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EDITORIAL COMMENTS

Special Advice on Competition Policy for the Digital Era

In 2018, the Commissioner for competition, Margrethe Vestager, appointed three eminent academics (a lawyer, an economist, and an engineer) as special advisers. She asked them to write a report on how competition law should evolve in light of the challenges posed by digital markets. The report was released in March 2019, following a public consultation and a one-day conference.[1] It is one of many reports on competition law and digital markets requested by governments, by competition agencies worldwide, or initiated by independent scholars that were released nearly contemporaneously.[2] While one cannot chide the Commission (or other competition agencies) for wishing to learn more about the possible role of competition law enforcement in digital markets, one has to wonder about the timing of this exercise. When the intention to appoint a panel of experts was announced,[3] the Commission was already well on its way to deciding three cases concerning Google,[4] had taken a fair number of decisions under the EU Merger Regulation about Facebook and Microsoft expanding the portfolio of products they offer,[5] and it had dealt with Amazon's and Apple's ebooks policy.[6] The so-called GAFAMs were thus within the sights of the Commission. Perhaps at this stage it might have been wiser to ask for a retrospective study of cases that were closed, so as to

1. Crémer, de Montjoye and Schweitzer, *Competition Policy for the Digital Era – Final Report* (2019). Supplementary docs and pics at: <ec.europa.eu/competition/information/digitisation_2018/report_en.html>.

2. Furman, *Unlocking Digital Competition: Report of the Digital Competition Expert Panel* (March 2019); Australian Competition and Consumer Commission, *Digital Platforms Inquiry – Final Report* (June 2019); Stigler Committee on Digital Platforms, *Final Report*, September 2019, available at <research.chicagobooth.edu/stigler/media/news/committee-on-digitalplatforms-final-reportstiger>; *Digital Era Competition BRICS Report* (September 2019), available at <bricscompetition.org/materials/news/digital-era-competition-brics-report/>; *A new competition framework for the digital economy: Report by the Commission 'Competition Law 4.0'* (September 2019), prepared for the German Ministry of Economic Affairs and Energy and counting among its principal authors, Heike Schweitzer. As might be expected some of the ideas in this report echo those of the special advisers.

3. Vestager, "How competition can build a better market", Speech at the American Enterprise Institute, Washington, 18 Sept. 2017.

4. Case AT.39740 – *Google Search (Shopping)* (27 June 2017), Case AT.40099 – *Google Android* (18 July 2018), Case AT.40411 – *Google Adsense* (20 March 2019).

5. E.g. Case M.7217, *Facebook/Whatsapp* (3 Oct. 2014), Case M.8124 – *Microsoft / LinkedIn* (6 Dec. 2016).

6. Case AT.39847 – *E-books* (25 July 2013), Case AT.40153 – *E-book MFNs and related matters (Amazon)* (4 May 2017).

learn from past enforcement efforts as a guide to the future. This was done by the UK Competition and Markets Authority with respect to a spate of merger clearances for example.[7] And one might have considered what lessons were to be learned from the turn-of-the-century *Microsoft* case, where the final judgment of the General Court on remedies was issued in 2012, over a decade after the start of proceedings.[8] Indeed, it is claimed that the antitrust action against Microsoft's exclusionary practices in the US in the late 1990s helped open the market for firms like Amazon and Google.[9] If competition agencies knew how to open up digital markets then, could the present Commission not learn from the past to sharpen the approach for today?

Still on the issue of timing, this report arrived towards the end of the Juncker Commission's term: the Commissioner for competition would have had precious little time to act on it. At any rate, the impact of this advice is likely to be seen only once the von der Leyen Commission begins its work, not least as Ms Vestager has retained the competition portfolio (this is the first time that this portfolio has been held by the same person in two different Commissions) and she is also executive Vice-President in charge of setting the strategic direction for Europe in the digital age, giving her a clear mandate to enforce antitrust law and play a role in initiating legislation if competition laws are not up to the task. The first initiatives on digital market regulation have been announced recently and, as will be seen, they chime with the more cautious lines of the special advisers' report.[10]

Moreover, as might have been expected, Google has been quick to appeal against the decisions rendered against it: pending judicial consideration of some of the innovative features of the Commission decisions in these cases, it is not clear how much of the special advice offered in this report can actually be implemented by the Commission in its decision-making practice moving forward. This must also have placed the authors in a quandary: could special advice even hint that a Commission decision is poorly grounded, or could the advice risk contradicting expected enforcement action?[11]

And it won't therefore be surprising that the report is "proudly centrist".[12] In other words the authors do not take the neo-Brandeisian line for a revolution in antitrust, nor do they favour a laissez-faire attitude and advocate

7. Lear, *Ex-post Assessment of Merger Control Decisions in Digital Markets: Final Report* (UK Competition and Markets Authority, 2019).

