A contribution to 'Shaping competition policy in the era of digitisation' (Panels 2 and 3)

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1. Introduction

I welcome the opportunity to share my views about the implementation of competition policy in the era of digitisation. EU competition policy is a story of success. It provides a flexible set of tools that can bring an effective response of many of the challenges posed by digital platforms. It is likely to be more valuable than other regimes or instruments. The comments that follow relate, first, to the implementation of EU competition policy and, second, to the contributions that DG Comp can make to broader debates about the appropriate way to tackle the actual or perceived threats posed by digital platforms. Most of them are relevant for Panel 2, but there are questions, in particular relating to innovation, which would also be relevant in Panel 3.

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2. EU COMPETITION LAW IS ADEQUATELY EQUIPPED TO ADDRESS PRACTICES APPLIED BY DIGITAL PLATFORM OPERATORS

2.1. The phenomena associated with digital platforms are not unique to them

The phenomena that have been identified in digital markets are in no way unique to them. These phenomena have long been identified and studied. In addition, they exist on non-digital markets – or existed in some industries prior to their digitisation. The webpage inviting to submit comments, for instance, refers to leveraging, which is, and has always been, a concern of any competition law system. Similarly, there are references to network externalities and lock-in effects, which have been the subject of systematic study for decades. The same can be said of related questions, such as two-sided markets.

Second, the EU competition law system is familiar with these phenomena and has applied a variety of remedies (e.g. access, non-discrimination, transparency obligations) to deal with them. The *Microsoft* saga, where network externalities featured prominently, is an obvious example that comes to mind, but by no means the only one. There is evidence of vigorous enforcement in the liberalised network industries and in other sectors sharing some features (media, payment systems). Against this background, it is not obvious to see why the system would not be responsive to the challenges raised by digital platforms.

Finally, one should bear in mind that the abovementioned phenomena are not inevitable, in the sense that they do not invariably result from markets presenting the features of digital markets. For instance, leveraging – understood as the extension of a position of market power from one market to a neighbouring one – is not an unavoidable consequence of the existence of a dominant position (or a monopoly) at one or several levels of the value chain. This point is captured in the Commission Guidelines on Non-Horizontal Mergers. Similarly, the emergence of dominant positions and monopolies is not an inevitable consequence of the existence of network effects on a given market, as the extensive experience of the Commission shows.

2.2. There is no evidence justifying a special, more stringent, treatment of digital platforms

It has become commonplace to hear that digital platforms pose challenges that are in some way unique. According to this argument, even though the underlying phenomena are not new, their pervasiveness or their intensity would justify a different, more stringent treatment – perhaps sector-specific. While the anxiety of some stakeholders and institutions can be understood, there is no robust evidence supporting these claims. Unless consensus positions evolve clearly and unambiguously to support them, calls for sectoral exceptions or carve-outs should be dismissed. Around two decades ago, the Commission committed to following mainstream economic principles, and has put in place mechanisms to ensure that enforcement is guided by them. EU competition law policy has improved as a result. There is no reason to depart from this approach.

3. Some enforcement approaches pose significant risks

3.1. Conduct should be prohibited in and of itself ('by object') only where it is truly justified

The experience of several decades of enforcement suggests that, whenever courts and authorities are confronted with a new practice – or whenever a well-known practice applies in a different context or industry – they sometimes have a tendency to prohibit the practice in and of itself (or 'by object') (that is, irrespective of its effects on the market in which it is implemented). On the other hand, experience and economic analysis also suggest that the 'by object' treatment of potentially anticompetitive conduct is, more often than not, unwarranted. The Court of Justice has endorsed these lessons, and explicitly declared that the 'by object' category should be interpreted restrictively (Case C-67/13 P, *Cartes Bancaires*). This is an important principle that should not be ignored when EU competition law is enforced in digital markets.

