers a layered analytical approach that considers how this growth in informational access needs to figure into antitrust considerations, and lays out two basic premises.

The first premise is that a firm's data and its algorithmic ability to analyze such data — including that which it has, but equally importantly, that which it can get — are themselves products, multi-faceted commodities that exist independently of the firm's

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2 In a 2016 lecture at the Fordham Competition Law Institute, former Federal Trade Commission ("FTC") Chairwoman Edith Ramirez referred to the "three Vs" of Big Data: volume, velocity, and veracity. Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Keynote Remarks at the 43rd Annual Conference on International Antitrust Law and Policy: Deconstructing the Antitrust Implications of Big Data (Sept. 22, 2016) (available at: https://www.ftc.gov/system/files/documents/public_statements/1000913/ramirez_fordham_speech_2016.pdf).

3 In September, 2018, the European Union opened an investigation into Amazon.com, Inc., examining the company's business practices, and specifically, whether "Amazon earned a competitive advantage from the data it collected from merchants and transactions on its platform." Sara Germano, Germany Opens Amazon Antitrust Probe, Adding to European Scrutiny, *WSJ.com* (Nov. 29, 2018, 10:50 AM), <https://www.wsj.com/articles/germany-opens-amazon-antitrust-probe-adding-to-european-scrutiny-1543491840>. In November, Germany's Federal Cartel Office opened a similar investigation, examining Amazon's effects on the German marketplace. *Id.* In the fall of 2018 into winter 2019, the FTC held a series of hearings ("Hearings on Competition and Consumer Protection in the 21st Century") on the topics of Big Data and competition, consumer protection and privacy and enforcement priorities. Federal Trade Commission, Hearings on Competition and Consumer Protection in the 21st Century, <https://www.ftc.gov/policy/hearings-competition-consumer-protection> (last visited Feb. 2, 2019).

more traditional products and services. The data which a firm has, or to which it can gain access, may or may not derive from the manufacturing of its special widget or creation of service offerings. This could raise competition concerns, because a firm's possession of Big Data might actually expand its conceived market power, or shift the firm into a different market than it was traditionally in.

The second premise is that most firms today consider all manner of data harvested from their own conduct or acquired from a third party as, so to speak, "born in wedlock," and thus necessarily lawful and unproblematic. That is, firms expect that data they possess may be put to any use; and that includes data that they are able to publicly acquire from firms trading in Big Data sets pertinent to one or more industries or populations. However, this also raises competition concerns, as we have seen — and continue to see — in the increased scrutiny of Big Data.

Data itself has, thus, quietly become a competitive force within all firms, and its usage is capable of causing anything from ripples to waves to tsunamis in market conditions. You might think of it this way: when analyzing a firm's products and its lines of business, it is time to consider not only what comes off the manufacturing line, but the information — the large data sets — that may be generated, available, or used anywhere in or by the firm.

Today, the digital ability to capture and process such information may have little to do with product characteristics, a firm's unit sales, or customer lists. Instead, a harvestable data set might include whether customers in particular zip codes are sophisticated or unsophisticated purchasers, whether they engaged in meaningful comparison shopping and if so, with which competitors, and whether those competitors offer substitutable widgets to the same customers in the same geographic area, with the same or similar terms and conditions. On the one hand, information can provide an extraordinary opportunity for efficient firm conduct; on the other, it carries known and unrecognized risks: it may be used to disrupt a well-functioning competitive process.

The article will first define "Big Data" and discuss specific areas of competitive concern, including online advertising. Then, it will offer a new definition of consumer welfare that takes information issues into consideration, and suggest redefinitions of product markets and market power. Finally, it will describe potential impacts on competitive effects and exclusionary conduct.

II. DEFINING BIG DATA FOR PURPOSES OF COMPETITIVE IMPACT

Conceptually and practically, Big Data is the digital capture of vast quantities of information capable of algorithmic manip-

ulation. Such information may include details about any firm that interacts with buyers, sellers, or supply chain participants in a digitally-networked manner; it similarly includes any and all information about the digitally-networked conduct of a single person, household, or population segment. It is not only current information, but also historical information converted to or maintained in a digital and algorithmically accessible format. It can include domestic or international data specific to an industry or generalized to the economy. Critically, algorithmic manipulation allows such data sets to be accessed and queried; the days of data "snapshots" or sampling are coming to an end.

The competitive utility of such data has unimaginable breadth. It can render competitive or anticompetitive conduct both easier and harder to detect; and, as much of its value derives from processes occurring within servers and as the result of algorithmic manipulations, it is a machine and not human-driven role. Big meetings in conference rooms are unnecessary and even unhelpful. Informational exchange and usage is rendered incredibly quick, automatic, and nearly self-executing.

Questions may be asked of any data set — and those questions may be the simple ones we imagine: does this industry or set of firms, this population of consumers, this household, this person, acquire, want to acquire, or can he or she be made to acquire, X product? Will that firm or person pay a particular price based on prior purchasing patterns? Do those patterns rely on the customer base of a firm, or the demographic characteristics of consumers? The questions may also be more complex: is this population likely to want, need, or be receptive to a product or service no one has ever heard of? Is there any "must have" data for firms seeking to achieve a significant position in this area? Is exclusionary conduct relating to data access lawful? Let me provide a few examples of the utility of acquired or harvested and analytically manipulated data sets. I'll start with a few that are more obvious and then move to several of a newer vintage.

First, a firm's unparalleled access to data enables targeted advertising at a level that allows the firm to know more about us than many of the people closest to us. This advertising has the potential to create demand through manipulated, perceived need.⁴ In addition, a firm's unparalleled access to data can further enable it to obtain an unerring first mover advantage in new product areas based on predictive modeling. It allows a firm to achieve or maintain a competitive advantage, even dominance, by tying other firms or consumers to "sticky" experiences (think Facebook, LinkedIn, Amazon, Apple, Uber, but also other platforms).

Access to data allows a firm to engage in price discrimination at a sophisticated level based on known and predictive buying pat-

⁴ See generally, Salesforce Research, *Digital Advertising 2020* (2018), available at https://c1.sfdcstatic.com/content/dam/web/en_us/www/assets/pdf/datasheets/digital-advertising-2020.pdf.

terns.⁵ Big Data allows consumer-directed price discrimination differentiating between demographics as well as those exhibiting certain buying patterns, or between those with varying digital presences. In short, different prices can be presented simultaneously to different market participants.

Finally, it allows a firm to gain unparalleled insight into purchasing patterns and to the prices a buyer has paid or is likely to consider paying.⁶ It allows a firm to create a market opportunity or enter a market early and dominate in areas in which that firm did not traditionally compete (thus rendering firms with data access into all manner of nascent competitors). It allows a firm to observe, analyze, and act on incremental pricing behavior, in a way that is similar to that of flash securities traders. It allows a firm to provide data on an exclusive basis to a firm that may acquire it simply to shelve it. It allows a firm to engage in price fixing through “understandings” gleaned from digital knowledge heretofore unattainable. For instance, a firm may be technically able to observe numerous diverse price elements through machine-related processes and determine or predict prices charged by other market participants through algorithmic processing; conforming pricing under these circumstances could well be problematic.

III. REDEFINING CONSUMER WELFARE

The potential economic utility of Big Data — both good and bad — pushes us to redefine consumer welfare. For the purposes of this article, let me describe consumer welfare as a consumer’s ability to acquire goods or services based on market forces free from unreasonable external manipulation. Such an ability provides consumers with fair access to available goods and services that are necessary to and/or enhance their quality of life.

Competition policy and law is premised on a view that maintaining robust competitive conditions between firms, in which exclusionary behavior is discouraged and even penalized and in which dominance is controlled or prevented when possible (and carefully monitored when naturally occurring or nascent), enhances consumer welfare. In an era in which data can heavily influence or even control firm conduct or consumer behavior, observed price and output effects are no longer the only factors by which to analyze competition and consumer welfare.

Observed price alone may obscure an array of behind-the-scenes conduct that is increasingly sophisticated, enabling discrimination at granular levels, and that can be exchanged in non-traditional ways. Thus, using observed price and output effects to define the parameters of conduct that is welfare-enhancing or harmful no longer has the same utility it once did. An additional driver, how firms can and do acquire, collect, use, and trade in vast quantities of information, must also be recognized as directly impacting on consumer welfare.

This article offers a revised definition of consumer welfare that takes into account issues relating to the competition implications of Big Data. What it suggests is that we must understand consumer welfare and the health of the competitive process as including freedom from unreasonable manipulation of captive data sets. Algorithmic data manipulation that reduces free market decision-making reduces overall welfare. To be clear, access to data is often welfare enhancing — we depend on it for well-functioning markets. However, since Big Data has potentially manipulative effects, one must consider whether particular uses of it impact consumer welfare.

Two additional examples of Big Data’s potential impact on consumer welfare are instructive. The first is that use of data by a firm that has deep access, inherent network effects, and dominant market position (think Amazon, Facebook, or LinkedIn) may inhibit new entry.⁷ Consumer welfare may be harmed when data is harvested, analyzed, and used in a manner intended to or having the effect of precluding competitive choice or creating such networked attachment that consumers no longer have a real ability to engage in freely-chosen purchasing behavior.

Another example of welfare-reducing conduct is, as previewed above, granular and highly sophisticated price discrimination based on a known demographic or a willingness to share data in exchange for price effects. In this regard, consumers with a robust digital presence may have different pricing options than those without — leading to data-driven consumer “leave behind” or “jump ahead.”

Current literature touches on some of these issues — framing them differently in important ways—as incursions on consumer privacy. No doubt privacy issues carry impacts on consumers — many negative. But in terms of competition law, the question for right now is how Big Data may manipulate firm

5 See generally, MCKINSEY & COMPANY, *MARKETING & SALES, BIG DATA, ANALYTICS, AND THE FUTURE OF MARKETING AND SALES* (Mar. 2015), available at <https://www.mckinsey.com/~media/McKinsey/Business%20Functions/Marketing%20and%20Sales/Our%20Insights/EBook%20Big%20data%20analytics%20and%20the%20future%20of%20marketing%20sales/Big-Data-eBook.aspx>.

6 MCKINSEY & COMPANY, *supra* note 5.

7 According to one study published in 2018, “by 2019 66% of digital advertising spend will go to Google Search, YouTube, Facebook, and Instagram. Taken together these channels represent 63% of total spend in North America, 67% in the Asia-Pacific region, and 69% in Europe.” Louis Columbus, *Analytics Are Defining The Future of Digital Advertising*, *Forbes.com* (Jan. 18, 2018, 8:34 PM), <https://www.forbes.com/sites/louiscolombus/2018/01/18/analytics-are-defining-the-future-of-digital-advertising/#4e65518d786f>. See also Leonid Bershidsky, *The Digital Ad Market Is Overdue for Antitrust Review*, *Bloomberg Opinion* (Dec. 5, 2018, 1:01 AM), <https://www.bloomberg.com/opinion/articles/2018-12-05/amazon-google-facebook-are-ripe-for-a-european-antitrust-review> (discussing how a lack of new entry into the digital advertising business may be a symptom of market failure).

and consumer interactions with the marketplace for goods and services.

There are emerging differences as well in how the United States and Europe are approaching Big Data and antitrust issues, as mentioned briefly above. Europe, for example, is moving towards increased data privacy. Approved and adopted by the European Union's parliament in 2016, the General Data Protection Regulation ("GDPR") came into effect in 2018. This regulation requires strict rules on possessing and controlling personal information, and requires stronger conditions for customer consent.⁸

Now, lest this article convey a solely negative picture, let me be clear that Big Data has welfare enhancing aspects. For instance, a positive effect could be identifying product characteristics consumers find most useful, or anticipating and avoiding supply chain bottlenecks that allow smooth maintenance of output levels and price equilibrium. Of course, there are also enormous health impacts that Big Data can have: identifying epidemiological issues, responses and the like.⁹ Pharmaceutical companies surely find these of great interest.

IV. REDEFINING PRODUCT MARKETS AND MARKET POWER

Once we redefine consumer welfare, we must carry the implications of that definition through to conceptualizing what constitutes a competitive effect. Traditionally, the existence or impact of competitive effects is correlated to a firm's position in the market: does the firm have sufficient market power to create or enhance a welfare-reducing market condition? In the world we now inhabit, when data sets allow for unseen but real manipulative impact on competition and consumer welfare, the concept of market power also needs redefinition. Is it still appropriate to define market power or dominance in relation to interchangeable products, when a firm's real competitive impact is based instead on how it manipulates data? Firms with the capacity to harvest and utilize Big Data now have two products: their nominal one (for example, the widgets they manufacture), and their data set and related processes for algorithmic analysis. A competitor group therefore encompasses not only those engaged in making or providing substitutable goods or services, but those who have or possess similar data sets or analytic capacities. In this regard, the potential commoditization of a data set works as a proxy to define a competitive universe.

This definition means that what used to be a single-product firm now has another product line: its data and analytic capabilities. Thus, firms that might not traditionally be considered competitors may find themselves in competition with each other.

What does this mean? It means that defining markets based on manufactured products may be insufficient, and therefore that measuring competitive effects based on price and output may similarly be insufficient. An anticompetitive effect thus includes data manipulation that has a defined ability to unreasonably impact market behavior. This article is not suggesting the abandonment of price or output analyses to measure competitive effects. But, in this informationally-driven world, price and output analyses are no longer sufficient measures to define market impact.

In theory as well as practical application, what constitutes economically efficient behavior — what is procompetitive — must also evolve. A firm's decision to follow a path to making more and better widgets, expanding market reach, or improving quality, is only a piece of what will improve that firm's overall competitive prospects and what will create market efficiencies. Modeling firm conduct that is categorized as economically rational or irrational should now include analyses of how a firm's data has been effectively harvested and used.

V. REDEFINING POTENTIAL IMPACTS ON COMPETITIVE EFFECTS AND EXCLUSIONARY CONDUCT

In our redesigned framework, individual or collective firm conduct that seeks to utilize data to reduce independent decision-making, create unparalleled dominance, or preclude timely and effective entry, would be subject to scrutiny and potential redress. Exclusionary conduct that prevents wide access to certain data sets, however, may not be the real problem, and therefore more access may not provide the real solution. I do not view data itself as an essential facility; on the other hand, the algorithm through which it is run, and the mining techniques applied to it, may be. With all of this said, non-exclusive access to algorithms is not necessarily the best solution. In this context, non-exclusivity may act to proliferate rather than reduce market manipulation.

VI PRACTICAL ISSUES

Let us turn now to certain practical questions: what implications, if any, does all of this have for policy and practitioners? Critically, when regulators, policy makers, and advisors are analyzing firm behavior, the concept of what may harm or help ensure robust competition and best serve consumers, needs to expand. For example, we must ask:

First, in what ways can firms cause anticompetitive price effects through data manipulation? Second, in what ways is price discrimination an acceptable or unacceptable market outcome of

⁸ See generally EU GDPR.ORG, <https://eugdpr.org/> (last visited 2/24/19).

⁹ See generally Bernard Marr, How Big Data is Changing Healthcare, Forbes.com (Apr. 21, 2015, 10:50 AM), <https://www.forbes.com/sites/bernardmarr/2015/04/21/how-big-data-is-changing-healthcare/#290e9f302873>.

data manipulation? Third, what are the competitive implications for firms in one line of business to share non-price, and non-output-related data sets? Fourth, how do we include an analysis of informational access and manipulation in merger analysis? For instance, what role does it play in the merger of firms that previously would have been considered non-horizontal competitors, but that we now recognize as having complementary data sets and strong analytical capabilities?

Let me end with a few final practical points. Firms increasingly and appropriately recognize data as a crown jewel. Elevating data to such status informs strategic decision making in terms of acquisition, harvesting, and use. Regulators need to understand and think through the implications of this, and ensure that regulation does not deprive customers of Big Data's benefits. The speed at which all of this is moving challenges legislative and regulatory processes. Separately, firms may want to consider self-policing in the form of codes of conduct. Such codes could, for instance, recognize, that data manipulation can negatively impact free market competition.

VII. CONCLUSION

In conclusion, we are at an inflection point that requires fundamental alterations in legal theory. This article offers one way of considering the issues arising from unparalleled informational access and usage, but of course there are many ways to think about such issues. More important than the absolute correctness of any emerging views is that we begin the dialogue that recognizes the important changes that are occurring around us. ■

ONLINE ADVERTISING AND ANTITRUST: NETWORK EFFECTS, SWITCHING COSTS, AND DATA AS AN ESSENTIAL FACILITY

By Catherine Tucker¹

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I. INTRODUCTION

One of the most rapid shifts in the digital economy has been a shift in the regulatory approach of many governments, from a focus on protecting consumers from false claims in advertising to considering digital advertising in the context of antitrust discussions and policy.²

Given the fact that online advertising companies are in the “crosshairs” of antitrust authorities, it is important to examine where their market power (if any) originates. Critics suggest that a combination of network effects, switching costs, and access to large amounts of data would give economics-based explanations for the rise of digital advertising platforms, and that the combination of these factors means that such markets will not “self-correct.”³ In this essay, I evaluate the extent to which such claims hold up from an economics perspective.

