Should we disrupt antitrust law?

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1. Introduction

Competition policy in the digital era and in times of populism is a hot topic.[1] Politicians like Elizabeth Warren in the US[2] and certain Europarliamentarians[3] want to "move fast and break things", that is, speed up enforcement and split up Big Tech firms. Academics of the "new Brandeis school" call for stronger enforcement and a rethinking of the goals of antitrust policy, and for more regulation.[4] On the other side of the spectrum, the *Siemens/Alstom* decision led to a Franco-German call to loosen competition law to enable "European Champions" to emerge.[5] EU Commissioner Vestager suggested that those proposals are contradictory.[6] At the very least, there is a risk that competition law in digital and non-digital sectors will diverge. Like the child in Brecht's *Der Kaukasische Kreidekreis*, antitrust policy risks being ripped apart by opposing forces. In the meantime, competition authorities experiment with new theories of harm in cases against Google,[7] Apple,[8] Facebook[9] and Amazon,[10] and conducting sector inquiries into digital markets.[11]

1 See seminal article by Carl Shapiro, "Antitrust in Times of populism", Macro-economy, November 17, 2017.

2 E. Warren, "Here's how we can break up Big Tech" March 8, 2019, available at https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c. See also Recode, March 16, 2019, "Sen. Amy Klobuchar, 2020 presidential candidate, explains how she would regulate Big Tech if she wins", https://www.recode.net/podcasts/2019/3/16/18267880/amy-klobuchar-2020-democratic-president-candidate-antitrust-privacy-kara-swisher-decode-podcast-sxsw. Republican senators Ted Cruz and Josh Hawley have joined the debate as well (Washington Post, March 13, 2019, "The Technology 202: Freshman Sen. Josh Hawley emerges as one of toughest Republican critics of Big Tech", https://www.washingtonpost.com/news/powerpost/paloma/the-technology-202/2019/03/13/the-technology-202-freshman-sen-josh-hawley-emerges-as-one-of-toughest-republican-critics-of-big-tech/5c88136a1b326b2d177d6069/?utm_term=.94b30f05416c). Even Facebook Co-founder Chris Hughes wrote "It is time to break up Facebook", New York Times, OpEd May 9, 2019, https://www.nytimes.com/2019/05/09/opinion/sunday/chris-hughes-facebook-zuckerberg.html.

3 Motion on the Annual Report on Competition Policy, April 19, 2018, http://www.europarl.europa.eu/doceo/document/A-8-2018-0049_EN.html?redirect#title6.

4 Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age, Columbia Global Reports 2018. Lina Khan, Amazon's Antitrust Paradox, Yale Law Journal Vol. 126, No. 3 (2017) (https://www.ft.com/content/7945c568-4fe7-11e9-9c76-bf4a0ce37d49). For a different perspective, see Joshua D. Wright, Elyse Dorsey, Jan Rybnicek and Jonathan Klick, Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust.

5 Joint publication by German and French ministers of economic affairs, "A Franco-German Manifesto for a European industrial policy fit for the 21st Century" (https://www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf), February 19, 2019. The Government of the Netherlands opposed this in a recent position paper (May 15, 2019), emphasizing that "*European Champions should build on healthy competition*" and that "*the key issue is the competitiveness of our economy as a whole*". (https://www.permanentrepresentations.nl/documents/publications/2019/05/15/position-paper-strengthening-european-competitiveness)

6 *Vestager: French-German Antitrust Push would have cleared Google*, FT of March 31, 2019, https://www.ft.com/content/676e24c6-509a-11e9-b401-8d9ef1626294.

7 *Google Shopping* – EU Case AT.39740 (2017); *Google Android* – EU Case AT.40099 (2018); *Google Adsense* – EU Case AT.40411 (2019); French Interim measures against Google in *NavX* – 10MC-01 (2010) and *Amadeus* – 19-MC-01 (2019).

8 See "Spotify escalates Apple dispute with formal EU antitrust complaint", MLex, March 13, 2019, and the Dutch ACM investigation into the Apple app store (April 11, 2019, https://www.acm.nl/en/publications/acm-launches-investigation-abuse-dominance-apple-its-app-store).

9 *Facebook* – German case B6-22/16 (2019); *Facebook Privacy Practices* (https://www.ftc.gov/news-events/press-releases/2018/03/statement-acting-director-ftcs-bureau-consumer-protection).

10 *E-book MFNs* – EU Case AT.40153 (2017), Amazon Marketplace – EU Case AT.40462 (ongoing); ongoing German Cartel Office investigation, see https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/29_11_2018_Verfahrenseinleitung_Amazon.html?nn=3591568.

11 EU E-commerce sector inquiry (2017); German sector inquiries into price comparison websites, smart TVs (both ongoing) and online

In parallel , we see a movement towards regulation of the digital sector:[12] the EU's GDPR triggered efforts in the US to adopt a comparable privacy framework.[13] An EU Platform to Business regulation was recently agreed.[14] EU Commissioner Gabriel issued a challenge: "*These are the first rules of this kind anywhere in the world, and they strike the right balance between stimulating innovation while protecting our European values*."[15] Several more EU regulatory proposals are in the pipeline[16] as well as developments at member state level, like the new digital services tax recently introduced in France and similar proposals in the UK.[17]

Why this excitement? After all the initial enthusiasm about the benefits of the digital revolution, it turns out that there is a shadow side to the digital economy. Consumers and "mini-multinationals"[18] alike welcomed the new, free services and the efficiencies derived from digital innovation. But digital platforms are being abused by fake news providers, extremists, and people who prey on the vulnerable. Things we valued about the old economy are at risk – like small stores in the High Street, work in manufacturing, privacy, reliable news, civility in public discourse, proper political debate and decision-making, a well-informed electorate voting for trustworthy politicians, a bridgeable gap between rich and poor, physical books, and an attention span longer than that of a goldfish.[19] So we blame online firms, conveniently large targets. And while they are all different, with different business models and ethics, the calls for intervention tar them all with the same brush. The questions are whether that is right, whether these issues are caused by market failures, and whether antitrust is the right tool to address them.

It is a good moment to reflect on whether change is needed, and what works and what doesn't. Governments have commissioned several thoughtful expert reports on whether competition law should be reformed to address the new digital challenges.[20] We discuss some proposals to deal with market concentration, and some recent suggestions, including the 2019 Report on Competition in Digital Markets by the Digital

advertising (announced to begin 2019); UK plans for an online advertising market study; several US FTC hearings into competition and consumer protection issues (2018) and new FTC taskforce for online platforms (2019); Australian digital platforms inquiry (2018); Japanese Study Group on Improvement of Trading Environment surrounding Digital Platforms (ongoing); Dutch ACM "Market Study into Mobile App Stores", April 11, 2019. https://www.acm.nl/sites/default/files/documents/2019-04/marktstudies-appstores.pdf.

12 See even "Mark Zuckerberg: The Internet needs new rules. Let's start in these four areas", The Washington Post, 30 March 2019, https://www.washingtonpost.com/opinions/mark-zuckerberg-the-internet-needs-new-rules-lets-start-in-these-four-areas/2019/03/29/9e6f0504-521a-11e9-a3f7-78b7525a8d5f_story.html?utm_term=.df9db3228fbf.

13 Stacey: "How Washington plans to regulate Big Tech," FT of January 7, 2019, https://www.ft.com/content/8aa6680e-f4e2-11e8-ae55-df4bf40f9d0d.

14 COM(2018) 238 final – 2018/0112 (COD), adopted by the European Parliament on April 17, 2019, see https://data.consilium.europa.eu/doc/document/PE-56-2019-INIT/en/pdf. For more information on the rationale behind the regulation see https://ec.europa.eu/digital-single-market/en/business-business-trading-practices.