One implication of this principle is that the anticompetitive potential of a practice is, as such, insufficient to take action under Articles 101 and/or 102 TFEU. For instance, the fact that a digital platform treats more favourably its affiliates is potentially anticompetitive. However, this fact, in and of itself, should not suffice to prohibit the practice. The case law shows that, as a rule, the 'by object' treatment of practices is not warranted for conduct with ambivalent effects on competition – that is, that it can pro- or anticompetitive effects depending on the context in which it is implemented. This conclusion is compatible with consensus positions in economics. Accordingly, only conduct that is not a plausible source of pro-competitive gains should be prohibited in and of itself. The only meaningful exception to this principle relates to instances in which market integration is at stake – and even then, the exception needs to be qualified.

3.2. The assessment of effects should be meaningful

It is widely acknowledged, in line with the above, that the vast majority of practices should be prima facie prohibited only if it can be shown that they have, or are likely to have, negative effects on competition. While this idea is widely accepted – there seems to be a consensus around it, which is in line with the case law – it is not entirely clear what the notion of effect means, and what the assessment entails. The notion can be given many different meanings. The consequences for competition policy of the choices made in this sense can be substantial. If the threshold of effects is set at the lowest level, conduct would be treated, for all practical purposes, as if it were prohibited 'by object'. Such would be the case, for instance, if it were sufficient to show that harm to competition is plausible on the relevant market. Potentially anticompetitive conduct is typically a plausible source of anticompetitive effects. Accordingly, it almost never fail to meet such a low threshold. The same would be true if any competitive disadvantage would be understood to amount to an anticompetitive effect.

It is submitted that the analysis of anticompetitive effects should not be nominal, but meaningful. In other words, it should shed light on the likelihood of the practice negatively affecting rivals' ability and incentive to compete. By the same token, the threshold of effects should not be set at a low level that would be satisfied in all or the vast majority of instances. In this regard, both the case law and the policy positions of the Commission provide valuable guidance about the appropriate way to perform the assessment. In line with what has already been suggested, there is no reason to depart from these principles when policy is implemented in digital markets.

The principles stemming from the case law can be summarised as follows:

- *Not every competitive disadvantage amounts to an anticompetitive effect*. This principle was made explicit by the Court of Justice in Case C-525/16, *Meo*, but several precedents support this conclusion. Accordingly, it would not be sufficient to infer an effect from the fact that, for instance, an affiliate of a vertically-integrated platform operator benefits from a competitive advantage over rivals.
- *A practice that makes it more difficult for rivals to compete does not necessarily have anticompetitive effects*. This principle is a corollary of the preceding one. Again, there is consistent case law supporting this conclusion. For instance, evidence that equally efficient competitors are forced to sell below cost (which cannot fail to make it more difficult to compete) is not, in and of itself, sufficient to conclude that a margin squeeze has anticompetitive effects (see in this sense Case C-280/08, *Deutsche Telekom*).
- *EU competition law is only concerned with the exclusion of equally efficient rivals*. In *Intel* (Case C-413/14), the Court of Justice clarified that Article 102 TFEU is only concerned (at least as a matter of principle) with the exclusion of equally efficient rivals. This principle seems to be applicable across the board, including instances, in which firms compete on parameters other than price, and including practices which are not implemented via prices (such as refusals to deal and tying).
- *Anticompetitive effects must at least be likely*. It has been explained above that, if the threshold of effects were set at the level of plausibility, virtually every practice would be found to have effects. It is therefore not surprising that the Court of Justice endorsed a higher standard – likelihood – in *Post Danmark II* (Case C-23/14). In light of the Opinion of AG Kokott in the same case, it would seem that the threshold is met where it is more likely than not that the practice will have such effects.