II. NETWORK EFFECTS IN ONLINE ADVERTISING MARKETS

Network effects occur when the value of a product depends on others that are using the product. Network effects can be same-sided; that is, there is a performance benefit for users as more of the same type of users use the network, such as is the case for a social media platform. Network effects can also be cross-sided where the presence of one group of users (such as viewers of content on YouTube) benefits another group of users (such as people who produce content on YouTube).

Network effects are a potential source of market power in online advertising, because they imply that larger firms may have larger network effects and therefore have increasingly attractive services. This could reinforce incumbency and make it difficult for new firms to challenge them.

Same-sided network effects are unlikely to be that important in online advertising markets. Typically, consumers of content do not benefit from the presence of other consumers of content. In the few forums where there are same-sided network effects, such as social media websites, my research suggests that these type of network effects are quite local. This means that they depend only on the user’s smaller friend-group and do not depend on the user base of the entire platform.⁴

Cross-sided network effects occur largely when advertisers benefit from the presence of large clusters of eyeballs on the other side of the platform. However, one of the most striking characteristics of the development of digital advertising has been to actually undermine such network effects in the provision of advertising. To understand this, it is useful to revisit an older marketing phenomenon called the “relevance-reach” tradeoff. The relevance-reach tradeoff suggested that, as an advertiser, it was possible to achieve relevance with consumers in advertising or reach, but not both. The underlying idea was that with television advertising an advertiser could achieve reach, but there would be many viewers of the ad for whom the product would not be relevant. On the other hand, with an ad in a specialized periodical such as “Crochet Today,”⁵ you could reach viewers for whom your product would be relevant, but you couldn’t reach many of them.

The relevance-reach tradeoff is, of course, relevant to network effects. If an advertiser was prioritizing reach then this would

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2 “Europe’s antitrust cop, Margrethe Vestager, has Facebook and Google in her crosshairs,” https://www.washingtonpost.com/world/europe/europes-antitrust-cop-margrethe-vestager-has-facebook-and-google-in-her-crosshairs/2018/05/10/519eb1a0-47cd-11e8-8082-105a446d19b8_story.html.

3 See Maurice E. Stucke, “Here Are All the Reasons It’s a Bad Idea to Let a Few Tech Companies Monopolize Our Data,” Harvard Business Review, <https://hbr.org/2018/03/here-are-all-the-reasons-its-a-bad-idea-to-let-a-few-tech-companies-monopolize-our-data>.

4 Catherine Tucker, (2017), Network Stability, Network Externalities, and Technology Adoption, in (ed.) Entrepreneurship, Innovation, and Platforms (Advances in Strategic Management, Volume 37) Emerald Publishing Limited, pp.151 – 175.

5 <https://www.librarything.com/series/Crochet+Today+Magazine>.

suggest the advertiser would be attracted to online platforms with large user bases, which is suggestive of a cross-sided network effect. Indeed, this might explain why in the early days of the internet, popular websites such as Yahoo! were so successful at attracting advertisers, as they could offer large audiences in a manner that other websites could not.

Since the heyday of Yahoo!, however, a whole new host of consumer tracking and collation technologies have evolved to mean that websites with large audiences such as Yahoo! no longer have an advantage. The way these tracking technologies work is that an advertising network collates information from many different publishers (websites) about people who might be interested in a topic from their browsing behavior. It is then possible using cookies to track these consumers as they browse different websites, and show ads to them across the internet. It is no longer necessary to focus an ad campaign on a single website. Furthermore, these technologies mean it is possible to achieve relevance, even while achieving reach, due to the use of targeting technologies to identify the right audience from users' browsing behavior.

Because these so-called targeted ads no longer require potential consumers to visit a specific website, and instead can be shown on any website, advertisers have gained the ability to achieve reach across the web, without sacrificing relevance. As a result, the services of these data brokers and advertising platforms mean there is no longer a relationship between the viewership of any one website and its attractiveness to advertisers.

Recently, it has been suggested that there might be “data-based” network effects in online advertising, which appear to be similar to what economists refer to as “economies of scope or scale.”⁶ The basic idea is that as a firm, an online advertising platform could improve its ad performance if it has access to data on what types of ads perform well and could attract more advertisers as a result. This is similar to the idea that a train line could improve its performance if it had access to data on when consumers chose to take trips, and that if the train line improved its performance, it could then attract more consumers. This latter example suggests that such data-based economies of scope or scale are certainly not a phenomenon which would be unique to online advertising, or even to digital markets. The key question, though, is whether this is self-reinforcing as a process and could therefore give rise to a sustainable source of competitive advantage to larger firms. To answer this, it is necessary to understand whether there are increasing returns to data, such that as a firm gets more data it improves its performance proportionally more. Most studies suggest there

are, at best, concave returns to data – that is, initially data can indeed provide performance advantages, but these performance advantages quickly decline as the firm obtains more data.⁷

III. SWITCHING COSTS IN ONLINE ADVERTISING MARKETS

Switching costs occur when it is costly or difficult for users of a service to switch to a cheaper alternative. Switching costs can reinforce incumbency by making it more expensive or difficult for new entrants to attract consumers away from existing providers.

In platform markets, such as online advertising, the key question is whether switching costs make it likely that advertisers will not use multiple advertising platforms or will not switch to another advertising platform should it potentially offer higher return on investment. In general, in digital markets, we observe users of platforms incurring switching costs when they would face costs of leaving behind their data (or trying to convert it into a new format). Therefore, often the question becomes whether or not advertiser data that is already integrated into the online advertising platform is itself valuable enough that the advertiser is reluctant to leave. In general, unlike in other markets, there is little value to historic data on advertising performance, simply because advertising tends to be a short-lived and tactical part of firm strategy. This is in contrast to something like health records, where there is large value to patients or a hospital having access to historic data.

Reflecting this fluidity, many technologies, known as cross-channel attribution technologies, have evolved precisely to facilitate advertisers switching between platforms. These platforms provide dashboards which allow advertiser to measure exactly how spending on one particular venue for reaching eyeballs affects conversions and profits. Recently, the advent of digital television and radio and expanded tracking facilities have enabled such services to expand into offline advertising too. Other services also offer the potential for real-time optimization, where the software automatically adjusts ad campaigns to focus on the advertising venue that is delivering the highest return on investment.⁸

As well as data, another potential source of switching costs in digital markets is standards. If an advertiser has invested in a particular standard format for an ad, then there is the risk that it would be difficult to port that creative design to another advertising platform that used a different format. However, online advertising has been characterized by increasing standardization of formats, led by institutions such as the IAB, which mitigate this concern somewhat.⁹

6 Grunes, Allen & Maurice Stucke, *Big data and competition policy*, Oxford University Press, 2016.

7 See for example, Schaefer, Maximilian, Geza Sapi & Szabolcs Lorincz, “The effect of big data on recommendation quality: The example of internet search,” (2018).

8 <https://www.adition.com/en/product-solutions/attribution-automation/>.

9 Goldfarb, Avi & Catherine E. Tucker, “Standardization and the effectiveness of online advertising,” *Management Science* 61.11 (2014): 2707-2719.

IV. BIG DATA AS AN ESSENTIAL (FACILITY) INPUT INTO ONLINE ADVERTISING MARKETS

Data has revolutionized online advertising by allowing platforms to “target” consumers who are likely to respond well to an ad with the right ad at the right time, and then measure the effectiveness of the ad. Digital data has been credited with transforming the online advertising industry, so a natural question is whether a hoard of digital consumer data could itself become an essential facility in such industries.

Standard economic models of vertical competition suggest three main criteria for evaluating whether data is an essential facility in online advertising markets. First, is it a valuable input in the production process? Second, are there other means by which rivals can gain access to the input? Finally, can a firm actually control who has access to it? Though this is an economist’s perspective, it echoes the analysis of Abrahamson in the context of litigation, who suggests that for data to be an essential facility, the following should hold: (1) The monopolist must control and deny access to the data; (2) competition must fail without access to the data; (3) the plaintiff must lack means to duplicate the data; (4) the monopolist – in principle – must be able to share the data; and (5) the essential facility plaintiff must demonstrate the monopolist’s power in the market.¹⁰

A. IS DATA VALUABLE?

Unsurprisingly, the answer to the question of whether data is valuable for the targeting of online advertising is that it depends. Perhaps more surprising, though, is the answer that most of the time, the data that users create when browsing the internet is not that valuable.

Let us take the example of a valuable piece of data, such as evidence that a business person is thinking about chartering a jet. This is valuable because such leads are profitable, but also rare in the sense that not many people can afford to charter a jet, and even then, they only do so occasionally, and there tends to be only a very small window to get charter jet company alternatives before them.

On the other hand, most data that is created online is done so in the pursuit of activities which are inhospitable to advertising. For example, if I am watching movies online, that data is not particularly valuable as it doesn’t inform advertisers about any products I am likely to buy in the near term. Furthermore,

while I am watching the movie, I am likely to feel unkindly towards any ad that intrudes on my experience.

In the analysis of the value of data in online advertising, perhaps the best general approach is to begin with the baseline assumption that most online advertising is not effective because it is simply ignored by consumers. In my own research I have documented that, even using reasonably low thresholds of effectiveness, over nine out of ten ad campaigns accomplish nothing.¹¹ As a result, the right data can greatly improve the performance of advertising, but only because of the baseline assumption that online advertising is rather ineffective.

B. ARE THERE ALTERNATIVE SOURCES OF DATA IN ADVERTISING MARKETS?

The key to examining alternatives to consumer data that large advertising platforms have access to is to understand what job that online data does. To understand this, it is useful to think about two potential ways that online advertising affects consumer behavior. The first way it may affect consumer behavior is to activate awareness among consumers. This may be awareness of a brand, or a new type of product that solves a problem a consumer has. The second way advertising may affect consumer behavior among consumer who are already aware of their needs, is to inform them about various alternative suppliers for meeting those needs.

Marketing professionals sometimes distinguish between “outbound advertising,” or ads that try and raise awareness of needs, and “inbound advertising,” which tries to provide useful information when consumers are seeking sources or vendors to supply products or services to fulfill these needs.

For inbound ads, there are usually many potential sources of data regarding a consumer’s intent. Indeed, an entire industry has arisen that sells segments to advertisers – for example the segment “auto intenders” uses clues from a consumer’s browsing behavior to infer that they may be seeking a new car.¹² These data management platforms allow advertisers to purchase data from a variety of data brokers who collate information from browsing behavior and even offline spending. Economists have found that often, though inbound advertising looks very valuable to advertisers, actually the ads weren’t needed, as people would have bought anyway if they had already identified a specific supplier.¹³

For outbound ads, there is slightly more controversy about what data is useful. Indeed, there are significant proponents of the

¹⁰ Abrahamson, Zachary, “Essential Data,” *Yale Law Journal* 124 (2014): 867.

¹¹ Goldfarb, Avi & Catherine Tucker, “Online display advertising: Targeting and obtrusiveness,” *Marketing Science* 30.3 (2011): 389-404.

¹² For example, Audience 360 sells access to “to 91,767 Australians in the market for Toyota Corolla vehicles in the last 30 days, along with more than 200,000 Australians intending to travel to the US in the last 30 days, and 197,479 Australians looking to buy a new home over the same time period.” <https://www.cmo.com/au/article/574667/how-carsales-improving-audience-targeting-data-management-platform/>.

¹³ Blake, Thomas, Chris Nosko, and Steven Tadelis. “Consumer heterogeneity and paid search effectiveness: A large-scale field experiment.” *Econometrica* 83.1 (2015): 155-174.

idea that marketers should not target ads using digital data, but instead should purposely avoid using data to isolate out audiences and try and reach everyone.¹⁴ In general, though, there are many ways of trying to establish whether someone might be a good target for an ad trying to raise awareness of a need. For example, I might be unaware of the usefulness of a slow cooker. An advertiser might use many pieces of data to identify whether I would be a good target for an ad: Do I visit cooking websites? Do I visit parenting websites? Do I live in an area where people tend to have hectic schedules?

It is also useful to think of instances where perhaps there are no alternative sources of data. For example, suppose that your house's water pipes sprung a leak and you used a search engine, or a single website such as "Angie's List," in order to quickly find a plumber. In that instance, perhaps only one web property would be aware of your need for a plumber and be able to take advantage of the related advertising opportunities.¹⁵ What is crucial here is that it is the limited interaction with the digital environment which leads to the lack of alternative sources of data. If you were looking for a plumber to do more general work (say for a bathroom remodel) without the same sense of urgency, then you would leave a broader digital footprint - for example browsing review sites to try and assess plumber quality, or browsing websites describing different types of showers and bathtubs. The key thing when approaching competition is to articulate the instances where the natural breadth of a digital consumer footprint is likely not to exist. In these cases, there are less likely to be alternative sources of data, and there are more likely to be areas of concern.

C. CAN A FIRM CONTROL WHO HAS ACCESS TO DATA?

In general, the presence of multiple digital footprints limits control over a piece of data that reveals consumer intent. This is because they are generating public information in the process. For example, Twitter cannot restrict access to data on retweets so as to prevent rivals or consumers from accessing these data since, by their nature, they are public. However, there are some forms of digital data which are not necessarily public - such as whether I visited a shopping site and abandoned my cart - that is valuable information that will not necessarily be known to any other firm.

Given that the question of control over access is context-specific, I instead highlight a potential risk in such markets which may lead to entrenched control over consumer data by large digital advertising platforms. In earlier research, I suggested that privacy regulation may help reinforce incumbency if consumers are less likely to consent to the use of their data by a new startup

if they have to "opt-in."¹⁶ Since that paper was written, we have seen large increases in privacy regulation in the form of GDPR. One incremental concern in the online advertising space in particular is that privacy regulation will prevent the sharing of data between different firms and players. This sharing of data (such as the information that someone visited a charter jet blog) is essential for promoting competition, and any costs that are implied by privacy regulation which reducing sharing could have consequences for effective competition in this sector.

IV. FINAL THOUGHTS

In general, the debate about market power in online advertising tends to have a remarkable lack of precision. Commentators talk about network effects without specifying for whom they are envisaging that the network effects apply or why. Commentators talk about how "sticky" online platforms are without being clear about whether they mean they are sticky for advertisers or users. And commentators generally take as given the principle that data is the lifeblood of online advertising, without distinguishing what kind of data they mean, how broadly available it is, or whether such data guarantees the ad's success. However, such precision is necessary in order to have a meaningful discussion about sustainable sources of competitive advantage in online advertising markets. ■

¹⁴ <https://www.cmo.com.au/article/618692/dr-sharp-digital-ad-targeting-has-been-oversold/>.

¹⁵ I thank an economist at the Australian Competition Commission for providing this example.

¹⁶ Campbell, James, Avi Goldfarb & Catherine Tucker, "Privacy regulation and market structure," *Journal of Economics & Management Strategy* 24.1 (2015): 47-73.

PRIVACY AND COMPETITION: FRIENDS, FOES, OR FRENEMIES?

By Maureen K. Ohlhausen¹

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I. INTRODUCTION

The debate about the future of data rich tech companies has reached a fever pitch in the European Union (“EU”)² and, to a slightly lesser extent, the United States, with some voices calling for changes to consumer privacy law, competition law, or both to address perceived concerns. The desire to impose increased restrictions on data collection, usage, and sharing in the name of consumer privacy is manifest in Europe’s adoption of the General Data Protection Regulation (“GDPR”).³

The regulatory impulse is not limited to changing consumer privacy law, however, and some have advocated using competition law to impose new controls and obligations on entities that collect consumer data. In fact, there has already been some melding of consumer privacy and competition concerns in data regulation itself. For instance, the GDPR mandates data portability to allow consumers to move their data among competing entities and thereby avoid “lock in” that may otherwise give current strong players an ongoing competitive advantage. Competition concerns reflect the fact that data about, or generated by, consumers can be a valuable asset. For example, The Economist magazine famously characterized data as the new oil.⁴ Reflecting this view, some have called data an essential facility and have advocated using competition law to force big tech companies to share consumer data because of its utility as an asset today and as an essential input into new products and services tomorrow.

This article will explore the challenges and limits to these theories and the tension they create between reducing and widening access to consumer data. Can privacy and competition values live in harmony as friends, will some of these proposals make them enemies, or is it a bit of both?

