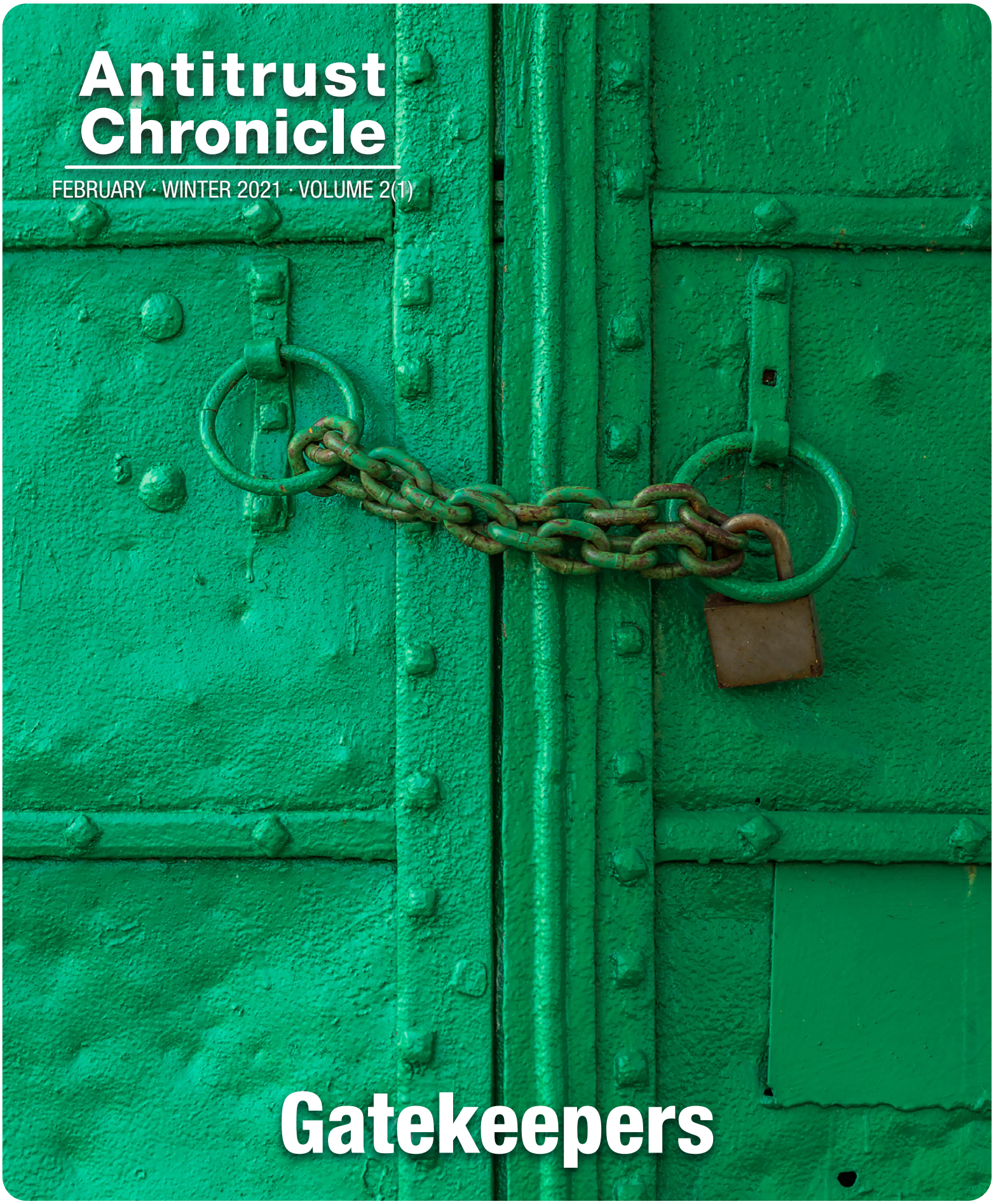

Antitrust Chronicle

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Gatekeepers

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

What is a gatekeeper? More than other terms of art that have gained currency in recent years, the notion of a "gatekeeper" holds particular potency in today's environment.

In essence, the term "gatekeeper" seeks to capture the notion of a company or platform that mediates the public's access to information and commerce. Obvious examples include the prominent search, social media and online commerce platforms that have gained significant economic power in recent decades.

Skeptics of the notion will point out that consumers retain the ability to choose between "gatekeepers," as do the economic operators on the other side of the "gate." Nonetheless, the economics of such two-sided platforms (as gatekeepers almost inevitably are) remain disputed, both in academic discourse and legal and enforcement practice.

The pieces in this Chronicle seek to address the state of the art in the debate surrounding the notion of "gatekeepers" and its relationship to contemporary antitrust practice. Each addresses a timely element of the debate from jurisdictions around the world, and seeks to contextualize the debate and draw out the contours of the contours of the notion of a "gatekeeper" as it applies in today's environment.

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

Sincerely,

CPI Team

SUMMARIES

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The Necessary Revival of Sherman Act Section 2

By Diane P. Wood

The application of the antitrust laws to single-firm behavior is challenging. On the one hand, neither courts nor government enforcers are well equipped, or even inclined, to micro-manage a single firm's choice of suppliers, customers, distribution strategies, or product bundling, even if that firm is a monopolist or otherwise dominant. On the other hand, firms with substantial market power can inflict serious economic harm. For many years, the difficulty of controlling exclusionary practices led to the de-emphasis of Sherman Act Section 2 cases. But in recent years, as the harms from single-firm exclusionary behavior have become more apparent, in the big tech world and beyond, there has been a resurgence of interest in Section 2. This essay argues that the antitrust laws are indeed capable of effectively addressing practices that sustain market dominance, and it encourages renewed attention to, and use of, Section 2.

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Gatekeeper Regulation in the Digital Economy – The Pitfalls (and Opportunities) Ahead?

By Rod Carlton, Rikki Haria & Caroline Chew

Intense regulatory scrutiny on the digital economy and "Big Tech" companies has led to a raft of expert reports and regulatory proposals across the world relating to the digital economy. Regulators have increasingly focused on identifying digital businesses who play a "gatekeeper" role as the basis of regulatory intervention. However, the exact delineations of how such a "gatekeeper" designation should be determined remain amorphous. There are complex questions where further debate and consideration should continue, in particular: how should a "gatekeeper" designation be formulated, and is a "blacklist" or principles-based approach to restricted conduct more suitable in the dynamic digital economy? Beyond the form such regulation takes, what types of "gatekeeper" conduct should be regulated and how will this impact longer-term competition and innovation incentives?

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On the Competitive Effects of Single-Homing: The Case of Hybrid Marketplaces

By Neil Dryden, Jorge Padilla & Helder Vasconcelos

By revisiting the "competitive bottleneck" hypothesis in the context of multi-sided platform competition, this paper shows that the existence of single-homing consumers needs not to raise anti-competitive concerns regarding the behaviour of the online platform running the marketplace, as the nature of the induced competitive effects will critically depend on the specificities of the platforms' business model. This then suggests that the only sensible way of assessing the likely competitive effects of single-homing in the context of platform competition is a case-by-case approach that captures the heterogeneity of adopted business models as well as the complex competitive dynamics involved. In particular, several reasons justify why hybrid platform marketplaces (i.e. marketplaces run by vertically integrated platforms which operate also as resellers) would not be able to extract high fees from third-party sellers and from consumers even if a significant proportion of the latter decided to patronize a single gatekeeper platform.

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Gatekeepers' Tollbooths for Market Access: How to Safeguard Unbiased Intermediation

By Thomas Höppner

Gatekeepers may seek to maximize revenues by replacing any unbiased, purely relevance-based intermediation of business users with a biased, payment-based intermediation. To this end, search engines, app stores or online marketplaces may exploit an entrenched intermediation power by making the outcome of their matching increasingly dependent on the amount of money that a business user is paying the platform for the intermediation, rather than on objective criteria to determine the relevance of offerings. Using the example of the systematic replacement of "organic" search results with paid results in Google Search, the article outlines under which circumstances a shift to a biased intermediation constitutes a market failure. The article concludes that an excessive substitution of unbiased intermediation by a gatekeeper may amount to an unjustified private "toll" to access markets that reduces competition and innovation. The article then outlines how regulation can ensure a sufficient level of purely relevance-based intermediation of gatekeepers.

SUMMARIES

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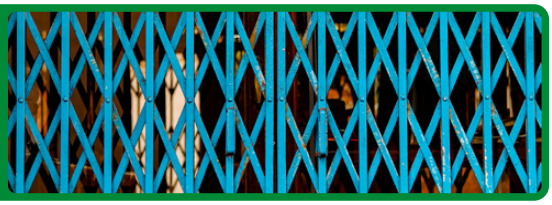

Online Gatekeepers to Commerce and Culture

By John M. Yun

Recently, the term "gatekeeper" has featured prominently in policy discussions concerning whether "big tech" needs to be regulated and whether antitrust laws need to be reformed to better protect consumers from their market power. Consequently, this Article asks: what exactly is an online gatekeeper? Within that discussion, it also asks whether the term is useful within antitrust. Next, it discusses some general guidelines that should be considered when determining whether an online service qualifies as a gatekeeper. Finally, it discusses potential concerns with gatekeepers that go beyond the standard litany of antitrust theories of harm — namely, information asymmetries and representations made to users and businesses.

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Taming Gatekeepers – But Which Ones?

By Can Çeliktemur, Arnd H. Klein, Vivek Mani & Marc Rysman

The allegedly entrenched positions of certain dominant companies in the digital economy and the alleged inability of antitrust enforcement to prevent potential anticompetitive conduct by these firms have led several European jurisdictions to consider an overhaul of their competition policy approach. A common theme is giving competition authorities or newly created digital agencies the power to regulate firms with *gatekeeper* status. This article discusses the criteria that have been proposed in the EU, UK, and Germany for identifying the firms, or *gatekeepers*, that are to be subject to such regulation. It also highlights advantages and disadvantages of different approaches as well as challenges for practitioners in their implementation, and discusses some potentially far-reaching consequences due to inconsistencies in the proposed criteria across jurisdictions.

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Proposed Solutions for Big Tech in the United States: Out of Step or Déjà Vu?

By Urska Petrovcic & Gonçalo Coelho

The U.S. House Report on digital markets suggests adopting important changes to U.S. antitrust law. If implemented, the proposed changes (particularly those related to unilateral practices) would bring U.S. antitrust law closer to EU competition law, by lowering the burden of proof and expanding existing prohibitions. Yet, the experience from the EU suggests that the proposed reforms are unlikely to provide an adequate solution for the problems identified with digital markets. In December 2020, the European Commission presented a proposed text for the Digital Markets Act, a regulation that seek to ensure "contestable and fair" digital markets. The regulation stems from the explicit recognition that even a broader competition law regime, such as the one available in the EU, cannot address the problems with big tech. One could thus question whether expanding U.S. antitrust law is likely to provide an adequate relief in dealing with the problems described in the House Report.

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Regulating Digital Gatekeepers: Lessons from the Banking Industry

By Juan Delgado

Gatekeepers are not exclusive to digital markets. Gatekeepers exist in many other industries such as banking, telecoms and energy. The new element introduced by digital gatekeepers is their scale and scope: There are digital gatekeepers that have a global scope, have millions of users and are present in several industries. The potential anticompetitive conducts of those digital gatekeepers might have a large impact over consumers. Banks have traditionally been the main gatekeepers and facilitators of the overall financial industry. The banking industry provides an illustration of an industry where regulation has been imposed to reduce the market power of gatekeepers. The analysis of such regulations shows that regulatory remedies necessarily have to be tailored to the relevant competition problems, to the characteristics of the industry and of the business models of the market participants. A too general regulation runs the risk of not being operational and creating uncertainties amongst market players.

WHAT'S NEXT?

For March 2021, we will feature Chronicles focused on issues related to (1) **China Edition**; and (2) **2021 Horizons**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2021, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLES APRIL 2021

For April 2021, we will feature Chronicles focused on issues related to (1) **Open Banking**; and (2) **Inclusive Competition**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

THE NECESSARY REVIVAL OF SHERMAN ACT SECTION 2

BY DIANE P. WOOD[1]

1 United States Circuit Judge of the United States Court of Appeals for the Seventh Circuit; Senior Lecturer in Law, The University of Chicago Law School.

Section 2 of the Sherman Act has been a problem child for a long time. Judge Learned Hand put his finger on its difficulties 75 years ago, when he wrote in his famous *Alcoa* opinion that "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins."[2] Yet only a few pages earlier, in the same opinion, Hand had also written that "[t]hroughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other."[3] So which is it? Should we, in the name of letting the market go where it will, accept the results of the competitive race, no matter how dominant the winning firm may be, or should we adopt as an independent goal a more decentralized industry structure, even if it may mean higher prices?

For many years, starting roughly in the mid-1970s, anyone asking that question would have been laughed out of the room. It was Gospel that Big was not necessarily Bad; that the costs of mistaken intervention in potentially efficient business behavior far exceeded the costs of pursuing an overlooked monopoly or cartel (i.e. that Type 1 errors were more serious than Type 2 errors); and that the *summum bonum* for competition law was consumer welfare, defined as the best quality achievable for the lowest price. No one expressed this philosophy better than the late Justice Antonin Scalia, who wrote this in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, with respect to the exclusionary practice of refusing to deal:

> Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing — a role for which they are ill suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion. Thus, as a general matter, the Sherman Act does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.[4]

During the heyday of this era, neither the federal government nor private enforcers focused their efforts on Section 2 enforcement. Merger policy reflected much the same philosophy: whereas during the 1960s the government and the Supreme Court worried in the *Von's Grocery* case about a merger between the #3 and #6 grocery chain in Los Angeles (accounting together for 7.5 percent of the entire market),[5] by 1990 a merger between two firms that collectively had 76 percent of the relevant market for certain drill bits was permitted, in *United States v. Baker Hughes Inc.*[6] The few exceptions to this pattern simply proved the rule: the great AT&T case of the late 1970s was resolved by the Modified Final Judgment on January 8, 1982[7]; on the same day the government dropped its case against IBM[8]; and, while the Antitrust Division had some success in the 1990s with its case against Microsoft,[9] it was unable to obtain the same kind of broad-ranging structural relief that it did in AT&T.[10] In the end, the *Microsoft* case fizzled out.[11] People argued that antitrust was just not able to cope with the Internet Era; markets moved too fast; the technical aspects of the industries were well beyond the capabilities of generalist federal judges; and competition itself would take care of any remaining problems.

Other jurisdictions — in particular, the European Union and the countries that follow its model for competition law — were never convinced that single-firm behavior could safely be left alone, nor were they so pessimistic about the ability of government to address concentrations of market power. For example, while the U.S. Federal Trade Commission investigated Google in the early 2010's and came to the conclusion that

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2 *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945).

3 *Id.* at 429.

4 540 U.S. at 407–08 (quotation marks omitted).

5 See *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966).

6 908 F.2d 981 (D.C. Cir. 1990) (Thomas, J.).

7 *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. *Maryland v. United States*, 460 U.S. 1001 (1983).

8 This decision was discussed by Edward T. Pound, in "Why Baxter Dropped the I.B.M. Suit," New York Times, Jan. 9, 1982, at https://www.nytimes.com/1982/01/09/business/why-baxter-dropped-the-ibm-suit.html.

9 See *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

10 The Court of Appeals rejected the district court's order requiring Microsoft to engage in both conduct modification and structural reorganization, see 97 F. Supp. 2d 59 (D.D.C. 2000), vacated, 253 F.3d 34, *supra*.

11 Granted, there were some remedial measures that were imposed with the goal of undoing the effects of the exclusionary practices in which Microsoft had engaged. See *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004). But they were modest compared with the government's original aspirations for the case.

Google had not engaged in "search bias,"[12] the Competition Directorate of the European Commission was taking a more aggressive approach.[13] It announced a narrow case in April 2015,[14] and in late June 2017 the Commission found that Google had abused its dominant position in the comparative shopping service market in Europe. It fined Google €2.42 billion ($2.7 billion). That case was quickly followed by an action in 2018 that targeted Google's Android mobile operating system; that one ended with a fine of €4.34 billion ($5 billion). And that was not the end: in March 2019 the EC launched an investigation based on Google's alleged dominance in the online advertising market. The advertising case was resolved with a fine of €1.49 billion ($1.69 billion); by way of justification, the Commission stressed Google's exclusive contracts and later premium payments with website owners.

The U.S. Department of Justice, on behalf of the United States, re-entered the fray in October 2020, when it announced the filing of a suit against Google asserting that Google was unlawfully maintaining its monopoly in search engines by cutting off rivals from critical distribution channels. It is worth reiterating, however, that the Department and the FTC rarely bring cases under section 2 of the Sherman Act. Notably, if one checks the Antitrust Division's website, which allows the user to filter by the type of case that was filed, monopolization does not even come up as a choice. Instead, the list includes "price-fixing, horizontal; bid rigging; horizontal merger; customer, territorial or market allocation – horizontal; and other restraint of trade."[15]

The essence of the Division's theory in the Google case is that Google's search engine is what we used to call an "essential facility," and that in the case of a monopolist with the kind of market power Google exercises, the deliberate exclusion of rivals from that essential facility amounts to an anticompetitive practice. There was a time, once again best illustrated by *Trinko*, that the essential facilities doctrine had been given the Last Rites. It was derided by one and all as devoid of content, impossible to apply in practice, and, to the extent it reflected economic reality at all, superfluous as compared to the standard doctrine on refusals to deal. But perhaps we were too quick to throw it away. In a talk entitled "Disinterring the Essential Facilities Doctrine" that I gave at the University of Colorado Law School a few years ago, I suggested that we might have mistaken the *factual* rarity of monopoly cases presenting genuine essential facility concerns with the *legal* coherence of that concept. I was struck by the fact that in countries that did not have an economy with the same depth, competitive vigor, entrepreneurship, and strong legal traditions (including in the fields of contract, property, antitrust, and regulated industries) as the United States has enjoyed, competition authorities found the need to attack entrenched monopolies and to pry open markets that were strangled by single-firm bottlenecks.

There is now a virtual flood of books that are re-examining what antitrust law should have to say, and does have to say, about single-firm power. Matt Stoller has written a book called "Goliath: The 100-Year War Between Monopoly Power and Democracy,"[16] which harkens back to the Learned Hand quote with which this essay began. Put simply, Senator Sherman and his fellow authors of our foundational antitrust law had no trouble seeing the close link between enormous economic power and our political institutions. Zephyr Teachout's book "Break 'Em Up: Recovering Our Freedom from Big Ag, Big Tech, and Big Money"[17] challenges the conventional wisdom of the 1970s through the 2010's to the effect that dispersal of economic power is inherently inefficient and will, in essence, impose an unwanted tax on consumers. Tim Wu also argues for restored attention to the consequences of monopoly power, in his book "The Curse of Bigness: Antitrust in the New Gilded Age."[18] So does Jonathan Baker, who wrote (with a nod to Robert Bork's transformative book, "The Antitrust Paradox: A Policy At War With Itself"[19]) "The Antitrust Paradigm: Restoring a Competitive Economy."[20] He too turns to the field of exclusionary practices, which was under fire during the reign of the so-called Chicago School.

Recall that adherents of the Chicago School, led by such notables as Richard Posner, Robert Bork, and Frank Easterbrook, argued strongly that courts are ill-equipped to juggle both apples (economic efficiency goals) and oranges (distributional and market-access goals), and so it was best to give them simple instructions and rely on other tools to handle the latter concerns. By limiting antitrust to the simple aim of protecting "consumer welfare," understood as exclusively referring to low prices for consumers, the Chicago School argued, antitrust (and the judges and

12 In the Matter of Google, Inc., Statement of the FTC Regarding Google's Search Practices, Jan. 3, 2013, FTC File No. 111-0163.

13 See e.g. Statement of VP Almunia on the Google Antitrust Investigation, Speech/12/372 (2012).

14 Commission Sends Statement of Objections to Google on Comparison Shopping Service, European Commission, Fact Sheet, 2015.

15 See https://www.justice.gov/atr/antitrust-case-filings; choose "filter and sort," and scroll down.

16 Published 2020.

17 Published 2020.

18 Published 2018.

19 Published 1971 (amusingly, it comes up on Amazon as published in 1791).

20 Published 2019.

lawyers who administer the laws) can deal with lawsuits designed to prevent or break up hard-core cartels, and they can and should prevent the most egregious of mergers (maybe a three-to-two transaction, and likely a two-to-one deal unless other economic factors suggested that those numbers overstate the likely future harm to competition). Exclusionary agreements, including exclusive dealing arrangements, boycotts, predation of various types, tying arrangements, and bundled or loyalty discounts, were just too hard to sort and thus had to be left, so people argued, to the market-correction mechanism.

Part of the great re-examination of antitrust that is currently taking place calls into question the pessimistic assessment that exclusionary practices just can't be regulated in a principled way. Another part is inspired by the impact of the digital giants.[21] Competition, after all, is a dynamic process: just because today's monopolist may be providing services at prices consumers like does not assure that the long-term market for innovation and diverse approaches is best served.

Section 2 of the Sherman Act lies at the center of this debate. If, as many urge, antitrust begins once again to concern itself with the exclusionary practices monopolists use, that will reflect a return to a more complex understanding of the purposes of the antitrust laws. But no one should be surprised that the U.S. antitrust laws reflect more than one goal, nor should that fact prompt enforcers and courts to throw up their hands in dismay. Bills are passed and enacted into law every day that reflect several goals, and the goals are not always 100 percent compatible. Executive branch enforcers, private parties, and courts deal all the time with laws that have more than one aim. The result is not some kind of "anything goes" outcome. No violation of Sherman Act section 2 can be found unless the court (a) finds that the company in question has the requisite degree of market power, depending on whether the case charges an attempt to monopolize or full-blown monopolization, (b) finds that that market power was unlawfully obtained or maintained, and (c) finds that the power did not arise "as a consequence of a superior product, business acumen or historic accident."[22] The rub has been this: when does exclusionary conduct on the part of a monopolist amount to an abusive practice, and hence one that qualifies under step (b), and when is it just old-fashioned hard competition, and thus something that falls under step (c)?

For decades, courts have answered those questions by reference to the antitrust basics: How much market power does the defendant firm have? Can the exclusionary practice be explained by a legitimate business concern, such as the protection of intellectual property, or cost in unbundling aspects of the firm's own product or service, or a genuine quality control or other reputational issue? The answers to those (and similar) questions should reveal whether the practice is one that any firm would use, or if it is designed solely to push a competitor out of the market and cement the monopolist's control. Other aspects of the potential case of monopolization can also be evaluated. Does the firm quietly go around buying up all potentially competing technology? Is the firm taking advantage of path-dependence, making sure that it had a head start and putting roadblocks in the way of potential competition?

At the most general level (with a nod to the much-maligned case of *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*[23]), the question is whether the alleged monopolist's behavior is explicable only because it will ensure the profits that come from lessened competition, not for any other business purpose. Recall that in *Aspen Skiing*, the Ski Company was so eager to destroy Highlands's business that it ultimately refused to accept cash vouchers from Highlands customers. (It finally agreed to take travelers cheques, but the harm had already been done by that time.) Walking away from cash is not something that a normal firm would do; the competing inference, that the Ski Company was trying to monopolize this destination ski resort, was a compelling one.

Size matters, at least when it leads not just to the power to raise prices and reduce output, but also to the muscle to push other competitors out of the market. The Supreme Court remarked in *Brown Shoe Co. v. United States* that "the antitrust laws were passed for the protection of *competition*, not *competitors*."[24] It has repeated that mantra frequently.[25] But there is a flip side: it is impossible to *have* competition without competitors. That means, logically, that an antitrust law that focuses exclusively on competition in the abstract — those cartels and monopolies that create a dead-weight loss triangle when they price at marginal cost and sell the correspondingly reduced quantities — will miss an important part of the point of the legislation. Exclusionary practices may be difficult to analyze in close cases, but the job must be done.

21 In addition to the books mentioned above, see Francesco Ducci, Natural Monopolies in Digital Platform Markets (2020).

22 *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

23 472 U.S. 585 (1985).

24 370 U.S. 294, 320 (1962).

25 See e.g. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993).

The people who enacted the antitrust laws knew this. Not until the 1970s was this even a controversial proposition. Classic lists of *per se* illegal offenses included exclusionary practices such as tying arrangements and group boycotts.[26] It now appears that the U.S. economy — and to some degree the world economy — once again is confronting single-firm behavior that calls for antitrust intervention. Section 2 of the Sherman Act is there for the taking; it is time to remember our history, to dust off the cobwebs, and to get to work.

26 See *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5 (1958).

GATEKEEPER REGULATION IN THE DIGITAL ECONOMY – THE PITFALLS (AND OPPORTUNITIES) AHEAD?

BY ROD CARLTON, RIKKI HARIA & CAROLINE CHEW[1]



1 Rod Carlton (partner), Rikki Haria (senior associate) and Caroline Chew (associate) are members of Freshfields Bruckhaus Deringer's Antitrust Competition and Trade Group. The views expressed in this article are the authors' own.

I. THE (RE-)FORMULATION OF THE CONCEPT OF "GATEKEEPERS"

With the digital economy and "Big Tech" companies under intense regulatory scrutiny across the globe, regulators have increasingly coalesced around identifying digital businesses who play a "gatekeeper" role as the basis of regulatory intervention. Many regulators have focused on identifying as "gatekeepers" those digital platforms who play a "dual" role in the market, in that they provide a crucial upstream service while at the same time competing with other third parties in a downstream market (or otherwise have reached a certain size that third parties are allegedly 'reliant' on them to access customers in other markets). For example, the European Commission ("EC") has imposed over €8 billion in fines on Google in relation to its Shopping, Android and AdSense cases[2] and has opened investigations into Apple[3] and Amazon.[4]

While stakeholders are in broad agreement that digital innovation has provided significant benefits to consumers and businesses,[5] vociferous public and political pressures have resulted in a particular urgency on the regulators' part to test and determine the remit of the gatekeeper concept, as well as any potential avenues for heightened regulation and enforcement. Against this backdrop, a raft of reports have been published which deal with the question of how best to regulate the digital economy. Prominent examples include: the UK Competition and Markets Authority's ("CMA's") Final Report in its market study on Online Platforms and Digital Advertising,[6] the U.S. House Judiciary Subcommittee's report on its Investigation of Competition in Digital Markets,[7] the report commissioned by the EC on "Competition Policy for the Digital Era,"[8] and the Australian Competition & Consumer Commission's Final Report in its Digital Platforms Inquiry[9].

