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Shaping Competition Policy in the Era of Digitisation
Response to the European Commission's Call for contributions

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ProSiebenSat.1 Media SE welcomes the opportunity to respond to Commissioner Vestager's call for contributions of 6 July 2018 in preparation for the conference on implications of digitisation for competition policy hosted by the European Commission and scheduled for 17 January 2019. Specifically, this contribution deals with the topics addressed by panel no. 2 on Digital Platforms' Market Power.

I. Introduction

[1] This submission does not aim to give a comprehensive account of the numerous antitrust law implications surrounding digital platforms and the need for enforcement and/or regulatory action in this regard. Instead, we would like to draw your attention to digital platforms' leveraging of market power into other markets. This is a major competition law problem that also affects ProSiebenSat.1 Media SE in the day-to-day conduct of its business. We consider it a fundamental failure affecting a number of digital markets that dominant platforms are in a position to extend their respective dominance to further markets without having to go through a competitive process and to sustain competitive pressure.

[2] By leveraging market power, dominant platforms forego any competitive dynamics in the newly entered markets and rest upon their supremacy in

other fields instead of having to engage in competitive efforts on the merits. Eventually, this hurts the consumer, who is deprived of benefits derived from healthy competition on quality. Enforcement action is needed. European competition law is fit for such action and already provides for the relevant tools for intervention now.

[3] At the outset, what puts dominant digital platforms in a position to leverage their market power is the fact that they not only act as intermediaries between the different sides of the platform. In many cases, platform providers themselves become active in the sale of goods and/or the provision of services offered via the platform. However, in this case they do not compete under fair conditions. Far from it: as the platform "owner" is at the same time setting the "rules of the game", this puts him in a superior position compared to his competitors and customers on the platform.

[4] Leveraging is often achieved through a combination of practices that are designed to reinforce each other. First of all, existing market power is in many cases leveraged by bundling separate services. It is a common practice to tie additional services to the dominant platforms, e.g. cloud space for photos, streaming services for music and video as well as own electronic devices. Typically, users are forced to go with the entire bundle and there is no – or no economically viable – possibility to acquire the different parts of the package separately and/or to combine the services of the dominant platform with services offered by third-party providers.

[5] In addition, bundling practices are reinforced by the respective platforms' common practice of giving preference to its own offers over third-party products and services. As illustrated by the *Google Shopping* decision of the European Commission[1], many platforms are far from neutral. At the outset, platform providers draw users from both sides of the platform and benefit from network effects created by both P2B and P2C customers. However, while platforms are by their very nature generally open to third parties, they become active on the platforms themselves. Furthermore, when expedient they prefer their own sales or services. This results in nothing short of free riding on network effects created by others.

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1 European Commission, Decision of 27 June 2017, Case AT.39740 – *Google Shopping*.

[6] Besides tying and bundling, in many cases additional predatory pricing practices are employed to promote newly added services. Dominant platforms often set the prices for their bundled services, such as instant messaging applications and VoD or music streaming services, significantly below cost, so that they cannot be matched by competing service providers. Low prices, however, will only be transitory and are aimed at eliminating competitors from the market. Such pricing practices cannot be considered in isolation but must be viewed as a further element of leveraging market power reinforcing the bundling practices described above.

[7] What's more: some platforms are not only in a position to undercut competitors' prices by their own predatory pricing behavior. In addition, they have a direct influence on their competitors' prices. First, such influence is derived from the fact that platforms can determine the prices for the access to their platforms or the platform services, e.g. commissions or additional fees. Second, some platform providers – besides "being" the platform and at the same time "being on" the platform – control relevant infrastructure "surrounding the platform", e.g. by offering logistics, shipment or cloud services. As they set the prices for such services, platform providers are equipped with a further tool to determine the prices of their competitors who are active on the platform.

[8] This situation of rivalry on unequal footing is added to – and significantly worsened – by the platform providers' superior access to relevant data – data that are mainly created by way of the commercial activities of others, as to a large part they are derived from transactions of third parties and not of the platform provider. Only the platform provider has full access to data relating to the commercial interactions that take place via the platform, even if they concern the activities of third parties. Further insight is available where, as described above, a platform provider offers additional infrastructure services, such as warehousing, shipping or billing. Unequal access to relevant data allows platform providers to make use of their superior insight and – at their own discretion – decide whether to promote their own services or merely act as a platform and earn commissions and/or fees by providing infrastructure services.

