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*"SHAPING COMPETITION POLICY IN THE ERA OF DIGITISATION"*

**CONTRIBUTION FROM INTESA SANPAOLO**

**TO THE EUROPEAN COMMISSION'S CALL FOR CONTRIBUTIONS**

## *EXECUTIVE SUMMARY*

- **Panel 1 (privacy)**: Empirical studies have demonstrated that customers do not take their privacy in consideration when they act in the online market. Privacy does not seem to be a driver of consumers' choices. Therefore, privacy can hardly be considered a qualitative (non-price) dimension of competition in the digital world.
- **Panel 1 (portability)**: Portability of data is key to ensure the competitivity of the EU digital market. GDPR rules concerning portability are insufficient, and antitrust enforcement could be not enough. Thus, a new regulatory measure that creates a free-data portability area within the EU, applied to services that are based on networks (based on what the PSD 2 has done for the banking sector), would prevent anti-competitive behaviour and boost competition to the benefit of the EU economy.
- **Panel 2 (platforms' market power)**: Platforms are increasingly becoming gatekeepers of the digital market. Competition law, which basically intervenes *ex post*, could be insufficient to ensure a real competitive environment. In this regard, a neutrality obligation should be imposed when – through vertical integration – platforms start operating as business users of their own intermediation services offering their own product and services in competition with their business users. Platforms should not apply preferential treatments to their own products and services offered through their own intermediation services, and should be forced to accept competition from third parties.
- **Panel 3 (data and innovation in merger control)**: In merger cases involving innovative and digital markets, competition authorities should complement the analysis based on traditional means (*e.g.*, market shares calculated on sales and volumes) with other indicators that rely on other competition's dimensions and on other sources of market power. In this respect, authorities should consider that the amount of data under the control of undertakings regarded by a proposed merger, as well as the computational power they detain to exploit such data must play a role in the analysis of the present and the prospective market power of a post-merger entity.



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***Panel 1: COMPETITION, DATA, PRIVACY, AND AI***[1]

*Privacy as a non-price dimension of competition: "a contrario" arguments*

In her dissenting opinion in the Google/DoubleClick case in 2007, Commissioner Jones Harbour of the Federal Trade Commission (FTC) included privacy as a non-price dimension of competition, assuming that (in the field of search engines) undertakings compete (also) on "privacy protections or related non-price dimensions"[2]. However, since then, there has been an expansion of online markets and, especially, of "zero price" services offered through the web and digital technologies. We all have perceived our **inclination to accept to share personal data in order to obtain a "zero price" service** that we deem beneficial for us.

Such an inclination has been demonstrated by a study conducted in June 2017 by the National Bureau of Economic Research (NBER). In the context of a wider project aiming at establishing a cryptocurrency community, participants were asked to express their privacy preferences linked to the exchange of data generated using their cryptocurrency wallets. Afterwards, researchers gave an incentive to a sub-group of these participants, *i.e.*, a pizza they could share with their closest friends, in exchange for more data on such friends. Results show that, notwithstanding the theoretical importance given to privacy, a little incentive (like a pizza) can have an important effect on the behaviour of people in terms of availability to share personal data[3].



NBER's researchers traced back the difference between what participants said regarding the importance of their privacy, on the one hand, and what they did in presence of a little incentive, on the other, to the concept of "**digital privacy paradox**". Therefore, to properly assess whether privacy (and its protection) could be considered as a non-price element of competition in the digital online environment, it would be necessary to consider the paradox highlighted by the just mentioned research. Indeed, it suggests that customers do not really take into consideration their privacy when they act in the online market and, specifically, when the only money they spend to buy an online

[1] The content of this part is largely based on S. Lucchini, J. Moscianese, I. de Angelis, F. Di Benedetto, *Online digital services and competition law: why competition authorities should be more concerned about portability rather than about privacy*, *Journal of European Competition Law and Practice* (2018), DOI:0.1093/jeclap/lpy052.

[2] In the matter of Google/DoubleClick F.T.C. File No. 071-0170, *Dissenting Statement of Commissioner Pamela Jones Harbour*, footnote n. 25, https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf. For recent comments regarding the relevance of privacy in the competition assessment, see G. Buttarelli, *Strange Bedfellows: Data Protection, Privacy and Competition*, 13 No. 1 *Competition Law International* 21 (2017).

[3] © 2017 by S. Athey, C. Catalini and C. Tucker, *The Digital Privacy Paradox: Small Money, Small Costs, Small Talk*, Working Paper 23488, National Bureau of Economic Research, Cambridge, June 2017, (http://www.nber.org/papers/w23488.pdf).

digital service is represented by their own data[4]. In other words, a "zero price" service seems to be a sufficient incentive for people to superficially share their personal information. Once companies are able to provide efficient "zero price" services, customers do not really care about their personal data and, consequently, their privacy is not perceived as a decisive element for their choices on the market. From the above considerations, it should follow that **privacy can hardly be considered as a qualitative dimension of competition in the digital world** (platforms, social networks, apps etc.).