II. GDPR, DATA BROKERS, AND DATA PORTABILITY

The GDPR, which took effect in May 2018, generally applies to companies processing the personal data of residents of the EU.

The GDPR’s definition of “personal data” is broad, covering any information that can directly or indirectly identify a person, such as a name, identification number, location data, or online identifier. The regulation also has a broad geographical sweep and applies to entities outside the EU that offer goods or services to EU citizens (regardless of whether payment is required) or monitor behavior that takes place within the EU.

The GDPR’s fundamental requirements are that personal data be processed lawfully, fairly, and in a transparent manner. The regulation states that personal data may only be collected for specified, explicit, and legitimate purposes and not be further processed in a manner incompatible with those purposes. It also limits data collection to what is necessary for the purposes of processing. Personal data must also be accurate and kept up to date but retained for no longer than necessary. Companies must also ensure the integrity and confidentiality of the personal data they collect, including against unauthorized or unlawful processing and against accidental loss, destruction, or damage. The entity that controls personal data is responsible for, and must be able to demonstrate, compliance with the GDPR’s requirements.

The GDPR further states that processing is lawful only under certain conditions, with a prime example being when the data subject has given consent freely and in a specific, informed, and unambiguous manner. For example, the request for consent must be in an intelligible and easily accessible form and use

¹ Partner, Baker Botts LLP. The author would like to thank Brian Jacobsmeier for his research assistance.

² See, e.g. a 2/1/19 tweet by Giovanni Butarelli, European Data Protection Supervisor, that said, “1865 President Lincoln abolished slavery. We now face the challenge of abolishing digital servitude – where people are mined for their data, and served back personalised information in order to induce behaviours that benefit a few powerful players #CPDP2019.” Putting aside the question of the appropriateness of the comparison, the statement illustrates the intensity of European privacy regulators’ sentiment about data.

³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

⁴ “The World’s Most Valuable Resource,” The Economist (London, May 6, 2017).

clear and plain language.⁵ Moreover, the entity controlling the personal data must be able to demonstrate that consent, and individuals can withdraw consent at any time.

Consent is not required in all situations, however, such as in connection with performing a contract with a person. The GDPR also permits processing for the data controller's legitimate interests, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject. Legitimate interest is not based on a particular purpose, like performing a contract with the individual, and it could in principle permit processing for a wide variety of purposes. The GDPR does not provide a detailed list of legitimate interests, although it offers the examples of fraud prevention, network and information security, and public security. It also states that processing employee or client data, direct marketing, or administrative transfers within a group of companies may indicate a legitimate interest.

The GDPR does not explicitly address whether data brokers, who collect consumer data from a variety of sources and create profiles for a number of purposes, may fall under a legitimate interest exception. In 2014, the Federal Trade Commission issued a comprehensive report about the data broker industry ("Data Broker Report").⁶ Based on an in-depth study of nine data brokers, it described how data brokers collect personal information about consumers from a wide range of commercial, government, and other public sources and provide it for a variety of purposes, including verifying an individual's identity, marketing products, and detecting fraud. While acknowledging risks to consumers, the Data Broker Report also identified several consumer benefits such as targeted marketing that allows consumers to find more easily goods and services that meet their needs. Importantly, the Report also concluded "consumers benefit from increased and innovative product offerings fueled by increased competition from small businesses that are able to connect with consumers they may not have otherwise been able to reach."

If the data broker model is prohibited outright or made impractical by the GDPR, this may reduce competition in some aspects. Entities that wish to target new customers or create new products but have not collected consumer data themselves may be disadvantaged if they cannot buy or otherwise access such data.

Ironically, the GDPR may in this way actually help entrench the position of incumbents who have collected large amounts of consumer data.

The GDPR also grants consumers a number of explicit rights,⁷ and, interestingly from the competition perspective, includes a right of data portability. Pursuant to this right, an individual must be able to receive his or her personal data from the data controller, in a structured, commonly used, and machine-readable format and transmit the data to another controller where the processing is based on consent and carried out by automated means. Although this right is clearly related to the GDPR's overall goal of giving people greater control over their data, as other commentators have explained, it also has the additional aspect of possibly enhancing competition by making switching easier and reducing the effects of lock-in.⁸

In sum, the GDPR's overall goal is to give consumers greater control over their data. It may enhance competition to the extent consumers take advantage of the right of data portability and where lock-in and switching costs have been barriers to competition. But, as the FTC concluded in its Data Broker Report, access to consumer data may be an important spur to competition. If the GDPR bars or greatly burdens this access, it may reduce competition.

The FTC Data Broker Report is just one example of the competitive importance of data, including data about or created by consumers. The next section will address how current antitrust law has treated data as an asset and where it has imposed data sharing as an antitrust remedy.

III. DATA AS AN ASSET AND DATA SHARING UNDER CURRENT U.S. LAW

Specialized data related to personal information — think real estate records or credit data — have previously been subject to antitrust analysis. In today's online world, however, the debate in competition law circles centers around how to treat data about or created by consumers that is collected through online platforms and used by these entities to target ads, improve current offerings, and create new products. This type of consumer data is often an input for other products and services. For example, Waze (owned by Google) collects and aggregates the location and speed of travel of individual users' phones and uses it to produce dynamic trip directions based on changing traffic con-

5 For example, on January 21, 2019, the French National Data Protection Commission ("CNIL") imposed a penalty of 50 million euros against Google LLC, under GDPR for lack of transparency, inadequate information, and lack of valid consent regarding their ad personalization. <https://www.cnil.fr/en/cnails-restricted-committee-imposes-financial-penalty-50-million-euros-against-google-llc>.

6 Data Brokers: A Call for Transparency and Accountability, A Report of the Federal Trade Commission (May 2014), <https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf>.

7 The GDPR also grants individuals a number of rights, such as access, rectification, and erasure (often called the right to be forgotten).

8 See, e.g. Banda, Carolina, "Enforcing Data Portability in the Context of EU Competition Law and the GDPR," (September 13, 2017). MIPLC Master Thesis Series (2016/17), available at <https://ssrn.com/abstract=3203289>.

ditions. Consumer data is also a commodity asset for advertisers, allowing them to target their ads more precisely, which makes those ads more valuable and thus allows the platforms that hold such data to charge a higher price for that advertising space than other advertising channels.

Antitrust enforcers in the U.S. have experience with competitive issues involving data about or generated by consumers.⁹ An example is the 2013 *Bazaarvoice* case, in which the DOJ successfully challenged a merger involving companies that provide software platforms for online ratings and reviews (“R&R”) of products created by consumers that manufacturers and retailers host, share, distribute, and display. After a bench trial, the court found a relevant market for R&R platforms and that “syndication, switching costs, intellectual property/know how, and reputation are formidable barriers to new firms entering the market for R&R platforms.”¹⁰ The court also found persuasive the fact that both competitors referred to each other as duopolists in the R&R market and that *Bazaarvoice* would have a high market concentration after the acquisition, likely enabling it to charge monopolistic prices.

In *Bazaarvoice*, the court upheld the challenge to the combination of two platforms that used consumer-generated data because of a likely reduction in competition in the market for such platforms, and the DOJ required the defendant to divest the overlapping asset in a settlement. Other merger cases involving specialized data have allowed the merger to occur but required data sharing as a remedy. For example, in a series of mergers involving entities with databases of public real estate records used for title insurance underwriting (called title plants), the FTC has required the merging parties to sell a copy of their title plant.¹¹

In another example of data sharing as an antitrust remedy (albeit not involving consumer data), in 2015, the DOJ sued to block Cox Automotive’s acquisition of Dealertrack. Cox Automotive is the owner of the AutoTrader and Kelley Blue Book brands. As part of its acquisition, Cox sought to purchase Dealertrack’s

inventory management solution business (“IMS”) — a business unit devoted to providing analytics and algorithms to assist car dealers with the management of their vehicle inventory. DealerTrack also held ownership of valuable vehicle information data.

The DOJ was concerned that Cox would not only become an effective monopolist in the IMS market but also would acquire valuable vehicle information data that served as inputs to IMS businesses. With control over that data, Cox could “deny or restrict access” to the data “and thereby unilaterally undermine the competitive viability of Cox’s remaining IMS competitors.” To allow the deal to go through, the DOJ not only required Cox to divest the IMS portion of Dealertrack’s business, it also required Cox to enable the continuing exchange of data and content between the websites it owns and the divested IMS business.

IV. DATA AS AN ESSENTIAL FACILITY

Some would like to take this sharing of data outside the realm of traditional remedies for competitive overlaps in mergers and require data rich companies to provide access to their data assets on the ground that it is simply necessary to compete. In a striking example, last year in Davos, George Soros attacked “giant IT companies” arguing, “[T]he fact that they are near-monopoly distributors makes them public utilities and should subject them to more stringent regulations, aimed at preserving competition, innovation, and fair and open universal access.”¹²

In an interesting U.S. case, hiQ — a startup that scrapes data from LinkedIn, analyzes that data, and sells its analytics to businesses for workforce management purposes — sued LinkedIn under California competition law because LinkedIn had sent a cease and desist letter ordering hiQ to stop scraping its data in violation of LinkedIn’s User Agreement, citing privacy concerns for LinkedIn users.¹³ Notably, hiQ argues that “LinkedIn’s conduct violates the ‘essential facilities’ doctrine, which precludes a monopolist or attempted monopolist from denying access to

9 See, e.g. Ohlhausen & Okuliar, “Competition, Consumer Protection and the Right [Approach] to Privacy,” 80 ALJ 121, 143-46 (listing antitrust cases involving data about or generated by consumers) (2015).

10 See *Bazaarvoice* Memorandum Opinion at p. 133.

11 See, Complaint, *Fidelity Nat’l Fin., Inc.*, FTC Dkt. No. C-4425 (Dec. 23, 2013), available at <https://www.ftc.gov/system/files/documents/cases/140305fidelitcmpt.pdf>; Complaint, *Fidelity Nat’l Fin., Inc.*, FTC Dkt. No. C-4300 (Sept. 16, 2010), available at <http://www.ftc.gov/sites/default/files/documents/cases/2010/09/100916fidelitcmpt.pdf>; Complaint, *Fidelity Nat’l Fin., Inc.*, FTC Dkt. No. C-3929 (Feb. 25, 2000), available at <http://www.ftc.gov/sites/default/files/documents/cases/2000/02/fidelitcmpt.pdf>; Complaint, *Commonwealth Land Title Ins. Co.*, FTC Dkt. No. C-3835 (Nov. 12, 1998), available at <http://www.ftc.gov/sites/default/files/documents/cases/1998/11/ftc.gov-9810127cmp.htm>; Complaint, *LandAmerica Fin. Grp., Inc.*, FTC Dkt. No. C-3808 (May 27, 1998), available at http://www.ftc.gov/sites/default/files/documents/cases/1998/05/ftc.gov-9710115.cmp_.htm.

12 BuzzFeed.news, “George Soros Just Launched a Scathing Attack on Google and Facebook,” 1/25/18.

13 *hiQ Labs, Inc. v. LinkedIn Corp.*, 273 F. Supp. 3d 1099 (N.D. Cal. 2017).

a facility it controls that is essential to its competitors.”¹⁴ The court granted a preliminary injunction against LinkedIn, finding that there was a reasonable likelihood of success that this claim would prevail on the merits.

The issue of whether companies who accumulate a large amount of consumer data should be required to share it on the basis that it is an essential facility also arose at the European Commission’s recent conference on digital policy. In response to a question about whether companies who accumulate large data sets should be forced to share it, Professor Ariel Ezrachi responded that treating big data as an essential facility may be a “worthwhile remedy” to address alleged data monopolization by large tech companies.¹⁵ He cautioned, however, that some information may be private and subject to the GDPR, thus making it different from a typical essential facilities analysis.

V. PRIVACY AND COMPETITION: A COMPLICATED RELATIONSHIP

The confluence of privacy and competition law creates numerous dilemmas. Sharing as a competition remedy has traditionally been invoked where data is difficult or expensive to create, raising an entry barrier that keeps out competitors who need access to such data. As discussed above, this has been imposed typically in a merger analysis, where two holders of such a data set want to combine. By contrast, the concern driving privacy law, like the GDPR, is that consumer data has become too widely available, with a perceived loss of consumer control. The remedy adopted for privacy concerns limits collection and restricts sharing of data, except at the consumer’s direction. Arguments that consumer data should be treated as an essential facility are hard to square with evidence that data is abundant and available from many sources, as the FTC Data Broker Report showed. The GDPR, or similar laws, are likely to make consumer data harder to obtain and share. Evidence thus far suggests that the GDPR has reduced the collection of data but has also helped entrench some large online companies and hurt smaller players, possibly due to the cost of compliance with the law’s complex requirements.¹⁶ Using competition law to force sharing of consumer data as an essential facility, perhaps to mitigate this effect, would undercut the fundamental purpose of the privacy law.

A recent example of this complicated relationship is the German Bundeskartellamt’s recent decision that Facebook abused a dominant position as a social network by combining into detailed profiles user data from its own website, its Instagram and Whatsapp services, and from third parties. Though not a data protection agency, the Bundeskartellamt asserted that Facebook

violated the GDPR and thus engaged in an exploitative practice that hurt consumers, as well as competitors, who were not able to amass data in the same way. Their proposed remedy is to require Facebook to get consent from users before combining data in this way and to allow consumers to use the services in the same way, even if they do not consent. Whether this blended consumer protection and competition approach will withstand scrutiny or extend outside Germany is unclear, as Facebook has appealed and the head of DG Competition said the decision cannot serve as a template for EU action.¹⁷

VI. CONCLUSION

Given the raging debate about the role of large tech platforms in our economy and their effects on consumer privacy, competition law and privacy law will continue to interact in complex and sometimes inconsistent ways. In deciding the appropriate relationship between the two, it is important to keep clearly in mind the values that undergird each area of law. Antitrust can take privacy and data, even consumer data, into account to the extent they are tied to a competitive impact, such as when a merger combines specialized data that is not otherwise reasonably available in the market. Invoking it to force data sharing outside these areas is not only unsupported in antitrust law, it may run counter to privacy protections. Privacy law pursues the important goal of helping individuals assert more control over personal data. It can also risk reducing competition, however, and these risks must be taken into account to ensure consumers’ interests in both competition and privacy are respected. ■

¹⁴ *Id.* at 1117.

¹⁵ GCR, “Big data is not a typical essential facility, Ezrachi says,” 1/17/19.

¹⁶ See, e.g. <https://techcrunch.com/2018/10/09/gdpr-has-cut-ad-trackers-in-europe-but-helped-google-study-suggests/>.

¹⁷ <https://www.bloomberg.com/news/articles/2019-02-08/germany-s-facebook-order-will-be-studied-by-eu-vestager-says>.

DATA PROTECTION AND ANTITRUST: NEW TYPES OF ABUSE CASES? AN ECONOMIST'S VIEW IN LIGHT OF THE GERMAN *FACEBOOK* DECISION

By Justus Haucap¹

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I. INTRODUCTION

Many services on the Internet are seemingly offered for free, people do not have to pay for them, at least not with money. Instead, it is regularly argued, people are paying with their (personal) data. If people are not paying with money, but with data, however, the question emerges how antitrust laws can be applied to these particular markets.

How difficult it is to define markets in the absence of monetary prices has been discussed in the literature at length by now. Less attention has been given to the question whether and, if so, how data protection and privacy concerns should be part of antitrust enforcement. Three different issues can be distinguished in this context. First, there is the question of what kinds of behavior (if any) may be considered exploitative abuses by dominant firms in markets where customers are not paying with money, but – as it may seem – with data. This is, by and large, at the heart of the Federal Cartel Office's *Facebook* case in Germany, the decision of which has long been eagerly awaited and was finally announced on February 7, 2019, even though the text of the decision has not been published yet.² Second, a question emerges whether denying competitors access to certain types of data may be considered an obstructive abuse or anticompetitive exclusionary behavior that unduly impedes effective competition. And third, a question arises whether the effects that arise from the acquisition and combination of data sets should be subject to distinct consideration in merger analysis.

II. DATA USAGE BY DOMINANT FIRMS AS EXPLOITATIVE ABUSE?

Let us start with analyzing the first question, which is also decisive for the German *Facebook* case: What kind of behavior constitutes an exploitative abuse in markets where people do not pay with money for the services they use? In principle, the underlying idea pursued by the Federal Cartel Office appears to be quite simple: Excessive pricing by dominant firms is unlawful in

many countries, for example under Article 102 of the Treaty of the Functioning of the European Union. Hence, once users are “paying with data,” a dominant Internet firm's use of customer data may also be considered excessive. Put differently, if a firm asks its customers for “too much” data and is “too intrusive” with respect to users' privacy in return for its services, this may be considered an exploitative abuse of market power analogous to excessive pricing. However, as is often the case with simple ideas, things become more complicated at second sight.