8. Case T-167/08, *Microsoft Corp.* v. *Commission*, EU:T:2012:323.

9. Baker, *The Antitrust Paradigm* (Harvard Univ. Press, 2019) Ch.1.

10. *Shaping Europe's Digital Future,* COM(2020)67 final.

11. It seems the authors chose to support the current stance: e.g., some of the discussion in Ch. 5 seems to offer support for *Google Shopping* (see especially p. 66) and also to tally with the concerns surrounding the ongoing *Amazon* case.

12. *Supra* note 1, p. 14.

a lower enforcement effort. The report does not explain why the middle of the road is to be preferred to the two radical options left and right of it, but it can be imagined that the Commissioner did not want a blueprint that did not align closely to delivering a plan of action that could be implemented in the lifespan of the new Commission. Moreover, time probably prevented the authors from engaging in depth with the relevant literature, a feature that is shared by many of the other reports: a broader contextualization of technology markets and their regulation would have been helpful had the urgency for writing these reports not been there.[13]

At the same time, one wonders if commissioning the near-simultaneous promulgation of reports by multiple groups of experts is just a façade to show that the agencies are doing something about digital markets – after all, as is noted in one of the later reports, the experts echo each other's findings.[14] More optimistically this convergence among the reports about how to proceed *vis-à-vis* digital dominance might serve as a signal to competition agencies to take enforcement action, safe in the knowledge that there is a global consensus.[15]

In sum, the context and background that led to the special advisers' report are somewhat unusual and, as discussed below, the report is also a mixed bag, at once conservative (competition law can deal with digital markets by incremental evolution) and provocative (some recommendations stretch competition law in ways that other reports consider off-limits).[16] The report is structured as follows: first the issues are framed by recalling the economics of digital markets and by reflecting on how EU competition law can position itself to face the digital marketplace. Armed with these premises, three topics are discussed: platforms, data, and merger control. We follow that structure here to engage with aspects of this report.

13. E.g. heads of competition agencies might like to study Wu, *The Master Switch* (Penguin Random House, 2010) for historical contextualization of innovation and incumbents' response; Zuboff, *The Age of Surveillance Capitalism* (Public Affairs, Hachette Book Group, 2018), for a sociological insight; Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (OUP 2019), for a wider legal framing; Baricco, *The Game* (Einaudi, 2018) for a cultural account of the paradigm shift of new technology.

14. Stigler Report (*supra* note 2), p. 28.

15. This is the view taken by Competition and Markets Authority, *Online Platforms and Digital Advertising: Market Study Interim Report* (2019), paras. 6.10 and 7.16, an authority now sadly sidelined.

16. E.g. both Stigler and Furman Reports focus on regulation or a code of conduct on platforms, while the special advisers think some steps may be taken under Art. 102 TFEU.

Recalling the economics

The report begins with a review of the economics of digital markets, noting that "large incumbent digital players are very hard to dislodge."[17] This is the result of a combination of features which inevitably leads many digital markets to tip so that there is a single dominant player: extreme returns to scale (that is, once Google has set up its search engine, serving one or one billion users makes relatively little difference to its costs), network effects (the more users on a social media platform for example, the greater the value the platform has for everyone because each user can connect with more people), and data. Data is a source of competitive advantage, for example a music platform that knows your tastes (and the tastes of others) is better able to suggest what other music you might enjoy.[18] This may make consumers reluctant to switch to another music platform that is unable to provide personalized offers. Moreover, some digital markets operate as ecosystems (e.g. when we buy a mobile phone subscription we obtain by default a diverse set of digital services as a bundle): economies of scope (which mean that the unit costs for the provider of one digital service fall if they offer other related services) and incompatibility between ecosystems may lock consumers into the first mover.

