

Forging a European Competition Policy Response to Online Platforms

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Introduction

‘Mind the gap’

Trading in marketplaces is a familiar process for law-makers, who have seen fit since antiquity to establish normative rules of behaviour for trading standards and business etiquette governing market behaviour.¹ Indeed, even the development in the European Union (EU) of a coherent antitrust policy for business-to-business (B2B) transactions dates back to the millennium, where a series of behavioural and merger decisions by the European Commission

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1 One can go as far back to Aristotle’s *Politics* (Book 7) to understand the nature of the legal structures put in place to ensure that an ancient marketplace worked efficiently. Thus, Aristotle remarks that the *kapeloi* (retail traders) served a ‘kind of exchange which is justly censured’ in the agora (the marketplace and space for public gathering in ancient Greece). Moving forward to medieval times, the Court of Piepowders was established as a special tribunal in England that administered justice in relation to the markets. See Sir William Blackstone, *Commentaries on the Laws of England*, Book III, 1768, f 32.

(the ‘Commission’) established clear working principles according to which business transactions conducted online could be assessed.²

However, the exponential rise over the past 20 years in computer processing power, coupled with the growth in connectivity brought about by the increased capacity of the telecoms networks underlying online platforms, has fuelled an explosion in demand for digital content and new means of communication over the internet. This has in turn facilitated the ability of trading marketplaces to accommodate an infinite range of B2B and business-to-consumer (B2C) transactions³ (in parallel or in combination) in an online environment. In doing so, they have fostered an online environment characterised by a series of infinitely more complex commercial relationships. The range of these relationships in the digital world has pressed commentators into referring to concepts in terms of the internet ‘space’, ‘ecosystem’ or ‘value chain’. These shorthand terms have developed over the past decade, inter alia, as a means of conveying the message that the competitive dynamics of the internet embrace a range of complex interactions going well beyond the sorts of competitive constraints usually associated with:

- (1) on the one hand, ‘markets’ prone to antitrust (ex post) investigation because of identifiable (and well understood) anti-competitive conduct; and
- (2) on the other, stable, well understood ‘services’ or ‘networks’ that can justify forward-looking (ex ante) regulatory intervention to remedy market failures driven by the existence of market power.

Increasingly, policy-makers around the world have become concerned about the rate at which a number of large, global, internet-based market players have successfully developed their business models over a short period of time, while at the same time being perceived, to a significant degree, to act beyond traditional public policy constraints usually associated with many

2 See discussion in Joachim Lücking, *B2B-E Marketplaces: A New Challenge to Existing Competition Law Rules?*, paper delivered at the conference on ‘Competition Law and the New Economy’ at the University of Leicester, 12–13 July 2001.

3 A B2B transaction refers to a transaction conducted exclusively between business enterprises, while a B2C transaction refers to transactions conducted by businesses with consumers. See OECD Report, *New Forms of Work in the Digital Economy* (OECD Digital Economy Policy Papers 2016), 7.

other industrial and commercial sectors.⁴ Many of these concerns are in turn encapsulated in the use of the emotive term ‘big data’, which has become synonymous with those large global internet market players whose business models are in some way driven by very high levels of accumulation, processing and exploitation of data drawn from and about end users. Policy-makers have come to feel that, while data protection authorities may in principle have leverage over big data market players as regards the effective application of data protection rules, they are constrained in their attempts to curb the exercise of market power, whether in preventing them from foreclosing smaller market players or engaging in exploitative abuses.

It should come as no surprise that much of the thinking devoted to determining whether and how online platforms should be addressed under antitrust rules has been pioneered (and is ongoing) in the EU, both at the Community and at the Member State level. The policy developments have occurred both in the context of the enforcement of a range of individual competition infringement actions under antitrust rules and merger reviews, and through competition law-driven stakeholder consultations. This article aims to review the recent policy developments across the EU and to draw some preliminary conclusions as to where such investigations might be leading and those areas where competition policy enforcement is likely to be compromised.

In seeking to develop a coherent competition policy that addresses public policy concerns arising from online platforms, the overarching question that needs to be asked is whether European policy-makers should be wary of committing ‘Type 1’ errors through premature interventions in markets that are still relatively immature, or whether pre-emptive action is necessary to ensure that emerging markets are not artificially distorted (ie, ‘Type 2’

4 In particular, the limitations of privacy obligations, copyright rules and consumer protection rules. For example, refer to the discussions in Chapters 7, 8, 15, 18 and 22 in Maurice Stucke and Allen Grunes, *Big Data and Competition Policy* (Oxford University Press 2016). Refer also to A Daly, *Private Power, Online Information Flows and EU Law – Mind the Gap* (Oxford: Hart Publishing 2016) (especially at Chapter 2). See also recent articles: Ariel Ezrachi and Maurice Stucke, ‘The Rise of Behavioural Discrimination’, SSRN, 2016; John Newman, ‘The Myth of Free’, SSRN, 2016; Akiva Miller, ‘The Dawn of the Big Data Monopolists’, SSRN, 2016; Ramsi Woodcock, ‘Big Data, Price Discrimination, and Antitrust’, SSRN, 2016; Alessandro Acquisti, Curtis Taylor and Liad Wagman, ‘The Economics of Privacy’ (2016) 54(2) *Journal of Economic Literature* 442; Jin-Hyuk Kim, Liad Wagman and Abraham Wickelgren, ‘The Impact of Access to Consumer Data on the Competitive Effects of Horizontal Mergers’, SSRN, 2016.

errors).⁵ In this regard, it must also be acknowledged that as of late 2016, the EU lies well behind the US and Asia in terms of the volume of business conducted over online platforms, which represents a mere four per cent of the total market global capitalisation of the major online platforms.⁶ Irrespective of this relatively small stake in the online world, the Commission has stated that the need to foster growth in EU-based platforms is both an economic and strategic imperative if the EU is to improve its competitiveness on a global scale.⁷

Key characteristics

At the heart of dealing with online platforms is the issue of how they can be defined in legal terms, given that they are able to perform such a diverse range of functions and reflect many different business models. While the concept of a 'platform' is elusive, one can also argue that its very breadth has the advantage of greater flexibility as regards the crafting of remedies designed to address market failures than might otherwise be available under traditional antitrust or regulatory regimes.

A broad definition used by European Parliament to describe the term 'online platforms' provides that these platforms are 'a broad category of digital businesses that provide a meeting place for two or more different groups of users over the Internet'.⁸ In turn, the Commission has defined online platforms as sharing 'key characteristics including the use of information and communication technologies to facilitate interactions (including commercial transactions) between users, collection and use of data about these interactions, and network effects which make the use of the

5 'Type 1' errors, or 'false positives', involve over-enforcement (which is defined as prohibiting agreements, conduct or mergers where there is no actual or potential harm to the relevant market). 'Type 2' errors, or 'false negatives', involve under-enforcement (which is defined as failing to prohibit anti-competitive harm within the marketplace). Over-enforcement may even be more harmful than under-enforcement where it would have a tendency to prevent commercial practices that are not per se anti-competitive from taking place if such action would have a negative impact on innovation in the marketplace.

6 See the Commission's Communication COM(2016) 288 final, p 3: <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-288-EN-F1-1.PDF>.

7 *Ibid*, p 4. By contrast, note that traffic volumes over the internet are significantly greater in Europe than is suggested by capitalisation figures. Refer to the study by WIK entitled 'The impact of Internet platforms in Germany': www.wik.org/index.php?id=833&id=833&L=1.

8 See www.publications.parliament.uk/pa/ld201516/ldselect/1deucom/129/129.pdf.

platforms with most users most valuable to other users'.⁹ Online platforms are usually associated with having a narrower business scope than 'digital platforms'; as noted in the 2016 OECD Report on *New Forms of Work in the Digital Economy*, these latter types of platforms might even encompass operating systems.¹⁰

A distinctive aspect of a number of the leading online platforms is that they successfully facilitate different types of transactions, including the matching of individuals with peers (P2P), businesses with other businesses (B2B) or businesses with consumers (B2C). Thus, examples of online platforms include:

- search engines and specialised search tools (eg, Google Search, TripAdvisor, Twenga, Yelp);
- online or e-commerce marketplaces (eg, Amazon, eBay, Allegro, Expedia, Booking.com);
- 'collaborative', 'sharing' or 'matchmaking' economy networks (eg, Uber, Airbnb, Deliveroo, Tinder, TaskRabbit, BlaBlaCar);
- social networks (eg, LinkedIn, Instagram, Facebook); and
- app stores (eg, Apple's App Store, Google Play).¹¹

Given the diversity of business models facilitated by the use of online platforms, a key line of enquiry must be whether the preferred policy response should be driven by the need to adopt a uniform, holistic approach in relation to all online platforms, or whether it should be driven by the particular historical rationale for intervention in those legacy industries where online platforms are challenging incumbent operators.¹²

A key characteristic of many online platforms is that the revenue they can generate through advertising on one side of the market can be used to subsidise the 'free' services that the platform may provide on the other side

9 See the European Commission's Glossary of Digital Single Market terminology: <https://ec.europa.eu/digital-single-market/en/glossary>.

10 See OECD Report, n 3 above, 8.

11 See Commission's Communication COM(2015) 192: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0192&from=EN>; see also the European Commission's Glossary, *ibid*.

12 In other words, the issue is whether the appropriate policy response should vary as between online platforms depending on whether the initial policy driver for intervention was economic regulation (ie, the curbing of market power), consumer protection concerns or social/employment/environmental concerns (including concerns about the pluralism of the media).

of the market.¹³ However, the currency of exchange may be something more complex and valuable than the payment of mere monetary consideration, and might involve transactions where services are ‘sold’ in competition for users’ commitment to provide their attention, trade their data, or confer their endorsement.¹⁴ As such, online platforms inevitably give rise to ‘two-sided’ or ‘multi-sided’ markets, which require a more nuanced antitrust analysis compared to traditional ‘bricks and mortar’ transactions.¹⁵

Digital platforms also bring together buyers and sellers in ways that are qualitatively different from traditional commercial relationships. Thus, an effectively functioning platform should in principle generate ‘value’ for all sides of the market in a manner that is otherwise not available to market actors operating outside the online platform. However, as a result of indirect network effects, one set of affected parties (or a subset of them) might be adversely affected at a particular point in time by this balancing exercise,¹⁶ especially when the pricing model used on one side of the platform confers disproportionate benefits to one set of users. Thus, the balancing exercise might have a negative impact on competing platforms where the pattern of cross-subsidisation is different.

Another key feature of online platforms is their potential to scale up quickly without the need for a large asset base, thereby allowing them to compete effectively with firms as they lower transaction costs, match demand

13 The absence of quantified monetary value on one side of the relationship does not mean that this relationship does not constitute a ‘market’ for antitrust purposes. This position was clarified as far back as 23 April 1991 in the *Höfner* case (C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-01979, at para 19). The *Höfner* case considered that the provision of employment procurement services in Germany without remuneration could constitute a ‘market’ and could therefore be subject to the EU competition rules.

14 Thus, users can be transacting merely by providing ‘eyeballs’ to potential advertisers, and can also trade off their data protection standards for better usage rates. Given the nature of many online platforms, it is naive to take the view that the mere absence of monetary consideration deprives a transaction of its commercial value. See discussions in R Feasey, ‘Digital platforms: shapeshifters, restless monopolists and crimeless victims’, *Notes for a lecture given to students at Kings College*, London, January 2017: <https://docs.google.com/viewer?a=v&pid=sites&srcid=ZGVmYXVsdGRvbWFpbmXmZWZzZXI3YWxl3xneDoyZTQxYjI2M2I5NWlxMDhi>.

15 Refer to discussions in David S Evans, ‘The Antitrust Economics of Two-sided Markets’, *Joint Center AEI-Brookings Joint Center for Regulatory Studies*, 2002; Mark Armstrong and Julian Wright, ‘Two-Sided Markets, Competitive Bottlenecks and Exclusive Contracts’, SSRN, 2005; Jean-Charles Rochet and Jean Tirole, ‘Two-Sided Markets: A Progress Report’ (2006) 35(3) *The RAND Journal of Economics* 645; Thomas Hoppner, ‘Defining Markets for Multi-Sided Platforms: The Case of Search Engines’ (2015) 38(3) *World Competition* 349; Inge Graeff, ‘Market Definition and Market Power in Data: The Case of Online Platforms’ (2015) 38(4) *World Competition* 473–505.

16 Refer to discussion in Feasey, n 14 above.

and supply, and exploit the effects of markets interrelated by overlapping data, which in turn allows them to shape the evolving market that relies upon its currency. Often, the explanation for the rapid growth of online platforms is attributed to the importance of direct and indirect network effects¹⁷ in the operation of the online platform, which can contribute to both positive and negative consequences for competitive dynamics and the furtherance of social policy goals.¹⁸ The Commission has noted its concern that, as a result of such a dynamic: ‘Some platforms can control access to online markets and can exercise significant influence over how various players are remunerated.’¹⁹ Whether or not the control of such access and the exercise of significant influence over remuneration models constitute competition concerns has been the subject of review in the context of both mergers and competition law infringement actions.

The European response

EU merger review practice

Before embarking upon any systematic assessment of policy towards online platforms, the Commission has had the opportunity to develop policy in a series of individual merger decisions (‘concentrations’ in EU jargon).

17 A direct network effect is understood to be the effect that one user of a product or service has on its value to others (ie, with telecoms networks, users benefit from being able to connect with more people, which means that the greater the number of people that join the network, the more attractive it becomes and the higher its value becomes). By contrast, an indirect network effect is said to arise where the *variety* of goods or services increases with the number of users. See generally, M Katz and C Shapiro, ‘Network Externalities, Competition, and Compatibility’ (1985) 75(3) *American Economic Review* 424. See also M Cave, SK Majumdar and I Vogelsang, *Handbook of Telecommunications Economics* (North-Holland 2002).

18 Thus, the proliferation of apps for the popular iPhone inevitably saps at the basic phone capacity of the device as a result of its very popularity. Similarly, local government councils have sought to limit the amount of commercial letting available through Airbnb in certain areas of cities in order to promote more affordable permanent housing in those areas. By contrast, the legality of the Uber business model is likely to be clarified as a result of a series of national actions brought in EU Member States, with references for an Advisory Opinion being sought from the European Court of Justice. See www.reuters.com/article/germany-housing-court-idUSL8N19035F and <http://nltimes.nl/2016/05/03/dutch-cities-tightening-airbnb-restrictions>. Refer more generally to the discussions in the European Commission’s Communication of June 2016 on the ‘sharing’ or ‘collaborative’ economy at <http://ec.europa.eu/DocsRoom/documents/16881>.

19 Refer to the definition of ‘online platforms’ in the European Commission’s Glossary, n 9 above.

FACEBOOK/WHATSAPP²⁰

Facebook, whose main business is its social network platform, sought to acquire WhatsApp, the popular messaging app for smartphones. Despite its very high value of US\$21.8bn, the transaction only qualified for review by the Commission because of the ‘referral up’ procedure set forth in the EU Merger Regulation.²¹ While the Commission’s merger analysis took into account the many sides of the market that were potentially affected by the transaction, the sides of the market likely to be affected by the concentration were understood to be made up of:

- (1) consumer communications services;
- (2) online advertising; and
- (3) social networking services.

The concentration broadly raised horizontal overlap issues at least on a European Economic Area (EEA)-wide basis (if not worldwide) in relation to consumer communications services applications for smartphones. On one side of the market, a significant degree of multi-homing²² was observed to be occurring, with many consumers using both Facebook Messenger and WhatsApp applications for their communication needs. These services were therefore considered to be complementary, rather than substitutes. In addition, there were numerous other communications services that fell within the relevant product market. Seen in this light, the Commission concluded that the parties to the concentration were not ‘close competitors’ and that therefore one could assume that effective competition post-concentration would continue to occur.²³

With regard to online advertising, WhatsApp apparently did not generate any revenue from the placement of advertisements and, accordingly, did not have access to the data sets of its users, aside from their phone numbers. Its

20 Commission Decision of 3 October 2014 in Case COMP/M.7217, *Facebook/WhatsApp*, C(2014) 7239 final.

21 Article 4(5) of the EU Merger Regulation (Regulation 139/2004, as amended) allows the merging parties to request the review of their concentration by the European Commission where the merger control regimes of at least three EU Member States have been triggered by the notifiable transaction, assuming that none of the Member States in question objects to the Commission exercising its jurisdiction over the transaction. This provision has been relied upon in a number of merger reviews involving online platforms, ‘big data’ and other IT sector mergers: see, for example, *Google/DoubleClick*, Case M.4731, *TomTom/TeleAtlas*, Case M.4854, *Noka/Navteq*, Case M.4942.

22 Multi-homing refers to users having non-exclusive relationships with several platforms so that they use them interchangeably (eg, where users switch between instant messaging services such as Facebook Messenger, Google+, WhatsApp, Viber and Snapchat, rather than using one application exclusively, which would be ‘single-homing’).

23 The relative ‘closeness’ of merging competitors is a critical analytical issue used in determining whether a merger has the potential to result in a ‘substantial lessening of competitors’ under the EU Merger Regulation.

official privacy policy was *not* to retain any personal information or messages, which constituted an integral part of its business model. In considering whether or not any relevant theory of harm arose from its particular method of data collection, the Commission concluded that Facebook's acquisition of WhatsApp did not strengthen its market power in relation to online advertising. In turn, WhatsApp, given that it had no relevant data sets, did not increase Facebook's arsenal of data for advertising purposes, which meant that advertisers would still have sufficient options to place advertisements on other platforms (especially that of Google) given that Facebook could not acquire exclusive control of the relevant data.