First of all, data is not like money. Providing personal data to an online service does not reduce the user's ability to provide the same data to another service or multiple other services. Hence, while in public discussions data is often portrayed as “the new oil” or as a means of payment, these analogies are highly misleading. Oil is an exhaustible resource and a private good that cannot be used either in parallel or sequentially by different users, while data can be used multiple times and at the same time by many services. Similarly, the idea that data is a means of payment is misleading, as – unlike money – the same data can be shared with multiple users multiple times. Even if a user “pays” with data for a particular service, the user's amount of data available to him or her is not reduced. His or her wealth in terms of available data is not affected. In that way, “paying with data” is quite unlike paying a monetary “price.” Hence, it is conceptually much more difficult to construct an exploitative abuse case, as users are not left with less data than they had before. This is a fundamental difference to excessive pricing cases where customers are left with less

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² The Federal Cartel Office published a summary of the case on February 15, 2019, available at <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf>.

money/wealth once they have been exploited. If a resource can be used infinitely often without incurring any additional cost, however, it is not possible to exploit that resource or its holder.

However, while users may not be exploited with respect to their data, their privacy may be reduced, possibly unduly so. In fact, this view is closer to the FCO's theory of harm. According to the FCO, Facebook's behavior is exploitative *vis-à-vis* its users because users are losing control about how their data is used.³ Still, for a reduction in personal privacy (and excessive data requirements) to be similar to a reduction in personal wealth (and excessive pricing), people actually need to care about privacy. At this point, it is noteworthy that, quite generally, many people willingly consent to other parties' using their personal data if this increases the quality of the services they are interested in. While it is true that many people, when asked in public, maintain that they are concerned about how their personal data is used and that they are rather protective about how their data is used, these stated preferences are not revealed in their actual behavior. Put differently, a substantial body of empirical and experimental evidence has consistently found over and over again that even a vast majority of individuals who maintain to be heavily concerned about privacy are willing to share personal data in return for rather small forms of compensation or improved services.⁴ This finding has been coined the "privacy paradox."⁵ As, however, preferences revealed through actual behavior are typically taken to better reflect individuals' true preferences than surveys, it appears that many people willingly share their data in order to obtain better services. Given these findings, it is difficult to conceive how users can be exploited if they willingly share their data. Overall, however, we may need to broadly distinguish between two types of potential users: Those who really care about their personal data and their privacy and those who do not, but happily share their data.

If users of a particular Internet service do *not* mind if their personal data is used by the service provider, this means that they do not receive disutility from sharing personal data and having data sets combined. In these cases, collecting and combining data from these users can hardly be an exploitative abuse, as consumers cannot be exploited if they do not mind providing the data that is collected. Put differently, there can hardly be any harm inflicted onto these users if they do not receive any disutility from having their data combined. On the contrary, as combining data typically facilitates the development of better matching technologies to rank offerings, news, and other infor-

mation to match user interests, the prohibition to do so would lead to a deterioration of the services offered (as the matching technology would deteriorate).

In addition, as a rule of thumb, it appears safe to assume that users at least weakly prefer advertising that matches their interests over advertising that does not coincide with their interests ("spam" at the extreme). Hence, better matching users and advertisers should, if at all, increase users' utility from using a particular service and clearly increase the benefits that accrue to both users and advertisers. Put differently, the quality of a platform's matching technology does not only affect advertisers, but also tends to benefit users. Generally speaking, the quality of any matching technology depends, in part, on the amount, but also on the quality of information available to be used by the technology, along with a host of other factors. Hence, the benefit received from a particular service, for both users and advertisers, is a positive function of the amount and quality of information available to be used to match users with content that may interest them, both organic and advertising. In this context, access to and use of different sources of data (e.g. off-Facebook data and on-Facebook data, which is at the heart of the German *Facebook* case) allows for better matching than the use of just one source.

The case is different, of course, once we assume that (a) either a sufficient number of consumers do actually receive disutility from "excessive" data requirements and from having their data combined or (b) consumers are somehow being harmed without noticing it. But even for these cases, it is not clear that antitrust laws are best to deal with these valid concerns. Virtually all jurisdictions have specific laws regarding data protection and privacy that typically apply to all firms and transactions regardless of market power. It is obvious that firms with market power have to adhere to these standards in the same way as firms without (substantial) market power. It is unclear though, at least from an economic perspective, why a breach of privacy and data protection laws would also, in addition, constitute a breach of antitrust laws. Put differently, since a breach of data and privacy laws by firms without market power cannot be an antitrust abuse, why would the same behavior by dominant firms constitute a breach of antitrust laws? The question appears to be whether antitrust laws should hold dominant firms to stricter data protection and privacy standards than competing firms without market power are held by general data protection and privacy laws. From a competition policy perspective, it is difficult to conceive of good reasons for such a policy.

³ See Bundeskartellamt (2019), Facebook FAQ's, online at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf.

⁴ See, e.g. Acquisti, A., C. R. Taylor & L. Wagman (2016), "The Economics of Privacy," *Journal of Economic Literature* 54, pp. 442-492; or Benndorf, V. & H.-T. Normann (2018), "The Willingness to Sell Personal Data," *Scandinavian Journal of Economics* 120, pp. 1260-1278.

⁵ See Norberg P. A., D. R. Horne & D. A. Horne (2007), "The Privacy Paradox: Personal Information Disclosure Intentions versus Behaviors," *Journal of Consumer Affairs* 41, pp. 100-126.

In fact, hypothetically requiring dominant firms to use or combine less data or only data from certain sources and to offer higher privacy standards than what is legally required from competing firms without market power would be equivalent to requiring dominant firms by law to offer – from the perspective of those users who heavily care about privacy - superior products than rivals – a requirement, which could – in the extreme case – even foreclose the market, as data-sensitive consumers would basically be guaranteed higher privacy standards with dominant firms.

At the same time, a dominant firm in the “user market” may become less competitive in advertising markets vis-à-vis competitors from other “user markets.” And, finally, as data is used to develop and offer better services at least in the eyes of those consumers who do not mind sharing their data, preventing firms from collecting, combining, and using data beyond what is regulated by privacy and data protection laws is equivalent to requiring the firm to be less innovative and to offer inferior services – both of which would harm competition.

Still, a situation may emerge where dominant firms can “force” their users to consent to the use and combination of levels of data which non-dominant firms may not be able to obtain from their customers. In fact, this appears to be the FCO’s key objection regarding Facebook. The dominant firm’s access to more data is likely to help the firm to improve and tailor its services to user preferences and also to increase advertising efficiency. Here a difficult trade-off emerges, as requiring dominant firms to collect and to combine less data will typically also imply a deterioration of service quality and advertising efficiency, and thereby, a softening of competition. While some consumers may prefer higher privacy standards even if this reduces service quality, other consumers may happily share their data in exchange for better-tailored services. In the past, therefore, the idea has been brought forward that dominant firms should be forced to offer consumers two forms of “payment”: Consumers should be free to either pay with their data or with their money. There are several problems with this suggestion, however. First, it is unclear what the competitive price in monetary terms should be, given that it has not emerged in the market for most services that are under consideration. Second, firms use the information not only to improve advertising efficiency, but also the product itself. Hence, the more consumers chose to pay with money, the lower the service’s quality will inherently become, as data is a critical input to improve the services. While users who do not provide data may individually receive lower service quality levels, the overall quality of a matching algorithm will also deteriorate as less information on users’ preferences and behavior is available.

Consider the case of social networks as an example: Typically, social network users are fairly heterogeneous in their motives as to why they use social networks. While some users tend to be more active and send out and share personal information, comment on other users’ activities, and engage in discussions, other users tend to be more passive and, instead, receive and consume information provided by other users (i.e. they may “follow” others’ activities rather than using social networks as a “broadcasting” medium). Of course, many people tend to engage in both information sharing and consuming activities at various times, but for analytical purposes it is helpful to distinguish between sharing and consuming activities, keeping in mind that users are “senders” at one point in time and “receivers” at others. “Senders” tend to benefit if they are able to reach interested “receivers,” while “receivers” benefit from relevant information broadcasted by “senders,” as this increases the likelihood of receiving interesting or engaging content.

It is important, though, to note that the user benefits of sending and receiving information do not simply increase with the amount of information received and the number of potential receivers addressed. If “senders” share information with many people, but most “receivers” do not find the information useful or interesting, the “sender” may not really benefit from sending out the information- just as commercial advertisers do not benefit if they target the wrong audience. Similarly, “receivers” do not benefit from an increase in the amount of information if they find the information offered uninteresting and useless. Quite in contrast, receiving more information of little interest (which may be considered “spam”) will even decrease “receivers” utility, as they will find it more difficult to sort out the more interesting updates from the less interesting ones, especially if such an increase in information leads to information overload. Hence, both “senders” and “receivers” tend to benefit from better matching technology. “Receivers” benefit the better the information highlighted to them is. Similarly, when users share information they benefit if the information they share primarily reaches people who are interested in that particular information. If, in contrast, the information shared is received by users who do not find that information useful or neglect it, the “sender” receives less benefit from sharing his information, assuming that people share information with the purpose of reaching an audience who finds the information useful or interesting. If the matching mechanism for information shared and information received is improved, user benefits increase. Hence, better matching any type of content with user interests increases the utility of the social network for both “senders” and “receivers.”

Finally, forthcoming empirical evidence even suggests that larger firms often tend to offer more privacy than small ones.⁶

6 Sabatino, L. & G. Sapi (2019), “Online Privacy and Market Structure: An Empirical Analysis,” DICE Discussion Paper No. 308, available online at <https://ideas.repec.org/p/zbw/dicedp/308.html>.

Hence, it becomes unclear which privacy level would prevail at the competitive level – the standard hypothetical counterfactual for antitrust abuse cases – and which level would be considered abusive.

In its *Facebook* case, the German competition authority is particularly concerned about Facebook's practice of collecting data from outside the Facebook universe. In fact, Facebook collects data about its users and even non-users via apps such as WhatsApp and Instagram that are owned by Facebook and also via third-party apps and webpages that use Facebook interfaces, for example, in the form of Facebook-like-buttons that are integrated in many webpages. However, while these practices may possibly violate privacy and data protection laws, it is still unclear how they relate to Facebook's market power, and whether and how consumers are exploited beyond the harm possibly inflicted by potentially violating privacy and data protection laws.

In sum, Internet users and advertisers both tend to benefit from the use and combination of data, as the usage and combination of different data sources facilitates the improvement of matching algorithms to offer services, rank information, and provide news for users. The case is different, however, if some users receive direct disutility from their data being used. In these cases, however, data protection and privacy laws appear to be the proper statutes to regulate firms' behavior. It is not clear from an economic perspective why firms with market power should be held to stricter privacy standards than firms without market power, as such a practice may distort, rather than protect, competition. Moreover, it is at best unclear whether small firms adhere to stricter privacy standards than large firms. If, however, the opposite is true, the question emerges what the appropriate benchmark for abuse cases should be. Requiring dominant firms to behave more like competitive firms would be rather absurd if small firms without market power violate privacy standards more often than larger firms.

The FCO also suggests that users may not always be aware of what kind of data is collected and how this data is used due to a lack of transparency. This, however, appears to be by and large a problem of asymmetric information which is not necessarily related to market power. Put differently, information asymmetries are often also exploited in competitive markets with small firms, as George Akerlof already suggested in his famous used car dealer example.

Also, any analogy with data as a form of money or payment is misleading, as monetary resources cannot be used multiple times. Finally, empirical evidence suggests that (many) people do not feel exploited when their data is used. Quite in contrast, a fair number of people tends to willingly share data in order to obtain benefits such as improved services. This is probably

especially true for social networks where many people “broadcast” personal information about their activities. Against this background, it is conceptually rather difficult to establish sound evidence that collecting and combining users' data constitutes an exploitative abuse of market power, especially when considering the fact that small networks and Internet service providers without market power also engage in comparable practices.

III. DATA USAGE BY DOMINANT FIRMS AND OBSTRUCTIVE ABUSE OF MARKET POWER?

At least from a conceptual point of view, situations in which dominant firms deny third-party access to certain types of data may be more easily conceived as an (obstructive) abuse of market power. Put differently, situations may emerge in which – due to network effects and economies of scale – a dominant firm has collected such an amount of data that competitors may not be able to duplicate the same or a functionally equivalent set of data and, therefore, suffer from a substantial competitive disadvantage. In the extreme case, certain data may be considered an essential facility to which competitors need access, unless there are valid justifications for not granting access – such as, for example, privacy and data protection laws. Nevertheless, depending on the particular circumstances, sometimes even anonymized or pseudonymized data may be sufficient to facilitate competition. For the Google search engine, for example, some authors have argued that granting third party-access to historical search and click data would solve most of the competition concerns.⁷

From an economic viewpoint, there are good reasons why, in principle, third-party data access should be granted more easily than in the case of classical essential facilities such as physical networks or other infrastructure. First, classical infrastructure is often rival in usage. Once a competitor has taken over the incumbent's local loop, the incumbent cannot use the relevant lines itself anymore. Similarly, if a certain slot for a railway track is used by a new entrant, the same slot cannot be used by the incumbent any longer. In contrast, even with third-party access to data, the incumbent can still use the data itself. Hence, access to assets or facilities that are not rival in usage should be granted more easily. Second, physical infrastructure typically requires significant investment and maintenance expenditures. Therefore, antitrust law and regulation have established rather high legal thresholds for third-party access in order to preserve the investment and maintenance incentives. In contrast, while data collection and maintenance can also require significant investment, this is not always the case. Instead, data is often generated and collected as a by-product without significant investment efforts by the collector. If, then, incumbents can collect data without significant investment, the threshold for third-party access should be systematically lower than for traditional essential facilities.

⁷ Argenton, C. & J. Prüfer (2012), “Search Engine Competition with Network Externalities,” *Journal of Competition Law and Economics* 8 (1), pp. 73-105.

Overall, the fact that (a) data is typically non-rival in usage and (b) data is at least sometimes collected by incumbents without significant investment together suggest that the threshold for third-party access should, in principle, be systematically lower than for classical infrastructures. Data protection and privacy laws play a role in these cases; however, they may also provide valid justifications for why third-party access to data may not be granted in some cases.

In the FCO's prominent *Facebook* investigation mentioned above, access to data or data sharing has not played any role. However, the FCO's second theory of harm circles around the effects that Facebook's data collection efforts have on competitors, more precisely the effects of Facebook's data collection activities in advertising markets. Interestingly enough, the FCO has found Facebook to be "the dominant supplier of advertising space in social networks," suggesting that "advertising in social networks" is a separate antitrust market in its own, separate from other online advertising markets. It remains to be seen what evidence there is to suggest that Google (which does no longer operate social networks, as YouTube does not appear to be part of the relevant market in the FCO's eyes) and Facebook do not compete for online advertising in the same market. Be it as it may, the FCO's theory of harm with respect to advertising markets mainly consists in Facebook being able to collect and combine so much data that it can easily outcompete its rivals, as it can better target advertising – by and large an efficiency offense, which may even benefit users if they prefer more targeted advertising over advertising that is less related to user preferences.

IV. DATA PROTECTION AND MERGER POLICY

Finally, new challenges emerge for merger policy, as the potential combination of data sets may give rise to new competition concerns not only in horizontal and vertical, but also in conglomerate mergers. In many instances, however, the combination of data sets will give rise to new efficiencies as long as the combination of data sets either increases the productivity of production and/or distribution activities, or facilitates the supply of tailor-made products or services. Moreover, data protection and privacy laws obviously also apply to merged entities. As long as data protection and privacy laws regulate firms' behavior with respect to their usage of data, there does not appear to be an additional role for merger policy with respect to data protection.

In the context of the FCO's *Facebook* case, an interesting observation is that the FCO has chosen a rather narrow market definition for social networks, explicitly excluding WhatsApp from that market. While this is certainly helpful for the FCO in bringing its abusing case, it also contrasts with thinking by the European Commission's chief competition economist

Tommaso Valletti whether we should not define markets for attention (which is truly a scarce resource). From a merger policy perspective, defining markets for attention is, of course, attractive for competition authorities as it allows them to tackle Facebook's acquisitions of WhatsApp and Instagram more easily. Abuse cases, however, become more difficult under such a market definition, as it would be much less clear whether Facebook would be dominant in a market for attention. In order to apply competition law in a consistent fashion, markets need to be defined in a consistent way, either as markets for attention or more narrowly, independent from whether mergers or potentially abusive behavior is investigated.