15 EC Press Release, "Digital Single Market: EU negotiators agree to set up new European rules to improve fairness of online platforms' trading practices", February 14, 2019, http://europa.eu/rapid/press-release_IP-19-1168_en.htm.

16 *Copyright directive*, COM(2016) 0593, *ePrivacy Regulation*, COM/2017/010 final - 2017/03 (COD); *New Deal For Consumers* COM(2018) 183, COM(2018) 184, COM(2018) 185; *Geoblocking regulation*, Regulation (EU) 2018/302.

17 Government press release: "Taxation: the outlines of the GAFA tax revealed" (March 6, 2019, available at https://www.gouvernement.fr/en/taxation-the-outlines-of-the-gafa-tax-revealed).

18 SMEs with online access to world markets. See Stepanek, Micro-multinationals rising, May 14, 2010 https://ssir.org/articles/entry/micro-multinationals_rising

19 Egan: The Eight-Second Attention Span, The New York Times, January 22, 2016, https://www.nytimes.com/2016/01/22/opinion/the-eight-second-attention-span.html

20 EU expert panel report on "Competition policy in the era of digitisation" (http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf), April 4, 2019; Digital Competition Expert Panel chaired by Professor Jason Furman final report on competition in digital markets (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf), March 13, 2019; Cairncross Review on advertising and "A Sustainable Future For Journalism" (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779882/021919_DCMS_Cairncross_Review_.pdf) February 12, 2019. Lord Tyrie (the CMA Chairman) highlighted the challenge that "*the UK has an analogue system of competition and consumer law in a digital age*" (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781151/Letter_from_Andrew_Tyrie_to_the_Secretary_of_State_BEIS.pdf), and the House of Lords Select Committee on Communications published a report in response to concerns that if governments fail to regulate the internet adequately, *"it will evolve in ways determined by, and in the interests of,* [the large tech] *companies."* (https://publications.parliament.uk/pa/ld201719/ldselect/ldcomuni/299/299.pdf) Schweitzer et al published "Modernising the Law on Abuse of Market Power" in Germany in 2018 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3250742). See also the French Competition Authority opinion on online advertising (2018) (http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=684&id_article=3133&lang=en); the Australian ACCC's December 2018 preliminary report recommending stricter regulation on the market power of Google and Facebook (https://www.accc.gov.au/system/files/ACCC%20Digital%20Platforms%20Inquiry%20-%20Preliminary%20Report.pdf); the Dutch ACM Discussion Paper on "Future-proofing competition policy for online platforms", December 2018 (http://competitionlawblog.kluwercompetitionlaw.com/2019/01/02/dutch-government-publishes-discussion-paper-on-online-platforms-and-the-need-for-additional-regulation-input-requested-before-3-february-2019); and the Japan Fair Trade Commission market study on competition and digital platforms, December 2018 (https://www.jftc.go.jp/en/pressreleases/yearly-2019/April/190417.html).

Competition Expert Panel chaired by Professor Jason Furman (the "UK Report"), the 2019 Report on Competition Policy in the Era of Digitisation" written for the European Commission by Professors Heike Schweitzer, Jacques Crémer and Yves-Alexandre de Montjoye (the "EU Report"), and a 2018 Report on "Modernising the Law on Abuse of Market Power" by Schweitzer et al (the "German Report").[21]

2. Concentration in the digital economy and what to do about it

There is a wide-spread perception that digital markets tend towards concentration[22] or even natural monopolies ("winner takes all"). Commonly identified causes are economies of scale and scope; network effects of certain online services such as social networks; barriers to entry for startups without access to large data sets; technical restrictions; the "paradox of free" (meaning that new entrants cannot compete on price and must compete on quality); limited data portability and tying arrangements that increase switching costs and limit multi-homing; and fast-moving markets that "*tip […] towards a single winner.*"[23] It is true that users seek out social networks on which they are most likely to find their friends, colleagues and neighbors. This makes it difficult for a new social network to compete with the market leader. But network effects do not arise in all services. For instance, online search users are indifferent to whether others use the same service. The UK Report at least recognizes that "*many of these features are evident in non-digital markets*" but suggests that "*the combination and strength of them in digital markets is unique.*[24] But even if traditional tools to define markets and find dominance are not so easily applied to free multi-sided products, is it true that there is a lack of online competition? If so, what should be done about it?

2.1 Breaking up Big Tech?

Each online company seems to have a different core competency: Apple in audio streaming and mobile devices, Amazon in books and shopping, Facebook in social networks, Google in general search, Netflix in streaming video content, and Microsoft in PC operating systems and productivity applications. Markets appear as an archipelago of separate islands, each dominated by an individual firm. This is an oversimplification, however.

> Digitization and globalization present new challenges, but many do not derive from a lack of competition but from intensification of competition from online businesses and global producers.

First, even if they offer different services, they compete with one another for the same users' attention by providing free, new products on one side of their platform ("attention rivalry"), to draw advertisers and suppliers to the other side.[25]

Second, firms can and do invade one another's islands. They may fail, like the Google+ social network, but there are many areas where they compete, as table 1 shows.[26]
On individual islands, these firms compete also with brick-and-mortar firms, and with online specialists. In search, for instance, Google, Bing, DuckDuckGo, and Qwant compete with hundreds

21 See also Draft Report of the Stigler Center of the University of Chicago Booth School of Business of May 15, 2019 building on the EU and UK Reports, https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure---report-as-of-15-may-2019.pdf.

22 See also IMF World Economic Outlook, April 2019, Ch. 3 The Price of Capital Goods: A Driver of Investment Under Threat? https://www.imf.org/~/media/Files/Publications/WEO/2019/April/English/ch3.ashx?la=en. Note that increased mark-ups may reflect not just increased power, but also increased risk or greater capital investments, or increased efficiencies. The study advises against drastic action designed to curb acquisitions or break up online companies.

23 UK Report, p. 56.

24 UK Report, p. 37.

25 See D. Evans, Attention Rivalry Among Online Platforms, University of Chicago Institute for Law & Economics, Olin Research Paper No. 627, April 12, 2013 (available at https://ssrn.com/abstract=2195340).

26 See Varian, Dolmans, and Baird, Digital challenges for competition policy, Submission for the EU debate on competition policy for the digital era, Sept 2018.

Product	Amazon	Apple	Facebook	Google	Microsoft
advertising platforms	✓		✓	✓	✓
artificial intelligence	✓	✓	✓	✓	✓
browser	✓	✓		✓	✓
cloud services	✓			✓	✓
digital assistants	✓	✓	✓	✓	✓
ebooks	✓	✓		✓	
email and messaging		✓	✓	✓	✓
games	✓	✓	✓	✓	✓
general purpose search engines				✓	✓
home delivery services	✓			✓	
maps		✓		✓	✓
office tools		✓		✓	✓
operating systems	✓	✓		✓	✓
smartphones	✓	✓		✓	✓
social networks			✓		
special purpose search engines	✓	✓	✓	✓	✓
streaming video	✓		✓	✓	
video and music distribution	✓	✓		✓	
video conferencing		✓	✓	✓	✓

Table 1 *- Areas of online rivalry*

of special purpose search engines such as Amazon, Alibaba, Criteo, eBay, Idealo, Hotels.com, LinkedIn, MoneySupermarket, Monster, Pinterest, Shopify, Travelocity, TripAdvisor, Trivago, Skyscanner, and many others that help users find products, people, places, services, and information. These specialists focus on the most monetizable aspects of search, ignoring queries not usually matched to ads (such as local history).[27] Taken together, they are a real competitive force – and statements that digital players have 90% market shares are misleading to the extent they ignore this.