No competition concerns were considered to be capable of arising in relation to social networking services, given that the parties were (at best) distant competitors. This was because the range of functionalities provided by Facebook's main operations – its social network platform – were deemed not to be comparable to the service provided by WhatsApp, which focused mainly on one-to-one interactions and which did not offer the one-to-many communications that characterised Facebook's sharing of personal content among friends and subscribers. The net gain in terms of new members post-merger was unlikely to be significant, given the fact that a substantial number of consumers already used both services, which meant that they regarded the respective services as complementary products that satisfied different demands.

The Commission's review concluded that the merging parties were not direct competitors across their various product lines.²⁴ It also concluded that privacy-related concerns flowing from the increased concentration of data as a result of the transaction did not fall within the scope of EU competition law, but within the scope of data protection rules. More recently, however, the Commission appears to have developed reservations about its conclusion that the data sets of the merging parties did not overlap at the time of its decision in 2014, announcing in December 2016 that it is re-examining this aspect of its investigation because of the alleged failure of the merging parties to explain accurately the ways in which their respective data sets might be shared and reinforce one another.²⁵ That investigation has been

24 Short innovation cycles, the ease with which apps could be developed and the use by customers of multiple apps simultaneously (with the possibility of switching between them) meant that network effects posed no significant competition concerns in the circumstances.

25 The European Commission initiated proceedings against Facebook in late December 2016 in relation to the information provided by it in relation to its WhatsApp acquisition, as regards the issue of the technical combination of datasets between Facebook and WhatsApp. See www.ft.com/content/f652746c-c6a4-11e6-9043-7e34c07b46ef. This investigation, however, is not likely to result in a reconsideration of the Commission's primary findings about the lack of competition concerns, irrespective of any findings as regards the potential sources of user data.

complemented by the recently announced complaint lodged in Germany by the consumer agency VZBV against the allegedly unlawful sharing of data between WhatsApp and Facebook.²⁶

GOOGLE/DOUBLECLICK²⁷

In September 2007, Google sought to purchase DoubleClick, a company that provides advertising technology designed to enable buyers, creators and sellers worldwide to create, transact and manage digital advertising (with these solutions being commonly referred to as ‘ad serving technology’). Google was active on the market for ad intermediation via its AdSense unit. Ad intermediation involves the aggregation of available ad space from several publishers, which is then sold on to advertisers in order to optimise the supply and demand of online advertising. Google provided ad serving solutions as a bundled offer with its intermediation service. The Commission ultimately cleared the proposed transaction, concluding that it was unlikely to have any negative impact on consumers in the relevant markets for ad intermediation and ad serving solutions. The transaction, however, generated considerable debate about mergers in data-driven industries.

There were deemed to be no horizontal competition concerns arising as, on the one hand, Google did not offer its ad serving solutions on a standalone basis, and these solutions were in any event only interoperable with its own data collected in the related markets for ad intermediation and online advertising. On the other hand, although DoubleClick had entered the market for ad intermediation, its scale of operations was substantially smaller than that of Google and other competitors. Moreover, the Commission took into account that there were specific and distinct datasets to be acquired by Google from DoubleClick’s ad serving technology. Thus, while ad serving allows the collection of data regarding the browsing behaviour of website users and IP addresses, DoubleClick was apparently restricted contractually from exploiting these datasets in order to improve its ad serving solutions for other publishers and advertisers; this meant that any data Google collected would supposedly be solely for the use of the contracting advertiser (with the ownership of some data actually belonging to publishers). Given these

26 On 30 January 2017, the German Consumer Protection Agency ‘Verbraucherzentrale Bundesverband’ (VZBV) filed a lawsuit against WhatsApp – before the Berlin District Court, alleging breach of data protection laws: VZBV press release of 30 January 2017, ‘vzbv verklagt WhatsApp: Verbraucher müssen Hoheit über Daten behalten’, available at www.vzbv.de/pressemitteilung/vzbv-verklagt-whatsapp-verbraucher-muessen-hoheit-ueber-daten-behalten.

27 Commission Decision of 11 March 2008 in Case COMP/M.4731, *Google/DoubleClick*, C(2009) 927 final.

contractual barriers, DoubleClick apparently could not make the ad serving data available to other publishers and advertisers, which would in effect prevent network effects ‘tipping’ the market in its favour.²⁸ Since DoubleClick could not exploit any such network effects in its recent ad intermediation activity, it should also not be viewed as being a potential competitor to Google, especially given that numerous competitors were already active in the ad intermediation market capable of exerting competitive pressure on the merged entity.²⁹

The key theory of harm explored by the Commission in this case was the potential foreclosure effects on the ad intermediation market that might result from the integration of Google’s and DoubleClick’s advertising-related data. It was concluded that, while contractual barriers regarding ad serving data in theory might be overcome by contractual renegotiations, any such attempts would be likely to prompt advertisers to switch to alternative ad serving providers. Moreover, while the combination of search data with browsing data behaviour would indeed be likely to improve the targeting of advertisements, such a capacity was already available to competitors such as Microsoft and Yahoo!, rather than being uniquely available to the merged entity. Accordingly, it would have been unlikely that, as a result of the merger, Google AdSense would be able to increase its traffic in such a way as would foreclose rivals in the ad intermediation service, and lead to increased prices.

MICROSOFT/SKYPE³⁰

The acquisition of Skype by Microsoft in 2011 affected two distinct EEA-wide (and possibly global) markets, for: (1) consumer communications services; and (2) enterprise communications services, both of which could be further segmented into instant messaging, voice calls and video calls.

As regards consumer communications services, a certain degree of horizontal overlap existed between Microsoft’s Windows Live Messenger (WLM) software system and Skype, but only on Windows-based PCs, given that WLM was generally not installed on other operating systems. In addition,

28 ‘Tipping’ is understood to mean ‘the tendency of one system to pull away from its rivals in popularity once it has gained an initial edge’, ML Katz and C Shapiro, ‘Systems Competition and Network Effects’ (1994) 8(2) *The Journal of Economic Perspectives* 106.

This concept is also associated with the idea that certain network effects can lead to a ‘winner takes all’ situation for online platforms due to the ‘snowballing’ effect of large-scale operations developing quickly and squeezing out smaller competitors: see C Shapiro and H Varian, *Information Rules* (Harvard Business School Press), 174 et seq.

29 See Commission Decision of 11 March 2008 in Case COMP/M.4731, *Google/DoubleClick*, C(2008) 927 final.

30 Commission Decision of 7 October 2011 in Case COMP/M.6281, *Microsoft/Skype*, C(2011)7279 final.

Skype had more functionality, including the ability to call and receive calls from public mobile networks and to hold conference calls involving more than two people. Accordingly, the parties were considered to provide complementary, rather than competing, services.

With regard to instant messaging, no competition concerns were identified, especially given the limited competitive overlap of the parties and the fact that Facebook was already the market leader, a position that would probably be consolidated further due to the increased use of mobile devices. By contrast, WLM was not available as an app for mobile devices and Skype's market share was accordingly relatively small. As regards voice calls, the presence of WLM was almost absent and Skype's share was between 40 and 50 per cent. Both software systems were functionally different and not substitutable in this market segment (ie, WLM only allows voice calls to be made between WLM users). Moreover, Google was a new entrant and was offering more competitive rates for internet voice calls as compared to Skype. Given this changing market structure, the Commission raised no competition concerns.

With respect to video calls, although the acquisition of Skype would result in Microsoft obtaining a leading market position, certain market characteristics played a critical role in the clearance of the merger without conditions. For example, the Commission acknowledged that video calls were free of charge and that market shares were, at best, proxies for market power, especially in such fast-paced online markets. There were numerous competitors for the provision of video calls, including recent market entry from strong brands with sophisticated monetised models derived from online advertising, notably Google and Facebook. Hence, despite the *prima facie* market leadership of the merged entity, the Commission concluded that the concentration was unlikely to significantly impede effective competition for voice calls and video calls, which fell within the broader consumer communications services market.

Third parties also alleged that the merged entity would have incentives to deteriorate interoperability for competing consumer communications services on the Microsoft Windows operating system (OS), thereby allowing Microsoft to leverage its market power. However, Microsoft was not found to have such incentives, since any deterioration in interoperability would have inevitably led to its loss of Skype users. Given that Microsoft was motivated to maintain Skype's brand value, it needed Skype to operate over as many platforms as possible. Other alleged conglomerate effects included the potential tying and bundling of Skype with Microsoft's other products such as its Windows or Office products. The Commission, however, emphasised that consumers were essentially multi-homing and would not simply restrict

themselves to the consumer communications services already installed on Windows. Moreover, other apps such as FaceTime and Viber had already proven to be successful despite being unavailable on Microsoft's Windows OS. Third-party concerns were therefore not considered to be credible, given that consumer communications services were being consumed as part of 'broader user experiences such as Facebook, the recent Google+ and Gmail', which meant that competing providers were left with ample opportunities to engage in competitive ventures.

As regards the provision of enterprise communications services, there were found to be no horizontal overlaps between Skype and Microsoft's enterprise communication services 'Lync' product. Even if an enterprise communications services market could be defined more narrowly based on the number of users, Skype was serving a discrete segment of the overall enterprise communications market, while Lync had an appreciable presence on the broader market, with its main competitors being Cisco, IBM and Siemens. As such, Microsoft would still be facing significant competitive constraints in the relevant market post-merger, and its acquisition of Skype was therefore not problematic in terms of horizontal effects. Moreover, Skype's small presence in the broader enterprise communications services market meant that an assessment of conglomerate effects was irrelevant. Thus, while third parties submitted that tying and bundling practices could occur between Skype and Microsoft products such as Office, Microsoft was already active in the relevant market via its Lync business. Accordingly, any competitive harm derived from tying/bundling would be no greater than that already related to Lync, and would therefore not be linked to the merger.

Thus, the *Microsoft/Skype* case represents another clear example of where a range of conglomerate effects was not deemed to be exacerbated by the merger, given that the relevant impugned conduct is already being effected pre-merger. Most importantly, it reflects a very forward-looking approach towards the assessment of market power in the online world, by emphasising that market shares, even if extremely high, might be no more than 'ephemeral', given the short innovation cycles that characterise the consumer communications sector. In this regard also, the Commission was satisfied that the availability of opportunity for consumers to switch providers was dispositive, as there was no need for competition law to question assumptions about the actual likelihood of switching.

MICROSOFT/LINKEDIN³¹

In the Commission's review of the recent acquisition by Microsoft of the social networking service provided by the company LinkedIn, the deal was approved in December 2016 subject to conditions, based on the Commission's review of three separate product markets, namely:

- (1) professional social network services;
- (2) customer relationship management software solutions; and
- (3) online advertising services.

As regards the notional market for professional social network services, the Commission was concerned that, as a result of the merger, LinkedIn's existing position of strength in the provision of such services would be significantly enhanced in such a way as would erect very high entry barriers to potential competitors, especially in Member States within the EEA such as Austria, Germany and Poland, thereby potentially 'tipping' the market in the merged entity's favour as a result of the network effects generated by the merged entity. According to the Commission, this situation would arise because of the possible increase in LinkedIn's user base brought about by a range of potential Microsoft actions³² that could significantly enhance LinkedIn's visibility on the Microsoft platform, while at the same time denying its competing professional social network services the same opportunities. Accordingly, the Commission concluded that behavioural commitments were required from the parties to address the Commission's competition concerns in the relevant market.

With respect to customer relationship management software solutions, the Commission did not consider that there were any problematic conglomerate effects arising from the overlap of the respective customer bases of the merging parties over related or neighbouring products, especially given that LinkedIn did not appear to possess a 'must have' product that was immune from effective competition on the market. As a result, Microsoft could not foreclose its competitors by obliging purchasers of its customer relationship management software solutions also to buy LinkedIn's sales intelligence solutions. Secondly, Microsoft could not realistically deny competitors access to LinkedIn's database so as to deprive them of the ability to develop advanced customer relationship management functions through machine learning,

31 Commission Decision of 6 December 2016 in Case COMP/M.8124, *Microsoft/LinkedIn*, C(2016) 8404 final.

32 This includes actions such as: (1) pre-installing LinkedIn on all of Microsoft's Windows PCs; and (2) integrating LinkedIn into Microsoft's Office platform and combining, insofar as is possible consistent with respect for privacy rules and existing contractual commitments, the user databases of the respective merging parties. In the Commission's view, this latter practice might have been reinforced by the potential shutting out of LinkedIn's competitors from Microsoft's application programming interfaces, which was a practice that might emerge as a direct result of the merger.

given that access to the complete LinkedIn database was not essential for a competitor to compete in the relevant market. Moreover, Microsoft's role in the customer relationship management market was relatively minor when compared to larger competitors such as the clear market leader, Salesforce, and companies such as Oracle and SAP.

Finally, in connection with online advertising services, the Commission found that the merging parties had overlapping interests in relation to display advertising. However, given their relatively small combined market share, the fact that a large amount of user data would continue to be available on the market post-transaction, and the inability of the transaction to reduce the amount of data available to third parties (ie, given that neither party currently made available its data to third parties for advertising purposes), there were no competition concerns in this regard.

In the Commission's view, access to the full LinkedIn database was 'not essential to compete on the market'. Nevertheless, while privacy-related concerns did not of their own accord constitute a competition law infringement, they might nevertheless be taken into account in a broader competitive assessment to the extent that consumers view privacy as a significant quality differentiator, and the parties actually compete in its provision. Thus, the degree of data concentration generated by the transaction meant that an important parameter of competition (namely, the provision of competitive data privacy policies) might have been adversely affected by the transaction. Accordingly, the commitments put forward by the merging parties also needed to address this issue.

The transaction was ultimately cleared by the Commission upon the satisfaction of the commitments offered by the merging parties, which will apply for a period of five years and will be monitored by a trustee, include the following obligations:

- assurances that PC manufacturers and distributors would be free not to install LinkedIn on Windows, while users would be permitted to remove LinkedIn from Windows in the event that PC manufacturers and distributors decided to pre-install it.
- permission granted to professional social network service providers to maintain current levels of interoperability with the Microsoft Office suite of products (through the Office add-in programme and the Office application programming interfaces); and
- the grant to competing professional social network service providers of access to 'Microsoft Graph', a gateway used by software developers for the purposes of using access data stored in the Microsoft Cloud (eg, contact information, calendar information, emails, etc) in order to drive subscribers and usage to their professional social networks.

The decision confirms the Commission's tendency to define markets in the internet space narrowly and also confirms its overarching concern that interoperability is not compromised because the parties' combined incentives as a 'gatekeeper' change their incentives to deal with all competitors equally. Most interestingly, the Commission acknowledges its concern that certain online platforms may be characterised by the phenomenon of tipping in the event that direct and indirect network effects have the tendency to create a 'winner takes all' scenario. Finally, the Commission has clarified that the hallmark of innovation in an online platform context may be the privacy policies deployed by the merging parties. In this way, the Commission has thrown down the gauntlet to those parties who seek, through a merger, to maximise their use of individual users' data at the expense of smaller competitors by relaxing their privacy policies.

JURISDICTIONAL REVIEW OF MERGER CONTROL

The explosion in value of certain internet-based companies that are still new entrants on the market has meant that a disconnect has developed between the usual merger control threshold tests used around the world, which are based on revenues, and the relative importance of the deal when seen through the eyes of the financial community. Whether or not this phenomenon has created an enforcement gap has attracted the attention of a number of European merger authorities.

European Commission

Further to the adoption by the Commission of its White Paper 'Towards more effective EU merger control',³³ the Commission launched a public consultation on 7 October 2016 for the evaluation of procedural and jurisdictional aspects of EU merger control, with the deadline of 13 January 2017.³⁴ The purpose of the consultation, inter alia, is potentially to update the jurisdictional thresholds of the EU Merger Regulation (EC) No 139/2004, which are currently based on turnover alone. To this end, the Commission acknowledges the recent debate that calls into question the effectiveness of turnover-based jurisdictional thresholds in the digital economy (and, to some extent, the pharmaceutical industry).

33 See Commission's White Paper, 'Towards more effective EU merger control', COM (2014), 449 final.

34 http://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html.

The Commission points out that high-value acquisitions have occurred in the digital sector in the recent past, where the disruptive business model or the datasets of the target company might have exercised important competitive constraints on the purchaser, but have also fallen outside EU level merger review because of the low turnover of the target company. The consultation thus seeks to evaluate the potential benefits of additional rules regarding jurisdictional thresholds based on transaction value,³⁵ since most of these transactions were priced at a significant premium.

Stakeholders from the digital sector were invited to participate in the consultation, particularly as regards the issue of whether the current gap in the turnover-based thresholds is addressed sufficiently through the existing mechanism of case referral, whereby acquisitions in the digital sector not having an EU dimension can still be referred to the Commission at the parties' request in the absence of any objection from the relevant national competition authorities affected (or, even more rarely, from the affected Member States themselves). The questionnaire also invites opinions on whether alternative jurisdictional thresholds to transactional value that are sector-specific, or that only require notification if they have a measurable impact within the EEA (ie, through the adoption of an 'effects-based' criterion) should be introduced.

Member State approach

Similar concerns to those expressed by the Commission have been voiced at the EU Member State level in two public consultations on digital platforms conducted respectively in the United Kingdom³⁶ and Germany.³⁷ In its public consultation on digital platforms, the UK's House of Lords Select Committee also expressed, *inter alia*, its concerns that large online platforms frequently acquire small innovative firms (often at a significant premium) in order to gain a competitive advantage over rivals or to eliminate the possibility of disruptive alternative business models emerging. In order to avoid such transactions falling outside EU or Member State merger review, the Select Committee advocated that a more dynamic approach be adopted in the setting of merger thresholds, which might take into account either:

35 At least from the point of view of mergers involving large global online platforms, the type of approach based on transaction value is already in effect in the United States under the Hart-Scott-Rodino Antitrust Improvements Act 1976. As such, a filing in both the US and the EU would not pose a disproportionate burden on notifying parties.