*Portability of data: a decisive element for competition*

The public discourse regarding data and competition in innovative businesses has devoted great importance to privacy, while little attention has been given so far to the portability of data, which is the object of more recent analysis under competition law[5].

The data portability is not only the right of the customer to obtain his data in a transferable format, but also his right to ensure that the data held by an enterprise can, upon his request, be transferred to another company. In this regard, the concept of portability reveals its value within the competitive context between competitors: portability is not only a consumer's right but also a **duty for businesses**. In fact, "the right to data portability may also reduce lock-in by enabling users to switch easily between services. In this regard, data portability also has a competition law angle"[6].



A great boost to the portability of data and to competition has recently come with the entry into force of the new EU **General Data Protection Regulation** (GDPR), whose Article 20 has introduced a right of consumers to the portability of personal data[7]. This is a wide regulatory intervention, involving all sectors and companies, regardless of their size.

[4] Commissioner Margrethe Vestager used the expression "new currency" with reference to big data during her speech on 18 January 2016, *Competition in a big data world*, https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-big-data-world_en.

[5] I. Graef, J. Verschakele, P. Valcke, *Putting the right to data portability into a competition law perspective*, in *Law. The Journal of the Higher School of Economics*, Annual Review 2013, p. 53-63. A. Diker Vanberg, M. B. Ünver, *The right to data portability in the GDPR and EU competition law: odd couple or dynamic duo?*, in *European Journal of Law and Technology*, Vol 8, No 1, (2017), http://ejlt.org/article/view/546/726.

[6] I. Graef, *Data Portability at the Crossroads of Data Protection and Competition Policy*, Big Data e Concorrenza, 9 November 2016, LUISS Guido Carli, http://www.agcm.it/component/joomdoc/eventi/convegni/20161109_07.pdf/download.html.

[7] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1–88. A positive contribution to the free movement of data is provided by Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, OJ L 60I, 2.3.2018, p. 1–15.

The introduction of such a right has been welcomed as a pro-competitive tool. However, there are intrinsic **limits to this legislation**[8]. First, since it concerns only consumers, legal entities have no right to data portability. Furthermore, since data portability refers only to personal data, there is no possibility of extending it to anonymous data, inferred or derived data[9]. Last, but not least, data portability is emphasized at the request of the data owner and not at the request of third parties, and only to the extent that this is technically possible for the controller that holds the data[10].

So, while the right to portability encompassed under the GDPR has pro-competitive effects, it does not ensure that, in the future, competition problems regarding data portability won't arise. Indeed, in such a context, it is important to emphasise the role of **antitrust enforcement as a supplementary tool** of the new GDPR. Indeed, given the above-mentioned limits of the new right to data portability, antitrust regulators should be able to extend the portability of data to those cases where – although not falling within the scope of the new regulation – a conduct consisting in the refusal to grant access to crucial data may constitute an abuse of dominance under Article 102 TFEU[11].

However, considered that data portability is a matter of entry barriers[12], EU legislation should force data portability through a regulatory measure, supplementing both GDPR and competition enforcement. This has been already done, in a specific sector of the economy, by the EU lawmakers with the adoption of the **Payment Services Directive 2** (PSD 2)[13]. Given the perception of a lack of data portability in the banking sector, the PSD 2 introduced rules to grant third-parties (*i.e.*, fintechs) that wish to offer services to accounts' holders a mandatory access to bank accounts' data. Such a regulatory intervention intends to reduce the risk of anti-competitive behaviours by banks.



Therefore, a new general legislation applicable to a wide range of economic activities and providing for the same obligations that now banks have under the PSD 2 would, thus, create a **free-data portability area within the EU** (*e.g.*, through application programming interfaces, APIs), both

[8] Article 29 Data Protection Working Party, 16/EN WP 242, *Guidelines on the right to data portability*, 13 December 2016, http://ec.europa.eu/newsroom/document.cfm?doc_id=43822.
[9] I. Graef, J. Verschakele, P. Valcke, *Putting the right to data portability into a competition law perspective*, *cit.*
[10] On the limits of portability under the GDPR in the competitive context see also I. Graef, *Data Portability at the Crossroads of Data Protection and Competition Policy*, *cit.*
[11] A. Diker Vanberg, M. B. Ünver, *The right to data portability in the GDPR and EU competition law: odd couple or dynamic duo?*, *cit.*
[12] D. Geradin, M. Kuschewsky, *Competition Law and Personal Data: Preliminary Thoughts on a Complex Issue*, 9, http://ssrn.com/abstract=2216088.
[13] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, OJ L 337, 23.12.2015, p. 35–127.

preventing anti-competitive risks and boosting competition to the benefit of the EU economy[14]. Such a legislation should be applied to **services that are based on networks**, where interoperability and data portability are fundamental keys to create or consolidate a fair and efficient competitive environment. In specific circumstances, such a free-data portability area could be established through the creation of **centralised repositories** at the EU level that would ensure access to technologies, infrastructures and – especially – data to all interested entities (public bodies or undertakings) on a non-discriminatory basis (*e.g.*, a centralised repository of data in the transport sector, especially regarding commuting).

