

*Contribution to European Commission Conference*

*Shaping Competition Policy in the Era of Digitisation*

**Submission to Panel 2: Digital Platforms' Market Power**

**A Brief Word About Us**

The Digital Policy Alliance (DPA), originally founded in 1993 as EURIM, alerts EU and UK Parliamentarians and policy makers to the potential impacts, implications, and unintended consequences of policies which interact with and leverage online and digital technologies. We collaboratively cut across organisational and cross-sector boundaries to produce informed, representative and authoritative publications based on practical experience and insight, and suggest and review proposals for government policy, legislation and regulation as it applies to the UK.

For more information including lists of directors, members and observers see: [www.dpalliance.org.uk](http://www.dpalliance.org.uk). Email us at: [admin@dpalliance.org.uk](mailto:admin@dpalliance.org.uk).

The DPA warmly welcomes the initiative by Commissioner Vestager and has 2 working groups examining issues it covers. In response to the 'call for contributions' our Competitions Policy Working Group offers the following submission to Panel 2. A separate submission to Panel 1 will be made by Smart Society Working Group.

The Digital Policy Alliance Competitions Policy Working Group is examining the new forms of competition in the digital economy, and making recommendations on changes that may be needed to policy, legislation and enforcement. Active engagement of Parliamentarians, providing leadership, and of participants, making contributions in clearly defined issues, is the basis for our work.

**Digital Platforms' Market Power**

*ISSUES ADDRESSED: The interests of platforms are not always aligned with the interests of their users, which can, as a result of platforms' market power, give rise in particular to: a) leveraging concerns (digital platforms leveraging their positions from one market to another); and b) lock-in concerns (network externalities, switching costs, better service due to accessibility of data make it difficult for users to migrate to other platforms, and allow platforms to "exploit" their user bases). What should/can competition policy do to address these concerns and how?*

**The interests of platforms are not always aligned with the interests of their users**

In competitive markets the supplier's interests and the user interests are typically closely aligned. The process of competition in terms of the dynamic rivalry between firms seeking out users' needs is such that firms' success is dependent on meeting the revealed preferences and demands of users. This should be the case whether the suppliers are meeting those needs over technology that is described as a "platform" or not.

## Advertising funded markets

Advertising is the source of finance for many online markets today. Advertising can be pro-competitive and beneficial where it promotes product differences and increases transparency, allowing comparisons to be made by consumers and enhancing consumer choice. However, advertising may also give rise to imperfect competition through ‘perceived’ differentiation in product characteristics. Some downsides include consumers being sold a set of attributes that, for example, encourage them to become emotionally attached to brands, or misled or encouraged into not making rational decisions.<sup>1</sup>

Evidence has emerged from online gambling investigations by the UK Consumer and Markets Authority that companies are using advanced knowledge of human psychology to create attention and this may be creating unhealthy dependency<sup>2</sup>. In many ways suppliers can obtain price premium and increased profit - in economic terms – but a loss of consumer welfare, from successful advertising. It can, however, be difficult to distinguish between beneficial product differentiation and consumer-harming exploitation.<sup>3</sup>

Where companies achieve enhanced economies of scale (high fixed costs and low variable costs), network externalities, and global access to people (as happens with many internet businesses), together with high first mover advantages and barriers to entry, then a position of enduring market power can arise.

Once market power happens in ad-funded markets, the consumer, who only exerts weak demand over the supplier’s incentives as it does not pay the supplier directly, has an even weaker position in the system. Ad-funded markets are not driven by consumer demand, and welfare can be reduced. If the market power of an ad-funded supplier is big enough, the user can become an asset of the firm with market power, which can also be expected to exploit this power.

## Exploiting user data

With many digital platforms being funded by advertising, consumers can become assets to be exploited rather than sources of revenue and income whose interests must be respected. A clear example of this can be found in some platforms’ user terms, which appear to be mostly set with reference to their commercial interests, and include the consumer agreeing to the platform having a considerable amount of power over their data and any content they upload. In current competition policy, there is often an assumption that consumer choices drive suppliers to differentiate their offerings in various markets. As described here, this assumption does not work in the same way for digital platforms. Consumer choices would only be likely to change supplier behaviour if enough consumers stopped using a platform, thereby endangering the platform’s continued advertising income. However, if the users remain loyal to the services provided, no economic incentive will operate to change its behaviour.

Overall it is clear that the interests of platforms may not be to operate in the interest of users - indeed one of the characteristics of two-sided platforms, where one side is an advertising interest, will, in circumstances of market power, probably give rise to exploitation. At a basic level, this could be a direct result of market failure where users have no choice of alternative platforms and are open to exploitation. Consumer power in such circumstances is too weak to create incentives to alter the behaviour of such digital platforms.

