

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW
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Introduction

Chairman Cicilline, Ranking Member Sensenbrenner, members of the subcommittee, thank you for accepting this written statement for submission with regard to the subcommittee's investigation into competition in the digital economy and the role of digital platforms.

I provided my previous submission to this subcommittee in my capacity as the European Union's Commissioner for Competition. Following the entry into office of the new European Commission on 1 December 2019, in addition to the portfolio of Commissioner for Competition which I have retained, in my capacity as Executive Vice-President of the Commission for a Europe fit for the Digital Age, I also have the broader policy responsibility of coordinating the Commission's work in addressing the varied challenges arising from today's digital economy, and ensuring that the digital world works better for European citizens.

Although only 9 months have passed since my previous submission, policy reflections on the issues and challenges raised by digital platforms have intensified around the world, and so it is a very timely moment for me to be able to address you again, and inform you of the latest developments and the nature of our own reflections, both as regards the application of competition policy itself, as well as policy initiatives that are complementary to competition policy.

I have followed closely the hearings conducted by the subcommittee over the last year, and I am comforted to see that the issues you are looking at overlap to a large extent with what we are examining and seeking to address on this side of the Atlantic.

Main issues and challenges

Many if not most parts of today's economy are becoming increasingly digitised. One important element of this online economy is the development of digital platforms, which act as intermediaries between different businesses and consumers. To be sure, these platforms can bring significant benefits, not least in bringing consumers and businesses together. At the same time, in the context of considerations in relation to a level and competitive playing field, we have a concern that the reach and role of some platforms is unprecedented, and that they have a gatekeeper role which means that if they act unchecked, they can also cause significant harm to competition, innovation and ultimately to consumers. This is the context of our ongoing policy reflections.

Let me briefly highlight two categories of issue that are of increasing relevance when we consider digital platforms. The first is the dual role that digital platforms often have. By this, I mean that a company both operates a platform upstream, and at the same time competes with others who operate on the platform downstream. The company therefore has the possibility to influence the conditions of

competition downstream in its favour in a way that may be detrimental to choice and innovation and that ultimately harms consumers. To use a sporting analogy, the platform is both a player on the downstream market against rivals, and at the same time is the referee which determines the conditions of that competition on the upstream platform and can therefore influence the result in its own favour. It's of course true that in one sense, the platform provides a potentially valuable way for businesses to reach consumers, but when the platform has in practice become the whole market upstream or at least the key route to consumers, for example because of network effects and consumer lock-in, the question has to be asked whether the power to be the referee and exclude or diminish downstream players is beneficial for competition and ultimately society.

The second issue that I would like to highlight relates to the role and importance of data. It has become commonplace to refer to data as the new currency of the digital economy. This description is obviously pithy but there is a lot of truth in it. Many digital services, especially those offered by digital platforms, are or at least appear to be free of charge, but in practice, in exchange for the service, consumers have to provide vast amounts of data about their habits, preferences and personal lives to those platforms. One port of call to limit the potential consumer detriment of this “data hunger” of large platforms is strong privacy regulation. The European General Data Protection Regulation (GDPR) already provides many safeguards for individuals in this respect, but data protection enforcement, no matter how robust, may not capture all the complexities that the accumulation of “big data” sets by digital platforms can give rise to in markets for digital services. It is precisely the ability of large digital platforms to accumulate and exploit these big data sets about consumer behaviours and transactions which may lead to competition problems.¹ Such big data sets may consist of many different data that consumers hand over to the platform such as their e-mail addresses (“volunteered” data), or that platforms deduce from consumer behaviour such as data about transactions on a platform (observed data) or about predictions on consumer behaviour (inferred data). The competitive value of data therefore largely depends on the exact nature of the gathered data. The impact of data accumulation by large digital platforms on competition can be manifold. For example, the concentration of big data in the hands of a few digital platforms may act as a strong barrier to entry for newcomers. Conglomerate platforms may use data gathered by one service to inform business decisions with regard to other services they offer, thereby leveraging their market position in one market into another. Dual role digital platforms may use data about platform users to compete downstream with business users on the platform. In short, the shift to a data driven economy we are currently experiencing will also need a shift in how we look at markets and in particular consumer harm, which in data driven markets does not necessarily manifest itself in price increases but in less choice and innovation.