When these elements combine, it is likely that a single digital provider dominates the market at any one time, so that competition is not "in" the market, but rather "for" the market. In other words, firms compete to replace the incumbent market leader. This is not to say that the market is operating poorly. As the authors note, the overall impact of digital markets has been "extremely positive."[19] Rather, the advice is common sense: adapt competition law enforcement to the economic realities of markets. Specifically, this means being attentive to the high entry barriers faced by new entrants and to the risk that the incumbent will defend its position in ways that may be anticompetitive. This quick summary of the economics of digital markets offered by the special advisers is largely uncontroversial and tallies with the considerations found in the other reports.[20]

Reflecting on the nature of EU competition law

Chapter 3 of the report is likely to be of more interest to the readership of this *Review* as the advisers reflect on the fundamentals of EU competition law, in particular on the role of competition law *vis-à-vis* dominant firms. We should

17. *Supra* note 1, p. 3.
18. *Supra* note 1, p. 28 for this example.
19. *Supra* note 1, p. 35.
20. E.g. Furman Report, cited *supra* note 2, Ch.1.

recall that the application of competition law to dominant firms has always been controversial, and many have observed the mixed fortunes of DG Competition's attempt to redirect Article 102 TFEU towards an approach that is more aligned with mainstream economics, requiring robust evidence of likely anticompetitive effects before condemning the practices of a dominant firm.[21] This stance arose from a concern that competition law was being over-enforced, protecting undeserving market actors and stymieing innovation. Recently, in cases like *Intel* and *MEO*, it appears that the analytical framework proposed by the Commission in the Guidance on enforcement priorities is (finally or regrettably, depending on one's point of view) gaining some traction among the judiciary.[22]

Just as the Court is inching towards an effects-based evaluation of unilateral conduct, the report appears to advance a cautionary note about the more economic approach, indicating that over the past 60 years competition law enforcement has evolved but "[a]t the same time, the stable core of EU competition rules has prevented EU competition policy from following fashions."[23] This is reminiscent of the view of Advocate General Kokott who, reflecting on the calls for the adoption of a more economic approach, advised that "the Court should not allow itself to be influenced so much by current thinking ('Zeitgeist') or ephemeral trends, but should have regard rather to the legal foundations on which the prohibition of abuse of a dominant position rests in EU law."[24] At the same time the report hedges its stance, indicating that the emphasis on the effects of a practice has been part of the DNA of EU competition law since the 1980s, but that the adverse effects that EU competition law protects against are those for all users, not just those for final consumers.[25]

Whatever the nature of the effects-based approach that EU competition law has applied so far, ultimately the report suggests that under-enforcement is risky in a setting where market power is more "sticky" given the economic features of digital markets. In sum, it seems that the debate on how to calibrate enforcement of Article 102 TFEU continues, now under the rubric of how to

21. Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, O.J. 2009, C 45/7; Monti, "Abuse of a dominant position: A post-*Intel* calm?" 3 (Winter 2019) *CPI Antitrust Chronicle.*

22. Case C-413/14 P, *Intel Corp* v. *Commission*, EU:C:2017:632; Case C-525/16, *MEO – Serviços de Comunicações e Multimédia SA* v. *Autoridade da Concorrência*, EU:C:2018:270.

23. *Supra* note 1, p. 39.

24. Opinion of A.G. Kokott in Case C-23/14, *Post Danmark A/S* v. *Konkurrencerådet* (*Post Danmark 2*), EU:C:2015:343, para 4.

25. The report does not make any reference to *Intel* when discussing the nature of competition law, preferring the more conservative judgment in Case C-23/14, *Post Danmark 2*, EU:C:2015:651.

handle digital dominance. This report appears to push back against the more economics-based approach, favouring a more aggressive enforcement line.

In this perspective, the authors of the report suggest that some tinkering with the standard and the burden of proof might be necessary in instances where markets are highly concentrated and entry barriers insurmountably high. Two high-level suggestions are made. The first is quite general and hard to interpret: "one may want to err on the side of disallowing types of conduct that are potentially anticompetitive, and to impose the burden of proof for showing pro-competitiveness on the incumbent."[26] It seems here that the advice is to lower the standard of proof for the agency (even if potential effects already appear to suffice according to the case law the advisers cite),[27] while asking the defendant to explain its conduct. But on this point it is not clear whether "pro-competitive" is meant as a synonym for efficiency (which would sit well with the case law) or whether the advice is that for some conduct which is welfare ambiguous the burden should shift to the defendant to show that conduct enhances rather than harms competition (which would be a radical break from what the case law suggests).[28] The second suggestion is more concrete: a presumption in favour of imposing a duty of interoperability in cases where the dominant platform holds certain data that rivals cannot reproduce or in cases where the dominant platform is expanding its services to create an ecosystem of digital services, thereby risking the marginalization of firms that offer only certain digital services.[29] The gist of this suggestion is more clear: for example, a dominant social media platform could be required to allow its subscribers to use some of its features on another social media platform, thereby allowing subscribers of social media platforms to multi-home in a convenient manner. This would facilitate the entry of new rivals. Conceptually, this remedy is nothing new (it is in essence one of the remedies imposed on Microsoft, requiring it to facilitate interoperability with other software), but what is novel in the advice is that there may be circumstances when the duty is triggered without establishing an abuse in the first place, shifting the burden of justification onto the undertaking. One can already hear the defence lawyers sharpening their quills to recall that the criminal law nature of competition law militates against such aggressive tactics.