## What should/can competition policy do to address these concerns?

### Early application of Anti-trust measures

The above questions relating to leveraging or lock in are examples of different forms of abuse. For example, abuse may occur by acquisition, thereby increasing the existing dominance of the acquiring party. A vertical acquisition of a player in a market adjacent to the platform market may also create inevitable foreclosure and exclusion from the market for competing rivals - where, for example the acquiring firm is a platform that acquires an upstream or downstream competitor, thereby vertically integrating its platform with a

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<sup>1</sup> See for example the work of EH Chamberlain

<sup>2</sup> Mattha Busby, ‘Social media copies gambling methods to create psychological cravings’, *The Guardian*, <https://www.theguardian.com/technology/2018/may/08/social-media-copies-gambling-methods-to-create-psychological-cravings>

<sup>3</sup> Tim Wu, 2016, *The Attention Merchants: The Epic Scramble to Get Inside Our Head*, (Atlantic Books: London).

player in a separate but related market. Such activity is, just like bundling or leveraging, a mechanism through which foreclosure and restriction or reduction in competition can then take place. Many examples of such acquisitions can be provided by the major platforms to date.

Anti-trust measures should immediately be applied to prevent such behaviour from occurring. As a matter of practicality good policy toward competition and market structure should in our view err on the side of intervening at the optimal time - preventing situations of market power from arising or preventing acquisition from operating as an abuse. Addressing the problem after it has arisen is often too late to save the market from permanent harm.

### **Redefine Notification Thresholds**

The current focus on turnover as the threshold for notification of mergers and acquisitions to competition authorities is peculiarly inappropriate for platform markets where the players are funded by advertising. In such markets the number of users is more important as an indication of market power than the absolute amount of revenue involved. For example, platforms operating as digital billboards seek to demonstrate their value through recording the number of unique users who see the adverts. Another way they measure their success is on the number of page impressions generated (where a page impression is generated when a user views an advert online), or the number of people clicking on the advert (known as the click through rate or CTR). All these measures are measures of users seeing adverts - and can stand as a proxy for users' purchasing or products or services in more traditional goods or services markets - since the advert is the product and it is consumed when seen.

### **Merger Vetting to become fully reflective of Market Power**

Prevention of abuse and rapid action to ensure that damaging foreclosure does not take place requires vetting mergers before they occur. This would require changing turnover thresholds from the current revenue base to another basis that is more reflective of market power in a digital environment. The turnover thresholds were developed when the majority of company revenue resulted from contracts with consumers, whereas digital platforms rely on a secondary market or affiliate network advertising and are often offered to consumers for no monetary cost, in return for consumers data being harvested and monetised. As currently used in competition policy and law enforcement, the turnover thresholds are therefore inappropriate for digital markets, and should be reformed.

This reform needs to consider future market potential and the market power of the proposed acquirer. It should reflect the concern that acquisitions of nascent technologies by larger established players may hold back the development of more competitive markets.

With data-driven platforms, high fixed costs and low variable costs, barriers to entry can quickly become prohibitive, rendering it highly unlikely a potential competitor would ever be able to develop equivalent scale or reach equivalent numbers at similarly low costs. Where markets have already become dominated, regulation cannot hope to address the position after the event and should therefore operate pre-emptively.

### **Remedies to Leveraging and lock in issues:**

#### **Swift intervention**

In order to prevent such domination of digital markets, competition policy must turn its focus to reacting with speed to developments. Swift intervention may prevent the accumulation of market power outlined above. Moreover, where such power is accumulated, swifter enforcement of competition law is necessary: the leading competition cases brought against Google, Intel, and Microsoft all relate to technology platforms and all took many years.

## Increased incentives toward compliance

The most urgent change to incentives would be to limit the profits that digital platforms can make from non-compliance. Laws often incentivise desirable behaviour by reinforcing preferred outcomes with financial incentives. Company behaviour is thus conditioned and driven by operating within the law to meet profitable goals. Oddly, competition law allows for damages actions to be brought against abusive dominant companies, and fines to be levied on them, but then as a matter of principle, because damages are quantified against the claimant's losses and not the defendant's gains, also allows market abusers to keep the gains and profits from their wrongdoing. The law needs to be respected to be worthy of its name, and in social terms, the signal sent by enforcement activity needs to be that breaking the law is unprofitable as well as unacceptable.

## Building Capacity within Competition Authorities

In addition to changes to enforcement and incentives toward compliance the following changes could be made to the practical operation of competition authorities:

- 1. Management experience.** Where heads of authorities have limited litigation experience, is it appropriate to give them a mandate to take and manage litigation? They have to litigate against the world's best and it is a wonder that they win at all, given the scale of the firms, information disadvantages, expertise and the budgets and talent that they face. Outsourcing the management of litigation to experts is rarely if ever done by competition authorities and should be the default position.
- 2. Processes and procedures** adopted also typically mean that competition authority people are assembled to deal with specific transactions, investigations and issues rather than being organised into industry specific groups. The complexity of the modern economy demands greater specialisation, focus on market areas and monitoring of transactions and measurement and monitoring of outcomes which would facilitate speed of understanding and more rapid decision making.
- 3. Timescales** are measured in the time taken to achieve perfect administrative outcomes, rather than providing the response needed by markets in defined timescales. Our authorities need to move at internet speed.

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