[9] Finally, when extending their market positions into additional markets, platform providers are largely immune from competition, as they benefit from extensive lock-in effects on all sides of the platform. On the P2B

side of the markets, for most companies not being on the platform is not an option as, otherwise, they would not have sufficient access to the customer. Many companies are therefore locked into the platform. Where they rely on the platform providers' infrastructure services, such as logistics or cloud services, this lock-in effect is strengthened even further.

[10] P2C customers in turn are locked in as, first of all, it is convenient for them to only register with one platform and, in addition, a significant portion of their platform-related commercial activities generates assets that are not portable. For example, this holds true for personal and commercial ratings, search and purchase history as well as digital music, films, pictures or other products and services purchased via a particular platform.

[11] As a result, this combination of practices and factors leads to a situation where – once the provider of a platform extends its market position into another market – providers of digital services in such markets cannot compete on the merits. They would have to offer the same bundle as the one offered by the dominant platform. The investment for offering such bundles is, however, prohibitively large, even more so in light of the predatory pricing employed by platforms to bolster their anti-competitive bundling. In addition, the significant lock-in effects described above render it all the more impossible to try and offer competing bundles.

[12] This allows platform owners to leverage dominant market positions in an ever-growing number of additional markets without facing any competition on the merits. To restore competition on equal terms, it is necessary for antitrust authorities to intervene where platforms distort competition by way of such practices. European competition law provides for the relevant tools to do so but is currently lacking the vigorous and prompt enforcement required to level the playing field again for effective competition.

II. Abusive expansion by leveraging

[13] As outlined in our introductory remarks, leveraging poses a huge problem, as it puts digital platforms in a position to expand their dominance into adjacent and more distant markets alike. By doing so, dominant digital platforms do not flourish based on competition on the merits but in

fact by avoiding competition wherever possible. Platform providers are in a position to leverage their respective positions, as they are not only acting as mere platforms but also competing themselves on the platforms, while at the same time setting the rules governing the transactions conducted via the platform.

1. Means of leveraging market power

1.1 Bundling

[14] Vertical and horizontal expansion through leveraging is usually propelled by bundling strategies. Digital platforms often venture aggressively into new markets **by bundling separate products or services with their entire – or large parts of their – existing platform**. Even if customers only intend to use a specific product or service, the platform provider inevitably sucks them into the platform. The platform providers' business model is not based on the quality of their individual products or services, but simply on leveraging their market power from their platform to other markets. This allows dominant platforms to succeed in other markets even where they offer inferior products.

[15] As soon as customers have access to all of the bundled products and services, it often does not seem worthwhile to them to seek competing third-party offers. Products and services are increasingly interlocked, tailored and synchronized not only to each other, but also to corresponding software and hardware applications. Many dominant platforms **push all of these into the customers' platform accounts irrespective of any decision taken by the customer in favor of such services**. Customers are thus both incentivized and conditioned not to leave the comprehensive commercial ecosystem imposed on them by the platform providers.

[16] When deciding upon a purchase, consumers will always consider whether they will be able to use certain products or services within the familiar ecosystem and what additional effort and expense it would require to "leave" the ecosystem they have already been tightly embedded in. Even where competitors' products or services are deemed clearly superior, consumers will thus generally refrain from leaving the ecosystem and stick with the offer on the dominant platform. The consumers' willingness to opt for a competing offer is further diminished, as within their

perception **they are already paying for a given service included in the bundle** anyway. A typical example is the bundling of mediocre VoD content with a dominant sales platform's privileged subscription shipping service, which undermines stand-alone quality VoD offers by third parties.

[17] This leads to an effective market foreclosure of the various bundled products and services. Dominant platform providers thus use these bundling strategies to shield their customers from competing individual products and services by locking them deeper and deeper into their platform.

1.2 Giving preference to own products and services

[18] The fact that many platform "owners" both operate the platform and are at the same time active in adjacent or more distant markets via the platform is often made use of in a discriminatory fashion in that such owners give preference to their own offers. Platform providers accord themselves the discretion to decide in their own best interest whether to confine themselves to the role of an intermediary between the P2C and the P2B side of the platform or to directly contract with the consumer.

