What should EU competition policy do to address the concerns raised by the Digital Platforms' market power?

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I. Introduction

I appreciate the opportunity to submit observations in the context of the Commission's decision to host a conference in Brussels in January 2019 on "*Shaping competition policy in the era of digitisation*". This will be an important event.

The present observations are based on the research work I have carried out over the past decade on the digital economy, in the context of which I have authored papers on two-sided markets,[1] intermediation platforms and the "sharing economy",[2] mobile operating systems,[3] big data,[4] and business models based on the offering of "free" services.[5] While my scholarly work has generally cautioned against an over-extensive application of EU competition law, and in particular Article 102 TFEU,[6] in recent years I have become increasingly concerned about the anticompetitive harm created by certain practices pursued by digital platforms.

There is no consensus on what constitutes a "digital platform". For the purpose of the present observations, I consider that digital platforms comprise technology-enabled tools, which facilitate exchanges between multiple groups – for example end users and producers – who do not necessarily know each other. Digital platforms are often lumped together under acronyms such as FANG or GAFA, but the reality is that the business models of these companies can significantly vary. Google and Facebook operate a two-sided business model comprising the provision of free services, which are monetized through online advertising. Apple's strength is in the manufacturing of devices, such as the iPhone or the iPad. It also developed a highly profitable eco-system for the distribution of apps, music and other products. Amazon is the

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1 See, e.g., L. Filistrucchi, D. Geradin et al., "Identifying Two-Sided Markets, 36 (2013) *World Competition*, 33; L. Filistrucchi, D. Geradin et al., "Market Definition in Two-Sided Markets: Theory and Practice", (2014) (10)2 *Journal of Competition Law & Economics* 293.

2 See, e.g., B. Edelman and D. Geradin, "Efficiencies and Regulatory Shortcuts: How Should we Regulate Companies like Airbnb and Uber", 19 (2016) *Stanford Technology Law Review* 293

3 See, e.g., B. Edelman and D. Geradin, "Android and Competition Law: Exploring and Assessing Google's Practices in Mobile", 12 *European Competition Journal* 159 (2016)

4 See, e.g., D. Geradin and M. Kuschewsky, "Competition Law and Personal Data: Preliminary Thoughts on a Complex Issues", 2 (2013) *Revue Concurrences*.

5 B. Edelman and D. Geradin, "An Introduction to the Competition Law and Economics of 'Free'", CPI Antitrust Chronicle (September 2018).

6 See D. Geradin et al., *EU Competition Law and Economics*, OUP, 2013 (Chapter 4).

world leader in e-commerce. But it also provides a range of other services, such as cloud computing. Thus, while these companies typically have market power on one or several core markets, the antitrust challenges they create may be different.

Given space limitation, this submission focuses on platforms relying on a two-sided business model with a "free" side and a "monetization" side (i.e., "ad-funded platforms"), such as Google, Facebook or Twitter, and the challenges they create for EU competition policy.[7]

II. While caution is needed, there is no reason why antitrust authorities should not intervene to maintain or restore competition in digital platform markets

There is a great deal at stake in designing good competition policy for digital platform markets given the growing role played by digital platforms in the economy. The key challenge for competition law enforcers is to distinguish anticompetitive practices that will harm consumer welfare from practices, which although they may be commercially aggressive, stimulate competition and innovation.

Some competition policy experts have expressed caution against precipitous antitrust intervention in digital platform markets on two main grounds.

In the first place, arguments are regularly made that market power in such markets is temporary. It is indeed easy to point out to examples of digital platforms that were displaced by more innovative competitors. For instance, social network MySpace was overtaken by Facebook, and the early search engines like Altavista and Yahoo! were supplanted by Google. However, when Facebook overtook MySpace and Google unseated Yahoo and Altavista, those incumbents were much smaller in market capitalization, employees, scope of operation, user base, and every other dimension compared today's tech giants. Moreover, certain characteristics of digital platforms may render entry difficult:

- First, when services are offered for free, the classic trade-off between quality and price, which allows new entrants to gain market share by offering their products at a somewhat lower level of quality but for a much cheaper price (what has been labelled "disruptive innovation"), is absent.[8] Thus, in the absence of a positive price that can be undercut, entry may be made difficult, especially as it forces the new entrant to compete at the same level of quality of the incumbent. This may not be possible when, as is often the case in digital platform markets, quality depends wholly or partly on scale (see next bullet point).[9]

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[7] Thus, my observations have no or limited application to digital platforms, which are not funded by ads, but by user subscriptions or commissions.

