

EBU Reply to the European Commission's Consultation on 'Shaping Competition Policy in the Era of Digitization'

EXECUTIVE SUMMARY

In the context of the consultation on 'Shaping Competition Policy in the Era of Digitization', the Commission is seeking contributions from stakeholders that are involved in or affected by the process of digitization. Digitization has undoubtedly had a major impact on Public Service Media (PSM). In order to fulfil their public service remit, PSM organizations must have an online presence; either through their own tools or through third-party platforms, they must reach *all* audiences, offering high-quality content that fulfils the social, cultural and democratic needs of the citizens they are meant to serve.

Our submission puts forward proposals on how the EU competition rules can be applied to respond to certain digitization challenges facing PSM organizations and the Commission alike. More particularly,

- To reach out to all segments of society, PSM organizations increasingly rely on third-party platforms. Given that the markets in which they operate have a natural tendency to concentration, a handful of platforms currently have the ability and incentive to engage in practices that distort competition. This is partly because decisional practice has focused on measuring price effects. However, competition in the relevant markets is driven by non-price parameters, such as variety, quality and innovation. We take the view that, **if the Commission develops a practice that takes account of the effects of a given conduct or transaction on the non-price parameters of competition, related decisions will adequately assess whether the platforms under scrutiny have the power to act anti-competitively.** As a consequence, the Commission would go a long way towards levelling the playing field in digital (media) markets (Part B.1.). Stricter merger control would also be instrumental in protecting undistorted competition (Part B.2.). In addition to addressing competition concerns, assessments that adequately consider the non-price effects of platform practices would partly contribute to the **protection of freedom of expression and media pluralism**, which the Commission must respect under Article 51(1) CFREU.
- Related to the above, platforms collect and control a vast amount of data to which they may withhold access or render it difficult to obtain. However, undertakings that use platforms to reach consumers (and, in the case of PSM organizations, their audiences) significantly contribute to the success of these platforms. Accordingly, these undertakings should be entitled to have access to certain categories of data they enable platforms to obtain. Until horizontal regulation in this area is adopted, **competition law may be relied upon to mandate access to data where appropriate** (Part C).
- Given the major contribution of the PSM sector to the creative and cultural industries and its commitment to reach all segments of society with high-quality services, **competition policy must be conducive to PSM innovation.** For example, in assessing partnerships between PSM organizations (or between PSM organizations and other providers), the Commission and

National Competition Authorities must take account of the intensity of global competition (Part D).

- Many of the practices in which platforms engage are novel, thereby challenging the current legal framework in a number of ways. The EU competition rules are flexible enough to address certain problems arising from harmful platform conduct. However, **competition enforcement alone cannot be expected to remedy all concerns deriving from the way in which platforms operate; competition law must be complemented with effective regulation.** More particularly, regulatory instruments must be adopted that stimulate competition (Part E.2.) *and* reflect the increasingly important role that platforms play in the digital economy (Part E.3).

A. Preliminary Remarks

1. The European Broadcasting Union (EBU)¹ and its Members, Public Service Media (PSM) organizations from 56 countries in Europe and beyond, welcome the opportunity to reply to the Commission's consultation on the implications of digitization for competition policy.
2. It is widely acknowledged that, while it brings many opportunities, digitization poses great challenges to competition enforcement. For example, digital technologies are **moving at a faster pace than ever**, innovative business models are constantly emerging, and **non-monetary transactions** (e.g. the exchange of data and/or attention for a service) are increasingly defining the relationship between firms and their customers. Moreover, **consumer choice is now largely determined by 'editorial-like' judgments made by algorithms.** Those algorithms may be driven by interests that are not aligned with the interests of the users they serve.

Against this background, **traditional antitrust tools, which mainly seek to determine the effects of a given conduct or transaction on price, cannot take account of the full picture in cases affecting markets where competition is driven by quality, (disruptive) innovation and variety.** Given that the use of digital technologies is only expected to increase, re-thinking how the EU competition rules can be applied in order to respond to the above and other challenges and reap the benefits of the Digital Single Market is of utmost importance.