26. *Supra* note 1, p. 51.
27. Case C-23/14, Case *Post Danmark 2*, para 66; see *supra* note 1, p. 42.
28. In this respect the Stigler Report (cited *supra* note 2) is bolder in calling for reversals of the burden of proof.
29. *Supra* note 1, pp. 51–52.

Platforms: Regulating private regulators

Having noted the risks that platform markets may tip to favour a single provider, the authors of the report discuss two issues: how to ensure there is competition for the market, so that today's incumbent may be replaced, and how to use competition law to discipline platforms that play a regulatory role.

In addressing the first issue, some interesting insights are provided about how to facilitate multi-homing by consumers and by customers of platforms, but it is with the disciplining of dominant platforms that the paper offers some fresh perspectives. The gist of the principal proposal is that when a platform regulates a given market, "the operators of dominant platforms have a responsibility to ensure that competition on their platforms is fair, unbiased, and pro-users."[30] Thus, if one has a dominant online marketplace then those wishing to sell goods via the marketplace must be treated fairly and the platform cannot favour one seller over another arbitrarily, and consumers must be able to benefit from the marketplace by being given valuable information and not be steered to certain sellers. In order to motivate this obligation, the report's authors draw on case law concerning sporting bodies that regulate the way athletes may participate in sporting events and what competitions are run. The International Skating Union, which regulates the eligibility of skaters and organizes its own competitions, cannot use its regulatory powers to ban athletes who participate in competing events in order to exclude rival organizations wishing to set up competing skating events.[31] Mutatis mutandis, neither can a platform favour its own products at the expense of rivals selling through that platform.

The authors might have bolstered this argument by noting that undertakings to which the State grants exclusive rights are also under similar obligations to facilitate competition. In particular, this strand of case law articulates a wide-ranging principle akin to that which the authors wish to discover. In these cases, the ECJ has held that the system of undistorted competition provided for under EU Law "can be guaranteed only if equality of opportunity is secured as between the various economic operators."[32] In these cases, the Court has condemned arrangements whereby a firm active on a market is also that market's regulator: in such cases it is inevitable that the undertaking will favour its business at the expense of rivals, much like the dominant platforms under discussion here. Those believing that competition is just one click away will never be persuaded by this analogy, nor will those who insist that it is one

30. *Supra* note 1, p. 61.

31. Case AT.40208 – *International Skating Union's Eligibility rules* (8 Dec. 2017).

32. Case C-49/07, *Motosykletistiki Omospondia Ellados NPID (MOTOE)* v. *Elliniko Dimosio*, EU:C:2008:376, para 51. This principle is also used by the Commission to motivate its decision in *Google Shopping* (cited *supra* note 4), para 331.

thing to impose obligations on firms whose dominance is conferred by public power, but quite a stretch to consider similar obligations on private undertakings. Moreover the case law referred to here generally deals with a market player that is present in two markets: as a regulator of market access (e.g. a sporting body) and as an organizer of activities on the downstream market (e.g. sporting competitions). In this instance, a duty to facilitate competition on the downstream market is relatively easy to justify because the firm has a clear incentive to use its regulatory power to favour its own businesses downstream. It is less easy to see how this could apply to a platform that is merely a regulator, but has no stakes up or downstream: can such a platform also be required to ensure a level playing field among rivals?