36 See the House of Lords' Select Committee on European Union's 'Online Platforms and the Digital Single Market', 10th Report of Session 2015–16, 20 April 2016.

37 See German Bundeskartellamt Working Paper, 'Market Power of Platforms and Networks', 9 June 2016.

(1) the price paid for the target; or (2) a version of the ‘share of supply’ test used in the UK.³⁸

In Germany, the Monopolies Commission (the ‘Monopolkommission’) has also expressed its clear view about the need for reform of the current merger control regime in Germany as regards notification requirements. In its view, transaction values should be taken into account in order to bring more internet-sector acquisitions within the jurisdiction of the Bundeskartellamt, at least where the transactions in question would be likely to have an impact on digital markets but would otherwise not be notifiable due to the low revenues of the online target company.³⁹

In response to this recommendation, the German government introduced an Amendment Bill on 28 September 2016 to the German Competition Act, proposing an amendment to the current merger notification rules. The amendment introduces a notification threshold that is linked to the transaction value of a concentration, thereby allowing the Bundeskartellamt to review concentrations in which large online platforms or networks buy out disruptive new technology companies that would otherwise not satisfy the general revenue thresholds for merger notification. The Proposal⁴⁰ would apply in the alternative where the German revenues of one of the merging practices did not exceed €5m (amending paragraph (1) of section 35 of the German Competition Act).⁴¹ Provided that both Parliamentary Chambers accept the merger notification requirement based on transactional value, it is expected that the amendment will come into force in the first half of 2017.

Austria also adopted a draft Bill on 28 February 2017, which seeks to revise merger filing obligations to include transactions with a deal value of at least €200m and where the local revenue of the target entity is at least €15m.⁴²

38 The UK’s Office of Fair Trading (OFT) – now the Competition and Markets Authority (CMA) – reviewed Facebook’s 2012 acquisition of photo-sharing platform Instagram, based on the UK’s ‘share of supply’ test, which allows for the review of a transaction where the merging parties will have a post-transaction share in excess of 25 per cent in the supply of particular product or service (as opposed to the broader concept of a ‘market’) in the UK. See the OFT’s Decision of 14 August 2012 on Case ME/5525/12, *Facebook Inc/Instagram Inc*.

39 See the Monopolkommission’s Special Report No 68 on *Competition Policy: The Challenge of Digital Markets*, 1 July 2015, paras 451–479.

40 Refer to draft legislation for the ninth amendment of the German Competition Act (‘Amendment Bill’): www.bmwi.de/Redaktion/DE/Downloads/Gesetz/entwurf-eines-neunten-gesetzes-zur-aenderung-des-gesetzes-gegen-wettbewerbsbeschaerungen.pdf?__blob=publicationFile&v=7.

41 Amendment Bill, at para 21. Thus, a notification may still be triggered if: ‘3. the target company is largely active in Germany and the transaction value exceeds €400 million.’ In other words, the notification exemption for transactions where global turnover does not reach €10m (ie, s 35(2) of the German Competition Act) would not apply. The Amendment Bill was passed by the lower House on 9 March 2017 and the upper House on 31 March 2017.

42 The Bill can be found at www.bka.gv.at/-/beschlussprotokoll-des-33-ministerrates-vom-28-februar-2017. The Bill is due to become effective in law as of 1 May 2017.

CONCLUSIONS

Drawing on legal principles from cases covering subject-matter broader in scope than online platforms, the Commission's merger practice suggests that the competitive dynamics of online platforms are not as elusive as many would believe them to be. In its decisions, the Commission has established clear principles relating, inter alia, to:

- market definition (including the delineation of narrow markets such as those for social networks);⁴³
- the identification of data-driven markets both in terms of output⁴⁴ and input⁴⁵ markets;
- the relative importance of vertical integration in assessing foreclosure concerns;⁴⁶
- the importance of ensuring that alternative data sources are available to competitors, so that the merging parties do not combine what is tantamount to an essential facility or bottleneck for certain types of data;⁴⁷
- concerns that certain technological advantages do not act as a means for disrupting interoperability, while also providing the basis for the data owner to act as a 'gatekeeper' to certain technology functions;⁴⁸
- privacy concerns should be examined separately to the analysis performed in a merger control context;⁴⁹

43 See, for example, *Facebook/WhatsApp*, n 20 above, and *Microsoft/LinkedIn*, n 31 above.

44 See Commission Decision of 14 May 2008 in Case COMP/M.4854, *TomTom/TeleAtlas*, C(2008) 1695. The importance of *TomTom/TeleAtlas* as a precedent lies in its recognition that the acquisition of databases made up of essential data might be capable in appropriate circumstances of creating significant entry barriers due to their low degree of replicability, so as to result in the potential foreclosure of competitors based on the exclusive control over such essential data.

45 See Commission Decision of 19 February 2008 in Case COMP/M.4726, *Thomson/Reuters*, C (2008) 654 final. Unlike previous cases, the Commission's analysis focused on data as an output. In order to overcome competition concerns stemming from the concentration of data in the hands of the merged entity, the commitments offered to the Commission included a requirement that the merged entity sell copies of certain databases considered by the Commission not to be replicable by competitors.

46 Refer to *TomTom/TeleAtlas*, n 44 above.

47 See Commission Decision of 9 January 2014 in Case COMP/M.7023, *Publicis/Omnicom*, C(2014) 89 final, which assessed the role of data analytics in the potential disadvantaging of competitors. See also Case COMP/M.8180, *Verizon Communications Inc/Yahoo Holdings, Inc*, for an analysis of whether key data was accessible to competitors.

48 See Commission Decision of 29 March 2010 in Case COMP/M.5669, *Cisco/Tanberg*, C(2010) 2217. In order to address interoperability concerns in that case, Cisco divested a particular protocol to an independent industry body, which was used for the functional interoperability between Cisco's video-communication solutions and its competitors, thereby allowing competitors to participate in the updating of the protocol and removing entry/expansion barriers in the relevant market.

49 Refer to *Facebook/WhatsApp*, n 20 above.

- the need to establish that a data-based product must be the equivalent of a ‘must have’ product in order to be able to generate conglomerate effects such as those usually associated with tying and bundling practices;⁵⁰
- an understanding that direct and indirect network effects can play an important role in market power assessment of a merger;⁵¹
- an acknowledgment of the ephemeral nature of market power if measured purely by reference to market shares;⁵²
- the need to ensure that conglomerate effects are assessed only post-merger, so that any potential competitive harm identified is directly referable to the notified merger;⁵³ and
- the crafting of behavioural remedies designed to ensure that traders and customers on either side of an online platform are not obliged to work through an individual provider for their full range of demands.⁵⁴

While the Commission’s findings provide a useful basis for analysing many aspects of online markets driven by data collection and processing,⁵⁵ the precedents are nevertheless limited thus far to an analysis of markets falling on either side of the online platform, rather than in an holistic manner that identifies market failures on all the relevant sides of the online platform. The adoption of a more holistic view will clearly require both a deeper analysis of the impacts of network effects and a welfare analysis that balances gains in innovation and quality, on the one hand, against the risks of foreclosure, on the other. The Commission’s analysis also falls short of understanding the commercial impacts of online platforms in terms of their potential to leverage market power across markets or market segments, nor has it yet sought to examine whether switching costs for certain customer groups may be asymmetric. As its latest investigation into the *Facebook/WhatsApp* case demonstrates, the types of data and the methods by which they can be garnered across services and customers are matters in relation to which the Commission continues to be in a ‘work in progress’ mode.

50 Refer to *Microsoft/LinkedIn*, n 31 above.

51 Refer to *Facebook/WhatsApp*, n 20 above, and *Microsoft/LinkedIn*, n 30 above; cf Commission Decision of 24 March 2004 in Case COMP/37792, *Microsoft*, C(2004) 900 final.

52 See *Microsoft/Skype*, n 30 above; and *Facebook/WhatsApp*, n 20 above. See also Case T-79/12, *Cisco Systems and Messagenet SA v European Commission*, ECCI:EU:T:2013:635.

53 Refer to *Microsoft/Skype*, n 30 above.

54 Refer to *Thomson/Reuters*, n 44 above.

55 The Commission has recognised the importance of data analytics in the *Telefónica Vodafone/Everything Everywhere ‘M-Commerce’ JV* (Case COMP/M.6314), where it noted that data analytic activities (at least in that case) comprised three main elements: namely, reporting analytics, business development analytics and loyalty analytics (see para 191). Moreover, the Commission took the view that online and mobile data analytics services are generally considered to be complementary and will continue to be used in parallel (at para 200).

Finally, despite the chorus of competition regulators' views proposing to amend existing jurisdictional thresholds either by reference to a transaction value test or an 'effects-based' test, the author feels that a compelling case for the modification of existing EU turnover thresholds has yet to be made. In what has already become a relatively mature online marketplace, a radical revision of merger thresholds to capture a handful of internet sector mergers might simply be little more than shutting the proverbial barn door after the horse has bolted. Moreover, given the relatively narrow market definitions already deployed by merger authorities in the internet space, one can imagine that there will be a residual role for Article 102 Treaty on the Functioning of the European Union (TFEU) and its national equivalents to play in the event that the merged entity exploits a position of dominance where concerns about a 'Type 2' error exist). It also needs to be asked whether, given the relatively high-profile precedents that have already been adopted at EU level, which have raised few or no competition concerns, further intervention in the merger sphere is necessary in relation to nascent markets that have not as yet proven to be financially viable.⁵⁶ To the extent that many Member States might be tempted to modify their national merger thresholds to encompass deal value, the inevitable consequence might also be that the 'one-stop-shop' principle that has made the EU Merger Regulation so successful will ultimately be undermined, leading to a fragmented approach to mergers in the online world while – perversely – the same 'one-stop shop' principle will remain intact for more traditional offline mergers (ie, concerning markets that are less likely to be inherently pan-European in scope). Accordingly, the author takes the view that, should any procedural amendment be deemed necessary, it would be best advised to strengthen the existing Article 4(5) 'referral up' procedure that is open to private parties, or indeed the parallel power of Member States to refer mergers to the Commission under Article 22(1) of the EU Merger Regulation, which has already resulted in a number of high-transaction-value mergers being reviewed by the Commission.

56 To the extent that high-value transactions do raise potential competition problems, one will always need to ask whether the Commission's review is anything more than enlightened speculation, given the complexities (and many unknowns) of online markets and the fact that the purchaser is buying a business with potential (but not guaranteed) prospects for growth. Moreover, the principle of legal certainty will be even further compromised if merger reviews are triggered by perceived 'effects' on competition even though they do not satisfy the existing turnover thresholds establishing jurisdiction (which have already been revised down from their original level). In addition, complex assessments of whether any given transaction has a sufficient nexus with the territory of the EU are more of a substantive test of review, rather than a straightforward procedural threshold).

EU and national behavioural investigations

While EU merger control has already developed a valuable body of precedent relevant to our thinking on online platforms, tackling behavioural issues under Articles 101 and 102 TFEU and the EU Member State equivalents in relation to online platforms is still very much a ‘work in progress’, with: (1) important ongoing investigations dealing with theories of harm; and (2) a number of sweeping stakeholder consultations having sought to address a range of competition issues.

*ASNEF-EQUIFAX*⁵⁷

This case concerned a preliminary reference from a Spanish court on the exchange of data, compiled on a register, between financial institutions regarding the solvency of customers. The main issue of the case was whether such an exchange of information was liable to infringe Article 101(1) TFEU and, if so, whether it could benefit from a defence based on the four conditions listed in Article 101(3) TFEU.⁵⁸

The Court of Justice held that the market structure was of particular importance in its assessment of whether or not the exchanges of debtor information restricted competition ‘by object’. Given that the market was fragmented, rather than concentrated, it was held that the data was not liable to remove uncertainty regarding the strategic behaviour of the participating financial institutions, particularly because the identity of lenders was not being revealed in the exchanged information. Rather, the nature of information served to enhance transparency about potentially defaulting customers and thus to minimise the lenders’ risk of unpaid debt repayments. Consequently, the exchanged data actually facilitated risk assessment and the supply of credit at cheaper rates. In taking these considerations into account, the Court concluded that the behaviour in question could not amount to a restriction of competition ‘by object’.

Critically, the register was available to *any* new lender entering the market, based on non-discriminatory terms. Hence, no entrant would lack necessary information on defaulting customers, and would thus not be placed at a

57 See judgment of the Court of Justice of 23 November 2006 in Case C-238/05, *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, ECLI:EU:C:2006:734.

58 See above, at para 26. The four criteria set out in Art 101(3) TFEU are that an agreement: (1) contributes to improving the production or distribution of goods or to promoting technical or economic progress; (2) confers a fair share of the benefits to consumers; (3) only imposes restrictions that are indispensable to achieve such benefits; and (4) does not allow the parties the possibility of eliminating competition with regards to a substantial part of the relevant market.

competitive disadvantage vis-à-vis incumbent market players. In practice, this meant that market entry was being facilitated, rather than deterred. Given the fragmented market structure, data exchange in such circumstances was also unlikely to restrict competition ‘by effect’.

As regards the interface between competition law and data protection rules, the Court held that any concerns relating to breaches of data protection laws normally fell outside the scope of competition rules. The Court observed that there was sufficient legal protection provided under national data protection laws to address concerns of consumers/borrowers, including the possibility to obtain access to their data recorded on the register and, where necessary, the right to have the information amended or deleted. The Court’s view does not amount to a blanket exclusion of competition rules from conduct otherwise covered by data protection rules; by framing its views in terms of issues of data privacy not being ‘*as such*, a matter for competition law’ and the fact that such issues *may* be resolved on the basis of the relevant provisions governing data protection, this author takes the view that in exceptional circumstances, an infringement of data protection rules might be considered to form part of a competition analysis (including Article 101(3) TFEU).

The Court also took the opportunity to assess whether, in the event of a technical restriction of competition ‘by effect’, the exchanged data might in any event be able to satisfy the cumulative criteria of Article 101(3) TFEU, particularly the consumer benefit criterion. To this end, the Court accepted that consumers/borrowers listed on the register would potentially be afforded less favourable credit terms or could even be denied the supply of credit. However, it did not rule on whether this amounted to a detrimental effect for consumers or provided them with a benefit by way of protecting them against over-indebtedness.

In any event, the Court held that it is not necessary as a matter of law to demonstrate that each individual consumer had derived a benefit in order to satisfy Article 101(3) TFEU. Rather, it must be shown that the ‘overall effect on consumers in the relevant markets must be favourable’. To that extent, it observed that the data exchange led to better credit terms due to the minimisation of debtor default and to an overall increase in the availability of credit. Whether this was sufficient to satisfy Article 101(3) TFEU was for the national court to decide.

By focusing on the ‘overall effect on consumers’ of a particular practice, the Court of Justice has established the basis of a more holistic view of consumer welfare considerations going well beyond traditional concerns about the impacts of an impugned practice on retail prices. In the complex internet ecosystem in which online platforms operate, recourse will inevitably

need to be made to broader applications of the concept of consumer welfare and to our understanding of efficiencies.⁵⁹ The fact that such an analysis will be made in accordance with the views of a national court begs the question of whether or not it is advisable to develop an EU-wide standard by which to assess consumer welfare, rather than risking a fragmented approach as between Member States.

GOOGLE ANTITRUST PROBES (EU)

At the time of writing, Google is currently facing three pending parallel antitrust investigations that have been launched by the European Commission, namely:

- (1) the search/shopping case;
- (2) the Android case; and
- (3) the AdSense case.

In each of these cases, the Commission appears to be exploring different theories of harm.

Search/Shopping case⁶⁰

The investigation into the search function provided by Google focuses primarily on shopping comparison services. There are, however, a number of other elements of the Commission's investigation that raise concerns with regard to Google's search function, such as Google's alleged preferential treatment of its Google Maps service over the services provided by competing mapping providers, and Google's practice of copying or 'scraping' from travel websites, such as user reviews. At the heart of the Commission's case is the allegation that Google may have abused its dominance by treating its own comparison shopping service ('Google Shopping') preferentially in its search results, to the detriment of competing shopping comparison websites. According to the Commission, such a practice would lead to consumer harm because users might not be provided with the most relevant results to their search queries and at the cheapest prices.

Google's defence to these claims is built on its assertion that the Commission has wrongly differentiated between its general search function and the specialised search functions available over merchant platforms

59 For example, one can imagine that dynamic efficiencies and allocative efficiencies play a much more significant role in an online world than in traditional markets. See Bishop and Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (Sweet & Maxwell, 3rd edn, 2010), 131–144.

60 The Commission first opened proceedings on 30 November 2010 in Case AT.39740, *Google Search*.

such as Amazon and eBay. It argues that, since both types of search are functional substitutes that fall within the same relevant product market, the Commission has failed to accurately reflect ‘the broader dynamics of online shopping’. As regards Google’s allegedly abusive conduct, its defence is based on its interpretation of the competition precedents relating to the refusal to supply. Information in the public domain suggests that the Commission is considering the imposition of a (quasi-regulatory) remedy whereby Google would position and display competing comparison shopping services in the same way as its own Google Shopping comparison shopping service. Google contends that such an obligation to deal with competitors on non-discriminatory terms could arguably only be imposed if Google’s search function were to be regarded as an essential facility, a proposition that Google refutes.⁶¹ Other commentators have argued that there is no need for the Commission to have recourse to such a high legal standard, as the Commission is entitled to rely on a range of other doctrines relating to non-discrimination, tying and leveraging to address the refusal to supply allegation.⁶²

Although it is anticipated that a decision will be adopted in this matter during the course of 2017, it is somewhat galling that the Commission’s formal investigation began as long ago as November 2010 (with the basis of the complaint having been brought to its attention years earlier). In the circumstances, it is difficult to imagine that what occurred with the Commission’s protracted investigation into Microsoft’s alleged bundling practice will be repeated, namely that any remedy proposed after such a long period of investigation will be incapable of having a meaningful economic impact in markets that are so innovative. No doubt the adoption of a final decision in this matter will resolve the precise legal basis upon which the Commission will proceed, although it appears to this author that the concept of non-discrimination, if established, more than adequately justifies the Commission’s intervention in this matter.