3. The Commission is seeking contributions from those stakeholders that are involved in or affected by the digitization of the economy. The process of digitization has undoubtedly had a major impact on EBU Members. To fulfil their public service remit in an increasingly digitized environment and serve all audiences, PSM organizations must have an online presence. For example, they stream linear television and radio services online and provide non-linear program services and apps for streaming and/or download. In order to reach out to all segments of society and to meaningfully interact with the audiences they are meant to serve, **EBU Members also rely on third-party online platforms**, such as search engines, social media networks, app stores, and content aggregators. In recent years, platforms have become the main gateway through which

¹ For more information about the EBU please access our website, which is available at: <http://www.ebu.ch>

users access media content online.² In principle, platforms facilitate the provision of PSM services in digital markets. However, they may engage in practices that prevent PSM from reaching or building a relationship with their audiences.

In view of the increasingly important role that platforms play in the distribution of PSM content, our submission will focus on how the EU competition rules can address issues related to digital platforms' market power. However, where appropriate, our reply will also tackle the other two topics of the consultation, namely the role of data and privacy in competition enforcement and the preservation of innovation through competition policy.

4. At the outset, it must be noted that platform practices do not raise only competition concerns. In recent years, it has become clear that platform practices may also interfere with the effective exercise of fundamental rights, such as freedom of expression (Article 11(1) CFREU) and data protection (Article 8 CFREU), and harm democratic principles, and especially media pluralism (Article 11(2) CFREU).

It is not doubted that competition authorities cannot (and should not) replace media regulators and data protection authorities. However, in formulating the EU competition policy, **Article 51(1) CFREU requires the institutions and bodies of the Union to respect the rights and observe the principles enshrined in the Charter in accordance with their respective powers.**

The EBU and its Members take the view that, if the EU competition policy is adapted to the specific characteristics of digital markets, most notably the fact that these markets are mainly driven by non-price parameters, the Commission may develop a decisional practice that not only reflects how digitization affects competition but also addresses some of the non-economic concerns arising from platform practices.

B. Measuring platforms' market power: Competition in digital markets is not primarily driven by price

1. The role of the non-price dimensions of competition in digital markets

- 1.1. Competition is not solely about low prices. As numerous policy documents applying to the Commission point out, competition has several non-price dimensions.³ For example, the (Horizontal and Non-Horizontal) Merger Guidelines explain that an increase in market power, which the Commission seeks to prevent in cases where a concentration is likely to impede effective competition, refers to '**the ability of one or more undertakings to profitably increase prices, reduce output, choice or quality of goods and services or diminish innovation**' [emphasis added].⁴

In digital markets, price is not the only (and perhaps not even the most pertinent) dimension of competition. However, in many decisions, though highly relevant, non-

² For example, the Reuters Institute found that two-thirds of web users (65%) now prefer to use a side-door of some kind (e.g. search engines, social media and aggregators) to access news. This rises to 73% for under-35s. See Reuters Institute (2017). *Digital News Report*, p. 14

³ See, for instance, Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements [2011] OJ C 11/1, paragraphs 183, 185 and 190; Commission Guidelines on Vertical Restraints [2010] OJ C 130/1, paragraph 91; and Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/2, paragraph 11

⁴ Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/3, paragraph 8 and Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C 265/7, paragraph 10

price parameters have not received the attention they deserved. As a result, the relevant assessments were arguably not adapted to the specific circumstances of the affected markets, perhaps underestimating **the power that the platforms under scrutiny had to distort competition**. This point will be illustrated by briefly examining the Commission's reasoning in cases where **concerns over whether the firms under investigation would have the power to reduce the quality of their products or services were raised**. In those cases, **the Commission dismissed such concerns partly on the grounds that users are capable of reacting to such quality reduction**. However, the assumption that users exercise competitive constraints on the companies under scrutiny was not well-grounded.

1.2. Relevance of results as a parameter of search engine quality

In *Microsoft/Yahoo!*, the Commission examined whether the merged entity would have the ability and incentive to reduce the quality of its services by degrading the relevance of search results.⁵ The Commission found that this was not likely to materialize, noting that:

*'Concerning the possible post-merger effects of the transaction on the level of relevance, the respondents to the market investigation stated that algorithmic search engines' quality and relevance are the most important factors to attract users to a particular search engine. **Therefore, users are considered to be responsive with respect to variations to the relevance provided by a search engine** [emphasis added].⁶*

Contrary to what the Commission suggests in its decision, while users may attach importance to relevance, we would question whether they are in a position to assess whether a search engine indeed delivers the results that are most relevant to their queries. In examining whether users are indeed responsive to relevance variations (and other platform practices leading to quality degradation), **the Commission must carefully consider the parameters that determine the users' ability to switch to a competing service, including the users' level of digital literacy and the significant information asymmetries that exist between platforms and users**. The Commission must also take into account **the incentives that may exist for platforms to determine relevance** by reference to factors that are sub-optimal for consumers.