The European Commission's policy reflection

Our own reflections in recent years on the role of competition policy in the increasingly digital and globalised world have been part of a broader policy debate. On 2 June 2020, the European Commission launched a broad public consultation seeking to gather evidence, data and views from citizens, businesses, academics, civil society and any other interested parties on how to make a modern regulatory framework for digital services and online platforms in the EU.

¹ Of course, there may be very well be issues in relation to data that go well beyond the competition sphere, for example in terms of what individuals are in practice obliged to share as a condition of having access to certain services, and the transparency of such arrangements.

One key part of this aims to address the issue of the level playing field in European digital markets, where currently a few large online platforms act as gatekeepers. We are exploring rules to address these market imbalances, to ensure that consumers have the widest choice and that the EU single market for digital services remains competitive and open to innovation. On the basis of our own knowledge and experience, which are complemented by many varied contributions from different stakeholders, our view is that to ensure the contestability and fair functioning of markets across the economy, there is a need for a holistic and comprehensive policy response. This comprises three complementary and mutually reinforcing pillars:

1. **Continued vigorous competition law enforcement** using our existing case framework;
2. **Possible *ex ante* regulation** of digital platforms, including additional requirements for those that have a gatekeeper role; and
3. **A possible new competition tool** to deal based on case-by-case investigations with structural competition problems across markets which cannot be tackled or addressed in the most effective manner on the basis of the current competition rules.

Let me now address each of these pillars in turn.

Competition enforcement

The first pillar is and remains vigorous enforcement against anti-competitive conduct under our existing rules.

These rules are based on Article 101 of the EU Treaty on anticompetitive agreements (the equivalent of Section 1 of the Sherman Act) and Article 102 of the EU Treaty on abuse of a dominant position (the equivalent of Section 2 of the Sherman Act²). Pursuing, sanctioning and remedying anticompetitive conduct is the bread and butter of competition policy, and effective case enforcement will continue to have a key role to play - it can address and remedy harmful conduct in each individual case at the same time as having a broader benefit in terms of deterring similar harmful conduct in the future. As with every public authority, our resources are limited, and so our task must always be to focus on those conducts that have the greatest harmful effect, and hence where our intervention can bring the greatest benefits to consumers. When we pursue a case, we have to meet high procedural and evidentiary thresholds to prove a competition violation that will withstand in-depth scrutiny by our European Courts.

Let me take this opportunity to briefly outline our most recent and ongoing case activity in the area of digital platforms.

In relation to Google, we have adopted three prohibition Decisions in 2017, 2018, and 2019 (*Google Shopping*, *Google Android* and *Google AdSense* respectively). Each of these has been appealed by Google to the General Court of the European Union in Luxembourg (our court of first instance), and we continue to monitor implementation and compliance with the respective remedies in each case. I outlined the main elements of the cases in my previous submission, so will not dwell on them in any detail here. One noteworthy point that is common to all in my view, however, relates to the analytical framework. I sometimes hear it said that digital platform markets are characterised by new phenomena

² although Article 102 does not contain a provision on monopolisation - it relates solely to abuse of an existing dominant position.

such as network effects, two-sided markets and the role of data, and that antitrust cannot analyse such phenomena effectively. Whilst the role and importance of data may be orders of magnitude more significant than was the case in the past, the phenomena themselves are not new, and our framework has shown that our tools can be flexibly adapted to analyse the relevant issues. Indeed, what was striking in all three Google cases was that whilst the specific markets concerned in each case had not been dealt with by us before, the types of conduct that we sanctioned were rather “traditional” and involved *inter alia* tying, exclusivity requirements, and other types of contractual restriction.

Let me now turn to two ongoing investigations, which illustrate issues that may arise in relation to dual role platforms and which in my view merit a very close look to ensure that competition is not distorted.