Finally, IT firms race to develop new technologies such as artificial intelligence ("innovation competition"). These dynamics keep tech firms on their toes, innovating to ward off the threat of invasion and the threat of advertisers and users moving to other platforms, normally benefiting consumers in the process.[28]

When reviewing "new Brandeis" literature, what we see, arguably, is not just a concern about a *lack* of competition online, but about *too much* competition between online firms and offline incumbents. Online sales take away from brick-and-mortar shops. It is true that many small firms including "mini-multinationals" find new opportunities selling through their own websites and online market places. It is equally true that many brick-and-mortar shops are faced with free riding – consumers coming in the shop to try out and compare products, and then buying them online – and find it difficult to replicate the efficiencies of online firms, including scale and scope. Ordo-liberals conclude that the social and political consequences cannot be ignored, but there is a paradox in seeking to use tools designed to encourage competition as a way of reducing competitiveness of online suppliers.

27 See Goodwin: Organic vs Paid Search Results: Organic Wins 94% of Time, Searchenginewatch, August 23, 2012, https://searchengine-watch.com/sew/news/2200730/organic-vs-paid-search-results-organic-wins-94-of-time. No money is made on 94% of search query clicks. Specialists and new entrants this focus on where the money is. As many as 54% of people looking for a product online now begin their search directly on Amazon.

28 Not all innovation benefits consumers, and social media networks may be designed for addiction. Interview of Chamath Palihapitiya, former Facebook VP User Growth, "View From The Top", November 2017, at https://www.realclearpolitics.com/video/2017/12/11/fmr_facebook_exec_social_media_is_ripping_our_social_fabric_apart.html; See also Dr. Brent Conrad, TechAddiction "Why is Facebook Addictive?" at http://www.techaddiction.ca/why-is-facebook-addictive.html. That design incentive, however, arises regardless of the intensity of competition, and is more effectively addressed by consumer protection rules than a change in competition law. For a brief discussion of AI regulation, see below.

Indeed, so-called "digital monopolists" do not enjoy a "quiet life" like classical monopolists. The constant innovation suggests there is plenty competitive pressure.[29] This suggests that there could in fact be *both* strong competition (between online firms, and between online and offline firms) *and* increased concentration. If so, intensified competition enforcement based on an assumption of *inadequate* competition may not be the answer. Breaking up online firms may not increase competition either.[30]

First, large platforms engage heavily in R&D and release new features constantly.[31] If we (threaten to) break them up, we reduce incentives to keep innovating.

Second, under the modern consumer welfare standard, competition law is primarily concerned with controlling abusive conduct. *"The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices–at least for a short period–is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct."* [32] A concentrated market structure alone does not warrant intervention.

Third, it is by no means clear how a break-up could be achieved without undermining two-sided business models (for instance, when separating advertising from a service) or even undermining the benefits of vertical integration; or whether breaking up would have any effect (where there are no causal links between market power in one area and activities in another). A split could in fact reduce competition, for instance, if a market platform provider like Amazon were prohibited from itself selling products online.

Fourth, international law and comity stand in the way: could a US authority break up Baidu or the EU break up Facebook? This extraterritorial exercise of jurisdiction would create legal issues and international tension.[33] Breaking up Western IT firms while leaving Chinese or Indian firms untouched is not a solution either, since it could skew online competition in the long term.

Finally, and most importantly, it is unclear whether breaking up digital companies would be a solution at all. If it is true that they benefit from network, scale, and scope effects, and "winner takes all" or "tipping" dynamics, one of the successor entities would simply regain the market share of their former parent company.[34] That process of eliminating efficiencies is at best inefficient with little social and political benefits, and at worst leads to capital destruction and undermines trust in Government.

In sum, breaking up means consumers lose, and society gains little, if anything. Social and political problems should be addressed by appropriate social and educational policies. Loss of privacy should be addressed by personal data protection laws;[35] concentration of the press by media plurality laws;[36] online tax avoidance by tax reform

29 For a good overview of the Schumpeter vs Arrow debate, on whether concentration or competition is better for innovation, see C. Shapiro: "Competition and Innovation: Did Arrow Hit the Bull´s Eye?", in: J. Lerner and S. Stern (editors): The Rate and Direction of Inventive Activity Revisited (2012).

30 This is without prejudice to structural remedies as a measure of last resort under current law. See Article 7(1) of Regulation No. 1/2003. For a critique of breakup, see FTC Commissioner Phillips, We Need to Talk: Toward a Serious Conversation About Breakups, Hudson Institute, Washington D.C., April 30, 2019, https://www.ftc.gov/system/files/documents/public_statements/1517972/phillis_-_we_need_to_talk_0519.pdf.

31 UK Report, p. 20.

32 See e.g., Justice Scalia in *Verizon v. Trinko*, 540 U.S. (2003).

33 See for example the political pressure when the EU prohibited the GE/Honeywell merger, http://content.time.com/time/business/article/0,8599,166732,00.html, or when 59 senators sent a letter to the European Commission about the Oracle/Sun Microsystems transaction https://chillingcompetition.com/2009/12/10/anti-trust-goes-political/.

34 Commissioner Vestager, too, doubts that the effects of breaking up companies will give better results than "mainstream tools": "Full Q&A: European commissioner for competition Margrethe Vestager on Recode Decode", Recode, March 18, 2019, https://www.recode.net/2019/3/18/18270522/margrethe-vestager-europe-competition-commissioner-recode-decode-kara-swisher-podcast-interview-sxsw.

35 See also answer by Commissioner Vestager to EP Question P-001183/2019 (*"The European legislator has made sure that the type of conduct in question is addressed by the General Data Protection Regulation"*), May 5, 2019, http://www.europarl.europa.eu/doceo/document/P-8-2019-001183-ASW_EN.pdf

36 Online media plurality – not restriction of competition – is the main concern (and media concentration legislation is the proper tool to address the concern) expressed with respect to Facebook by co-founder Chris Hughes in "It is time to break up Facebook", New York Times, OpEd May 9, 2019 (*"Mark alone can decide how to configure Facebook's algorithms to determine what people see in their News Feeds, what privacy settings they can use and even which messages get delivered. He sets the rules for how to distinguish violent and incendiary speech from the merely offensive, and he can choose to shut down a competitor by acquiring, blocking or copying*

and State aid rules; fake news, fake views and hate speech by criminal and libel law (as well as a ban on unidentified bots and fake identities, a duty to employ fact checkers and suppress distribution of fake news and "deep fakes", an effective duty to publish corrections, appropriate technical solutions and education to empower users to discern fake news and exercise critical thinking); manipulative political ads by a realtime database of online ads and a duty to visibly identify and imprint the real ad publisher (and an Electoral Commission with online skills and effective policies); increasing income disparity by social policies and appropriate taxation; online bullying and exploitation of vulnerable people by education and effective enforcement of criminal law. These are all real problems, but it is hard to see how using competition law to break up firms is an answer.

2.2 Mandated access to data?

Most recommendations focus on less restrictive and more targeted measures than break-up, such as data sharing, to reduce barriers to entry based on superior access to user or usage data.[37]

Competition law as it stands will rarely require rivals to share data.[38] Data are seldom an indispensable input in the sense of *Bronner*, given that most data are widely available and non-rivalrous – consumers can share user data with several firms, and collecting usage data does not prevent other companies from collecting usage data of their own. An as-efficient competitor should normally be able to replicate the infrastructure used to collect the data. If data can be recreated or found elsewhere, a refusal to share will not lead to "complete foreclosure of downstream competition", nor stifle a "new product" or innovation. Even though these requirements have been established for 30 years, it is proposed that the thresholds be removed.[39] Is that really needed, useful, or doable?