More particularly, based on Eurostat data, only 26% of Europeans have a 'basic' level of overall digital skills.⁷ As a result, it is doubtful whether users are aware of the intricate ways in which search engines may affect the relevance of the search results they provide (e.g. that search results may be 'personalized' based on a user's search history, that search engines may grant their own services preferential treatment in the list of results). Moreover, even if users had a solid understanding of how search engines work in practice, they would still not be able to assess whether the results they receive are the most relevant to their queries. This is because of the considerable uncertainty about the factors determining the display of search results (an industry-wide fact-finding exercise

⁵ Commission decision, *Microsoft/Yahoo! Search Business*, Case No COMP/M.5727 C(2010) 1077, paragraphs 201 et seq.

⁶ *Ibid.*, paragraph 220. For the avoidance of confusion, the Commission mentions in other parts of the decision that relevance is a parameter of quality of organic search results (see in particular paragraphs 202 and 204). That in paragraph 220 the Commission refers to 'quality' and 'relevance' as two distinct features appears to be a drafting error.

⁷ See <http://epp.eurostat.ec.europa.eu/tgm/refreshTableAction.do?tab=table&plugin=1&pcode=tsdsc470&language=en> NB: the 'basic' level of digital skills was assessed by reference to -what may seem to many- low standards. See http://ec.europa.eu/eurostat/cache/metadata/en/tepsr_sp410_esmsip.htm

identified lack of transparency regarding relevance and ranking as one of the most problematic practices in the online platform economy⁸).

It must be noted that **the proposed platform-to-business Regulation (though a first step in addressing lack of transparency in platform markets) would only partly mitigate the information asymmetries discussed here**; as the proposal currently stands, search engines would only be required to disclose 'the main parameters determining ranking'.⁹ In addition, other transparency requirements, including platforms' obligation to include in their terms and conditions a description of any differentiated treatment they give their own services,¹⁰ would not apply to search engines. **Given the important role that search engines play in today's information economy, the EBU is proposing that the EU extend the applicability of other provisions of the Regulation (Articles 3, 4, 6, 7 and 9) to search engines.**

1.3. Data protection as a parameter of platform quality

In *Facebook/Whatsapp*, respondents to the market investigation expressed concerns that the concentration could strengthen Facebook's position in the provision of online advertising services as a result of the increased amount of data which would come under Facebook's control.¹¹ The Commission, however, dismissed this concern, noting that, if Facebook started collecting data from Whatsapp users, this could 'prompt some users to switch to different communications apps that they [would] perceive as less intrusive'.¹²

Similarly, in *Microsoft/LinkedIn*, the Commission found that the amount of consumer data that the entity would control post-merger (e.g. information about an individual's job, career history, professional connections) would not grant it the ability and incentive to distort competition. This was partly based on the fact that both Microsoft and LinkedIn are subject to data protection regulation. With respect to the changes brought about by the General Data Protection Regulation in particular, the Commission noted that the 'new rules [...] strengthen the existing rights and [empower] individuals with more control over their personal data (i.e. easier access to personal data; right to data portability; etc.)'.¹³

The Commission's reasoning in *Facebook/Whatsapp* and *Microsoft/LinkedIn* rests on the assumption that users may react to practices that would lower the level of data protection afforded to them. However, a recent decision adopted by the Italian Competition Authority (AGCM) concerning the changes introduced by Whatsapp in its privacy policy following acquisition by Facebook sheds doubt on the Commission's

⁸ ECORYS (2017). *Business-to-Business relations in the online platform environment*, vi and xii. Retrieved from: <https://publications.europa.eu/en/publication-detail/-/publication/04c75b09-4b2b-11e7-aea8-01aa75ed71a1/language-en>

⁹ Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services. COM(2018) 238 final, Article 5. Retrieved from: <https://ec.europa.eu/digital-single-market/en/news/regulation-promoting-fairness-and-transparency-business-users-online-intermediation-services>