On 17 July 2019, we started an in-depth investigation into Amazon’s business practices. When providing a marketplace for independent sellers, Amazon continuously collects data about their activity on its platform. Our investigation focuses on the use by Amazon of accumulated, competitively sensitive information about marketplace sellers, their products and transactions on the Amazon marketplace, which may inform Amazon’s retail business decisions. On 16 June 2020, the Commission also started an in-depth investigation regarding the terms that govern the use of Apple’s App Store by developers of apps that compete with Apple’s apps, and the conditions under which these developers can distribute their apps to users of devices running on Apple’s mobile operating systems.

Both investigations concern companies which at the same time offer platform services and downstream services in competition with the business user on their platform. Both investigations will explore whether this dual role leads to conflicts of interest and distortions of competition. As these investigations are ongoing, we have not yet drawn any conclusions in this regard.

Our experience shows that enforcement needs to be grounded in in-depth market knowledge. For this purpose, in order to obtain a good overview of how markets work and identify potential competition problems that may arise, the Commission has the possibility to launch inquiries into specific sectors of the economy (sector inquiries). In 2017, we successfully completed such a sector inquiry into e-commerce markets, which gave us valuable insights and led to follow-on enforcement - I outlined the details in my previous submission.

Earlier this month, we opened a new sector inquiry into the markets for consumer products and services linked to the Internet of Things. The consumer Internet of Things is now becoming a reality as more and more devices like TVs, fridges, wearables, smartwatches and fitness trackers become connected to the Internet and voice assistants allow us to control those smart devices. With this sector inquiry, we want to examine the relevant issues and ensure that these nascent markets remain open to competition, and that in particular data gathered through millions of connected devices are not monopolised by big online platforms to the detriment of consumers.

Whilst I consider that the cases and the sector inquiry that I have outlined illustrate our commitment to vigorous antitrust enforcement, we must not be complacent. There is always scope for improvement, both in terms of the way that we analyse issues substantively, but in particular in the efficiency of our interventions. In my view, this has two main dimensions: speed and effectiveness of remedies.

In terms of speed, I am sensitive to the criticism that our cases take too long, and that when our intervention does come, it can be too late, particularly in the context of digital markets where due to network effects, markets may be prone to tipping. I should first stress that in our system, which is

based on the rule of law and where our decisions are subject to intense judicial scrutiny by the European Courts, it is most important to fully prove the case in full respect of the parties' procedural rights, and that in complex markets, the substantive analysis is not something that can be carried out from one day to the next. At the same time, this does not mean that improvements are not possible. For example, in terms of substantive analysis, whilst it is our burden of proof to demonstrate that a certain practice has harmful effects, when we undertake an effects analysis, I sometimes wonder how much needs to be shown to demonstrate that a company with a 95% market share which locks up more than half the market by imposing exclusivity on customers has harmed choice and competition. Another example where improvements are possible relates to interim measures. This is a part of our toolkit that we had not used for some time, but it allows us to stop behaviour that is likely to result in serious and irreparable harm to competition, provided that we can prove that a *prima facie* infringement of competition rules is ongoing. We have made use of this instrument in October last year in the Broadcom investigation, by issuing an order on Broadcom to suspend obligations on its customers to buy all or nearly all their requirements from Broadcom, as well as pricing and non-pricing advantages that were conditional on such obligations. Since then, Broadcom has offered commitments to close the investigation - we are currently assessing these in light of the market feedback that we have received. It is too early to speculate on the outcome of this case but the interim measures tool is one that we are likely to be using more frequently in the future when the circumstances justify it.

Another area in which I take a particular interest is the need to ensure that our remedies are effective. But what should that mean in practice? When we conclude that there has been a competition infringement, we certainly have the power to order the company to stop the conduct in question (a so-called “cease-and-desist” remedy). But in a scenario where that conduct had been going on for many years and has allowed the company to illegitimately benefit to the detriment of others, I often find myself asking the question whether such a cease-and-desist order is sufficient, or whether we shouldn't impose remedies that go beyond such an order - the aim being to restore the competition that has been lost, rather than just levelling up the playing field where the company has already gained a competitive advantage due to its illegal conduct. Of course, this very much depends on the specifics of each case, but this aspect of restorative remedies is something that we will be looking at more closely in the months and years to come.

