Last Thursday, 9 May, a joint conference (co-organized by the National Markets and Competition Commission (**NMCC**) and the Spanish Fulbright Alumni Association) took place on "***Electronic Platforms: Regulatory and Competition Law Challenges***". The conference was divided in three different panels.

The first panel dealt with **Internet platforms vs. traditional business models: taxi vs. VTC; tourist apartments vs. hotels…**, dealing with the highly contentious irruption of Internet platforms and/or Internet services in the local transportation business. Pre-contracting VTCs has become immediate through platforms' apps and taxis consider this to be unfair competition because VTCs do not have to fulfill the same administrative obligations as taxis do, in key areas such as applicable fixed tariffs, rights of drivers (maximum hours of work, holiday periods), restrictions to polluting vehicles, rights of clients, etc. According to the taxis' advocates, deregulation of the sector would be detrimental, as common public interest and service quality would be undermined. The view of the new Internet platforms is that they do not aim at competing with taxis but rather at offering an alternative to the private vehicle and facilitating a "transportation platform", offering VTCs, motorbikes, electric scooters and even taxi services.

According to the European Court's case law, platforms such as Cabify and Uber must be considered transportation operators, mainly because electronic platforms fix the prices to be applied by the VTCs, and are, thus, subject to the transportation regulations applying in Spain. Law 25/2009, of 22 December, implementing the Services Directive, allows each Autonomous Community to regulate the provision of the VTCs services, generating additional and different restrictions throughout the national territory. For instance, a new regulation was recently approved in Barcelona forcing VTC services to be pre-booked no less than 15 minutes in advance, which eliminated the benefit of immediacy and led Uber to stop providing its services in that city.

Another contentious area (that of touristic apartments) was also discussed from a regulatory standpoint by Mr. Lavilla.

The second panel of the conference dealt with **privacy, competition law and big data**. The debate dealt thoroughly with the Bundeskartellamt's Decision in the *Facebook Case.*[1] The theory of harm used by the German antitrust authority provides a new approach since it stems from the lack of control of users over their data and, thus, the lack of a proper consent given to Facebook.

From a data protection standpoint, Jesús Rubí emphasized that the conduct analyzed by the Bundeskartellamt was very similar to an investigation initiated by the Spanish Data Protection Agency resulting from Facebook's acquisition of Whatsapp. Indeed, the conduct was punishable in accordance with data protection laws since it is necessary that the consent offered by the user while accepting data treatment policies has to be lawfully obtained. On this regard, it was highlighted that the crucial part of an antitrust investigation is not that the conduct in question is lawful or unlawful from a data protection standpoint but that it is anticompetitive in the sense that the said data treatment, due to network effects, for instance, can give rise to instances of abuse by the dominant company.

Another question was whether or not competition authorities are qualified to apply antitrust rules to safeguard other general interests that are not purely antitrust-based such as privacy

[1] Decision of the Bundeskartellamt of 6 February 2019, ref. B6-22/16.

or environmental issues. Advocates of competition authorities applying competition laws to safeguard these interests stated that these issues should only be exceptionally analyzed and be limited to the aspects that affected competition. Privacy conditions are part of a business decision of undertakings. If users prefer to use services that guarantee higher levels of data protection they can choose other options. Thus, if competition authorities intervene in these decisions, this intervention could be impinging upon the operators' commercial freedom. High data privacy standards are a cornerstone of Apple's business model and Apple's competitive advantage, but that does not mean that Apple's competitors are breaking the law. Advocates of competition authorities' intervention acknowledged that millions of people accept burdensome terms and conditions and privacy settings without even reading them; Article 3 of the Spanish Competition Act allows the NMCC to intervene in cases where laws, such as privacy laws, are breached even in the absence of a dominant position.

The concept of data as an essential facility was also discussed, with some participants displaying a degree of skepticism.

Finally, there was consensus throughout the speakers that competition law is a perfectly valid tool to face new threats such as the digital revolution without needing specific reform in this regard. Great value was placed in the fostering of soft law by the different competition authorities so that businesses can have legal certainty on how to behave in dealing with these new phenomena. Similarly, the need of antitrust authorities being more agile in taking decisions was also stressed so that the said decisions do not lose their deterrent nature (an increased use of interim measures was also offered as a solution).

In the third panel, dealing with **market power of large internet platforms, and how public policy instruments should identify market power and avoid abuses**, the speakers reflected on the concept of market power asserting that traditional instruments used to measure market power such as market shares or high margins were in some cases becoming obsolete. Competition authorities should focus on alternative potential sources of market power, such as data or network effects.

Google's representative provided an interesting insight into the Google cases and how the 'essential facilities' doctrine had come to evolve in a way that no longer grants access to competitors in very narrow circumstances where such access is "essential" for the entrant business; but rather, as explained regarding the *Google Shopping* case, the European Commission had turned the requirement of "indispensability" into one of "convenience".

There is a global trend towards market concentration, which is a source of concern. Market concentration in this sector is also combined with quasi regulatory powers in some marketplaces, *e.g.*, Amazon. The vast resources invested in the Google cases show that it may be more productive from a competition policy standpoint to attempt to reorient these cases in a more consensual manner, to work out with companies which commercial policies best forward the goals of competition law. Forced divestitures of large Internet platforms (Facebook being the one recently mentioned by the press as candidate) would doubtlessly face important legal hurdles unless divestiture is consented or advanced by the relevant Internet company.

Several mentions were made to the expert report "*Competition Policy in the Digital Era*" with regard to its key findings in topics such as killer acquisitions of smaller or start-up Internet companies, or the need to reform competition law, especially with regard to

concentration thresholds. In this regard, Spain's market share threshold, even though heavily criticized internationally, has proven effective in dealing with acquisitions of electronic platforms (for instance, Facebook's acquisition of Whatsapp). Equally, Austria and Germany's size-of-transaction threshold was reflected upon, even if it's still early to see its results.

The role of competition enforcement was put in the spotlight. On the one hand, critics argued that in dynamic, fast changing markets, such as those in the digital economy, there is no need for enforcement because, naturally, incumbents are displaced by new competitors through fast-paced innovation. On the other hand, advocates of the need for active enforcement highlighted that network effects lead to permanent situations with consumers locked-in, dominant platforms able to leverage their power into connected markets, leading to instances of abuse and, possibly, insurmountable barriers to entry in digital markets.