¹⁰ *Ibid.*, Article 6

¹¹ Commission decision *Facebook/Whatsapp Case No COMP/M.7217* [2014] OJ C 417/2, paragraph 184. The Bundeskartellamt is currently investigating whether, by collecting an 'excessive' amount of data, Facebook is abusing its dominant position. For more information see Bundeskartellamt. Press Release of 19 December 2017. *Preliminary assessment in Facebook proceeding: Facebook's collection and use of data from third-party sources is abusive*. Retrieved from:

https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/19_12_2017_Facebook.html. Similarly, we note the European Commission's preliminary steps as regards a potential investigation into Amazon and the way in which it uses the data it harvests from sellers on its sites. See, for instance, Chee, Y. *Amazon's use of merchant data under EU microscope*. 19 September 2018, Reuters. Retrieved from: <https://uk.reuters.com/article/uk-eu-amazon-com-antitrust/amazons-use-of-merchant-data-under-eu-microscope-idUKKCN1LZ1V4>

¹² *Ibid.*, paragraph 186

¹³ Commission decision *Microsoft/LinkedIn Case M. 8124 C*(2016) 8404 final, paragraph 178

assumption. More particularly, AGCM found that Whatsapp forced users to accept in full the new Terms of Use, and specifically the provision to share their personal data with Facebook, by inducing them to believe that without granting their consent to data sharing they could no longer use the service.¹⁴

- 1.4. The above remarks exemplify that, in order to establish whether users exercise competitive constraints on platforms, competition authorities need to resort to instruments that examine whether and if so, to what extent, consumers react to platform practices that degrade quality, reduce choice or diminish innovation (e.g. consumer surveys, experiments, focus groups). This is because in cases such as those described above, users do not pay for the services they receive. As a result, price-based instruments (e.g. the SSNIP test, price diversion ratios) are not adequate to assess the demand-side substitutability dynamics (i.e. what services users regard as substitutes) or whether the entities under scrutiny have the ability and incentive to distort (non-price) competition. Alongside the other factors that are particularly relevant to digital markets, such as network effects, switching costs (including the switching cost to a consumer of losing the network effect of social media platforms) and access (or lack thereof) to data, thoroughly examining user behaviour will enable the Commission to conduct a more complete assessment of the issues arising in any given case, including whether the platforms under scrutiny hold market power.

A notable example that shows that our suggested approach is not only defensible in theory but also workable in practice is the recent *Google Search* decision. In order to assess whether Google is dominant, the Commission not only examined the barriers to entry and expansion, including the network effects between users and advertisers and the role of data in improving the relevance of search results, but also user behaviour. For example, the Commission relied on experiments showing that a significant number of online users trusted the Google brand to such an extent that they would be highly unlikely to use another search engine if Google were to deliver less relevant search results.¹⁵ We suggest that this is a more appropriate approach for future cases.

- 1.5. The importance of properly assessing user behaviour in digital markets (where consumers do not necessarily pay for the services they receive) merely illustrates the role that non-price parameters, such as quality, variety and innovation, may play in competition enforcement in relevant cases. If the EU competition rules are adapted to the circumstances of the markets concerned, several challenges arising from issues specific to digitization will be adequately addressed.

For example, **'excessive' data gathering** may amount to an exploitative abuse of dominance¹⁶ (see, for instance, the Bundeskartellamt's investigation into Facebook's data practices); repeated instances of **exposure to 'fake news'** that do not result in users

¹⁴ See AGCM (2017). Testo Provvedimento PS10601. Retrieved from: http://www.agcm.it/component/joomdoc/allegati-news/PS10601_scorsanz_omi.pdf/download.html See also AGCM (2017, May). WhatsApp fined for 3 million euro for having forced its users to share their personal data with Facebook. Retrieved from: <http://www.agcm.it/en/newsroom/press-releases/2380-whatsapp-fined-for-3-million-euro-for-having-forced-its-users-to-share-their-personal-data-with-facebook.html>

¹⁵ Ibid., paragraph 312 and fn. 333. For example, the decision refers to an eye tracking experiment which demonstrated that, when participants selected a link to follow from Google's general search result pages, they favored links in a higher position, even if the abstracts themselves were less relevant. Referring to Pan, B., Helene Hembrooke, Thorsten Joachims, Lori Lorigo, Geri Gay, and Laura Granka (2007). *In Google we trust: Users' decisions on rank, position, and relevance*. Journal of Computer-Mediated Communication, 12(3), 812. The Commission also refers to a conducted by SurveyMonkey indicating that participants preferred general search results labelled with the 'Google' name, *even if they were results of another general search engine*.