[8] Joseph Bower and Clayton Christensen, "Disruptive Technologies: Catching the Wave," *Harvard Business Review*, January-February 1995.

[9] B. Edelman and D. Geradin, supra note 5.

- Second, digital platform markets may be characterized by the presence of user and monetization "feedback loops".[10] User feedback loops arise as more users allow a platform to collect more user data which in turn allows the platform to provide better quality services, which in turn attract a larger number of users. This user feedback loop may also translate into a monetization feedback loop where the more data a platform can collect, the better it can target its ads and monetize its services. Whether the presence of such feedback loops can be overcome by smaller providers and new entrants depends on the point at which returns to additional customer information begin to diminish, as well as the extent to which a data disadvantage can be overcome by innovation. These are complex questions to which there are no clear answers.

- Digital platforms may also be characterized by "network effects" (also called network externality or demand-side economies of scale), which arise when the value of the platform to each user grows with the number of other people who use the platform. Such network effects are observable with social networks, such as Facebook, where the attractiveness of the platform grows with the number of users. The presence of such network effects may cause reach a tipping point with the market turning to monopoly.[11]

  While these feedback loops and network effects may provide benefits to consumers, they can also "*contribute to the development and durability of platform monopolies*".[12]

In the second place, concerns have been expressed that the conventional antitrust framework, which focuses on prices and output competition, may fail to capture that competitive pressure may come less from actual competitors trying to have a stab at the incumbent's market share than from rivals innovating to supplant the incumbent.[13] In other words, pursuant to Schumpeterian competition, firms compete sequentially for the market as a whole. In this context, antitrust intervention in digital markets is not only superfluous, but it is also subject to type-II (over-enforcement) errors. While these concerns are valid, they tend to be overstated as the Commission has placed an increased emphasis in its competitive analyses on innovation, and – as pointed out by its Director General – it is well aware that the main parameters of competition in digital markets are "*quality, choice and innovation*".[14]

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[10] See A. Lerner, "The Role of Big Data in Online Platform Competition", 27 August 2014, available at http://ssrn.com/abstract=2482780

[11] H. Shelanski, "Information, Innovation, and Competition Policy for the Internet", 6 (2013) *University of Pennsylvania Law Review* 1663, 1682.

[12] Id. at 1684.

[13] M. Katz and H. Shelanski, "'Schumpeterian' Competition and Antitrust Policy in High-Tech Markets", , Fall/Winter 2005, *Competition*, at 47, 49

[14] J. Laitenberger, "EU competition law in innovation and digital markets: fairness and the consumer welfare perspective", MLex / Hogan Lovells event Brussels, 10.10.2017, available at http://ec.europa.eu/competition/speeches/text/sp2017_15_en.pdf

Thus, while caution must be taken when analysing digital platform markets, there is no reason to believe that the Commission cannot properly assess such markets and that the risk of type-II errors should necessarily prevent intervention. To the contrary, type-I (under-enforcement) errors may be particularly damaging considering that these platforms not only control access to their own products and services, but also – and this is a critical observation – to third-parties' products and services given their intermediation functions ("bottleneck monopolists").[15]

III. Antitrust concerns raised by digital platforms operating a two-sided business model

Conducts by digital platforms have raised a variety of exclusionary concerns. The focus of Commission investigations thus far has been on vertical foreclosure, including efforts by digital platforms to extend their market power in one market (e.g., general search) to one or several other markets (Section A). However, there are reasons to believe that digital platforms can also engage in anticompetitive forms of abuse that do not necessarily fit within the vertical foreclosure box (Section B).

A. Vertical leveraging

In its March 2004 *Microsoft* decision, the Commission found that Microsoft had breached Article 102 TFEU by "*by leveraging its near monopoly in the market for PC operating systems onto the markets for work group server operating systems and for media players*."[16] Vertical foreclosure was also at the core of the *Google Shopping* decision where the Commission found that Google leveraged its market power in general search to favour its comparison shopping services,[17] as well as in the *Android decision* where the Commission considered that Google had illegally tied its Search app and browser apps (Chrome) to its app store (the Play Store), which is a "must have" for all Android users.[18] Vertical leveraging seems also central to the Commission's (informal) investigation of Amazon's eco-commerce platform where Amazon sells not only items from third-party sellers, but also its own.[19]

While these Commission interventions rely on a long line of EU courts' case-law, the difficulty lies in the adoption of a remedy that will restore competition. For instance, the remedy adopted by the Commission in its *Google Shopping* decision seems to do little to address the concerns

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[15] H. Shelanski, supra note 9, at 1676 ("While a typical monopolist controls its own products and services, a typical bottleneck monopolist both controls access to its own service and can affect access to some number of other products and services. Thus, a digital platform monopolist controls its own product or service as well as access to a much broader universe of products or services; it affects the decisions of a much broader universe of users").

