Dated 30 September 2018

Shaping competition policy in the era of digitalisation – Submission on Online Platforms

We welcome the opportunity to contribute our thoughts ahead of the upcoming conference on *Shaping competition policy in the era of digitalisation* to be hosted by the European Commission ("**Commission**") on 17 January 2019. This submission primarily relates to the Panel 2 discussion on Digital Platforms' Market Power, but also includes some discussion of the Panel 1 issues on Competition, Data, Privacy and AI. In these panels, the Commission has requested contributions on the following:

Panel 1: In a world of ubiquitous data, thanks to, for example, 5G, the Internet of Things and connected cars, where would we have data bottlenecks – or, conversely, data access, data sharing or data pooling – causing competition issues? In which ways should privacy concerns serve as an element of the competition assessment? Since data is the raw material of artificial intelligence, how do we ensure that AI technology is as competitive as possible?

Panel 2: 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?

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1 Introduction and Overview

Online platforms intermediating between different user groups come in all shapes and sizes, stretching from globally recognised digital giants such as Google, Facebook and Amazon, to smaller platforms for the collaborative economy.[1]

The growth of online platforms has undoubtedly brought significant benefits to consumers across the EU: introducing new products, reducing transaction costs and ultimately doing far more to integrate the single European market than any regulatory intervention. Our ability to access hotels and apartments across the EU at the click of a button via Booking.com and AirBnb is just one example of the benefits delivered by the rise of online platforms.

There is, however, an undeniable and growing consensus amongst policy makers that certain conduct by dominant online platforms is having detrimental effects on the economy.[2] Indeed, the competition community increasingly recognises that '*the size and market power of some large digital platforms has been on the increase*' with – in certain circumstances – the potential to harm competition and consumer welfare.[3] This concern goes hand in hand with the fear that the conventional application of competition law – in particular Article 102 TFEU – has failed to tackle such conduct.

Given this growing unease and the potential negative economic impact of failing to intervene where appropriate, the Commission is right to dedicate resources to understand the potential harms created by online platforms and how to address them. In this regard, the Panel topics raise three timely questions: (i) what can competition law do to prevent dominant platforms from exercising their market power to foreclose their competitors in related markets (e.g. by tying and bundling); (ii) how can competition law address exploitative and exclusionary concerns in the platform markets themselves; and (iii) whether exclusive access to data can cause competition issues.

These questions cover a wide field. We have, at the request of some of our clients in the consumer goods industry, focused our response on how best to address the risk of dominant "hybrid platforms" leveraging their market power into related markets and, in summary, would propose that the Commission have regard to the following aspects in developing future policy:[4]

First, Article 102 TFEU already provides a highly flexible framework to address anti-competitive effects of online platforms' conduct. However, it is crucial that the Commission:

- adjusts its tools and underlying presumptions, accounting for the different competitive dynamics of online platforms; and
- adopts a prospective approach to assess the likelihood of anti-competitive effects given the competitive dynamics in such markets and the real risk of significant harm from failure to intervene.

Second, the nature of online markets means that they are more susceptible to dominant hybrid platforms leveraging their strength into related markets. Accordingly, the Commission should

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1 Commission Communication, *'Online Platforms and the Digital Single Market Opportunities and Challenges for Europe'* SWD (2016) 172, available here.

2 Council of Economic Advisers, *'Benefits of Competition and Indicators of Market Power',* April 2016, available here.

3 Diane Coyle, '*Practical competition policy implications of digital platforms*' Bennett Institute for Public Policy Working Paper No. 01/2018*,* available here.

4 We have used the term "hybrid platforms" to describe platforms that also operate in markets related to the core markets in which their platforms operate (e.g. neighbouring or vertically related markets).

(continue) to put significant efforts into prosecuting such leveraging strategies, which may be detrimental to long-term consumer welfare.

Third, we consider that, in particular, such leveraging concerns may arise where:

- hybrid online platforms discriminate in favour of their own vendor activities to the detriment of other platform users ("**self-preferencing**"), and / or
- hybrid online platforms reserve the use of data collected on their platform for their own businesses to leverage their entry / expansion into the related markets of their suppliers / customers ("**cross-usage of competitor data**").