From a practical perspective, a number of significant proposals are being rapidly developed in the near-term, including:[10]

- The United Kingdom's proposed Digital Markets Unit ("DMU"): the UK set up a Digital Markets Taskforce ("DMT"), which published its advice to the UK Government in December 2020 on digital regulation (the "DMU Proposal"). A key part of the DMT's recommendations revolves around the designation of firms with "*Strategic Market Status*" ("SMS"), defined as firms with "*substantial, entrenched market power in a particular digital activity*" which provides the firm with "*a strategic position,*" meaning the "*effects of its market power are likely to be particularly widespread or significant.*"[11] As well as proposing a separate merger control regime for SMS firms, firms' activities which are deemed to have SMS status will be subject to an enforceable, principles-based code of conduct,[12] as well as possible "*pro-competitive interventions*" (such as data mobility and interoperability).[13]

2 See https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf, https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf and https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770.

3 See https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073.

4 See https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077.

5 For example, the CMA's Final Report in its market study on Online Platforms and Digital Advertising acknowledges that platform services funded by digital advertising bring "*substantial benefits to consumers,*" with "*consumers plac[ing] great financial value on a range of online services*"; and that the "*current COVID-19 pandemic has emphasised the critical importance of digital services for consumers' well-being and prosperity*" (see Box 2.1, available at: https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf); see also the Advice of the Digital Markets Taskforce, para 2.2, available at: https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice_--.pdf).

6 See https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf.

7 See https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

8 See https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

9 See https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf.

10 In addition to those listed below, there are active legislative proposals worldwide, including the establishment of a special unit within the Australian Competition and Consumer Commission to proactively enforce, monitor and investigate competition and consumer protection in digital markets (see https://treasury.gov.au/sites/default/files/2019-12/Government-Response-p2019-41708.pdf); the endorsement by the German Federal Government of draft legislation introducing the concept of "*undertakings with paramount significance for competition across markets*" (see https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2020/25_02_2020_Stellungnahme_10_GWB_Novelle.html); and the establishment of a Japanese Headquarters for Digital Market Competition, which released an interim report proposing *ex ante* regulation for digital platforms (see https://www.kantei.go.jp/jp/singi/digitalmarket/index_e.html).

11 See paras 12 and 4.4 of the Advice of the Digital Markets Taskforce.

12 This code of conduct is based on the principles of Fair Trading, Open Choices and Trust and Transparency (see paras 4.37-4.41 of the Advice of the Digital Markets Taskforce).

13 For example, focusing on transparency, consumer controls, interoperability and data access and separation.

- The EC's proposed Digital Markets Act ("DMA"): in December 2020, the EC published its legislative proposals imposing *ex ante* regulation to regulate "gatekeeper" platforms in order to promote the contestability of digital markets (the "DMA Proposal").[14] The DMA Proposal applies to platforms which, on a cumulative basis, provide "*core platform services,*" have "*a significant impact on the internal market,*" "*serve an important gateway for business users to reach their customers*" and "*which enjoy, or will foreseeably enjoy, an entrenched and durable position.*"[15] There are quantitative thresholds for each of these criteria; if met, there is a rebuttable presumption that the company is a "gatekeeper." In addition, the EC is able to conduct a market investigation to determine, on a qualitative case-by-case assessment, whether companies should be deemed to be gatekeepers or otherwise may constitute "*emerging gatekeepers.*"[16] In contrast to the DMU Proposal, which suggests keeping the burden of proving SMS status on the DMU, the DMA Proposal goes further in that it reverses the burden of proof to the benefit of the EC. There is an obligation on companies themselves proactively to self-assess whether they meet the quantitative thresholds and provide such information to the EC. It sets out prohibited practices to tackle unfair practices by gatekeeper platforms, with a list of prohibited conduct (i.e. a "blacklist").[17] Platforms will be subject to sanctions in the event of non-compliance.

However, on either approach, the exact delineations of how such a designation will be determined remain amorphous. Rather than providing a view on the hotly debated topic of whether *ex ante* regulation is actually needed or desirable in relation to large digital businesses, this article seeks to explore three issues that go to the fundamentals underpinning any potential regulation of selected digital businesses, namely:

- how a "gatekeeper" designation should be formulated, particularly in light of the wide-ranging ramifications of being subject to *ex ante* regulation;

- whether the approach of having a "blacklist" of restricted conduct, or conversely a principles-based approach, for "gatekeepers" (however defined) is suitable in the digital economy; and

- what types of "gatekeeper" conduct should be regulated.

II. HOW TO IDENTIFY AND DESIGNATE "GATEKEEPERS"

The well-established EU regulatory framework for telecommunications is a case study in how to designate a "gatekeeper." Under this framework, national regulators are tasked with identifying the markets which contain characteristics justifying the imposition of regulation, identifying whether there are any undertakings that should be subject to such regulation (which is based on whether any such undertaking has "significant market power" or "SMP"), and then determining what regulatory measures are appropriate and proportionate on a case-by-case basis. National regulators may consider that the imposition of regulatory remedies on a relevant national market is defensible if (upon investigation):

- there are high and non-transitory structural, legal or regulatory barriers to entry;

- there is a market structure which does not tend towards effective competition within the relevant time horizon (keeping in mind the state of infrastructure-based competition and other sources of competition behind the barriers to entry); and

- competition law alone is insufficient to adequately address the identified market failure.

The telecommunications sector has a number of features in common with the digital economy, such as network effects and economies of scale, which suggest that certain lessons can be drawn from the existing regulatory framework for telecommunications, particularly in terms of process and procedure (as noted below).

14 See https://ec.europa.eu/info/sites/info/files/proposal-regulation-single-market-digital-services-digital-services-act_en.pdf.

15 See Articles 3(1) and 3(2) of the DMA Proposal, which also set out the cumulative quantitative thresholds which create a rebuttable presumption of gatekeeper status as follows:
(i) EEA turnover of at least €6.5bn in the last three financial years or market capitalisation or equivalent fair market value of at least €65bn in the last financial year;
(ii) more than (a) 45 million monthly active end users established / located in the EU and 10,000 yearly active business users established in the EU in the last financial year; and
(iii) providing a core platform service in at least three EU Member States.

16 Emerging gatekeepers are companies which will foreseeably have an entrenched and durable position in the future. Emerging gatekeepers would only need to comply at most with certain obligations (i.e. those in Article 5(b) and Article 6(1)(e), (f), (h) and (i) of the DMA Proposal) and only those which are "*necessary and appropriate to ensure that the company does not achieve by unfair means such entrenched and durable position.*"

17 See Article 5 and 6 of the DMA Proposal.

However, key differentiating features remain that make the use of regulation more challenging in relation to large digital businesses. For example, large telecommunications players in the EU typically operate critical (and non-replicable) infrastructure, are vertically integrated and hold substantial and often enduring market power as a result of their former position as State monopolies. These factors underpin the case for a telecommunications regulatory framework, but they do not necessarily read across to the digital economy. In addition, the EU telecommunications sector remains characterized by national markets and predominantly national players.

In contrast, large digital businesses are typically active across the EU (and globally), with the markets they operate in typically being at least EU-wide in scope. This means that there is a greater risk, as compared to the telecommunications sector, that differing approaches at a national level (e.g. between EU member states) will hinder the ability of digital products to function seamlessly and consistently across national borders and, in practice, require digital businesses to abide with the most stringent national regulation with respect to their activities across the EU (and possibly even globally). There is therefore a greater need for transnational coherence and cooperation to enable effective regulation, to avoid digital businesses facing materially different regulatory obligations in different countries. If that situation were to arise, any local consumer benefits specific to each national regime risk being outweighed by EU (or global) consumer detriment, potentially hindering innovation on a global scale and resulting in adverse outcomes for consumers in certain countries (e.g. the offer of more limited digital services or not rolling out new features in certain countries). In addition, the digital sector is fast-paced and dynamic, making regulation inherently more difficult to implement and "future-proof" in an effective way.

A. The need for a robust analysis of digital markets and services to devise clear, objective criteria for gatekeepers

Given this context, it is crucial that regulators carry out rigorous analysis as to what types of digital markets or services should be the points of regulatory focus. In particular:

- When considering which digital markets and services should be captured by a gatekeeper regulation, regulators should go further than identifying certain market factors which might conceptually lead to gatekeeper-type situations, such as the presence of network effects, economics of scale and scope or the ability to engage in self-preferencing behavior. It is crucial for regulators to analyze which markets or services are in practice producing adverse outcomes for customers. In light of the extensive benefits that digital services have provided for consumers, businesses and wider society (highlighted most recently in the ongoing COVID-19 pandemic), any assessment must balance robustly evidenced (rather than speculative) consumer harm against such benefits.

- Moreover, given any gatekeeper regulation would cover a variety of different markets (many of which are interconnected), it is important that the designation process does not occur in a way that provides certain businesses (or business models) with an advantage over others. This would distort competition. By way of example, the UK's recent DMT advice suggests that the DMU should initially prioritize firms active in "*online marketplaces, app stores, social networks, web browsers, online search engines, operating systems and cloud computing services.*" However, little explanation is provided around: (i) the reasons why these sectors should be prioritized over other digital markets; and (ii) whether the designation process would be undertaken in parallel across interconnected digital markets to avoid certain businesses being placed at a regulatory disadvantage due to an earlier designation.

In the interests of legal certainty and fairness, clearly articulated objective criteria are needed to determine which firms should be subject to regulation. The current proposals differ in this respect:

- For example, the EC's DMA Proposal includes quantitative criteria in relation to designating gatekeepers. While this seeks to draw a bright line between companies that fall within the scope of the DMA Proposal and those that do not, this largely binary approach risks inadvertently distorting competition among competitors who hold a fairly similar market position.

- The DMU Proposal takes a different approach and provides much greater discretion to the DMU. When explaining the SMS concept, the UK's DMT notes that a firm's market power must furnish the firm "*with a strategic position,*" in which its effects are "*likely to be particularly widespread and / or significant.*" However, the relevant factors – for example, a "*very high proportion of the population,*" the facilitation of "*large*" values of transactions and/or the ability to "*extend market power from one activity into a range of other activities*" – are not particularly clear and make it difficult to identify which digital markets and firms should be considered to have SMS.

Given that gatekeeper designation-based regulatory interventions being proposed globally are likely to have far-ranging implications for a significant number of digital players, it remains important for regulators to formulate clear, objective criteria which go beyond simply identifying that businesses are large or that many customers have chosen to use a particular business. These criteria should be determined as a result of

careful, evidence-based analysis, avoiding the trap of being crafted to target certain business models. Failing to produce such objective criteria will not only result in widespread legal uncertainty but will risk undermining innovation incentives and competition in the long-term.

B. Procedural fairness is key – defensible, logical processes with appropriate rights of appeal

In addition to setting out clear, objective legal tests for the designation of gatekeeper status, it is also crucial that any designation process runs on a statutory timeline, building in opportunities for a firm to respond to the objections of any regulator to its practices. For example, under the EU telecommunications regulatory framework, national regulators are only able to impose an *ex ante* designation of a firm as having SMP following an investigation into each relevant market. Similar mechanisms should function in a gatekeeper designation process, with the burden of proof lying with the regulator. As part of this process, firms should be allowed to propose remedies and solutions to any regulatory concerns raised in a collaborative manner. From this perspective, it is encouraging that both the EC's DMA Proposal[18] and UK's DMU Proposal[19] recognize the need for the timely review of the designation of gatekeepers, with the opportunity for companies to be heard as part of the process. This would assist in assessing whether the gatekeeper designation and associated activities continue to be aligned with rapid developments characteristic of digital markets.

Following a regulator's decision, firms should have recourse to robust appeal procedures against a designation as a gatekeeper and/or the additional regulatory burdens that flow from such designation. This is in line with both the EU telecommunications regulatory framework [20] and the CMA's powers to make a market investigation reference,[21] which both contain a judicial review mechanism.

Beyond the designation process itself, regulators should also commit to a process of reviewing their decisions and assessments on a periodic basis. Market reviews in the telecommunications space are usually taken periodically every five years, with only the undertakings which continue to have SMP being subject to further regulatory interventions, and only to the extent necessary to address such SMP. Bearing in mind the fast-paced, dynamic nature of digital markets, a shorter review period may be desirable in relation to any gatekeeper regulation.

III. A "BLACKLIST" APPROACH vs. A PRINCIPLES-BASED APPROACH

One of the differences that has arisen amongst regulators in how to formulate any *ex ante* regulation lies in whether to take a rules-based or principles-based approach. For example, the EC's proposed DMA has set out a list of clear "blacklisted" practices that are forbidden if they are put in place by gatekeeper firms. These obligations are split into two categories: (i) those which apply outright and where the Commission would ensure compliance via sanctions; and (ii) those which are "susceptible of being further specified" and where – in addition to sanctions – the Commission would be able to ensure compliance by specifying specific implementation measures. Some of the more controversial obligations fall within this second category of obligations, including those relating to data access, interoperability, data portability, and the use of data from business users in activities that compete with those business users. While there is currently little detail around what further specification is envisaged in relation to the second category of obligations, this approach indicates that considerable further work will be needed after any adoption of the DMA Proposal to work out what these obligations mean in practice and how different gatekeepers would comply with them.

In contrast, the UK's DMU aims to put into place a principles-based, enforceable code of conduct, which is meant to "*provide flexibility to address a wide range of practices…[which] could be difficult to capture within a narrow 'blacklist' of restrictions.*"[22]

Any suitable approach to gatekeeper regulation must ensure flexibility, particularly given the dynamic, fast-changing nature of the markets in question and the different business models through which tech firms operate. In this respect, advice from the UK's DMT recognizes that a

18 Based on the current DMA Proposal, the EC will review, at least once every 2 years, whether designated gatekeepers continue to satisfy the threshold requirements or whether new providers of CPS do so; as well as whether a gatekeeper's list of affected CPSs requires adjustment (see Article 4(2) of the DMA proposal).

19 The DMU's SMS designation process is proposed to be open, transparent and consultative. Once a decision is made, the SMS designation would persist for a fixed time period (e.g. 5 years); however, where there has been a material change in circumstances, the DMU could receive applications from companies to remove the designation (subject to the DMU's own review).

20 For example, see para 76 of Directive (EU) 2018/1972, which states that "*[a]ny party subject to a decision of a competent authority should have the right to appeal to a body that is independent…Member States should grant effective judicial review against such decisions*" (available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1972&from=EN).

21 See para 87, Guidelines for market investigations (CC3 (Revised)), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284390/cc3_revised.pdf).

22 See para 4.36 of the Advice of the Digital Markets Taskforce.

rules-based (or "blacklist") approach may provide greater clarity to firms on compliance but notes certain downsides, including that "*they tend towards a one-size-fits-all approach which is not tailored to where there is evidence of harm" and "given the pace with which firms' conduct evolves in digital markets, [rules] are likely to need frequent review and updating to remain effective.*"[23] It seems that a "blacklist" approach may be too blunt an instrument for fast-moving markets; history has shown that such an approach to regulation can often lead to unintended consequences.

Moreover, many of the practices that regulators are attempting to restrict – such as "self-preferencing" and how firms use data across their activities – encompass a wide range of possible conduct. It is widely recognized by regulators, practitioners and academics that these types of practices can be pro-competitive and generate benefits for consumers.[24] Accordingly, blanket prohibitions on these types of practices would be untargeted, disproportionate and carry a substantial risk of distorting competition and hindering innovation. The better view might therefore be to avoid or at least restrict the specification of black-listed practices.

While it may be ostensibly tempting to impose blanket bans on certain types of conduct for administrative ease, it would be preferable to apply remedies on a case-by-case basis, taking into account the overriding need for such remedies to be proportionate (in line with well-established EU principles). This targeted approach may result in more efficient outcomes as remedies will be tailored the specific market failures as they arise in relation to a certain gatekeeper. Drawing on the EU telecommunications regulatory framework, this approach of basing regulation on an objective assessment of markets, with due consideration to the proportionality of remedies proposed, provides a more stable and predictable regulatory environment. It would further be appropriate to provide for a periodic review of these remedies, with the designated regulator reviewing the effectiveness of such remedies to ensure that they are appropriate and keep pace with any market changes. This approach would minimize the loss of innovation, avoid the imposition of unnecessary regulatory burdens and limit the potential for other unintended consequences.

IV. APPROPRIATE TYPES OF CONDUCT TO RESTRICT BY WAY OF REGULATION

Differences of view remain as to what types of conduct should be captured by *ex ante* regulation that applies to "gatekeepers." For example:

- Where the conduct overlaps with, for example, Article 102 of the Treaty of the Functioning of the EU ("TFEU"), this has the practical effect of replacing an in-depth, case-by-case *ex post* assessment of the impact of such conduct with an outright *ex ante* ban (or otherwise a reversed burden of proof). This leaves regulators vulnerable to the charge that they are simply seeking to side-step the need to demonstrate that the conduct in question results in anti-competitive effects, such that their approach is disproportionate.

- Certain concerns that have been raised by regulators and stakeholders, such as a lack of transparency and consumer "choice," appear to be industry-wide issues that are not limited to businesses of a particular size. Regulation aimed at tackling these concerns should be applied more broadly to be effective. Imposing regulatory obligations only on firms that have been designated as "gatekeepers" runs the risk of missing many harms, without necessarily alleviating the underlying concerns justifying the use of regulation.

There is a strong case that conduct identified under any gatekeeper regulation should be limited to practices where the harmful nature of the conduct is easily identified, and the conduct is not capable of being assessed as pro-competitive. Unlike the Article 102 TFEU mechanism, where the categories of abuse are not "closed" and thereby provide flexibility to regulators, categories of conduct captured by *ex ante* regulation should be more specifically and clearly demarcated in order to guarantee legal certainty. This approach avoids the risks of restricting competition on the merits, which would adversely affect the incentives for market players to deliver valuable innovations to consumers.

In this respect, questions arise over whether "leveraging" practices, in which a company uses its market power in a market where it is dominant to boost its position in a vertically-related or adjacent market where it may not have market power, should be included within the remit of any gatekeeper regulation. It is commonly acknowledged that new entry into markets is generally pro-competitive and the conditions that lead to consumer harm in these scenarios tend to be highly case-specific (and linked to the concept of "tipping" markets). However, the line between legitimate regulatory intervention and regulatory overreach that hinders pro-competitive market entry is perilously thin. And it is notoriously difficult to identify and predict markets that are likely to "tip"; indeed, this predictive exercise is largely unproven in the digital sector. Over-regulating in this area therefore risks re-instating "efficiency offence"-type theories of harm that have been widely rejected in the merger context.

23 See para 20 of Appendix C of the Advice of the Digital Markets Taskforce.

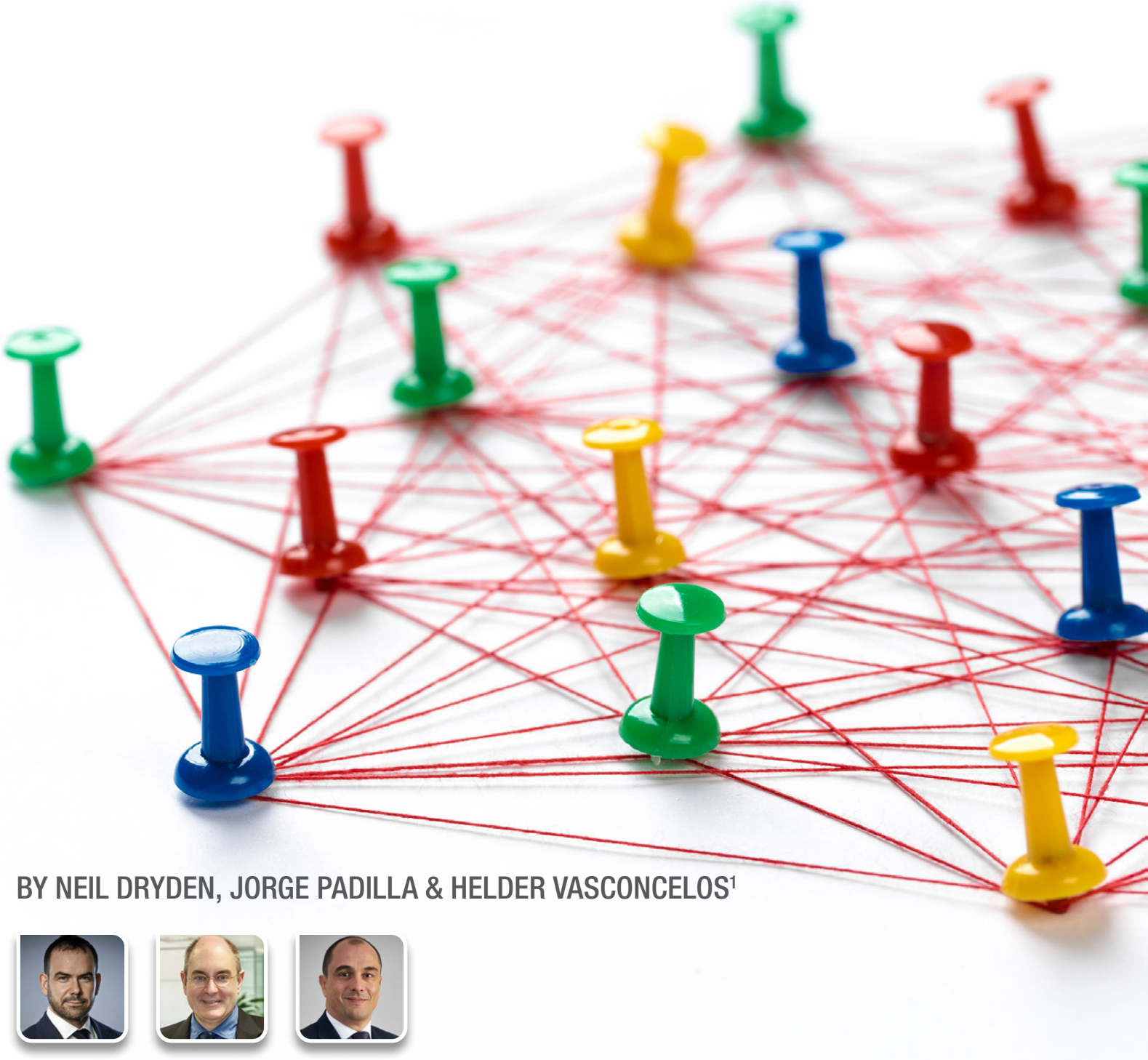
24 For example: (i) the European Commission's guidelines on the assessment of non-horizontal mergers state that "*the integration of complementary activities or products within a single firm may produce significant efficiencies and be procompetitive*"; and (ii) the OECD has noted that "*self-preferencing is in many ways simply a softer variant of in-sourcing, and it is well-established that in-sourcing, even by government monopolists, can often be more efficient than out-sourcing when there are transaction costs*" (OECD, Lines of Business Restrictions – Background Note by the Secretariat, (8 June 2020), available at: https://one.oecd.org/document/DAF/COMP/WP2(2020)1/en/pdf, paragraph 7).

If regulators consider it necessary to enforce against leveraging practices *prior* to any competitive damage being done, it could be that some limited reversal of the burden of proof may be appropriate. This would require gatekeeper firms to prove that rivals will still be able to compete in the vertically-related or adjacent market. However, if such a potentially significant measure were to be introduced as part of any gatekeeper regulation, this would need to be accompanied by: (i) more rigorous evidence gathering to ensure regulatory remedies are justified and proportionate in the particular circumstances, and not outweighed by any harm to competition and innovation; and (ii) greater procedural safeguards, such as a more stringent approach to the designation process and the ability to appeal the imposition of any regulatory remedies to an independent body or court for a "merits review" (i.e. not limited to judicial review grounds).

V. CONCLUSION

The issues that lie at the heart of designing effective, proportionate and pro-competitive regulation are manifold and complex, particularly in light of the need to balance competing interests in fast-changing digital markets and to avoid dis-incentivizing the innovation that has enabled the substantial benefits delivered by the digital economy. Given this backdrop, there can be no pretense of easy or clear-cut answers; any such pretense carries significant risks and costs for consumers. However, given the imminent introduction of regulation on multiple fronts, it is key that all stakeholders engage in further debate and consideration to ensure that the most constructive regulatory approaches are adopted.

ON THE COMPETITIVE EFFECTS OF SINGLE-HOMING: THE CASE OF HYBRID MARKETPLACES



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I. INTRODUCTION

The growing digitalization of the economy has led to the emergence of new business models, based on multi-sided platforms, which have inspired a relatively recent, but rapidly expanding, strand of the economics literature on the economics of two-sided markets.[2]

This literature has given rise to many important challenges as far as competition policy enforcement is concerned. As several commentators have repeatedly highlighted,[3] the one-sided logic may be misleading in making inferences in two-sided markets. To correctly frame the competitive environment in multi-sided markets, it is therefore crucial to factor in the intrinsic characteristics of these markets as well as the associated economic context.

For example, due to the existence of network effects between different groups of market participants intermediated by online platforms, on the one hand, and of increasing returns to scale, on the other, these platforms typically work in markets which are prone to concentration, tipping to one or a few providers.[4] Nonetheless, as highlighted by Tirole (2019):[5]

> *That today's information-technology markets are highly concentrated is beyond dispute. In most cases, a single company dominates a given market. There is nothing abnormal about this, as users are prone to flocking to just one or two platforms, depending on the service.*

The analysis developed in the scope of the application of competition law must then carefully take into consideration both the specificities of multi-sided markets and,[6] we add, the specific business model adopted by online platforms when competing in those markets. Otherwise, competition agencies and enforcers may run the risk of misusing traditional principles and, most importantly, of failing to capture the essence of competition in multi-sided markets as well as the correct identification of their potential anticompetitive problems.

A typical concern within competition assessments in two-sided markets relates to the fact that platforms can become "bottlenecks" or "gatekeepers" that provide exclusive access to single-homing users,[7] which may grant those platforms market power *vis-à-vis* agents on the other side(s) of the market wishing to interact with the single-homing users.

While not disputing that this is a legitimate concern, as the exclusive access to single-homing users by a dominant firm may strengthen its competitive advantage over its competitors, eventually giving rise to anticompetitive effects if used in an abusive manner, our claim is that dealing with single-homing consumers needs not be anticompetitive and, more precisely, that the final induced competitive effects are bound to depend on the business model of the (allegedly) dominant firm. More specifically, in this paper, we investigate in detail what are the likely competitive effects of single homing in the context of hybrid platform marketplaces, i.e. marketplaces run by vertically integrated platforms which operate also as resellers.