[16] Press Release, "Commission concludes on Microsoft investigation, imposes conduct remedies and a fine", IP/04/382, 24 March 2004.

[17] CASE AT.39740, Google Search (Shopping), Decision of 27 June 2017.

[18] Press release, "Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine", 18 July 2018.

[19] See, R. Waters, "Brussels bids to get ahead of the curve with Amazon investigation", *Financial Times*, 20 September 2018, available at https://www.ft.com/content/bfac46c0-bc63-11e8-94b2-17176fbf93f5

expressed by the vertical search engines competing with Google.[20] The adoption of behavioural remedies raises difficulties when applied to platforms operating intermediation services not only in terms of design, but also with respect to implementation and monitoring. This is why, although they are often depicted as extreme, structural remedies (or a prohibition on platforms to engage in vertical activities) may present advantages, especially when, as noted above, these platforms not only control access to their own products and services, but also to third-parties' product and services.

This can be illustrated by the following example. Businesses that are dependent on Google's traffic regularly argue that Google implements discriminatory search algorithms. In its *Google Shopping* decision, the Commission validated that proposition by observing that Google "*included a number of criteria in these algorithms, as a result of which rival comparison shopping services are demoted*."[21] On the other hand, Google has always maintained that its algorithm changes are designed to consistently improve search results for consumers, which in most instances is certainly true.

To the extent that discrimination is an (antitrust) issue, which is a highly debated question, it is hard to see how it could be addressed through a behavioural remedy, which would for instance ask Google to not discriminate (as this remedy could be easily evaded) or prescribe in detail the way such algorithms should be run (as this remedy would be impracticable since algorithms are a constant work in progress). Only a structural remedy that would separate Google Search from Google's verticals would address this problem satisfactorily as it would remove discrimination incentives. As to whether it would eliminate a range of efficiencies between Search and Google verticals, this is a question of fact that I am not well placed to address, but competition authorities can apply a balancing test.

B. Other antitrust concerns: Exploitative and innovation-suppressing conduct

While vertical foreclosure has been the main concern of the Commission, most likely because its intervention against foreclosure can rely on well-established case-law, other antitrust concerns may also arise.

One such concern is *exploitation*. There is an inherent "give-and-take" relationship between an intermediation platform and its users. For instance, in return for freely enjoying its social network service, users allow Facebook to collect and use their data to target the display ads that appear in their feed. Business users are also involved in a give-and-take relationship with digital platforms. For instance, while Google's ability to respond to user queries by providing links to news stories is beneficial to Google, publishers also benefit from the traffic that is sent to them in response to such queries. The give-and-take relationship may, however, become

[20] R. Toplensky and M. Acton, "Google antitrust remedy delivers few changes for rivals", *Financial Times*, 27 October 2017, available at https://www.ft.com/content/b3779ef6-b974-11e7-8c12-5661783e5589

[21] Press release, "Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service", 27 June 2017.

unbalanced when platforms acquires market power. This can lead to user exploitation, not in the traditional form of excessive pricing (as services are free), but by the platform giving less (quality of service, privacy, etc.) and taking more (data, scraping content from publishers, etc.). While some forms of exploitation can be addressed by regulation,[22] there will be instances where the Commission should step in to prevent digital platforms to engage in exploitative behaviour.

Another concern can be referred to *innovation-suppressing* conduct, i.e. dominant platform conduct that has the effect of making it harder for other companies to innovate. While some conducts belonging to this category may take the form of vertical foreclosure (see Section III, A), others may not, and this is why I believe that the Commission should not hesitate to go beyond its focus on vertical foreclosure cases. The reason why the Commission should focus on protecting the ability of firms to innovate is two-fold:

- First, suggesting that competition authorities focus on innovation-suppressing conduct makes sense considering that there is a broad consensus, even among those suggesting that competition authorities should generally not intervene in digital markets (see Section II),[23] that – in these markets – competition is based on innovation, i.e. that incumbents are eventually displaced by more innovative firms.

