FairSearch Secretariat
E: secretariat@fairsearch.org
W: www.fairsearch.org
@FairSearch

28 September 2018

FairSearch submission on the European Commission's call for contribution on

"shaping competition policy in the era of digitization"

FairSearch fosters and defends competition in the digital economy and has been an active participant in the European Commission ("**Commission**")'s antitrust investigations of Google in relation to Search and Android.

This submission in response to the call for contribution on "shaping competition policy in the era of digitization" will focus on (i) the need for a light touch approach when it comes to regulating the technology industry, and (ii) digital platforms and data collection.

1. Avoiding regulatory over-reaction

FairSearch would like to stress the need for caution in any endeavour to regulate platforms and/or the data they collect. Defining platforms is a complex issue where any ill-considered step today to shape Europe's regulatory environment risks impeding our capacity to keep up with the rapid pace of digital change and undermining our global competitiveness.

Our involvement in the Google cases reflects FairSearch's and its member companies' conviction that European antitrust law is sufficiently robust to remedy Google's anti-competitive practices on a case-by-case basis, adapted to the specific circumstances, whether it relates to leveraging or lock-in concerns.

This in turn reflects our shared belief that existing competition law, properly enforced, provides companies room to innovate in a competitive environment, and that any additional regulation would need to be developed very carefully to ensure that it does not constrain the digital sector's ability to evolve to meet fresh challenges.

Nevertheless, FairSearch would like to emphasize the importance of dealing with competition cases quickly and efficiently in order to ensure that anti-competitive behaviour does not lead to irreversible damage before a final decision has been taken. This is of particular importance when dealing with fast-moving technology markets. FairSearch therefore believes that the Commission's powers to impose interim measures should be examined carefully in order to identify whether they are apt for the digital era.

2. Digital Platforms and data

a. Dominance and data

FairSearch Secretariat
E: secretariat@fairsearch.org
W: www.fairsearch.org
@FairSearch

28 September 2018

The issues that arise due to the commercialisation of data increasingly concern competition law, and in particular market power. Amassing large volumes of data does not inherently result in dominance. However, achieving scale in data may create barriers to entry and can be a means to establish or strengthen market power. FairSearch believes that when assessing market power of data-rich companies, every situation should be addressed on its own facts. FairSearch therefore suggests that concerns specific to entrenched monopolies, such as Google, should not be generalized to other undertakings, and regulating a broader category of actors risks hindering innovation while not adequately addressing abusive conduct by monopolists. For example, in search markets having a huge scale advantage in query-related data will yield dominance, having a scale advantage in other contexts might not do so. Competition law enables the Commission to take account of such differences by assessing the facts of each case.

b. Abusive data-related conduct

Consumer data has immense value to companies as well as consumers. While consumers do receive many valuable "free" services across the internet, mass data collection has become so widespread that it is disproportionate to what any user could reasonably expect is necessary for use of these "free" services. Over time, the amount and detail of data (including personal data) that consumers are required to share with digital platforms to use its services has increased exponentially, without a commensurate increase in quality of the services.

The Commission has primarily looked at the collection, use, and exchange of personal information from a privacy perspective and, accordingly, has engaged in initiatives requiring companies to provide consumers with greater transparency and more meaningful choices. Unfortunately, consumers are often met with “take-it-or-leave-it” privacy policies that are indecipherable to all but the most sophisticated users and that very few users have the time or inclination to read. In that respect, FairSearch stresses that complying with data protection laws does not make digital platforms immune from antitrust enforcement with respect to their data-related conduct. While a firm may comply with data protection rules, its collection or processing of personal and other data may still cause harm to competition and consumers.

Dominant digital platforms data-related conduct can infringe competition laws by means of (i) exploitative conduct, such as in the Bundeskartellamt's Facebook case where it is alleged that Facebook uses a dominant position to extract unfair terms from consumers, leaving aside whether it actually excludes rivals; or (ii) exclusionary conduct. FairSearch is of the opinion that the Commission is equipped to investigate and sanction both exploitative and exclusionary data-related anti-competitive conduct.

FairSearch Secretariat
E: secretariat@fairsearch.org
W: www.fairsearch.org
@FairSearch

28 September 2018

Online advertising is an area where exclusionary data-related anti-competitive conduct has been taking place. In online advertising, data is crucial for targeted ads. Control over data means control over online advertising. If we look at Google, most if not all of its products and services in reality serve as data collection channels. By forcing users of its dominant products to agree that Google may combine user data gathered from its dominant services with data from other, unrelated services, Google in effect "ties" its dominant products to an unrelated contractual condition – namely, accepting combination of user data across unrelated services. Google can then use the resulting competitive advantage – a superior, detailed set of user data – to foreclose other advertising intermediaries, none of whom have access to such combined datasets.

a. Mergers and data

Digital Platforms and the collection of data should also be considered in the context of mergers. As the Commission knows, following its consultation on purely turnover based merger notification thresholds, the acquisition by an existing large player of another innovative company with little current revenue but large quantities of unique data that is not easily replicable could establish barriers to entry and establish or maintain a dominant position. A merger involving a company with these kinds of assets might result in a "significant impediment of effective competition", even though the company's turnover might not be high enough to meet the Merger Regulation thresholds. FairSearch believes the Commission should continue to look into the Merger Regulation thresholds and consider whether they are apt for the digital era. However, leaving aside the question of thresholds, the Commission must find the right balance in each case to prohibit or require remedies only for transactions that could have potentially negative effects on competition, without making life more difficult for innovative start-ups.