***Panel 2: DIGITAL PLATFORMS' MARKET POWER***

Because of the prominent role of platforms as e-commerce's gatekeepers, which is expected to grow and consolidate in the next years[15], it could be argued that soon such operators will *de facto* assume a **crucial role as *quasi*-essential facilities of the digital market**. In fact, in the context of the digital economy, it is possible to see the emergence of seemingly dominant platforms, especially considering the role of network effects, as well as the high incidence of single-homing[16], which should be considered as an evidence of a lack of demand substitutability.

From a chronological perspective, while in a first phase of e-commerce platforms need business users, because they attract customers and through network effect the platform becomes valuable and less replaceable[17], in the second phase (which basically corresponds to the current stage of the most profitable platforms), **it's the business users that become dependent on the platform**, which thus acquires enormous market power as a gatekeeper.



In cases where the dominant position of a platform is established and an abuse has been committed, EU competition law provides to competition authorities all the necessary tools to tackle such a behaviour through Article 102 TFEU. However, given the rapid growth of platforms' market power, a tool such as antitrust enforcement, which basically operates *ex post*, could be unsatisfactory to maintain a real competitive environment in the digital sector. Thus, it could be useful to **impose them**

[14] The establishment of a free-data portability area at the EU level is perfectly in line with the position recently expressed by the Commission in SWD(2018) 125 final, accompanying the Communication "Towards a common European data space" (COM(2018) 232 final), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD:2018:125:FIN.

[15] It was estimated in 2015 that 60 percent of EU private consumption and 30 percent of EU public consumption of goods and services related to the total "internet economy" were purchased through online platforms. In this regards, see Copenhagen Economics, *Online Intermediaries: Impact on the EU economy* (2015), https://www.copenhageneconomics.com/dyn/resources/Publication/publicationPDF/2/342/1454501505/edima-online-intermediaries-eu-growth-engines.pdf.

[16] Even if it seems to be easier to switch online platform to buy goods and services, as there are usually no switching costs, consumers tend to stick to the same digital platform to acquire the same kind of goods for reasons linked to brand loyalty.

[17] F. Bostoen, *Neutrality, fairness or freedom? Principles for platform regulation*, 7(1) *Internet Policy Review* (2018).

**neutrality obligations** to prevent possible abuses through regulation. In this regard, the Commission proposal for an **EU Regulation for platform fairness and transparency**[18] seems not going sufficiently further in tackling likely future competition problems[19]. Anyway, it is still a first step towards recognizing the specialty of the platform economy and its need for regulation whether based on competition rules or not.

*The need for reinforcing the proposed regulation on platform fairness and transparency*

Such a neutrality obligation should be imposed when – through vertical integration – **platforms start operating as business users of their own intermediation service** offering (directly or through controlled entities) their own product and services, competing with other business users[20]. Empirical case studies have noted that unfair competition between platforms and business users can reduce innovation and increase prices, limit consumer choice, and degrade the quality of the platform[21].

Under the proposed regulation, platforms should (i) be **obliged not to apply a preferential treatment to their own products and services** offered through their own intermediation service, and – in cases where such products and services are initially offered on the platform only by the platform itself – (ii) **be forced to accept competition from third parties' business users** regarding products and services that the platform itself offers through its own intermediation service. In fact, the digital platform operator offering a product or a service on its intermediation service which is neither search nor matching (*i.e.*, which is not intermediation as core activities of platforms), should have a duty to "open up the platform" and let third parties offer that same product or service. The effect of such a regulation will decrease prices, increase consumer choice and drive innovation.



Moreover, following the principles of fairness and competition, when the platform owner competes with the business users offering its own product and services on the platform, **regulation should include the right of third parties' business user to have access to data generated by customers on the platform**. Especially in the case of competition between the platform owner and the business

[18]Cf. https://ec.europa.eu/digital-single-market/en/news/regulation-promoting-fairness-and-transparency-business-users-online-intermediation-services.