- Second, the risk that digital platforms engage in innovation-suppressing conduct is particularly heightened considering the large amount of information they are able to collect as part of their intermediation role. For instance, Google Search gives Google unparalleled insights into consumer and market trends and thus the ability to anticipate where competitive challenges may come from, and these challenges may not necessarily come from direct rivals.

Without pretending to exhaustiveness, innovation-suppressing conduct can take the following forms:

- *Appropriating a platform user's content*. For instance, Google has long been accused by Yelp of "scraping" content to fill its own rival site with content and reviews.[24] Google also extracts snippets from news publishers' content, which will appear in response to search queries on its SERP or on Google News. As pointed out by a leading scholar:

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[22] The Commission's proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services (Brussels, 26.4.2018 COM(2018) 238 final 2018/0112 (COD)) takes useful steps in this direction.

[23] For a good discussion of the Schumpeterian argument, see Shelanski and Katz, supra note 10, at 49 (explaining that "[a]t the heart of the Schumpeterian argument is the assertion that, in important instances, competition primarily occurs through cycles of innovation, rather than through static price or output competition," and that in such instances firms compete "sequentially for the market as a whole").

[24] See N. Tiku, "Yelp Claims Google Broke Promise to Antitrust Regulators, Wired", 9 December 2017, available at https://www.wired.com/story/yelp-claims-google-broke-promise-to-antitrust-regulators/

> "[W]hen viewed from the perspective of innovation, such conduct is damaging, even absent any intellectual property violation. ... Specifically, scraping sends the message that as soon as a firm develops a complementary product that is superior to the platform's proprietary complement, the platform will snatch the improvements for itself. This conduct also removes the platform's incentive to continue developing its own product, thus further magnifying the harm to competition." [25]

While in the case of Yelp scraping could be seen as a form of vertical foreclosure harming a downstream competitor, innovation can also be discouraged when a platform takes advantage of the content produced by businesses that are not direct competitors (e.g., news publishers) as scraping produces the same innovation-suppressing effect.

- *Suppressing access to data or making such access more difficult*. Given the role of user data as a central input to products and services in the digital economy, digital platforms' actions that prevent actual or potential rivals to obtain access to categories of data that are not replicable may produce an innovation-suppressing effect. For instance, restrictions to the portability of online advertising campaign data to competing online advertising platforms may be problematic as they prevent these rival platforms to build scale and improve their services.[26] Similarly, when a platform is able to gather data from the interactions between users and content produced or services offered by third-parties, these third-parties should obtain easy access to that data as it may be necessary to improve and monetize their services.

- *Predatory innovation (i.e. the alteration of one or more technical elements of a product to limit or eliminate competition).* While predatory innovation is still a "burgeoning" theory of harm in EU competition law, it should receive greater attention in the context of digital platforms, especially when these platforms do not limit themselves to a pure intermediation function.[27] To the extent that a digital platform alters a product or service (e.g., by degrading interoperability or compatibility with rival products or services) specifically to interfere with the competitiveness of actual or potential competitors, it impedes innovation to the detriment of consumers.[28]

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[25] See Shelanski, supra note 8, at 1700.

[26] See Press Release, "Antitrust: Commission probes allegations of antitrust violations by Google", IP/10/1624, 30 November 2010.

[27] For a discussion of predatory innovation, see Daniel A. Crane, Legal Rules for Predatory Innovation, 4 (2013) *Concurrences* 5.

[28] See Shelanski, supra note 8, at 1697.

IV. What should EU competition policy do to protect competition in markets affected by the activities of digital platforms?

In the past decade, the Commission has devoted considerable energy and resources to protect competition in the digital space and it is widely recognized as the world's leading enforcer in that space. As noted above, an important question is whether the Commission should limit its intervention in clear cases of vertical foreclosure where a dominant platform leverages its market power on an upstream market to extend it to a downstream market. The interactions between platforms and their users are multiple and complex, and the traditional distinctions between upstream and downstream markets, as well as between competitors and consumers are no longer necessarily relevant. Thus, a digital platform can use its market power not only to harm a direct rival on a downstream product market, but also a firm representing a distant threat, or even a business model that does not suit its commercial strategy. In these circumstances, the vertical foreclosure box may be too rigid to capture the potential harms that may result from digital platforms' conducts.