V. CONCLUSION

For many Internet services, users do not pay with money, but rather pay with their (limited) attention. While users are sometimes said to pay with their data for these services, this analogy is rather misleading, as users' data is, unlike money, not limited – quite in contrast to users' attention. As data is, in principle, not limited, it is much more difficult to conceive what use of data would constitute an exploitative abuse of market power – the issue which is at heart of the German antitrust case into Facebook's data combination practices. Moreover, since data is typically used to improve the respective services, it should be much more difficult to provide sufficient evidence that the usage of data constitutes an exploitative abuse of market power that harms consumers. In addition, as smaller networks and service providers without market power do not appear to systematically adhere to stricter privacy and data protection standards, it becomes difficult to envisage what the appropriate counterfactual should be that dominant firms need to adhere to. A hypothetical requirement for dominant firms to adhere to stricter privacy standards would, also, very likely distort rather than safeguard competition. As a consequence, portraying data usage as analogous to excessive pricing is fraught with difficulties.

In contrast, it is easier to conceive that not granting third-party access to data may be an obstructive abuse of market power. Moreover, as data is – in contrast to many other facilities – non-rival in use and, at least in some cases, not associated with significant investment expenditure, the legal threshold for third-party access should generally be lower than for classical essential facilities, such as physical network infrastructures. ■

THE EU *GOOGLE* DECISIONS: EXTREME ENFORCEMENT OR THE TIP OF THE BEHAVIORAL ICEBERG?

By Amelia Fletcher¹

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I. INTRODUCTION

The recent EU *Google* decisions made waves around the world. In large part, this was because they involved a huge and innovative digital economy platform and were the highest fines yet imposed by the EU. However, the decisions are also notable for their reliance on key insights from behavioral economics.

Behavioral economics may not have been mentioned explicitly in the *Google Shopping* decision, but the Commission's case hangs on the fact that the "more favorable positioning" of results on the Google search page leads to increased traffic and click-throughs. As such, the case effectively relies on a behavioral tendency called saliency bias, whereby individuals typically decide on the basis of what is most obvious or prominent to them.

The EU *Google Android* case is more explicit still. The decision is not yet out, but the press release uses behavioral economics terminology in mentioning status quo bias as a key underlying driver of the abuse. This behavioral tendency means that users who find search and browser apps pre-installed on their devices are likely to stick to these apps.

Together, these Google decisions may represent a high-water mark for the use of behavioral economics in EU competition policy to date, but are they so novel? Not necessarily. The 2009 EU *Microsoft Browser* decision was effectively also related to status quo bias, even if the term was not used, and the "choice screen" remedy was specifically designed to ensure consumers made an active and unbiased choice, implicitly recognizing the risk of default bias.

The bigger question is what the *Google* decisions imply for competition policy in the future. Are such cases as far as behavioral economics can and should be taken in this arena? Or do these cases represent baby steps towards the more comprehensive incorporation of behavioral economics into competition policy thinking?

In some senses, the use of behavioral economics in these cases is far from extreme. The biases mentioned above – *status quo* bias, default bias, and saliency bias – are among the most well-evi-

dened and least controversial of all behavioral biases. It would arguably be more extreme to ignore factors that are so obviously relevant to how consumer behavior, and therefore competition, in fact works.

Moreover, behavioral thinking has already had widespread influence in a variety of other areas of policy. In EU consumer law, the recent online ban on opt-out selling of add-on products (otherwise known as the ban on pre-ticked boxes) is specifically designed to address default bias. In developing recent EU law relating to financial services, the Commission has increasingly adopted consumer testing of new regulations, reflecting a recognition that behavioral factors are highly relevant. In the UK, the law has been changed such that firms must now provide workplace pensions on an opt-out, rather than an opt-in, basis. This was based on an understanding of behavioral biases, and in particular the consumer inertia, surrounding pension decisions.

So, does such thinking have a much wider role to play in competition policy too, reflecting the revolutionary effect it is having across both economics and policy more widely? This short article discusses four key questions, relating to ways in which behavioral thinking could potentially transform this area.

- Does effective competition policy require more than standard antitrust?
- Within standard antitrust, will behavioral economics change theories of harm?
- What does behavioral economics imply for empirical analysis in antitrust?
- Do supply-side biases need to be considered too?

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Some of the ideas discussed below may be controversial. Others, however, seem almost incontrovertible if competition policy is properly to reflect real world behavior.

II. DOES EFFECTIVE COMPETITION POLICY REQUIRE MORE THAN STANDARD ANTI-TRUST?

In the UK, the competition policy tools available to the Competition and Markets Authority (“CMA”) include market investigations. If the CMA identifies features of a market which have an adverse effect on competition, it can impose proportionate remedies.

A key insight from these investigations, over the years, is that the identified competition problems are often related to problems on the demand-side. These are very different from the sorts of supply-side considerations that are more normally addressed by standard antitrust. However, they can be equally important, if not more, for driving effective competition which delivers for consumers.

What is the thinking behind this? Behavioral economics tells us that consumers may not act like rational automata, choosing an optimal product that perfectly maximizes their utility. Rather, they instead exhibit all sorts of biases and these can in turn have important implications for competition.

- First, biases can weaken competition, in particular by creating or exacerbating search frictions and switching costs. For example, if consumers exhibit *status quo* bias or myopia – both common behavioral tendencies – they are less likely to take the time to seek out better options that may be available in the market. But if this is the case, then firms will in turn have less incentive to improve their offerings, since they will gain fewer customers by doing so, and the process of competition will thus be less vigorous. This insight has led to a greater focus by the UK competition authority and sector regulators on developing interventions which “nudge” consumers to engage with the market, with a view to increasing competition.²
- Second, if consumers differ in the extent to which they exhibit such biases, we may observe market segmentation, whereby there is plenty of competition for “active” customers, but far higher prices for “inactive” customers. Overall, profits need not necessarily increase, depending on the extent to which firms compete away, in the “active” segment, the rents they make from the “inactive” segment. Nonetheless, such pricing may be of concern, both because it distorts consumption decisions and due to fairness considerations, the latter of which can also be highly political. In the UK energy market, such

concerns recently culminated in the introduction of a safeguard price cap to protect inactive customers. In the meantime, there are continuing attempts to develop more competition-friendly solutions to this particular problem.

- Third, biases may result in competition occurring on “the wrong dimensions.” For example, if consumers are more likely to choose products on the basis of what is most salient, then firms will tend to compete harder on more salient dimensions and act more monopolistically on less salient dimensions. As a result, in some markets we may see plenty of competition on upfront price, which is highly salient, but firms offering poor quality or terms and conditions, which are less salient. Consumer law can help here. For example, the law on unfair contract terms can be viewed as a way of helping to ensure that competition works to deliver good consumer outcomes. However, other interventions may also be needed to nudge consumers towards the more holistic appraisal of options and reduce the impact of saliency bias.
- Fourth, given that consumer biases can weaken competition, we may see firms deliberately acting to exacerbate such biases. This could involve obfuscation or by framing information in misleading ways. The strategic use of partitioned pricing and drip pricing are two obvious examples. It could also involve using contractual means, such as automatic renewal terms in contracts, which are designed to discourage engagement with the market. Again, consumer law can play a role in enhancing competition by limiting such misleading sales behavior, but there may be a role for more competition-focused interventions.

Indeed, in all of the above, while consumer law can clearly play a positive role, it is important to recognize that consumer law is essentially motivated by a focus on consumer protection, not competition concerns. As such, it may not always be ideally designed for the latter objective.

If competition authorities are to address this important aspect of competition policy effectively, therefore, they may require competition-focused rule-making tools – like UK market investigations – which go beyond the standard antitrust provisions. This set of concerns may also provide a rationale for combining competition and consumer enforcement powers within one authority, which is then able to address concerns from both perspectives at once.

III. WITHIN STANDARD ANTI-TRUST, WILL BEHAVIORAL ECONOMICS CHANGE THEORIES OF HARM?

Behavioral economics can also enhance our understanding of how firms’ actions can have anti-competitive effects. This may

² For a detailed description and evaluation of the “demand-side remedies” described in this and the following bullets, see Amelia Fletcher (2016), “The Role of Demand-Side Remedies in Driving Effective Competition: A Review for Which?,” available at <https://www.staticwhich.co.uk/documents/pdf/the-role-of-demand-side-remedies-in-driving-effective-competition-456067.pdf>.

involve entirely new theories of harm, but it may also involve tweaks to more standard theories of harm. There is an extensive existing literature on “behavioral antitrust” which highlights a number of such potential implications.³ Rather than simply summarize those ideas, this article focuses on a few more novel, and potentially more controversial, aspects which have been given less attention to date.

A. ABUSE OF DOMINANCE

First, as is shown by the *Microsoft Browser* and *Google Android* cases, the impact of tying and bundling can potentially have a more serious anti-competitive effects if one allows for default or status quo bias. If consumers can be tied into a particular related service initially, this can create long-term market power, even if they are free to switch thereafter. This is a well-recognized point.

Perhaps less obvious is that, in the digital arena, this effect may potentially be amplified by the fact that services are ostensibly free, albeit effectively paid for with consumer data. Another behavioral bias may be relevant here. If services are apparently free, then consumers may be disinclined to focus on the less salient price they are paying in terms of their data. Moreover, even if they did, consumers find it very hard to value this data, and their revealed preferences may be very different from their stated preferences. Such factors may make consumers even less likely to move away from the default or status quo choice, thus exacerbating the risk of anti-competitive tying and bundling in this digital environment.

Second, as discussed above, the *Google Shopping* case essentially relies on saliency bias, such that consumers tend to make choices on the basis of what is most prominent to them, rather than assessing information more holistically. While that case involves a platform giving undue prominence to its own vertically integrated offering, and thereby leveraging its market position from one activity to another, the strong impact that rankings can have on sales by platform users could potentially have wider anti-competitive effects.

Suppose, for example, that a platform provides seller rankings to consumers which appear to reflect their interests but in fact depend on the level of commission paid to the platform by the sellers. This means that competition ends up occurring on the basis of which sellers can pay the most to the platform for the ranking, rather than which sellers actually offer consumers the best product offering. Such behavior is therefore potentially

misleading for consumers, which could breach consumer law. However, it is also arguably exploitative of the platform’s “competitive bottleneck” position in reaching those consumers. This is especially likely to be true where consumers are “single-homing” in that they do not search around across platforms, perhaps due to *status quo* bias. If the platform also gives better rankings to sellers which are willing to list exclusively on that platform, this could potentially also be exclusionary.

Moreover, requiring the platform to provide information to consumers on how the ranking is in fact derived is likely to be of little use in correcting this situation, given that real consumers, who exhibit bounded rationality, are unlikely to know how to adjust their choices on the basis of this information. Given this market context, then, might such ranking rules constitute an abuse of dominance?

Third, another area which has raised renewed interest in recent years has been personalized pricing. Where price discrimination was based on consumers’ willingness to pay, authorities typically took a fairly sanguine view. However, it is not obvious that this *laissez faire* approach is still justified when price discrimination reflects consumer biases.⁴ Again, this has been identified as a particular issue in a digital environment. In this context there are also concerns that such price discrimination will be much easier for an incumbent which has masses of data about consumer behavior, and much harder for an entrant without access to such data. As such, in a digital environment, personalized price discrimination could potentially be exclusionary, as well as exploitative.

Fourth, the impact of consumer myopia on firms’ incentives to protect and exploit their own proprietary aftermarket are fairly well understood. The less weight that consumers give to future prices, the more they will tend to opt for low upfront prices, even if these are to be followed by “rip-off” aftermarket prices. As such, a greater integration of behavioral economics within antitrust could thus lead to a renewed interest in aftermarket cases.

Perhaps less well recognized is that similar “consumer tie-in” effects can result from other behavioral biases too. For example, saliency bias can lead consumers to focus on prominent upfront prices and ignore the less prominent after-market prices. If firms are able to reduce the prominence of the latter through deliberate “shrouding,” could this be seen as an abuse of dominance?

Likewise, as discussed above, *status quo* bias can mean that, once a firm has won a consumer in one period, it is more likely to

³ See, for example, Matthew Bennett, Amelia Fletcher, Liz Hurley & David Ruck, “What Does Behavioral Economics Mean for Competition Policy?,” *Competition Policy International*, Spring 2010, 120-32, <https://www.competitionpolicyinternational.com/what-does-behavioral-economics-mean-for-competition-policy/>; Maurice E. Stucke, “Behavioral Antitrust and Monopolization,” *Journal of Competition Law & Economics*, Volume 8, Issue 3, 1 September 2012, Pages 545–574, <https://doi.org/10.1093/joclec/nhs018>; Avishalom Tor, “Understanding Behavioral Antitrust,” 92 *Tex. L. Rev.* 573 (2013-2014). https://scholarship.law.nd.edu/law_faculty_scholarship/296.

⁴ Such naïveté-based discrimination is discussed in Paul Heidhues & Botond Koszegi, “Naïveté-Based Discrimination,” *The Quarterly Journal of Economics*, Volume 132, Issue 2, 1 May 2017, Pages 1019–1054, <https://doi.org/10.1093/qje/qjw042>.

keep that consumer in later periods. Firms may be able to exploit this position by charging these inactive customers a higher price than they offer to active customers. They may also be able to exacerbate the effect of the *status quo* bias by making it harder for consumers to search or switch away, perhaps playing on behavioral factors such as forgetfulness (which may limit a consumer's ability to cancel the contract during a defined termination window) or dislike of conflict (which may limit a consumer's willingness to switch if it requires calling up the original supplier).

As such, just as is the case for aftermarkets, firms can potentially behave in an exploitative and exclusionary manner in respect of their inactive customers. Should this ever be considered an abuse of dominance?

B. ANTI-COMPETITIVE AGREEMENTS

Consumer behavioral biases may also have implications for anti-competitive agreements.

In terms of horizontal agreements, it is increasingly well understood that the presence of behavioral biases may potentially alter the likelihood of standard price or market-sharing collusion. For example, Bos et al. (2011) show that if consumers exhibit strong inertia, then price collusion is easier to achieve.⁵

Less attention has been given to the idea that, in the presence of demand-side behavioral biases, firms may be able to engage in an alternative form of collusion: collusion to dampen competition. For example, it may be in the joint interest of two rival firms to agree to set their price structures very differently, or make their pricing highly complex, in order to limit comparability between them. By dis-incentivizing consumer search, this can dampen competition and enhance firm profitability.⁶ Likewise, firms may agree to make quality far more salient to consumers than price. With saliency bias, this will tend to lead to competition occurring on quality rather than price, which in turn may again be rather weaker, and thus generate higher profits.

In terms of vertical agreements, much of the behavioral anti-trust literature to date has focused on how behavioral biases may provide additional support for efficiency rationales frequently given for vertical agreements.⁷ However, there are potential negative implications of behavioral biases for vertical agreements too, which have so far been less well developed.

As an example, there has been much discussion of the role of retail MFNs in changing platforms' incentives when setting their

commission rates. There has been less focus on their potential impact on consumer behavior. If retail MFNs are accompanied by credible "best price" claims, then consumers who are anyway disinclined to search across different platforms may be even more inclined to stick to a single platform. This is important because any increase in "single homing" on the consumer side of the market will in turn tend to increase the market power of the platform in relation to the seller side of the market, by making the platform more of a competitive bottleneck to consumers. As such, retail MFNs can potentially increase platform market power, through their effects on consumer behavior.

C. MERGERS

Demand-side biases may also have implications for merger analysis. For example, if consumers find it hard to think about absolute quality, then they may focus their decision-making on the relative quality of different products. In this situation, we may expect firms to compete more vigorously on quality, since there is an added incentive to achieve a higher quality than rivals. This in turn means that the impact of a merger in reducing quality might be greater than would be the case in the absence of this behavioral bias.

Likewise, we know that consumer behavior is affected by how the decision facing them is framed. Consumers may be more likely to buy a particular flight ticket, if they are informed that there are only a few tickets still available at the current price. They may be more likely to buy a £5 bottle of wine that was £10 yesterday than one which has always been £5, even if the £10 was never a real price.

This in turn means that such framing behavior can affect competitive outcomes. Should merger assessment therefore include consideration of the impact of merger on firms' incentives when framing consumer choices? For example, how should authorities consider a takeover by one firm, which is expert in framing their offering in a misleading way, of a second firm which is more scrupulous?

IV. WHAT DOES BEHAVIORAL ECONOMICS IMPLY FOR EMPIRICAL ANALYSIS IN ANTI-TRUST?

Behavioral biases may also have implications for the empirical evidence and analysis typically carried out in antitrust cases.