Finally, we conclude that the Commission has a rare opportunity to intervene early in a targeted manner to prevent a significant risk of anti-competitive harm. By developing the rules for online platforms entering / expanding into related markets as well as their use of competitor data, the Commission can, in the words of Commissioner Vestager, stay '*ahead of the curve*' and '*spot the problems that are on the horizon'*.[5]

2 Article 102 TFEU offers a flexible tool to intervene in online platform markets

First, as evidenced by recent enforcement actions (e.g. *Google Search (2017)*, *Google Android (2018)* and the online hotel booking cases),[6] competition law (including Article 102 TFEU) offers flexible tools to regulate the conduct of online platforms and prevent anti-competitive effects in both the platform markets and related markets. To focus on dominance, the EU Courts have repeatedly confirmed that Article 102 TFEU is not limited to a list of prescribed abuses, but encompasses all dominant firms' conduct that is likely to have anti-competitive effects.[7]

These cases, however, also expose the complexity of the competitive framework in which online platforms operate and the need for rigorous economic analysis to prevent both "false positives" and "false negatives" which could have a detrimental impact on the development of platform markets in the EU. To prevent such scenarios from occurring in practice, the Commission should: (i) reflect the characteristics of the online platform markets; and (ii) adopt a prospective approach to assess anti-competitive effects.

2.1 Enforcement action must reflect the particular competitive dynamics of online platforms

When assessing an online platform's conduct, the Commission should assess the nature of the markets in which these platforms operate and recognise that conduct which may typically be benign in (one-sided) offline markets may be more problematic in the world of (multi-sided) online platforms, and *vice versa.*[8]

Online platforms (like many other multi-sided platforms such as stock exchanges or dating agencies) are characterised by indirect network externalities (participants on one side benefit the more

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[5] Commissioner Vestager speech at CEPS Corporate Breakfast Brussels, 10 September 2018, available here.

[6] This includes investigations by national competition authorities into the use of price parity clauses in the online hotel booking sector under Article 101 and / or 102 TFEU (and relevant national rules), such as Germany (including Case B 9-121/13 and Case B 9-66/10), Sweden (including Case Ref. 596/2013 and 595/2013), France (including Decision No. 15-D-06) and Italy (Case No. i779 B).

[7] C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECLI:EU:C:2011:83, para. 26; Case AT.39740 *Google Search (Shopping)* (2017); Case AT.40099 – *Google Android* (2018).

[8] See Coyle (2018), David Evans & Richard Schmalensee, '*The Antitrust Analysis of Multi-sided Platform Businesses*', NBER (2013), David Evans & Richard Schmalensee, '*Matchmakers: The New Economics of Multisided Platforms*' (2016), Jean-Charles Rochet & Jean Tirole, '*Platform Competition in Two-Sided Markets*', Journal of the European Economic Association (2003).

numerous the participants on the other side).[9] To succeed, a platform thus needs to get participants on both sides on board using strategies such as cross-subsidisation i.e. by designing price structures whereby the less price-sensitive side of the platform is charged more while the other side is charged less (or nothing *à la* Google search).

Due to the interrelationship between the different sides of the market, any competition law analysis of online platforms cannot only focus on narrow antitrust markets but must consider the platform as a whole. In particular, the fact that the success of a platform stems from its ability to attract *both sides of the market* means that market power must be assessed in the round for online platforms. And, by the same token, any competition analysis of online platforms' conduct must equally look at the potential effects on all users (not just users on one side).

Furthermore, the dynamic nature of competition in online platforms markets means that price is not always the key parameter of competition (although, as well-documented in the case of Amazon, it can be). Innovation and quality of service (e.g. the quality of search results) may be equally – if not more – important. Any competitive analysis of online platform markets therefore requires greater focus on the effect on dynamic, rather than static, competition.

Finally, certain competition concerns, in particular discrimination, have greater importance for some online platform markets than they would in offline markets. The use of matching algorithms, allocation of premium advertising space, (mobile) broadband technologies and "*big data*" form a critical part of online platforms' business models.[10] The use of these (beneficial) tools has however also led to a *"black box"* in terms of how online platforms operate. This opacity means that discrimination between different consumer groups, while frequently pro-competitive (welfare enhancing) in offline markets, is more likely to cause concern in online platform markets.[11]

2.2 Crucial to adopt prospective approach to assessing anti-competitive effects

The EU Courts' jurisprudence on Article 102 TFEU has – in a welcome move – increasingly stressed the importance of an effects-based analysis to determine whether conduct is abusive.[12] The CJEU, in particular, has repeatedly clarified that Article 102 TFEU does not need concrete anti-competitive effects but, rather, the likely prospect of abusive conduct giving rise to such effects.