[19] The Commission has set up an Observatory on the Online Platform Economy, with the decision of 26.4.2018. The Observatory is tasked with providing the Commission with advice and expertise on the evolution of the online platform economy, and performing expert analysis on issues of particular importance that may arise in relation to the online platform economy.

[20] This issue has recently been raised by the Commission regarding Amazon's use of third-party merchants' data on its Marketplace platform and related to activities where Amazon acts as a merchant itself (http://ec.europa.eu/avservices/video/player.cfm?ref=I160574).

[21] W. Wen, F. Zhu, *Threat of Platform-Owner Entry and Complementor Responses: Evidence from the Mobile App Market*, Working Paper No. 18–036 Harvard Business School (2017). M. Luca, *et al.*, *Does Google Content Degrade Google Search? Experimental Evidence*. Harvard Business School Working Paper, 16-035, 44 (2016).

user, it would be unfair if only the platform owner offered products or services leveraging data acquired through his intermediation activity.

***Panel 3: PRESERVING DIGITAL INNOVATION THROUGH COMPETITION POLICY***

It is argued that innovation is often characterized by **exponential growth**[22]. That does not mean neither that innovative markets always grow faster than "traditional" markets characterized by linear growth, nor that innovative markets will always grow at an exponential rate. In a first phase, innovative markets' rate of growth can be lower than that of "traditional" markets. However, there is a certain point in the time-line when innovative markets' growth explodes with disruptive consequences. This could be considered as the **second phase of growth in innovative markets**. Competition authorities should exactly deal with this second phase of innovation. Indeed, an intervention during the first phase would impede innovation. By contrast, a proportionate action during the second phase would be able to **tackle in advance the creation of those dominant or *quasi*-dominant positions** that can be considered as such a danger for competition, consumer welfare and innovation. Indeed, the rapid consolidation of market power by the first movers in innovative markets could **hinder innovation**, through both the enhancement of barriers to entry and the acquisition of competitors with excluding purposes. Some reflections in this regard have already been made by the Commission in recent merger cases[23].



*Data as source of market power in the digital markets*

In this regard, as already suggested by the Commission[24], it could be useful to partially review the tools adopted by competition authorities in merger control cases. In particular, it seems necessary to **amend some analytical tools such as those for the assessment of market power** which are based on market shares (calculated on sells or volumes)[25]. However, the solution should not be limited to the adoption of complementary thresholds based on the value of the transaction, recently introduced by lawmakers in Germany and Austria[26]. In other words, competition authority should focus their analysis more on the wide concept of "market power", rather than on narrow concepts of "market

[22] In this regard, see S. Quintarelli, *Costruire il domani. Istruzioni per un futuro immateriale*, paragraphs 1.8 and 1.9 (2017).
[23] In this regard, for example, see the innovation-related concerns expressed by the Commission in the Bayer-Monsanto case (http://europa.eu/rapid/press-release_IP-18-2282_en.htm).
[24] Cf. http://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html.
[25] Cf. Israel Antitrust Authority inquiry on competition issues in the digital economy, p. 5 (2018), http://www.antitrust.gov.il/files/35246/%D7%A7%D7%95%D7%9C%20%D7%A7%D7%95%D7%A8%D7%90%20%D7%90%D7%A0%D7%92%D7%9C%D7%99%D7%AA.pdf.
[26] In this regard, for the last developments, see: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2.

share" or "value of the transaction". A wide concept of market power should rely on the real sources of power, which – as already said – in innovative markets are mainly represented by **data**.

It follows that, in merger cases involving **innovative markets** competition authorities should complement the analysis based on traditional tools (market share and transaction's value) with those that rely on other competition dimensions. In fact, it is well-known that innovation in the digital technology is data-driven. Therefore, the (i) **amount of data** under the control of undertakings regarded by a proposed merger, as well as their (ii) **ability to extract data's value** (*i.e.*, a mix of computational power, artificial intelligence, sophisticated algorithms and data scientists), must play a role in the analysis of the present and prospective market power of the post-merger entity. Commitment **decisions** could have a fundamental role in reducing competition concerns in data-driven markets[27] (*e.g.*, requiring parties to ensure the interoperability of some systems or the openness of certain sources of crucial data).

In this respect, it should be noted that the Commission Notice on the definition of relevant market for the purposes of EU competition law recognizes that although "sales are usually the reference to calculate market shares, there are nevertheless other indications that, depending on the specific products or industry in question, can offer useful information […]"[28]. Thus, the opportunity to overcome the limitations inherent to the traditional methods for the calculation of the market power in innovative markets is consistent with the EU legal framework.



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[27] Cf. Israel Antitrust Authority inquiry on competition issues in the digital economy, p. 10 (2018), *cit.*
[28] *Commission Notice on the definition of relevant market for the purposes of Community competition law*, OJ C 372 09.12.1997, pages 5–13, para. 54.