[19] Platform providers closely follow the interactions taking place via the platform. Wherever a platform provider sees an **expedient profit margin**, they leave this intermediary role and **encroach upon the commercial process between their customers**. By stepping in as vendors and/or service providers themselves as a matter of fact, they **free-ride on the network effects** generated by the platform customers in order to enhance their own profits at the expense of their P2B customers.

[20] This goes hand in hand with a **discrimination against competing products** in favor of the platform providers' own products and services. As was the case in the Commission's findings in the *Google Shopping* case, many platforms **give prominent placement to their own products and services** whilst downgrading – and sometimes even excluding – third-party offers. Wherever the platform provider identifies a **strategic opportunity** to bolster its own retail business, competitors' products and services are not displayed according to the same process and criteria that apply to the platform provider. Platform users are hence directed straight to the products and services offered by the platform provider itself.

[21] Independent businesses, which are forced to rely on the platform in order to reach their consumers, find themselves **more and more dependent on a dominant competitor**. Relying on competitive efforts, innovation and/or product improvements increasingly turns out be a useless endeavour. The apparent conflicts of interest that arise from platform providers competing on the retail level pose a significant detriment to competition **tarnishing neutrality and fairness in the competitive process as a whole.**

1.3 Pricing practices

[22] The abusive practices described above are often reinforced and augmented by additional anticompetitive pricing practices.

1.3.1 Predatory pricing

[23] Platform providers tend to offer the various bundled products and services in exchange for a lump sum, usually based on a subscription fee. Considering the total cost of all bundled products and services, most platform providers offer their digital ecosystem **significantly below cost**. For instance, the mere per capita content costs of a thus bundled e-book selection alone may by far exceed the individual subscription fee charged for the whole bundle.Sometimes products and services are even offered completely free of charge to consumers whilst causing substantial costs for infrastructure and maintenance.

[24] As a result of predatory pricing patterns, in order to challenge the incumbent platform provider, a **competitor** would not only have to provide an **equally comprehensive bundle**, but would also have to be prepared to incur substantial losses in order to keep up with the incumbent's predatory pricing strategies. In particular, providers of stand-alone products and services find it **almost impossible to compete on the merits** rather than on mere financial clout.

[25] In many cases, dominant platforms are prepared to **incur substantial losses** to ensure a swift, comprehensive **penetration** and **foreclosure** as well as a **lock-in of the consumers** into their respective consumer ecosystems. However, resulting low prices will only be of transitory nature and are exclusively aimed at eliminating competitors from the market and subsequently raising prices again – then mostly unfettered by effective competition.

1.3.2 Influencing third-party pricing

[26] In addition to employing predatory pricing practices, some platforms have a considerable influence on the prices of their P2B customers. This influence is derived from the platforms' ability to determine the prices for accessing their platforms and/or the provision of additional platform or infrastructure services, such as warehousing, shipping or customer care services.

[27] By raising these commissions or fees, a platform provider may **raise** the costs and thus, eventually, **the retail prices** of vendors or service providers operating on the platform. Once a platform provider decides to leave its passive intermediary role and starts targeting the retail level, this influence on the competitors' cost structure constitutes a **competitive advantage** which gives platform providers the upper hand regarding price competition. Further, fees are levied for **additional services** such as logistics or IT-related services.

[28] As vertically integrated platform providers control a substantial part of the P2B customers' upstream cost, they are also able to determine the retail price charged to the consumer by adjusting the prices for upstream services, and may thus easily undercut the prices charged by their competitors who depend on them on the upstream market. In essence, platform providers may exploit their competitors' reliance on their infrastructure in order to determine prices on the downstream market.

1.4 Information asymmetries

[29] These abuses are aggravated by fundamental information asymmetries exploited by the platform providers. Platform providers, in particular sales and service brokerage platforms, **collect commercially sensitive sales data** and are thus able to keep track of availability, demand, as well as retail prices of products and services offered via the platform. What's more, platforms enjoy **privileged access to consumer personal and commercial data** generated by the use of the platform, which gives them a substantial additional **competitive advantage** over their competitors. They are able to monitor consumers' behavior in detail, e.g. where the customers moved their cursor during their presence on the platform, how long they stayed on certain pages or their purchasing history.