- *A causal link between the practice and the effects must be established*: In *Post Danmark II*, the Court also clarified that it must be shown that the actual or potential effects are *attributable* to the practice under consideration. If exclusion would have happened irrespective of the practice – due to technological change, or due to the inefficiency of rivals – EU competition law is not infringed.
- *Evidence of ex post harm is insufficient to take action*. A consistent line of case law, dating back to *Société Technique Minière* (Case 56/65), makes it clear that it is insufficient to show that, seen ex post, the practice has restrictive effects. If a pure ex post approach to the evaluation of anticompetitive effects were endorsed, a very vast range of conduct, including refusals to license intellectual property, would invariably be found to restrict competition. As exemplified by *Nungesser* (Case 258/78), an assessment of the anticompetitive effects of a practice needs to take ex ante factors (such as the incentives to invest in the first place) into consideration. Indeed, in *Société Technique Minière*, the Court explained that the notion of competition needs to be understood as such competition which would have existed in the absence of the practice under consideration.

The soft law instruments adopted by the Commission are very much in line with the case law. This conclusion is clear from the Non-Horizontal Merger Guidelines and the Guidance on Article 102 TFEU. The two documents endorse the same definition of *anticompetitive foreclosure*, pursuant to which competitive disadvantages are not problematic in and of themselves. The Commission endorsed in the two documents a threshold of likelihood. It is important that enforcement in digital markets does not depart from these principles – at least absent truly exceptional circumstances that are appropriately and expressly identified.

3.3. Ad hoc decision-making should be avoided: decisions should meaningfully engage with legal and economic principles

The outcomes of many competition law cases are context-specific, in the sense that the same practice that leads to a finding of infringement in a specific economic and legal context may be found to be innocuous in another one. This point, which is uncontroversial, should not be interpreted as meaning that ad hoc decision-making, whereby outcomes are justified by reference to the specific features of the firm(s), the market and/or industry, is appropriate. This ad hoc approach to decision-making is particularly problematic in digital markets, where guidance about the boundaries between lawful and unlawful conduct is particularly necessary given the novelty of many issues.

The Commission should engage meaningfully and explicitly with the legal and economic issues underpinning every case, so as to clarify how the finding of infringement (or the finding of no infringement) fits in the system as a whole and to allow stakeholders to infer principles guiding action in comparable scenarios or circumstances. The Commission can take steps in this direction by committing to the following practices:

- *Define with precision the legal test against which the lawfulness of conduct is assessed, as well as the precedents (if any) supporting this conclusion*.
- *Explain why one precedent has been chosen over others that are claimed to be the applicable ones by the firm(s) involved in the proceedings.*
- *If the Commission chooses to depart from the case law, and/or from its past practice, it should outline explicitly the reasons why it does so, and the factors relating to the economic and legal context of the practice that justify such departure*.
- *The same applies when the Commission departs from the legal test and/or analytical approach set out in a soft law instrument (including the instruments mentioned above).*

- *The Commission should also clarify explicitly how the decision conforms to the horizontal principles stemming from the case law that have been outlined above.*

4. There is no legal or economic basis for some popular principles and assumptions

4.1. There is no basis to see vertical integration, in and of itself, with suspicion

The fact that digital platforms are vertically integrated is often seen with concern. Claims for the break-up of platforms, in the same vein, are not infrequent. There is no legal and economic basis for these concerns. It has long been understood that vertical integration is not problematic in and of itself and, as already pointed out, there is no evidence that suggests that there is something about digital platforms that justifies departing from this principle. What is more (as acknowledged, for instance, in the Non-Horizontal Merger Guidelines), it has long been understood that vertical integration is a source of pro-competitive gains that can enhance the competitive process and, in addition, benefit citizens through the emergence of new and/or improved products and services.

4.2. Non-discrimination and level-playing-field obligations are remedies, not as the default setting in digital markets

Another question that is seen with concern is the preferential treatment given by platform operators to their affiliates. These affiliates may be given privileged access to data collected by the platform operator or may be displayed more prominently or more attractively than rival services. As a result, there have been frequent calls for the imposition of strict non-discrimination obligations placing affiliates and third-party services are placed on a level playing field. It is undeniable that such obligations may be appropriate in certain circumstances. Indeed, it is not difficult to think of examples, from long before the rise of digital platforms, in which such obligations were imposed.