¹⁶ See *supra* n. 11

switching to another platform may be an indication that the entity disseminating fake news holds significant market power; and **scraping third-party content (e.g. news produced by another organization)** may harm innovation (e.g. original investigative journalism) in news markets. By no means does the above imply that EU competition law should be instrumentalized to address concerns over media pluralism or data protection. However, platforms undoubtedly monetize on data, 'fake news', and the use of third-party content. As a result, taking the above parameters into consideration would simply reflect how digital markets work in practice.

2. Stricter merger control would benefit competition in digital markets

- 2.1. It is widely acknowledged that digital markets have a natural tendency to concentration. This may be attributed to sector-specific economics, including (direct and indirect) network effects, and disruptive innovation, which usually result in the market 'tipping' in favour of certain players. In EU competition law, being dominant is not an antitrust violation. Article 102 TFEU does not prohibit a firm from acquiring and holding, on its own merits, a dominant position but only the abuse thereof.

Nevertheless, the market power that many platforms enjoy is not necessarily the result of internal growth. In some cases, it can be attributed to a relaxed approach to mergers and acquisitions. **The Commission has cleared most, if not all, concentrations involving popular online platforms**, including *Microsoft/Skype*, *Microsoft/Yahoo!*, *Microsoft/LinkedIn*, *Google/DoubleClick*, *Facebook/Whatsapp*, and *Apple/Shazam*. **Most of those concentrations were approved unconditionally.**

- 2.2. While concentrations may generate several efficiencies, in our view the decisions discussed above (Part B.1.) demonstrate that the Commission's approach in assessing certain mergers may not in the future be adequate to capture concerns specific to digital markets. The Commission itself has acknowledged that, in cases affecting markets driven by innovation, 'the overwhelming majority of [its] interventions were based on [...] effects on prices. [...] Interventions based on innovation concerns thus remain relatively rare'.¹⁷ Yet, placing an excessive focus on static price effects whilst attaching secondary (or no) importance to dynamic effects may lead to approving a merger that could impair competition.

For example, in *Microsoft/LinkedIn*, the Commission simply notes that the combination of the datasets of Microsoft and LinkedIn would not result in raising barriers to entry/expansion for other players, as the merging firms compete with each other only to a very limited extent in online advertising and its possible segments.¹⁸ This seems to be a rather narrow approach that does not capture the dynamics of data-driven markets. For example, it has been suggested that, in cases involving markets that rely extensively on the collection and use of consumer data, a forward-looking stance is needed and competition authorities must be in the position to look beyond current usages of data in the relevant markets for existing products and services.¹⁹

Similarly, national competition authorities have often failed to accurately assess the dynamic effects of mergers of companies in the digital sector. For example, in

¹⁷ Esteva Mosso, C. (2018). *Innovation in EU Merger Control*, p.6. Retrieved from: http://ec.europa.eu/competition/speeches/text/sp2018_05_en.pdf

¹⁸ Commission decision *Microsoft/LinkedIn Case M. 8124 C(2016) 8404 final*, paragraphs 179-180

¹⁹ Graef, I. (2015). *Market Definition and Market Power in Data: The Case of Online Platforms*. *World Competition* 38(4), 493

Facebook/Instagram, the UK competition authority at the time did not consider the potential for Instagram to grow into the large photo and video-sharing network that it is now, or the potential for Facebook to become a public forum, and instead concluded that 'the evidence before the OFT does not show that Instagram would be particularly well-placed to compete against Facebook in the short run'.²⁰

C. Access to data is key to ensuring that digital markets are competitive

1. Data is a key asset in the digital economy. Many have referred to data as 'the new oil' inasmuch as it is becoming 'the new raw material of business: an economic input almost on a par with capital and labor'.²¹ This is largely because the analysis of large amounts of data traffic provides unique insights into consumer needs, thereby driving the development of new and better services.
2. The increasingly important role of data in shaping digital markets raises a number of challenges in terms of access to and use of this valuable input. For example, as already mentioned, PSM content is increasingly accessed via third-party platforms. As a result, platforms act as intermediaries between PSM organizations and their audiences. Platforms may prevent PSM from accessing their audiences' data. Platforms may also render access to data difficult to obtain. For example, the format in which platforms provide data may preclude a meaningful use of the information obtained or the price which platforms charge for data may be excessive. We take the view that **firms that use platforms to reach their customers (and, in the case of PSM, their audiences) should be able to rely on legal tools in order to gain access to data to support their product and service development and innovation.**²²

Similar to the point we raised above, the Commission Communication 'Towards a common European data space' notes that:

'non-personal data generated by Internet of Things objects in an automated manner pose specific questions as typically the manufacturers of such objects are in a privileged position to determine access to and usage of the data generated. ***Depending on the nature of the respective market they may or may not grant access and usage rights to the user of the object who may find himself prevented from the usage of data the generation of which he triggers***' [emphasis added].²³

The Communication further notes that, in order to ensure fair and competitive markets, one of the key principles that must be respected is '**shared value creation**', that is, the recognition that, '**where data is generated as a by-product of using a product or service, several parties have contributed to creating the data**'.²⁴ Since the issue the

²⁰ OFT decision, *Facebook/Instagram*, (22 August 2012), paragraph 29.