First, there may be a need for changes to existing analytical tools. For example, standard demand estimation techniques do not

5 Ivan Bos, Ronald Peeters & Erik Pot (2017), "Competition versus collusion: The impact of consumer inertia," *Int Jnl of Economic Theory*, 13: 387-400. doi:10.1111/ijet.12136.

6 This possibility is discussed in Robert Edwards, "Pricing and obfuscation with complexity averse consumers," *Oxford Economic Papers*, gpy053, <https://doi.org/10.1093/oepp/gpy053>.

7 For example, an interesting behavioral justification of RPM is provided in Roman Inderst & Sebastian Pfeil, "An Image Theory of RPM," MPRA Paper 54139, March 2014, https://mpra.ub.uni-muenchen.de/54139/1/MPRA_paper_54139.pdf.

typically allow for the fact that consumer purchasing behavior may be strongly affected by both their past purchasing behavior and framing effects. For example, a price reduction from £2 to £1.50 may have a very different impact on sales if the price label specifically states “Was £2, now £1.50,” as opposed to the price simply changing without such labelling.

Meanwhile, consumers who exhibit loss aversion may have very different reactions to a price change depending on the direction of the change, with many more switching away on the basis of a price rise from £2 to £2.20 than would switch to the product on the basis of a price reduction from £2.20 to £2. Again, most demand estimation techniques implicitly assume symmetric reactions.

Second, behavioral biases have important implications for the effectiveness of remedies, where these are reliant on consumer behavior. For example, offering consumers a new option may have little impact on competition if they exhibit strong default or *status quo* bias. In some cases, remedies will only work well if they change the choice *architecture* facing consumers, not just the choice options. A thoughtful example was the remedy in the *Microsoft Browser* case; a “choice screen” which forced consumers to make an active and unbiased choice. Following the introduction of this remedy in the EU, Internet Explorer’s market share in the browser market fell significantly more rapidly in the EU than it did in the U.S., which was not subject to the remedy.⁸

Consumer reactions can, however, be hard to predict, and competition authorities can easily get this wrong. A key implication, therefore, is that authorities should carry out consumer testing of any such remedies, ideally through the use of randomized controlled trials. This is a relatively new technique for antitrust, but has become increasingly commonplace in sector regulation, at least in the UK, when putting in place new consumer-focused regulatory interventions. It has shown clear benefits in terms of helping to identify the most effective remedies.

V. DO SUPPLY-SIDE BIASES NEED TO BE CONSIDERED TOO?

Finally, and perhaps most controversially, it has to be recognized that behavioral biases may not be restricted to the demand-side of markets. Firms can exhibit them too. There is an extensive and growing literature on the tendencies of executives within firms to engage in a variety of behaviors that are not necessarily profit-maximizing, such as empire-building, maximization of stock market valuation, focus on the relative performance of the firm (rather than its absolute performance), seeking admiration through taking big risks, and even protection of market share in

order to protect jobs (perhaps to avoid difficult conversations with staff being made redundant).

In some cases, these behaviors may in fact be individually rational for the executives involved, given the reward structures they face and the perceptions of shareholders and wider capital markets, which may themselves be hard to fully rationalize. However, whether individually rational or not, these apparent biases can potentially lead to anti-competitive behavior (or indeed pro-competitive behavior) which is not apparently profitable for the firm.

As has been highlighted in the existing behavioral antitrust literature, this has clear implications for antitrust, which has traditionally included a strong focus on considering the profit incentive of firms to engage in the behavior in question. This emphasis has perhaps been stronger in the U.S., where the influence of the Chicago School has been stronger. However, such thinking is present in many EU cases too, with authorities often seeking to demonstrate in their decisions that the dominant firm is likely to profit from the abusive behavior.

If we take supply-side behavioral biases seriously, however, it is far from obvious that this is still a sensible question to ask. For example, a firm may engage in a course of abusive conduct simply because its CEO wants to preserve market share for personal reasons, and irrespective of whether the behavior will be profitable. Would it be so outlandish for competition authorities to allow for such possible motivations in abuse cases?

Likewise, in the context of mergers, if some mergers are driven not by pure profitability motives but by executive reward, empire-building incentives, or potentially over-optimism or over-confidence bias, then this may be relevant to assessing their likely effects and also their efficiency justifications. Such factors may also be relevant to assessing the likelihood of successful entry post-merger, in that potential entrants may well be over-confident about their likely success in the market. Indeed, recent ex-post evaluation work, carried out for the CMA, found entry to have been less successful than expected in constraining post-merger competitive outcomes in four out of the eight cases reviewed.⁹ Again, to what extent should the authorities take such considerations into account?

Similar supply-side biases may also justify additional scrutiny around purchaser approval for assets divested in order to gain merger clearance. The UK merger regime has sadly overseen a number of failed merger divestment remedies, most notably in a series of three grocery mergers (*Co-op/Somerfield* (2008), *Co-op/Lothian* (2009), and *Asda/Netto* (2010)) which led to the divest-

⁸ See Fletcher (2016). Footnote 2.

⁹ KPMG LLP, “Entry and expansion in UK merger cases: An ex-post evaluation,” April 2017, Report For Competition and Markets Authority, <https://www.gov.uk/government/publications/evaluation-of-entry-and-expansion-in-uk-merger-cases>.

ment, in total, of 52-54 stores to an apparently dynamic and aggressive new grocery retailer called Haldanes. The company turned out to have been unrealistically over-confident about its own chances of success. It failed in 2011, within a year of the final divestment, resulting in most of the divested stores closing down.

In the area of cartels, supply-side biases may affect the likelihood of anti-competitive agreements being formed and remaining stable. For example, collusion may be facilitated by strong trust and social links across cartel members,¹⁰ but may be hampered by a non profit-focused human desire to be a law abiding member of society. This suggests that a successful strategy to reduce collusion may need to focus on changing culture and social norms, not just penalizing illegal cartels.

Finally, it should be noted that allowing for behavioral biases on the supply-side is not the same as accepting that firms might engage in any sort of unexplained non-rational behavior. For example, it is sometimes argued that mergers will not lead to price rises or foreclosure effects, on the basis that managers of the different divisions of the merged firm will not take each others' profits into account. Such arguments are unlikely to be credible unless there is a clear behavioral rationale, and supporting evidence, for such inaction.

VI. CONCLUSIONS

Overall, while the sum of the ideas above may be controversial, it is clear that behavioral economics is here to stay. It has already had huge influence across wide swathes of policy and law, and it seems unlikely that competition policy will be immune. Competition policy is, after all, essentially about making markets work well for consumers. It will only therefore be effective if it allows for the behavior of real markets with real consumers and real firms.

There is an extensive behavioral antitrust literature which sets out a number of potential developments. Some additional aspects are presented here. However, there may also be implications that no one has identified yet, even in theory. The academic field of behavioral economics is itself developing very quickly, and new thinking – for example, in respect of theories of harm – is highly likely to emerge. It would be reasonable to bet that we have only really seen the tip of the behavioral iceberg so far. ■

¹⁰ See Andreas Stephan, "Cartel Laws Undermined: Corruption, Social Norms, and Collectivist Business Cultures," *Journal of Law and Society*, Vol. 37, Issue 2, pp. 345-367, June 2010, <http://dx.doi.org/10.1111/j.1467-6478.2010.00507.x>.

CADE AND THE CHALLENGES OF THE DIGITAL ECONOMY

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I. INTRODUCTION

Antitrust authorities have been responding to the challenges posed by innovative markets, disruptive businesses and a fast-changing economy worldwide, and it has not been different with the Brazilian Administrative Council for Economic Defense (“CADE”).

Studying the impact of the digital economy on antitrust analysis and designing adequate responses has been an institutional priority for CADE in recent years. This article focuses on three topics that summarize CADE’s recent actions in response to the emergence of the digital era:

- Institutional strengthening;
- Domestic and international cooperation; and
- Advocacy

II. INSTITUTIONAL STRENGTHENING

CADE understands that the main pillar of its effective enforcement of competition law and policy is its staff. Therefore, training and enhancing the capacity of its staff has been a major goal at the institution. In April this year, for example, we conducted an internal workshop on competition and the digital economy, with the participation of over 100 people who engaged in debates, case simulations, and sharing of experiences, on two main topics: (i) how the emergence of digital markets will affect competition enforcement in Brazil; and (ii) what CADE can do to adequately continue developing its functions in this new scenario.

CADE is also undertaking efforts to increase staff numbers. In recent years, the Department of Economic Studies (“DEE”), for example, has almost tripled in size. This year, CADE conducted a major process to recruit civil servants, which received more than three thousand applications. Of course our goal is to grow not only in numbers, but in quality. In the context of the digital economy, CADE has been aiming to enhance its in-house competence related to the digital market, in areas such as data science and information technology (“IT”).

We have also been working to consolidate and develop our analytical toolkit. For instance, we have recently published Guidelines for Remedies,² as well as Guidelines for the submission of data to CADE’s Economic Department.³ We are also working on guidelines for fine calculation, as well as a manual for unilateral conduct analysis.

The challenges posed by technological developments also represent an opportunity for competition enforcers to develop more effective tools in the fight against anticompetitive conducts such as cartels. This is the case with the “Brain Project” (or “Cérebro”), which uses data mining techniques to identify evidence of cartels, such as suspicious facts or behavioral patterns, and to provide relevant information in cases under investigation. The Cérebro interface consists of a platform that integrates public procurement databases and applies data mining tools and economic filters to identify possible patterns and measure the probability of cartels in public bids. CADE derived mathematical models from academic articles to create statistical tests for general use in a kind of reverse engineering process, as described by the 2019 OECD Peer Review on Brazilian Competition Law and Policy. This technology allows for the automation of analyses formerly conducted by investigators and case handlers. Some investigations have been started as a result of the Cérebro tool. This also reduces CADE’s reliance on leniency agreements to detect cartels.

Finally, CADE has been undertaking many empirical studies as a way to inform decision-making. For example, CADE has conducted a series of empirical studies on ride sharing apps and is working on ex-post analysis of mergers, as will be further mentioned in Section IV, below.

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² Available in Portuguese at http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/copy_of_GuiaRemdios.pdf.

³ Available in Portuguese at http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/guia-para-envio-de-dados-ao-dee-do-cade_final_site.pdf.

III. DOMESTIC AND INTERNATIONAL COOPERATION

The second challenge relates to the need to coordinate competition enforcement, both domestically and internationally. At the domestic level, in Brazil, we have different bodies that regulate sectors that have significant interplay with competition policy in the digital economy, such as consumer protection, data protection, and the financial sector.

This interplay between consumer protection, data protection, and competition policy is tight. As noted by the OECD, an increasingly important concern of merger control in the context of the digital economy is the accumulation of consumer data.⁴ Personal data collected and processed by internet companies reveal a great deal about users' preferences and characteristics. On the one hand, companies might use data to improve the design and features of their own platforms, or to better tailor the marketing of products and services according to the specific interest of their customers. On the other hand, such technologies allow the employment of highly sophisticated segmentation, like microtargeting or geotagging, which in turn makes it possible to restrict competition and prevent users' access to certain goods or services based on their personal features. Additionally, CADE is aware of the risks that the exploitation of big data by companies may pose to the protection of other rights, such as the right to privacy. Therefore, CADE understands that the dynamics of digital platforms give rise to a close relationship between data protection, privacy and competition policy.⁵

In August 2018, Brazil enacted the Brazilian Data Protection Law (Law n. 13.709/2018, "LGPD"),⁶ which regulates the treatment of personal data, defined as information relating to an identified or identifiable person, with the aim of protecting, among others, the fundamental rights of freedom and privacy.⁷ The LGPD also introduces rights for personal data subjects vis à vis the controller⁸ of its data, which includes but is not limited to the right to obtain (i) the confirmation of the existence of treatment; (ii) the access to the data; (iii) the correction of incomplete, inaccurate or outdated data; and (iv) the portability of data to another provider. In 2019, the Brazilian Congress approved a modification to the LGPD, creating the National Data Protection Authority ("ANPD"), which will be in charge

of drafting guidelines for a national personal data and privacy protection policy. The LGPD will come into force in 2020. With the new Data Authority due to open, CADE understands the importance of working to shape a cohesive regulatory landscape, which will require intensive cooperation among the different authorities.

In this regard, CADE has been working hard on actions aimed at establishing closer cooperation with other bodies in Brazil's public administration. CADE signed a cooperation agreement with the National Consumer Secretariat ("SENACON").⁹ The agencies committed themselves to exchange technical information and promote joint actions that guarantee effective consumer protection and the strengthening of competition. We are also working on creating channels for direct communication between both agencies and developing joint activities aimed at consumer education.

CADE also signed a Cooperation Agreement for the exchange of technical information and for the promotion of a closer relationship between CADE and the National Institute of Industrial Property ("INPI").¹⁰ CADE and INPI committed themselves to provide technical subsidies for the analysis of administrative processes and to exchange information, knowledge, data, and documents, safeguarding the confidentiality of information. They also committed themselves to conduct studies, events, and seminars that relate to both intellectual property and antitrust.

Finally, as an example of a regulated sector, the Brazilian competition authority signed in 2018 a Memorandum of Understanding with the Central Bank of Brazil ("BCB"), the body responsible for the financial market. This document established a framework for interaction between the two different bodies in the analysis of mergers and in the investigation of possible violations of the economic order involving financial institutions under the BCB's supervision. This document was later developed into a joint normative resolution¹¹ that establishes, among other things, procedures to harmonize and render the enforcement activities of the respective bodies in merger review in the financial system more efficient. The act also provides for the sharing of information between CADE and the BCB for joint action in competition, as well as periodic meetings between the two bodies.

4 Implications of E-commerce for Competition Policy – OECD Secretariat Background Note. June 6, 2018. DAF/COMP(2018)3. Apud (Lao, 2018b).

5 As presented in CADE's replies to the internal questionnaire circulated within the BRICS Competition Authorities Working Group on the Digital Economy and published in the First Report "BRICS in the digital economy: competition policy in practice," available at http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/brics_report.pdf.

6 Available in Portuguese at: http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2018/Lei/L13709.htm.

7 According to article 1 of the LGPD.

8 According to article 5, item VI of the LGPD, controller is the legal or natural person, private or public, that is responsible for deciding on the treatment of personal data.

9 Available in Portuguese at http://www.cade.gov.br/aceso-a-informacao/convenios-e-transferencias/acordos-nacionais/sei_mj-6330054-acordo-de-cooperacao-tecnica.pdf/view.

10 Available in Portuguese at <http://www.cade.gov.br/aceso-a-informacao/convenios-e-transferencias/acordos-nacionais/cade-e-inpi.pdf/view>.

11 Available in Portuguese at https://www.bcb.gov.br/conteudo/home-ptbr/TextosApresentacoes/Ato%20normativo%20conjunto%205_12_2018%20limpa.pdf.

As digital markets are borderless, international cooperation becomes indispensable for consistent decisions, for example in the remedies applied worldwide by different jurisdictions to global players. CADE has been pursuing active cooperation with different actors in the international arena.

Since the last BRICS Conference, in 2017, Brazil has been the main coordinator of the BRICS Working Group for the Digital Economy, which is co-chaired by Russia. The first meeting of the working group was held in 2018 in Brazil. On that occasion, BRICS representatives agreed that CADE would prepare a joint report regarding the digital economy, based on the answers provided by the five countries to a questionnaire drawn up by Brazil.

The report describes how CADE and the other BRICS countries are dealing with the challenges posed by the digital economy and was released at the BRICS Conference in September, in Moscow, Russia.¹² This was the first joint document of the BRICS authorities regarding the digital economy.

CADE also promoted an international conference on the digital economy: *Designing Antitrust for the Digital Era*, in July, 2019, where international experts and representatives of competition authorities were invited to discuss the challenges of the digital economy for antitrust enforcement. This Conference also hosted the second meeting of the BRICS Working Group on the Digital Economy, which was a valuable opportunity to reunite the BRICS antitrust authorities to discuss the digital market.

Another key factor in strengthening international cooperation in the digital economy was CADE's recent change of status to an associate member of the OECD Competition Committee. This places CADE in a more prominent position in discussions regarding international best practices, including competition authorities' approach to the digital economy. Within the OECD framework, CADE also participates in the Latin American and Caribbean Competition Forum, which aims at promoting dialogue, consensus building and networking among competition officials in the region.¹³

In particular, we believe that competition authorities might benefit a great deal from discussing cases which have been common to different jurisdictions.

In order to stimulate further debate, we raise some questions on the topic of domestic and international cooperation: To what extent do the policies applied by the different bodies related to the digital economy in the domestic arena need to be harmonious to be effective in their respective realms? What institutional mechanisms could be created to facilitate this harmonization? What could we learn from the international experience in this field? How can we create more effective institutional mechanisms for cooperation among antitrust authorities? While coordinating domestic regulation in the digital economy seems desirable, could we apply this same logic in the international sphere?