First, could requirements to share data actually conflict with GDPR and privacy rules? For example, sharing personally identifiable information would raise privacy concerns and impinge on users' rights and freedoms absent informed consent. Article 102 TFEU cannot simply take precedence over the fundamental right to privacy in Article 8 of the EU charter of fundamental rights.[40] This issue should not be left to competition agencies, but should be pursued by the legislator.

> Socio-economic issues should be addressed by appropriate proportionate policies and regulation, not by tightening competition policy.

Second, mandating access to "nice to have" data rather than "indispensable" data reduces the incentives on firms to innovate and create their own better products and solutions. The same principles apply here as identified by AG Jacobs in *Bronner* for mandating a high threshold for a duty to deal.[41]

Third, the role of data as a barrier to entry is often overstated, appears based on anecdotes and seems to lack an empirical foundation. An asset can be a barrier to entry, if the fact that a first mover has

it. … The most problematic aspect of Facebook's power is Mark's unilateral control over speech. There is no precedent for his ability to monitor, organize and even censor the conversations of two billion people." https://www.nytimes.com/2019/05/09/opinion/sunday/chris-hughes-facebook-zuckerberg.html

37 See e.g. UK Report, p. 76, German Report, pp. 150, 156 (the German government plans to strengthen data access rights under the 10th revision of the ARC, confirmed by Daniel Fülling (Federal Ministry for Economic Affairs and Energy) at the Speyer Competition Law Forum on March 26, 2019. If rivals share data, that may require a (block) exemption under competition law.

38 Case C-7/97 *Bronner* [1998] ECR I-7791, Case C-418/01 *IMS Health* [2004] ECR I-5039, Case T-201/04 *Microsoft Corp* [2007] ECR II-03601.

39 Germany plans to strengthen data access rights under the German law against restrictions of competition. See also Jacques Cremer's comment that "essential facilities doctrine" was "not appropriate" for dominant data rich companies. http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1080956&siteid=190&rdir=1

40 Costa-Cabral, Francisco and Lynskey, Orla, "Family ties: the intersection between data protection and competition in EU Law", Common Market Law Review, 54 (1), (2017). pp. 11-50.

41 Graf/Mostyn, "European Union – Access to Online Platforms and Competition Law", GCR E-Commerce Competition Enforcement Guide, December 7, 2018.

created or acquired it makes it *more difficult or more costly* for a potential entrant (than it was for the first mover) to make or buy an equivalent. But data can often be created or acquired (they are a non-rivalrous good as explained above). And knowledge and experience gained from data can be obtained by acquiring firms, or enticing or inspiring employees to move to a new firm. Many start-ups are begun by, and grow with the help of, employees of the large online firms.

Are huge amounts of data really needed for a start-up to be viable? In a number of cases, the EC evaluated whether data are a real barrier to entry, concluding that depending on the type of data, there are many alternative data sources in the market that can serve demand.[42] Data are non-rivalrous, easy to collect and store, of limited life-span, with dispersed ownership, and returns that diminish as volume increases. Artificial intelligence, for instance, often uses large amounts of data. However, like other factors of production data tends to be subject to diminishing marginal returns: whether we look at machine translation, language modeling, image processing, or speech recognition, the first million observations are much more valuable in improving predictions than the second million, and so on.[43] Open source datasets are increasingly available,[44] and cloud computing makes it easier than ever before to run complex computations even for startups. The real barriers to entry are not usually data, but skills, ingenuity, and judgment.

Finally, granting access to data is complicated, and may require determining technical modalities of continuous access to data streams and FRAND rates for the remuneration. Are competition authorities willing and able to monitor compliance in individual cases? A "bottom-up" approach to facilitate user switching between services, in particular data mobility, may be better – more proportionate – than a "top-down" approach of mandating data sharing. First, data mobility (especially when combined with interoperability and data format standardization) helps users take advantage of multiple competing or complementary services in parallel. Second, the prospect of user switching should facilitate new entry and intensify competition among digital service providers for existing users – not just new users. Third, placing users in control could spur businesses to compensate users for accessing their data not just with free services, but rewards programs. Fourth, it could create a new market for intermediary services or portals that help users manage multiple platform settings in one place. Such an approach is also advisable, because we simply don't have a proper model for the value of privacy yet: In essence, the well-known "privacy paradox" states that users claim to value privacy, but are actually not willing to pay for it.[45]

Indeed, Article 20 of the EU General Data Protection Regulation (in force since May 2018) gave users a right to port their personal data. The UK Report suggests that government-led standardisation is likely to be "*inflexible and ill-equipped to deal with market developments or changes in technology*". Interestingly, the market is developing solutions: Google Takeout has been available for years, and the UK Report recognizes that "*Some companies are already making substantial efforts in this regard, like the Data Transfer Project that includes Microsoft, Google, Facebook and Twitter*".[46] Another example is "Uber Movement", through which Uber has released anonymised, aggregated data to inform local authorities' infrastructure and planning decisions. Startups are developing

42 *Google/DoubleClick* – Case COMP/M.4731 (2008), para. 269, 364; *Facebook/WhatsApp* – Case COMP/M.7217 (2014), para. 188; *Microsoft/LinkedIn* – Case M.8124 (2016), para. 253-264; *Publicis/Omnicom* – Case COMP/M.7023 (2014), para. 625-630; *Microsoft/Skype* – Case COMP/M.6281 (2011), para. 121-131, see the EGC press release No. 156/13 on the General Court's decision (Case T-79/12) declaring the Microsoft/Skype merger compatible with EU law: "*The consumer communications sector is a recent and fast-growing sector characterised by short innovation cycles in which large market shares may turn out to be ephemeral. … Any attempt to increase prices of communications for users of PCs might encourage them to switch to alternative devices. Furthermore, since services on that market are usually provided for free, a commercial policy of making users pay would run the risk of encouraging users to switch to other providers continuing to offer their services free of charge.*" See also the CMA Report on "Commercial Use Of Consumer Data" of June 2015.

43 See, for instance, Hestness et al: "Deep learning scaling is predictable, empirically", December 1, 2017, p. 13 ("*We also show that model size scales sublinearly with data size.*").(https://arxiv.org/pdf/1712.00409.pdf)

44 See e.g. freely available datasets from community-based projects on kaggle.com or data.fivethirtyeight.com, or from organizations like https://data.unicef.org or https://www.who.int/gho.

45 See Kokolakis, Privacy attitudes and privacy behavior: A review of current research on the privacy paradox phenomenon, Computers & Security 2015; see also Norberg/Horne/Horne, The privacy paradox: Personal information disclosure intentions versus behaviors, Journal of Consumer Affairs (2007), page 100.

46 UK Report, p. 5.

apps to facilitate and syndicate user consents for ads, providing users incentives to give appropriate permissions.[47]

This is not to say data access should never be considered. It's just that given the points discussed above, the law as it stands after *Microsoft* seems adequate, combined with measures – as proposed in the UK Report – to support data portability, mobility, and interoperability. Let the consumers decide. And where lack of data access is a systemic barrier to entry, an industry-specific regulatory framework may be better.[48] The PSD2 directive in the financial sector or the UK's open banking initiative are examples.[49]

2.3 Blocking killer acquisitions?

The pharmaceutical sector provides examples of dominant firms acquiring early growth drugs to stop or slow down the development of rival technology.[50] Transactions like Facebook/WhatsApp, Facebook/Instagram, Google/Waze and/or Google/Android are sometimes said to have been "killer acquisitions" too, although in these cases, the resources (in terms of budget/employees) of the acquired companies were increased and they have many more users and innovative features today than at the time of their acquisition.[51]

To stop "killer acquisitions", it is proposed to reform merger control, either by capturing more deals (*e.g.* by lowering transaction value thresholds) or adopting stricter merger control standards. It is important not to paint transactions *a priori* as "killer acquisitions" without clear evidence that eliminating a rival was the intent, or must be the reason in the absence of other justifications. It could be counterproductive to make buying start-ups prohibitively difficult. The prospect of being bought out is an important incentive for startups. The potential for acquisition drives venture capital firms to invest. This is the fuel that fires startups. Making it more difficult for startups in Europe to be acquired risks reducing those incentives – when the EU should encourage startups.