Given the fundamentally prospective effects-based analysis articulated in the EU Courts' jurisprudence, as well as the fast-moving nature of the competitive dynamics for online platforms, it is crucial that the Commission should focus on a prospective analysis of the *likely* anti-competitive effects of dominant platforms' unilateral conduct (in line with the Commission's framework for assessing mergers). Such an approach is particularly merited in the case of online platforms for the following reasons.

Competition in online markets, as set out above, centres to a greater extent on investment in innovation, knowhow and brand and is often coupled with a "winner takes all" dynamic. This, in turn, increases the possibility for online platforms to develop market power in their relevant activities. And, in light of this, dynamic competition has a greater role with the concomitant need to understand better the long-term effects of dominant platforms' conduct.

Given the speed of innovation in online markets, competition authorities must be mindful of the risk that delayed intervention may not be sufficient to preserve effective competition. Innovations create

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[9] The *raison d'être* of online platforms lies in these fundaments: the users of the platform (on both sides) cannot capture the value of the indirect network externalities themselves.

[10] Coyle (2018), Diana Coyle, '*Making the Most of Platforms: A Policy Research Agenda*', 17 May 2016, available here.

[11] Coyle (2018), Lina Khan, '*Amazon's Antitrust Paradox*', Yale Law Journal (2017).

[12] Judgment of the Court of 6 September 2017 in Case C-413/14 P *Intel v Commission* (ECLI:EU:C:2017:632).

new market dynamics, ranging from the growth of algorithmic price discrimination, the preferential reservation of premium advertising space, the use of exclusive access to customer and traffic data, platforms vertically integrating by creating their own distribution systems, and the use of "default options" in conversational commerce tools that refer customers to specific (or potentially the online platform's own) products. These developments could all have deleterious effects on consumer welfare which may be difficult to correct if a rigorous analysis of their effects on competition are not considered sufficiently early.[13]

Against this background, we would also suggest that early intervention may well be advantageous, particularly when there is a prospect of significant anti-competitive effects from delays.

3 The Commission should put particular emphasis on prosecuting "leveraging" strategies

Second, we consider that the Commission should, in the context of dominant online platforms, put special focus on leveraging theories of harm, where such platforms use their strength to leverage their position into related markets.

Such harms are particularly salient because online platforms frequently operate "hybrid" business models, where they act as a platform operator mediating between different market participants operating on the platform, whilst simultaneously acting as a competitor to such participants upstream (e.g. by competing with firms using such platform for distribution *à la* Amazon) or in downstream and related markets (e.g. by competing with firms using the platform as an "eco-system" for marketing apps to consumers *à la* *Google Android*).[14]

Hybrid platforms can generate significant eco-systems through supply of multiple product / service lines which have a close connection to their core platform activities. Examples include:

- Google who, in addition to its flagship general search function, has a wide array of activities ranging from its online comparison shopping tool to hardware products, including a number of products and platforms with over one billion active monthly users, such as its Android mobile operating system, Chrome internet browser and Youtube.[15]
- Microsoft, whose activities extend far beyond its Windows PC operating system, from software applications, including productivity software, internet browsers, the Bing search engine, and media players, to cloud computing, the production of a range of computing and gaming hardware devices, and ownership of the world's largest professional network, LinkedIn.[16]
- Amazon, which acts as the world's most important merchant platform (and also operates an increasingly core media platform) and is becoming ever more active in producing products sold on its platforms (introducing more than three-quarters of its rapidly expanding private label portfolio in the past eighteen months) as well as (*inter alia*) voice assisted technology and "last mile" delivery logistics.[17]

Such hybrid activities tend to create an inherent conflict of interest between the platform's role as neutral intermediary on one hand, and as platform participant (active in related markets) on the other. In simple terms, the commercial interest in boosting revenues in related markets may provide

[13] See Coyle (2018) citing Newman and Schrepel on predatory innovation.