Although the competitive issues are multi-fold and complex, the goal of competition authorities should be to protect innovation understood in a broad sense. This is the case for two related reasons. First, in a digital space where services are offered for free, competition is based on quality, but also very largely on innovation.[29] Thus, consumer welfare is served by making sure that innovation is allowed to prosper. Second, as noted above, even those who are hostile to enforcement of competition rules in the digital space – on the ground that market power is temporary, and that intervention creates risks of errors that outweigh any benefits it may generate – recognize that incumbents are eventually displaced by more innovative rivals. Thus, protecting the innovative process is central to Schumpeterian creative destruction.

The link between competition, innovation and consumer welfare is explicitly recognized in Article 102(b) TFEU, which prohibits abuses of a dominant position consisting in "*limiting production, markets or technical development to the prejudice of consumers*". This provision prohibits conduct by dominant firms, including dominant platforms, that impede "technical development" or – to use a more modern term – "innovation". The prohibition of conduct harming innovation is necessarily broader than the other prohibitions of other conducts that may harm innovation, including discrimination (Article 102(c) TFEU) or tying (Article 102(d) TFEU). An additional strength of Article 102(b) TFEU is that it contains its own limiting principle: a conduct impeding competition will only be abusive if it prejudices consumers. Thus, competitor harm is not sufficient. Harm to consumers cannot be assumed, it must be shown.

The reason why the notion of innovation should be broadly understood is that harm to innovation takes multiple forms in the digital context. Thus, when a dominant platform scrapes

[29] The role played by competition policy in protecting innovation has been recently emphasised by Commission Vestager. See Speech, "Getting the best out of technology", 10 September 2018.

the content of Yelp or the Wall Street Journal, it harms innovation because it reduces these firms' incentives to invest in a superior product and this hurts consumers. When a dominant platform hoards user data and makes access to such data more difficult for other firms, it hurts their ability to innovate when such data is a critical to improve the quality of their services and/or to monetize them. When a dominant platform distorts traffic away from firms operating a business model that does not meet its commercial interest because it reduces their data gathering or advertising opportunities as it is monetized through subscription fees, it also harms innovation as it locks online service providers into a two-sided business model while other models may be needed to stimulate innovation and investment. Finally, when a dominant business platform degrades interoperability or compatibility of complementary products or services, it hurts innovation. Whether the conduct in question fits into rigid legal boxes created by the case-law does not matter in my view as long as there is clear and cogent evidence that innovation is harmed to the detriment of consumers. The goal is not to expand competition law, but to focus on what truly matters.

V. Institutional constraints

One of the challenges for competition authorities in the digital space is that they are subject to institutional constraints in terms or resources and procedures.

The following bullet points make several suggestions that the Commission should perhaps consider in order to address concerns that are regularly expressed about the way in which investigations are conducted in fast moving technology markets.

- *Faster outcomes*. While the Commission cannot rush the conduct of its investigations as it is subject to strict judicial review, there may be merits in nevertheless in producing faster outcomes. While some of the measures that could be taken may require a modification of Article 1/2003, there may be for instances merits in establishing time limits to some of the phases of the procedure. Whether a complaint should be rejected or lead to the opening of formal proceedings is a decision that should, for instance, be taken within a reasonable period of time. That is not always the case. More generally, although there may be circumstances where the investigated firm tries to slow down the procedure, it is somewhat hard to understand why some investigations take over five years to deliver an outcome. Once proceedings have been opened, the investigation must move as fast as possible.

- *Use of interim measures*. While the Commission is yet to use its powers to impose interim measures under Article 8 of Regulation 1/2003, the digital space is probably an area where such measures could be adopted when justified. The conditions included in the current legal test for the adoption of interim measures are quite stringent, but there are considerable merits in using such measures in industries where markets can tip quickly and, unless the Commission steps in, harm to the competition process may be irreversible.

- *Need for data science expertise*. While the lawyers and economists who regularly compose case teams have great skills, it would be helpful to consider the recruitment of data scientists. Some authorities, such as the UK CMA have already taken steps in this direction and, unless done already, the Commission should perhaps follow suit.

- *Stimulating debate and research*. While DG COMP is an enforcement body, it should also seek to stimulate independent research in the field of competition policy and digital platforms. Enforcement actions have allowed the Commission to acquire significant knowledge on the possible impact of certain digital platform actions on competition. Yet, many important questions remain unsolved and independent research is scarce. In this respect, the appointment of three academic experts to advise Commissioner Vestager and the organisation of a high-level conference in January 2019 on "*shaping up competition policy in the era of digitisation*" is a step in the right direction.

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