> Commissioner Vestager said, "*That doesn't have to mean changing our rules … we need to be ready to use those powers to the full, when the situation demands it.*"

The UK Report recommends *ex post* reviews of past acquisitions to see whether they should have been blocked. Both the UK CMA and the US FTC have formed investigative task forces to conduct thorough ex-post reviews of past technology transactions.[52] A lot can be learned from this. And we should not forget that existing merger control and even Article 102 cases reaching back to *Tetra Pak II*, *Continental Can*, and *Servier*[53] should be flexible enough to catch true killer acquisitions. *Tetra Pak II* in particular qualified the acquisition of an exclusive license as an abuse, where the patent in question was the only possible alternative to the dominant acquiror's technology, and the acquiror

47 E.g. ErnieApp, a privacy knowledge manager, see https://ernieapp.com.

48 The UK Report recognizes that *"Email standards emerged due to co-operation but phone number portability only came about when it was required by regulators. Private efforts by digital platforms will be similarly hampered by misaligned incentives. Open Banking provides an instructive example of how policy intervention can overcome technical and co-ordination challenges and misaligned incentives by creating an adequately funded body with the teeth to drive development and implementation by the nine largest financial institutions."* (p. 5).

49 PSD2 – Directive (EU) 2015/2366.

50 European Union: European Commission, *Report from the Commission to the Council and the European Parliament, Competition Enforcement in the Pharmaceutical Sector* (2019), available at http://ec.europa.eu/competition/publications/reports/kd0718081enn.pdf, pp. 4, 10-12, 30-31.

51 See Bitton, Dolmans, Mostyn and Pearl, "Competition In Display Ad Technology: A Retrospective Look At Google/Doubleclick and Google/Admob," CPI, April 2019.

52 The CMA's Data, Technology and Analytics (DaTA) unit (https://competitionandmarkets.blog.gov.uk/2018/10/24/cmas-new-data-unit-exciting-opportunities-for-data-scientists) and the FTC's Technology Task Force (http://ec.europa.eu/competition/publications/reports/kd0718081enn.pdf).

53 Case T-51/89 *Tetra Pak Rausing SA v Commission* [1990] ECR II-00309; Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215; Case T-691/14 *Servier SAS and Others v Commission* [2018]. The technology acquisition part in the *Servier* case appears to be conceptually similar to the cases meant to be included in the concept of a killer acquisition, see EU press release on the decision: *"Servier had a strategy to systematically buy out any competitive threats to make sure that they stayed out of the market."* (http://europa.eu/rapid/press-release_IP-14-799_en.htm)

proceeded to shelve the patent.[54] So, precedents already exist to stop killer acquisitions.

2.4 Facilitate findings of dominance and abuse?

Several of the reports propose to facilitate intervention against platforms. This takes various forms: narrowing of market definition, stricter rules for unilateral conduct, and avoiding the dominance framework altogether.

The EU Report suggests "*even in an apparently fragmented marketplace, there can be market power*" and refers to the notion of "unavoidable trading partner" and "intermediation power" for platforms. It continues by saying that "*we should put less emphasis on analysis of market definition, and more emphasis on theories of harm and identification of anti-competitive strategies.*" The UK Report recommends a principles-led 'code of conduct' for "fair and reasonable" conduct supervised by a new Digital Markets Unit for digital platforms holding 'strategic market status', *i.e.*, "*a position of control over other parties' market access*". The German Report proposes to extend the definition of dominance to undertakings that have control over large amounts of data, recommending "*to implement the concept of intermediary power in s. 18(1) ARC, next to supply and purchase power*".[55] They suggest to take intermediary power into account also when assessing whether there is "relative dominance" under Section 20(1) ARC, and to broaden its scope to benefit all firms that are dependent upon another enterprise, not just small and medium businesses.[56]

The common denominator is to define "ecosystem-specific aftermarkets" where a platform supplier is by definition dominant. Is it appropriate to neglect inter-platform competition, or to disregard the impact of constraints on one side of a two-sided platform for its other side? The result may be to ignore the ability of suppliers, advertisers, and consumers to switch between platforms, suggesting a dependency that may not actually exist, or to mandate changes on one side of a two-sided platform that affect competition or efficiency on the other. It is comparable to applying Article 101 TFEU to vertical restraints of intra-band competition without regard to whether inter-brand competition exists.

By defining markets so narrowly, a finding of dominance is likely, releasing the full power of Article 102 TFEU. This is then combined with stricter rules for unilateral conduct: non-discrimination,[57] a ban on self-preferencing,[58] algorithm transparency,[59] a shift to the defendant of the burden to prove "pro-competitiveness" or even "the absence of adverse effects" (proving a negative!),[60] doing away with effects analysis (reintroducing a form-based approach for platform management), obligations to share data, and eliminating a requirement to show consumer harm. Added to this are a proposed greater tolerance for false positives, more extensive remedies which "have a restorative element" rather than simply ceasing the alleged abusive conduct, and the procedural reforms discussed below.

This constellation of proposals raises concerns. Precedents from one jurisdiction will influence cases elsewhere. Many platforms are active EEA-wide and even worldwide. Even if a particular jurisdiction does not adopt all of the proposals mentioned above, the likely effect is that platforms have to take a *combination* of all of them into account. Moreover, the loosening of the criteria for a finding of abuse creates a risk of inconsistent and possibly arbitrary results, as the EU Report recognizes.[61] The reversal of the burden of proof is simply not consistent with the presumption of innocence and the principle that the Commission or claimant bears the burden of proof (Art 2 of Regulation 1/2003). The consequences could be serious. Competition law is in the nature of

54 Case T-51/89 *Tetra Pak Rausing v Commission* [1990], ECR II-00309, para. 23.

55 German Report, p. 92.

56 German Report, p. 74.

57 Case C-525/16, *MEO*, para. 25 would require an effect on competition, but the proposals would do away with this.

58 *Google Shopping* – EU Case AT.39740 (2017).

59 ACCC Report, pp. 5, 111. The UK reports suggests to "*monitor how use of machine learning algorithms and artificial intelligence evolves*", p. 15. The House of Lords Communication Committee finds in their 2019 report that circumstances point to a "transparency gap" regarding algorithms, p. 17. Is it right to require disclosure of algorithmic mechanisms, when suppliers have to contend on a daily basis with unscrupulous market players intent on manipulating the ranking of results?

60 EU Report, pp. 66-67 ("*to the extent that the platform performs a regulatory function as described above, it should bear the burden of proving that self-preferencing has no long-run exclusionary effects on product markets. The dominant platform would then need to prove either the absence of adverse effects on competition or an overriding efficiency Rationale.*")

61 EU Report, p. 50, which appears to recognize that the "error-cost" framework proposed in the Report may lead to "arbitrary" enforcement.

criminal law,[62] fines are high, and damage claims may be significant. Particularly worrying in this context is the suggestion to avoid an effects analysis and limit judicial review (see below).[63] It conflicts with the trend in *Intel*.