The remainder of this paper is organised as follows. In Section II we present the logic of the so called "competitive bottleneck," an economic concept which states that, in multi-sided markets, a platform may be granted (and exercise) significant market power whenever its end-users concentrate and single home. In Section III we present and discuss arguments in the extant economics literature regarding who benefits from

2 See, for instance, Evans, D.S., (2003), "The Antitrust Economics of Multi-Sided Platform Markets," *Yale Journal on Regulation*, Vol. 20, pp. 325-381, Caillaud, B. & Jullien, B., (2003), "Chicken & Egg: Competition Among Intermediation Service Providers," *RAND Journal of Economics*, Vol. 34, No. 2, pp. 309-328, Rochet, J.-C. & Tirole, J., (2003), "Platform Competition in Two-Sided Markets," *Journal of the European Economic Association*, Vol. 1, pp. 990-1029, Rochet, J.-C. & Tirole, J., (2006), "Two-Sided Markets: A Progress Report," *RAND Journal of Economics*, Vol. 37, No. 3, pp. 645-667, Armstrong, M., (2006), "Competition in Two-sided Markets," *RAND Journal of Economics*, Vol. 37, No. 3, pp. 668—691, and Armstrong, M., (2007), "Two-Sided Markets: Economic Theory and Policy Implications." In: Choi, J. P. (Ed.), *Recent Developments in Antitrust*, MIT Press: Cambridge, for seminal pathbreaking references regarding the economics of multi-sided platforms. See also Jullien, B., (2012), "Two-Sided B2B Platforms," In: Peitz, M. & Waldfogel, J. (Ed.), *The Oxford Handbook of the Digital Economy*, Oxford University Press, providing a roadmap to this literature with a specific focus on B2B marketplaces.

3 See e.g. Wright, J. (2004), "One-Sided Logic in Two-Sided Markets," *Review of Network Economics*, vol. 3(1), pp. 44-64.

4 The online economy has been demonstrating a tendency towards winner-takes-all outcomes. As observed by Tirole, J., (2019), "Regulating the Disrupters," *Think Outside*, ING. ING Bank N.V. (available at https://think.ing.com/opinions/jean-tirole-regulating-the-disrupters), "by dint of network effects and economies of scale, the digital economy almost inexorably creates 'natural monopolies'." (p. 3). See also Section II in Jullien, B. & Sand-Zantman, W. (2019), "The Economics of Platforms: A Theory Guide for Competition Policy," Toulouse School of Economics, Digital Center Policy Papers series No.1, September 2019.

5 See Tirole (2019), *op. cit.*

6 Along related lines, Tirole (2019), *op. cit.*, underlines that: "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." (p. 3).

7 An economic agent single homes if she uses only one platform in a particular industry and multi-homes if she uses several.

single homing in platform competition. In Section IV we claim that even if consumers decide to single home when joining a hybrid-marketplace, this need not to give rise to anticompetitive behaviour by the online platform running the marketplace, as the nature of the induced competitive effects will critically depend, among other factors, on the specificities of the business model adopted by the platform. Finally, Section V presents some policy implications from our analysis and concludes.

II. THE LOGIC OF THE SO CALLED "COMPETITIVE BOTTLENECK" PROBLEM

One important factor to address when appraising competition in two-sided markets is the extent to which each side can use more than one platform.

There are many situations wherein users on one side join only one platform (single home) whereas users on the other market side join more than one platform (multi home). When this is the case, platforms are bottlenecks: users on the multi-homing side can only access single-homing users by joining the platform that grants exclusive access to those single-homing users.[8]

In this context, and according to the "competitive bottleneck" hypothesis,[9] multi-sided platforms will likely compete for the single-homing users, as by ensuring these agents participation they will then enjoy monopoly power over the multi-homing users with regards to granting access to their (exclusive) single-homing users. Put it another way, platforms will naturally compete intensively for the users belonging to the side of the market on which there is (high degree of) single-homing since, by so doing, they will be able to extract more rents from the multi-homing users interested in interacting with those single-homing users.

Competition for single-homing users and monopoly power over multi-homing users can, therefore, give rise to biased pricing structures benefiting the single-homing side of the market,[10] as profits extracted from the multi-homing side might be used to compete aggressively for the single-homing side users,[11] that may end up paying zero, or even negative, prices.[12]

As Evans & Schmalensee (2017), point out, however:[13]

It is not clear how robust this finding is and how it interacts with other aspects of platform competition. Operating system providers, for example, typically charge users, who single home, and subsidize developers, who multi-home.

As we discuss in the next Section, some recent theoretical research has shown that Evans & Schmalensee's conjecture was right: the intuition behind the "competitive bottleneck" argument is not always correct, and the result may even be reversed.

In the analysis that follows, apart from presenting the recent important findings of the literature in this domain, we claim that the specific features which characterize the functioning of some hybrid marketplaces introduce key additional ingredients that should be carefully factored in when assessing the market power of a multi-sided platform eventually dealing with single-homing users on one market side.

8 See e.g. OECD (2018), "Rethinking Antitrust Tools for Multi-Sided Platforms," OECD, Paris, available at www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm.

9 Armstrong (2006), *op. cit.*, was probably the first who highlighted the importance of multi-homing for competition, creating the concept of "*competitive bottleneck*" in the context of (multi-sided) platform competition. See also Armstrong, M. & Wright, J., (2007), "Two-sided markets, competitive bottlenecks and exclusive contracts," *Economic Theory*, Vol. 32 (2), pp. 353-380.

10 The price structure reflects the interlinked demands of the two groups of agents intermediated by a platform and the need to get both sides on board, thereby solving the well-known "chicken & egg" problem (see Caillaud & Jullien (2003), *op. cit.*). This then often results in complex pricing where the price to each group of consumers does not reflect the marginal cost of supplying them. As Armstrong (2006), *op. cit.*, points out, when two groups (say, 1 and 2) interact via one or more platforms, then "[i]f a member of group 1 exerts a large positive externality on each member of group 2, then group 1 will be targeted aggressively by platforms. In broad terms, and especially in competitive markets, it is group 1's benefit to the other group that determines group 1's price, not how much group 1 benefits from the presence of group 2." (pp. 668-669).

11 This effect, according to which higher revenue per user on one side of the market translates into lower prices on the other market side, is what is referred to as the 'waterbed effect' in the literature on the economics of telecommunications addressing the regulation of termination rates. See e.g. Armstrong, M. & Wright, J. (2009), "Mobile Call Termination," *The Economic Journal*, 119: 270-307.

12 As Armstrong (2006), *op. cit.*, describes it: "Here, if it wishes to interact with an agent on the single-homing side, the multi- homing side has no choice but to deal with that agent's chosen platform. Thus, platforms have monopoly power over providing access to their single-homing customers for the multihoming side. This monopoly power naturally leads to high prices being charged to the multihoming side, and there will be too few agents on this side being served from a social point of view [...]. By contrast, platforms do have to compete for the single-homing agents, and high profits generated from the multihoming side are to a large extent passed on to the single-homing side in the form of low prices (or even zero prices)." (pp. 669–670).

13 See Evans, D.S. & Schmalensee, R., (2017), "Multi-sided Platforms," In: Palgrave Macmillan (eds), *The New Palgrave Dictionary of Economics*, Palgrave Macmillan, London.

III. WHO BENEFITS FROM SINGLE-HOMING IN PLATFORM COMPETITION?

Imagine a scenario in which there is a move from single-homing on both sides to a "competitive bottleneck," i.e. to a situation where one side, say side 1, keeps on single-homing whereas the other side, therefore side 2, wants to patronize both platforms.

By exploring the allocative effects of such a change from single- to multi-homing, a recent article by Belleflamme & Peitz (2019a) has challenged the conventional wisdom, according to which the possibility of multi-homing hurts users on the multi-homing side while benefitting the single-homing users on the other market side.[14] As the authors demonstrate, this is not always true, as the opposite may happen or, alternatively, both sides may benefit from such a movement.

The intuition is as follows. Let us first consider a two-sided single-homing environment (i.e. when both sides single-home). In this environment, if a user on one side wants to interact with a particular user on the other side, they both must be on the same platform. Hence, if a platform manages to poach a user (from either side) away from a competitor onto its site, this platform becomes more attractive to users on the other side, as more transaction partners become available on the platform's site and fewer partners are available at the competing platform's site. So, competition in each side of the market may be pretty intensive since an additional user on one side of the market brings others from the other side.

Let us now turn to the market scenario described in the previous Section, with single homing on side 1 and multi homing on side 2. In this scenario, competition between platforms becomes softer on side 2 and fiercer on side 1.[15] However, that does not necessarily mean that users on side 2 are worse off or that users on side 1 are better off. Also, the effect of multi-homing on side 2 on the platform's profits is ambiguous.

Consider the multi-homing side 2 first. Users on this market side will make their choice to join each platform separately (i.e. independently of the decision on whether to join the competing platform). Thus, multi-homing eliminates competition to attract users on this side, since the marginal user on one platform will join the other platform as well in any case. The lack of competition on side 2 has a critical implication for the distribution of bargaining power between users and the platform on side 2. Because each side-1 user single-homes, if any side-2 user wants to be connected to a specific user on side 1, then she will have to join the same platform that this specific side-1 user patronizes, as that platform holds an exclusive access to that user. Hence, in this scenario, each platform acts as a competitive bottleneck (or as a gatekeeper) to its side 1 user base, thereby raising their price on side 2,[16] possibly leading to too few side 2 users on their networks.

Consider now the single-homing side 1. As far as the price on this side is concerned, the outcome is more ambiguous. On the one hand, the value destroyed for a competitor by poaching some of its side-1 users does not give rise to a competitive advantage on side 2, as there is no direct competition anymore on that market side. That is, the competitor who loses some of its side-1 users is not in a worse competitive position on side 2, since all side-2 users multi home. On the other, the value generated when acquiring an additional side-1 user is larger because of bottleneck rents enjoyed on side 2.

The surplus gained by users on a given market side depends, naturally, on the price they are charged, but also on the price set by the platform on the other side. This is for two reasons. First, it follows from the above that the price charged to side-1 users will reflect the bottleneck rents available on side 2. Secondly, because the price set on one side may impact the number of users that will be available to interact with on that other side of the market, that price affects the level of cross-group network externalities within the platform.[17] Therefore, the single-homing side-1 users can either benefit or lose from a higher price on side 2, since they may be charged a lower price but could lose network benefits. It follows that the introduction of multi-homing on side 2 need not benefit users on side 1 (the single-homing side). On the contrary, while side-2

14 See Belleflamme, P. & Peitz, M. (2019a), "Platform competition: Who benefits from multihoming?," *International Journal of Industrial Organization*, Vol. 64, pp. 1–26. See also Belleflamme, P. & Peitz, M. (2019b), "The competitive impacts of exclusivity and price transparency in markets with digital platforms," CORE Discussion Paper 2019/19, Université Catholique de Louvain, for a non-technical discussion of the main results in Belleflamme & Peitz (2019a).

15 Here, we follow closely the description in Jullien & Sand-Zantman (2019), *op. cit.*

16 Put it another way, platforms are expected to compete fiercely for single-homers and, in return, to charge higher prices (or, using the language of the two-sided markets literature, to milk) multi-homers – the "bottleneck" problem.

17 A network benefit is generated by the interaction with users in the other group. In the context in which agents are sellers and buyers, the more buyers there are on a platform, the better-off are the sellers when they join this platform, as they have a larger potential demand for their products. Likewise, the more sellers there are on the platform, the better-off are the buyers, as they have access to a wider array of products. See e.g. Belleflamme & Peitz (2019b), *op. cit.*, who underline that: "Noteworthy is the fact that, in this model, it is not just the platforms that 'play a game' (price competition): users are also in a game situation, as the network benefits they obtain depend on what users of the other group decide" (p. 4). Along related lines, Evans, D.S., & Schmalensee, R. (2012), "The Antitrust Analysis of Multi-Sided Platform Businesses," Coase-Sandor Institute for Law & Economics Working Paper No. 623, point out that: "When there are material demand interdependencies the welfare of the customers on the multiple sides are inextricably intertwined, and may move in opposite directions as price structures change." (p. 22).

users (the multi-homing users) are charged a higher price in this scenario, they may derive greater network benefits because the lower prices charged to side-1 users may expand the number of users available to interact with on that side.

Using the words of Belleflamme & Peitz (2019a):[18]

> *In the two-sided single homing market environment, platforms compete on both sides of the market, whereas in the competitive bottleneck environment, they compete on only one. One may therefore be tempted to conclude that the users that obtain the possibility to multi home face higher prices and obtain a lower surplus, while the other users face lower prices and obtain a higher surplus. Also, since in the competitive bottleneck, platforms compete on only one side, one may expect that their profits are higher than in the market environment in which both sides single home. (…) Yet, the effect of letting one side multi home instead of single home is less straightforward than what may in general be perceived. While it is true that platforms exert monopoly power over the multi-homing side, participants on this side may actually benefit from multi homing. In addition, platforms may do better under two-sided single homing than in the competitive bottleneck.*

One important implication of these findings is then that, *a priori*, there is no clear-cut conclusion regarding whether the side that changes its behavior from single homing to multi homing (or *vice versa*) benefits or is hurt as a result. Likewise, for the welfare of users on the other market side. This analysis then clearly suggests that the only sensible way of assessing the likely competitive effects of single-homing in the context of platform competition is a case-by-case approach that fully captures the complex competitive dynamics involved.

In what follows we further defend this position by reference to the case of hybrid online marketplaces, reaching the conclusion that, when taking actions to prevent or enable single-homing, competition agencies and regulators must carefully factor in the specificities of the underlying business model, the strength of competition at the marketplace, and the relative bargaining power of the platform in the case at stake.

IV. SINGLE-HOMING IN HYBRID MARKETPLACES

One could argue that if multi-homing is limited on either side of the market (say, because it is too costly to patronize multiple platforms), then a multi-sided platform can raise prices and/or lower the quality offered to its current users without running the risk of losing business (on either side of the marketplace) to a more efficient competitor. As the discussion in previous sections suggests, however, this intuition is flawed, as how multi-homing affects users' welfare and platforms' rents depends on specificities of the platforms' business models as well as on the competitive dynamics involved.

In what follows we explain that the eventual materialization of the potential anticompetitive effects resulting from a platform becoming a bottleneck that provides exclusive access to single-homing agents critically depends on a number of interrelated factors: (i) a low degree of market contestability; (ii) high switching-costs and, thus, significant lock-in effects; and (iii) high bargaining power of the online platform *vis-à-vis* platform users on both market sides. We also explain why these assumptions are not verified in the case of hybrid marketplaces.

A. Market Contestability

Suppose that single-homing is a feature on one side of the market, while the other side multi homes, and consider whether the platform can exercise market power over third-party sellers seeking to do business with its single-homing user base.

The answer depends on whether the platform faces credible (actual or potential) competitors. Suppose it does. Then, multi-homing users may profitably delist from the platform if it tries to charge them too high a price. Of course, this will be more likely when the marketplace's share of single-homing consumers is low. Second, even if delisting is not a profitable option, users on the multi-homing side may downsize their activity on the platform. One way or the other, the decision to exploit its gatekeeper position will expose the platform to lose the business of multi-homing users initially and then, due to the operation of network effects, on the single-homing side as well.

Hybrid marketplaces are particularly exposed to the competitive pressure exerted by other direct competitors, whether actual or potential.[19] They typically serve both multi-homing and single-homing buyers, on one side, and multi-homing third-party sellers, on the other. Indeed,

18 See Belleflamme & Peitz (2019a, p. 3), *op. cit.*

19 Using the words of Jullien & Sand-Zantman, *op. cit.*, "we should point out that tipping in digital markets may not resemble a natural monopoly as encountered in infrastructure markets. Large heterogeneity and low entry cost imply that while there may not be room for two large platforms, there are usually niche opportunities for small platforms, which may have the potential to challenge the incumbent." (p. 54).

third-party sellers sell through several competing platforms, as well as through their own direct distribution channels, and often even offer in those direct channels more competitive prices and/or a higher spectrum of varieties.[20]

Since alternative distribution channels and platforms are promptly available, and no hybrid marketplace is likely to be a bottleneck for a substantial number of buyers, these marketplaces feel constrained in their ability to charge high prices. On the one hand, third-party sellers may delist from the marketplace. On the other, even if they do not delist, third-party sellers will pass on the marketplace's charges to consumers in that platform by raising their own prices and/or limiting the number and quality of varieties offered through the marketplace.

B. Switching Costs and Lock-in Effects

We have argued above that a platform trying to exploit a bottleneck risks losing both multi-homing and single-homing users. Of course, whether that is the case depends on the magnitude of any switching costs such users face. Only if those costs are not too high, a potentially contestable market will prove effectively competitive.

Arguably, the costs of switching from one marketplace to another are small, both for consumers as well as for third-party sellers. Yet, some consumers prefer to single home. Does this suggest that they are effectively locked in? Answering this question requires investigating three separate issues: (i) what are the consumers' perceptions regarding possible barriers to multi-homing, if any?; (ii) what is the true extent of single-homing?; and (iii) what drives the decision to single home?

A survey by Oxera, an economic consulting firm,[21] sheds some light on these issues by providing useful insights on how consumers use online marketplaces (such as eBay, Booking.com, Asos, Allegro or Amazon) to search for products or services in practice, as well as on consumers' preferences with respect to off-platform options.

Their survey respondents appear to make active choices over the platforms they use. The evidence suggests that they face no lock-in effects. Notably, most respondents use two or more websites when buying online, citing the ease of multi-homing as a reason for doing so.[22] In particular, the vast majority of (both multi- and single-homing) respondents do not to perceive any barriers to multi-homing in terms of time, cost, lack of awareness or incompatibility.

In addition, and very importantly, the results of the survey also indicate that the main reason why some buyers do not use more than one online marketplace is that they feel that the website that they use is the most appropriate for their requirements. Put it another way, single homing, when adopted, is a revealed preference rather than a compulsory or constrained option resulting from significant real or strategic switching costs.[23] Remarkably, this finding is in line with a recent result in the academic economics literature, according to which buyers tend to prefer the "competitive bottleneck" environment (where, again, only one side, say the sellers' side, multi-homes) when they value a lot the presence of multiple sellers and sellers find it profitable to multi-home.[24]

Hence, given that, in the context of hybrid marketplaces, consumers multi-homing is always an option, when consumers opt for embarking on single-homing strategies, they are actually signalling that the chosen platform is the one that attracts them the most because it offers a service which best fits their needs and requirements. So, single homing can, in this context, be simply understood as consumers rewarding the most attractive platform for their activities in terms of on-line shopping. Thus, as explained above, attempts to exploit multi-homing third party sellers may backfire on the single-homing consumer side if third-party sellers delist or otherwise respond by reducing the appeal of their offers in the marketplace.

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20 See Dryden, N., Khodjamirian, S., & Padilla, J. (2020), "The Simple Economics of Hybrid Marketplaces," Competition, California Lawyers Association, Vol 30, No. 2, pp. 85-99. for a detailed discussion of the incentives of third-party sellers within hybrid marketplaces as opposed to other types of business models.

21 See Oxera (2015), "Benefits of online platforms," available at https://www.oxera.com/publications/what-are-the-benefits-of-online-platforms/, for a survey involving European consumers from four countries.

22 Along related lines, Liu, Teh, Wright & Zhou, (2019), stress that: "following advancements in technology that make it easier for buyers to compare the options across multiple platforms, there has been a substantial shift in the capability and willingness on the buyer-side to multihome on platforms." (p. 2). Liu, C. Teh, T.-H., Wright, J. & Zhou, J. (2019), "Multihoming and oligopolistic platform competition", mimeo, National University of Singapore (available for download at: https://www.wrighteconomics.com/post/multihoming-and-oligopolistic-platform-competition).

23 As Oxera (2015), *op. cit.*, underlines, their analysis "suggests that, even with more time, at lower prices, with higher awareness of alternatives and increased compatibility across platforms, a large majority of consumers who single-home would continue to do so." (p. 23).

24 See Belleflamme & Peitz (2019a), *op. cit.*

C. Bargaining Power vis-à-vis a Platform's Users

A bottleneck can only be exploited if the platform has bargaining power both over its multi-homing and single-homing users. Absent bargaining power on the multi-homing side, the platform will not be able to monetize its exclusive access to certain single-homing customers. Absent bargaining power on the single-homing side, then competition for those single-homing users will expropriate any rents extracted from the multi-homing agents.

There are reasons to believe that hybrid marketplaces do not have significant bargaining power on either side of their platforms. A marketplace's attraction depends on its ability to stimulate competition within its store in order to grant consumers the lowest possible prices, on the one hand, and on its capacity of enhancing the quality of its offerings and of attaining selection parity with other competing platforms and distribution channels, on the other. A marketplace which fails to deliver in either of these two dimensions, which are likely under the control of the third-party sellers operating in the marketplace, will fail.

The simple fact that these sellers can switch away a greater share of their business to competing platforms or to their own (direct) distribution channels provides them with a credible "outside option" that increases their bargaining power when the marketplace's commissions and fees are set. The hybrid platform will then, naturally, be prepared to make concessions in order to avoid creating a serious variety/selection gap within its marketplace, which would have a critical impact not only in terms of the platform's attraction from the eyes of consumers, but also as far as its sustainability is concerned.[25] Further, hybrid platforms also anticipate that if an important variety is missing in its product portfolio or traded at a non-competitive price within its marketplace, this might facilitate the entry of a new competitor aiming at exploiting a business opportunity in the specific market niche linked to that product variety.[26]

Hence, again, the logic of operation of the business model places severe limits to the marketplace's ability to exercise market power so as to extract surplus from the multi-homing side agents, which in turn imposes strict and pressing upper bounds on the access and other fees that it is able to charge to third-party sellers with multiple off-platform alternatives (such as own distribution channels and other online marketplaces).

The marketplace is also unlikely to have any bargaining power over its single-homing customers. Consumers benefit from lower prices, higher quality and greater variety. When looking for the best possible deal in terms of these dimensions, many of them will use the wide range of instruments available to increase market transparency, such as ranking or recommendation algorithms as well as "comparison platforms."[27] These services facilitate buyers to find, compare and review products and services, and even gather feedback from (other) consumers' experience. They have then greatly contributed to the reduction of transaction and search costs, and to the promotion of product discovery as well as of price and/or quality comparisons across alternative sellers.

Armed with all these comparison instruments, single-homing consumers will be able to switch away to an alternative platform or distribution channel, i.e. they will make use of their best "outside option," as soon as they discover a supplier offering a better deal elsewhere. By so doing, they can punish the marketplace they decided to sponsor on an exclusive basis and will only eventually come back later in case that original platform restores its competitive advantage in terms of lowest prices available and best quality and range of product varieties offered.

25 Achieving selection and price parity with other distribution channels are important drivers of traffic within a marketplace, which is a key determinant of platform sustainability and attractiveness with respect to other platforms and distribution channels. See Dryden, Khodjamirian & Padilla (2020), *op. cit.*

26 As highlighted in Section 2 of the report by Autorité de la Concurrence and Bundeskartellamt (2016), "Competition Law and Data," in some cases, greater transparency can facilitate entry by new competitors (e.g. other platforms and/or channels) that gain access to more information about consumer needs and market conditions.

27 See Oxera (2015), *op. cit.*, for information on the use of comparison platforms, as well as for estimates on consumers' savings due to the use of those platforms. See also Moraga-González, J.L., & Wildenbeest, M., (2012), "Comparison Sites," in: Martin Peitz & Joel Waldfogel (Eds.): *Handbook of the Digital Economy*, Oxford University Press, pp. 224-253, for a study on the effects of product and price comparison sites on price competition and on market efficiency.

V. CONCLUSION AND POLICY IMPLICATIONS

In this paper, we have revisited a traditional argument in the literature on the economics of multi-sided platforms, according to which single-homing may create important "competitive bottlenecks" in the access to a group of exclusive users that decided to patronize a single platform. The main idea is that a platform may subsidize competition for this scarce and exclusive resource, the single-homing users, at the expense of high access or utilization fees charged to multi-homers on a distinct side of the market.

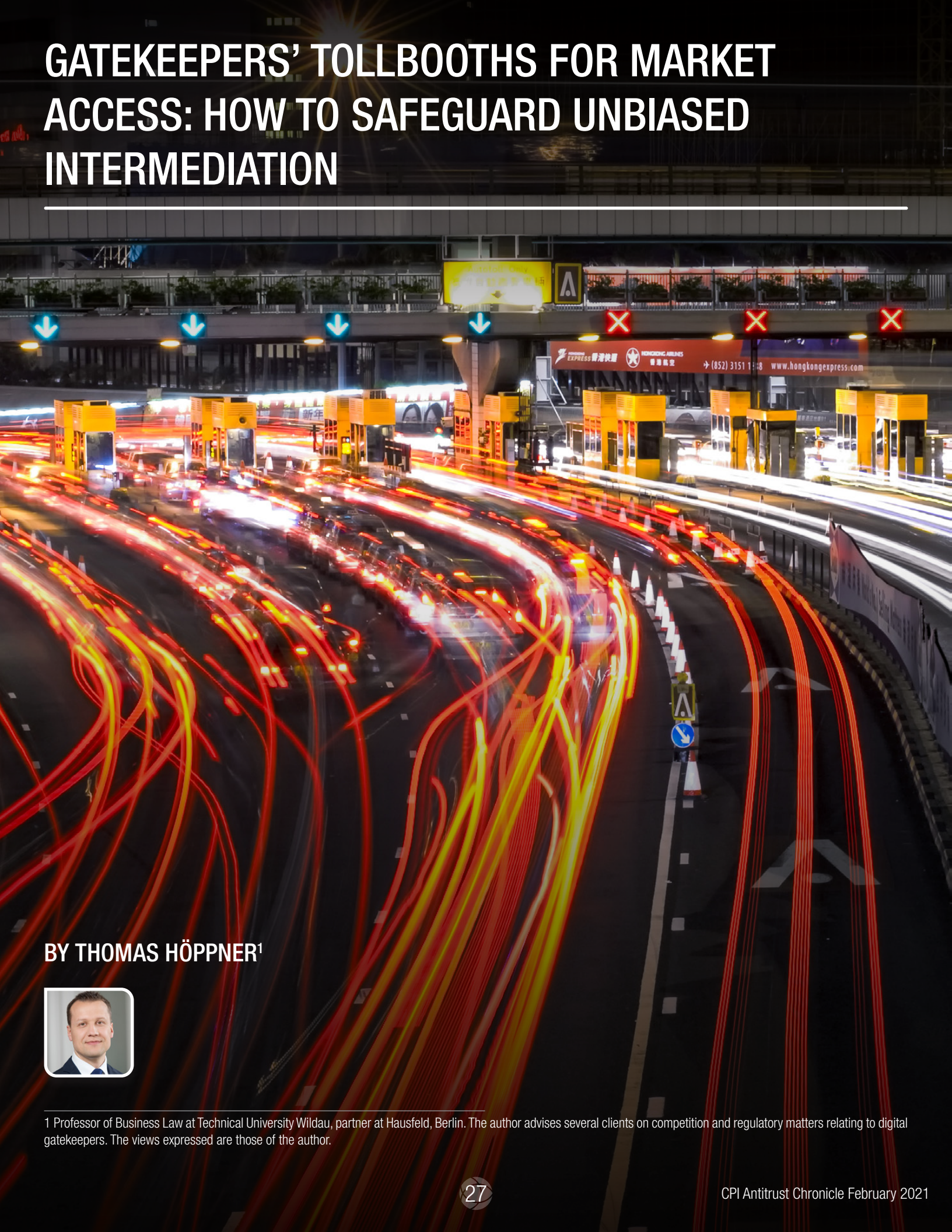
Even though the logic behind the "competitive bottleneck" argument may appear intuitive, and many have been persuaded by it, the likely welfare implications of the existence of single-homing users, for users on either side, are not unambiguous. They may be positive or negative depending on a number of platform-specific and market-specific factors. This then suggests that the only sensible way of assessing the likely competitive effects of single-homing in the context of platform competition is a case-by-case approach that fully captures the heterogeneity of business models used by online platforms and the competitive dynamics involved. Otherwise, competitive assessments or policy rules that ignore the underlying details and specificities of each case are likely to come up with serious errors and misjudgments.