²¹ Cukier, K. *Data, data everywhere*. The Economist, 25 February 2010. Retrieved from: <http://www.economist.com/node/15557443>

²² Access to data issues have been made more complex by the increase in use of voice assistants, with tensions developing between content and service providers as to who is the controller of data captured by voice assistants

²³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. *Towards a common European data space*. COM(2018) 232 final, p. 9. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2018:0232:FIN>

²⁴ *Ibid.*, p. 10

Communication raises is by no means limited to Internet of Things objects, **'shared value creation' must be a guiding principle in data-driven markets.**

3. In the aforementioned Communication, the Commission indicates its preference for contractual arrangements on the grounds that it may be 'early for horizontal legislation on data sharing in business-to-business relations'.²⁵ According to the Commission, businesses should be free to decide to whom and under what conditions access can be granted to non-personal data.²⁶

However, **the EBU and its Members take the view that, to effectively protect and stimulate competition in digital markets, horizontal regulation is needed.** For example, platforms benefit from network effects between consumers and undertakings using those platforms (in fact, network effects partly explain why a handful of companies control the gates through which data is collected). This aggravates the problems arising from the uneven playing field between platforms and their business users.

It must be noted that **the proposal for a platform-to-business Regulation does not address our concern**; as the proposal currently stands, platforms would only be required to 'include in their terms and conditions a description of the technical and contractual access, or absence thereof, of business users to any [...] data'.²⁷ **The EBU supports an amendment to the Regulation that would require platforms that fall under its scope to grant access to data.** More particularly, the EBU proposes that platforms grant all business users access to anonymized consumer data.²⁸ This obligation would be without prejudice to the obligations with which platforms must comply under the applicable data protection and privacy rules.

4. Until regulation mandating data sharing is adopted, antitrust and merger control have a major role to play in addressing competition concerns arising from concentration of this valuable input in the hands of few. The oft-repeated argument that competition authorities should not intervene to force data sharing assumes that data is a non-rivalrous good (i.e. the fact that a certain firm has gathered a given set of data from a user does not prevent others from collecting identical information from that same user).

These arguments must be considered against practices and consumption patterns that significantly restrict access to data for which few or no substitutes may be available. For example, a platform may have imposed on its partners (e.g. advertisers) exclusivity requirements or data portability restrictions (for non-personal data) that discourage them from switching to another platform. In other instances, users may not multi-home (see, for instance, the *Google Search* decision discussed above). There are also cases where services provided by a firm are disaggregated by platforms and consumed by users within distributed environments. For example, a user may consume a news item without

²⁵ Ibid., p. 9

²⁶ Ibid.

²⁷ Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services. COM(2018) 238 final, Article 7(1). Retrieved from: <https://ec.europa.eu/digital-single-market/en/news/regulation-promoting-fairness-and-transparency-business-users-online-intermediation-services>

²⁸ The scope of this obligation would be proportionate to the objective it pursues (i.e. a level playing field in markets where platforms operate) and in line with the 'shared value creation' principle since it would be limited to anonymized consumer data generated 'through the facilitation of a transaction between consumers and the business user concerned'. NB: One of the conditions set by the Regulation for a platform to fall under its scope is that the platform concerned must 'allow business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded'. See Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services. COM(2018) 238 final, Article 2(2)(b)

clicking through to the website of the organization that produced the news item in question.