This seems what the authors of the report intend when, armed with this obligation, they exemplify what it entails. A dominant marketplace that, when searched by users, gives them only one choice out of many "risks selling monopoly power" and is suspect. Or a dominant marketplace that does not give users correct information about how its search results are ranked (e.g. it does not explain that sellers can pay for a higher ranking) may well infringe competition law. The authors note that this practice may also be contrary to the UCPD (Unfair Commercial Practices Directive), which has recently been amended to deal with digital markets.[33] If so, one wonders why we need to stretch competition law when we have existing legal tools to handle this. It seems as futile as using competition law to attack infringements of the GDPR (General Data Protection Regulation).[34] And sticking with acronyms, this piece of advice seems to intimate that the P2B Fairness Regulation is too timid an instrument.[35]

The obligation on regulatory platforms also provides the authors the opportunity to indicate that a vertically integrated platform that performs intermediation functions (is Google the name that is between these lines?) and which gives preferences to its goods or services at the expense of rivals also selling via the platform, "should bear the burden of proving that

33. Directive 2019/2161 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, O.J. 2019, L 328/7, Art. 3. See also the commitments that Booking entered into, "Booking.com commits to align practices presenting offers and prices with EU law following EU action" (Press Release IP/19/6812, 20 Dec. 2019).

34. Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), O.J. 2016, L 119/1. For discussion, see Robertson, "Excessive data collection: Privacy considerations and abuse of dominance in the era of big data", 57 CML Rev., 161–190.

35. Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, O.J. 2019, L 186/57.

self-preferencing has no long-run exclusionary effects on product markets."[36] This needlessly harsh language (proving a negative is invidious) is toned down by affording the defendant the opportunity to provide an efficiency defence for this conduct, even if the Commission has so far shown little sympathy for efficiency claims.

Bold in crafting aggressive enforcement, the authors are more restrained with remedies – supporting the use of behavioural remedies in lieu of breaking up vertically integrated platforms. However, they also reveal an imaginative streak in suggesting a new remedy category – restorative. This is not elaborated upon very much: the key idea is that a rival who has been disadvantaged by the dominant platform is entitled to seek some remedy (e.g. data access or compensation) from the dominant firm in order to "regain strength". One might retort that private enforcement is already well-placed to provide remedies to individual firms, especially given the latest case law whereby anyone with enough imagination to trace a causal link between competition law infringements and their losses can secure standing.[37]

Data: Designing access regimes

Holding data about consumers is key for the success of many digital markets: better data allows a platform to target advertisements more precisely allowing the platform to attract and charge more advertisers. One executive waxed lyrical about this: "So more users more information, more information more users, more advertisers more users, more users more advertisers, it's a beautiful thing, lather, rinse repeat, that's what I do for a living."[38]

The authors (in addition to offering a nice discussion of data exchanges and of the risks that too much sharing of data could yield anticompetitive effects) inquire when the holder of data might have an obligation to share that data to facilitate market access. Their premise is that the considerations for data access may be different from the considerations used to develop the case law on access to facilities or IP rights. For one thing, the holder of data has a right to data portability: users can thus transfer their data to a new service provider so that access can occur through voluntary conduct by consumers. However, as the authors note, the right to data portability enshrined in the GDPR is focused on conferring rights on the data subject and not on stimulating competition. Nor is it foreseeable that this right will be used so extensively as

36. *Supra* note 1, p. 66.

37. Case C-435/18, *Otis Gesellschaft m.b.H. and Others* v. *Land Oberösterreich and Others*, EU:C:2019:1069.

38. Jonathan Rosenberg, former Google Senior Vice President of Product Management and Marketing (2008) quoted in *Google/Android* (*supra* note 4) fn. 943.

to have an impact on competition.[39] Moreover, there are wider interests to be balanced when considering mandated access to data: not only a tradeoff between stimulating innovation and promoting competition but there are also concerns about the obligation to respect the privacy of data subjects (which means that either data subjects should consent or that the data is anonymized before being shared), the business secrets of the dominant firm, and the costs of requiring access (which can be very high if one requires regular access to data on a daily basis or when preparing a dataset to be shared).[40] Accordingly, a somewhat different framework may be required and the authors posit that perhaps this is a scenario where sector-specific regulation might be preferable to the application of competition law.[41]