Policy makers, competition agencies and regulators should, therefore, avoid one-size-fits-all solutions of handling the competitive assessment of single-homing in multi-sided platforms. Instead, their (case-by-case) analyses should be based on solid and sound economic principles and, especially, must take into consideration that the competitive, organizational, and contractual environment wherein many well-known hybrid marketplaces operate, severely limits the ability and the willingness of those platforms to exercise market power by exploring their exclusive access to single-homing consumers, if single-homing is, in fact, what consumers decide to do.

In particular, and as demonstrated above, there are many reasons why hybrid platform marketplaces would not be able to extract high fees from third-party sellers and consumers even if a significant proportion of the latter chose to single-home.

In concluding, it should be highlighted that we have relied on a comparison between a scenario (or market environment) with two-sided single-homing with a scenario wherein there is a "competitive bottleneck" (i.e. one side is able to multi-home, while the other single-homes) to conclude that single-homing need not be anticompetitive. A related comparison is then whether the "competitive bottleneck" scenario is less desirable than a scenario with two-sided multi-homing. Whilst this companion comparison is not addressed in this paper, we believe that our conclusions regarding the need for a case-by-case analysis would naturally extend to this other comparison.

GATEKEEPERS' TOLLBOOTHS FOR MARKET ACCESS: HOW TO SAFEGUARD UNBIASED INTERMEDIATION



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I. INTRODUCTION

It is the central function of commercial online intermediaries to best match the offers of their business users with the demand of their end users, as expressed by the latter's search query to the platform.[2]

Where faced with competition, intermediaries strive to enhance the quality and hence the attractiveness of their service by indexing, ranking and displaying ("matching") all available business offers purely on the basis of their genuine relevance to the search query entered by an end user on the platform. However, the situation changes once the respective intermediation market has tipped in favor of a particular platform that thereby emerges as a gatekeeper to the single-homing users of its service. The firmer both user groups (end users and business users) are locked into one intermediary in lack of alternatives that generate similarly strong indirect positive network effects, the stronger the incentive and ability of such gatekeeper to successively exchange a purely relevance-based intermediation with a biased matching that best serves its own commercial interests.

Such biased intermediation can be found where the intermediary systematically presents its own content or services as the most relevant results or where it makes the display and ranking of business users dependent on their payments or the granting of other commercial advantages to the intermediary. As the most prominent example, over the last years "*Google has pushed the organic links further and further down the results page and featured more search advertising results and Google's own vertical or specialised search offerings.*"[3]

This article outlines why such exchange of unbiased with biased intermediation is harmful and how specific regulation should therefore ensure that online intermediaries serving as gatekeepers provide their users with a sufficient level of unbiased, purely relevance-based search results.

II. BACKGROUND: SIGNIFICANT INTERMEDIATION POWER OF UNASSAILABLE GATEKEEPERS

A. Intermediation Power

The Internet is vast. For an end user to find the right website or software application (app) with the relevant content or commercial offering to satisfy its respective needs costs time and effort. To reduce such transaction costs, every end user is dependent on online intermediaries to find his or her way round the depths of the Internet. Conversely, every business wishing to offer any product or service on its website or through an app, depends on being found by end users on the intermediaries that they use (general or specialized search engines, app stores, marketplaces, etc.).

This dependency goes even deeper. Intermediaries have taught end users that the most relevant results appear at the top of a results interface or are particularly highlighted. Due to a "saliency bias"[4] end users are more likely to focus on items or information that are more prominently presented and ignore those that are less so – even if they are in fact more relevant to their query. Their primary intention is to find (some) relevant content as quickly as possible. For this purpose, end users often blindly trust the algorithmic judgments of the intermediary they are accustomed to and click on pre-installed choices or the results at the top.[5] The majority of users are not (and have no time to be) concerned about the precise mechanisms underlying the results suggested by their chosen intermediary. They click on the most prominent top results even if those are labelled as "advertisement" or any other bias is revealed in accompanying information on the platform. For example, "*[v]arious studies over the last 16 years have shown that users are often unaware of or unable to distinguish Google's paid ads from natural search results.*"[6] One study found that even in 2018, two centuries after the introduction of paid search, over 59 percent of end users were not aware of the difference between natural ("organic") results and paid ads on Google, and only 34 percent of those who did recognize paid ads said they would deliberately

2 Unless stated differently, the terminology in this article is based upon the definitions used in EU Commission's Proposal for a regulation on contestable and fair markets in the digital sector (Digital Markets Act, (the "DMA")). Contrary to its Article 2 (6), the term "intermediary" shall also include online search engines of any type.

3 *USA et al. v. Google LLC*, Complaint of October 20, 2020, District Court for the District of Columbia, Case 1:20-cv-03010, para. 170.

4 Cf. Pedro Bordalo, Nicola Gennaioli, & Andrei Shleifer "Salience theory of choice under risk" (2012) The Quarterly Journal of Economics 127(3), p. 1243-1285.

5 European Commission, Case AT.39740, 27/06/2017, *Google Search (Shopping)*, Section 7.2.3.1.; Case AT.40099, 18/07/2018 – *Google Android*, Section 11.3.4.1. II.; Bing Pan et al. "In Google we trust: Users' decisions on rank, position, and relevance" (2007) Journal of Computer-Mediated Communication, p. 12.

6 Richard Falconer "Google: Blurring the line between 'natural' and paid search results," Sept. 19, 2019, https://weareyard.com/blog/google-blurring-the-line-between-natural-and-paid-search-results, with references to 8 studies.

avoid clicking on them.[7]

Conversely, this saliency bias means that every business user wishing to get access to an intermediary's end users, is not just dependent on being found *somewhere* on that platform but on being found in those attractive formats on the results interface that attract most end user attention. If a business user is not to be found there, it will lose out *vis-á-vis* its direct rivals that do appear in those top positions. Hence, intermediaries can determine the winners and losers on the markets for the intermediated business users. This renders the matching by intermediaries the central battle grounds for competition online. In turn, the power to determine who wins these battles enables intermediaries to play-off business users against each other to extract maximum benefits from them.

B. Gatekeepers' Significant Intermediation Power Over Single-homing End Users

From a policy perspective, the power of intermediaries to determine market outcomes is less of an issue where there is strong competition amongst intermediaries and end users engage with several platforms, i.e. multi-home. In general, the success of multi-sided intermediaries with inherently strong indirect network effects depends on the quality of the matching of their user groups. The better the matching, the more attractive the intermediary becomes for both end users and business users. Therefore, in a competitive environment, intermediaries have an economic interest to fully focus on providing the most relevant intermediation service possible by unbiasedly identifying and displaying the most relevant content for the respective end user needs at the lowest transaction costs for all user groups. Particularly if the intermediation service is provided for free, end users will turn to the platform with the expected highest intermediation quality, which in turn depends on the size of the platform's content base and its matching abilities. If consumers find a platform's intermediation quality to be inferior due to any biases, they may switch to alternative platforms (if such exist). Thus, in a competitive environment intermediaries' commercial interests are generally in line with the interests of the intermediated user groups and competition concerns are limited.[8]

Matters change dramatically, however, once an intermediary gained significant intermediation power because at least one user group became dependent on it. The larger the number of users on each platform side, the less relevant the individual user becomes for the platform. Intermediaries require sufficient content from business users to cater for the various requests of end users (product offers, price information, images, reviews etc.). But once an intermediary has amassed a sufficient minimum portfolio of content, it typically no longer requires any particular content from any particular business user to satisfy the end user's demand. That is because, most end users turning to intermediaries do not know which content (such as offers) is available and would best fit their respective demand. While they expect that an intermediary makes some relevant content available to them, they cannot assess whether the suggested list of results indeed contains the most relevant sources. Thus, where an intermediary has a sufficient portfolio of content, it does no longer depend on having a particular businesses user "on board." There is no mutual dependency. This in turn drastically shifts the bargaining power to the advantage of the intermediary: The more single-homing end users an intermediary has bundled, the more business users have to make their content available to the platform to reach its unique user base but the less dependent the intermediary becomes on individual business users. Since it is in the full discretion of the intermediary whether and on which conditions it enables business users to reach the intermediary's accumulated end user base, it is the intermediary that pulls all the strings.

As a result, with the growth of an intermediary, its bargaining power towards business users increases while the business users' flexibility to leave the platform diminishes. They become increasingly dependent, up to the point that the platform is an unavoidable trading partner. At this point, the intermediary serves as a "gatekeeper" by controlling the access to and the business decisions of a unique user group (its single-homing end users). As a consequence, the more established an intermediary becomes and the less competition it is facing, the stronger its incentives and ability to use its intermediation power to maximize rent from its user groups, resulting in a stronger need for regulation.

7 Mark Jones "Two-thirds of people don't know the difference between Google paid and organic search results, Marketing Tech News" Sept. 6, 2018, https://marketingtechnews.net/news/2018/sep/06/two-thirds-people-dont-know-difference-between-google-paid-and-organic-search-results/.

8 End users should still be protected against misleading or bias results. However, where genuine alternatives exist, transparency obligations to reveal any bias or conflicts of interest for intermediaries will suffice.

III. GATEKEEPERS' EXCHANGE OF UNBIASED WITH BIASED RESULTS AS EMANATION OF INTERMEDIATION POWER

A. Need for a Holistic View on Gatekeepers' Significant Intermediation Power

There are several ways in which a platform acting as a gatekeeper may exploit its significant intermediation power.

The most prominent and broadly discussed option is "self-preferencing," where a vertically integrated intermediary promotes its own downstream service *vis-á-vis* competing business users when matching their offers to the demand of end users.

A gatekeeper may also exploit its intermediation power by making the matching of a business user dependent on this user granting additional commercial advantages. For example, gatekeepers have made the ranking of business users dependent on them using ancillary services,[9] refraining from granting better prices and conditions on other platforms,[10] providing additional data to the platform[11] or granting free licenses for the use of their content[12] that were neither required nor proportionate for the actual intermediation service at stake but benefitted the gatekeeper elsewhere.

As an even more obvious option, gatekeepers may exploit an entrenched intermediation power by making the outcome of their matching increasingly dependent on the amount of money that the business user is paying the platform for the intermediation, rather than on objective relevance criteria. This is the case, where instead of selecting, ranking and displaying all business users on the basis of their genuine relevance, a gatekeeper starts to take into account how much a respective business user is willing to pay the intermediary for any matching or where the intermediary increases the relevance of such payment factor *vis-á-vis* other matching factors. For example, a general search engine may successively exchange "organic" search results with "paid" results. An app store may present apps more prominently dependent on their bids to be displayed or the revenue share they are willing to grant and an online marketplace may rank equivalent offers in the order of the commission that the merchant has agreed to pay for any concluded transaction.

All of the above cases have in common, that the gatekeeper replaces its purely relevance-based (unbiased) intermediation service for a (biased) intermediation service, considering factors that are unrelated to the actual relevance of the intermediated business offers and hence (should be) irrelevant for the crucial matching that the intermediation service provides.

Over the years, competition authorities[13] and legislators[14] have opined that a gatekeeper must not take its own affiliation with downstream businesses into consideration, i.e. that is shall not favor own services. There is also a growing understanding that gatekeepers must not make their matching depending on the granting of unrelated advantages such as the provision of data or free licenses for content.[15] However, thus far, little attention has been paid to the third emanation of intermediation power: the direct exchange of a purely relevance-based intermediation service with a payment-based intermediation.

The case of Google may best exemplify the need for a more holistic regulatory approach.

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9 *Cf.* Italian Competition Authority, A 528, *Amazon*: investigation launched on possible abuse of a dominant position in online marketplaces and logistic services, Press release of Apr. 16, 2019, see also https://www.thelocal.it/20190417/amazon-italy-antitrust-investigation.

10 See Bloomberg "Hotel site accuses Booking, Expedia of EU antitrust breaches" Jun. 11, 2019 https://www.bloomberg.com/news/articles/2019-06-11/hotel-site-accuses-booking-expedia-of-breaking-eu-antitrust-law; in detail Daniel Mandrescu "The return of the MFN clauses – platform ranking as an enforcement mechanism for price parity" Jun. 29, 2019, https://www.lexxion.eu/coreblogpost/the-return-of-the-mfn-clauses-platform-ranking-as-an-enforcement-mechanism-for-price-parity/.

11 *Cf.* Natasha Lomas, "Travel startups cry foul over what Google's doing with their data," Aug. 14 2020, https://techcrunch.com/2020/08/14/travel-startups-cry-foul-over-what-googles-doing-with-their-data/.

12 French Competition Authority, Case 20-MC-01, Apr. 09 2020, *SEPM and APIG v. Google*, paras 234, 237; *Almunia*, SPEECH/13/1042, Dec. 19 2013, "*Google creates a link between getting the right to use material from other sites on its specialised search services and the appearance that these sites have on Google's general search results – a practice that allows Google to benefit from investments made by other firms. I have asked Google to sever this link to restore competitive incentives.*"

13 European Commission, *Google Search (Shopping)* (n. 5); Competition Commission of India, Case Nos. 07 and 30 of 2012, 08/02/2018, Section 195.; Turkish Competition Authority, Case 20-10/119-69, Feb. 13 2020; *USA et al. v. Google LLC*, Complaint of October 20, 2020 (n. 3); *Colorado et al. v. Google LLC*, Complaint of December 17, 2020, District Court for the District of Columbia (to be consolidated with Case 1:20-cv-03010), para. 29, 168, 190 et seqq.

14 See Art. 6 para. 1 lit. (d) DMA-Proposal (n. 2); U.S. House of Representatives Subcommittee on Antitrust, Commercial and Administrative Law "Investigation of Competition in Digital Markets" (2020), Section VI.A.2.

15 See footnote 12 above; § 19a para. 2 lit. 7 of German Competition Act as of Jan 15, 2020.

B. The Example of Google Search

Launched in 1998, Google has become the world's most popular general search engine. Its success stems from the high quality of its "organic" search results which are ranked on the basis of unbiased criteria for the relevance of a web page, in particular its "PageRank."[16] Google praised itself for neither showing own content nor accepting any payments to influence its search results.[17]

In 2000, Google launched AdWords, which allowed website operators to pay for keyword-based ads. First, only some ads appeared to the right of Google's organic search results. However, since 2004, the year in which the market "tipped" towards Google, the search engine has significantly changed the design of its results pages in several ways, most notably by (1) increasing the number and the size of ads placed *above* organic search results, (2) blurring the distinction between how ads and organic listings are presented and (3) placing own content between ads at the top and organic results at the bottom.[18]

As a result of Google reducing the space (real estate) devoted to organic listings, in case of queries with a commercial intent, users now hardly find any organic search result on a standard results page and (are made to) click more on ads or Google's own offerings, even though such results are less relevant to their query. The trend is especially pronounced on mobile devices, which make up more than half of all searches now. For queries that suggest a commercial intent, the first organic listing on mobile devices now often only appears on the bottom of the third search results screen.[19] The rate of clicks on such results "*fell by more than 30% between January 2016 and June 2019, while paid click-through rates over the same period of time more than tripled*"[20]. That is despite an estimated average price increase for search ads of about 5 percent year-on-year in the U.S., and even more in countries with higher market shares.[21]

Despite all criticism, to further increase the share of clicks on paid search results, in late 2020 Google started testing larger gaps (white space) between search results[22] as well as taller shopping ads[23] – in order to effectively push organic results further out of end users' sight.

Even when end users clearly indicate to which website they wish to be navigated to by entering the trademark of particular businesses (e.g. "tripadvisor"), Google will only present the organic link to this site below any paid search results that third-party websites may purchase for such navigational keywords (e.g. ads for competing travel sites). As affected companies have reported, this effectively means that businesses are extorted "*to pay for the privilege that consumers who search for our trademark brand name can find us because if we don't they will sell our brand name as misdirection to our competitors.*"[24]

All of this contrasts with Google's own policies. Google has a dedicated algorithm that looks at the layout of a website and demotes those that "load the top with ads" or "make it hard to find the actual original content on the page"[25]. According to a Google blog post of 2012, "*[i]f you click on a website and the part of the website you see first either doesn't have a lot of visible content above-the-fold or dedicates a large fraction of the site's initial screen real estate to ads, that's not a very good user experience. Such sites may not rank as highly going forward.*"[26] Similarly, while generally business users can buy ads for trademarks of their competitors, this is not possible for Google brands.[27]

16 *Cf.* Google Search Central Blog, "Evaluating page experience for a better web," May 28, 2020, https://developers.google.com/search/blog/2020/05/evaluating-page-experience.

17 *Cf.* Larry Page, "*Most portals show their own content above content elsewhere on the web. We feel that's a conflict of interest, analogous to taking money for search results. Their search engine doesn't necessarily provide the best results; it provides the portal's results. Google conscientiously tries to stay away from that. We want to get you out of Google and to the right place as fast as possible. It's a very different model.*" Google Founders' Interview with the Playboy Magazine ("The Google Guys"), Sept. 2004, https://www.sec.gov/Archives/edgar/data/1288776/000119312504139655/ds1a.htm#toc59330_25b.

18 US House of Representatives Subcommittee on Antitrust, Commercial and Administrative Law "Investigation of Competition in Digital Markets" (2020) p. 194-195.

19 *Id.* p. 197.

20 *Id.* p. 201.

21 *Id.* p. 196 (footnote 1186).

22 To this end, Google increased the front-size of headings of search results from 18 pixels in 2018, 20 pixels in 2019 to now 22 pixels.

23 Barry Schwartz, Google Search Testing Taller Shopping Ads, SearchEngineRoundetable, Dec. 10, 2020, https://www.seroundtable.com/google-taller-shopping-ads-30576.html.

24 Statement of David Hansson, Cofounder & Chief Tech. Officer, Basecamp in U.S. House of Representatives Subcommittee, (n. 18), p. 202.

25 Google Inside Search, Page layout algorithm improvement, Jan. 19, 2012, https://search.googleblog.com/2012/01/page-layout-algorithm-improvement.html.

26 *Id.*

27 *Cf.* Hansson, (n. 24).

IV. THE CASE FOR ENSURING A SUFFICIENT LEVEL OF UNBIASED INTERMEDIATION

The following arguments are calling for a regulatory limitation of such practices by digital gatekeepers.

A. Prisoners' Dilemma and Barriers to Entry for Business Users

Exchanging a relevance-based intermediation with a biased (paid) intermediation effectively forces business users to pay the intermediary an ever-increasing price for the ability to reach end users even though these end users only turned to the intermediary to access the business users' content.

Where payments to the intermediary influence the ranking, business users have no other option than to take part in the bidding and to increase their bids in accordance with any increased competition from other bidders in order to remain findable online. That becomes necessary even for those business users that are indeed offering the most relevant content for the respective queries of the end users. Instead of competing for users by offering high-quality services that should lead to better organic listings, these businesses must now compete for users based upon how much money they pay the gatekeeper.[28] "*This raises their costs, reduces their competitiveness, and limits their incentive and ability to invest in innovations that could be attractive to users.*"[29]

An analysis of the economic literature on the welfare effects of sponsored ranking confirms this: "*[B]oth the theoretical and the empirical literature have highlighted that the platform may be able to expropriate a significant part of the content providers' gross surplus through a sponsored ranking. Generally, the more it pays to be prominent, the more likely the platform is able to expropriate the content providers' surplus, and thus the more likely that it is ultimately the platform that gains the most. In reverse, content providers may end up playing a prisoners' dilemma where no one can commit not to bid for a top position in the sponsored ranking, but ultimately all content providers are worse off by doing so.*"[30]

B. Lower Quality, Higher Prices and Less Innovation for End Users

End users turn to intermediaries to find the most relevant content as quickly as possible. As Google explained elsewhere, if "*it's difficult to find the actual content, [users] aren't happy with the experience. Rather than scrolling down the page past a slew of ads, users want to see content right away.*"[31] Accordingly, exchanging unbiased intermediation results – the content that end users are using an intermediary for – with paid results (ads) reduces the user experience and degrades the quality of a service. It is apparent, for instance, that if a consumer searches for a particular business by entering its trademark brand and the intermediary instead shows paid results of rivals that bid on this trademark term, the consumer is not finding what it is looking for but is effectively misled.

In addition, (excessive) paid intermediation by gatekeepers increases overall prices for the products of business users. If platforms base their ranking (also) on the listing fees they can attain from content providers, ultimately those business users that can best monetize a click or download will be able to bid the highest price and therefore appear at the top. Those businesses, however, are not necessarily the ones that competition policy should promote because typically the ability to monetize a click stems from the highest profit margin due to the highest prices. Moreover, a sponsored ranking always favors the companies with the "deepest pockets," which are typically incumbent dominant firms.

Economists therefore found that "*[a]ll prices tend to be higher than in the absence of a sponsored ranking and consumers' surplus is lower than in the case without sponsored ranking, if [the platform] is able to expropriate the benefits of prominence from the content providers.*"[32] Conversely, an organic ranking provides a business user with the highest incentives to invest in quality, precisely because it will compete for the top-ranking position only in terms of quality.[33]

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28 U.S. House of Representatives Subcommittee, (n. 18), p. 201.

29 *USA et al. v. Google LLC*, Complaint of October 20, 2020, (n. 3), para. 170.

30 Jan Krämer & Daniel Schnurr "Is there a need for platform neutrality regulation in the EU?" (2018) Telecommunications Policy 42, p. 514, 525.

31 Google Inside Search, (n. 25).

32 Jan Krämer & Daniel Schnurr, (n. 30), summarising the findings of Mark Armstrong, Jidong Zhou "Paying from prominence" (2011) The Economic Journal, 121(556), F368-F395; Jidong Zhou "Ordered search in differentiated markets, International Journal of Industrial Organisation" (2011) 29(2), 243-362.

33 Compare Jan Krämer & Oliver Zierke "Paying for prominence: The effect of sponsored rankings on the incentives to invest in the quality of free content on dominant online platforms" (2020) https://ssrn.com/abstract=3584371 "*Intuitively one would expect that an organic ranking provides content providers with the highest incentives to invest in quality. […] Indeed, this is what we denote as the competition effect, and we can show that it becomes stronger the more similar content providers are with respect to their ability to produce quality content.*"

C. Higher Transaction Costs for all User Groups

Exchanging relevance-based intermediation with biased intermediation increases transaction costs for all user groups.

In general, intermediation services reduce decision complexity for end users by matching their expressed demand with the most relevant offerings. This reduces transaction costs and increase the average quality of a business user's offerings that an end user accesses.[34]

However, the more an intermediation process becomes influenced by biased, paid-for intermediation, the less relevant the results will be and the more time the end user will need to invest in strategies to avoid or even game the techniques used to manipulate the user through biased results. For instance, the end user will spend time hiding his or her personal data (for targeted ad results) or check price recommendations several times a day or via separate devices, in order to ensure that he or she is not falling victim to biased results.[35] This creates unnecessary expenditures and hence externalities.

D. Dominance-related Inability of User Groups to Escape Exploitation

Some have argued that excessive advertising or paid intermediation more generally may drive end users to switch to other platforms, which would solve the policy concerns.

However, while we can rely on such switching where genuine competition between intermediaries exists, no such self-healing can be relied upon where the market has irreversibly "tipped" and a gatekeeper emerged.

End users do not turn to intermediaries for advertising or paid results. They turn to the platform from which they expect the highest weighted content quality and price on average. One could assume that a rational end user that becomes aware of a high share of bias paid-for rankings start to consider alternatives. In particular if paid results are based upon an auction, a rational end user may be afraid that it is subjected to a "double marginalization," where both, the business user and the intermediary seek to maximize revenues from the user's attention. Accordingly, to prevent users from switching, in a competitive and transparent environment, every intermediary would have an incentive to ensure a sufficient degree of purely relevance-based intermediation.

However, to rely on a self-regulation of the market due to end users' ability to switch the platform in case of bias intermediation is no longer justified once the market has tipped towards one intermediary. The more acquainted consumers got with a particular intermediary, the higher their *status-quo* bias to stay with this platform even if the quality degrades. Accordingly, if end users are faced with a poor quality of the intermediation results of their incumbent platform, they tend to invest into a more comprehensive analysis of the results available on that platform, e.g. by looking at more results or fine-tuning their query, before considering any switch to an alternative intermediary. For a switch, the expected performance of the alternative platform would have to be so much better in terms of relevance that it clearly outweighs the disadvantages of the incumbent's biased results. This, however, can be a very high hurdle as the incumbent typically enjoys significant quality advantages from data-driven positive network effects. Moreover, the incumbent will be able to test at which precise share of biased intermediation end users typically commence switching. This allows the gatekeeper to fine-tune and adjust the balance between bias and unbiased intermediation to prevent any relevant switching.

E. Gatekeepers' Degenerated "Advertising" Models as Unjustified Private Internet Tolls

In traditional media such as newspapers, television or radio, advertising serves a justifiable purpose. Ads make consumers aware of new products and businesses and may create a new demand. To potentially trigger a commercial interest of the consumer creates the value of the ads in such media.

The situation is quite different for ads that are used to form sponsored rankings of an intermediary's business users. In such cases, the ads are displayed in return for an already existing commercial interest and consumer demand: Where an end user turns to an intermediary and enters a commercially relevant keyword for a particular product or business that triggers paid results, such consumer is already determined to purchase such product or to visit the respective business. Hence, the ads in the sponsored ranking that the intermediary displays no longer contribute any added value in creating a new demand or in delivering the end user to the advertiser. The end user was already intending to turn

34 *Id.* p. 9.