61 In other words, the Commission would have to meet the high legal threshold laid down by *Oscar Bronner*, Case C-7/97 *Oscar Bronner GmbH & Co v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG*, ECLI:EU:C:1998:569, 41. According to the test imposed in that case, a dominant firm cannot refuse to deal where three conditions have been satisfied, namely: (1) the refusal must be likely to eliminate all competition in neighbouring markets; (2) the access sought must be indispensable for the competitors to carry on its business (insofar as there is no actual or potential substitute in existence to the facility); and (3) the refusal is incapable of being objectively justified. An advocate of such an approach is B Vesterdorf, ‘Theories of Self-Preferencing and Duty to Deal – Two Sides of the Same Coin’ (2015) 1(1) *Competition Law & Policy Debate* 4.

62 For example, refer to N Petit, ‘Theories of Self-Preferencing Under Article 102 TFEU: A Reply to Bo Vesterdorf’ (eprint/working paper 2015): <http://i-comp.org/wp-content/uploads/2015/06/THEORIES-OF-SELF-PREFERENCING-UNDER-ARTICLE-102-TFEU.pdf>.

Google Android⁶³

Google licenses its app store (Google Play) to mobile device manufacturers on the condition that they pre-install Google Search and Google Chrome. The Commission's Google Android investigation concerns alleged tying practices and exclusivity agreements. By engaging in such practices, Google is alleged to have abused its dominant position in general internet search services, mobile operating systems and app stores used in relation to the Android mobile operating system. The Commission's case alleges that this tying of several products in relation to the Google Android mobile OS is a practice that arguably strengthens Google's dominance in search and distorts competition in the market for web browsers for mobile devices.

As regards exclusivity, Google licenses its Android technology on the condition that mobile device manufacturers do not install so-called Android Fork versions, which would facilitate the installation of competing web browser and search services. In addition, the Commission has expressed concerns that Google had in some instances granted rebates and other financial incentives to mobile device manufacturers on the condition that they pre-install Google Search on an exclusive basis.

The Commission's investigation appears to some commentators, given the allegation that the tying of apps is an issue, to be revisiting a number of the aspects of the *Microsoft* case, where Microsoft was found to be tying its Media Player to its Windows OS.⁶⁴ However, the consumer welfare implications of Google's practices appear to be more evenly balanced against the potential foreclosing effects of the practices than was the case in the *Microsoft* bundling allegations.⁶⁵ For example, while Google's restrictions prevent mobile phone manufacturers from making a range of changes to Android, on the one hand, the consumer welfare balancing exercise will also no doubt take into account, inter alia, whether:

- Apple's iOS (which is not licensed to other manufacturers) imposes a competitive constraint on Android;
- consumers might ultimately consider multiple app choices for the same functionality to be duplicative;
- mobile handset capacity might be clogged by the volume of available apps installed on the handset; and

63 The Commission opened proceedings on 15 April 2015 in Case AT.40099, *Google Android*. For recent developments see Commission's Press Release of 20 April 2016 2016, IP/16/1492: http://europa.eu/rapid/press-release_IP-16-1492_en.htm.

64 *Microsoft*, Case COMP/377921.

65 As can be seen by the much-publicised support of Google's Android policy by a large telecoms operator such as BT. See article of 7 February 2017: www.reuters.com/article/us-eu-google-antitrust-bt-idUSKBN15L1SG.

- whether additional revenues from app producers would drive mobile handset manufacturers on the other side of the market to lower their equipment prices.⁶⁶

These issues are likely to weigh heavily on the Commission's mind when evaluating the impugned conduct of Google, and especially in formulating remedies to address it.⁶⁷

AdSense⁶⁸

The Commission is also investigating whether Google is abusing its dominant position on the market for online ad intermediation. Many publishers have embedded the Google Search engine function onto their own websites, through which a user can find the information it seeks on their respective websites. This is achieved through 'AdSense', which is essentially an algorithm that recognises the content of the publisher's website and then ensures that thematically relevant advertisements are displayed in addition to the search results that the user had initially searched on the website.

In essence, Google has allegedly contracted with large website publishers so that they do not meaningfully source their search advertisements from competing ad intermediaries. From 2009 onwards, these agreements were allegedly restructured so that Google's search ads would be treated preferentially on its search results pages, with prior consent being required from Google if a website publisher intended to display competing search advertisements. The Commission has expressed concerns about this practice because it is said to deprive competing ad intermediaries from commercial dealings with website publishers. This in turn renders their ad intermediation services less attractive to advertisers, especially given the limited amount of ad space to which the intermediary has access. In addition, web publishers are arguably restricted in their choice of supply of search ads.

As currently framed, the Commission's *AdSense* case seems to reflect classic antitrust concerns such as discrimination and exclusivity being put into effect by a dominant firm.

66 Refer to discussions in B Edelmann, 'Google, Mobile and Competition: The Current State of Play', *CPI Antitrust Chronicle*, January 2017; cf 'Android, iOS and Market Power – What Does Mobile Platform Competition really Look Like?', *CPI Antitrust Chronicle*, January 2017.

67 Google's commercial policy towards the Android system is also the subject of parallel investigations in the US, South Korea and Russia.

68 The Commission opened proceedings on 14 July 2016 in Case AT.40411, *Google Search (AdSense)*. See Commission Press Release of 14 July 2016, IP/16/2532: http://europa.eu/rapid/press-release_IP-16-2532_en.htm.

STREETMAP LITIGATION (UK)⁶⁹

In a variant of the theory of harm pursued by the Commission in the *Google Search/Shopping* case, *Streetmap v Google* concerned an action brought by Streetmap, a provider of digital mapping services, against Google, accusing the search provider of promoting its own 'Google Maps' services over those of its rivals. This act of alleged discrimination was said to be in breach of both Chapter II of the UK Competition Act 1998 and civil litigation in the UK involving Article 102 TFEU.

The cause of action specifically focused on Google's introduction of a clickable image of Google Maps at the top of its search engine results. Streetmap argued that such conduct conferred upon Google Maps an unfair advantage over other online map providers, not by virtue of the introduction of a clickable thumbnail map (which Streetmap accepted represented added functionality to the benefit of consumers), but rather because the thumbnail map was exclusively drawn using Google Maps.

In assessing the case, the High Court's focus was on whether Google's conduct was intended to foreclose competition on a related but separate market through the leveraging of its dominant position in a neighbouring market and whether that conduct had an appreciable actual or potential effect on competition that could not otherwise be objectively justified. Justice Roth summarised the issue facing courts when examining the abuse of dominance in online markets: 'The unusual and challenging feature of this case is that conduct which was pro-competitive in the market in which the undertaking is dominant is alleged to be abusive on the grounds of an alleged anti-competitive effect in a distinct market in which it is not dominant.'

In reaching judgment, the Court concluded that Google's main purpose in introducing the clickable image was to improve the functionality of its general search engine and not to foreclose competition in online mapping services. Furthermore, Justice Roth took the view that, given that Google's conduct had a pro-competitive effect on the general search market, it would have to be reasonably likely that its conduct would have a serious or appreciable effect on competition in the market for online mapping services in order for that conduct to be considered abusive. While concluding that Google's conduct probably had some effects on competition, based on the evidence presented, Justice Roth did not believe that effect to be sufficiently serious to constitute an abuse. In any event, Justice Roth took the view that, as Google's conduct represented a pro-competitive technical improvement on the general search market, it could be objectively justified.

69 Case A3/2016/1210, *Streetmap.Eu Ltd ('Streetmap') v Google, Inc and Others*.

The High Court judgment is particularly significant, not only to the extent that it does more than pay lip-service to the idea that a technical improvement could provide an objective justification for certain commercial practices of a dominant firm, but insofar as it introduces the concept of an ‘appreciability’ threshold when assessing the effects of alleged abusive conduct on a separate but related online market. It is therefore particularly relevant to online platforms, which are characterised by the ever-increasing convergence driven by technological innovation that takes advantage of the high degree of interrelation between neighbouring markets, and also gives rise to a series of different consumer welfare considerations.⁷⁰ What is far less convincing is Justice Roth’s reluctance to countenance that an abuse of a dominant position can occur in a relevant market in which the perpetrator does not necessarily hold a dominant position.⁷¹

FACEBOOK ANTITRUST PROBE (GERMANY)⁷²

The Bundeskartellamt initiated proceedings against Facebook in 2016 in relation to Facebook’s allegedly unfair contractual terms imposed on its users for the use of their data. The Bundeskartellamt’s investigation is based on its preliminary understanding that Facebook may be dominant in a stand-alone market for social networks in Germany. On the one hand, the Bundeskartellamt takes the view that there are no technical means for users to switch their user data from Facebook to other social networks, which gives rise to the potential for a large concentration to occur in relation to datasets and to their potentially exclusive use. The Bundeskartellamt also conceded that such markets are prone to volatile market share swings; the company Myspace serves as good example of how quickly a seemingly pre-eminent market position can be diluted by successful entry into the market by a

70 Leave to appeal from the judgment was refused by the UK Court of Appeal on 7 February 2017.

71 With respect, insofar as the dominant firm enjoys dominance in a related or neighbouring market from which it can leverage its market power, it is settled EU precedent that an action can be brought under Art 102 TFEU on the basis of traditional leverage theory. See, for example, C-311/84, *Télémarketing (CBEM) v CLT* [1985] ECR I-3261.

72 The Bundeskartellamt initiated proceedings against Facebook on 2 March 2016: www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html?nn=3591568.

company with the standing of Facebook.⁷³ Moreover, the Bundeskartellamt has made it clear that the practice of multi-homing will be a crucial factor in its market power analysis, given that many social media platforms are used in a complementary manner.

The theory of harm being considered by the Bundeskartellamt revolves around a form of exploitative abuse. Thus, users seeking to use Facebook's services allegedly have no option but to consent to its terms of use. These terms of use and the sharing of user data are practices that are allegedly non-compliant with German data protection laws. Hence, the Bundeskartellamt's initial view is that the terms of use might amount to an imposition of 'unfair trading conditions', as is prescribed in the German equivalent of Article 102(a) TFEU. While the Bundeskartellamt stresses that a breach of data protection law by a dominant undertaking does not *of itself* constitute a breach of competition rules, it is apparently an important consideration for it to assess the potential nexus between the alleged dominance that takes advantage of non-compliant clauses under data protection rules.⁷⁴

In reviewing this matter, the Bundeskartellamt is no doubt mindful of the existence of the recent German Federal Supreme Court precedent that provides that the use of unlawful general terms and conditions by a dominant undertaking might constitute an abuse of market power under the German equivalent of Article 102 TFEU.⁷⁵

The result of the Bundeskartellamt's Facebook investigation will be anticipated keenly by the legal profession as a benchmark in terms of the relevance of data collection in the establishment of market power, the interplay between data protection and competition law and, ultimately, whether or not *ex post* competition rules are sufficient for the effective scrutiny of social network platforms. Given the importance of such issues, we should not be surprised if these proceedings will trigger the referral of questions to the Court of Justice for a preliminary ruling on these issues,

73 Myspace was founded by employees of an internet marketing company in 2003 and is a social networking site. News Corporation acquired Myspace in 2005, and it became the largest social networking site in the world from 2005 to 2009, hitting its peak of success in 2008 when it reached 75.9 million monthly visitors (in the US), a figure that fell to 34.8 million by 2011. See Felix Gillette, 'The Rise and Inglorious Fall of Myspace', *Bloomberg*, 2011: www.bloomberg.com/news/articles/2011-06-22/the-rise-and-inglorious-fall-of-myspace).

74 Refer to discussion in A Daly, *Private Power, Online Information Flows and EU Law – Mind the Gap* (Oxford: Hart Publishing, 2016) and A Angel, *Fairness in Antitrust* (Oxford: Hart Publishing 2014). By contrast, Bundeskartellamt President Andreas Mundt has recently argued in favour of a disjunctive analysis between competition law and copyright law in respect to 'scraping', a practice that involves taking content from other websites and publishing it on one's own website.

75 See judgment of 6 November 2013 in Case KZR 58/ 11, *VBL-Gegenwert*.

particularly since the legal threshold for review in Germany is arguably lower than that used under EU law⁷⁶ and because German antitrust rules contain a strong element of consumer protection that goes beyond the traditional antitrust standard applied at EU level.

Importantly, there have been two recent public statements made by the head of the Bundeskartellamt, Andreas Mundt, in relation to the case. In the first of these statements, he suggested that Facebook should view the Bundeskartellamt as its ‘ally’⁷⁷ in these proceedings, given that, *inter alia*, if the Bundeskartellamt fails in its antitrust probe against Facebook, the introduction of online platform regulation will be inevitable. In the same interview, however, he expressed the view that *ex ante* measures are an unsuitable option because online platforms are most likely to circumvent regulation and simply alter their business models, thereby rendering the regulation outdated within a very short timeframe. In an even more recent public statement, Andreas Mundt remarked that Facebook was not likely to incur fines as a result of the antitrust investigation, but that the Bundeskartellamt intended to use these proceedings as a basis upon which to shape commercial relations over online platforms.⁷⁸

MOST-FAVOURLED NATION CLAUSES IN ONLINE HOTEL BOOKINGS

In December 2014, the European Commission announced the launch of market tests in relation to the antitrust investigation undertaken by the respective French, Swedish and Italian national competition authorities in the online hotel-booking sector.⁷⁹ Those national investigations were complemented by a series of further investigations conducted by a number of other Member States.⁸⁰ Consistent with the terms of the parity clauses used in the arrangements between Booking.com and individual hotels, the latter could not offer their services through online travel agencies or any other booking channel (including the hotels’ own websites) at lower prices

76 See Act against Restraints of Competition 1999, as amended on 1 January 2017 (‘Gesetz gegen Wettbewerbsbeschränkungen’) s 20, which triggers the review of ‘relative market power’ emanating from undertakings that, though not dominant, engage in abusive conduct in relation to certain relationships of vertical dependency or in relation to other competitors.

77 CRA Annual Brussels Conference: Economic Developments in European Competition Policy (7 December 2016).

78 The Innovation Economics Conference held at King’s College London, on 3 February 2017, panel on ‘Privacy & Big Data: Can the Big Data Companies be Coerced?’

79 Commission’s Press Release of 15 December 2014, IP-14-2661.

80 For example, Austria, Denmark, Greece, Ireland and the UK. The CMA closed the investigation on administrative priority grounds but committed to being aware of market developments in this sector.

or on better conditions than those offered on Booking.com's website. The concerns expressed by the various national competition authorities have been that the parity obligations in the contracts between online travel agent Booking.com and the hotels, achieved through the use of so-called most-favoured nation (MFN) clauses, are capable of resulting in anti-competitive effects.

The use of MFN clauses poses specific competition challenges in the context of online platforms. Commentators have focused on whether MFN clauses used by online platforms are little more than a particular application of a resale price maintenance (RPM) obligation that should be assessed under the traditional analysis for RPM obligations under Article 101 TFEU and its national equivalents.⁸¹ The three main competitive concerns that are understood to arise from online MFN clauses can be summarised as follows. First, they might restrict entry at the (downstream) platform level, as new platforms would be prevented from effective market entry or expansion given that the upstream supplier cannot offer better terms to competing platforms. Second, they have the potential to inhibit competition as between online platforms, given that the use of MFN clauses across platforms might lead to collusive or non-collusive parallelism on the margins charged to suppliers. Third, they have the potential to generate the same sorts of horizontal effects that often occur with conventional RPMs, insofar as suppliers are in effect offering identical prices across platforms, with the price being harmonised artificially and thus eliminating price competition from which end users cannot benefit.

Of those Member States that have investigated the use of 'platform MFNs' for online hotel reservations, it has only been Germany that has adopted prohibition decisions classifying all forms of MFN clauses as restrictions of competition 'by object', reflecting the rule for the more traditional assessment of RPM obligations under EU competition rules, which allows for only a small possibility of antitrust exemption insofar as the criteria set forth in Article 101(3) TFEU can be satisfied. Thus, in December 2015, the Bundeskartellamt prohibited Booking.com from continuing to apply MFN clauses in all circumstances. It objected to both *wide* MFN clauses, which prevent hotels from offering lower room prices on competing hotel bookings platforms, and *narrow* MFN clauses, which prevent a hotel from offering its own rooms more cheaply on its own website. The Bundeskartellamt considered that guaranteeing the lowest price for the platform was an anti-competitive infringement by object

81 See, for example, Fletcher and Hviid, 'Retail Price MFNs: Are they RPM "at its worst"?' (2014) CCP Working Paper 14-5: www.uea.ac.uk/centre-for-competition-policy/publications/working-papers-2014.

because it amounted to a price floor on hotel bookings and thereby restricted pricing freedom.⁸²

Booking.com appealed the Bundeskartellamt decision before the Higher Regional Court in Düsseldorf, where it has advanced (at the most recent hearing on 8 February 2017) a defence to the effect that, in the absence of it at least being able to use a narrowly crafted form of MFN obligation, hotels would be enjoying a ‘free ride’ when using its booking platform to promote their accommodation and then allowing customers to circumvent the platform, booking directly on the hotel’s website. According to this defence, narrow MFN clauses would be able to serve the proportionate goal of preventing Booking.com being undercut by hotels that otherwise benefited from its search engines without payment. This would, in turn, affect the sustainability of Booking.com’s business model. The Court is currently considering whether these restrictions are ‘objectively necessary’ for Booking.com’s business. To this end, the Court is considering whether the ‘best price’ clauses should be assessed under the traditional doctrine of ‘ancillary restraints’,⁸³ according to which it is accepted that some restrictions on contractual freedom may be deemed necessary in order to protect a party’s otherwise legitimate business interests, and thereby do not contravene the prohibition provided in Article 101(1) TFEU. In order to determine the applicability of the ancillary restraints doctrine, Booking.com has been requested to submit further data explaining how the annulment of its best-price clause would affect its business.