However, strict non-discrimination obligations should only be seen as a remedy, not as a principle guiding policy. There is no legal and/or economic basis supporting the conclusion that, as a matter of principle, platform operators should place affiliates and third-party services on an equal footing. By the same token, there is no support in the case law for the proposition that differential treatment by a dominant platform operator amounts, in and of itself, to a breach of Article 102 TFEU. Likewise, there is nothing mainstream economics that suggests that strict non-discrimination obligations should be the default setting in online platforms. This conclusion is apparent from the Non-Horizontal Merger Guidelines, where differential treatment is only seen as problematic in very specific circumstances to be established on a case-by-case basis.

4.3. There is no basis to favour open vs closed systems, or vice versa

There has been considerable debate about the relative merits of (relatively) open systems and (relatively) closed ones. It is submitted that EU competition law is, and should be, agnostic about business models. The choice by one firm of one business model over the other should be seen as a concrete manifestation of the competitive process. There is no support in the economic literature for the conclusion that one model is invariably superior to the other, or that remedial action to make systems relatively open, or relatively closed, is warranted. It is understood (and there is ample empirical evidence supporting the conclusion) that both can allow for the emergence of new products and improve the competitive process.

4.4. There is no basis for substituting innovation considerations for robust effects analysis

Typically, innovation considerations are introduced *indirectly*, or *by proxy*, in EU competition law analysis. In other words, harm to innovation is inferred from harm to the competitive process. This is the approach that the Commission followed in merger cases, including *Dow/DuPont* (Case M.7932). This approach is both uncontroversial and robust, as well as in line with the way in which other parameters of competition are introduced in the analysis. This same approach is and can be followed in digital markets. For instance, if there is cogent and convincing evidence of anticompetitive foreclosure by a platform operator, the Commission can infer harm to innovation therefrom.

On the other hand, there is no basis for the *direct* introduction of innovation considerations in the analysis. Accordingly, it should be avoided. Innovation considerations are said to be introduced in a *direct* way when they are relied upon in lieu of an assessment of anticompetitive effects. For instance, a competition authority may claim that, even though there is no cogent and convincing evidence of anticompetitive foreclosure, intervention is nevertheless justified insofar as it could lead to a reduction in innovation. There seems to be no support in economic theory or in the case law for such a policy approach. In the same vein, there is no support for the idea that a level playing field in which all rivals deal with a platform operator on non-discriminatory terms and conditions can be presumed to enhance firms' incentives to innovate.

These considerations are important, in particular, for the issues that the Commission intends to discuss in Panel 3. The webpage refers, for instance, to 'copycat' products. It is difficult to see why, in the absence of an IPR infringement, the launch of 'copycat' products by a dominant platform operator would be an issue under EU competition law. For the reasons explained above, intervention based on the direct introduction of innovation considerations in such an instance would be unwarranted. Even if the behaviour of the platform operator amounts to an IPR infringement, the Commission (given the relative novelty of the issue) would need to proceed with care when designing the legal test. In particular, the Commission would need to ensure that its approach is consistent with to the balance between competition law and IPRs struck in its Guidelines on technology transfer agreements and in pay-for-delay cases.

5. It seems appropriate for competition authorities to rely on the whole range of legal tests available

5.1. A standard case-by-case analysis is not appropriate in all circumstances: filters and proxies are necessary

It has been explained above that the 'by object' approach is only appropriate for a limited set of practices. In the same vein, it is submitted that it would be inappropriate to use a case-by-case effects analysis for all practices. The range of legal tests in the case law is broader. There are practices that are deemed *prima facie lawful* (such as quantity rebates and pricing above average total costs), and some practices that are subject to an *enhanced effects analysis* (in the sense that they are only prohibited where there is at the very least evidence that access to an input or infrastructure is *indispensable*).