35 Compare Ryan Calo "Digital Market Manipulation" (2014) 82 George Washington Law Review, p. 995, 1027.

to such "advertiser" and to buy the respective product before he or she even saw the sponsored result/ad. Hence, sponsored rankings do not fulfil the traditional purpose and justification of advertising to generate an additional interest or demand.

Instead, ads used to create sponsored rankings now effectively serve as a fee to access the intermediary's end user base, a private "toll" for market access. The firm intention of the end user to purchase something is monetized, not by the supplier that the end user wishes to reach, but by the intermediary that is interposed between the end user and the supplier. Somewhat shockingly, the currently dominating auction model for paid results means that the more determined and the more likely a consumer is to purchase something when turning to the intermediary, the higher the "toll" that the intermediary will charge the suppliers that the consumer will ultimately turn to. That is because the stronger the commercial intent that the entered keyword suggests, the higher the average price that a business needs to bid to be considered as a top paid search result. In the most extreme case of paid results in return of navigational search queries for a particular business or one of its products, that business may have to outbid all its rivals (that bid on its trademark terms) to appear at the top, even though the end user was searching specifically and only for that business and the intermediary's lists of paid search results does not provide a new "match" but only causes confusion.

By forcing businesses to increase bids in order to remain findable for end users, gatekeepers' intermediation power allows them to extract a toll from virtually every business that hopes to participate in digital markets.[36] As seen in the example of navigational queries, this is the case even where the intermediary does not add any value in terms of matching offer and demand.

Such Internet toll from business users is not justified. First and foremost, considering that end users are interested in the offerings of businesses (rather than their ads or any intermediation), it is the online business users that have attracted consumers to the Internet and there to the intermediaries in the first place. If it was not for high quality offerings of business users, there would be no business case for commercial intermediaries. More generally, the largest share of the costs for setting up the infrastructure enabling high-speed Internet services was borne by states or telecoms providers. In Germany alone, during 2014 and 2023 with the support of the state, telecoms providers committed to invest € 100 billion into glass fiber networks to bring broadband services to rural areas. Considering the previous investments into the infrastructure, by now a high three-digit billion figure will have been invested in the Internet architecture in Germany alone. However, while the costs for enabling Internet access are primarily borne by taxpayers or telecoms firms, the toll for using the Internet is now imposed by digital gatekeepers using sponsored rankings to artificially block consumers off business users.

V. HOW A SUFFICIENT LEVEL OF UNBIASED INTERMEDIATION COULD BE ENSURED

A. Alternative Approaches

All of the above shows that an excessive exchange of unbiased with biased results is ultimately an issue of intermediation power as a sub-category of market power. The issue therefore needs to be addressed by asymmetric gatekeeper regulation rather than horizontally applied obligations for all intermediaries.

There is no need to outright prohibit any form of advertising or paid intermediation for gatekeepers. Neither is there a need to regulate their prices for such intermediation. In general, auction mechanisms are a competitive tool to determine an adequate price. The issue is not how the prices for paid results are determined. The concerns arise from the replacement of relevance-based intermediation with biased intermediation which undermines competition, misleads consumers and degrades the overall quality of central intermediation services.

To secure a sufficient level of unbiased intermediation by digital gatekeepers could be approached in several ways. One approach would be a universal-service type obligation to secure a sufficient level of purely relevance-based intermediation. Since the Internet can be seen as a service of general interest, i.e. a service that a consumer requires on a daily basis, the provision of Internet access is covered by the universal service obligation of telecoms providers.[37] Internet access is of limited use, however, if consumers cannot find their way around it. Gatekeepers therefore often praise themselves for securing the functionality of the Internet.[38] It could therefore be acknowledged that an unhindered access

36 Cf. Fiona Morton & David Dinielli "Roadmap for a Digital Advertising Monopolization Case Against Google" (2020), p. 30 regarding Google. The situation is similar for app stores and marketplaces.

37 Art. 4 para. 2, recital 8 of Directive 2002/22/EC of the European Parliament and of the Council of March 7, 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive).

38 *Cf.* German Federal Supreme Court, judgement of September 17, 2017, I-ZR 11/16 – *Vorschaubilder III „In the interest of the information society, [search engines] ensure the functioning of the Internet. Without recourse to search services, a meaningful use of the unmanageable scope of information on the Internet would practically be precluded.*" (unofficial translated from German original).

to intermediation services that are indispensable to find, visit and use relevant Internet services is also of general interest. Accordingly, central Internet intermediaries could be obliged to secure the sufficient access of end users to purely relevance-based intermediation services.

An alternative approach would be to reflect the limitations that exist(ed) for traditional media as regards the amount of advertisement that they may serve as compared to the content they present.

Overall, the following obligations could be imposed on intermediaries acting as gatekeepers:

B. Cap on Capacity for Biased Results

It could be regulated that the space for paid-for results or results from the gatekeeper's own services on an average intermediation results interface shall not exceed a maximum cap of (for instance) 25 percent of the visible space in comparison to the remaining, unpaid (purely relevance-based) "organic" results (for example, generic search results on Google, third-party products on Amazon, third-party apps on Apple's or Google Android's app store).

Limiting maximum ad space would not necessarily reduce intermediaries' ad revenues because the limitation of ad "capacity" would go hand-in-hand with increased auction prices for the remaining ads. On the upside, it will, however, leave more space for a purely relevance-based intermediation, for consumers to "meet" the most relevant business users.

C. No Favoring of Biased Results

It could be regulated that relevance-based ("organic") results must not be displayed less favorably than sponsored/paid-for results on the regulated intermediation interfaces. This would ensure that a gatekeeper may not force businesses to buy ads by making them visually more attractive than purely relevance-based results.

D. No "De-commercialization" of Organic Results

It could be regulated that for commercial queries a gatekeeper shall not reduce the quality/relevance of (free) organic results *vis-á-vis* biased (paid) results by demoting commercial offerings in organic results in favor of non-commercial offerings (such as Wikipedia articles, product descriptions or news articles).

E. No Paid Results in Case of Navigational Search Queries for Trademarked Brands

Where an end user has clearly indicated his or her intent to find or access a particular business, a digital gatekeeper, in particular search engines, should be obliged to display (at least) a free link to this business above any paid results. Alternatively, the gatekeeper could be prohibited from allowing companies to bid on keywords that include the trademark terms of competitors with a view to displaying ads above the organic results for such competitors.

VI. CONCLUSIONS

The significant intermediation power of commercial gatekeeper platforms can be exploited in various ways. One emanation is to excessively exchange unbiased with biased intermediation with a view to maximizing profits from the matching of end users and business users. Where following the tipping of a market, the intermediated user groups have no option to escape any such manipulation by switching to alternative intermediaries, regulation needs to step in to ensure a sufficient level of unbiased intermediation.

ONLINE GATEKEEPERS TO COMMERCE AND CULTURE

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I. INTRODUCTION

In the 1990s, the typical path to the Internet was a subscription to America Online ("AOL") using a dial up modem on a Microsoft Windows computer. AOL was, at the time, the dominant online presence and offered what was commonly referred to as a "walled garden" — providing email (who can forget the notification "You Got Mail"), messaging, and website access for an hourly and, later, monthly fee.[2] A walled garden is an online ecosystem where the provider exerts considerable control over the content including restricting access to non-approved content.[3] The emergence of broadband internet access (such as, DSL and cable modems) and standalone web browsers, such as Netscape, began to change that paradigm, as users were no longer as reliant on AOL's portal and proprietary content. They increasingly used bookmarks and search engines to directly navigate to content outside of AOL's protective walls.[4]

Recognizing that this development threatened not only to circumvent online portals but also potentially to "commoditize" desktop operating systems, Microsoft imposed a series of practices aimed at limiting the distribution and access to Netscape on computers running Windows ("PCs").[5] The end result was a seminal antitrust case condemning Microsoft's conduct as illegally maintaining a monopoly.[6] Perhaps in an appropriate bookend to the 1990s, AOL acquired Netscape in 1999. The 1990s represented the dawn of the digital era and still informs our approach to online platforms and "gatekeepers" today.[7]

Recently, the term "gatekeeper" and variants such as "gateway" and "bottleneck" have made a major comeback in policy discussions concerning successful digital platforms and, in particular, whether "big tech" needs to be regulated and whether antitrust laws need to be reformed to better protect consumers from their market power.[8] Indicative of this resurgence, in the Department of Justice's (DOJ's) complaint against Google, the DOJ simply declares: "Google of today is a monopoly gatekeeper for the internet."[9] Given this declaration by a federal antitrust agency, the time has come to better understand the label "gatekeeper" and its intersection with antitrust law.

Is Google, as the DOJ asserted, a monopoly gatekeeper to access content on the internet? If so, what role do Amazon, Apple, and Facebook play? Are they monopoly gatekeepers over specific areas of the internet or are they collectively oligopoly gatekeepers over the entirety of the internet? Are the following proclamations true: "Apple controls our phones;" "Facebook controls our access to people;" "Google controls our access to information;" and "Amazon controls our access to goods and many software services"?[10]

Importantly, determining whether an online service is a "gatekeeper" depends on a precise definition and a factual inquiry as to whether an online service meets the criteria established. What should be avoided are *ex post* declarations that a service is a gatekeeper based on, for

2 See, e.g. *Paul S. Maxwell, From Aol to Apps: The Return of the "Walled Garden*," MediaVillage.com, Oct. 20, 2015, https://www.mediavillage.com/article/from-aol-to-apps-the-return-of-the-walled-garden.

3 See e.g. PC Mag Encyclopedia, *walled garden*, PCMag.com, https://www.pcmag.com/encyclopedia/term/walled-garden ("A network or service that either restricts or makes it difficult for users to obtain applications or content from external sources. Cable TV and satellite TV are walled gardens, offering a finite number of channels and programs to their subscribers. When AOL was king of the Internet providers, it did an excellent job of keeping users on AOL-affiliated sites.").

4 See e.g. Wall Street Journal Opinion, *AOL's 'Walled Garden*,' Wall Street J., Sept. 4, 2000, https://www.wsj.com/articles/SB968104011203980910 ("...people began to hear rumors of the wider Internet vistas to be found outside the garden and they wanted a look. Of course, AOL, Prodigy and CompuServe thought their gardens were quite nice, and were reluctant to let their customers out. But consumers knew what they wanted, and when they didn't get it, they didn't stay, or they stopped coming.").

5 See e.g. W. Joseph Campbell, *The '90s Startup That Terrified Microsoft and Got Americans to Go Online*, Wired, Jan. 27, 2015, https://www.wired.com/2015/01/90s-startup-terrified-microsoft-got-americans-go-online.

6 The case involved, *inter alia*, Microsoft preferencing its Internet Explorer web browser (over Netscape) on PCs through various restrictive practices and settings. See *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001).

7 For instance, the recent U.S. Department of Justice (DOJ) complaint against Google's agreements to distribute Google Search explicitly cites the *Microsoft* precedent as support for their allegation that Google violated U.S. antitrust laws. *See* United States v. Google, Complaint, Oct. 20, 2020, https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws.

8 These terms are used frequently in several influential antitrust studies and reports. *See*, e.g. Investigation of Competition in Digital Markets, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary ("House Report"), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf; Dig. Competition Expert Panel, Unlocking Digital Competition (UK), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf; Stigler Comm. on Dig. Platforms, Stigler Ctr., Final Report (2019) ("Stigler Report"), https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf.

9 DOJ Complaint, *supra* note 7, at 3.

10 Scott Rosenberg, *The Squabble between Apple, Facebook, and Google Shows How the 3 Have Become Gatekeepers with Enormous Power*, Business Insider, Feb. 1, 2019, https://www.businessinsider.com/tech-giants-apple-google-and-facebook-are-the-new-gatekeepers-2019-2.

instance, a regulatory objective.[11] An *ex post* approach leaves no room for objective debate whether a service is actually a gatekeeper — given that the term is widely used in policy discussions.

Consequently, this Article begins by asking: what exactly is an online gatekeeper? Within that discussion, it also asks whether the term is useful within antitrust. Next, it discusses some general guidelines that should be considered when determining whether an online service qualifies as a gatekeeper. Put succinctly, determining who is a gatekeeper should be, like all antitrust inquiries, a fact-based one — after establishing objective criteria. Finally, it discusses potential concerns with gatekeepers that go beyond the standard litany of antitrust theories of harm — namely, information asymmetries and representations made to users and businesses. These concerns encompass more than just gatekeepers, however, and include all online services that make representations about how the service will be governed and potential deviations from those representations.

II. DEFINING ONLINE GATEKEEPERS

At a foundational level, gatekeepers must control access to *something*. Further, in order to be relevant for public policy, a gatekeeper must control access to something of significant value. For instance, when Apple introduced the App Store in 2008, the store became the exclusive pathway to iOS users for app developers. The online store remains the only pathway to iOS users today and is at the center of the dispute between Epic Games and Apple.[12] Does this qualify Apple as an online gatekeeper?

When discussing online gatekeepers, are we simply rebranding multi-sided platforms?[13] To address this question, let us suppose that Apple was not a multi-sided platform. Specifically, suppose that Apple only allowed proprietary apps for its iOS and those apps were distributed through its proprietary App Store. Would we still consider Apple a gatekeeper? With complete vertical integration, we probably would not consider Apple to be a gatekeeper because there is no "gate" at all — *everything* is excluded. Similarly, suppose that Amazon only sold Amazon-made and branded items? Would we consider Amazon a gateway? Again, probably not. Given a platform's central role is to bring together two or more groups, being a gatekeeper seems integral to what a platform is. Yet, is being a platform integral to what a gatekeeper is?

Consider Walmart, book publishers, and Netflix. These are not platforms. Instead, all three are, in a sense, intermediaries. Walmart aggregates products from various manufacturers, while also mixing in private label products. Book publishers and Netflix aggregate the works of various authors and visual creators, respectively. After this selection and aggregation process, ultimately, all three distribute and sell a set of products to consumers. While they are not strictly platforms, their role as intermediaries controlling what is allowed in and what stays out sounds a lot like the role played by a gatekeeper.

Where does this leave us? To summarize, first, a gatekeeper must control access to something of significant value. Yet, access is two-sided. When we are in their "castle," gatekeepers control access to consumers (from the perspective of producers), but they also control access to various producers (from the perspective of consumers). This leads to the second element. A gatekeeper is an "intermediary" of some type, whether as a platform or an aggregator of products generated by other sellers or agents. Consequently, a gatekeeper controls what comes in (from sellers) and what goes out (to consumers). If everything is produced "in house," that is, if the firm is entirely vertically integrated, then there is no sense of controlling what is coming in from third parties. Thus, this second element is about dependency on the intermediary from a group other than consumers.

Finally, the third element is that a gatekeeper has substantial market power; otherwise, there is nothing to distinguish an ordinary intermediary from a gatekeeper. Additionally, with no significant market power in the hands of any one intermediary, there is no legitimate rationale for antitrust attention — absent collusion among competing intermediaries. Another way of stating this element is that a gatekeeper must control access to something of significant value and that the access it provides does not have close substitutes. For instance, is Yelp a gateway for local businesses? Yelp certainly controls access to something of value and is a multi-sided market. Yet, does Yelp have substantial market power? It might — particularly for certain business searches — but this determination is, ultimately an empirical question based on evidence of consumer

11 This appears to be the approach of the European Commission (EC) in their proposed Digital Markets Act that would regulate "gatekeepers," where qualification is based largely on whether a company is successful (that is, whether they have reached certain revenue and user threshold levels). See European Commission, *Digital Markets Act: Ensuring Fair and Open Digital Markets*, Press Release, Dec. 15, 2020, https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2349.

12 See *Epic Games v. Apple*, Complaint for Injunctive Relief, Aug. 13, 2020, https://cdn2.unrealengine.com/apple-complaint-734589783.pdf.

13 Multi-sided platforms are catalysts that bring together two or more groups to facilitate exchanges that otherwise would not take place or would take place at an inefficient level but for the platform. Platforms are also identified by the presence of indirect network effects, a.k.a., cross-group effects. See, e.g. David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 Yale J. on Reg. 325 (2003).

substitution within a well-defined relevant market. If it turns out that there are other sufficiently good substitutes for the services Yelp provides, the label "gateway" would seem like hyperbole rather than adding something of value to antitrust policy discussions.

Who would qualify as a gatekeeper using these elements? Every platform and intermediary with significant market power would qualify. Given that antitrust determinations of market power are based on demand conditions facing the supplier, this approach to gatekeepers does not seem to add much other than, perhaps, recognizing that intermediaries beyond platforms could be gatekeepers.[14] Nonetheless, there is certainly nothing wrong with the use of the word as a shorthand. For that matter, thinking of gatekeepers (or intermediaries) as "inputs which, if monopolized, would afford considerable market power" might be accurate for many purposes as well.

Yet, various digital reports and public policy discussions concerning big tech seem to be capturing something broader than simply controlling access to a commercial product, where that access does not have close substitutes. Indicative of this are pronouncements by European Commission officials discussing new initiatives aimed specifically at regulating online "gatekeepers" — namely, the Digital Services Act and the Digital Markets Act.[15] The etymology of the word "keeper" also denotes someone with an office of responsibility and a decisionmaker.[16]

This broader idea is that powerful digital platforms, particularly Google, Facebook, Amazon, and Apple, are (1) controlling access to markets in the sense that businesses need to go through these companies in order to reach consumers[17] *and* (2) controlling access to information, including information that could significantly impact public policy discussions and influence political outcomes.[18] In other words, big tech is collectively alleged to be a monopoly access point for both online commerce, political information, and, ultimately, culture. In turn, this gives big tech the power to potentially engage in anticompetitive conduct, but also to shape public policy.

This concern over control over dissemination of information and control over culture suggests yet a fourth element possessed by today's online gatekeepers. Consider the role of major Hollywood studios before the advent of streaming services like Netflix and Prime Video. These major studios, and certain powerful producers, had gatekeeper control over, not only actors, screenwriters, and directors, but also what consumers saw in terms of major Hollywood productions.[19] Given that movies represent a powerful medium for telling stories, controlling what stories are told can have a profound influence on culture.[20] Similarly, "old school" gatekeepers such as national newspapers and major broadcast networks had a powerful ability to frame political, cultural, and public policy debates. These offline gatekeepers from an earlier age had significant control over certain types of information that reached households.[21] Of course, this is working under the presumption that major studios, national newspapers, and major broadcast networks had substantial market power; otherwise, if they operated in competitive markets, then they would not be gatekeepers (other than in a collusive scheme).

Given this fourth element, the following is a proposed definition: *An online gatekeeper is an intermediary, not necessarily a platform, that controls access to certain groups (e.g., users, websites, developers, merchants), where alternative access points and pathways are sufficiently distant substitutes that this gives the intermediary substantial market power commercially and/or over information, including data, relevant to public policy debates.* In theory, one can have multiple gatekeepers, each with substantial market power, in a market or a single, dominant mo-

14 Work by Professors Andrei Hagiu and Julian Wright recognizes this fluidity between platforms and businesses like Walmart. See Andrei Hagiu & Julian Wright, *Multi-Sided Platforms*, 43 Int'l J. Indus. Org. 162 (2015).

15 See European Commission, *Europe Fit for the Digital Age: Commission Proposes New Rules for Digital Platforms*, Press Release, Dec. 15, 2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2347 ("Commissioner for Internal Market Thierry Breton said: 'Many online platforms have come to play a central role in the lives of our citizens and businesses, and even our society and democracy at large.').

16 See e.g. Webster's Dictionary 1828, http://webstersdictionary1828.com/Dictionary/keeper ("In Great Britain, the keeper of the great seal, is a lord by his office, and one of the privy council. All royal grants, commissions and charters pass through his hands. He is constituted lord-keeper by the delivery of the great seal. The keeper of the privy seal is also a lord by his office, and a member of the privy council."). *See also Genesis* 4:9 (Douay-Rheims) ("And the Lord said to Cain: Where is thy brother Abel? And he answered, I know not: am I my brother's keeper?").

17 See e.g. House Report, *supra* note 8, at 39 ("As Amazon, Apple, Facebook, and Google have captured control over key channels of distribution, they have come to function as gatekeepers. A large swath of businesses across the U.S. economy now depend on these gatekeepers to access users and markets.").

18 See e.g. Stigler Report, *supra* note 8, at 152 ("The influence of the digital platforms on the news media has been under increased scrutiny and focus since the last US presidential elections, yet much of the focus has been on fake news and the interference of foreign governments in elections through such platforms.").

19 See Ben Thompson, *Goodbye Gatekeepers*, Stratechery, Oct. 16, 2017, https://stratechery.com/2017/goodbye-gatekeepers. While the overall number of movies released each year has increased linearly since the 1990s, the number of major studio releases has remained largely constant, which means there is a fixed supply that major studios control.

20 This discussion holds aside the question of causality. Are studios influencing culture or culture influencing studios? The answer is almost certainly both.

21 See e.g. Kurt Lewin, *Frontiers in Group Dynamics: II. Channels of Group Life; Social Planning and Action Research*, 1 Human Relations 143, 145 (1947) (defines "gate keepers" as "an individual or group [that] is 'in power' for making the decision between 'in' or 'out.'").

nopoly gatekeeper, which may or may not be an essential facility.[22] The goal of this proposed definition is to fix ideas — given that, currently, the term gatekeeper (and its variants) suffers from a lack of clarity in antitrust discussions.

III. WHO ARE THE ONLINE GATEKEEPERS?

Determining who is a gatekeeper is, like almost all antitrust inquiries, a fact-based one that should involve quantification of the actual claims of control over access. For example, how important is social media to how U.S. households get their news, and does any firm plausibly have substantial market power in providing it? Allcott & Gentzkow report that "only 14 percent of American adults viewed social media as their 'most important' source of [2016] election news."[23] Given the continued growth of social media, this percentage most likely increased for the 2020 election; although, there is evidence that people consider the news they read on social media, and even with news in general, with a heavy dose of skepticism.[24] Consequently, if social media is not a critical intermediary for dissemination of news, then even market leaders like Facebook — which is only part of "social media" — may not qualify under a definition requiring control over access to news.

Similarly, how important is Google Search for website traffic? Undoubtedly, the answer will depend on the site and category of sites. Focusing on news sites, Allcott & Gentzkow find top U.S. news sites received 10.1 percent of their traffic from all social media sites and 30.6 percent from all search engines.[25] While these are significant percentages, they fall short of monopolistic gatekeeper proclamations — even combining all social media and search engine sites — let alone one specific site. As the digital age continues to mature, will these percentages increase for social media and search engines? Possibly. Although, innovation is hard to predict. Just ask AOL.

Even with the continued importance of social media and search engines for obtaining information, one should differentiate between a potentially anticompetitive exercise of legitimately obtained market power and outcome-based market success. For example, suppose it were established that Google Search is responsible for 70 percent of the traffic that a category of sites receives (e.g. local restaurant reviews). On its face, the welfare consequences of this are not clear. Is this high percentage because these sites specifically invested heavily in optimizing their presence on Google Search relative to other distribution channels — and they succeeded in that investment? Is it because Google has determined these sites are relevant to users and are efficiently matching users with content better than other sources? Or is it, at least in part, because Google has anticompetitively choked off access to other search and referral sources? In other words, is Google's success in being responsible for significant traffic to specific sites due, in part, to restricting access, hampering competition, and promoting misinformation or due to meritorious competition including higher quality services and providing useful information that users are seeking?

This leads to the point that the presence of gatekeepers — like market power elsewhere in our economy — should be considered a state of the market—perhaps simply a reward for skill, industry, or foresight — rather than an antitrust concern in and of itself. Gatekeepers have a procompetitive and efficiency-enhancing role, while also clearly having the potential to engage in anticompetitive conduct. Even advocates for more aggressive antitrust enforcement acknowledge that gatekeepers have played an important role in promoting gains from trade and spurring innovation and commerce.[26] Their substantial market power could be largely the result of procompetitive investments in innovation that consumers value, rather than conduct that simply diminishes the competitive constraint provided by others.[27]

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22 For an overview of the essential facilities doctrine, see Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 Stan. L. Rev. 1187, 1211 (1999) ("Inherent in the concept of an 'essential facility' is the premise that the owner of that facility possesses monopoly power…First, some degree of uniqueness and market control is inherent in the term 'essential.' Second, the inquiry regarding the impracticability of duplication assures that the doctrine will apply only to facilities for which no feasible alternative exists, or which cannot be reproduced.").

23 Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. Econ. Persp. 211, 212 (2017).

24 See e.g. A.W. Geiger, *Key Finding About the Online News Landscape in America*, Pew Research Center, Sept. 11, 2019, https://www.pewresearch.org/fact-tank/2019/09/11/key-findings-about-the-online-news-landscape-in-america/ ("Even as they regularly turn to social media for news, a majority of those who often get news on social media (57 percent) say they expect the news they see on these platforms to be largely inaccurate."); Megan Brenan, *Americans Remain Distrustful of Mass Media*, Gallup, Sept. 30, 2020, https://news.gallup.com/poll/321116/americans-remain-distrustful-mass-media.aspx ("Americans' confidence in the media to report the news fairly, accurately and fully has been persistently low for over a decade and shows no signs of improving, as Republicans' and Democrats' trust moves in opposite directions.").

25 Allcott & Gentzkow, *supra* note 23, at 222 (Figure 3).

26 See e.g. Directorate-General for Competition, Eur. Comm'n, Competition Policy for the Digital Era (2019), https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf at 13 ("Users have limited time and need curators to help them navigate the long tail of websites to find what they are looking for.").

27 See e.g. Avinash Collis, *Consumer Welfare in the Digital Economy*, The GAI Report on the Digital Economy (Joshua D. Wright & Douglas H. Ginsburg, eds., 2020), https://gaidigitalreport.com/2020/08/25/digital-platforms-and-consumer-surplus.