By contrast, the French, Italian and Swedish competition authorities have opted for commitment decisions in dealing with platform MFN clauses. In July 2015, Expedia and Booking.com offered commitments by which they changed their terms and conditions across Europe and agreed to remove *wide* MFN clauses.⁸⁴ These commitments do not cover *narrow* MFN clauses, thereby allowing Booking.com to continue requiring hotels to offer it the

82 Bundeskartellamt decision of 23 December 2015, B 9-121/13.

83 The doctrine has been described as ancillary restraints that are ‘directly related and necessary to the implementation of a main operation’: Case T-112/99, *Metropole Télévision v Commission* (2001) ECLI:EU:T:2001:215, para 104. This typically encompasses contractual restrictions that are essential to achieve a legitimate commercial transaction, including non-compete clauses or exclusive distribution agreements.

84 Decision by the *Autorité de la Concurrence* No 15-D-06 of April 2015; decision by the Italian Competition Authority of 21 April 2015 in Case II779 B and decision by the Swedish Competition Authority of 15 April 2015 in Case 596/2013. On 16 February 2017, Expedia has successfully defended a case against the German Hotel Association, having been accused that it had punished a hotel, which had lawfully refused to accept its MFN clauses, with lower rankings on its website. The Cologne Regional Court agreed with Expedia that it was entitled unilaterally to give the hotel a lower ranking because its price on Expedia was higher than on rival portals.

same rates and conditions as they offer on their own websites, but not the same terms as regards room availability. These settlements have opened the door for settlements in other countries, including Denmark, Greece and Ireland, with the UK investigation having been closed on the grounds of administrative priority.

By July 2016, the European Commission and ten national competition authorities had launched, in a coordinated fashion, a monitoring project to collect information on how the recent amendments of MFN clauses had affected the market.⁸⁵ This resulted in responses to a questionnaire being received by August 2016, with the results of that consultation being due for publication by the European Competition Network over the course of March 2017. The responses will be important in determining where there exists a need for further coordinated action in this sector.⁸⁶

It is unfortunate that, until a concrete prohibition decision on the effects of online platform MFN clauses has been adopted by the Commission, the national approaches across the EU will inevitably diverge. Indeed, the proverbial horse may have already bolted from the antitrust barn, with targeted legislative interventions already having been introduced (or in the process of being introduced) in EU Member States such as France, Italy and Austria to address the online platform MFN issue, often in stark contrast to the approach adopted by their own national competition authorities. For example:

- (1) *France*. In the commitment decision of France's Autorité de la Concurrence against Booking.com and Expedia in April 2015, the Autorité did accept the efficiency argument that *narrow* MFN clauses could principally address free-riding concerns. By only objecting to wide MFN clauses, the Autorité had sought to balance effective competition between booking sites and the hotels with significant bargaining power on the one hand, while also increasing the incentives of an online platform such as Booking.com to invest in its offering. After the commitment decision, however, the French legislator prohibited the use of MFN clauses in agreements between online travel agents and hotels, under the Macron Act.⁸⁷ Going much further than the commitment

85 Surveys were launched in Belgium, the Czech Republic, France, Germany, Hungary, Ireland, Italy, the Netherlands, Sweden and the UK.

86 In a different context, the Commission has had the opportunity to consider the application of MFN clauses in an online context with respect to retail prices on eBooks. Read more at: http://europa.eu/rapid/press-release_IP-13-746_en.htm, http://europa.eu/rapid/press-release_IP-15-5166_en.htm, and http://europa.eu/rapid/press-release_IP-17-137_en.htm.

87 Law No 2015-990, of 6 August 2015, for economic growth, activity and equal economic opportunities.

decision, the legislation prohibits *all* MFNs used in any online booking arrangements. Hence the Macron Act now allows hotels to offer their own prices through *any* sales channel of their choice, including their own website, irrespective of whether higher prices are offered on an online reservation platform. To all intents and purposes, this puts to an end the use of narrow MFN scenarios, which were previously considered by the Autorité to be consistent with competition rules in order to counteract the potential risks of free-riding by services offered over the online booking platform.⁸⁸ Should an online reservation platform contravene the new rules, a substantial fine of €30,000–€150,000 can be imposed.

- (2) *Italy*. Following the commitment decision adopted by the Italian Antitrust Authority, which only addressed the use of *wide* MFN clauses and accepted the commitments of Booking.com in relation thereto, the Italian Parliament is scheduled to approve a new law on the legality of these clauses over the course of 2017.⁸⁹ The Senate has heard testimony of the Authority's President, who expressed concerns about the scope of the MFN provision, believing it to be excessively wide. Advocating the adoption of an 'effects-based' approach, he noted the possible anti-competitive consequences of such clauses in the respective cases brought against the practices of Booking.com and Expedia. These consequences were said to be inextricably linked to the market positions enjoyed by those platforms in the market (ie, collectively holding a 75 per cent share in online hotel bookings). The Authority's President also expressed his concerns that, if price parity clauses were classified as 'object' (hard-core) infringements, the Italian Competition Authority would not need to carry out an effects-based analysis of the actual effect on competition, thereby risking over-enforcement (namely, a 'Type 1' error).
- (3) *Austria*. Consistent with the approach favoured by French legislators, Austria passed a law in late 2016 banning both *wide* and *narrow* price parity clauses in agreements between hotels and online travel agencies (OTAs).⁹⁰ In February 2017, Expedia complained to the European

88 *Autorité de la Concurrence*, decision no 15-D-06 of 21 April 2015. A ruling from Paris Commercial Court on 29 November 2016 declared Booking.com's parity clauses of 2011 to be contrary to the French Commercial Code, creating a 'significant imbalance' in the business relationship between Booking.com and the hotels. The Court expressed the view that Booking.com cannot impose restrictions on the direct marketing information of hotels.

89 Draft Law No 2085 '*Legge annuale per il mercato e la concorrenza (Annual Law on Market and Competition)*': www.senato.it/service/PDF/PDFServer/BGT/00940669.pdf.

90 *Bundesgesetz gegen den unlauteren Wettbewerb 1984*, as amended on 11 July 2016, Annex, recital 32: www.ris.bka.gv.at/Dokumente/RegV/REGV_COO_2026_100_2_1246341/REGV_COO_2026_100_2_1246341.pdf.

Commission that the Austrian legislation in question violates both EU and Austrian legal principles.

The adoption of such divergent approaches by EU Member State legislatures, particularly when they run counter to the logic of their own national competition authorities, clearly raises the risk that a fragmented application of legal principles will be taken in relation to online platforms. Such an outcome seems particularly counter-intuitive given that online platforms provide the EU with a practical vehicle with which to achieve market integration. Mindful of the risks of such fragmentation, the EU Competition Commissioner Margarethe Vestager and the head of the Autorité, Bruno Lasserre, have recently conceded that the Commission needs to intervene at an earlier stage when new markets are concerned. In addition, they have questioned whether the alleged competitive mischief created by narrow MFN clauses is of such significance to justify their classification as ‘hard-core’ restrictions of competition (ie, restrictions ‘by object’).⁹¹

The Commission’s failure to act decisively in an area of economic activity with such a critical pan-European dimension, and where the resolution of complex antitrust issues requires guidance, has unfortunately created a situation where legislators have felt it appropriate to intervene, thereby raising the spectre of significant over-regulation. The risk of committing a ‘Type 1’ error looms large in these circumstances, especially where the national laws in question have been adopted with scant or no regard being given to issues of market power, a failure to apply the doctrine of ‘reasonably ancillary restraints’ and no consideration being given to the delicate balancing exercise required to be undertaken to optimise welfare considerations in relation to particular types of online platforms.

VERTICAL E-COMMERCE ISSUES

The antitrust assessment of so-called ‘vertical restraints’ under EU competition policy is undergoing a renaissance given the increasing popularity of distributing goods over the internet. Vertical agreements are those that are entered into by firms that operate at different functional levels of competition, namely, at different levels of the production or distribution chain. The key distinguishing feature of EU competition policy is arguably its insistence that the ‘vertical restraints’ between an upstream producer and its downstream distributor should not unreasonably be at the

91 Presentation by Commissioner Vestager on 15 June 2015 at Conference ‘New Frontiers of Antitrust’, Concurrences, Paris; Panel Discussion on 29 September 2015 with Bruno Lasserre, speaking at the 9th Annual Georgetown University Law Centre Global Antitrust Enforcement Symposium, Washington DC.

expense of ‘intra-brand’ competition and should not occur in such a way as to jeopardise the EU’s goal of creating an integrated internal market.⁹²

Fostering those goals becomes more complex where transactions are increasingly taking place (usually at lower prices) in an online context. This is especially the case given the important historical legacy enjoyed by luxury brands in Europe and the real corporate and consumer value associated with the distribution of products through traditional ‘bricks and mortar’ distribution channels alongside the online channel. That complexity can be seen in the results of various cases brought before the courts and in the policy directions being advocated by the European Commission in a recently concluded stakeholder consultation into e-commerce issues.

Agency and distribution models online

Whereas it is a relatively straightforward exercise in the context of the traditional ‘bricks and mortar’ (offline) distribution channel to distinguish between the operations of an independent distributor and an agent, the relevance of this distinction becomes blurred in the online world. Given the fact that a traditional agency relationship would normally exempt commercial arrangements from the scope of Article 101(1) TFEU, this has a number of important ramifications, including, inter alia, whether the widespread use of agency relationships globally and for multiple principals has an overarching tendency to facilitate RPM (ie, traditionally seen as an antitrust infringement ‘by object’ under Article 101(1) TFEU).

In the *E-books* case,⁹³ for example, the Commission expressed concerns regarding the joint switching of book publishers from a wholesale model, where the retailer independently determines the retail price, to agency contracts, where all arrangements contained the same key terms (ie, wide MFN clauses, maximum retail price grids and the same level of commission at 30 per cent). In that case, the Commission took the view that, contrary to the terms of Article 101(1) TFEU, the comprehensive switching to agency contracts was tantamount to a coordinated practice between Apple and several book publishers, with the alleged aim being to raise or limit retail prices between Apple and those publishers.⁹⁴ What is interesting, however, is that the Commission was reluctant to declare that the agency model could

92 This point was first established in the seminal judgment of the Court of Justice in Case 56/64, *Consten v Grundig* [1966] ECR I-299.

93 Case COMP AT.39487 – *E-books*, as from 12 December 2012.

94 See Press Releases of 13 December 2012 and 25 July 2013 (http://europa.eu/rapid/press-release_IP-12-1367_en.htm; http://europa.eu/rapid/press-release_IP-13-746_en.htm).

not apply to dealings between Apple and book publishers, as this type of arrangement seems more consistent with a global online market experience than the fragmented geographical market experience that consumers associate with offline sales. In doing so, the Commission is implicitly conceding that, in the online world, the usual standard to establish an agency relationship should be relaxed, as arguably the perception of competition concerns is also relaxed (especially RPM concerns), which would otherwise characterise other more traditional distribution channels.

Competitive restrictions affecting online platforms

A spate of litigation activity has occurred over the past few years across the full spectrum of the European court system (and to a lesser extent before antitrust agencies), which challenges the very fabric of traditional vertical restraints policy in an online environment. Aside from the treatment of MFN clauses (see discussion directly above), those cases have raised a number of issues, including the legality of practices such as:

- outright bans on trading through online platforms;
- the prohibition of sales through specific platforms; and
- the imposition of dual pricing systems that distinguish between sales made over the respective ‘bricks and mortar’ and online channels.

Outright online bans

The question arose before the Court of Justice in 2011 in the *Pierre Fabre* case⁹⁵ as to the extent that manufacturers could prevent the sales of their goods through online channels. The Court expressed the view that an outright ban on such sales was prohibited as a restriction ‘by object’, due to the loss of intra-brand competition, and the requirement that sales be made only through traditional pharmacy outlets could not be justified by reference to the pro-competitive considerations set forth in Article 101(3) TFEU.⁹⁶ Although such an outright ban is prohibited, the Commission’s guidance provides that a manufacturer has some latitude insofar as it is able to require that the distributor must sell at least a specified amount of the contract goods through its physical outlets and also must provide the range of services in support of the goods that are available at its physical outlets.

These restrictions are justified on the basis that they preserve the viability of the physical outlets. As ancillary restraints they must also be proportionate

95 C-43/09 *Pierre Fabre Dermo-Cosmétique* [2011] ECR I-9419, p 9.

96 See discussion in P Alexiadis, *Vertical Restraints Policy in the EU: Open Questions in the Face of Policy Compromises*, Antitrust Report (LexisNexis, 1 December 2011).

insofar as they do not result in a limitation of the distributor's online sales.⁹⁷ The compromise explored by the European courts and the Commission reflects the relative importance to the European economy of luxury brands and specialist technical products, which rely on the distribution of their goods through physical outlets that are consistent with so-called selective distribution criteria.⁹⁸

Specific types of bans on online platforms

If one goes beyond outright bans on sales made online, the question also arises as to whether manufacturers can oblige the members of their selective distribution networks to restrict or deny sales over specific online platforms. The policy trade-offs being considered by antitrust regulators and courts in these circumstances are whether any loss of competitive pressure brought about by lower online prices is offset by the greater on-the-spot and after-sales support offered by physical outlets that sell luxury brands or specialist technical products.

During the course of 2017, the critical judgment of the Court of Justice is due to be delivered in the reference from Frankfurt's High Court in the *Coty Germany* case⁹⁹ in relation to the permissible contractual restrictions that can be imposed upon members of a selective distribution network for cosmetics products. The Court of Justice has been asked a series of key questions about the permissible scope of selective distribution networks and the possibilities that their members might be prohibited from selling their products to online distributors such as Amazon or eBay. The reference to the Court stems from the fact that there have been a number of precedents in which German regional courts and the Bundeskartellamt have taken different positions on these issues.¹⁰⁰

The outcome of this case will, to a large extent, determine the future form that selective distribution systems will take in the EU. The European Commission (supported by Member States such as France, Italy, Austria and the Netherlands) supports the rights of manufacturers under certain

97 Refer to the European Commission's *Guidelines on Vertical Restraints*, OJ [2010] C 130/1, at paras 54–56.

98 A selective distribution network is one 'where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system', Commission Regulation (EU) 330/2010 on vertical block exemptions, Art 1(e).

99 Case C-230/16, *Coty Germany*, OJ C 260 from 18 July 2016, p 21.

100 The conflicting decisions and judgments are discussed in the paper by AB Hüttenlauch, 'Enforcement in Digital Markets', *CPI Antitrust Chronicle*, January 2017.

circumstances to limit or prohibit sales to online platforms,¹⁰¹ while Member States such as Germany and Luxembourg support the view that a restriction of sales through online platforms constitutes a ‘hardcore’ or ‘by object’ restriction of competition. Given the diversity of approach between key competition law enforcers and the prevalence of selective distribution networks in the EU, the future of trading through online retail sales platforms is up for consideration in the *Coty* case.

Dual pricing systems

As a means of incentivising sales through traditional physical sales outlets while not violating the principle established in the *Pierre Fabre* case (see above), a number of manufacturers have sought to create more favourable trading conditions for distributors relying primarily on their physical sales outlet, especially in terms of the prices at which goods are supplied to them by manufacturers. Precedent in the form of Bundeskartellamt investigations most recently into the distribution practices of LEGO and earlier investigations¹⁰² has consistently held that advantageous pricing to the physical distribution channel will only be permissible if the price discrimination being implemented reflects the fact that online sales platforms have lower costs.

In such situations, specific costs incurred by physical outlets (eg, taking more space, hiring additional personnel to advise customers) are considered to be capable of benefiting from the Article 101(3) TFEU exemption, although regional courts on appeal have also demonstrated their scepticism as to whether such costs genuinely need to be incurred. It is hoped that the *Coty Germany* case will also shed more light on dual pricing strategies, if not directly then at least by analogy with other principles espoused by the Court.

EU sectoral inquiry

The Commission’s ongoing E-Commerce Sector Inquiry (launched 6 May 2015)¹⁰³ is being carried out inter alia in order to determine the extent to which

101 Those circumstances, consistent with the terms of the *Vertical Restraint Guidelines*, n 97 above, are that a manufacturer may exceptionally charge a distributor higher prices for products meant to be sold online if the online sales lead to substantially higher costs for the manufacturer. This could include circumstances where offline sales generally include installations services from the distributor, whereas online sales would not, leading to more customer complaints and warranty claims to the manufacturer, para 64.

102 Bundeskartellamt Press Release of 12 January 2016, ‘Bundeskartellamt fines LEGO for vertical resale price maintenance’.