[14] Commission Staff Working Document, '*Online Platforms*', May 2016.

[15] Alphabet Inc Form 10-K for year ended 31 December 2017, available here.

[16] Microsoft Annual Report 2017, available here.

[17] McKinsey & Company, '*Amazon Prime Day: What the real lessons are'*, September 2018, available here.

a strong incentive to design the platform to discriminate in favour of its own offerings (self-preferencing) or to leverage outputs gained as the platform operator to inform strategy or boost (solely) their own offering (cross-usage of data).

Furthermore, the nature of online platform markets makes these strategies more likely to succeed and cause anti-competitive harm:

As a starting point, the inherent function of platforms to connect user groups and – in many cases – act as a transaction venue for multiple products and services (particularly in consumer-facing industries), generates strong connections between online platforms and a vast multitude of markets. The platforms thus often have means to "leverage" their market power from the platform market into such related markets.

Furthermore, the *"black box"* nature of online platforms' operations (notably in their search and advertising functionality) significantly impedes the market's ability to correct for any self-preferencing, as consumers are unaware of the existence or impact of such discrimination / distortion. This is particularly the case in consumer goods where end customers are not sophisticated buyers that can adjust their purchasing to take account of product / data manipulation. Accordingly, there is a heightened risk of competitive and hence consumer harm (including hollowing out).

On the other side of the divide, the increasing ability to outsource production and reduced advertising costs from the advent of social media, create lower barriers to entry for platforms into consumer goods markets, where they are particularly well placed to engage in rapid trial-and-error product launches through the introduction of pilot "minimum viable products" (a core test model for the consumer goods industry), whose scale can be flexed in accordance with product demand.

Finally, the increasingly "intangible" rich nature of markets – including consumer goods markets – means that there is a greater risk of online platforms being able to appropriate the investments of other firms in related markets. As Haskel and Westlake have argued, *'some intangible investments have unusually high spillovers: that is to say, it is relatively easy for other businesses to take advantage of intangible investments that they don't themselves make.'*[18] In such circumstances, online platforms may have a greater ability to "leverage" their online platform strength and thus dampen the incentive of firms to invest in related markets in the first place (thereby harming dynamic competition).

4 Self-preferencing and cross-usage of competitor data

Third, when considering leveraging concerns, the Commission should be particularly mindful of the following two leveraging strategies in relation to online platforms, namely (i) self-preferencing; and (ii) cross-usage of data.

4.1 Competition concerns arising from self-preferencing

Some of the most high-profile digital Commission cases are, at their heart, self-preferencing cases, where the abusive behaviour saw the platform operator discriminate in favour of its own products or services, and against those of rivals.

The most obvious example is *Google Search (2017)*, where the Commission found Google to have abused its dominant position in general internet search by demoting the placement of rival comparison shopping services in its general search results while giving prominent placement to its own such service (including via rich graphical formats). A less obvious case is *Microsoft (2004)*, the

[18] Jonathan Haskel & Stian Westlake, '*Capitalism without Capital: the rise of the intangible economy*' (2018), 72.

seminal Windows Media Player ("**WMP**") decision. The Commission found Microsoft's strategy to pre-install WMP on its dominant Windows operating system for personal computers as reserving to itself (and to the exclusion of other WMP producers) Windows as a distribution channel, and thereby '*[anti-competitively ensuring] for itself a significant competitive advantage in the media player market'*.[19] While the Commission ran the case as constituting abusive tying, it was, at its heart, about self-preferencing.

Self-preferencing concerns have also been raised in relation to other online platforms, including recently in respect of Amazon. The New York Times, for example, states, referring to analyst reports, that: '*Amazon is utilizing its knowledge of its powerful marketplace machine – from optimizing word-search algorithms to analysing competitors' sales data to using its customer-review networks – to steer shoppers toward its in-house brands and away from its competitors.*'[20] This invokes concerns that by leveraging its platform power, Amazon could provide itself with a significant competitive advantage in retailing private label products at the expense of competing product providers, irrespective of whether their products are more attractive on the merits.