Users are attracted to gatekeepers, at least in part, because of the opportunity cost of obtaining information.[28] While the advent of the internet has significantly lowered these costs,[29] precisely *because* there is such vast information available at our fingertips — there can be substantial costs associated with finding the right information and having one's questions efficiently answered. These costs include a fixed amount of time and utilizing one's scarce supply of attention and mental capacity. With more websites, advertisements, emails, apps, and messages than ever, there is an ever increasing need to filter online content and distill the vast amount of information that is readily available.[30]

In a sense, our attention is like a common resource — rivalrous but, to a degree, nonexcludable.[31] In such a setting, the role of intermediaries can be critical.[32] Of course, information scarcity, whether through asymmetric information, moral hazard, or adverse selection, are not unique to the digital era. Information gatekeepers have always been highly valued.[33] Prior examples include yellow pages, TV guides, encyclopedias, and libraries. AOL's walled garden allowed it to steer consumers to specific content and promote certain products.[34] Yahoo Search, an early search engine leader, was known for organizing websites into categories that users could choose from. Curation is the raison *d'être* of search engines. Of course, *how* the results are exactly curated is a subject of not only popular debate, but also antitrust investigations and litigation.[35]

Importantly, we can both recognize welfare-enhancing aspects of gatekeepers but also scrutinize potential antitrust violations. The DOJ's recently filed case against Google alleges that Google has anticompetitively restricted access and foreclosed market opportunities of rival search engines.[36] While there are legitimate questions regarding the soundness of the DOJ's evidence and particular theory of harm,[37] the allegations are of a type that address the defendant's conduct, rather than simply its considerable success in the marketplace. Similarly, the FTC's recent case against Facebook alleges that its acquisition of Instagram in 2012 (and its subsequent acquisition of WhatsApp, among other products) was welfare-reducing.[38] Again, holding aside the merits of the case, the acquisition of nascent competitive threats is a legitimate theory of harm that goes beyond the mere status of Facebook as a gatekeeper.[39]

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28 See George J. Stigler, *The Economics of Information*, 69 J. Pol. Econ. 213 (1961); Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J. L. & Econ. 1 (1969).

29 See e.g. Casey Coleman, *The Democratization of Knowledge*, Around the Corner Innovation in The Business of Government: A GSA Blog, Sept. 17, 2012, https://gsablogs.gsa.gov/innovation/2012/09/17/the-democratization-of-knowledge ("Technology allows access to more information for more people than ever before in history. Sounds like hyperbole, but it is actually true.").

30 See e.g. Simon P. Anderson & André de Palma, *Information Congestion*, 40 RAND J. Econ. 688, 690 (2009) ("Excess information is costly.").

31 See *id.* at 689 ("The economics of such unsolicited advertising (such as billboards and radio/television) are characterized by a clutter of messages and the subsequent congestion of the consumer's limited attention span. In response, the consumer rations attention by screening out information—and good goes out with the bad, like a spam filter that blocks out some worthwhile messages.").

32 See e.g. Eszter Hargittai, *Standing Before the Portals: Non-Profit Websites in an Age of Commercial Gatekeepers*, 2 J. Pol'y, Regulation, & Strategy for Telecommunications 543, 544 (2000) ("the problem of attracting and, more particularly, retaining the attention of Web users causes individual creators of content to rely on 'gatekeepers' to channel their material toward users.").

33 In the Bible, Abraham tasks an elder servant to find a wife for his son Isaac (tradition holds the servant was Eliezer — see Genesis 15:2-3 & 24:2 (Douay-Rheims)). The "matchmaker" finds Rebecca at the well and knows that she is the right one because she not only gives the servant a drink but also offers water to his camels. This initiative signaled both her generosity to strangers and care for animals. *See Genesis* 24 (Douay-Rheims). The idea of village matchmakers spans across cultures. See, e.g. J.R. Thorpe, *7 Strange Facts About the History of Matchmaking*, Bustle, Aug. 31, 2016, https://www.bustle.com/articles/181415-the-history-of-matchmaking-in-7-strange-facts.

34 See e.g. Hargittai, *supra* note 32 at 546 ("According to one report, AOL users spend less than 20 percent of their online hours outside of AOL, which demonstrates the ability of AOL to target and focus users' online attention to its own content.").

35 In 2013, the FTC closed a multi-year investigation examining whether search bias, that is, whether Google preferencing its own content over rival content on its search results page, is an antitrust violation. *See* Fed. Trade Comm'n, File No. 111-0163, Statement Regarding Google's Search Practices, *In the Matter of Google Inc.* (Jan. 3, 2013), https://www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmtofcomm.pdf/. See also, John M. Yun, *Understanding Google's Search Platform and the Implications for Antitrust Analyses*, 14 J. Comp. L. & Econ. 311 (2018). The EC subsequently reached a different conclusion, and dozens of states recently filed an antitrust lawsuit alleging, among other things, search bias on the part of Google.

36 DOJ Complaint, *supra* note 7.

37 See e.g. Joshua D. Wright & Alexander Krzepicki, *Rethinking Foreclosure Analysis in Antitrust Law: From Standard Stations to Google*, Concurrentialiste, Dec. 17, 2020, https://leconcurrentialiste.com/wright-krzepicki-foreclosure/.

38 *Federal Trade Commission v. Facebook*, Complaint, Dec. 9, 2020, https://www.ftc.gov/system/files/documents/cases/1910134fbcomplaint.pdf.

39 In fact, the FTC Complaint never uses the term gatekeeper or its variants. *See id.* For more on nascent competition and how it relates with the doctrine of potential competition, see John M. Yun, *Are We Dropping the Crystal Ball? Understanding Nascent & Potential Competition in Antitrust*, 104 Marq. L. Rev. (forthcoming, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3698210.

IV. NON-ANTITRUST CONCERNS REGARDING GATEKEEPERS

Given online gatekeepers' role in providing access to information, there are at least two categories of increasing concern that go beyond antitrust. First, there is a concern that gatekeepers are not neutral arbiters and moderators but are "political," infecting their owners' biases into the dissemination of content on their platforms. This, it should be noted, has been a concern ever since search engines began to emerge at the turn of the century.[40] The allegation is that big tech is engaging in discriminatory moderation favoring one political group and one side of the debate on controversial topics ranging from election fraud, to the efficacy of masks and lockdowns in dealing with the coronavirus, and to the safety of vaccines. These concerns have led to calls by both the Executive and Legislative Branches to rescind big tech's legal immunity from discriminatory moderation under Section 230(c) of the Communications Act of 1934.[41] Debates about the merits of rescinding Section 230(c) and imposing regulatory controls on big tech are beyond the scope of this article.[42]

Second, there is a concern regarding how one can be expected to effectively regulate behavior that one cannot objectively and unambiguously classify. If a gatekeeper represents that it is not actually engaging in discriminatory moderation, how do we really know whether this is true? If a gatekeeper represents to content creators and to the public that content will be subjected to a fair review based on publicly announced moderation policies, how can we really know whether or not this promise has been adhered to? Relatedly, there is a concern about "bait and switch" strategies which involve a change in moderation policies/enforcement after a platform reaches a certain level of market success — especially after some users and creators make significant gatekeeper-specific investments based on representations that may change over time. In sum, there are questions regarding information asymmetry and the representations of online services regarding their governance policies.

Under this second concern, the problem with political bias is not the bias *per se*, but rather a platform's representation about its moderation policies and how it enforces those policies. Absent more, political bias, including the promotion/suppression of "fake news," is not an antitrust issue.[43] First, identifying fake news is extremely difficult and potentially subject to abuse, with a possibly chilling effect on free speech. Additionally, focusing on policing fake news would turn antitrust away from its well-ground objective of protecting the competitive process.

If the above is true, what role, if any, can usefully be played by government agencies such as the FTC? Arguably, an appropriate role would be to investigate allegations that a gatekeeper has engaged in conduct inconsistent with its public representations; in effect, whether it has been engaged in misrepresentation or fraud.[44] This is a consumer protection issue rather than an antitrust one. Platforms that discriminate against certain viewpoints are arguably free to do so under the First Amendment, but that should be made clear to all users.

The value of transparency is that it preserves a platform's freedom to govern its service in a manner that it sees fit rather than through some public, regulatory control over content. Transparency also helps give users clarity as to how their data is being used and how the platform's content will be moderated. Systematic deviations from these representations, while admittedly hard to detect, could be met with sufficiently high punishments to create optimal deterrence.[45] While current gatekeepers (collectively, though in general not individually) might be responsible for a large share of news delivery within a country, with more transparent governance policies and multi-homing or limited switching costs, market mechanisms — including new entry — can be expected to deliver alternatives.

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40 See e.g. Lucas Introna & Helen Nissenbaum, *Defining the Web: The Politics of Search Engines*, Computer 54, 54 (Jan. 2000) ("Make no mistake: These are political issues. What those who seek information on the Web can find will determine what the Web consists of—for them. We fear that technological limitations and commercial interests may conspire to disenfranchise those outside the mainstream and those who lack the resources or knowledge to promote their Web presence. Deprived of its diversity and impoverished by a lack of choice, a diminished Web would affect us all, individuals and institutions alike.").

41 See e.g. James Walker, *Tulsi Gabbard Backs Trump in Section 230 Battle, Accuses Lawmakers of 'Kowtowing' to Big Tech*, Newsweek, Dec. 4, 2020, https://www.newsweek.com/tulsi-gabbard-donald-trump-section-230-battle-1552336.

42 See e.g. Joshua D. Wright & Alexander Krzepicki, *What is an Independent Agency to do? The Trump Administration's Executive Order on* Preventing Online Censorship *and the Federal Trade Commission*, 6 Admin. L. Rev. Accord 29 (2020).

43 See e.g. Seth B. Sacher & John M. Yun, *Fake News is Not an Antitrust Problem*, CPI Antitrust Chron. (Dec. 2017).

44 This appears, somewhat, to be what the FTC is doing recently with its Section 6(b) study to determine how various online businesses collect and use the data from their users. See https://www.ftc.gov/news-events/press-releases/2020/12/ftc-issues-orders-nine-social-media-video-streaming-services. The order for data and documentation has been sent to Amazon, TikTok, Facebook, WhatsApp (Facebook), Reddit, Twitter, Snap, and YouTube (Google).

45 See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968).

V. CONCLUSION

"Gatekeeper" is a term that is gaining currency in the current debate over big tech. Certainly, gatekeepers in the role of curators and matchmakers can promote gains from trade and can spur innovation and commerce. Yet, gatekeepers can also violate antitrust laws and harm consumers; although, these allegations must be grounded in specific conduct rather than their status as a gatekeeper. Gatekeepers also make representations regarding how they are curating and moderating their services. To the extent that these gatekeepers deviate from their public representations, this can create welfare-losses and should invoke consumer protection concerns.

TAMING GATEKEEPERS – BUT WHICH ONES?

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I. INTRODUCTION

There has been extensive commentary on the allegedly entrenched positions of *GAFA* – Google, Amazon, Facebook, and Apple – and the inability of *ex post* enforcement of competition law to prevent potential anticompetitive conduct by these firms.[2] Several European jurisdictions are currently considering an overhaul of their competition policy approach towards dominant companies in the digital economy. A common theme is that competition authorities or newly created *digital markets agencies* could be given the power to regulate dominant companies with a *gatekeeper status*. As an important first step in this new regulatory approach, policymakers in various jurisdictions have specified the criteria for identifying the firms, or *gatekeepers*, that are to be subject to regulation.

This article discusses the criteria that have been proposed in the EU, UK, and Germany for assigning a special gatekeeper status to digital platforms. We highlight advantages and disadvantages of different approaches as well as challenges for practitioners in their implementation. We conclude by discussing some potentially far-reaching consequences due to inconsistencies in the proposed criteria across jurisdictions.

II. THE EUROPEAN APPROACH TO GATEKEEPERS

A. The EU's Gatekeeper Status

The EU recently published a proposed regulation of tech firms, the *Digital Markets Act*.[3] A key component is the designation of gatekeeper status to tech firms that operate at least one so-called *core platform service* and have a lasting, large user base in multiple countries in the EU. This designation triggers behavioral regulation.

A wide range of economic activities within the digital sphere could potentially be under scrutiny: The *core platform services* targeted by the regulation include "(i) online intermediation services (incl. for example marketplaces, app stores and online intermediation services in other sectors like mobility, transport or energy)[,] (ii) online search engines, (iii) social networking[,] (iv) video sharing platform services, (v) number-independent interpersonal electronic communication services,[4] (vi) operating systems, (vii) cloud services and (viii) advertising services …"[5]

The proposed necessary conditions for designating the gatekeeper status to a firm include the following three cumulative criteria:[6]

a. The firm "has a significant impact on the internal market," with a presumption of significance if, among other criteria,

   i. it "achieves an annual [European Economic Area] turnover equal to or above EUR 6.5 billion in the last three financial years," or

   ii. "where the average market capitalisation or the equivalent fair market value of the undertaking to which it belongs amounted to at least EUR 65 billion in the last financial year."

b. The firm "operates a core platform service which serves as an important gateway for business users to reach end users," which is presumed if "it provides a core platform service that has more than 45 million monthly active end users established or located in the Union and more than 10 000 yearly active business users established in the Union in the last financial year," and

c. The firm "enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future," which is likely to be the case where the above user threshold criteria are met "in each of the last three financial years."

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2 See e.g. Jacques Crémer et al., "Competition Policy for the Digital Era," Report for the European Commission, 2019 ("Crémer Report"), pp. 12–13, https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf; Jason Furman et al., "Unlocking Digital Competition," Report of the Digital Competition Expert Panel, 2019 ("Furman Report"), p. 22, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

3 European Commission, "Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act)," 2020 ("Digital Markets Act"), https://ec.europa.eu/info/sites/info/files/proposal-regulation-single-market-digital-services-digital-services-act_en.pdf.

4 "'[N]umber-independent interpersonal communications service' means an interpersonal communications service which does not connect with publicly assigned numbering resources, namely, a number or numbers in national or international numbering plans, or which does not enable communication with a number or numbers in national or international numbering plans." See Directive (EU) 2018/1972, Art 2.7. This appears to cover instant messengers.

5 Digital Markets Act, pp. 2, 34–35 (Art. 2.2).

6 Digital Markets Act, pp. 36–37 (Art. 3.1, 3.2).

If the above criteria hold, the firm is required to notify the Commission of the fact, with an opportunity to rebut the presumption of strategic market status. In addition, the Commission would be allowed to designate gatekeeper status even when some of these thresholds are not satisfied, for example, based on an assessment of:[7]

a. "the size, including turnover and market capitalisation, operations and position of the provider of core platform services;

b. the number of business users depending on the core platform service to reach end users and the number of end users;

c. entry barriers derived from network effects and data driven advantages, in particular in relation to the provider's access to and collection of personal and non-personal data or analytics capabilities;

d. scale and scope effects the provider benefits from, including with regard to data;

e. business user or end user lock-in; [and]

f. other structural market characteristics."

The Digital Markets Act specifies a comprehensive catalogue of behavioral remedies for designated gatekeepers. While many of the remedies are very specific in that they apply only to certain types of gatekeepers, others are more general. Examples of general requirements include the prohibition of the use of proprietary data generated by the gatekeeper's business users in the gatekeeper's activities that compete with the business users; the prohibition of self-favoring in rankings when products are sold by the gatekeeper; the obligation to provide data portability; the prohibition to combine personal data across services; prohibitions of price parity clauses; the obligation to allow business and end users that matched through the platform to conclude contracts outside the platform; and the obligation to notify the Commission of any acquisition of a provider of digital services irrespective of the regular notification requirements.[8]

The requirements that are more specific to the type of platform services offered by the gatekeeper include, among others, requirements for operation system providers to allow the de-installation of pre-installed software, and the facilitation of the installation and use of third-party apps and app stores; requirements for advertising platforms to provide advertisers and publishers with price information; and requirements for search engines to provide certain data to competing search engines.[9]

B. Alternative Proposals From Other Jurisdictions

1. UK: Strategic Market Status

In the UK, the concept of *strategic market status* ("SMS") was introduced by the Furman Report. It proposes to designate SMS to a company that has enduring market power over a strategic gateway or bottleneck in a digital market, where it controls market access by others.[10] The Furman Report further proposes that companies with SMS would be subject to certain forms of *ex ante* regulation by a newly established *Digital Markets Unit* ("DMU").

The UK Competition and Markets Authority ("CMA") recently published a market study[11] in which the UK government accepted the strategic recommendations of the Furman Report, in particular the concept of SMS and a DMU as the enforcer of an *ex ante* regulatory regime.[12] The CMA interprets SMS as a "position of enduring market power or control over a strategic gateway market with the consequence that the platform enjoys a powerful negotiating position resulting in a position of business dependency,"[13] concluding that SMS would "include firms that have

7 Digital Markets Act, pp. 37–38 (Art. 3.6).

8 Digital Markets Act, pp. 39–40, 44 (Art. 5, 6, 12).

9 Digital Markets Act, pp. 39–41 (Art. 5, 6).

10 Furman Report, p. 55.

11 Competition and Markets Authority, "Online Platforms and Digital Advertising," 2020 ("CMA Market Study"), https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf.

12 CMA Market Study, ¶ 7.2.

13 CMA Market Study, ¶ 7.55.

obtained gatekeeper positions and have enduring market power over the users of their products"[14] and would be based on evidence such as:[15]

a. "measures of shares of supply in the consumer-facing market;"

b. "the extent of reach across consumers;"

c. "[the] share of digital advertising revenues;"

d. "control over the rules or standards which apply in the market;" and

e. "the ability to obtain and control unique data that is applicable outside the market."

f. According to the CMA, the SMS "should apply to the corporate group as a whole (i.e., including all businesses with the same ultimate owner) … to … ensure that the DMU would have the ability to address concerns in markets that are adjacent to those where the firm has market power.…"[16]

The regulatory authority of the DMU would include measures with varying degrees of invasiveness. As the least invasive measure, the DMU could develop a code of conduct for platforms with SMS that would be aimed at safeguarding fair access to the platform and limiting the creation of barriers to switching to alternative platforms. This code would be developed in collaboration with market participants and other stakeholders.[17] As a more drastic intervention, the DMU would have the authority to mandate mobility of and access to data.[18] Importantly, companies with SMS would be required to make the CMA aware of all intended acquisitions.[19]

2. Germany: Paramount Importance for Competition Across Markets

In January 2021, Germany revised its *Act Against Restraints of Competition*, the federal antitrust law.[20] Most significantly, the law now includes a new statute that allows the Federal Cartel Office (Bundeskartellamt) to impose behavioral rules on platforms that it considers to have *paramount importance for competition across markets* ("PIFCAM").[21] The German PIFCAM concept is similar to the UK's SMS, but emphasizes the cross-market implications of gatekeepers.

With the revision, the German federal antitrust law defines a set of factors that the Federal Cartel Office is supposed to take into account in determining whether a platform has PIFCAM status. These include:[22]

a. dominance in one or more markets,

b. its financial or other resources,

c. vertical integration or activities in otherwise linked markets,

d. access to data relevant for competition, and

14 CMA Market Study, ¶ 7.56.

15 CMA Market Study, ¶ 7.57.

16 CMA Market Study, ¶ 7.65.

17 Furman Report, pp. 57, 61.

18 Furman Report, pp. 57, 65.

19 Furman Report, p. 12.

20 Philipp Bongartz, "Happy New GWB!," blog post, January 14, 2021, https://www.d-kart.de/en/blog/2021/01/14/happy-new-gwb/. The adopted revision is available in German as Deutscher Bundestag, Drucksache 19/25868, November 13, 2020, ("German Revision"), https://dip21.bundestag.de/dip21/btd/19/258/1925868.pdf. See " Wettbewerbsrecht novelliert und Kinderkrankengeld-Regelung ausgedehnt," press release of the German Bundestag, January 14, 2021.

21 German Revision, pp. 19-22 (§ 19a).

22 German Revision, p. 19 (§ 19a (1)).

e. the importance of its business activities for access to input and output markets by third parties, and the resulting influence on business activities of others.

Per the revision, the Bundeskartellamt can impose a set of prohibitions on companies with PIFCAM. The conduct that can be prohibited includes, among others, self-preferencing of its own offerings in intermediating access to input and output markets, the use of data collected as the gatekeeper to raise entry barriers or hinder competitors in other markets, requiring users to agree to the consolidation of data across different services provided by the company, tying of separate services, limiting interoperability and data portability, and limiting information on quality or success of its services. Firms have the ability to object to these prohibitions by providing an (efficiency) justification.[23]

III. DISCUSSION

A. EU's Threshold-based Approach

The criteria proposed by the EU on the one hand, and the UK and Germany on the other hand to identify gatekeepers differ substantially. Under the EU criteria, gatekeeper status may be triggered simply by exceeding thresholds for market size, and the numbers of users and business participants. The criteria of Germany ("dominance in one or more markets … and the importance of its business activities for access to input and output markets by third parties") and the UK ("market power or control over a strategic gateway market") depend on an economic analysis of an individual firm's market position. There are advantages and disadvantages to these approaches.

One of the advantages of the EU's proposal is that it is objective, that is, it does not leave too much room for interpretation and discretion of the regulatory body. While the gatekeeper status can be rebutted once triggered, firms can expect that they will, with a certain likelihood, be subject to regulatory scrutiny when exceeding these thresholds.[24]

The EU's threshold-based approach also has certain disadvantages. The existence of a fixed threshold may create perverse incentives for platforms to "stay under the radar." While this may not be an issue for regulating currently incumbent gatekeepers, it may be relevant in the future when those gatekeepers whose growth the new regulatory approach intends to foster will have reached a point when they will have gotten close to the threshold. This may lead platforms to actively limit the number of users (notably limiting the network effects that make these platforms so beneficial) to avoid regulatory scrutiny, for example, by limiting innovation or marketing activities. It could also lead to incentives to restructure. For example, a formerly pan-European gatekeeper could split into platforms at the member-state level and evade the EU's thresholds, while not improving the state of the competition in each member state.

Using thresholds for presumptions also runs the risk of designating firms as gatekeepers when the firms do not necessarily possess sufficient market power, potentially resulting in false positives – the risk that non-problematic behavior is falsely prohibited. For example, an important aspect of platform competition that may significantly limit platforms' market power is multi-homing. Consider a situation in which buyers offer products and sellers make purchases on two competing online e-commerce platforms.[25] In this situation, one of the platforms may very well exceed the proposed user thresholds to be designated gatekeeper status. However, given that both business and end users are already present on a competing platform, the designated gatekeeper may risk losing both sides to its competitor if it worsens the terms (price or quality of service) to its customers. Moreover, it may be the case that the platform with a larger user base offers the more efficient, more consumer-friendly core platform service compared to the competing platforms, and designating it a gatekeeper status may put constraints on the platform's ability to offer the better services to a wider user base. While such factors do not appear to be explicitly accounted for in the EU's threshold-based approach, they will presumably be accounted for in the alleged gatekeeper's attempt to rebut the gatekeeper designation.

The application of thresholds may also result in several firms in the same industry triggering the gatekeeper status, independent of the degree of competition between them. For example, consider a situation in which there are two large firms offering smartphone operating systems. These two companies would likely exceed the EU's thresholds in terms of market size and users, that is, a sufficiently large number of active business users (app developers) and active end users (phone owners). Under the EU's threshold-based approach, the gatekeeper presumption may be triggered for both firms, independent of the degree of competition between them. A blanket approach to apply thresholds independent of structure or conduct may also lead to false positives in cases where firms closely compete over prices or quality of services and act as strong competitive constraints on each other. The firms would have to engage in a rebuttal to assert that they are in fact competing.

23 German Revision, pp. 20–22 (§ 19a (2)).

24 The burden of proof for the rebuttal is on the firms. See Digital Markets Act, p. 37 (Art. 3.4).

25 The ability of sellers and buyers to multi-home is facilitated through tools that allow sellers to post their products on multiple platforms (multiple listing services) and price comparison websites.

B. UK's and Germany's Analysis-based Approaches

The UK's and Germany's analysis-based approaches act as an additional filter against false positives. While the proponents of a regulatory approach may disregard the risk of false positives in favor of avoiding false negatives (i.e. permitting problematic behavior),[26] the introduction of at least some analysis in the determination may shift the balance more towards what is economically reasonable. The more "uncertain" approach in the UK and Germany may also be less prone to potential perverse incentives arising with the EU's threshold-based approach.

However, the UK's and Germany's proposals are much more subject to the difficulties that arise in ex post enforcement of competition law in digital markets. In particular, in the UK and Germany, firms might have to form a view on the analysis of the relevant market and market power by the regulatory body. This is an inherently complex exercise in two-sided markets due to the challenges associated with market definition and the analysis of market power in two-sided markets. For example, such an exercise will need to contend with much debated issues relating to market definition for a two-sided platform – should one define a relevant market for each side separately or include both sides in a single relevant market?[27] Furthermore, while there is some practical guidance on how to implement a SSNIP test in a two-sided market (be it separate for each side or a joint one), these tests can be difficult to implement due to their data requirements or infeasible when prices to one side are zero.[28]

Finally, the role of indirect network effects in the analysis of market power is ambiguous – for example, in the case of positive indirect network effects, on the one hand, they may serve as a competitive constraint to pricing to one side; on the other hand, they may strengthen the market power of incumbent platforms.[29] As such, there may be differing views on the proper analysis of the relevant market and market power in the designation of the gatekeeper status when this designation is based on an economic analysis of the firm's economic position. Notably, the difficulty of this analysis has been cited as a motivation for using a regulatory approach in the first place.[30]

26 Crémer Report, p. 51.

27 In the United States, the Supreme Court has clarified that two-sided transaction markets be appropriately captured in a single relevant market including both sides. See *Ohio v. American Express Co.*, 585 U.S. ___ (2018). However, there is also substantial critique to this approach. See *e.g.* Michael Katz, "Ohio v. American Express: Assessing the Threat to Antitrust Enforcement," *CPI Antitrust Chronicle*, June 25, 2019. In Europe, case law has been inconsistent. See Lapo Filistrucchi et al., "Market Definition in Two-Sided Markets: Theory and Practice," *Journal of Competition Law and Economics* 10, no. 2 (2014): 293–339 ("Filistrucchi (2014)"). Notably, in Germany, the Bundeskartellamt has provided substantial guidance on how it will define relevant markets in two-sided markets and noted that, ultimately, "the question of whether one should define one or two markets therefore needs to be decided on a case-by-case basis." See Bundeskartellamt, "The Market Power of Platforms and Networks, Executive Summary," working paper, June 2016, p. 6, https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Zusammenfassung.pdf?__blob=publicationFile&v=4.

28 Filistrucchi (2014); Crémer Report, pp. 42–45; Furman Report, p. 89; Marc Rysman, "The Empirics of Antitrust in Two-Sided Markets," *Competition Policy International* 3, no. 1 (2007), pp. 197–209 at 204.

29 A platform experiences positive indirect network effects when users on one side benefit from having a greater number of users on the other side. The presence of these positive indirect network effects implies that a price increase that leads to a reduction in the number of users on one side also causes users on the other side to leave; on the other hand, positive indirect network effects may make it harder to compete against incumbent platforms with large user bases and may contribute to concentration.

30 Digital Markets Act, p. 8 ("However, the Commission considered that Article 102 TFEU is not sufficient to deal with all the problems associated with gatekeepers, given that a gatekeeper … may not be captured by Article 102 TFEU if there is no demonstrable effect on competition within clearly defined relevant markets.").