103 For more information see the Commission’s Staff Working Document of 15 September 2016, ‘Preliminary Report on the E-commerce Sector Inquiry’, SWD (2016) 312 final.

there exist barriers to competition in the provision of e-commerce services, with a view to understanding their rationale and in order to assess the impact that EU competition rules can have upon them. The Preliminary Report on the E-Commerce Sector Inquiry ('the Report'), which was published on 15 September 2016, identified some key business practices that could potentially limit online competition, namely:

- the lack of price transparency;
- the 'free-riding' phenomenon, insofar as in-store product testing was followed by online purchases;
- selective distribution becoming more prevalent for a very wide range of goods; and
- contractual sales restrictions (including pricing restrictions, online and cross-border sales restrictions).

The Commission has stated that, as online platforms are at present simultaneously subject to competition, consumer and data protection rules, its aim in introducing new rules will be to ensure that they are not so onerous as to prevent:

(1) the rise of startups, which should be given the opportunity to develop scale within the EU; and

(2) well-established online platforms from also being in a position to grow.

The guiding principles to the regulation of online platforms should be to provide:¹⁰⁴

- equal opportunities for online platforms offering similar services;
- the protection of key values through responsible conduct by online platforms; and
- in a data-driven economy, innovation and open, non-discriminatory markets should be preserved and users should be able to benefit from the principles of transparency and fairness.

ALGORITHMS USED TO FACILITATE CARTEL BEHAVIOUR

The vast majority of the cases discussed above deal either with the extent to which unilateral market power can be exploited in relation to an online platform or the extent to which the use of MFN obligations can skew competitive market conditions. Until 2016, there were no meaningful precedents regarding horizontal infringements of competition rules in relation to online platforms. However, given the increasing sophistication of algorithms to map ever more complex data to achieve certain results, the notion is not far-fetched that algorithms might also be used in certain

104 See Commission's Communication of 25 May 2016, *Online Platforms and the Digital Single Market Opportunities and Challenges for Europe*, COM(2016) 288 final, p 5.

circumstances to facilitate collusive behaviour. Two recent precedents on either side of the Atlantic shed some light on how traditional antitrust thinking on collusive practice might apply to the online world.

In the US, the issue arose in the context of the Department of Justice's prosecution under the Sherman Act of a number of firms engaged in the sale of posters on Amazon Marketplace. However, the case of *USA v Topkins*,¹⁰⁵ despite the novelty of having occurred in an online platform setting, has nevertheless been based on a set of classic antitrust allegations. Although facilitated by their mutual dependence on one another's pricing algorithms for the sale of posters – with a specific algorithm being coded to instruct a particular company's price-setting software – the conspirators were also alleged to have engaged in more traditional forms of collusive behaviour, ranging from actual discussions on the monitoring and exchange of poster pricing, to the actual agreement of a common pricing strategy. There was thus factual evidence in abundance of a prior agreement as to prices among horizontal competitors, rather than the case being built solely upon the unguided interaction of algorithms. There is no reason to suggest that the Commission and Member State National Competition Authorities would not share the DoJ's conclusions on this matter were the case brought in a European setting.

In the foreseeable future, however, the growth in the intelligence of algorithms and greater consolidation among online platforms and sellers might unwittingly facilitate market outcomes consistent with collusion. In the view of Stucke and Ezrachi, there are a variety of ways in which algorithms can generate cartel-like behaviour, ranging from their ability to act as 'predictable agents' (ie, delivery of predictable pricing outcomes in response to shifts in market dynamics) to the creation of an 'alternative universe' (ie, through which prices can be raised above the real market value of the service).¹⁰⁶ In such situations, a complex environment of conscious parallelism might develop among market players, thereby eliminating the risk of price competition beyond what any human being could achieve.

Given the need to establish an 'agreement' among conspirators and their 'intent' to engage in anti-competitive conduct as the basis for an action brought under Article 101(1) TFEU, antitrust enforcers will be put in the invidious position of having to develop forensic evidentiary techniques that allow them to determine whether an algorithm is purposefully designed

105 *United States of America v David Topkins*, filed on 6 April 2016 before the United States District Court, Northern District of California, San Francisco Division.

106 See ME Stucke and A Ezrachi, 'Artificial Intelligence & Collusion: When Computers Inhibit Competition', University of Tennessee, College of Law, *Legal Studies Research Paper Series*, Legal Research Paper #267, May 2015.

to achieve anti-competitive results (irrespective of direct evidence of an intention to collude among the human creators of the algorithms), along with the ability to determine whether pricing outcomes are likely to have a negative effect on competition. Commentators such as Mehra have suggested that the traditional assumption underpinning antitrust enforcement against collusive behaviour – that there be a ‘meeting of the minds’ in order to establish antitrust liability – might be severely compromised in an era of ‘robo-selling’ pursuant to the directions of algorithms.¹⁰⁷ In such an environment, given the difficulties of reconciling traditional antitrust enforcement techniques with ‘robo-selling’ techniques, there may be a need to adopt more flexible solutions that could even involve new ways of approaching privacy issues.

Some progress in developing an evidentiary standard that can address robo-selling that produces economic outcomes equivalent to a cartel has been made recently in the judgment of the Court of Justice of the European Union in the *Eturas* case. The Court’s judgment, delivered in response to a preliminary reference from the Lithuanian courts, throws some light on the issue of how an ‘algorithm cartel’ might be approached under EU competition rules.¹⁰⁸ *Eturas* is an online travel booking system that is embedded by OTAs on their websites. The *Eturas* system, by being able to communicate with each individual OTA through its network, introduced a technical restriction and capped all discounts available for online bookings to the level of three per cent. This was preceded by a dispatched system notice, automatically notifying all competing travel agents about the discount cap before the price restriction was implemented. While the OTAs could still offer greater discounts if they took additional technical steps, the restriction potentially resulted in higher prices for consumers and a softening of competition among OTAs.

The legal issue decided by the Court was whether a concerted practice could be inferred from the fact that the OTAs were informed by an automated notice about the future price change. The Court emphasised that the national rules of evidence had to be applied in the determination of this issue, provided of course that they adhere to the general EU principles of equivalence and effectiveness. In the view of the Court, the mere receipt of an automated notification did not suffice as conclusive evidence that the OTAs were aware of the price change. On the other hand, it could raise a presumption of such awareness, which the defendant is entitled to rebut,

107 See S Mehra, ‘Antitrust and the Robo-Seller: Competition in the time of Algorithms’ (2016) 100 *Minnesota Law Review* 1323.

108 Case C-74/14, *Eturas v Lietuvos Respublikos konkurencijos taryba*, ECLI:EU:C:2016:42.

such as through recourse to evidence of higher discounts being granted even after the notification was received, or the fact that the OTA has publicly distanced itself from the cartel-like behaviour.¹⁰⁹ The necessary implication of the Court's view is that the individuals exercising ultimate control over the calibration of algorithms can legitimately be presumed under national evidentiary rules to be aware of the potential risk of cartel behaviour, unless they can adduce reasonable evidence that human knowledge could not have foreseen such an outcome.

COMPETITION LAW STAKEHOLDER CONSULTATIONS

Given the ad hoc nature of EU-level decision-making in individual cases and the debate between the respective proponents of competition law and regulation as to which legal discipline is best adapted to deal with online platforms, a series of Member State consultations have been undertaken in the recent past to develop an integrated approach towards the role of competition law in relation to online platforms. The conclusions drawn from consultations, while exploring a number of common themes, also adopt approaches to individual issues and diverge in key respects.

France/Germany: Joint Paper

Prior to conducting their own stakeholder consultations on online platforms,¹¹⁰ in May 2016 the respective National Competition Authorities in Germany and France adopted a Joint Paper¹¹¹ in which they assessed their preferred competition law responses to big data operations, especially the extent to which those operations might provide: (1) a source of market power; and (2) the potential theories of harm under competition law that might be associated with big data.

As regards market power, the critical point raised in the Joint Paper is the relative ease with which a new provider can collect and process the range of

109 Refer especially to discussions at *Eturas*, *ibid*, paras 46–49.

110 On 23 May 2016, the French Competition Authority launched an inquiry into the use of data in online advertising: www.autoritedelaconurrence.fr/user/standard.php?id_rub=630&id_article=2780. On 9 June 2016, the Bundeskartellamt published its Working Paper, *Market Power of Platforms and Networks*: www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Langfassung.pdf?__blob=publicationFile&v=2. See also the Monopolkommission's Special Report 68 of 1 July 2015 *Competition policy: The challenge of digital markets*, available at www.monopolkommission.de/images/PDF/SG/s68_fulltext_eng.pdf.

111 See the Joint Paper *Competition Law and Data*, published by the Autorité de la Concurrence and the Bundeskartellamt on 10 May 2016: www.autoritedelaconurrence.fr/doc/reportcompetitionlawanddatafinal.pdf.

data already available to the incumbent online platform provider, although several other factors are critical in any such assessment, namely:

- the impact of network effects in terms of multi-sided markets;
- the extent to which customers can avail themselves of multi-homing opportunities;
- a focus on dynamic elements of competition, rather than on static elements;
- the replicability of the affected data (in terms of its relevance and scarcity); and
- the scale and scope of data collection in terms of its quality and ability to be analysed.

As regards theories of harm, the Joint Paper draws its inspiration from traditional competition law analysis. However, it concludes that, while existing methodologies continue to provide the basis of a conceptual framework, further refinements may be necessary to address concerns regarding data collection. The Joint Paper identifies three particular instances where data collection and use might be abusive under Article 102 TFEU and its national equivalents, namely:

- (1) where the refusal to deal occurs in exceptional circumstances that satisfy the legal standard developed under the case law for a refusal to supply under the ‘essential facility’ doctrine;¹¹²
- (2) where the refusal of access is objectionable if the nature of the relevant data is ‘truly unique’ and there are no other feasible means by which it can be obtained;¹¹³ and
- (3) going beyond an outright refusal to supply, where the owner of critical data sets might be able to foreclose competitors in a number of other ways, including through the use of exclusivity relationships, tying practices through leveraging or the grant of data on discriminatory terms that results in injury to a particular group of customers by placing them at a competitive disadvantage.

112 In other words: (a) where access to the data is necessary to carry out the relevant business activity; (b) if the type of access refused prevents the emergence of a new product where there is potential consumer demand; (c) if the refusal cannot be objectively justified; and (d) if the refusal is likely to eliminate all competition on a secondary market, ie, a relevant online platform.

113 The rationale behind confirming a high legal threshold for access reflects an acknowledgment that a mandated access relationship would undermine the investment/innovation incentives of both the dominant online platform and those of its competitors. Additionally, mandated access to the incumbent’s data is not easily reconcilable with data protection laws, as it would compel the dominant platform to share the data of its users with third parties, in the absence of having received prior consent.

The different approaches of the Bundeskartellamt and the Monopolkommission

Subsequent to the issuance of the joint German/French Position Paper, the two key competition law institutions in Germany each consulted widely and drew their own preliminary conclusions as regards the role of competition law in online platforms.

The essential conclusions in the Working Paper produced by Germany's National Competition Authority, the Bundeskartellamt, were that, with respect to the issue of market definition, a fundamental difference in approach should exist between the identification of antitrust markets where 'collaborative' or 'attention' platforms are involved. In its view, while the market definition process in online markets should continue to be based on the principles of demand and supply-side substitution, a more holistic approach was endorsed where collaborative platforms were being considered (ie, those whose service consists of bringing together two different user groups to facilitate a transaction), as this process reflected the multi-sided nature of these particular online platforms through their generation of an integrated product offering. By contrast, 'attention' platforms (ie, platforms through which one user group is subject to targeted advertising from another user group for another's products) should result in each affected market being considered *separately* on either side of the platform.

With respect to the determination of dominance in relation to online platforms, the Bundeskartellamt considered that market power should be assessed beyond traditional market share criteria to include those network effects that might give rise to the phenomenon of 'tipping', to which online platforms were particularly susceptible. In particular, five specific factors should play a more prominent role in the assessment of market power in relation to online markets, namely:

- (1) the impact of direct and indirect network effects, depending on the particular platform involved;
- (2) economies of scale generated by the online platform in question;
- (3) predominant user types on one side of the market and the extent of differentiation between users;
- (4) the ease with which competitors obtain access to data; and
- (5) the level of potential of innovation foreseen on particular digital markets.

There are key differences between the assessment of the Bundeskartellamt and the Monopolkommission in terms of the approach taken and emphasis given to a range of issues, namely:

- Given the innovative and dynamic nature of online markets, the Monopolkommission believes that the maintenance of a durable high market concentration probably occurs less frequently than the Bundeskartellamt anticipates.
- Traditional competition law principles *are* in principle adequate to address market failures and do not require the incorporation of additional elements from other legal disciplines. Thus, whether it be copyright rules to address concerns arising from the ‘scraping’ of data or the Data Protection Regulation to enforce privacy obligations (including the new right to data portability for consumers and the existing ‘right to be forgotten’),¹¹⁴ recourse should be made to other regulatory disciplines to address certain market failures. By the same token, the overly strict application of data protection rules might be a double-edged sword that impairs the efficiency of the marketplace by forcing individual suppliers to exit the market, resulting in even greater concentration levels.
- Recourse should also be made increasingly to technological solutions designed to increase consumer choice and thereby to overcome market power concerns.
- Whilst current *ex post* competition rules can benefit from being further refined in relation to the digital economy, there is no pressing need for the adoption of new legal standards with which to assess market power other than in relation to procedural aspects of investigations. This includes the legal standard for granting interim relief, the adoption of commitments under the settlement procedure, the need for mandatory timeframes in which to conclude investigations and the reform of merger control thresholds to capture high value transactions.
- Obliging dominant firms to publicly disclose their search algorithms or web indexes to competing search engines are risky policy options. Moreover, imposing an access obligation to share user data would be inadvisable, as it would require substantial technological and regulatory effort to achieve such an aim, while at the same time raising significant data protection concerns.
- With regard to vertical restraints in form of MFN-style clauses, the Monopolkommission saw the merit in an EU-level approach being developed, conceding that EU-level guidance would be desirable, even though cases raising MFN issues may require a case-by-case approach as they present anything but uniform circumstances.

114 See judgment of the Court of Justice of 13 May 2014 in Case C-131/12, *Google Spain SL, Google Inc v Agencia Española de Protección de Datos (AEPD), Mario Costeja González*, ECLI:EU:C:2014:317. <http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=406605>.

Since the publication of these two Reports, German Federal Minister of Justice Heiko Maas expressed his view on 2 November 2016 that EU competition law requires a major overhaul to address the online world, and supported the need for the greater inclusion of consumer protection measures in competition rules (as also proposed by the Bundeskartellamt in its current practice). His support for the greater scrutiny of high-technology companies (those considered to be at the cutting edge) by antitrust authorities also resonated with German Chancellor Merkel, who emphasised in her recent Party Convention on 6 December 2016 that the digital era, while an essential element of globalisation and job growth, also generated concerns about the rise of ‘platform monopolies’ that might exploit the lack of service transparency.

United Kingdom¹¹⁵

The House of Lords’ EU Select Committee’s Inquiry into Online Platforms and the EU Digital Single Market, to which the UK’s Competition and Markets Authority (CMA) submitted written evidence, is a direct response to the EU’s Digital Single Market Strategy.¹¹⁶

The Select Committee recommends against the use of platform-specific regulation because substantive competition rules, to the extent that they are principle-based and flexible, should be sufficient to address new types of abusive behaviour arising in an online platform setting. By contrast, the Select Committee concluded that the adoption of a regulatory approach is undesirable. Instead, the Select Committee proposes greater focus on the streamlining of the ex post enforcement regime through the better use of interim measures, settlement regimes, mandatory timetables for investigations and the use of market investigations.

While agreeing with the European Commission’s economic definition of online platforms as being multi-sided, the Select Committee identified a number of digital platform relationships that fall outside this definition (eg, Netflix). It also strongly believed that the sheer diversity of the types of online platforms currently available (coupled with the complexity of their business models, the lack of price signals on the consumer side of the platform and the presence of tailored prices in multi-sided markets) poses significant challenges for traditional antitrust analysis. Ultimately, the Select Committee identified that quality is a key parameter of competition in these markets, but that such a concept is not readily quantifiable.

115 House of Lords’ EU Select Committee on the EU’s ‘Online Platforms and the Digital Single Market’, n 36 above.

116 <https://ec.europa.eu/digital-single-market/en/digital-single-market>.

A concern was also raised about the lack of transparency observed on online platforms, particularly as regards to how search results are generated. This lack of transparency has a direct bearing on the potential for unfair commercial practices, for example, by presenting prices of the preferred business customers of the particular platform, rather than the best possible price. However, the Select Committee advised against the disclosure of algorithms, which it saw as a disproportionate intrusion into the intellectual property rights of online platforms. Other problems were also identified as arising from the effective administration, regulation and audit of such algorithms, which required a large degree of ‘technical literacy to understand the content and implications of often very complex algorithms and computer software’ on the part of policy-makers.

The Select Committee also offered a new angle on the competitive dynamics of the online world, by observing that there is no appreciable competition on privacy standards among online platforms. In this respect, it was concluded that ‘online platforms could potentially abuse a dominant position by downgrading their privacy standards’. While the CMA acknowledged in its submission that identified network effects may only be capable of being consistent with the consumer benefits of a few, ‘or even one’, platform in a given market, the Select Committee also expressed the view that network effects can facilitate discrimination against competitors, increase barriers to entry and ultimately raise prices above competitive levels. These market power concerns are exacerbated when leveraging occurs into other adjacent or neighbouring markets. Particular emphasis was paid to online platforms being characterised by network effects; that are understood to be accelerated in their effect in an online environment. These ‘accelerated network effects’ are said to fuel exponential growth, increase switching costs and erect barriers to entry (thereby having the potential to result in monopolistic outcomes). Successful firms that harness network effects in this way can ultimately become ‘gateways’ that reduce consumer choice and place them in the position of an ‘almost unavoidable trading partner for businesses’ where the market reflects ‘winner takes all’ tendencies.