IV. ADVOCACY

CADE has been giving special attention to enabling the development of an ideal environment for the emergence of disruptive businesses in the economy. Therefore, it is particularly important for CADE to have strategies to guarantee entry conditions in the market and to be vigilant about conduct leading to market foreclosure. This is achieved through enforcement of competition law, when anticompetitive conduct related to market foreclosure takes place, but also through advocacy work to guarantee regulation will not unduly restrict competition or entry.

CADE considers that competition advocacy is a crucial tool to guide the development of regulation and policies within other government branches. Coordination between different sector regulations and competition policy is a common challenge faced by competition authorities.¹⁴ As we know, one of the main goals of regulation is to address market failures. In the case of taxi services, for example, two major market failures are information asymmetry and negative externalities. The former occurs because consumers do not have prior knowledge about the type and the quality of the service they will hire and have little ability to negotiate fares. This information asymmetry could encourage taxi drivers to take a route longer than necessary, charge abusive fares or drive an unsafe vehicle. The second failure occurs because individual passenger transport market affects economic agents that are out of the market due to either traffic congestion or to air and noise pollution. Hence, free entry could be characterized as an example of the so-called "tragedy of the commons": free access to the resource (i.e. the

12 The Report is available at http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/brics_report.pdf.

13 According to the 2019 Latin American and Caribbean Competition Forum website available at <http://www.oecd.org/competition/latinamerica/2019forum/>.

14 In Brazil, regulatory and competition authorities work separately and are autonomous from each other in their decisions. In the financial sector, mergers are subject to review by both CADE and the regulatory authority - the BCB. Both authorities signed a Memorandum of Understanding in 2018 that clarifies the competencies and how the cooperation will take place between the authorities. In mergers, both CADE and the BCB will take their own decision, independently and according to the respective procedures. The one exception applies to cases that pose a potential systemic risk to the financial sector, in which the BCB will inform CADE about systemic risks and CADE will decide based on the reasoning provided by the regulatory authority. CADE continues to be the sole authority in charge of conducting investigations of anti-competitive conduct according to the Brazilian Competition Law. This notwithstanding, CADE will consult with the BCB before rendering a final decision, especially with regard to the imposition of sanctions.

taxi market), could cause an accumulation of negative externalities that would end up harming that very resource.

While regulation helps to minimize these market failures, it can also generate high social costs. The establishment of fixed fares may prevent discounts and, consequently, price competition. The limitation of taxi licenses inhibits the entry of new drivers, which may cause supply shortage and, consequently, a weakening of the market. In this context, disruptive innovations come into play, as they have the potential to fix market failures and address regulatory concerns in several markets. When a disruptive innovator enters the market, it can break monopolies and match supply and demand more efficiently. However, disruption can also render much conventional regulation outdated. CADE has been playing an active role in advocating that conventional regulation should not be directly transferred to disruptive businesses, which could offset many of the benefits generated by innovation, or impose unnecessary barriers to new entrants.

One example is CADE's work in the ride-sharing or individual passenger transport market. In 2015, CADE's Department of Economic Studies published two studies: "The market for individual passenger transportation: regulation, externalities and urban balance,"¹⁵ and "Post entry rivalry - the immediate impact of Uber's app on taxi rides."¹⁶ The goal was to assess the main implications of ride-sharing platforms for both the individual transportation market and urban planning in Brazil. The main findings showed that ride-sharing online platforms could be a viable solution not only to market failures in the transportation sector, such as asymmetry of information, but also to urban problems, such as traffic jams and high rents in the core areas of big cities. In 2018, the DEE published the updated version of the previous studies, entitled "Competition effects of the sharing economy in Brazil: Has Uber's entry affected the cab-hailing app market from 2014 to 2016?"¹⁷ This paper argues that in order to bring more benefits to consumers in terms of innovative services, improved quality and security, lower prices and more options, it is necessary to orient the debate towards a gradual deregulation of taxi services, especially concerning issues related to barriers to entry and pricing freedom.

V. FINAL REMARKS

CADE has been aware of the challenges raised by the digital economy and has been actively seeking to respond adequately to them. As discussed above, this has been done through the enhancement of its staff, through seeking domestic and international cooperation, and through continuous advocacy work.

In this endeavor, many questions are raised, without clear-cut answers. We are attentive to the fact that this work will require constant engagement and self-reassessment, as well as openness to enhance our strategies. Therefore, CADE is eager to debate and refine them with other antitrust authorities, academics, and practitioners in the international arena. ■

15 CADE's Working Paper 01/2015, available at <http://en.cade.gov.br/topics/about-us/dee/working-paper-001-2015.pdf>.

16 CADE's Working Paper 03/2015, available at <http://en.cade.gov.br/topics/about-us/dee/working-paper-003-2015.pdf>.

17 CADE's Working Paper 01/2018, available at http://en.cade.gov.br/topics/about-us/dee/working-paper-uber_01-2018.pdf

THE EVOLUTION OF COMPETITION LAW IN DIGITAL MARKETS IN INDIA

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I. INTRODUCTION

In step with global developments, Indian markets have been rapidly changing, characterized by the adoption of new technologies and innovation in almost all sectors of the economy. With recent disruptive policies including demonetization and the thrust towards digitalization, e-commerce has seen sudden growth in India. Online retail sales alone in India were expected to have reached U.S. \$32.7 billion by 2018, led by Flipkart, Amazon India, and Paytm Mall. With e-commerce projected to increase at a compound annual growth rate

(“CAGR”) of 44.77 percent as recently as 2016, and to reach U.S.\$ 63.7 billion by 2020, India is one of the world’s fastest growing retail markets. by 2018, led by Flipkart, Amazon India, and Paytm Mall.² With e-commerce projected to increase at a compound annual growth rate (“CAGR”) of 44.77 percent as recently as 2016, and to reach U.S.\$ 63.7 billion by 2020, India is one of the world’s fastest growing retail markets.

Competition law has a broad and deep role to play in these fast-changing market conditions. Indian competition law, under Section 3 of the Competition Act, 2002 (the “Act”), deals with anticompetitive agreements. While Section 3(3) specifically deals with horizontal agreements, Section 3(4) covers vertical agreements. Section 4 addresses issues related to abuses of dominance. Sections 5 and 6 deal with regulation of mergers, amalgamations, and acquisitions (“combinations”).

The touchstone of antitrust assessment under the Act is an appreciable adverse effect on competition (“AAEC”) test. This test is not defined in the Act, although Section 19(3) sets out factors to be taken into account by the Competition Commission of India (the “Commission”) to decide on the existence (or not) of an AAEC, as far as agreements are concerned.

The Commission started enforcing antitrust rules on May 20, 2009. Enforcement of combinations started on June 1, 2011. In the decade-long enforcement history of the Commission, major sectors where antitrust actions have been taken include pharmaceuticals, real estate, civil aviation, the financial sector, electricity, digital markets, sports and entertainment, as well as public procurement.

The jurisprudence on horizontal and vertical agreements in the digital and e-commerce sector in India has been largely limited, owing to the fact that the Act is still relatively young. Questions have often been raised as to the adequacy of Indian law to address suspected competition issues related to digital and e-commerce markets.

II. ANTICOMPETITIVE AGREEMENTS

Anti-competitive agreements traditionally fall in two broad categories - horizontal agreements and vertical agreements. Certain horizontal agreements that cause deadweight losses to all stakeholders and bring benefits only to their perpetrators are classified as “hardcore” cartels. Vertical agreements are agreements between economic players at different levels in the value chain, and are not treated as anticompetitive unless the Commission finds that they cause or are likely to cause an AAEC in India. A distinct category of cartels containing a mix of horizontal and vertical agreements, i.e. “hub-and-spoke” arrangements, have been alleged before the Commission only in a limited number of cases.

The essence of a hub-and-spoke cartel is that competing firms, instead of communicating directly between themselves, do so through a third party with which they have a vertical relationship. In a hub-and-spoke cartel, the spokes are connected to the hub, while the hub fulfils the role of a “serving hatch.”³ The spokes (also referred to as the “rim”), are competitors horizontally colluding amongst themselves, and the “hub” is an upstream supplier or downstream customer⁴ that facilitates collusion between the

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² A. Peter & N. Singh, *Online Vertical Restraints and Abuse of Dominant Position: The Emerging Indian Perspectives in Global Competition Law Enforcement: New Players and New Challenges*, (Eds) Kovacic & Buccrossi, Kluwer (2019).

³ *JJB Sports plc v. Office of Fair Trading*, Case 1022/1/1/03 [2004] CAT 17, para 141.

⁴ Harrington Jr, Joseph E., *How Do Hub-and-Spoke Cartels Operate? Lessons from Nine Case Studies* (August 24, 2018), available at <https://ssrn.com/abstract=3238244>.

spokes. These arrangements consist of both vertical and horizontal agreements at the same time, with horizontal coordination occurring between the spokes to adhere to terms set out by the hub, and a vertical agreement between the hub and each spoke individually.

While some direct communication between the spokes may take place, indirect communication through a hub is the quintessence of such an arrangement. For instance, in the Apple e-books case in the U.S., the court found that Apple had orchestrated a horizontal conspiracy among five leading publishers in the U.S. by entering into individual agreements with each, leading to an increase in the prices paid by consumers for e-books.⁵

In India, a hub-and-spoke cartel was alleged in *Jasper v. Kaff Appliances*.⁶ It was alleged that Kaff issued a notice stating that Kaff's goods sold on Jasper's online marketplace, Snapdeal, were spurious and that Kaff would not honor warranties on products sold through Snapdeal. Jasper alleged that Kaff's action, in discriminating against the online sale channel, was a hub-and-spoke arrangement between Kaff and retail outlets. Jasper also alleged that an e-mail clearly revealed that Kaff was attempting to impose a price restriction in the form of a Minimum Operating Price ("MOP") on Jasper's website, designed to force sales to be made at a minimum price, and that Kaff threatened to ban online sales if such prices were not maintained. However, the directions to the Director General ("DG") of the Commission for investigation were based on a violation of Section 3(4)(e) of the Act relating to resale price maintenance ("RPM") only, and the issue of a possible hub-and-spoke conspiracy was not examined by the Commission.

In digital markets, algorithms can be employed to limit competition through agreements, concerted practices, and other subtle means. In *Samir Agrawal v. ANI Technologies*,⁷ the Commission had the opportunity to decide whether the use of the same algorithm by the drivers of Ola/Uber through the use of a common platform amounted to cartelization under the Act. It was alleged that the Opposite Parties ("OPs"), i.e. Ola/Uber, acted as "hub" used by the competing drivers (the "spokes") to collude on prices. The Commission took the view that although the drivers may have followed the prices determined algorithmically by the platform (Ola/Uber), this could not be deemed to amount to collusion between the drivers. The Commission observed that a hub-and-spoke cartel would require an agreement between all

drivers to set prices through the platform, or an agreement for the platform to coordinate prices between them, but there did not appear to be any such agreement between drivers themselves to delegate pricing power to the platforms or cab aggregators.

In the e-commerce sector, the Commission has had the occasion to assess certain allegations brought by informants as cases of exclusive distribution under Section 3(4). In *Ashish Abuja v. SanDisk*,⁸ the Commission investigated allegations against Snapdeal, an e-commerce portal, and SanDisk Corporation, a manufacturer of electronic storage devices. SanDisk insisted that only its authorized online channel partners could sell its products through Snapdeal. The informant alleged that Sandisk and Snapdeal entered into an agreement to prevent the informant from selling certain Sandisk products, and that such an arrangement violated Section 3 of the Act, as the conduct of the OPs was intended to force the informant to become a Sandisk authorized dealer. The Commission held that SanDisk was within its rights to protect the integrity of its distribution channel.

In *Mohit Manglani v. Flipkart and Ors*,⁹ it was alleged that e-commerce websites and product sellers entered into exclusive agreements to sell the selected product exclusively on the selected portal to the exclusion of other e-portals or physical channels. It was also alleged that each e-portal had a 100 percent market share for the product it was exclusively dealing, leading to dominance. The Commission did not find any foreclosure, as most of the products the informant identified as being sold through exclusive e-partners (the OPs) were facing competitive constraints. The informants' contention that the conduct caused an AAEC was rejected on the ground that through the option of home delivery, consumers had the opportunity to receive the purchase at their convenience, which saved them precious time compared to visiting brick-and-mortar retail outlets. As regards allegations pertaining to Section 4, the Commission dismissed the informant's allegation that each exclusive product sold by each e-portal could be taken to constitute a relevant market in itself.

The issue of RPM as such is not novel. RPM can be understood as any agreement to sell goods on the condition that the price to be charged for resale by the purchaser must be that stipulated by the seller, unless it is clearly stated otherwise. Multiple cases of offline RPM have been dealt with by the Commission, including

5 *United States v. Apple, Inc.*, 791 F.3d 290, 314 (2d Cir. 2015).

6 Case No 61 of 2014, Competition Commission of India

7 Case No 37 of 2018, Competition Commission of India.

8 Case No 17 of 2014, Competition Commission of India.

9 Case No 80 of 2014, Competition Commission of India.

M/s ESYS Information Technologies v. Intel Corporation,¹⁰ *Ganashyam Das Vij v. Bajaj Corp.*,¹¹ *Shubham Sanitary*,¹² and *Prime Magazine v. Wiley*.¹³

The digital era has introduced new challenges, such as situations where RPM clauses used in online channels are adopted by manufacturers with the strategic intent to increase prices rather than to serve consumers. RPM restrictions imposed on certain online retailers tend to have a broader impact on overall online price levels in the industry, as most online retailers also use pricing algorithms to automatically adapt retail prices to those of competitors. In dealing with online RPM cases, the Commission has maintained the view that in digital markets and online platforms, the customary structure may not be present in every situation, especially in constantly evolving markets, and that any entity/firm contributing value to a product/service will be deemed to be a part of the value chain.¹⁴

The Commission, in its order in *Jasper v. Kaff*,¹⁵ hinted that Section 3(4), which lists RPM as a potentially prohibited vertical restraint, is fully equipped to deal with all substantial issues pertaining to online RPM. In this case, the Commission ordered an inquiry into alleged RPM by Kaff with respect to the sale of kitchen appliances. Kaff warned Jasper that if it did not maintain the market operating price (“MOP”) of Kaff kitchen appliances, Kaff would not allow their sale on the marketplace. It is noteworthy that the investigation was limited to the issue of RPM and did not touch upon any refusal to deal allegations.

*Ex Enterprises v. Hyundai*¹⁶ was the first case where the Commission directly ruled on RPM, holding that a restriction imposed by Hyundai on the maximum permissible discount that may be given by a dealer to end-consumers amounted to RPM in violation of the Act, and imposed a fine of Rs. 870 million. It was alleged, inter alia, that Hyundai imposed a “discount control mechanism,” through which dealers were only permitted to provide a maximum permissible discount, prohibiting them from giving discounts to consumers above a recommended range. The Commission was of the view that Hyundai sought to impose an arrangement resulting in unlawful RPM, which included monitoring of the maximum permissible discount level

through the discount control mechanism. It is noteworthy that such a discount control mechanism is of special importance in RPM cases in digital e-commerce markets. Such mechanisms or other sophisticated monitoring tools make RPM easier to sustain in online markets by allowing manufacturers to effectively track resale prices and to intervene swiftly in case of deviations from the imposed prices.

No occasion has yet arisen for the Commission to pronounce on so-called Internet Minimum Advertised Price (“IMAP”) or Most Favored Nation (“MFN”) clauses.

III. ABUSE OF DOMINANT POSITION

Section 4 of the Act prohibits abuses of a dominant position, and defines dominance as a position of strength enjoyed by an enterprise, enabling it to act independently of competitive forces prevailing in the market, or to affect competitors or consumers in its favor. The approach towards assessment of abusive conduct under Indian law is based on whether the dominant enterprise engages in exclusionary or exploitative conduct in the form of unfair or discriminatory prices and/or conditions, leveraging, or denial of market access.

Digital platforms are characterized by the gathering of user data, high upfront sunk costs, economies of scale, and low marginal costs. The drive to build large data banks, along with control of such data, may encourage digital platforms to expand into other related businesses.¹⁷ Taken together, such factors may be sufficient to confer market power on such platforms, enabling them to engage in anticompetitive conduct.