IV. CONCLUSION

The above proposals vary not only in the specific criteria for special status designation, but also in their reliance on economic analysis. While all of these approaches may capture currently incumbent platforms (i.e. GAFA), the differences between jurisdictions may create substantial burdens when today's entrants will have grown to a size that makes them subject to regulation in some – but not all – jurisdictions. This is significant because platforms often employ one platform design across all jurisdictions they operate in.[31] Consequently, the strictest legislation that triggers a firm's gatekeeper status the earliest may have an impact on the conduct of the gatekeeper across jurisdictions, or result in the gatekeeper ceasing operations in a particular jurisdiction to avoid a costly adaptation of its platform to the regulatory requirements in that jurisdiction.[32,33]

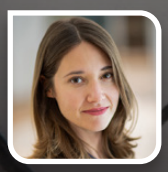
31 For example, following an investigation by Germany's Bundeskartellamt, Amazon changed the contract terms for its marketplace worldwide. See Natasha Lomas, "Amazon Amends Seller Terms Worldwide after German Antitrust Action," TechCrunch, July 17, 2019, https://techcrunch.com/2019/07/17/amazon-amends-seller-terms-worldwide-after-german-antitrust-action/?renderMode=ie11. As another example, in reaction to the introduction of the GDPR in Europe, Microsoft changed its contract terms on a worldwide basis. See " Microsoft's Commitment to GDPR, Privacy and Putting Customers in Control of Their Own Data," blog post, Microsoft, May 21, 2018, https://blogs.microsoft.com/on-the-issues/2018/05/21/microsofts-commitment-to-gdpr-privacy-and-putting-customers-in-control-of-their-own-data; Natasha Lomas, "Microsoft Announces Changes to Cloud Contract Terms Following EU Privacy Probe," TechCrunch, November 18, 2019, https://techcrunch.com/2019/11/18/microsoft-announces-changes-to-cloud-contract-terms-following-eu-privacy-probe. More recently, Microsoft announced the implementation of certain policies for the Microsoft Store (its app store for Windows) that do not appear to be country-specific. See Rima Alaily, "10 App Store Principles to Promote Choice, Fairness and Innovation," blog post, Microsoft, October 8, 2020, https://blogs.microsoft.com/on-the-issues/2020/10/08/app-store-fairness-caf-interoperability-principles/.

32 Google recently announced it could exit the Australian online search market in reaction to the newly proposed Australian regulation regarding royalty payments to media companies for content shared on Google's platform. Damien Cave, "An Australia With No Google? The Bitter Fight Behind a Drastic Threat," *The New York Times*, January 22, 2021.

33 This abstracts from the problem that regulations themselves may be inconsistent and – if a firm is designated gatekeeper in multiple jurisdictions – may impose contradicting requirements on the gatekeeper.

PROPOSED SOLUTIONS FOR BIG TECH IN THE UNITED STATES: OUT OF STEP OR DÉJÀ VU?

BY URSKA PETROVCIC & GONÇALO COELHO[1]



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On October 6, 2020, the Subcommittee on Antitrust, Commercial and Administrative Law of the U.S. House of Representatives Committee on the Judiciary issued a report on the investigation of competition in digital markets.[2] The Report summarizes the main findings of a sixteen-month investigation into the business conducts of four large U.S. tech corporations — Amazon, Apple, Facebook, and Google. The Report finds that each of these four companies controls access over "key channels of distribution," typically the firm's own digital platform.[3] It also finds that the four companies "have come to function as gatekeepers," reasoning that almost "30% of the world's gross economic output may lie with these firms."[4] The Report raises concerns that the four tech corporations were able to "exploit their gatekeeper power to dictate terms and extract concessions that no one would reasonably consent to in a competitive market."[5] It also raises concerns that they use their "data advantage" to obtain "near-perfect market intelligence," as well as "create and enforce barriers to competition and discriminate against and exclude rivals while preferencing its own offerings."[6] The Report concludes that these practices have led to a highly concentrated economy, which in turned has "materially weakened innovation and entrepreneurship in the U.S. economy,"[7] degraded online privacy, undermined "the vibrancy or the free and diverse press,"[8] and risks undermining political and economic liberties.[9]

To address the various problems identified, the Report recommends the adoption of three sets of complimentary reforms.[10] First, it proposes the adoption of measures that would seek to restore competition in digital markets. This includes proposals of structural separations for the big tech corporations, prohibition of self-preferencing, and the imposition of duties to ensure interoperability and open access with products or services offered by third parties. Second, the Report proposes strengthening the laws on mergers and monopolizations. Specifically, it suggests invigorating merger enforcement by introducing several assumptions that would make it easier for antitrust authorities to challenge mergers and acquisitions. It also recommends lowering the evidentiary burden for condemning a firm's unilateral conduct under antitrust law. Third, the Report recommends strengthening antitrust enforcement by providing more funding to antitrust agencies, but also by facilitating private enforcement and promoting Congressional oversight.

We focus our analysis on the second set of proposals — that is, strengthening the existing antitrust laws — that have so far attracted most attention among commentators. In particularly, we focus on the proposed revisions for scrutinizing the unilateral conducts of firms with market power. The Report says that "some of the anticompetitive business practices that the Subcommittee's investigation uncovered could be difficult to challenge under current law."[11] Consequently, it "identifies specific legislative reforms that would help renew and rehabilitate the antitrust laws in the context of digital markets."[12] The Report proposes reforms that, broadly, seek to lower the burden that a plaintiff must satisfy to show that a challenged practice violates antitrust laws. For example, the Report suggests overriding Supreme Court's precedents that have established the standard for condemning practices such as a refusal to deal or predatory pricing. It also suggests lowering the standards for condemning monopoly leveraging, tying, and product design. In addition, the Report proposes to introduce into U.S. antitrust law a prohibition of abuse of dominance similar to Article 102 of the Treaty on the Functioning of the European Union ("TFEU").

In many respects, the proposed legislative reforms suggest bringing U.S. antitrust law closer to EU competition law. The latter is typically understood as posing stricter limitation on firms' business practices. In other words, conducts such as a refusal to deal, or predatory pricing, are more likely to be found unlawful under EU competition law than under U.S. antitrust law. EU competition authorities are also able to challenge dominant firms' exploitative practices. Yet, the experience from the European Union provides a dire prediction for the likely success of the reforms that are proposed in the House Report. It suggests that even if regulators were to lower the standard for condemning firms' unilateral practices under U.S. antitrust law, that would not provide an effective solution for the practices that the Report identifies as problematic. Indeed, the European Commission has largely acknowledged the limitations of competition law in dealing with digital platforms and has opted instead for a tailored, sector-specific regulation.

2 Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations (2020) [hereinafter House Majority Report or Report].

3 *Id.* at 11.

4 *Id.*

5 *Id.*

6 *Id.* at 14, 17, 378.

7 *Id.* at 18.

8 *Id.* at 7.

9 *Id.* at 19.

10 *Id.* at 376.

11 *Id.* at 391.

12 *Id.*

This paper is structured as follows. In Part I, we summarize the existing differences between U.S. antitrust law and EU competition law. In Part II, we explain that, in the European Union, the more expansive competition-law regime has not provided a solution for the concerns raised with respect to digital platforms. Indeed, there seems to be a general agreement in the European Union that competition law cannot provide an adequate solution. In Part III, we examine the solutions that have been recently proposed by the European Commission to deal with the so-called digital gatekeepers.

I. A COMPARISON OF THE TWO ANTITRUST REGIMES

It is generally well-recognized that EU competition law poses stricter limitations on firms than U.S. antitrust law. That assumption holds particularly in the context of unilateral conducts by firms with market power. As a result, the same business practice is more likely to be found unlawful under EU competition law than under U.S. antitrust law.

The most obvious difference between EU competition law and U.S. antitrust law concerns the so-called exploitative conducts, which are conducts that do not affect competition but instead impose a direct harm on customers or consumers. Article 102(a) TFEU explicitly prohibits a dominant firm from "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions."[13] This provision has been interpreted as giving to the European Commission the authority to challenge a dominant firm's exploitative practices, such as charging "excessive" prices.[14] The Court of Justice of the European Union ("CJEU") has sustained this interpretation in its landmark judgment in *United Brands*, where it ruled that "charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse."[15] In contrast, U.S. antitrust laws does not condemn firms from engaging in exploitative practices. In *Trinko*, the U.S. Supreme Court said that charging high, or monopolistic prices "is not only not unlawful; it is an important element of the free-market system."[16] The Court reasoned that "[t]he opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place."[17] It added that "[t]o safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct."[18] Therefore, whereas EU competition law might condemn a dominant firm for engaging in exploitative conducts, U.S. antitrust law does not.

There are important differences also in the way EU competition law and U.S. antitrust law address exclusionary practices, that is, practices that harm competition and, therefore, consumers. For example, the two systems differ in the way in which the scrutinize predatory pricing, which refers to a firm's practice of selling products or services at a loss. The concern with predatory pricing is that selling products or services below costs might permit a firm to exclude competition and subsequently increase prices above-competitive levels. Although predation might be unlawful under U.S. antitrust law, courts have expressed more skepticism than its EU counterparts[19] with the idea that such practice could have harmful effects on competition and consumers. They have emphasized that a predatory practice is unlikely to harm consumers unless there is a danger that the firm that engaged in predation is able to maintain its monopoly "for long enough both to recoup the predator's losses and to harvest some additional gain."[20] Consequently, to condemn a practice as predatory, U.S. courts have required both evidence that (1) the price is below an appropriate measure of cost and (2) there is a dangerous probability that the company will be able to "recoup[e] its investment in below-cost prices."[21] Conversely, EU competition law does not always require proof of recoupment.[22] Because of the different standard of proof, a firm's practice is more likely to be deemed as predatory, and therefore found unlawful, under EU competition law than under U.S. antitrust law.

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13 Consolidated Version of the Treaty on the Functioning of the European Union Art. 102, May 9, 2008, 2008 O.J. (C 115) 89 [hereinafter TFEU].

14 Notably, challenges of exploitative practices are relatively rare. The European Commission's enforcement typically focuses on exclusionary rather than exploitative conduct. Nonetheless, legal actions are possible, and indeed, on several occasions, the European Commission has challenged under Article 102 TFEU a dominant firm's alleged exploitative conduct.

15 Case 27/76, *United Brands v. Commission* [1978] ECR 207, paragraph 250.

16 *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

17 *Id.*

18 *Id.*

19 See e.g. Case C-202/07 P, *France Télécom SA, v. Comm'n*, [2009] ECR 2009 I-02369, para. 109; *AKZO Chemie BV v. Comm'n*, Case C-62/86, [1991] ECR 1991 I-03359, para. 71.

20 *Matsushita Elec. Indus. Co., v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986).

21 See e.g. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*509 U.S. 209, 224 (1993).

22 See e.g. Case T-340/03, *France Télécom SA, v. Comm'n*, [2007] ECR II-00107, para. 227-28.

A further difference between EU competition law and U.S. antitrust law becomes evident when examining the way in which the two systems address a dominant firm's refusal to deal. The U.S. system is based on a strong belief that companies, including those with market power, should be free to select the companies with which they want to do business. The U.S. Supreme Court emphasized that principle in its 1919 decision *United States v. Colgate &Co.* when it said that U.S. antitrust law "does not restrict the long-recognized right of a trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal."[23] The Supreme Court reiterated this principle on several occasions, including in *Trinko* and *linkLine*.[24] In contrast, under EU competition law, a dominant firm's refusal to deal might violate Article 102 TFEU.[25] In *Microsoft*, for example, the CJEU said a dominant firm is in principle free to select the companies with which it wishes to do business, but also said that in "exceptional circumstances" a refusal to deal might violate Article 102 TFEU. In determining whether to challenge a dominant firm's refusal to deal under competition law, the Commission typically considers whether (1) the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market, (2) the refusal is likely to lead to the elimination of effective competition on the downstream market, and (3) the refusal is likely to lead to consumer harm.[26] Hence, whereas a refusal to deal is unlikely to violate U.S. antitrust law, it might more easily be found abusive under EU competition law.

In short, firms face stricter limitations under EU competition law than under U.S. antitrust law. EU competition law prohibits firms to engage in a wider set of practices. Furthermore, even when addressing the same type of practices, EU competition law imposes a lower burden of proof on the plaintiff, such that a challenged conduct is more likely to be found unlawful under EU competition law than under U.S. antitrust law.

II. HAVE BROADER ANTITRUST PROVISIONS BEEN ABLE TO ADDRESS CONCERNS WITH BIG TECH IN THE EUROPEAN UNION?

The proposals presented in the House Report recommend the adoption of reforms that, in many respects, would bring U.S. antitrust law closer to EU competition law. For example, the Report suggests introducing into U.S. antitrust law a prohibition of abuse a dominance.[27] Although the Report does not provide a detailed explanation of such prohibition, it refers to "exploitation" by digital platforms.[28] This suggests that such new provision would prohibit firms to engage in the so-called exploitative practices, as it is currently the case under EU competition law. The Report also recommends overriding several U.S. Supreme Court's decisions that have outline the elements that must be satisfied to condemn practices such as predatory pricing and a refusal to deal.[29] Specifically, the Report "recommends clarifying that proof of recoupment is not necessary to prove predatory pricing or predatory buying.'"[30] The Report also suggests that "Congress should consider overriding judicial decisions that have treated unfavorably essential facilities- and refusal to deal-based theories of harm," citing *Trinko* and *linkLine* as examples of decisions that should be overturned.[31] Therefore, many of the recommendations presented in the Report, if implemented in practice, would bring the provisions of U.S. antitrust law closer to those existing under EU competition law.

However, the experience from the European Union suggests that the proposed revisions are unlikely to provide a satisfactory solution for the problems that the Report identified with digital platforms. The European Commission, as well as national competition authorities in member states of the European Union, have brought several investigations against the four big tech corporation.[32] They have challenged both exploitative practices and exclusionary conducts. On several occasions, they have condemned the challenged practices, or they have concluded the investi-

23 250 U.S. 300, 307 (1919).

24 *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-8 (2004); Pacific Bell Telephone v. linkLine Comm., 555 U.S. 438, 448 (2009).

25 See e.g. Cases 6 and 7/73, *Commercial Solvents v. Comm'n*, [1974], ECR 223, para. 25; Joined Cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Comm'n*, [1995] EU:C:1995:98, para. 28; Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs*, [1998] ECR I-7791, para. 40; Case C-418/01, *IMS Health v. NDC Health*, [2004], ECLI:EU:C:2004:257, para. 52; Case T-201/04, *Microsoft Corp. v. Comm'n* [2017] ECR 2007 II-03601, para. 319.

26 Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, ¶ 81 OJ C 45 (Feb. 24, 2009) [Commission's Guidance on Exclusionary Practices].

27 House Report, at 395.

28 *Id.*

29 *Id.* at 397, n. 2498.

30 *Id.* at 396 (citing *Matsushita v. Zenith Ratio Corp.*, 475 U.S. 574 (1986); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007)).

31 *Id.* at 397 (citing *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *Pacific Bell Telephone Co. v. linkLine Commc'n, Inc.*, 555 U.S. 438 (2009)).

32 See e.g. Press Release, European Commission, Antitrust: Commission Opens Investigations into Apple's App Store Rules (June 16, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073; ACM Launches Investigation into Abuse of Dominance by Apple in its App Store, Authority for Consumers and Markets (Apr. 11, 2019), https://www.acm.nl/en/publications/acm-launches-investigation-abuse-dominance-apple-its-app-store; *Italy: Watchdog Opens Antitrust Probe into Google*, Competition Policy Int'l (May 19, 2019), https://www.competitionpolicyinternational.com/italy-watchdog-opens-antitrust-probe-into-google/.

gation after securing commitments from the party under investigation.[33] They have also imposed hefty fines, such as the 4.3 billion fine imposed on Google.[34] Yet, the intervention has neither prevented market concentration, nor has it provided a definitive solution for the practices that the Report describes as problematic.

Indeed, there seems to be a general agreement among commentators that even an expansive antitrust regime, such as the one available in the European Union, *cannot* provide an adequate solution for issues identified with digital platforms. In June 2020, the European Commission opened a public consultation for the Digital Services Act, a legislative package directed towards digital platforms.[35] Among other things, the Commission invited comments on how to "address the issue of the level playing field in European digital markets, where currently a few large online platforms act as gatekeepers."[36] On the same day, the Commission also open a public consultation for the adoption of a new competition tool.[37] The large majority of respondents to those public consultations have said that EU competition law does not provide an adequate solution the problems with digital platforms.[38]

The European Commission agreed. It said that "Article 102 TFEU is not sufficient to deal with all the problems associated with gatekeepers."[39] It also identified several features of EU competition law that limit the Commission's ability to address, in an effective way, conducts by digital platforms. First, gatekeepers might not meet the threshold of dominance, which is necessary to trigger Article 102 TFEU. Second, their practices might not have a "demonstrable effect on competition within clearly defined relevant markets," another essential requirement to condemn a practice under Article 102 TFEU.[40] Third, the timing of intervention under the prohibition of abuse of dominance (Article 102 TFEU) might not be quick enough to address these practices in a timely and effective manner.[41] Fourth, efficiency and objective justification arguments, which are available under competition rules, may result in further entrenching of the market position of gatekeepers, and therefore contribute to limit market contestability.[42]

Therefore, the experience in the European Union that adopting a more expansive competition law regime, is unlikely to provide an adequate solution to the problems identified in the House Report. In that respect, one could question whether the legislative reforms suggested in the Report are fit for purpose. Are the proposed changes to U.S. antitrust law likely to provide an effective solution to the problems identified in the Report or are they deemed to fail even before they are implemented?

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33 See e.g. Bundeskartellamt Obtains Far-reaching Improvements in the Terms of Business for Sellers on Amazon's Online Marketplaces, Bundeskartellamt (July 17, 2019), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/17_07_2019_Amazon.html;jsessionid=98F173CFCF40CBB4E3AA149FF088832E.1_cid362; Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources, Bundeskartellamt (Feb. 7, 2019), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html.

34 See e.g. European Commission, Press Release, Antitrust: Commission Fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine (July 18, 2018), https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581; Sam Schechner, *France Fines Google for Mistreating Search Advertisers*, Wall St. J. (Dec. 20, 2019), https://www.wsj.com/articles/france-fines-google-for-mistreating-search-advertisers-11576836560.

35 Press Release, Commission Launches Consultation to Seek Views on Digital Services Act Package (June 2, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_962.

36 *Id.*

37 Press Release, Antitrust: Commission Consults Stakeholders on a Possible New Competition Tool (June 2, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_977.

38 Press Release, Summary Report on the Open Public Consultation on the Digital Services Act Package (Dec. 15, 2020), https://ec.europa.eu/digital-single-market/en/news/summary-report-open-public-consultation-digital-services-act-package; see also Factual Summary of the Contributions Received in the Context of the Open Public Consultation on the New Competition Tool, https://ec.europa.eu/competition/consultations/2020_new_comp_tool/summary_stakeholder_consultation.pdf.

39 Commission Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector at 8, COM (2020) 842 final (Dec. 15, 2020) [hereinafter DMA Proposal].

40 *Id.* Explanatory Memorandum, page 7.

41 *Id.* Explanatory Memorandum, page 5.

42 *Id.* paragraph (9).

III. WHAT ARE THE SOLUTIONS CONSIDERED IN THE EUROPEAN UNION?

On December 15, 2020, the European Commission published two Proposals for Regulations of the European Parliament and of the Council: one on a single market for digital services (the so-called Digital Services Act),[43] and another – which is especially relevant for the purposes of this Article – on contestable and fair markets in the digital sector.[44] The latter proposal is referred as the Digital Markets Acts ("DMA").

The Commission's DMA Proposal was designed with the aim of ensuring fair and contestable markets in the digital sectors across the European Union. It is based on the premise that unfair practices go beyond the remit of anticompetitive practices as they stem, primarily, from a situation of imbalance in bargaining power between gatekeepers, their business users and end users.[45] In effect, the Proposal protects contestability and fairness regardless of the actual effects that the practice at issue has in the market. To achieve this goal, the DMA Proposal creates a system of *ex ante* regulation of large digital platforms, that is complementary to current EU competition law. In doing so, the DMA does not lower the thresholds for intervention under Articles 101 and 102 TFEU, but instead creates a new additional set of regulatory instruments that go beyond the remit of competition law.[46]

Three issues addressed in the Proposal deserve a particular scrutiny: (1) the definition of digital gatekeepers, that is, companies that would be subject to the DMA, (2) identification of practices that in the Commission's view "limit contestability or are unfair" and are therefore prohibited, and (3) market investigations.

A. The Definition of Digital Gatekeepers

The Commission's Proposal clarifies that the DMA would not apply to all digital platforms. Rather, the only platforms covered by the Proposal are the so-called "gatekeepers" that operate 'core platform services': "(i) online intermediation services, (ii) online search engines, (iii) social networking (iv) video sharing platform services, (v) number-independent interpersonal electronic communication services, (vi) operating systems, (vii) cloud services and (viii) advertising services, including advertising networks, advertising exchanges and any other advertising intermediation services, where these advertising services are being related to one or more of the other core platform services mentioned above."[47]

Gatekeepers are described as those enjoying "an entrenched and durable position, often as a result of the creation of conglomerate ecosystems around their core platform services, which reinforces existing entry barriers."[48] In tandem with the "low contestability" of the digital markets where they operate, gatekeepers are said to develop "unfair behaviour" in relation to business users that significantly depend upon them.[49] Although the Commission does not explicitly mention the need for impact on competition, it states that "[u]nfair practices and lack of contestability lead to inefficient outcomes in the digital sector in terms of higher prices, lower quality, as well as less choice and innovation to the detriment of European consumers."[50]

For a provider of core platform services to be designated as gatekeeper its activities must meet three criteria. First, it must be deemed to have a significant impact in the Internal Market. There is a rebuttable presumption of said impact if: (i) a core platform service is provided in at least three Member States; and (ii) the group turnover realized in the European Economic Area ("EEA") is equal to or exceeds EUR 6.5 billion in the last three financial years; or if the average market capitalization or the equivalent fair market value of the undertaking to which it belongs amounted to at least EUR 65 billion in the last financial year.[51] Second, the core platform service must serves as an important gateway for business users to reach end users; there is a rebuttable presumption that this criterion is met if the core platform service that has more than 45 million monthly active end users established or located in the EU and more than 10 000 yearly active business users outside the EU in the last

43 Commission Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/E [hereinafter DSA Proposal].

44 DMA Proposal.

45 *Id.* paragraph (4).

46 *Id.* paragraph (10), Article 1(6).

47 *Id.* Article 2(2).

48 *Id.* Article 3(1).

49 *Id.* Explanatory Memorandum, p. 2.

50 *Id.*

51 *Id.* paragraph (17), Articles 3(1)(a) and (2)(a).

financial year.[52] Finally, for a core platform service operator to be designated as gatekeeper, it must enjoy an actual or foreseeable entrenched and durable position in its operations; this criterion is met if the users thresholds are fulfilled in the last three financial years.[53] The status of gatekeeper shall be reviewed periodically, in order to contemplate any material change that might have taken place, as well as whenever the decision was based on incomplete, incorrect or misleading information.[54]

Online platforms may rebut the gatekeeper presumption for a given core platform, in which case they will not be designated directly but be instead referred for further investigation.[55] Conversely, the Commission may also find that the existence of a gatekeeper even if the objective thresholds are not met.[56] In the latter case, a gatekeeper designation can only be made following a market investigation (as discussed more in detail below).

Therefore, differently from the prohibitions on anticompetitive agreements (Article 101 TFEU) and abuse of dominance (Article 102 TFEU), the market investigation tool is not "reactive" in nature, in the sense that it does not respond to a violation of competition rules. Instead, it is directed at fixing an underlying structural market failure instead of bringing an infringement to an end. For this purpose, the Commission would designate ex ante the companies that are considered digital gatekeepers and then subject them to a special set of rules that to not apply to other market players.

B. Prohibitions and Obligations for Digital Gatekeepers

The DMA Proposal sets forth a list of prohibitions and obligations applicable to designated gatekeepers. The first provision (Article 5) consists of: (i) prohibition of combining personal data from core platform services with personal data from other services provided by the gatekeeper or collected from third-party services; (ii) allowing business users to offer same products or services through third parties, at different prices or conditions; (iii) allowing business users to make offers and conclude contracts with end users outside the gatekeeper's platform; (iv) refraining from restricting business users from raising potential issues with the relevant authorities; (v) refraining from requiring business users to use the gatekeeper's identification service; (vi) refraining from requiring business or end users to subscribe to any other services as a pre-condition for accessing core platform services; and providing advertisers and publishers price information for each relevant advertising service.[57]

In addition, the DMA Proposal's second provision (Article 6) lists obligations that may be further specified in relation to the gatekeeper. In those situations where gatekeepers have a dual role has provider of online services to business users while being active downstream in digital markets as well, they should refrain from (i) using data from business users that is not publicly available to offer similar services to those of their business users; and from (ii) engaging in forms of self-preferencing in ranking on the core platform service. In their relations with business users, gatekeepers also ought to: (i) refrain from restricting their freedom to switch to different software applications and services. Third-party ancillary services and software applications providers must: (i) be granted access to the operating system, hardware, or software features under equal conditions to those of the gatekeeper; (ii) be provided access, on fair, reasonable and non-discriminatory (FRAND) terms, to ranking, query, click and view data in relation to search generated by consumers on online search engine services. As regards advertisers and publishers, gatekeepers must: (i) provide transparent information to whom they supply online advertising services; (ii) provide, when requested, with access to the performance measuring tools of the gatekeeper free of charge; (iii) provide access, upon request and free of charge, to data generated by business users. As per the obligations *vis-à-vis* end users, gatekeepers should not (i) prevent the un-installment of pre-installed applications on a core platform service; (ii) restrict freedom of switching between or subscription od different software applications and services.[58] Finally, they must ensure (iii) ensure that business users and end users can port that data in real time effectively (e.g. through high quality application programming interfaces).

Although gatekeepers cannot invoke efficiency defenses to escape the obligations of the Proposal, they may request the suspension of a specific obligation in exceptional circumstances, where compliance with a specific obligation is shown to endanger the economic viability of the operations of the gatekeeper in the EU, as well as on grounds of public morality, public health or public security.[59]

52 *Id.* Article 3(1)(b) and (2)(b).

53 *Id.* Article 3(1)(c) and (2)(c).

54 *Id.* paragraph (30), Article 4; Legislative Financial Statement, at 2.2.2.