In cases such as those described above, the Commission may consider that **'access to data' remedies may address competition concerns**. This would be far from unusual in EU competition law. For example, in cases affecting broadcasting markets, where premium content is a driver of competition, the Commission was not reluctant to force the merging parties to grant competitors access to the content concerned on fair, reasonable, and non-discriminatory terms.²⁹ Similarly, in *Microsoft*, the Commission imposed on the tech giant the obligation to grant access to interoperability information.³⁰ With respect to the guiding principles as well as the (technical) aspects that may govern related remedies, the Commission has already considered solutions for B2B agreements in its Guidance on private sector data sharing.³¹

National Competition Authorities in Europe and beyond have already taken action to boost competition in certain markets by requiring firms with large reserves of data to share this data with other providers.³² For example, following the UK CMA's retail banking investigation, the CMA required banks to implement Open Banking; this is a remedy the principles of which can be easily extended into other sectors as open, standard APIs to enable the sharing of data in a controlled and secure manner are available.

Given the important role that data plays in digital markets, the Commission should consider, where appropriate, data sharing.

D. Preserving PSM Innovation through Competition Policy

1. In its call for contributions, the Commission raises certain issues with respect to how to preserve innovation through competition policy. We believe that one issue of great relevance to the topic of the consultation and specific to the PSM sector has not been raised by the Commission.

Given the major contribution of the PSM sector to the European creative and cultural industries and its commitment to reach all segments of society with high-quality services, including original content and accurate, impartial news, competition policy must be conducive to PSM innovation. To that end, **competition assessments affecting PSM organizations must be driven by the technology neutrality principle.** In order to serve all segments of society and to remain relevant, PSM organizations must have a universal reach; as a result, fulfilment of the public service remit must not be dependent on the technology used to provide citizens with high-quality content.

²⁹ See, for instance, Commission decision *NewsCorp/Telepiù*, Case COMP/M.2876 [2004] OJ L 110/73

³⁰ Commission decision of 24.03.2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 Microsoft) C (2004) 900 final

³¹ Commission Staff Working Document. Guidance on sharing private sector data in the European data economy, Sections 2 and 3. SWD(2018) 125 final

³² See, for instance, Autorité de la concurrence. Décision n° 14-MC-02 du 9 septembre 2014 relative à une demande de mesures conservatoires présentée par la société Direct Energie dans les secteurs du gaz et de l'électricité; Competition and Markets Authority (2016). *Retail banking market investigation*; Competition and Markets Authority (2016). *Energy Market investigation*; McLean, A. Australian 'big four' to align their data-sharing ducks ahead of Open Banking. 11 February 2018, ZDNet. Retrieved from: <https://www.zdnet.com/article/australian-big-four-to-align-their-data-sharing-ducks-ahead-of-open-banking/>

2. More particularly, in the field of merger control, **in assessing partnerships between PSM organizations (or between PSM organizations and other providers), the applicable rules must be applied by reference to current market realities.** These include the high concentration ratios characterizing European digital markets and the strong position that a handful of non-European providers with a global presence (which benefit from large economies of scale) occupy therein. This does not concern EU merger control only; it also concerns the decisional practice of National Competition Authorities, which have occasionally blocked partnerships between PSM and other providers that would have boosted competition in digital media markets (e.g. provision of on-demand content services).³³

It must be noted that, based on the high costs that the production and distribution of content entails, Ofcom is strongly encouraging PSM organizations to form partnerships with each other and with commercial competitors, including popular platforms, 'to give themselves greater scale'.³⁴ Ofcom has stated that, in assessing these sorts of partnerships, **'the competition framework needs to be more sensitive to the intensity of global competition'**.³⁵ The above principles should also guide the Commission in future cases. This could, to some extent, level the playing field, which remains uneven due to, *inter alia*, significant regulatory asymmetries (see Part E).

E. Competition enforcement must be complemented with effective regulation

1. Many of the practices in which platforms engage are novel, thereby challenging the current legal framework in a number of ways. The EU competition rules are flexible enough to address several problems arising from harmful platform conduct. However, competition enforcement alone cannot be expected to remedy all concerns deriving from the way in which platforms operate; competition law must be complemented with effective regulation. More particularly, regulatory instruments must be adopted that stimulate competition (E.2.) *and* reflect the increasingly important role that platforms play in the digital economy (E.3).

2. Regulation to stimulate competition

Competition enforcement has inherent weaknesses that cannot be overlooked. With the exception of merger control, **competition rules** (i.e. rules governing agreements restrictive of competition and abuses of dominance) **apply only ex post**. Given the tendency to concentration that relevant markets manifest, it is extremely difficult to restore the competitive process after the damage has materialized.