In general, any type of behavior that constitutes an abuse in an offline industry is also likely to constitute an abuse online. The competitive strength of online businesses is increasingly being determined by the amount, variety and quality of the data they hold. Big data, a relatively recent phenomenon, is important in the digital world, as it is a necessary input for a variety of products and services competing with (or complementary to) the services offered by incumbent providers of services such as online search engines, social networks and e-commerce platforms. On the other hand, big data may also offer significant benefits¹⁸

¹⁰ Case No 48 of 2011, Competition Commission of India.

¹¹ Case No 68 of 2013, Competition Commission of India.

¹² Case No 09 of 2015, Competition Commission of India.

¹³ Case No 07 of 2016, Competition Commission of India.

¹⁴ *Jasper v. Kaff Appliances*, Case No 61 of 2014, Competition Commission of India.

¹⁵ Case No 61 of 2014, Competition Commission of India.

¹⁶ Case No 36 & 08 of 2014, Competition Commission of India.

¹⁷ Competition issues in the digital economy, Note by the UNCTAD secretariat, May 1, 2019.

¹⁸ D. Daniel Sokol & Roisin Comerford, Antitrust and Regulating Big Data, 23 Geo. Mason L. Rev. 1129 (2016).

to consumers, such as improved quality, customized products and services at low prices, and enhanced innovation.

In *Matrimony v. Google*¹⁹ (“*Google I*,”) the Commission observed that the large volumes of information generated from searches conducted on such platforms constitute such “big data,” enabling search platforms to attract advertisers, target relevant advertisements, and conduct their search business. At the same time, the Commission was mindful of the fact that big data does not come without a cost, and that consumers may be increasingly facing a loss of control over their personal data, while exposing themselves to intrusive advertising and behavioral discrimination.

Such big data has the potential to be an entry barrier when online platforms collate a vast amount of data capable of being processed at high speed. In online aggregator business model, prevalent in unorganized and highly populated sectors such as hotels, taxis, etc., an aggregator company provides aggregation services under their brand. Such aggregators may refuse to grant data access to affiliates offering the same products on their own websites, often leading to disputes between the two. Since online multi-sided platforms do not rely on physical infrastructure, the internationally recognized “essential facilities” doctrine may need to be modified to apply to data accessibility or ranking by online competitors.

Section 4 of the Act can be interpreted to recognize the essential facilities doctrine as a form of exclusionary anticompetitive conduct, through which a dominant enterprise refuses to grant access to a type of infrastructure or other form of facility that rivals need in order to compete. The doctrine has been examined by the Commission in the cases of *Arshiya Rail Infrastructure Limited (ARIL) v. Container Corporation of India (CONCOR)*²⁰ and *Shamsber Kataria v. Honda Siel*.²¹ The Commission has, however, not yet been faced with a situation where big data would be an essential facility, i.e. a situation where online platforms would have the ability and incentive to erect entry barriers and maintain dominance, by limiting access to or refusing to share data that would be an important tool for competing platforms.

The fact that digital markets are often two/multisided with strong network effects can pose a challenge to the traditional approach to market definition, rendering it difficult even for ex-

perienced competition authorities to define the relevant market. As regards offline vs. online sales, the Commission, in *Ashish Abuja v. SanDisk*,²² held that they were merely different distribution channels for the same product, and hence were not two different relevant markets. In reaching this conclusion, the Commission had regard to the fact that both offline and online channels can differ in terms of discounts and shopping experience, and buyers weigh the options available in both to come to a final purchase decision. If the online price increases significantly, then the consumer is likely to shift to offline outlets, and vice versa. The same view was taken in *Deepak Verma v. Clues Network*,²³ and *Confederation of Real Estate Brokers Association of India v. Magicbricks.com*.²⁴

It was argued by Google in *Google I* that the DG’s definition of the relevant market ought to have included offline advertising. However, the Commission was of the view that online and offline advertising services are not comparable. Also, in *Google I*, the Commission held that online general web search services cannot be equated with specialized search services, and consequently held online general web search services to be a distinct relevant product market.

One of the questions often raised in two-sided/multisided platforms is whether the relationship between the platform and the respective market sides should be considered to be separate or whether there is a single market. In *RKG Hospitalities v. Oravel Stays*,²⁵ the Commission highlighted the fact that OYO and other similar players primarily operate as two-sided platforms connecting budget hotels with potential consumers. On one side, they serve budget hotels and on the other side they serve potential consumers looking for budget accommodation. The Commission held that since that case pertained to a complaint raised by a partner hotel, the relevant product market determination needed to take into account all alternatives available to such budget hotels, and the competitive constraints faced by the focal product, i.e. the service provided by OYO. The Commission noted that what OYO offers to budget hotels is essentially a franchising service comprising a bouquet of services, which enables the franchisee hotels to reap the benefits of the OYO brand (in return for a commission or share in revenues), while ensuring minimum monthly guaranteed revenues to the partner hotel. In this light, the Commission defined the relevant prod-

19 Case No 7 & 30 of 2012, Competition Commission of India.

20 Case No 64 of 2010 & 12 of 2011, Competition Commission of India.

21 Case No 03 of 2011, Competition Commission of India.

22 Case No 17 of 2014, Competition Commission of India.

23 Case No 34 of 2016, Competition Commission of India.

24 Case No 23 of 2016, Competition Commission of India.

25 Case No 03 of 2019, Competition Commission of India.

uct market to be the “market for franchising services for budget hotels.”

Platform markets also raise the issue as to whether there are circumstances under which a market can be viewed in isolation from the other side, or whether the interplay between both sides is always to be taken into account.²⁶ In *Google I* it was held by the Commission that the two sides of the market described above complement each other and are interdependent.

Another issue in defining relevant markets for online platforms is that the traditional SSNIP test may not be a practical tool, as the platform may argue that they provide free products or services. Google raised this argument in *Google I*, but the Commission rejected it, holding that users offer indirect consideration to Google by providing their attention (or “eyeballs”) to the Search Engine Results Page (“SERP”) and allowing Google to collect and use their information. Also, Google argued that consumers incur near zero search costs when gathering information for purchase decisions online, and that there is no purchase or sale of goods or services, as Google provides search services to users free of cost. This argument was rejected by the Commission, observing that several mobile applications/websites work through an advertiser funded model, but this does not imply that users do not provide any consideration for using these products and services.

It is noteworthy that the definition of price under Section 2(o) of the Act defines “price” as including any “valuable consideration,” whether it is “direct or indirect, or deferred, and includes any consideration which in effect relates to the sale of any goods or to the performance of any services although ostensibly relating to any other matter or thing. This definition is wide enough to reject Google’s argument by including personal data, attention, and revealed preferences as “valuable consideration.”

Predatory pricing, as per the Indian Act, is the sale of goods or services at prices lower than the cost of production, as defined in the CCI (Determination of Cost of Production) Regulations, 2009, with the intent to reduce competition or eliminate competition or competitor(s). In India, the abuse of predation involves pricing below cost and predatory intent. This is unlike the situation in the U.S., where besides pricing below cost, there is also a “recoupment” test which must be satisfied for a finding of predation. Specifically, in the U.S., the plaintiff must prove that the defendant had a “dangerous probability of recouping its investment in below cost prices.”

In India, allegations of predatory pricing have been raised against firms operating ride sharing/aggregator business models by traditional incumbent taxi companies whose businesses

have been disrupted by aggregators. The Commission in *Fast track Call Cab/Meru v. ANI Technologies*²⁷ rejected ANI technologies’ argument that it was merely a technology software service provider, holding that it is a radio taxi service provider. However, despite its high market share of 60-70 percent, ANI Technologies was not found to be dominant, due to Uber posing strong competitive constraints (the Commission noted that the incumbents were left catching up with a new entrant armed with a new technology which allowed it to arrogate to itself a large unmet demand).

During the investigation, Uber, which entered the relevant market in 2013-14, expanded its network rapidly to account for nearly one third of the active fleet in 2015-16. In terms of annual number of trips, its share increased from 1-2 percent in 2013-14 to 30-31 percent in 2015-16. Finally, the Commission did not see the need to intervene, as it found that the market was still evolving. Besides, efficiency considerations also appeared to favor ANI Technologies, which was providing ease of booking and ride tracking, besides having exponential growth in the market due to the presence of taxi aggregators. The Commission closed the matter for want of dominance and consequently did not examine the issue of predation.

Data protection and privacy concerns are also often raised in the context of digital platforms. Terms of use and privacy policies tend to be complex and written in an obscure manner hard for consumers to understand. Though data privacy is not the primary concern of competition authorities, data considerations may nevertheless be relevant for dominant players. The issue of privacy came before the Commission in *Vinod Kumar Gupta v. WhatsApp*,²⁸ where it was alleged that WhatsApp was abusing a dominant position by introducing a new privacy policy compelling users to share their account details and other information with Facebook. However, WhatsApp offered users the option to opt out of sharing such information with Facebook within 30 days of agreeing to the updated policy. This option was seen by the Commission to be sufficient to absolve WhatsApp of allegations that it compelled consumers to accept the updated policy.

Digital platforms, due to their multi-sided nature, may be in a position to impose potentially disadvantageous terms and conditions on different sides of the platform. On the consumer side, a platform may govern transactions using terms and conditions for the services or goods being traded, and exercise direct control over their performance (e.g. setting out rules for cancellations, refunds, automated price settings, dealing with complaints, or managing payments).

26 D. Daniel Sokol & Roisin Comerford, Antitrust and Regulating Big Data, 23 Geo. Mason L. Rev. 1129 (2016).

27 Case No 06 & 74 of 2015, Competition Commission of India.

28 Case No 99 of 2016, Competition Commission of India.

Discrimination between trading partners in relation to prices or other conditions of trade may also be operated by dominant digital platforms. In *Google I*, the Commission held that Google created an uneven playing field for competitors by “favoring” Google’s own services and partners through manipulation of its search results to the advantage of its vertical partners, while Google’s own sites appeared prominently on the search results page whether or not they were the most relevant or popular. In addition, an aggregator may give preferential or favorable treatment to its own partners, or its own firms set up to compete with the affiliates listed on its platform.

Anticompetitive practices may also include imposition of unfair prices or other unfair conditions of trade; limitation of production, supply or technical development; or the conclusion of contracts on the condition that the other contracting party agrees to accept or deliver additional goods or services. Imposition of unfair and discriminatory conditions on online search advertising customers was also alleged in *Google I*. The Commission held that Google’s ranking of its Universal Results prior to 2010, which was found not to be strictly determined by relevance, was a violation of Section 4(2)(a)(i). Also, the Commission found that the prominent display and placement of a so-called Commercial Flight Unit on the SERP, with a link to Google’s specialized search options and services (Google Flights), amounted to the unfair imposition of search services on users, depriving them of additional choices.

Similarly, in *Umar Javed v. Google*²⁹ (“*Google II*”), a case that is pending investigation, the Commission took the *prima facie* view that mandatory pre-installation of the entire Google Mobile Services (“GMS”) suite under its Mobile Application Distribution Agreement (“MADA”) for mobile device manufacturers amounts to the imposition of unfair conditions, in contravention of Section 4(2)(a)(i) of the Act. *Prima facie*, the conduct was also found to have limited technical or scientific development relating to goods or services to the prejudice of consumers in contravention of Section 4(2)(b) of the Act. The Commission is yet to decide the ultimate outcome in *Google II*.

As discussed above, the concentration of big data in the hands of a few dominant firms or monopolists and their consequent refusal to share information with potential competitors or new entrants may not only limit effective competition to the detriment of consumers, but also lead to foreclosure, denying market access to competitors. In *Google I*, it was alleged by Matrimony that Google denied such access to competing search engines. The Commission observed that by restricting websites from partnering with competing search services, Google was denying its competitors access to the search business, marginalizing

competitors and endangering their viability, while strengthening its own position. Consequently, the Commission held that Google’s competitors were denied access to the online search syndication services market in contravention of Section 4(2)(c) of the Act. In *Google II*, the Commission has also found that, *prima facie*, Google allegedly denies market access to competing search apps in contravention of Section 4(2)(c) of the Act.

In both online and offline markets, “leveraging” involves a dominant enterprise or platform using its dominant position in one relevant market to enter into or protect its position in the other relevant market. As digital platforms are dual/multisided, dominance on one side can be used to produce anticompetitive conduct on another. This is because platforms not only serve as critical infrastructure, but are also integrated across markets. In *Google I*, the Commission was of the opinion that *Google* was in a position to impose unfair conditions under negotiated search intermediation agreements with publishers owing to its dominance in the market for online general web search, which it was using to strengthen its position in the market for syndicated search services, in violation of Section 4(2)(e). In its *prima facie* opinion on *Google II*, the Commission also found *Google* leveraged its Play Store to protect its position in general online search markets.

IV. COMBINATIONS

Digital markets pose complex problems for competition authorities and analysts not only in antitrust analysis but also in combinations. Potential competition concerns that might arise from platform market power can be analyzed through merger control.³⁰ Innovation can be a major casualty in mergers in technology markets. Therefore, merger reviews in these markets have to focus on likely effects on innovation. Pre-emptive acquisitions of smaller companies by dominant digital or e-commerce firms may be used to thwart potential competition that could pose harm to an incumbent company’s business model.

Merger review becomes all the more necessary in cases where the merging firms are close competitors. Dominant firms and near-monopolists in the tech field have exhibited a tendency to acquire disruptive or potentially disruptive firms in adjacent markets to forestall potential competition. Besides, transactions in digital markets are often driven by a motive to gain control over or to access the target’s data. Such targets, normally start-ups, are asset-light and low in turnover. Transaction value may not have any direct correlation with the asset or turnover base of such firms. Problematic combinations could be better captured by transaction value rather than by asset- or turnover-based thresholds.

29 Case No 39 of 2018, Competition Commission of India.

30 Competition issues in the digital economy, Note by the UNCTAD secretariat, May 1, 2019.

India has been taking a cautious approach in dealing with digital markets so that upcoming digital companies are not disadvantaged by any rash action by the regulator. At the same time, the Commission remains vigilant of overlaps, be they horizontal or vertical, as a general factor to be considered for the assessment of AAEC. Combinations involving digital players may not be amenable to the traditional merger review process. The Commission approved the acquisition by U.S. retail giant Walmart of a 77 percent stake in Flipkart for U.S.\$16 billion, which was facilitated by the limited overlap between the companies' activities. The Commission observed that discounting practices by Flipkart may have to be reviewed by the relevant authorities. The Commission, in its order, observed that issues concerning FDI policy need to be addressed in that policy domain to ensure that online platforms remain a true marketplace providing access to all retailers.

As mentioned above, digital firms are generally asset-light and income flows are largely indirect, unlike in offline markets. The current asset- and turnover- based thresholds for the notifiability of combinations may be allowing some deals in the digital sector to escape scrutiny by the Commission. "Size of transaction" or "deal value" thresholds are being demanded by many. Germany, for example, introduced merger notification thresholds based on transaction value in 2016. The Indian Competition Law Review Committee ("CLRC") recently submitted a report to the Minister of Finance and Corporate Affairs, recommending a transaction-based notification threshold for combinations in digital markets.

V. CONCLUSIONS

While digital markets and e-commerce strengthen competition and reduce information asymmetries, they also pose substantial challenges for antitrust authorities. Digital markets are growing quickly and raise newer challenges such as hub-and-spoke agreements and algorithmic collusion, which pose conceptual and analytical issues for competition authorities. Such new forms of collusion are not only difficult to track but also it is an uphill task to bring them to book.

RPM in the digital space is much more complex than it is offline. Emerging challenges such as MFN clauses and IMAP may also come up before the Commission sooner or later.

Network effects exhibited by platform entities make market delineation particularly complex. Big data has been shown to be as potent as traditional physical infrastructure, leading to additional data protection and privacy concerns. Dominant firms' control over data may bestow market power to a considerable extent, making maverick firms vulnerable to abusive conduct. Incumbent online platforms may indulge in behavior aimed not only at denying access to competitors, but also at capturing and exploiting other relevant markets.

The question whether the existing legal instruments and provisions are capable of addressing concerns raised by digital markets is a real one. In India, the Commission found that the existing provisions are sufficient when it comes to antitrust. The definition of "price" in the Act is wide enough. In *Jasper v. Kaff*, the Commission hinted that Section 3(4), which lists RPM as a potentially prohibited vertical restraint, is adequate to deal with all substantial issues pertaining to online RPM.

Innovation is at risk of being obstructed, especially in mergers in digital markets. The current asset- and turnover-based thresholds may not be capable of capturing problematic combinations, since digital firms in general are light in assets and low in turnover. As noted, transaction value-based thresholds have been recommended by the CLRC in a report submitted recently to the government.

The approach of the Commission in dealing with digital markets has been rather cautious, lest innovation be blunted through the activism of the regulator, showing that the Commission appears to believe that regulatory intervention in tech industries should be targeted and proportionate. ■

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