"*Shaping Competition Policy in the era of digitization*": The European Commission hosts a conference with academic and business leaders to address the challenges of digitization for competition policy.

On 17 January 2019, the European Commission hosted an experts conference to address the perceived challenges and opportunities of digitization. This note highlights the main issues discussed and the contributions submitted by stakeholders.

(i) The importance of data as an essential input.

"*The world's most valuable resource is no longer oil but data*".[1] This headline of an article published in The Economist in 2017 encapsulates much of the debate. Data drives modern business; data clusters are more valuable the bigger they are; and as economies of scale increase, economies of scope arise as a result of the possibilities afforded by the statistical treatment of data enabling bundles or the marketing of new products.

There has been talk of data as *essential facility* (which for a competition practitioner, leads to some eye-brow lifting) in the form of bottlenecks of data caused by some companies owning massive data clusters. Data-driven markets are often *winner-takes-all* markets where small players and new entrants struggle to gather enough data to compete. **M. Vestager** noted in this regard that *there are worries that just a few companies could control the data you need and that may make real competition impossible*. The need to have access to massive data clusters may amount to a barrier to entry that may ultimately imply lessened consumer choice.

Reference has also been made to artificial intelligence (**AI**), which can maximize data value, but which also has dark sides such as instances of collusion (or tacit collusion!) amongst algorithms potentially posing issues.

(ii) Zero-priced markets.

Modern antitrust heavily pivots around price theory. Some of the best-known technology platforms (Facebook, Google) are known for the provision of social media and search engine services in exchange for no money. The methodological dependence on positive prices may have led antitrust agencies to overlook instances of welfare harm. In multi-sided data markets, many goods and services are free for consumers, as platforms have the ability to cross-subsidize those services. However, consumers *do* pay for these services with their personal data. Unfortunately, consumers do not know how much their data is worth. As **Vittorio Colao, former CEO of Vodafone Group Plc**, puts it, *we must empower consumers so that they are able to attach the right value to their personal data* (which may provide consumers with some degree of bargaining power?). Similarly, if consumers are unwilling to provide personal data, they must be able to move to premium services for which they must pay a price with the advantage of higher quality (*e.g*. increased privacy).

(iii) Privacy becomes an undisputed pillar of consumer welfare.

There seems to be consensus around the importance of privacy. Consumers need to be able to exercise their rights; for instance, their choice on their preferred level of privacy. When assessing products and services, consumers should be able to compare both price and quality effectively, including the degree of privacy protection afforded by each service.

Without clarity on what data is being collected and how it is being used, consumers are unable to properly assess service quality. There seems to be consensus that companies' privacy terms and conditions are unintelligible –sometimes even for lawyers-, as expressed by noble-laureate **Jean Tirole** which makes it hard for consumers to make an informed decision on the key issue of consent.

Whilst admitting that the collection of individual consumer data may enable firms to develop innovative products and services, privacy must also be safeguarded. In some cases, dominant platforms may be tempted to impose an excessive loss in privacy (in the form of a deterioration in quality). Sometimes, multi-sided effects may prevent platforms from abusing their power, given that charging monopoly conditions in one side of the market may lead to users abandoning the platform. However, as argued by **Monique Goyens, Director general of BEUC**, the European Consumer Organization, providing consumers with tools to easily identify those firms which afford them a higher or lower degree of privacy is a key competition instrument, and she gave some examples such as development of rating systems; certified standards for products and

[1] *"The world's most valuable resource is no longer oil but data"*, The Economist, 6 May 2017 (https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data).

services offering a minimum degree of privacy; or requiring firms to set high data protection standards as a default option – for example, consumer data cannot be shared with third parties unless consumers explicitly opt-in.

(iv) Market power in digital markets.

Sandeep Vahesan, Legal Director of the Open Markets Institute, compared tech giant Amazon to a sovereign state, exercising its (quasi-regulatory) powers over retailers and consumers accessing the Amazon platform.

A special focus was put on leveraging theories of harm, where platforms use their strength to leverage their market power to other markets. These concerns arise notably in dual-role or vertical integration scenarios: platform acting simultaneously as a provider upstream and retail competitor downstream (Amazon). Dual roles imply potential conflicts of interest.

To deal with market power an increasing use of behavioral remedies or even the breaking up of tech giants (Standard Oil, AT&T precedents in the US were mentioned) should be on the table.

(v) Preserving innovation: merger control and theories of harm.

There is recent evidence in the US of a general increase in concentration and price mark-ups (and dividends) which may be suggestive of an increase in market power across the board. There is a perception that policy is not forward-looking enough to capture innovation or potential competition and that market features that are common in technology markets such as network effects and privacy are dealt with inadequately. In the words of **Johannes Laitenberger, Director General of the European Commission's Directorate General for Competition**, *the application of some of the existing theories, legal tests, analytical methods and investigative procedures needs to be reconsidered to ensure that they adequately address new phenomena*.

On the one hand, there are many technology mergers which may not be captured by traditional, mostly turnover based, jurisdictional thresholds (which may have enabled many *killer acquisitions* to have taken place wholly unnoticed). Revision of thresholds is taking place internationally, with some countries introducing value of transaction thresholds (Germany, Austria) [our note: market share thresholds may be well equipped to tackle this as evidence in the *Facebook/Whatsapp* suggests]. On the other hand, authorities must start considering network effects in multi-sided markets and relevance of data in the competitive assessment (such as in the *Apple/Shazam*,[2] *Facebook/Whatsapp*[3] cases).

Authorities have generally tackled most favored nation (**MFN**) clauses in a market power context (*iBooks*, hotels cases, etc). Once again, even if price must be considered, non-price effects should also be looked at (impacts on innovation and new online entry in cases involving fast-moving and dynamic markets). The *Dow/Dupont* merger is a recent, good example of this.[4]

(vi) Regulation and Competition enforcement.

Fiona Scott Morton, Yale University Professor, argues that the risks of under-enforcing where a merger leads to a reduction in product quality and/or innovation may be considered to be higher than risks of over enforcement. More pioneer cases are required to provide flexible solutions that could deal in an adequate manner with the technological shift. For instance, refusal to supply cases may need an update to provide flexible solutions to data access problems that may arise. The use of interim measures in the digital sphere should be readily available.

Finally, limiting the time of antitrust investigations should be considered [our note: this happens under Spanish law, where an interesting feature is that investigations are limited to 18 months since formal initiation of administrative proceedings!]. Long duration of antitrust investigations is a serious shortcoming that can make a final decision ineffective.

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[2] Decision of the European Commission of 6 September 2018, *Apple / Shazam*, case COMP/M.8788.
[3] Decision of the European Commission of 3 October 2014, *Facebook / Whatsapp*, case COMP/M. 7217.
[4] Decision of the European Commission of 27 March 2017, *Dow / Dupont*, case COMP/M.7932.