Even so, the authors try and work out a pathway by which Article 102 TFEU might be invoked to compel a dominant firm to give access to data. In contrast to the discussion on platforms, this segment of the document is a tad more hesitant and not always particularly convincing. The authors start by noting that there are no property rights in data under EU law or national law, and this may justify "a more pro-active interpretation of Article 102". While property laws would set limits on property rights, that job in a setting with no property rights may fall to competition law.[42] Yet EU competition law has been applied in a fairly aggressive manner in cases where property rights exist (recall copyrighted TV listings that had to be licensed to Magill) by regulating the exercise of property rights in such a way as to limit their existence.[43] How much more pro-active can one be? At the same time, the authors suggest that a dominant firm should only be asked to share data to facilitate entry in complementary markets or aftermarkets. The reasons for limiting data access in this way are not entirely convincing: for refusals to license intellectual property rights, the ECJ has insisted that the party seeking access proposes to bring to market a new product, and it is not clear why the authors consider that such requests would be overly burdensome for data holders instead. Perhaps they fear that the holder of data may be the subject of too many data requests? But then, such is the bane of a dominant firm's special responsibility that the authors noted in discussing regulatory platforms: thou shalt make markets work well for others.

At any rate, the authors rightly recognize that a further limit to applying Article 102 is that data sharing cannot infringe the rights of the data subject, even if data sharing means that the data subject is better off economically.

39. *A European strategy for data*, COM(2020)66 final, p. 11.
40. *Supra* note 1, p. 76.
41. *Supra* note 1, p. 109. Reflected in the *European strategy for data* (cited *supra* note 39).
42. *Supra* note 1, p. 99.
43. Joined cases C-241 & 242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP)* v. *Commission*, EU:C:1995:98.

Thus, if a dominant energy supplier refuses to give customer data to other energy suppliers who would be able to use this data to offer consumers better energy prices, a competition authority may not request that such data is handed over unless the consumer is first offered the opportunity to object to their data being shared. [44] Rights trump efficiency, for once.

Buying start-ups

The dream of many a start-up is to be bought for a large sum by an established player. This is a significant incentive to innovate in the first place.[45] Recently, however, concern has been voiced that an established player may buy a start-up in order to exclude rivals or to prevent the start-up from usurping the incumbent's dominance. The report is curious in this section, for it ruminates on how to construct a theory of harm for these kinds of mergers, while at the same time it does not propose an amendment of the merger notification thresholds which would be necessary to activate the theory of harm which the report proposes.

The transaction the report's authors discuss in exploring how to regulate such mergers is *Facebook/Whatsapp*. While Whatsapp's turnover was below the threshold to require notification to the Commission, the transaction was the potential subject of review in three Member States and the parties thus requested that the Commission review it.[46] However, the Commission saw few problems with the merger, as the two firms were not (at the time of the transaction) actual or potential competitors. The authors review and reject a range of policy options that have been put on the table to handle this type of merger, because they risk over-enforcement. Their solution is to develop a new theory of harm which is premised on the dominant player holding a multiproduct platform or an ecosystem. In their view, such a player may wish to acquire a newly emerging firm out of fear that this entrant may in the long term attack the dominant firm's core market. Buying up the new entrant, instead, further consolidates the platform, for it is now able to offer an even wider range of services to its users.

This approach has something to go for it: since the late Clayton Christiansen developed the concept of disruptive innovation in the 1990s, a key management concern has been to try and anticipate threats to existing

44. This is the gist of the approach by French Competition Authority in Décision n° 14-MC-02 du 9 septembre 2014 relative à une demande de mesures conservatoires présentée par la société Direct Energie dans les secteurs du gaz et de l'électricité, paras. 289–297 which is cited by the authors.

45. *Supra* note 1, p. 111.

46. Council Regulation 139/2004 on the control of concentrations between undertakings, O.J. 2004, L 24/1, Art. 4(5).

business models.[47] The challenge of the theory of disruptive innovation however sits at odds with competition law: to Christiansen the disruptor is an unforeseeable actor who does not challenge the core business of the incumbent initially, but gradually turns market demand towards its business model. For non-millennials the paradigmatic example is Blockbuster losing its position to a firm that entered the film rental business by allowing users to borrow DVDs by mail order in 1997. That firm is Netflix; Blockbuster went bankrupt in 2010. The struggle for competition law enforcement is that, had Blockbuster proposed buying Netflix in 1998, one might not see likely harm, for Netflix was not a direct challenger to Blockbuster in the short term. Disruptive innovation is hard to foresee, and yet merger rules require reasonable foresight of harm. And this is where the advisers' suggestion for a new theory of harm falls rather flat, because they realize that "controversial acquisitions concern start-ups with a fast growing user base, such that the competitive threat is already present."[48] In other words, a merger can only be challenged when the disruption is foreseeable at the time the merger is notified. Thus the theory of harm proposed looks hard to implement since, as with the treatment of mergers with potential competitors, it requires a degree of foresight as to the likely impact the target will have on the acquirer's business model.