Article 102 TFEU offers a number of legal bases for proscribing self-preferencing strategies, notably: abusive discrimination, tying and bundling or refusal to supply. The framing of the legal basis for these abuses is often driven by regulatory arbitrage: dominant firms aim to characterise their behaviour on a legal basis which has a high evidential burden (e.g. refusal to supply) while complainants (and at times the Commission in its capacity as prosecutor) do the reverse (e.g. frame the conduct as tying or discrimination). The *Vesterdorf – Petit* exchange concerning *Google Search (2017)* exemplifies the often heavy emphasis put on the form of the abuse.[21]

Ultimately, when determining the classification of conduct, we consider that rather than undue focus on "form", the more salient question is whether the conduct is likely to have anti-competitive effects (so as to minimize the risk of both "false positives" and "false negatives"). And, in our view, the following considerations are relevant in this assessment:

Online platforms may be closed (restricting third parties from offering their products / services) or, like Google or Amazon, more open (allowing third parties to distribute via their platform). Where claims of self-preferencing concern an integrated or closed platform the bar for abusive self-preferencing should be higher (i.e. more akin to the refusal to supply standard) as there is a greater prospect of efficiencies. By contrast, where a firm operates a more open platform, in our view, a lower intervention threshold akin to abusive discrimination is appropriate.[22]

In addition, differential treatment of counterparties is a regular occurrence in markets with and without dominant players, and may be the result of multiple factors, including differences in bargaining power. Intervention against discrimination should therefore be limited to circumstances where factors point to likely competitive harm. Such factors include where the dominant firm has an incentive to exclude rivals (for example, to gain share in related market(s)) and the absence of plausible efficiency explanations (such as Google's promotion of its own comparison shopping service, or Amazon's alleged efforts to steer customers towards its own private label brands).

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[19] Case C-3/37.792 – Microsoft (2004), para. 979.

[20] Julie Creswell, '*How Amazon Steers Shoppers to Its Own Products*', The New York Times, 23 June 2018.

[21] See Bo Vesterdorf, '*Theories of self-preferencing and duty to deal – two sides of the same coin?*' 1(1) Competition Law & Policy Debate (February 2015) and Nicholas Petit '*Theories of Self-Preferencing under Article 102 TFEU: A Reply to Bo Vesterdorf*' (April 2015), available here.

[22] This is not dissimilar to the Commission's enforcement of refusals to supply where it distinguishes between de novo refusal to supply (akin to a closed platform) and termination or constructive termination of existing supply (akin to an open platform). See Guidance on the Commission's Enforcement Priorities in applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, para. 84.

Finally, where discrimination is not transparent and the dominant online platform presents an image of objectivity and neutrality there is a much stronger case for intervention. For example, when a brick-and-mortar store displays its own-brand product prominently, customers are aware of self-preferencing and do not assume those products are inherently more suitable. In the online world, however, customers may well believe that powerful (but confidential) search algorithms of companies such as Google or Amazon and visual pleasing "buy boxes" featured prominently in search results, display the most suitable products.[23] Artificial demotion of rivals could, given the importance of online search-result ranking, diminish competitor visibility to a much greater extent than corresponding practices in the brick-and-mortar world.[24] For example, the Commission found in *Google Search (2017)* that '*users typically look at the first three to five generic search results on the first general search results page and pay little or no attention to the remaining generic search results'*.[25] So whereas in the offline environment, a product may be on the bottom shelf, in the virtual world of online platforms a search algorithm gets to determine whether a product makes the "virtual" shelf at all (a trend that may be exacerbated with the rise of virtual assistants such as Google's Home, Apple's Siri or Amazon's Alexa).

Such scenarios could clearly lead to a reduction in consumer welfare and an erosion of trust in online platforms.

4.2 Competition concerns arising from cross-usage of data

The cross-usage of data (i.e. reserving data for the platform's own business to enter / expand into related supplier / customer markets) may play a critical role in the context of leveraging strategies by dominant platform operators and give rise to potentially significant anti-competitive effects.