Individual proposals also raise questions. Take the ban on self-preferencing, for example. It would hamper vertical integration which is presumptively efficient, eliminate synergies, and create a duty to supply rivals. Platforms compete on quality, and users can and do switch if self-preferencing reduces relative platform quality. Search services, for instance, compete by showing their own results in response to queries that users put to them. Claiming that they must show results from rival services is like saying a newspaper favors itself by publishing sports articles by its own writers, rather than articles from rival sports magazines. If the essential facilities test under *Bronner* is considered too rigid, why not stick with the rule of reason set out in the *Microsoft* case that "*the burden of proof of the existence of the circumstances that constitute an infringement of Article [102] EC is borne by the Commission*," and "*it is for the dominant undertaking … to raise any plea of objective justification and to support it with arguments and evidence. It then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted*."[64] A ban on self-preferencing goes too far. "*Competition law is about preserving independent rivalry between competitors, not competitors cooperating with each other. Second, a duty to supply interferes with property rights and the right to choose one's trading partners. Third, obligations to supply may diminish the incentives of both the company subject to the obligation and companies benefiting from it from competing and innovating. Fourth, in industries with fast innovation cycles, such as the technology sector, a duty to integrate rivals into constantly evolving technologies and products may delay – or preclude entirely – new developments*." [65]

Finally, are these proposals actually needed when the EU has just adopted the EU Platform to Business ("P2B") Regulation?[66] The P2B Regulation is "*to ensure that business users of online intermediation services and corporate website users in relation to online search engines are granted appropriate transparency, fairness and effective redress possibilities*"[67]. The regulation introduces transparency obligations, obliging platforms for instance to (i) specify within their terms and conditions the grounds on which they could suspend a business and to justify each individual case of suspension or termination of its services for a business user, (ii) explain any differentiated treatment they may give to themselves or a business they control, (iii) describe their ranking mechanisms, including where ranking is influenced by payment, and (iv) to describe the access that business users will have to personal data that they or consumers provide. The regulation encourages codes of conduct and obliges platforms to provide an internal, easy system to handle complaints from business users and to provide options for mediation. It enables business users to sue in civil courts to (i) declare non-transparent terms and conditions void or (ii) declare any changes of terms and conditions void, that were not provided reasonably in advance.

In sum, the P2B regulation already solves issues and provides swift remedies. It does not require defining a market or finding of market power. It effectively "transforms" competition issues into contractual disputes. Adjusting competition law when we have this P2B regulation seems overkill.

62 ECHR in *Menarini Diagnostics v. Italy*, no 43509/08 para 44.

63 UK Report, pp. 105-107; Letter from Lord Tyrie of the CMA, pp. 34-38.

64 Case T-201/04 *Microsoft v Commission* [2007] ECR II-03601, para 688 and 1144.

65 Graf and Mostyn, Access to Online Platforms and Competition Law, GCR December 7, 2018, https://globalcompetitionreview.com/insight/e-commerce-competition-enforcement-guide/1177728/european-union-%E2%80%93-access-to-online-platforms-and-competition-law.

66 Draft Regulation promoting fairness and transparency for business users of online intermediation services and online search engines COM(2018) 238 final – 2018/0112 (COD), see fn. 14. Similarly, on March 9, 2019, the UK House of Lords Select Committee on Communications published a report titled "Regulating in a Digital World" recommending regulation of the digital world based on 10 underlying principles: Parity (the same level of protection must be provided online and offline); accountability; transparency (digital businesses must be open to scrutiny); openness to innovation and competition; ethical design in the interests of users and society; privacy; recognition of childhood; respect for human rights and equality; education and awareness; and democratic accountability, proportionality and evidence based approach. The report calls for a public interest test for data driven mergers, stricter review of platforms with intermediary power to preserve consumer choice and long term innovation and fairness, algorithm audits and transparency, a duty of care on online services that host and curate content, more burdensome personal data reporting and an annual data transparency statement, all supervised by a new Digital Authority. See https://publications.parliament.uk/pa/ld201719/ldselect/ldcomuni/299/299.pdf.

67 Article 1 of the P2B regulation as adopted by the European Parliament on April 17, 2019.

2.5 Attempts to monopolize.

An alternative proposal is to prevent emergence of dominance via anticompetitive means in the first place, *e.g.* by prohibiting anticompetitive strategies to curb switching, or exclusivity strategies preventing multi-homing by consumers or business partners.[68] In other words, competition authorities should intervene even in situations where the undertaking has not yet reached a dominant position, but its conduct is liable to give rise to one.

> The real barriers to entry are usually not data, but skills and ingenuity

In principle, this is promising, and might avoid some of the concerns mentioned above: The existing "monopolization" doctrine in US antitrust law is based on a similar philosophy.[69] The risk of over-enforcement resulting from the absence of an effects analysis (by definition, since an attempt to monopolize can be found to be a problem even before the dominance has materialized) could be mitigated by introducing the requirement to prove a "dangerous probability of success" as in US law.[70]

Imposing sanctions for attempts to monopolize is possible under Article 101 TFEU in case of contractual arrangements to lock in customers or business partners, but probably not in case of unilateral practices. Article 102 TFEU requires the existence of dominance when the abuse takes place. The issue was considered in *Rambus*, where it was avoided by finding that the abuse consisted of exploiting a dominant position that was inappropriately obtained through practices predating the emergence of the dominant position.[71] If and when the TFEU is reviewed, it may be worthwhile aligning the law to that in the United States.

3. Procedure

3.1 Speeding up?

Excessive length of proceedings creates disproportionate uncertainty and costs for the companies involved. As the UK Report says, "*companies exposed to anti-competitive practices may go out of business before the case is concluded*." And if investigations drag on for many years, dynamic markets may have moved on by the time a decision is taken.

Several of the reports (apart from the EU Report) therefore recommend measures to increase speed. The UK Report proposes (i) fast-tracking antitrust cases in digital markets, (ii) greater use of interim measures, and (iii) curbing appeals. This reflects an emerging trend at the European level.[72]

It is in everyone's interests for antitrust authorities to complete their review of cases quickly and efficiently. The existing rules do not preclude this. Article 8 of Regulation 1/2003 allows interim measures in "*cases of urgency due to the risk of serious and irreparable damage to competition … on the basis of a prima facie finding of infringement*." It is true that the European Commission has in practice resisted interim measures after the *IMS Health* case, on the ground that the procedure is cumbersome, requiring an SO and an oral hearing, all within a short period of time. This concern can be reduced by focusing the interim measure on a narrow and crucial issue, and a specific single instance of an

68 German Report, pp. 62-64, 157-158.

69 See s. 2 of the Sherman Act (15 U.S.C. (2000): "*Every person who shall monopolize, or attempt to monopolize […] any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony*".

70 *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

71 Rambus – Case COMP/38.636 (2009).

72 France's Autorité de la concurrence has the power to issue interim measures since 2009. In a recent case, they imposed interim orders on Google in reaction to a complaint by Amadeus (http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=697&id_article=3343&lang=en). Margrethe Vestager has reportedly stated that "*The French have been very successful in doing interim measures for quite some time and that is, of course, of interest to us.*" (Financial Times, *EU considers tougher competition powers,* July 2, 2017, https://www.ft.com/content/7068be02-5f19-11e7-91a7-502f7ee26895); *see also* Germany's Federal Ministry for Economic Affairs and Energy, *White Paper on Digital Platforms of the Economics Affairs Ministry,* March 20, 2017: "*we plan to make it easier to order injunction measures so that the authorities can eliminate the effect of restrictions to competition (provisionally) before investigation proceedings have been completed.*" The CMA had previously expressed the view that greater use of interim measures is "*essential if the CMA is to respond to the challenges thrown up by rapidly changing markets.*"

abuse, instead of the broader range of conduct that the Commission usually investigates in in-depth cases. Moreover, the authority should not prejudge the final outcome of the case, and leave open the possibility of closing the proceedings if no abuse is found to have occurred.