But the authors are right to wish to secure a wider scope for merger control, so that a new entrant may supplant the incumbent. One avenue that might have been examined is whether the acquirer and target are both competing for the attention of users. Recent economic literature suggests that platforms compete in an "attention market", whereby the longer users stay on their platforms the more valuable the platform is to advertisers. Applying this approach when a platform buys a start-up requires asking whether the two are competing for the same scarce resource: users' time online.[49]

Bizarrely, while the advisers posit a theory of harm, this would only be unleashed occasionally: most such mergers will not be notifiable under the EU Merger Regulation automatically but only if requested by the parties, because the target's turnover will usually be below the thresholds. The advisers instead note that since some Member States (Austria and Germany) have explicitly amended their merger law to try and intervene in cases involving the acquisition of start-ups,[50] the Commission should observe how these systems

47. Christiansen, Raynor and McDonald, "What is disruptive innovation?" (2015) *Harvard Business Review,* 44, written 20 years after the original paper and reviewing the literature that emerged since.

48. *Supra* note 1, p. 122.

49. There is some discussion in the Lear Report (cited *supra* note 7).

50. For Germany, see Scholl, "Why the new merger control thresholds in Germany?" 8 *Journal of European Competition Law & Practice* (2017), 219.

fare and whether the existing referral tools suffice to bring such cases to the Commission's attention anyway.[51] It isn't clear, then, whether the advice in this part of the report is also for the German and Austrian National Competition Authorities (NCAs) as they deploy their merger rules. Granted, wishing for the merger thresholds to be lowered may well be a pipe-dream, given the Member States' reluctance to yield more powers to the Commission; but given the importance of the issue, a bolder request to amend the Merger Regulation might not have gone amiss.

Institutional considerations

There are two institutional considerations at play in regulating digital markets: the role of regulation and the role of NCAs.

As far as the role of regulation is concerned, the report offers a unique stance on the relationship between competition law and regulation when compared to other reports. Others call for establishing a regulator for some digital markets, but remain vague on how such a new body would work alongside the competition authority. The advisers instead see competition law as an analytical tool that can be utilized to sharpen existing regulation or to signal the need for regulation. The history of EU competition law in fact reveals how intervention by the Commission via antitrust law can serve as the stimulus for regulation. Consider telecommunications generally, roaming specifically, and computer reservation systems: these are all instances where intervention by the Commission stimulated a more general regulatory response in order to open up markets. As the authors put it, "competition law can specify the general preconditions and inform the possible regulatory regimes."[52] In this light, competition law serves two purposes: enforcement can identify systemic market failures that stimulate a regulatory response; conversely a competition perspective on regulation also serves to place brakes on regulatory designs, by ensuring that markets that are regulated remain competitive.[53]

The role of NCAs is not covered by the report but it is intriguing how, on many issues pertaining to digital markets, it is national authorities taking the lead, for instance Facebook's privacy policies have been challenged in Germany using antitrust and in Italy using consumer law;[54] Google's arbitrary

51. *Supra* note 1, pp. 115–116.
52. *Supra* note 1, p. 10.
53. *Supra* note 1, p. 109.
54. PS10601 CV154 – "Sanzione da 3 milioni di euro per WhatsApp, ha indotto gli utenti a condividere i loro dati con Facebook" (*Comunicato Stampa*, 12 May 2017); Bundeskartellamt prohibits Facebook from combining user data from different sources (Press Release 7 Feb. 2019); at the time of writing the approach of the German NCA has come under criticism from the national court, see Robertson (op. cit. *supra* note 34).

terms and conditions for advertisers in France;[55] the online travel agents' market was tackled by coordinated action by three NCAs.[56] There are advantages to having multiple agencies watching over markets where developments are fast and where securing an enhanced understanding of how technology affects economic performance is vital. However, a coordinated enforcement strategy could be elaborated to harness the various NCAs.