The CMA also emphasised that there could be many online markets that can be entered with generally lower up-front investment costs than more traditional industries, which could mean that ‘competition *for* the market may create competitive pressure even when a firm has a high market share’; this suggests that market power in online platforms can often be a transient phenomenon. Ultimately, the key to whether intervention is necessary (ie, to prevent a Type 2 error) is whether market power in online platforms is merely a transient phenomenon; critical to such an assessment will be the extent to which significant barriers to customer switching or multi-homing exist. Finally, the Select Committee recommended that the Commission should coordinate further research into the effects that algorithms may have on the implications of antitrust enforcement for online platforms.

Other jurisdictions

Further to the OECD's conclusions expressed in its 2016 Report entitled *New Forms of Work in the Digital Economy*,¹¹⁷ a number of Member States are in the process of conducting follow-up consultations on various public policy aspects raised by digital platforms, including:

- The Swedish Competition Authority published a report on digital markets and e-commerce on 6 March 2017, which was commissioned by the government.¹¹⁸ The report concludes that, while price transparency is a good thing for consumers, it also increases the risk of coordinated pricing. Ensuring that such coordination does not materialise is a policy priority for the Authority.
- The Netherlands' Authority for Consumers and Markets (ACM) is conducting a market study on online platforms offering audio-visual content, including YouTube and Facebook.¹¹⁹ In doing so, it seeks to appraise business models in online platforms and the means by which the revenue of such platforms is generated. The study will review, inter alia, the standard terms upon which these platforms operate, the revenue flows derived from advertising streams and the methods by which data is collected for the purpose of personalised advertisements. The effect of such online platforms on consumers is a policy priority for the ACM, which has to this end published a position statement entitled 'Big Platforms, Big Problems'.¹²⁰
- The Spanish Competition Authority has launched recent studies to push forward its own strategies in relation to digital markets, including a public consultation on the collaborative economy in 2015 (eg, including transport and tourist accommodation business models pioneered by Uber and Airbnb respectively).¹²¹
- Portugal launched a study in 2014 to analyse media consumption patterns on digital platforms. The aim of the study is to identify new ways of providing an appropriate regulatory response to the interests of the free flow of information and of citizens' protection in the public

117 OECD report, *New Forms of Work in the Digital Economy* (OECD Digital Economy Policy Papers, 2016). The report can be accessed at www.oecd-ilibrary.org/science-and-technology/new-forms-of-work-in-the-digital-economy_5jhwklt820x-en.

118 See the Swedish Competition Authority's Report: www.konkurrensverket.se/globalassets/publikationer/rapporter/rapport_2017-2.pdf.

119 www.acm.nl/nl/publicaties/publicatie/16332/Online-video-platforms-onder-de-loep.

120 www.acm.nl/nl/publicaties/publicatie/16333/Grote-platforms-grote-problemen.

121 See CNMC, *Press Release in consultation market study on new models for service delivery and on sharing economy* and its Preliminary results, available at: www.cnmc.es/Portals/0/Ficheros/notasdeprensa/2016/Promocion/160311_PressRelease_consultaestudioEC_EN.pdf; <https://docs.google.com/document/d/1n65MjUaTmRLuZCqTllqyWvobVqreR-iAzzs1mhxy2y0/edit>.

media space being redefined by new digital technologies. The Portuguese regulatory body for social communications published the results for public consultation in July 2015,¹²² according to which multimedia organisations must fulfil certain editorial responsibilities (with even stronger obligations being imposed in the case of news organisations).

CONCLUSIONS

The development of a coherent EU antitrust policy for online platforms, irrespective of the progress made in the available precedents under merger reviews and behavioural investigations, still leaves a number of unresolved questions. The results of the various investigations into Google, for example, remain outstanding but, as currently framed, they seem to apply traditional antitrust concepts about the scope of relevant product markets, the leveraging of market power and the scope of the non-discrimination obligation in an online context. The form that these investigations will ultimately take is a matter of some speculation.¹²³ By contrast, Member State precedents have already developed new ground, insofar as:

- in its Facebook investigation, the Bundeskartellamt is raising the possibility that German antitrust rules in the digital world will be interpreted in such a way as to introduce consumer protection policy goals, and more specifically antitrust norms based on data protection rules, into the heart of its antitrust analysis;
- the UK's *Streetmap v Google* case has taken a very holistic view of efficiencies and consumer welfare derived from online platforms, on the one hand, as opposed to technical restrictions of competition, on the other;
- the various hotel booking cases decided across the EU Member States have given rise to the proposition that narrowly framed MFN clauses, insofar as they have been formulated to protect the integrity of the hotel reservation booking platform vis-à-vis vertical hotel websites, preserve the appropriate policy balance between those parties sitting across different sides of the market;
- the National Competition Authorities of Germany, the UK and France have made great strides in enhancing our understanding of how direct or indirect network effects apply in relation to online platforms and in acknowledging the ambiguous nature of the respective consumer welfare

122 See *Estudio Digital Media Portugal 2015*, ERC: www.erc.pt/pt/pesquisa/?pesquisa_global=digital+platforms.

123 See for example Nazzini, 'Unequal Treatment by Online Platforms: A Structured Approach to the Abuse Test in Google', 11th Annual Conference of the GCLC, Brussels, 1 February 2016; Wagner-von Papp, 'Should Google's Secret Sauce be Organic?' (2015) 16(2) *Melbourne Journal of International Law* 609; Lang, 'Comparing Microsoft and Google: The Concept of Exclusionary Abuse' (2016) 39 *World Competition* 5.

and foreclosure considerations arising across either side of any given online platform; and

- the reference to the Court of Justice in the *Coty Germany* case from the Frankfurt Court of Appeals suggests that the balancing exercise between the different sides of a multi-sided market (as part of a competition analysis ‘by effects’) will be a key factor when considering the compatibility of selective distribution systems in an online world with EU competition rules. Beyond these precedents, however, there remains much conjecture as to the ways in which EU competition rules can address the range of potential market failures or inefficiencies that might arise from the operation of online platforms. A number of these as-yet-unanswered questions are discussed below.

A range of enforcement limitations impedes effective antitrust enforcement in the online environment

There are a number of practical limitations that exist on effective competition law intervention in relation to online platforms.

First, given the global reach of so many online platforms, it is questionable whether antitrust enforcement taken in relation to individual national geographical markets that do not command the customer bases of jurisdictions the size of the US, China and the EU is always viable. This is because a particular online service, while very important in a given national jurisdiction, might be *de minimis* in relation to a global online platform’s overall business. In these circumstances, the easiest option will be for the online platform to terminate the offending service immediately at the national level, but such an intervention might have the unintended consequence that the withdrawn service generates ‘harm’ on another side of a multi-sided market.¹²⁴ Consequently, smaller jurisdictions might consider that antitrust intervention creates at least as many problems as the decision not to intervene.

Secondly, the inordinate delays in the EU proceedings against Microsoft and Google (five years and seven years respectively) have served as salutary examples of the difficulties facing antitrust enforcers in taking prompt action

¹²⁴ For example, in late 2014, Google shut down its Google News service in Spain as a response to incoming copyright legislation that would have required it to pay royalties to Spanish publishers for using their content: www.ft.com/content/dc875aca-8100-11e4-896c-00144feabdc0.

with respect to online platforms.¹²⁵ Those cases have thrown into sharp focus the inherent difficulties of policy-makers relying on antitrust enforcement in fast-moving markets characterised by global presence, technological innovation and the inevitable complex consumer welfare analyses that need to be made where markets are multi-sided. To this end, a series of national competition law consultations have explored the possibility of a revised interim order mechanism (currently available at EU level under Article 8 of Regulation 1/2003) being instituted that would allow competition regulators to intervene in fast-moving markets in order to preserve the competitive status quo before a market ‘tips’ in favour of the market leader, especially where the market has ‘winner takes all’ characteristics. Under such a mechanism, competition regulators would be incentivised to review claims quickly so that, where required, the interim relief could be lifted. In addition, it has been proposed that the Commission should consider maximum two-year timelines within which to adopt final decisions (ie, under Article 7 of Regulation 1/2003) or the more streamlined use of settlement procedures through which to extract concessions in the context of antitrust investigations (ie, under Article 9 of Regulation 1/2003).

While these proposals are designed to avoid a Type 2 risk of under-enforcement that might arise from undue delays to achieve effective antitrust redress, Kadar explains that subjecting the Commission to rigid timeframes in all three of these decisional procedures runs significant implementation risks and raises concerns about the traditional rights of the defence being compromised.¹²⁶ Moreover, the advocates of change tend to gloss over the fact that Article 9 settlements have already been achieved within relatively short timeframes in the various MFN cases involving both Amazon and Apple.¹²⁷

Thirdly, given that the application of the SSNIP test¹²⁸ is all but irrelevant in a market environment in which transactions will often be without monetary value, one needs to ask the fundamental question of whether the usual preliminary analytical step in competition law of identifying a relevant product market is necessary in complex digital markets, and whether the

125 As regards the weaknesses inherent in traditional antitrust remedies and investigation procedures more generally, see T Cowen and S Dines, ‘The Good, Bad and Ugly in Competition Law Enforcement: Observations from the Technology Sector’, *CPI Antitrust Chronicle*, January 2017.

126 Refer to M Kadar, ‘European Union competition law in the digital era’ (2015) 4 *Zeitschrift für Wettbewerbsrecht* 342.

127 Refer to discussions in ‘MFN clauses in online hotel bookings’ (p121) and ‘Agency and distribution models online’ (p127) respectively.

128 The SSNIP or ‘Hypothetical Monopolist’ test refers to the ‘Small but significant non-transitory increase in price’ test, which is used to assess within which market a hypothetical monopolist could exercise market power by imposing a profitable increase in price. See M Stucke and A Grunes, *Big Data and Competition Policy*, n 4 above, 109.

time is ripe for policy-makers to address more directly the issue of whether the impugned practices in question reflect the exercise of market power, irrespective of the technical parameters of any given antitrust 'market'.¹²⁹

Fourthly, the usual concerns raised about market concentrations through the use of HHI index¹³⁰ ratios can often be misleading in an online market context, essentially because the ability of certain markets to sustain multiple online platforms is prone to error, the determination of market entry needs to be accompanied by a minimum level of scale or because there are certain markets that are more likely to be of the 'winner takes all' ilk (ie, in economics terms, whether competition is 'for' the market rather than 'in' the market).¹³¹ While the Commission and national competition regulators have been quick to point out that market shares might not be an ideal proxy for market power, antitrust regulators around the world will be struggling to apply an empirically sound technique to measure market power.

Fifthly, whereas consumer welfare losses are relatively straightforward for economists to assess based on the value of lost sales on the basis of price differentials both pre and post the abusive conduct in question, that counterfactual exercise is far more difficult to apply where the theory of harm is the potential foreclosure of innovation. This difficulty is compounded by the fact that it will usually not be possible to estimate in abstract terms which technologies will be successful and those that will fail.

These identified weaknesses in the ability of traditional antitrust analysis to deal with fundamental conceptual issues in relation to online platforms make it particularly important for intervention to be measured in its response, given that the possibility of a 'Type 1' error occurring may be high. Whether or not the measured introduction of a new policy of interim relief might spare competition regulators' blushes that they have committed a 'Type 2' error by allowing an online platform to alter competitive dynamics irreversibly is questionable, given the procedural difficulties in modifying the existing legal regime governing interim relief.

129 See, for example, the views of J Farrell and C Shapiro, 'Antitrust Evaluation of Horizontal Mergers: an Economic Alternative to Market Definition' (2010) 10 *The B.E. Journal of Theoretical Economics*, Article 9.

130 The Herfindahl-Hirschman Index is a formula with which market concentration can be determined especially in the appraisal of a merger between firms.

131 In this regard, refer to P Thiel, 'Competition is for Losers': www.wsj.com/articles/peter-thiel-competition-is-for-losers-1410535536, where the author extolls the benefits of a 'creative monopolist' in the online world.

Identifying the traditional commercial incentives of dominant firms is elusive in an online environment

Antitrust enforcement against digital platforms is also compromised because many of the economic conventional wisdoms that underpin enforcement strategies in other industries simply do not apply in the online platform context. By way of example:

- The usual theories of harm associated with anti-competitive practices, which often pre-suppose that higher prices will materialise in the wake of anti-competitive conduct, rarely materialise in the online world. The multi-sided nature of many platforms means that even the creation of a monopoly position might not result in price increases in the aftermath of an abusive practice, as the profit-maximising behaviour of the perpetrator is not always readily discernible, nor does it necessarily follow that such behaviour will occur vis-à-vis consumers (although it may be more questionable whether the costs of interacting with the platform are raised for intermediate users such as advertisers).
- The goal of a dominant firm to become a ‘lazy monopolist’ – the traditional beneficiary of monopoly behaviour – is in very short supply in the online world. On the contrary, what we are witnessing – at least at this stage in the proliferation of such platforms – is a constant commitment of large online platforms to innovate and reinvest their surplus into new ventures and new ways of doing business.¹³²
- The usual yardstick of efficiency in an antitrust analysis is the determination of how close to ‘cost’ a market player is charging customers for its services. In this way, a traditional antitrust analysis would seek to have the leading market player charging as close to marginal cost as possible in order to be deemed to be the subject of an effective competitive constraint. Yet, in a world in which value can be extracted in a multitude of monetary and non-monetary currencies and across a wide portfolio of services or over many ‘markets’, such a policy goal is of negligible utility, as it proves little or no insight into the efficiency of the alleged dominant firm. Moreover, there may be significant differences in the ways in which scale, fixed and incremental costs are spread across different types of online platforms.
- The imposition of interoperability obligations, so often considered to be a panacea for achieving open markets, might in practice dilute aggressive competition where a ‘first mover’ in a market feels that it will be prevented from being the company that can win the race ‘for’ the market

¹³² Refer to Case C-179/90, *Merci convenzionali porto di Genova v Siderurgica Gabrielli* [1991] ECR I-5889; see also Whish and Bailey, *Competition Law* (OUP, 8th edn, 2015), Ch 1(B) ‘The Harmful Effects of Monopoly’.

(especially where the race is occurring between ‘closed’ platforms).¹³³ In online markets where scale may be a critical consideration, this break on competition might produce negative welfare consequences.

- While it is clear that scale can generate competitive advantages for applications built on ‘big data’, there is no universal paradigm as to the scale at which ‘big data’ becomes problematic. This is because, for generalised searches, it may well be the case that there are diminishing returns, for example, for the last billion entries when compared to the first billion entries.¹³⁴ On the other hand, this proposition probably does not hold where ‘hidden’ or ‘lost’ data is at issue; in these later examples, the more data that is available, the more effective the results and the insights derived from that data.¹³⁵

In light of the fact that there are so many fundamental working premises regarding efficiency and competitiveness that do not correspond to traditional antitrust (or regulatory) thinking, concerns about competition regulators committing Type 1 errors through excessive intervention cannot be ruled out completely, although the extent to which proportionate remedies under the Article 9 settlement process can strike a balanced outcome might be the best way of minimising such concerns.

Traditional theories of harm are compromised by the dynamics of online platforms

Precisely because each side of the platform needs to strive to achieve the right ‘balance’ by the online platform to satisfy the demands of all sides of the market,¹³⁶ the identification of a cohesive theory of harm is rendered very complex beyond those cases with clearly understood abusive practices. Thus, while it might be clear that customer switching is theoretically possible (which would be sufficient in most industries to dismantle entry barriers), the fact remains that there may be highly asymmetric switching costs for customers to move from one online platform to another. This is precisely because of the value that they attribute to their continued use of a particular platform. The net effect of such loyalty to a particular online platform at the expense of others might be, however, that fully fledged competition between online platforms might not always materialise if customer choice is merely symbolic. While the Commission had few concerns about this

133 Refer to discussion in R Feasey, n 14 above.

134 See presentation of M Dolmans at ‘Concurrences – Innovation Economics for Antitrust Lawyers’, 3 February 2017, King’s College London (Panel on ‘Privacy & Big Data: Can the Big Data Companies be Coerced?’).

135 Refer to ICOMP, ‘Google under the Antitrust Microscope’, pp 30–31: http://i-comp.org/wp-content/uploads/2013/07/1213_Google_antitrust_lores_screen.pdf.

136 See R Feasey, n 14 above.

issue in its review of the notified merger in *Microsoft/Skype* (given that the Commission was understandably loathe to speculate about the likelihood of future events), one can expect that it will have far greater traction in those Article 102 TFEU settings in which it is alleged that the abuse of market power has already taken place.¹³⁷

In addition, although the phenomenon of cross-subsidisation is viewed with great suspicion by many antitrust regulators (especially where one affected market is the subject of *ex ante* regulation), it is the cornerstone of many online platforms' business models, as their online platform might otherwise be wholly unattractive if they are not allowed to spur demand by targeting subsidies into the hands of consumers.¹³⁸ Thus, while it might be asking too much for online operators to keep their various business units distinctly separate, it is inevitable that there will be transparency measures of some sort that will be relied upon by regulators to ensure that transfer pricing is consistent with efficient outcomes.