[30] As platforms integrate vertically and leverage their dominant position into many different markets, they may access a pool of different customer and commercial data from multiple angles and perspectives that helps them to create detailed consumer profiles. The data gathered allow platforms to closely target consumers and influence them with their own commercial propositions. Aggregating data across a multitude of markets can lead to competitive advantages on a great number of markets. In particular, data profiles reflecting multiple spheres of the individual consumers' day-to-day life are an invaluable asset when trying to leverage a platform's market power into new markets.

[31] As consumer profiles tend to become more detailed and extensive with every new market into which a platform provider leverages its market power, it becomes easier to enter additional markets by using the platform's superior knowledge. This **head start is not based on competitive achievements** but is derived from the efforts of third parties, as most data is generated from the commercial activities of P2B and P2C customers on the platform, i.e. the commercial activities of others.

1.5 Lock-in effects

[32] Leveraging is further facilitated by extensive lock-in effects. Platform providers are usually in very tight control of access to the consumers through the platform. Their **position as a gatekeeper** is often rooted in one or more **core services**, such as a social media networks or privileged shipping programs, which they often (at least ostensibly) provide to consumers **free of charge**. By drawing large numbers of **consumers** onto the platform via free of charge services and **linking** this heavily sought-after consumer pool with the platform's customers on the P2B side, platform providers create substantial **direct and indirect network effects**, which in turn lead to an immediate **market tipping** towards the platform.

[33] These network effects act as **entry barriers** to the market. They are usually enhanced by a cross-market bundling of the platforms' services and products and lead to **interconnected leveraging effects**. By bundling and interlocking services and products into a comprehensive consumer ecosystem – without granting equal access to third parties – the **network effects reinforce each other** on the various **sub-markets** of the consumer ecosystem.

[34] The resulting lock-in effects are further strengthened as **changing from one platform to another is made difficult and unattractive**. Customer data and digital assets remain largely non-portable, also after the entry into force of the GDPR. In particular, digital content acquired, created or stored via the platform (e.g. music, films, pictures, conversations) will be lost when leaving the platform. Consumers are thus **forced to start from scratch** when trying to cut loose from a particular platform. Moreover, consumers tend to be unwilling to provide sensitive data such as payment and address details repeatedly to different providers. This **disincentivizes consumers from leaving the incumbent ecosystem**. As outlined above, this lock-in effect is enhanced by the fact that the consumer is **already paying for services forcibly included in the platform's bundle and is not willing to pay for a competing offer** in addition to this, even if the competing offer is superior to the bundled service.

[35] Once established with users, a comprehensive consumer ecosystem holds an **unattainable lead** over potential competitors. As a platform provider is able **to leverage** the entire heavyweight of its cross-market bundled ecosystem into any individual market, viable **competitors** would have to invest in not only a single market or service, but also in an **equally comprehensive consumer ecosystem** that could be offered in its entirety straight away. The investments that would be necessary to pursue this enterprise render such an uncertain endeavor an unrealistic option.

III. More effective enforcement

[36] It is evident that, within their respective ecosystems, digital platform providers **set the rules at their own discretion** and thus **regulate – or rather avoid** – **competition** as they please. Competitors are forced to play by the platform providers' rules and/or are squeezed out of the market for good.

[37] In most cases, what has put dominant platforms in their superior position is not competitive achievements. In fact, they may have succeeded on the merits in their respective platform markets. However, this does not hold true for other markets into which they leverage and extend their respective dominant positions. **In fact, their economic success in these markets is merely a by-product derived from network effects and data generated from the commercial interactions of third parties.**

[38] To shift digital markets back to competition on the merits and restore a level playing field for all market participants, it is necessary to intervene wherever dominant platforms distort competition. The speed of digital markets and the obvious difficulties in rectifying competition on markets corrupted by dominant platforms' anticompetitive behaviour, however, needs more rigorous and swift enforcement of established rules by the authorities.

[39] The following three measures would ameliorate the worst effects of anticompetitive leveraging strategies employed by dominant platform providers:

- offers bundled into the respective platforms need to be **unbundled, in that additional services are offered separately** and platform services can be **seamlessly combined with third-party offers**;
- free-riding on network effects by **giving preference to own products and services must be prevented** and consumer choice restored; and
- the possibility to make use of **information asymmetries by superior access to data concerning user behaviour and commercial interactions of third parties must be prevented**.

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Please do not hesitate to contact us, should you have any queries.

Kind regards,

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