From the Member States, we hear calls for more radical action: four Member States have written a letter to the Commissioner urging her to consider regulation of "digital platforms with paramount importance for competition",[57] language that echoes that of Germany's current competition bill.[58] Intriguingly the members of the "Competition 4.0" Commission make a number of suggestions that build on the report of the special advisers, but they wish to see more legislative intervention at EU level, proposing a framework directive to enhance data portability and a platform regulation for dominant online platforms.[59] Along similar lines the three Benelux competition authorities have pushed for establishing ex ante powers so that competition authorities can intervene to prevent anti-competitive conduct by dominant gatekeepers to the online ecosystem.[60]

To date, the Commission remains reluctant to be so bold, so fast. In its general communication setting out the Commission's strategy, entitled *Shaping Europe's Digital Future*, the Commission is still in review mode, indicating that a sector inquiry into some aspects of digital markets will be launched this year and a Digital Services Act package will examine whether ex ante rules for platforms serving as gate-keepers should be introduced.[61] Its *European Strategy for Data* released in February 2020 indicates that any right of access to data would only be mandated for specific sectors, and only if

55. Décision 19-D-26 du 19 décembre 2019 relative à des pratiques mises en œuvre dans le secteur de la publicité en ligne liée aux recherches.

56. Monti, "Galvanising national competition authorities in the European Union" in Gerard and Lianos (Eds.), *Reconciling Efficiency and Equity: A Global Challenge for Competition Policy* (Cambridge University Press, 2019) p. 365.

57. Letter of 4 Feb. 2020 from the governments of Germany, France, Italy and Poland. On file with the *Review*. The letter also renews calls for an industrial policy orientation, discussed in Editorial Comments, "Think big? Think twice! EU competition law in the face of calls for European champions", 56 CML Rev. (2019), 329.

58. Entwurf eines Zehnten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 (GWB-Digitalisierungsgesetz), Available at: <www.bmwi.de/Redaktion/DE/Downloads/G/gwb-digitalisierungsgesetz-referentenentwurf.pdf>.

59. *Supra* note 2, recommendations 4, 9, 10 and 11.

60. Joint Memorandum of the Belgian, Dutch and Luxembourg competition authorities on challenges faced by competition authorities in a digital world (2 Oct. 2019).

61. *Supra* note 10, p.10.

competition law cannot resolve the market failure at hand.[62] And it looks as if before starting any further regulatory intervention the Commission wishes to also make use of the Observatory of the Online Platforms Economy to see how firms exploit their digital advantage.[63] Ex ante regulation to supplement competition law, if any, is likely to be sector-specific.[64] In sum, the Commission seems to share the special advisers' view that competition law can deliver, but that some regulation may also give added value.

The challenges for the new Commission

Ms Vestager and the Commission face three challenges in their quest to regulate digital markets. The first is to navigate a path that satisfies Member States. Here it will be telling whether during Germany's presidency of the EU in the second half of 2020 there will be increased pressure to act more quickly than the Commission is doing at the moment and to supplement competition with more aggressive regulation: if the report of the "Competition 4.0" Commission is anything to go by, then this is likely. Second, there is a challenge from within antitrust law, which is to find ways to expand the reach of the competition rules in a manner that withstands judicial review and avoids the risk of condemnation that competition law is instrumentalized to secure industrial policy objectives. Finally, there is a challenge from outside, to secure remedies that the public perceive as effective in reining in firms that wield extraordinary power. Response to this last challenge is likely to be hampered as long as the jurisdiction where most of the digital giants are situated, the United States, remains sceptical about deploying antitrust law more aggressively or devising fresh regulation. Judging by the latest Economic Report of the President, there is little appetite for any deeper intervention: "[i]nstead, fact specific investigations based on what the agencies already do are more sensible."[65] This does not mean that the EU is incapacitated, but the wriggle room for action is reduced as a result, unless there is a change in administration.[66]

62. *Supra* note 37, p.13, footnote 39.

63. Ibid. p.14.

64. Answer given by Executive Vice-President Vestager on behalf of the European Commission, Question reference: E-003417/2019 (30 Jan. 2020) <www.europarl.europa.eu/doceo/document/E-9-2019-003417-ASW_EN.html>.

65. Economic Report of the President: Together with the Annual Report of the Council of Economic Advisers (February 2020) p. 222. The markets consider a major regulatory attack against big tech unlikely, see "Big tech's $2trn bull run" *The Economist* 22–28 Feb. 2010, p. 7 noting that antitrust and regulatory fines against the five tech giants have amounted to 1% of their market value.

66. Most candidates from the Democratic party favour more aggressive control of digital market power, see Team Warren, "Here's how we can break up Big Tech" (8 March 2019), available at <medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c>.