There is an increasing emphasis on the potential value of data: research shows that firms adopting data-driven decision making can optimize resource allocation; develop new capabilities; and improve output and productivity.[26] Indeed, a significant majority of consumer goods product launches are considered to fail due to a lack of understanding of consumer preferences and good data is indispensable for generating the deep consumer insights that can lead to (*inter alia*) more targeted (precision) marketing.[27] Furthermore, the Commission has already found in *Google Search (2017)* that online platforms generating – or having – competitively important data can, for example, use machine learning techniques to hone products and services, and competition authorities have more generally explored "*big data*" as a potential source of market power.[28]

Hybrid online platforms' use of data may harm competition in related markets through the *cross-usage* of competitor data. There is an inherent conflict of interest where a dominant online platform: (i) generates data from the distribution of products / services of its suppliers / customers active on its platforms; (ii) uses the data to optimize the developments of their own products on the back of customer reactions to competitor innovations to compete with those suppliers / customers; and (iii)

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[23] See *Google – Search (2017)*, para. 598: '*users tend to consider that search results that are ranked highly in generic search results on Google's general search results pages are the most relevant for their queries and click on them irrespective of whether other results would be more relevant*'.

[24] Coyle (2016).

[25] *Google – Search (2017)*, para. 457.

[26] See HM Treasury, '*The economic value of data: discussion paper*', August 2018, page 4, citing research from E. Brynholfsson and others suggesting that '*firms adopting data-driven decision making can have 5-6% higher output and productivity*'.

[27] Precision marketing is a marketing technique that aims to retain, cross-sell and upsell to existing customers by creating targeted deals, offers and gimmicks for specific customer groups (instead of relying on persuasive ads). In order to achieve this, precision marketing relies on harvesting data about customer behavior to segment customers into smaller blocks with specific needs.

[28] See Bundeskartellamt and Authorité de la Concurrence, '*Competition Law and Data'*, 10 May 2016, available here.

refuses to supply the same suppliers / customers with the data (thereby preventing them from improving their products / services in the same way) or charges steep prices for (limited) access.

Adopting these strategies may enable dominant online platforms to effectively appropriate the benefits of investments in brand, innovation made by competitors (who are platform users) which in turn may allow them to identify and meet customer preferences without sharing the accompanying risks. There is an increased plausibility of such leveraging causing significant competitive harm given the wider economic developments, notably the shift from television and print advertising to (relatively cheap and more targeted and customised) online advertising, the ability to outsource manufacturing production and the growth of online and direct-to-consumer business models. This has the potential effect of dis-incentivising dominant online platforms' suppliers / competitors from competing effectively in the relevant markets as their investments risk being appropriated by dominant online platforms that can use (and reserve for themselves) data obtained from suppliers' / customers' product launches to perfect their own products.

Such competition concerns are, moreover, not novel: competition authorities and the EU Courts have in the past censured dominant firms that engaged in conduct that discriminated in favour of their own offerings.[29] Such concerns have also arisen specifically in relation to data when, for example, the Belgian authority fined the National Lottery for abusing its legal monopoly by using data acquired in running the national lottery to help launch a sports betting product in a competitive market.[30]

The Commission's awareness of the risk of data cross-usage is also apparent from Commissioner Vestager's comments and the Commission's subsequent decision to launch a preliminary investigation into the extent to which Amazon's data collection from smaller business which are hosted on Amazon Marketplace is then used by Amazon as a direct competitor.[31]

We agree that this is a crucial topic for the online economy and suggest that, *inter alia,* the following questions are important for testing whether refusal to share data, in particular in relation to the Commission's investigation in *Amazon – Data Cross Usage,* is likely to give rise to anti-competitive harm:

- Is the hybrid online platform discriminating in favour of its own related products by providing superior data access to its businesses competing against the relevant suppliers / customers of its platform? In the context of the *Amazon* investigation, to what extent does Amazon Marketplace make available data (and premium advertising space) to users of its platform with whom Amazon competes?[32] If Amazon only makes available comparably limited data packages to its suppliers / customers, has Amazon discriminated between its own business operations and those of its suppliers *taking advantage* of the uneven playing field created due to its retailing strength?
- How critical is the data collected for the development of new products, the identification (and shaping) of customer data and marketing strategies? It has been argued that, '*big data puts*

[29] Case T-301/04 *Clearstream v Commission* [2009] ECLI:EU:T:2009:317

[30] Decision No. BMA-2015-P/K-27-AUD and BMA-2015-P/K-28-AUD, Stanleybet Belgium NV/Stanley International Betting Ltd and Sagevas SA/World Football Association SPRL/Samenwerkende Nevenmaatschappij Belgische PMU SCRL (cases MEDE-P/K-13/0012 and CONC-P/K-13/0013) (September 2015).