55 *Id.* paragraph (23).

56 *Id.* paragraph, (24), Article 3(6).

57 *Id.* Article 5.

58 *Id.* paragraph (50).

59 *Id.* paragraphs (59) (60), Articles 8 and 9.

The Commission can update the obligations imposed upon gatekeepers following a market investigation, in accordance with Article 17 of the DMA Proposal. This enables the Commission to other practices that are considered to be unfair or that limit the contestability of core platform services because of: (i) an imbalance of an imbalance of rights and obligations between gatekeeper and business users, which disadvantages the latter in providing the same or similar services as the gatekeeper; or (ii) a weakened contestability of the markets as a result of the new practice by the gatekeeper.[60]

C. Market Investigations

In addition to the market investigation pursuant to Article 17 discussed above, the DMA Proposal provides that the Commission might initiate two additional types of market investigations.

First, market investigations can be used to designate as a gatekeeper a provider of core platforms services that does not meet the quantitative thresholds but nonetheless meets the qualitative criteria. Such investigation shall be carried out in accordance with "the objectives of preserving and fostering the level of innovation, the quality of digital products and services, the degree to which prices are fair and competitive, and the degree to which quality or choice for business users and for end users is or remains high."[61] In determining whether a company should be designated as a gatekeeper, the Commission shall take into consideration a variety of elements including: (i) extreme scale economies; (ii) very strong network effects; (iii) the multi-sidedness of the services provided and their ability to connect business and end users; (iv) lock-in effects; (v) lack of multi-homing or vertical integration; (vi) very high market capitalization; (vii) very high ratio of equity value over profit; (viii) very high turnover from end users of a single core platform service; and (ix) high growth rates combined with productivity growth.[62]

Second, the Commission can open a market investigation to determine whether systematic non-compliance, which has further strengthened the gatekeeper's market position, demands setting additional remedies.[63] Systematic non-compliance is deemed to have occurred in situations where the Commission has issued at least three non-compliance or fining decisions against a gatekeeper in relation to any of its core platform services in the last five years prior to the adoption of the decision opening a market investigation. (a non-compliance decision refers to a Commission's decision finding that a designated gatekeeper has violated the obligations specified in the DMA.) On the other hand, a gatekeeper shall be considered to have further strengthened or extended its gatekeeper position where its impact on the internal market has further increased, its importance as a gateway for business users to reach end users has further increased or the gatekeeper enjoys a further entrenched and durable position in its operations.[64] The market investigation may culminate with the imposition of any remedy, whether behavioral or structural, having due regard to the principle of proportionality.[65]

IV. CONCLUSION

Antitrust scholars and commentators in the U.S. and the EU have long considered each other's legal system to be more suited to address particular forms of anticompetitive conduct or to capture mergers with anticompetitive effects. This tendency for finding the grass to be always greener on the other side of the fence came to fore of late in the House Majority Report.

The House Report's main findings on the business conducts of Amazon, Apple, Facebook, and Google proposed a set of far-reaching recommendations that can change the face of U.S. antitrust laws. Under the guise of enabling the investigation of conducts that currently go undeterred in the digital market arena, it proposes to lower long-established standards of intervention in unilateral conduct cases, such as predatory pricing and refusal to deal. These recommendations could bridge the gap between U.S. antitrust law and EU competition law, especially through the import of the concept of "abuse of dominance" into the U.S., and the adoption of looser standards of intervention in unilateral conduct cases.

On the other side of the Atlantic, the European Commission has also kept itself busy in proposing reforms that can effectively tackle unilateral conduct by gatekeepers. However, the Commission's DMA Proposal from December 15, 2020 followed a distinctively different path from its U.S. counterparts by pursuing the regulatory reform avenue without amending EU competition laws. The reason for the U.S. not following the

60 *Id.* Articles 10 and 17.

61 *Id.* paragraph (25).

62 *Id.* paragraph (25).

63 *Id.* Article 16.

64 *Id.* Article 16 (3) and (4).

65 *Id.* paragraph (64).

regulatory approach might be one of philosophy. While in the EU, competition law and regulation are seen as complementary, in the U.S., they are typically regarded as self-excluding. However, it should be pointed-out that in *Trinko*, the Supreme Court appears to leave the door open for antitrust enforcement in those cases where "'[t]here is nothing built into the regulatory scheme which performs the antitrust function.'"[66]

Aside from putting U.S. and EU apparently out of step, the Commission's proposal also works as a warning sign about the inherent shortcomings of competition law in responding to the challenges posed by big tech and their conduct in digital markets. In effect, as the example of the EU shows, the concept of abuse of dominance appears to be manifestly inadequate to comprehensively tackle the challenges posed by big tech.

66 *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 412 (2004) (quoting *Silver v. N.Y Stock Exch.*, 373 U.S. 341 (1963)); see Howard A. Shelanski, *The Case for Rebalancing Antitrust and Regulation*, Michigan L. Rev., Vol. 109, Issue 5 (2011), p. 702.

REGULATING DIGITAL GATEKEEPERS: LESSONS FROM THE BANKING INDUSTRY

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I. INTRODUCTION

Digital gatekeepers can be defined as entities that "have a high degree of control and influence over the relationship between buyers and sellers, or over access by advertisers to potential buyers" which gives these entities "three distinct forms of power: the ability to control access and charge high fees; the ability to manipulate rankings or prominence; and the ability to control reputations."[2] Gatekeepers are not exclusive to digital markets. Gatekeepers exist in many other industries such as banking, telecoms and energy. The new element introduced by digital gatekeepers is their scale and scope: There are digital gatekeepers that have a global scope, have millions of users and are present in several industries. The potential anticompetitive conducts of those digital gatekeepers might have a larger impact over consumers.

During the last years, there has been an increasing debate on whether those gatekeepers should be regulated to prevent market foreclosing. Several competition agencies and governments have commissioned reports analyzing the role and the design of competition law and regulation in the digital era.[3] The European Commission recently issued the proposed Digital Markets Act ("DMA") that aims to establish rules to ensure fair and open digital markets. The DMA sets a list of general obligations to digital gatekeepers and an additional list of further potential obligations susceptible of being imposed on digital gatekeepers.

Digital gatekeepers differ on their nature, the industry they operate and the way they may exercise their gatekeeper role which is linked to their business model.

The regulation applied to gatekeepers in other industries provides an illustration of how regulation can facilitate market entry. The analysis of such industries also shows that regulations are very closely linked to the competition concerns, to the industry where they are implemented, to the competitive dynamics of the industry and to the business model of the gatekeepers. Remedies adopted in those industries are tailored to the competitive concerns detected and to the way markets operate. Thus, general principles and obligations can be a starting point for developing further and more detailed regulations but are no substitute for a detailed evidence-based analysis of the existing competitive concerns.

The banking industry provides an illustration of an industry where regulation has been imposed to reduce the market power of gatekeepers. Banks have traditionally been the main gatekeepers and facilitators of the overall financial industry. Their close customer relationship has traditionally made them the main channel to commercialize financial products. Banks have taken advantage of this fact providing bundles of their own products (checking accounts, investment products, pension plans, insurance, loans and mortgages, etc.). Competition in the banking industry has traditionally mostly developed through competing bundles offered by different banks.

The emergence of fintechs, that commercialize stand-alone products, and the increasing concentration in the banking industry after the economic and financial crisis in 2008 have taken regulators to adopt a number of measures aiming to facilitate the entry of alternative players (in addition to other measures aimed to increase transparency and financial stability which are not the object of this article). This article provides some illustrations of banking regulations that aim to reduce gatekeepers' market power and promote market entry. The examples do not aim to be comprehensive but to illustrate how existing regulation is being applied and whether lessons can be learnt for the design of regulation in digital markets.

The examples focus on three aspects that are also present in digital markets and addressed by the DMA: the use of data, interoperability and self-preferencing.

2 Furman, J., Coyle, D., Fletcher, A., McAuley, D., & Marsden, P. (2019). "Unlocking digital competition," Report of the Digital Competition Expert Panel. HM Treasury. Stigler Center for the Study of the Economy and the State (2019).

3 See, for example ACCC (2019), Digital platforms inquiry - final report. June 2019. Crémer, J., de Montjoye, Y. A. & Schweitzer, H. (2019) Competition Policy for the Digital Era. Report commissioned by the European Commission, Luxembourg, 2019. Furman, J., Coyle, D., Fletcher, A., McAuley, D., & Marsden, P. (2019). "Unlocking digital competition," Report of the Digital Competition Expert Panel. HM Treasury. Stigler Center for the Study of the Economy and the State (2019), Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report, George J. Stigler Center for the Study of the Economy and the State, The University of Chicago Booth School of Business, 2019.

II. THE USE OF DATA: OPEN BANKING REGULATIONS

Proprietary data can generate market power and erect barriers to entry. Banks collect information on customers' financial behavior (revenues, expenses, credit worthiness, investment profile, etc.) which is not available to other competitors. This creates a lock-in effect in customers that reduces competition. Customers' data provide banks market power and allow them to extract rents from locked-in clients.

Open banking initiatives aim to reduce customer switching costs by allowing customers to instruct their bank to share their account and transaction information with accredited third parties. Open banking regulations are in place in the UK (since 2017), Australia (since 2020), and the European Union (after the adoption of the Payment Services Directive PS2).

The 2018 Open Banking regulations in the UK[4] required big banks to permit bank account holders to share information with authorized third parties through common and open standards. Access is made possible through application programming interfaces or APIs, which allow software at one company to have access to information from another. In order to access the data, companies are required to have authorization from the UK regulator as Account Information Service Providers ("AISPs") and have to prove compliance with regulations including keeping data secure and only using access to provide their stated service.

The data sharing obligations are asymmetric and initially only apply to the nine biggest banks and building societies. The regulation allows access to a limited type of data (account and transaction data), requires the consent of each customers (data is only exchanged for those customers giving consent) and data access is only open to authorized financial service providers (around 135 service providers in 2019).

Open banking regulations reduce switching costs since competing banks can access new clients' financial history (and can offer loans and other products tailored to the specific needs of each customer), facilitate multihoming (for example, many operators, including incumbents, offer account aggregators which let their customers view their accounts in several banks, making it easier to manage and control their finances) and promote innovation (e.g. it has allowed the development of new products, especially in the payments sector).

The competition concern in this case was created by the collection of data by incumbents that granted them a competitive advantage that could imply a barrier to entry for new competitors and a switching cost for consumers. The regulatory remedy involves an obligation to share such data. The regulatory remedy specifies both the data that has to be shared (and the access format), and which entities can access to the data and for what purposes. The sharing of data should be approved individually by each client.

That is, open banking regulations do not constitute a general mandate to share customers' data but an obligation to share specific data in a controlled environment under specific conditions. The data-sharing conditions are adapted to the context. In other contexts, data-sharing obligations and conditions necessary to promote competition might be different.[5]

This basically reflects that data is not a commodity and thus data-sharing regulations cannot be of a generic nature. The nature of data and its role in each industry competitive dynamics matter in the assessment of market power derived from data collection and processing. Certain types of data might be of strategic value for a specific industry but of no value at all to others. For example, purchasing patterns might be of strategic relevance for marketplaces but irrelevant for insurance companies. Data cannot be regulated as a commodity and different types of data in different industries would require a differentiated regulatory approach (if any).

Another important element is the sharing of the data across industries. The open banking regulations do not generally allow the use of banking data outside the banking sector. There are many digital players that are present in several industries. Restricting data-sharing across industries while big digital players can pool their own cross-sector data internally would still imply a competitive advantage for multi-sector companies.

4 See CMA's Retail Banking Market Investigation Order (2017).

5 In 2019, in the context of the acquisition of the Belgian TV broadcaster De Vijver Media by Telenet, a broadband service provider, the Belgian Competition Authority (BCA) showed some concerns about the potential use of the data on consumer behavior collected by Telenet, to improve the targeted advertising in their own channel. To address this concern, the BCA mandated Telenet to provide other TV broadcasters access to the data concerning their respective channels. The access was limited in scope (broadcasters has access only to data related to their channels) and in the level of detail (access was not provided to raw data but to an upper aggregation level). See Vande Walle, S. (2019), "Sole Control: The Belgian Competition Authority Clears a Vertical Merger in the Audiovisual Sector, Subject to Conditions," in Concurrences Competition Law Review, Number 3, 2019, pp. 120-122.

In this respect, the recently announced European Data Strategy of the European Commission proposing, amongst other measures, a "cross-sectoral governance framework for data access and use" and "common European data spaces in strategic sectors and domains of public interest" through pooling European data in key sectors, with EU-wide common and interoperable data spaces, constitutes a vague policy statement of principles that needs to be narrowed down to be operational and which articulation would probably require hundreds of data- and sector-specific regulations.

III. SELF-PREFERENCING: INDEPENDENT FINANCIAL ADVISORS

Gatekeepers may have incentives to treat their own services more favorably than those of their competitors. This is known as self-preferencing.

Banks have traditionally been the main gatekeeper and facilitator of the overall financial industry. Banks have also traditionally offered financial advice to their clients. The financial advice provided by banks may not be fully independent since they may have incentives to promote their own financial products or sponsored third-party products which report them higher commissions.

MiFID II (Markets in Financial Instruments Directive II) is a European Union legislative framework that regulates financial markets strengthening investor protection and improving the functioning of financial markets making them more efficient, resilient and transparent. It entered into force on January 3, 2018. MiFID II introduces a complex set of requirements for firms qualifying as independent financial advisors.

MiFID II makes a distinction between independent and non-independent advisors. Before providing advice, an investment firm must inform a client whether this advice is being provided on an independent or a non-independent basis. Independent advisors must meet a number of requirements. Amongst others, they must include in their product portfolio different types of financial instruments offered by various providers and cannot limit their range of products to financial instruments issued or provided by the investment firm itself.

In addition, the so-called inducements regime, which includes a complex set of rules relating to conflicts of interest and other issues,[6] prohibits third-party benefits in relation to portfolio management and independent investment advice. That is, it prohibits independent advisors accepting and retaining benefits received from third parties in relation to the firm's provision of portfolio management or investment advice services to its underlying clients. This implies independent advisors charging fees to their clients since they can no longer receive fees from financial product providers.

Thus, MiFID II allows financial advisors favoring their own products and third-party sponsored products but, if they do so, they must clearly signal that they are non-independent advisors.

The competition concern in this case was created by the incentives of financial institutions to sell their own products and sponsored products from third parties under the appearance of independence. The remedies consist of a complex set of behavioral incentives and prohibitions. On the one hand, the regulation offers financial institutions incentives to commercialize third-party products by granting them the "independent advisor" denomination. On the other hand, the regulation prohibits third-parties paying for being part of financial institutions portfolios.

MiFID II regulations is complex and often difficult to monitor since they involve verifying not only that the regulations are met on paper but also that they are effectively implemented. For example, the fact that a financial institution offers products from third parties and can thus be considered an "independent advisor" does not guarantee that, in practice, it does not only sell its own products. Also, retail investors are not fully aware and conscious of the importance of independent fee-based advice which reduces the effectiveness of the regulation. The impact of inducement rules has been limited on financial services providers' decision to offer independent advice or to refrain from it.[7]

In general, addressing self-preferencing through behavioral remedies requires complex regulatory structures which are often difficult to implement and monitor. It also needs that, as a result of such regulations, firms and users change their behavior, which is not always the case. Such remedies should be carefully designed, tailored to each situation and subject to a detailed impact assessment, especially if such regulations affect the business models of the affected parties.

6 See "Understanding the MiFID II Inducements Regime," Latham & Watkins. Oxford Business Law Blog, May 30, 2018.

7 See ESMA – European Securities and Markets Authority (2020). Final Report: ESMA's Technical Advice to the Commission on the impact of the inducements and costs and charges disclosure requirements under MiFID II, March 31, 2020.

For example, many digital players are constituted as multisided platforms where the flow of payments between the different sides of the platforms follows the nature and strength of direct and indirect network effects. A MiFID II approach to self-preferencing might imply regulating the flows of payments between the different parties. This may affect the core business model of the platform which is often based on the cross-subsidization between sides. Changing the business model might harm some sides of the platform and might even affect the economic feasibility of the business, reducing ultimately consumer choice.

This is somehow the approach adopted by the European Commission when challenging Google Android's business model which placed Google's affiliated services under more favorable conditions than competing services. The solution proposed by Android implied changing its business model and moving towards a license fee model. The welfare consequences of this change of business model are not obvious.

IV. INTEROPERABILITY: PAYMENTS SETTLEMENT

Interoperability refers to the ability of alternative service providers to operate with the gatekeeper's software or hardware. The lack of interoperability may prevent new entrants to compete with the gatekeeper's services.

Interoperability has been essential for the introduction of competition in the payment services industry. Payments between accounts located in different payment service providers need a settlement agent. When a customer makes a payment to a business that has an account with a different provider, the customer's provider owes the business's provider the value of the payment. This creates a level of risk, so a payment system needs to use an intermediary, known as a settlement agent, for the final settlement of funds between providers.[8] In the UK, the Bank of England plays this role backing the payment system and guaranteeing monetary and financial stability.

Until 2018, most non-bank payment service providers ("non-bank PSPs") accessed the UK payment schemes through a sponsor bank to settle on their behalf, using the sponsor's settlement account at the Bank of England. Direct settlement with the Bank of England was not available to non-banking institutions. Indirect access arrangements were subject to commercial negotiation. Some Indirect Access providers subscribed a voluntary Code of Conduct for indirect access.[9]

Most PSPs opted to enter the market through the so-called Bank-as-a-Service (BaaS) platforms[10] which allowed them to use an existing bank infrastructure to settle their transactions. The use of BaaS platforms implied that non-bank PSPs were competing with banks to provide payment services while, simultaneously, were accessing the settlement system through the banks they were competing with. The banks had thus access to their competitors' data and could also limit the operation and innovation of new entrants by limiting their interoperability. Alternatively, PSPs could avoid settling through a sponsor bank by holding a banking license in order to be able to settle directly with the Bank of England. Such alternative required though meeting a number of costly regulations which constituted an expensive market entry ticket.

From 2018, the Bank of England allowed non-bank PSPs to open settlement accounts, subject to appropriate safeguards.[11] This means that non-bank PSPs no longer need to use competitors' BaaS platforms to offer their services, facilitating competition and innovation in payment services. On April 13, 2018, TransferWise, a Financial Conduct Authority-regulated PSP, became the first non-bank PSP joined a UK payment system settling in central bank money. The U.S. Federal Reserve announced in August 2019 that it would develop its instant payment system allowing non-bank PSPs to operate independently of banks.[12]

The competition concern in this case was the fact that market entry required operating through the infrastructures of competitors. The regulator initially opted for light-handed regulation leaving market players to self-regulate and negotiate agreements privately. The final regulatory

8 See Payments and Settlement webpage at the Bank of England for a description of the functioning of payment services.

9 For example, five UK banks signed a voluntary Code of Conduct for Indirect Access Providers to address concerns around the commercial access arrangements they provide to PSPs requiring Indirect Access Services to UK Payment Systems.

10 BaaS is an end-to-end model that allows digital operator to connect with banks' systems directly so they can offer their services using the bank's infrastructure. See "How the banking-as-a-service industry works and BaaS market outlook for 2021" (Business Insider, January 4, 2021) for a brief summary of how BaaS service operate.

11 See Guide on Access to UK Payment Schemes for Non-Bank Payment Service Providers developed by the Bank of England, FCA and Pay.uk (December 2019) for a description of the current settlement options for non-bank PSP.

12 Federal Reserve Press Release: "Federal Reserve announces plan to develop a new round-the-clock real-time payment and settlement service to support faster payments," August 5, 2019.

solution implied contesting the gatekeeper position of the incumbents by allowing an "outside option"[13] which involved settling directly with the Bank of England. This was made possible due to existence of an independent secure and reliable settlement agent that was the central bank. The existence of outside options improves the bargaining position of new entrants making interoperability regulation less necessary.

The existence of outside options plays an important role in eroding the market power of digital gatekeepers. Outside options might not always be available in digital markets and often depend on users' behavior. For example, if users multihome in several digital platforms, market players might be able to meet through different "routes" and regulating interoperability in each platform might become unnecessary. The context and the users' behavior thus determine the need (or not) for regulating interoperability. The existence of alternative "gates" to enter the market together with users multihoming reduce the need for regulation.

V. IMPLICATIONS FOR THE REGULATION OF DIGITAL MARKETS

The regulatory process in digital markets requires identifying the specific competition concerns and designing the appropriate remedies to address such concerns. In order to be effective and reduce the distortions created by market interventions, remedies should be objective and proportional and tailored to the competition problems, to the characteristics of the industry and of the business models of the market participants. It is also relevant that remedies do not create competition distortions and that do not make existing business models that benefit consumers not economically feasible.

There are plenty of examples of industries where gatekeepers are subject to some degree of regulation to promote competition and market entry. Despite the scale and scope of some digital players that increase the magnitude of the impact of their actions, some lessons can be learnt from other industries. This article shows different examples of competition concerns and subsequent regulatory responses in the banking sector addressing the use of data, self-preferencing and interoperability. The examples show that solving specific competition problems requires specific analysis of the problems and specific remedies adapted to the conducts, to the industry characteristics and to the business models.

Imposing effective remedies to competition problems requires a deep evidence-based analysis of the competition concerns at hand and of their impact in order to assess whether policy intervention in needed and to select the appropriate policy instrument. Issuing generic obligations might be a starting point but not fully operational, given that competition problems can adopt different forms, differ across different industries and their solution very much depends on the characteristics of the problem, the industry and the business models of the market players.

In this sense, the DMA proposes a list of generic obligations for all gatekeepers and a second list of obligations susceptible of being imposed on digital gatekeepers under certain circumstances. The proposed DMA does not however specify under which circumstances and for which industries and business models each obligation of the list is relevant. Potential competition concerns posed by gatekeepers can be very diverse. Making the DMA more operational would require a more detailed description and classification of the potential competition concerns in each market and for the different market models and establishing the link between the different competition concerns and the potential remedies.

The market investigation tool proposed by the DMA broadens the set of policy tools available for regulators to address competition concerns in digital markets but it should not be perceived as a magic tool. Market investigations might skip the legal hurdles of defining the markets and finding dominant positions, and allow to focus the analysis on the impact of the investigated conducts. However, market investigations require a detailed analysis of the competitive dynamics of the industry and of the impacts of the investigated conducts. Also, the potential proposed remedies would have to be designed on a case-by-case basis depending on the conducts and the market characteristics. Market investigations add a new tool to the toolbox of regulators but there is no guarantee that market investigations will constitute a speedier and more flexible policy instrument.

Finally, the setting-up of Regulatory Sandboxes, that enable a direct testing environment for innovative products and are widely used in financial markets, could be a useful instrument in digital markets to make sure that regulation promotes competition and innovation and that ultimately improves consumers welfare.

13 An outside option is defined to be the best alternative that a player can command if she withdraws unilaterally from the bargaining process.

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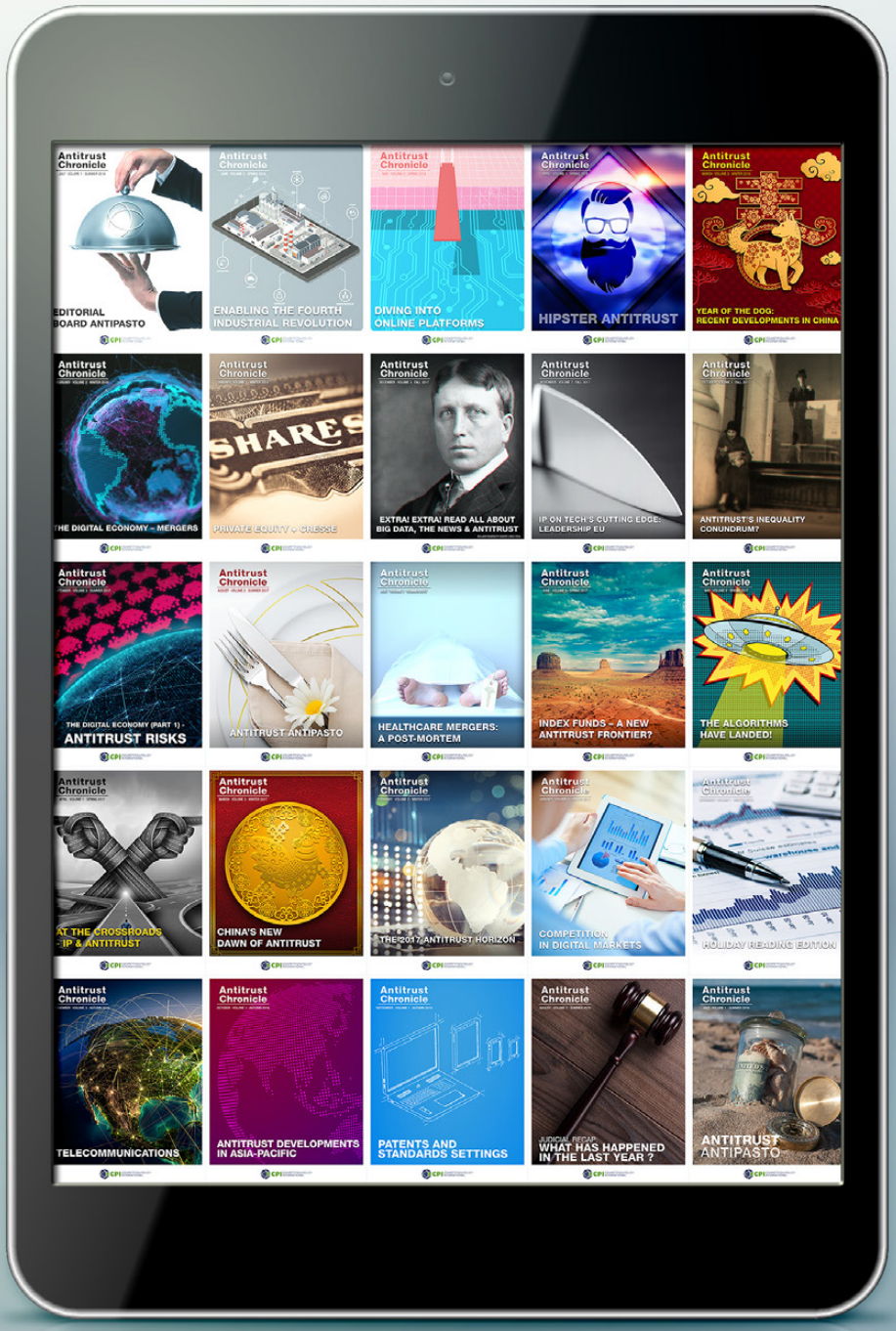


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