Moreover, the **threshold for finding dominance is high** and, as the Commission has acknowledged, 'the **bargaining power of business users vis-à-vis online platforms is unlikely to structurally increase** in the near future'.³⁶ Considering the (efficiency) losses brought about by relevant conduct, **the current regulatory gap must be filled**. This is becoming more pressing and imperative given the ever-increasing pace at which

³³ For an overview of some of those decisions and the problems arising therefrom see Bania, K. and Richard Burnley (2014). *Cooperation between broadcasters in the new media age: Rethinking national competition policy*. European Competition Law Review, 35(5), 216-222

³⁴ Ofcom (2018). *Public Service Broadcasting in the Digital Age*, paragraph 4.10. Retrieved from: https://www.ofcom.org.uk/data/assets/pdf_file/0026/111896/Public-service-broadcasting-in-the-digital-age.pdf

³⁵ *Ibid.*, paragraph 4.11

³⁶ European Commission. *Inception Impact Assessment - Fairness in Platform-To-Business Relations*. Ref. Ares(2017)5222469 - 25/10/2017, p. 3

relevant markets develop; harmful unilateral practices, which are not always caught by the competition rules, constantly emerge.

Finally, it must be noted that enforcement of the competition rules (whether by a competition agency or through the courts) is a time-consuming and expensive process. Not only does it take competition agencies a long time to reach infringement decisions and impose remedies, but these decisions are then often the subject of appeals.

The Commission's proposal for a platform-to-business Regulation goes part way towards addressing some issues arising from damaging platform practices. However, as the proposal currently stands, it only seeks to enhance transparency in platform-to-business relations. While lack of transparency is one of the main problems in the online platform economy, the obligations set by the proposed Regulation are not expected to fully address the imbalance of bargaining power between platforms and their business users and, by extension, to stimulate competition. For example, as already mentioned, platforms would be required to disclose whether they grant access to data. However, they would not be obliged to share data. Similarly, the Regulation requires platforms to include in their terms and conditions a description of any differentiated treatment granted to their own services. However, the Regulation does not address issues raised by algorithms which systematically favour platforms' own services. Finally, and perhaps more importantly, for a platform to fall under the scope of the Regulation, it must fulfil certain strictly defined conditions (see Article 2(2) of the Commission's proposal). In other words, the Regulation does not bind all platforms.

3. Regulation that reflects the role played by platforms in our society, including their effect on freedom of expression and media pluralism

In their attempt to circumvent regulation, platforms have often put forward the argument that they are technology companies, not media companies (as opposed to a 'light touch' approach to platforms, media organizations are often bound by strict structural, content and liability regulation).

While this argument carried some weight in the past, platforms are now playing an important role in determining the amount and quality of information that citizens access and engage with. There are several areas in which the activities they develop indicate control and may impact fundamental rights. With respect to freedom of expression and media pluralism in particular, **regulators must bear in mind the control platforms exercise over *distribution bottlenecks* through which users access content, the *editorial-like judgments* they perform in selecting the content they link to or carry, their role in shaping *future economic models for news provision*, and the capacity and incentive to *influence the political agenda*.**³⁷ In view of the above, a 'light touch' regulatory approach to platforms does not grasp the increasingly important role that platforms play in media content consumption.

In addition to the fact that regulation is needed in order to mitigate concerns arising from the impact of platform practices on fundamental rights, there is a competition dimension to the issue discussed here: The uneven playing field is largely attributed to the significant regulatory asymmetries between platforms and other actors in digital markets,

³⁷ See Foster, R. (2012). *News Plurality in a Digital World – Report prepared for the Reuters Institute for the Study of Journalism*, pp. 6-7

including PSM organizations. This is also being addressed by national regulatory authorities, which are contributing to the debate of how to regulate online services.³⁸

F. Conclusion

Given the central role that the Commission can play in setting the conditions under which digital markets develop, it is crucial to monitor how the practices in which platforms engage may affect (non-price) competition. To that end, we strongly encourage the Commission (and National Competition Authorities as well as National Regulatory Authorities with concurrent competition powers) to closely cooperate with other authorities, including media regulators and data protection authorities, and maintain an open dialogue with stakeholders affected by the process of digitization, including PSM organizations. The EBU and its Members are keen to continue exchanges with the Commission on the topic of the consultation and discuss in more detail issues of concern to media markets in general and the PSM sector in particular.

³⁸ See, for instance, Ofcom (2018, September). *Addressing harmful content online*. Retrieved from: https://www.ofcom.org.uk/data/assets/pdf_file/0022/120991/Addressing-harmful-online-content.pdf