Another issue that poses a unique dilemma for antitrust enforcers in an online setting is the platform bypass issue. Traditional antitrust thinking has consistently taken the view that the accumulation of market power is best addressed by ensuring that market players and consumers are free to choose alternative business models.¹³⁹ However, insofar as remedial measures are taken, which, in providing competitive alternatives to the platform, also damage its revenue generation model, questions must be asked as to whether or not consumers are better served in welfare terms by measures that strike a balance between a successful online platform business model and those keen to be 'free riders' on the innovation and investment of the online platform. The immediate areas in which this policy compromise is being struck are in the use of MFN clauses for hotel reservations and in the use of selective distribution systems where competing online and bricks and mortar distribution platforms are available.

These considerations all lead to the broader issue of the difficulties encountered by an antitrust regulator in addressing consumer welfare, efficiency and innovation issues against potential anti-competitive effects. This is a particularly acute problem given that, across the various sides of the markets affected, it is by no means clear how one can quantify such issues, especially where money is not changing hands. Making such delicate

137 Although note the Commission's concerns about the possibilities of combining data sets from different platforms in the most recent investigation of the *Facebook/WhatsApp* merger, 'The European response' above.

138 Refer to Commission Decision in *Deutsche Bahn AG/Bahn Transis GmbH* of 7 May 2002, OJ L211/7; Commission Decision in *Deutsche Post AG* of 25 January 2012, OJ 2001 L125/27. See also discussion in R Feasey, n 14 above.

139 See R Feasey, n 14 above.

welfare trade-offs is arguably something that antitrust regulators will feel more comfortable in achieving in more mature online marketplaces where the process of trial and error yields less ambiguous conclusions, and in turn lowers the possibility of Type 1 errors occurring.

The mixed blessings of competing on privacy options

The Commission's *Microsoft/LinkedIn* case merger review identified the importance of online platforms being able to compete in their privacy offerings. By the same token, the Commission's *Google* investigation into internet search has at its heart the issue of whether or not a dominant firm can take advantage of competition rules by manipulating data protection obligations. The two issues, while related in some ways, nevertheless raise very different policy trade-offs for antitrust regulators. Thus, when considering the extent to which firms compete in the provision of data protection/privacy, there is little doubt that the marketplace is characterised by a wide range of options whereby customers are offered the ability to have their personal data deleted or where they can trade off their right to privacy against some economic benefit in their purchase of the principal service being offered to them.¹⁴⁰ In such circumstances, concerns will inevitably arise where the merger might result in the disappearance of pre-existing privacy options for customers. Having said that, given that data protection and privacy standards are prescribed by law, it is difficult to foresee how a theory of harm could be established in circumstances where the merged entity is already in full compliance with the prevailing mandatory legal standards of the day (to the extent that is clear). This is presumably the case where multi-homing is available to consumers or where the cost of switching to other platforms is genuinely low.¹⁴¹

The issue of whether an antitrust theory of harm can be based on a firm's failure to conform to data protection rules is equally prone to conflicting views. One commentator notes that the use of data protection rules as an element of an antitrust offence might constitute an illegitimate extension of

140 For example, various privacy options are offered ranging from the anonymisation of search results (duckduckgo.com), the deletion of photographs after 24 hours (Snapchat), the end-to-end encryption of 'chats' (WhatsApp) and the anonymisation of communications (Whisper).

141 Although *query* whether a theory of harm might attach to a trade-off between online platform providers and customers that involves the provision of a service *in exchange for* customer data when compared to smaller competitors offering a comparable service without such restrictions.

the antitrust mandate.¹⁴² Other critics, even when acknowledging that privacy can in some cases be a legitimate parameter or dimension of competition, contend that privacy should not be accorded any higher rights than other fundamental rights or important public policy goals, with those authors coming very close to concluding that such a blurring of the lines between the two disciplines of antitrust and privacy renders antitrust intervention more susceptible to a Type I error.¹⁴³ As noted earlier, however, the author's view is that the *Asnef-Equifax* and *Facebook/WhatsApp* precedents do not stand for the proposition that data protection infractions can never amount to an antitrust violation, and the more recent *Microsoft/LinkedIn* case contained remedies that implied that data privacy issues were relevant to the scope of the remedies. Moreover, it is difficult to argue against the proposition put forward by commentators that data protection acts as an 'external constraint on competition law given its character as a fundamental right'.¹⁴⁴ Such an approach seems perfectly in tune with existing Commission precedents, whether measured in terms of: the logic behind the Commission's antitrust investigations into the margin-squeezing practices of a number of European telecommunications operators despite partial national regulatory approvals for those practices;¹⁴⁵ the de facto refusal by a national telecoms incumbent who was already bound by national regulatory measures to that effect;¹⁴⁶ the host of cases where condemned abusive practices have been otherwise condoned by IP laws;¹⁴⁷ and the breadth of the competition law action brought against AstraZeneca under Article 102 TFEU.¹⁴⁸

142 See M Dolmans, who asks whether such an extension would amount to a situation of 'detournement de pouvoir', see presentation 'Debunking Nine Big Data Myths' on 3 February at Concurrences Seminar, Antitrust, Big Data and Privacy, Brussels, n 134 above.

143 See A Lamadrid and S Villiers, 'Big Data, Privacy and Competition Law: Do Competition Authorities Know How To Do It?', *CPI Antitrust Chronicle*, January 2017.

144 Refer to F Costa-Cabral and O Lynskey, 'The Internal and External Constraints of Data Protection on Competition Law in the EU', *LSE Law, Society and Economy Working Papers* 25/2015. Refer more generally to C Townley, *Article 81 and Public Policy* (Oxford: Hart Publishing 2009).

145 *Telefonica/E-Plus*, Case M.7018, Decision of 2 July 2014; *Deutsche Telekom*, Decision 2003/707/EC (21 May 2003) (Case COMP/C-1/37.451, 37.578, 37.579); *Deutsche Telekom*, CFI judgment of 10 April 2008 (Case T-271/03); *Deutsche Telekom*, ECJ judgment (Case C-280/08) of 14 October 2010; *Slovak Telekom*, Commission Decision C (2014) 7465 final of 15 October 2014 in Case AT.39523.

146 See Commission Decision of 22 June 2011 in Case COMP 39.525, *Telekomunikacja Polska*.

147 See, for example, Joined Cases C-241/91 and C-242/91, *RET and ITP v Commission* [1195] ECR I-743 ('*Magill*'); Case T-201/04, *Microsoft v Commission* [2007] ECR II-3601; Case C-418/01, *IMS Health* [2004] ECR I-5039.

148 For example, see Commission Decision of 15 June 2005 in Case AT. 37507, *Generics/AstraZeneca* where a pharmaceutical company was judged not to be able to take advantage of regulatory shortcomings, which meant that it could not engage in actions whose effect would be to disincentivise parallel trade.

What is even more complex, however, is the delicate relationship between privacy norms and the economic drivers behind innovative services that rely upon 'big data'. As Padilla explains, the level of privacy protection in a competitive market will be greater because rivals with similar business models will try to steal market share by offering alternative (and better) privacy solutions. In the alternative, rivals with different business models (eg, with no presence in adjacent markets) will face a lower opportunity cost and may hence be willing to offer increased privacy protection. It may even be the case that the level of privacy protection offered in a competitive market is excessive because it leads to duplicative investments in terms of costly privacy solutions and/or it undermines competition in those adjacent markets where the data collected in the reference market was used to compete. It may also be the case that the provision of adequate privacy protection might be compromised where it involves:

- (1) incurring considerable direct costs (eg, the cost of providing the required functionality) and indirect costs (the opportunity cost of not being able to erect a barrier to entry by holding superior data compared to its competitors and the opportunity cost of exploiting data in adjacent markets where it could be monetised);
- (2) limiting revenues, given that consumers' willingness to pay for privacy may be limited (due to imperfect or asymmetric information); and
- (3) not being able to monetise the full value of privacy unless the provider can engage in price discrimination.¹⁴⁹

Seen in this way, determining the welfare losses and gains between firms willing to cut corners with a privacy policy or those that accord the highest priority to privacy protection may produce very different results in terms of competitive outcomes.¹⁵⁰

Final observations

It is clear to the author that, although the analytical base for understanding the antitrust implications of online platforms has already been established under EU competition rules, many of the questions that fall into the 'very hard' basket still need to be answered. A number of things, however, seem to be clear:

149 Presentation by J Padilla at 'Concurrences – Innovation Economics for Antitrust Lawyers', King's College London, 3 February 2017: www.concurrences.com/en/events/innovation-economics-for-antitrust-lawyers-king-s-college-london-03-february. Contrast with the views of R Feasey in 'Compliance is for winners', Cullen BITS seminar on Internet Platforms in Brussels on 16 July 2015.

150 For example, there are numerous instances of traditional telecoms operators even expressing concerns that the full (end-to-end) encryption, irrespective of the privacy benefits, might have unintended anti-competitive collateral effects on the market.

- (1) Insofar as antitrust policy has a role to play in relation to abusive market practices, the default setting for enforcement under Article 102 TFEU and its national equivalents will be the prevention of discriminatory practices. This will inevitably be the case because it is the most clear-cut abusive behaviour that does not require overly complex policy trade-offs to be made in order to justify its applicability in an online world.¹⁵¹ Whether the principle of non-discrimination becomes more associated with regulatory rather than antitrust disciplines and whether it makes inroads into traditionally relaxed approaches to price differentiation remains to be seen. In such cases, the likelihood of antitrust enforcers making Type 1 errors is more limited, if only because the immediate anti-competitive effects of discrimination are well understood.
- (2) The balancing of interests that is so important for firms to achieve across all sides of an online platform not only adds to the complexity of consumer welfare analyses to be performed by antitrust enforcers, but also opens up the possibility of the concept of ‘fairness’ being harnessed by antitrust policy-makers in order to achieve the requisite level of fairness through the vehicle of antitrust.¹⁵² Such a flexible concept seems to be finding favour in the pronouncements of the current EU Competition Commissioner, who has signalled her willingness to challenge exploitative abuses,¹⁵³ but also in the unprecedented actions of the Member States to play a leading role in the formulation of antitrust policy¹⁵⁴ and their increasing use of national competition policies to further consumer protection and data protection aims.¹⁵⁵ Whether the flexibility afforded by these policies renders antitrust decision-making more susceptible to Type 1 errors is a matter for conjecture.
- (3) Competition regulators must be cautious not to assimilate all types of welfare losses identified in relation to any given online platform across *all* online platforms, as the business rationale for each type of online business may be markedly different, resulting in the need to conduct

151 See D Wood, Panellist at the 2nd ‘Chillin’ Competition’ Conference, Brussels on 21 November 2016.

152 See, generally, A Ayal, *Fairness in Antitrust: Protecting the Strong from the Weak* (Oxford: Hart Publishing 2014), Part 1.

153 See Commissioner Vestager’s Keynote Speech, ‘Protecting Consumers from Exploitation’, 2nd ‘Chillin’ Competition’ Conference, Brussels on 21 November 2016: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/protecting-consumers-exploitation_en.

154 Refer especially to ‘Facebook antitrust probe (Germany)’ (p119), ‘MFN clauses in online hotel bookings’ (p121) and ‘Competition law stakeholder consultations’ (p134) above.

155 For example, Andreas Mundt, President of the Bundeskartellamt, has recently advocated a user-focused approach to competition law when addressing big data and online platforms.

a separate and different balancing exercise in relation to each online platform. Intervention will be more prone to Type 1 errors if the direct and indirect network effects generated by different platforms are not fully acknowledged.¹⁵⁶

- (4) The rise in economic importance of online platforms is matched by the relative vigour with which national competition authorities have recently addressed the application of antitrust rules in relation to such platforms (whether, inter alia, in terms of the use of MFN clauses in hotel booking reservations, the application of selective distribution policy in the online world or the conduct of stakeholder studies into online platforms). Given the clear pan-European impact of online platforms, it may appear incongruous that the Commission has taken a proverbial backseat on enforcement strategy in these crucial areas of economic activity, opening up the possibility for different levels of enforcement and the increase risks of 'Type 1' errors being made. While this may superficially threaten to lead to the 'Balkanisation' of antitrust enforcement in this critical area, rather than the centralisation of a uniform approach led by the European Commission, it can only be hoped that proposed changes to the fundamental workings of the European Competition Network (ECN) will mean that the adoption of a coordinated approach might still be a viable option even under a more decentralised enforcement regime for issues of clear pan-European importance.¹⁵⁷
- (5) While the procedural challenges faced by competition authorities to act decisively and quickly in relation to fast-moving industries is no better illustrated than in relation to online platforms, there remain significant legal pitfalls in changing existing procedural safeguards to accommodate faster and more effective decision-making.¹⁵⁸ As the Commission's interventions in new media markets involving online book sales demonstrates, real-time decision-making is still possible in complex digital markets.
- (6) To date, a range of regulatory measures have already been adopted (or their implementation has been foreseen) that seek to address key elements of online platforms, inter alia:

156 For example, refer to the Commission's appraisal of the very distinctive market dynamics that characterise the 'shared' or 'collaborative' economy in its June 2016 Communications, *A European agenda for the collaborative economy*, <http://ec.europa.eu/DocsRoom/documents/16881>.

157 See Commissioner Vestager on 19 April 2016 at ECON Committee on 'Empowering the national competition authorities to be more effective enforcers of the EU competition rules', http://ec.europa.eu/competition/consultations/2015_effective_enforcers/Summary_report_of_replies.pdf.

158 Refer to discussion in M Kadar, n 130 above.

- The importance of ensuring that customer switching is possible as between online platforms, based on the ability of customers to port their personal data between platforms.¹⁵⁹
- The perceived need to create a market for online services that is truly pan-European in its geographical scope, as a means of fostering a commercial environment in which large European online platform providers can flourish.¹⁶⁰
- The desire to recalibrate the balance between global online platforms, which benefit from the provision of greater broadband connectivity from national telecommunications network operators and telecoms operators who feel disadvantaged vis-à-vis so-called ‘over the top’ (OTT) operators, which are online platforms that provide a range of telecommunications services in competition with those providers of broadband infrastructure.¹⁶¹
- The harmonisation of consumer protection rules for contracts concluded online.¹⁶²

These measures are the logical extension of the application of the Commission’s May 2015 Communication on a *Digital Single Market Strategy for Europe*,¹⁶³ which had outlined 16 legislative and non-legislative initiatives designed to create a single market in digital goods and services across the EU. These measures seem largely compatible with the workings of competition law.

159 Especially in conformity with Art 18 of Regulation (EU) 2016/680, which repeals the current EU data protection regime. The importance of the measure can be seen in the discussions in E Lecchi, ‘Data portability, big data and the telecoms sector’ (2016) 2(4) *Competition Law & Policy Debate*. See also more generally, R Jay, *Guide to the General Data Protection Regulation* (London: Sweet & Maxwell 2017), Ch 13.

160 See Commission Communication of 10 January 2017, ‘Building a European data economy’, COM(2017) 9 final. See also Commission Staff Working Document on ‘Geo-blocking practices in e-commerce’, http://ec.europa.eu/competition/antitrust/e-commerce_swd_en.pdf; see also the Commission Report on the e-commerce sector inquiry, n 103 above. See also the European position adopted in the net neutrality provisions of the TSM Regulation (Commission Regulation (EU) 2015/2120 laying down measures concerning open internet access). Refer also to COM(2015) 627 Proposal on cross-border portability of certain forms of online content.

161 Refer to discussions among the European institutions as regards the Proposed Directive establishing the European Electronic Communications Code, COM(2016) 590; refer also to the BEREC Report of January 2016 on OTT Services. Refer also to ‘Europe’s digital progress report 2016’ at <https://ec.europa.eu/digital-single-market/en/european-digital-progress-report>.

162 Refer to Commission Communication on proposed revisions to the Audio-visual Services Directive, COM(2016) 287 final. See also COM(2015) 635 on the regulation of certain aspects of online contracts, and also COM(2015) 634 on contracts for the supply of digital content.

163 COM(2015) 192 final.

The Commission is also in the process of considering the extent to which it is necessary to create a ‘fit for purpose regulatory environment for platforms and intermediaries’, and launched a public consultation in relation to this issue on 24 September 2015. While it is far too early to predict the results of that consultation, it is clear that there will be a significant debate over the next year to determine the extent to which sector-specific regulation (in this case, telecommunications regulation) should encroach into areas that have hitherto developed without any meaningful *ex ante* regulatory intervention. Worryingly for online platform providers, proposals that have been considered range from: the European Parliament’s Resolution calling on the Commission to consider proposals unbundling search engines from other commercial services¹⁶⁴ and proposals to introduce a mechanism for obtaining fair access to ‘essential’ platforms,¹⁶⁵ to an extension of the concept of an ‘electronic communications service or network’ to capture the operations of many online platforms.¹⁶⁶

To the extent that the measures proposed seek to assimilate the myriad online platform providers into the world of more static telecoms networks, there is a clear and present danger that a Type 1 error will be more likely through such *ex ante* intervention. Accordingly, the author takes the view that such a path should be avoided unless *ex post* competition rules show themselves to be not ‘fit for purpose’. While there may be much that still needs to be resolved in the application of competition rules, it is submitted that their effectiveness is far more appropriate in resolving actual and potential market failures in the context of online platforms.¹⁶⁷

164 See European Parliament Resolution of 27 November 2014 supporting consumer rights in the digital single market (2014/2973 (RSP), at point 15.

165 Refer to Q&A session among national telecommunications operators at <http://innovation-regulation2.telecom-paristech.fr/wp-content/uploads/2015/04/R%C3%A9gulation-des-platformes-IRSN-7-avril-2015-FFF-EN-clean.pdf>.

166 The terminology used under the current EU Regulatory Framework.

167 The findings of the Commission in its Communication on the ‘collaborative’ economy, n 156 above, suggest that the Commission also shares such reticence in unnecessarily subjecting nascent (and varied) markets to prescriptive regulation.