Policies and rules should be consistent across jurisdictions and not create a cumulatively excessive burden.

If an interim measure results in a false positive – which can be expected especially in cases where new law is created or that go against precedent – the company deserves to be compensated for damage, in particular if the market should happen to tip to another competitor in the meantime. Under state liability rules, however, companies will get full compensation for "wrong" decisions by competition authorities, only in cases of clear error.[73] Arguably, this is correct public policy, so as not to deter competition authorities from taking decisions for fear of liability.

For these reasons, even interim measures (and *a fortiori* fast-track final decisions) should remain grounded in evidence and existing law. Interim measures should not create new law or go against precedent, unless there is exceptional urgency in the sense that a legitimate business could go under. Efficiency and effectiveness should not come at the expense of investigative rigour, due process and the right to be heard – particularly in semi-criminal cases.

Increased use of interim measures might slow down the main proceedings, and affect the rigor of investigation. This temptation should be resisted. The primary aim should be to try to speed up the main proceedings. Merger control assessments are extremely complex and cumbersome but take place in relatively statutory timetables (admittedly after a sometimes long pre-notification stage), so it seems antitrust cases could be speeded up, too, so long as due process is maintained. A good example is the CMA *Ice Cream* case where the CMA conducted an effects analysis and opened and closed an Article 102 TFEU case in 6 months.

3.2 Lower standard of judicial review?

The UK Report argues that a full merits review standard on appeal is unduly exhaustive and cumbersome, because it requires a full review of facts and law, and allows the CAT to substitute its decision for that of the CMA. It suggests that a lighter touch – judicial review rather than full merits – would accelerate case throughput.

A full merits review is important for several reasons. First, a "judicial review" does not guarantee faster process. Remitting a case for re-determination (a decision which may itself be appealed) can extend the end-to-end duration of a case significantly. Second, full merits reviews may enhance procedural economy. Particularly in complex, technical cases (as the CAT observed in a 2012 judgment, *TalkTalk Telecom Group v OFCOM*) it may permit the appeals court to cure otherwise determinative procedural defects in the original decision. Third, a judicial review standard does not adequately protect the fundamental rights of due process.

Digital markets cases are complex, and there are shortfalls inherent in an inquisitorial system, requiring the safety net of a full merits review. If investigator, prosecutor, judge, and jury are the same, even with the best of intentions, we may find "*the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand*."[74] Such a "*bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected*."[75] This is the more so in cases with a political dimension. This bias is by its nature difficult to prove,[76] and can undermine

73 See Case T-351/03 *Schneider Electric v Commission* [2007] ECR II-2237 paras 278-279 and Case C-440/07 *Schneider Electric v Commission* [2009].

74 Nickerson, "Confirmation bias" (1998) 2 Review of General Psychology, pp. 175–22

75 *R v Gough* [1993] UKHL 1 (Lord Goff)

76 Vesterdorf, Due Process, 2010

the requirement of impartiality, both "*subjective impartiality, in so far as no member of the institution concerned who is responsible for the matter may show bias or personal prejudice*" and "*objective impartiality, in so far as there must be sufficient guarantees to exclude any legitimate doubt as to bias on the part of the institution concerned*."[77] Lowering the standard of judicial review would not only go contrary to the trend in the EU,[78] but leads antitrust authorities into the temptation to ignore due process and the rule of law.[79] That would be wrong. Competition law is quasi criminal law,[80] and under Article 6(1) ECHR "*[i]n the determination […] of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*".[81]

4. Conclusion

The various expert reports issued in Europe recently are thoughtful and useful. They are right not to recommend a broadening of goals to a vague notion of fairness,[82] and not to call for the softening of rules for national champions. They are right to review critically whether competition policy is fit for the digital age. But should we go so far as to "disrupt" antitrust?

First, while digitization and globalization of the economy present new challenges, many are not antitrust concerns because they do not derive from a lack of competition but, at least in some cases, from an *intensification* of competition from online business models and more efficient, global producers. Making online firms the scapegoats for society's problems and breaking them up is not the answer – as the reports issued in the EU, UK, and Germany fortunately recognize. Problems such as loss of privacy, unfair taxation, wealth disparity, job displacement, fake news and hate speech, online bullying and exploitation deserve their own, targeted, regulatory or legislative solutions, like privacy rules, tax reform, social security, media plurality, libel and criminal laws (as well as a ban on unidentified bots and false impersonation on social networks, a duty for platforms to employ fact checkers and suppress distribution of fake news and "deep fakes", an effective duty to publish corrections on social networks and news sites, a realtime database of online ads with a duty to visibly identify and imprint the person on whose behalf the ad is published, and an Electoral Commission with online skills and effective policies). This should be combined with digital literacy and citizenship education, prudent financial regulation, and policies tackling the roots of inequality (*e.g.* better retraining initiatives for the unemployed, basic income policies). Market-based and technology-based solutions should not be ignored either – including judicious use of AI as a tool for detection and enforcement of the regulation suggested above. Finally, effective rules are needed for the design and use of artificial intelligence.[83]

77 Case C-439/11 P *Ziegler v Commission*, paras 154–155

78 See CJEU in Case C-272/09 P *KME v Commission* [2011], para. 102 ("*the Courts cannot use the Commission's margin of discretion – either as regards the choice of factors taken into account in the application of the criteria mentioned in the Guidelines or as regards the assessment of those factors – as a basis for dispensing with the conduct of an in-depth review of the law and of the facts*"). See also Case T-201/04 *Microsoft v Commission* [2007] ECR II-03601; EFTA-Case E-15/10 *Posten Norgen v ESA* [2012], paras 83, 99; Case C-386/10 P *Chalkor v Commission* [2011], paras 54 ("*in complex economic assessments, the Commission has a margin of discretion … [but] Courts [must] establish whether the evidence relied on is factually accurate, reliable and consistent … contains all the information … [needed] to assess a complex situation … [and] is capable of substantiating the conclusions drawn from it*"); later cases do not even refer to any discretion of the Commission, see Case T-588/08 *Dole Food Company Inc v Commission* [2014]; Case C-413/14 P *Intel v Commission* [2017].

79 See also Gilbert, "What's The Appeal? How The General Court And Competition Appeal Tribunal Are Shaping The EU And UK Antitrust Regimes," CPI Antitrust Chronicle, November 2018.

80 ECHR in *Menarini Diagnostics v. Italy*, no 43509/08 ("*Article 6(1) ECHR requires that subsequent control of a criminal sanction imposed by an administrative body must be undertaken by a judicial body that has full jurisdiction. Thus, the Court must be able to quash in all respects, on questions of fact and of law, the challenged decision." "[A]lthough the Court may not replace [Authority's] assessment by its own and, accordingly, it does not affect the legality of [Authority's] assessment if the Court merely disagrees with the weighing of individual factors in a complex assessment of economic evidence, the Court must nonetheless be convinced that the conclusions drawn by the Authority are supported by the facts." "Accordingly, the submission that the Court may intervene only if it considers a complex economic assessment of [the Authority] to be manifestly wrong must be rejected.*").

81 See also art 47 of the Code of Federal Regulations (CFR).

82 See Dolmans and Lin, "A Fairness Paradox," Concurrences No 4-2017, November 2017 (*"competition law should reflect the values of fairness, [but] if fairness were actually employed in substantive decision-making as a goal and criterion, that would lead to unequal and inefficient results.*").