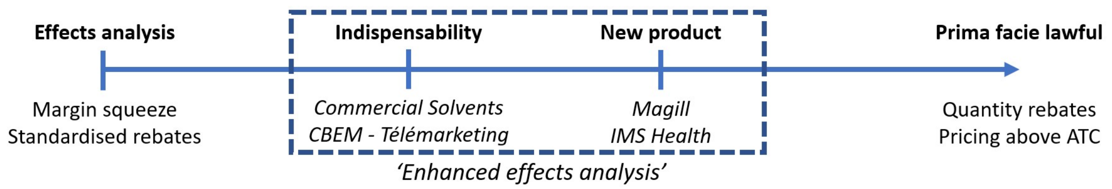

Fig. 1: The spectrum of legal tests: Article 102 TFEU

There are good reasons to rely on filters and proxies, as the case law does. A full-blown effects analysis does not seem appropriate for practices that are overwhelmingly likely to have pro-competitive effects, or which are incapable of restricting competition. For instance, a prima facie legality rule is appropriate for franchising or selective distribution systems. In the same vein, it is necessary to take into account the risks of intervention having unintended consequences, as well as the ability of the competition authority to improve the conditions prevailing on the relevant market. For instance, these factors explain, by and large, why a refusal to license an IPR is subject to an enhanced effects analysis.

5.2. A prima facie legality rule seems appropriate in relation to practices that are objectively necessary

As already mentioned (*Société Technique Minière*), practices that do not restrict competition that would otherwise have existed are not prohibited in EU competition law (that is, they fall outside the scope of Article 101(1) and/or Article 102 TFEU altogether). There may be instances in which a practice is objectively necessary for the firm(s) to attain a pro-competitive aim. For instance, the Guidelines on vertical restraints explain that a distributor may need protection from both active and passive sales in certain circumstances. Similarly, there may be clauses in an agreement that are ancillary to the aim sought by the main transaction. For instance, clauses aimed at protecting the know-how and uniformity of a franchising system fall outside the scope of Article 101(1) TFEU for this reason.

There may be instances, in and around digital platforms, in which practices are objectively necessary to attain a pro-competitive aim and therefore incapable of restricting competition that would otherwise have existed. Unlike the cases mentioned above, these practices may be new, or not obviously comparable to conduct previously deemed prima facie lawful. Accordingly, it is necessary to ensure that firms are given the opportunity to show that their behaviour is objectively necessary and thus prima facie lawful as incapable of restricting competition. It is clear from the case law that the possibility of advancing arguments in this sense exists, both under Article 101(1) TFEU – Joined Cases C-403/08 and C-429/08, *Murphy* – and Article 102 TFEU – Case C-413/14, *Intel*.

5.3. The enhanced effects analysis is appropriate where intervention would force platform operators to redesign their products and/or change their business model

An enhanced effects analysis is used where a firm is required to license its IPR under Article 102 TFEU. In addition to showing that the input is indispensable, an obligation to license requires showing that a refusal would prevent the emergence of a new product. As already pointed out, there are good reasons why an enhanced effects analysis applies in such a scenario. Competition authorities (and courts) lack the resources to measure, case-by-case, whether a compulsory license will be in the public interest (and enhance the overall incentives to innovate); in addition, forcing a firm to alter its way of exploiting its IPRs can have unintended consequences – it is accepted that, by and large, allowing a firm to exploit its property as it sees fit is pro-competitive.

In platform markets, the enhanced effects analysis would be appropriate in instances that are comparable to those in which indispensability (at least) has been required in the case law (see figure 1 above). Accordingly, this filter would apply where intervention would force a firm to alter the design of its products and/or to change its business model (see in this sense Joined cases 6 and 7/73, *Commercial Solvents* or Case 311/84, *CBEM-Télémarketing*). Two examples can usefully illustrate the instances in which, at the very least, evidence of indispensability should be required. One is inspired from *Intel/McAfee* (Case M.5984). Let us suppose that a dominant firm had independently started to embed security solutions in CPUs. Remedial action in such a case would require the firm to change the design of the firm's hardware to allow competing security solutions to work with its CPUs on a level playing field. The other is inspired by Commissioner Vestager's suggestion that she would rather pay for Facebook, in exchange for full privacy. Intervention requiring Facebook to start charging end-users would significantly alter the firm's business model and as such should be subject to an enhanced effects analysis.