[31] See Vestager speech (2018): '*Our sector inquiry showed that some platforms – which play a double role, both as marketplaces and sellers in their own right – might collect sensitive data about products that are sold by others through the marketplace. And they might use that data to boost their own sales of the same products, at the expense of sellers on the marketplace*.'

[32] Amazon can, for example, develop profiles of customer groups for specific products (based on age, gender, spending power, other products they buy on Amazon, patterns of purchasing behavior, etc.).

Amazon in the catbird's seat when it comes to deciding what products are its best candidates for the next private label branding opportunity and further how to slot their home-grown products into their captive search engine to pull the best prospective customers'.[33] This question is crucial in the consumer goods industry where: (i) rapid small scale product launches testing the viability of new products is fundamental to innovation (and where Amazon can use the data to replicate ahead of its suppliers / customers); and (ii) promotions are used as devices to understand consumer demand (which Amazon can also monitor far more effectively).

- Is the data replicable by other players such that suppliers / customers can deliver the same / similar customer improvements without undue difficulty through data from other sources? For example, the aggregated industry data available from traditional providers, such as Nielsen, cannot compare to the wealth and nuance of the data-analytics afforded to Amazon by its unique position. As James Thompson – a former Amazon executive – claims: '*Amazon has access to data that nobody else has … I can't just walk into a store and say, "Excuse me, did you look at this brand of cereal this morning and decide not to buy it?" Amazon has that data. They know you looked at a brand and didn't buy it and they're not going to share that data with any other brands.'*[34]

In short, while online platforms and other firms can use consumer data to bring the benefits of "*big data*" and machine learning to consumers, the Commission must be vigilant of discrimination in platforms' data supply, given its significance to product development and successful expansion. The Commission must carefully assess the relevance of such data to the given industry but, in the case of consumer goods, we note that consumer data is particularly important given the disaggregated nature of demand and the often rapidly changing demand dynamics from consumers.

5 Conclusions

In conclusion, the world of online platforms presents important challenges for competition authorities and, indeed, policy-makers more generally. This challenge is likely to grow as the pace of change – if anything – increases with tech firms – and online platforms in particular – on the cusp of introducing potentially revolutionary advancements including self-driving vehicle, drones and ever-more sophisticated artificial intelligence.

While online platforms offer huge benefits for consumers, competition law – and Article 102 TFEU in particular – must be used appropriately to minimise online platforms' conduct that has potential anti-competitive effects without chilling their undoubted consumer benefits. Such intervention should go hand in hand with the increasing regulatory efforts in relation to online platforms to ensure that the EU strikes the delicate balance between fostering the development of online platforms without allowing conduct that harms economic outcomes in related markets.

The authors also observe that there is a uniquely European angle to obtaining the "goldilocks" balance. As the Commission concluded in a recent study, the EU has to do more to encourage the emergence of new online platforms but equally ensure that businesses operating in related markets (such as related product markets and app markets where the EU economy is already successful) can compete effectively.[35] Competition law has a crucial role in contributing to this delicate regulatory balance by ensuring that online platforms do not negatively impact the incentive on firms in related

[33] Pamela N. Danzinger, '*How Amazon Plans To Dominate The Private Label Market*', Forbes, May 2018, available here. Amazon can, for example, measure the success factors for a competitor's product launch (based on metrics such as sales volumes, impact of discounts, effectiveness of advertising, influence of search key words, etc.).

[34] Creswell (2018).

[35] Commission Communication, SWD (2016) 172.

markets to innovate and compete effectively without the threat of dominant platforms appropriating their innovation, investment and risk taking through leveraging their platform strength.

Finally, we observe that the Commission has a rare opportunity to get "*ahead of the curve*" in relation to hybrid online platforms and ensure that online platforms remain free to compete vigorously while ensuring that such competition – particularly in related markets – remains "*on the merits*". We would urge the Commission to pursue early intervention in such scenarios where there appears a significant risk of self-preferencing either in relation to search or data usage as clarifying the law is likely to benefit both online platforms and all other firms that have ever greater commercial interactions on such platforms.

Linklaters (Christian Ahlborn, Will Leslie, Lodewick Prompers, Emily Burke) / 30 September 2018