83 For disruptive artificial intelligence, the European Commission encourages "compliance by design" and set out seven key requirements for a "trustworthy" AI: human oversight; robustness and safety; privacy and data governance; transparency; diversity, non-discrimination and fairness; societal and environmental wellbeing; and accountability. See European Commission - Press release Artificial intelligence: Commission takes forward its work on ethics guidelines, Brussels, April 8, 2019, http://europa.eu/rapid/press-release_IP-19-1893_en.htm. See also Turner, *Robot Rules: Regulating Artificial Intelligence*, 2018; Dolmans, Zimbron, and Turner, "Pandora's box of online ills", Concurrences No. 3, 2017, p. 5.

Second, to the extent that the emergence of new online business models raises concerns like abuse of dominance, established concepts in competition law are flexible enough to be "adapted and refined", as the EU Report proposes, without radical surgery. As Commissioner Vestager said, "*That doesn't have to mean changing our rules … we need to be ready to use those powers to the full, when the situation demands it*."[84]

For instance, competition law can already be used to prevent exploitation and unfair exclusion of small firms that are truly dependent on online platforms. The concept of an "unavoidable trading party" in EU competition law is decades old,[85] and the Court of Justice held years ago already that while a dominant firm "*must be conceded the right to take such reasonable steps as it deems appropriate to protect its [own commercial] interests, such behaviour cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it…*" and such steps "*must still be proportionate to the threat taking into account the economic strength of the undertakings confronting each other*."[86] Imposing a requirement that a platform owner behaves in a proportionate manner, and avoids exploitative and exclusionary practices, makes sense. But to suggest that a platform owner should always be treated as dominant regardless of the availability of alternative platforms to which users and businesses can switch would go too far. Similarly, preserving user ability to multi-home and switch between service suppliers, and encouraging data portability and data mobility, are desirable. But mandatory data sharing proposals without evidence that the data are essential may be counterproductive in that they discourage investments in alternative sources that may be better.

Several jurisdictions are introducing platform regulation, like the EU P2B Regulation, or proposing voluntary practice codes for platforms containing rules that apply regardless of dominance or exclusionary effects. Establishing a set of 'pro-competition' *ex ante* rules (in line with calls made by Professor Tirole for 'participative antitrust') may have some benefits over a reliance only on *ex post* enforcement.[87] If designed in cooperation with stakeholders, they may enhance consumer welfare better than enforcement in individual cases.

But online platforms are often active internationally. They must comply with rules in all countries where they are active, and have to take into account the *combined* effect of practice codes, platform regulation, and reinforced competition enforcement. If they face a combination of policies to make it easier to find intra-platform dominance, impose stricter rules for unilateral conduct, reintroduce form-based abuse principles (or reverse the burden of proof, requiring defendants to prove absence of anti-competitive effects), eliminate a requirement to show consumer harm, show greater tolerance of over-enforcement and "false positives", the cumulative effect may be stifling.

This concern is even more pressing when combined with procedural proposals to speed up proceedings and make appeals more difficult. While it makes sense to accelerate proceedings and use interim measures more widely and wisely, this should not be at the expense of due process and the rule of law.

In sum, a harmonized and holistic approach is needed. Harmonized, in the sense that the policies and rules should be consistent across jurisdictions and not create a cumulatively excessive burden. Holistic, in the sense that different socio-economic issues should be addressed by appropriate and appropriate policies and non-competition regulation. Tightening competition policy is not the answer to all of the problems caused by disruption, and we should ensure we do not stifle the benefits of digitalization and innovation.

The various proposals to impose stricter competition law seem to reflect a desire to sponsor or permit the emergence of European-based alternatives to the US-based online firms. But the answer is not to hamstring the latter. A better approach would be a deliberate policy to create conditions where innovation can flourish:

84 Vestager: Defending competition in a digitized world. Speech at the European Consumer and Competition Day in Bucharest, April 4, 2019, available at https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/defending-competition-digitised-world_en.

85 Case 85/76, *Hoffmann-La Roche v Commission*, EU:C:1979:36, para. 41.

86 Case 27/76 *United Brands*, [1978] ECR 207, para. 189-190.

87 Cf. Marsden, "Leave, Remain & Common Ground: Pragmatism in Dealing with Tech Giants," CPI Europe Column, April 2019.

innovation hubs located near academic centers of excellence and established tech businesses, providing start-up incubators with access to talent and venture capital, in a culture of entrepreneurship, curiosity, and creative action, with fair and balanced tax laws, IPRs strong enough to encourage innovation but not so strict as to block new entry, an enlightened immigration policy, and competition rules that enable innovative new entrants but are not so rigorous as to stifle the new entrants once they become successful.[88] In sum, we should foster disruptive UK and EU innovation, but not disrupt EU and UK competition policy.

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88 Dolmans, Mostyn, "Internet and Antitrust: An overview of EU and national case law", e-Competitions No. 71276, February 2, 2015.

Annex

The table below contains a high-level summary of recommendations included in recent reports (EU report, UK Furman Report, Letter from Lord Tyrie of the CMA, the German Report by Schweitzer et al, ACCC Preliminary Report, report from the House of Lords Communication Committee, Lina Khan of the New Brandeis School and the Franco-German manifesto published by the German and French ministers of economic affairs).

Recommendations		EU report	Furman report	Letter from Lord Tyrie	Schweitzer et al	ACCC report	House of Lords	New Brandeis*	Franco-German manifesto
Change in goals	Focus from consumer welfare to fairness or protecting market structure	✓ p. 42	✗	✗ p. 9	✗	✗	✓ p. 43	✓ p. 799	✗
	Industrial policy	✗	✗	✗	✗	✗	✗	✗	✓
Change in methodology	Accept more false positives by introducing error/cost-test	✓ p. 42	✓ p. 99	✗	✗	✗	✗	✓ p. 738	✗
	Narrower market definition	✓ p. 3	✓ p. 81	✗	✓ p. 74	✗	✗	✗	✗
	Less rigorous dominance criteria	✓ p. 4	✓ p. 81	✗	✓ p. 92	✗	✗	✗	✗
	Intermediary power as dominance	✓ p. 4	✓ p. 81	✗	✓ p. 92	✗	✓ p. 43	✗	✗
Change in substantive rules of competition law	Establish per se rules, e.g. against tipping	✓ p. 71	✓ p. 81	✗	✓ p. 92	✗	✗	✓ p. 793	✗
	Ban self-preferencing and leveraging	✓ p. 7	✗	✗	✗	✓ p. 65, 81	✗	✗	✗
	Lower switching barriers	✓ p. 57	✗	✗	✗	✗	✗	✗	✗
Change remedies	Restoration of competition instead of cease & desist	✓ p. 68	✗	✗	✗	✗	✗	✗	✗
	Interoperability across markets	✓ p. 71	✓ p. 74	✗	✗	✗	✗	✗	✗
	Enhance personal data mobility	✓ p. 82	✓ p. 65	✗	✗	✗	✗	✗	✗
	Mandated data sharing	✗	✓ p. 76	✗	✓ p. 150,156	✗	✗	✗	✗
Change in procedure	Speeding up the process	✗	✓ p. 108	✓ p. 13, 35	✗	✗	✗	✗	✗
	Easier interim measures	✗	✓ p. 105	✓ p. 13, 21	✗	✗	✓ p. 43	✗	✗
	New specialized unit	✗	✓ p. 8	✗	✗	✗	✓ p. 68	✗	✗

* The page numbers refer to Lina Khan: Amazon's Antitrust Paradox, Yale Law Journal * Vol. 126, No. 3 (2017).