Naturally, whilst what I have outlined above relates to enforcement as regards “conduct” (or “antitrust” as we would say in Europe), a critical part of our enforcement framework also relates to merger control. It is clear that digital and platform-related issues will also be highly relevant in this sphere. I outlined in my previous submission a broad range of digital-related merger cases where data aspects were an important part of our analysis, be it as an input, a potential barrier to entry or a parameter of competition, and I believe that such considerations can be fully integrated within our framework of analysis. These cases also raise specific questions for merger control when it comes to the need to ensure effective and appropriate remedies, especially as regards the risks of data accumulation in some already concentrated markets. Traditional divestitures may not always be conceivable to address such issues, hence the need to reflect on whether alternatives - such as data silos ensuring strict limitations on data usage, or alternatively, data access by third parties - could be operational and effective.

Regulation

The second pillar is potential *ex ante* regulation of digital gatekeeper platforms.

Beyond ensuring that our core competition rules are fit for purpose in the context of individual case enforcement, we observe that there are a number of large online platforms which operate as gatekeepers between businesses and citizens, benefitting *inter alia* from strong network effects and data advantages of the type I described above. Some such platforms exercise control over whole platform ecosystems that may be impossible to contest by existing or new market operators, irrespective of how innovative and efficient they may be. What is more, the platforms often have a dual role of the type I outlined above where they compete downstream with rivals which operate on their platform, and they are able to leverage their platform advantage, for example in relation to their access to large amounts of data or their ability to compete in downstream markets in a way that they would otherwise not be able to do. Whilst there is the benefit that I outlined from the platform bringing consumers and businesses together, we are concerned that the economic power and the gatekeeper role of such platforms may hinder entry and innovation possibilities from others, which is ultimately to the detriment of consumers and business users.

We therefore consider that additional rules at EU level may be needed to ensure contestability, fairness and innovation and the possibility of market entry that go beyond competition or purely economic considerations. On this basis, the Commission is exploring possible *ex ante* rules to ensure that markets characterised by large platforms with significant network effects acting as gatekeepers, remain fair and contestable for innovators, businesses, and new market entrants. This new framework would complement the horizontally applicable provisions of our Platform-to-Business Regulation which I outlined in my previous submission, and which entered into force on 12 July 2020. These provisions primarily contain transparency and information-related obligations which apply to all online intermediation services. In contrast, the additional *ex ante* regulatory framework would apply to a more limited subset of large online platforms which have a gatekeeper role, and which would be identified on the basis of clear criteria.

Our reflections on such a framework are ongoing, and they will be enriched by the results of the ongoing public consultation, which concludes on 8 September 2020. Whilst the precise nature and scope of any provisions are still to be determined, one option would be to establish a clear list of dos and don'ts that the platforms concerned would be required to comply with - in other words, a specifically defined set of obligations and prohibitions that would be of general applicability to the platforms concerned. That might include, for example, rules to stop platforms misusing their position as both player and referee - both owning a platform, and competing with others that rely on that very same platform. One possible rule could be one that prohibits platforms from displaying their own downstream services more prominently than those of rivals. Another possible rule in relation to data might be a so-called "data silo" rule, where a conglomerate platform is prohibited from using specific data sets for certain business purposes in order to prevent it leveraging from one market to another. Reflections are also ongoing on how to best ensure that the rules remain effective and pertinent against the background of the heterogeneity and fast evolution of platforms' business models.

Possible new competition tool

The third pillar is a possible New Competition Tool to address structural competition problems that cannot be tackled or addressed in the most effective manner on the basis of Articles 101 and 102 of the EU Treaty. This is also part of the ongoing public consultation that was launched on 2 June 2020.

The proposal is based on our experience with enforcing the EU competition rules in digital and other markets, as well as the many contributions to the worldwide reflection process about the need for changes to the current competition law framework to allow for enforcement action preserving the competitiveness of markets. This includes the report of the Special Advisers that I outlined in my previous submission,³ as well as economic evidence suggesting increasing market concentration and firm profitability levels in digital and other markets.⁴ The reflection process has identified certain structural competition problems that we believe that our existing competition rules cannot tackle (such as monopolisation strategies by non-dominant companies which nevertheless have market power) or cannot address in the most effective manner (e.g. parallel leveraging strategies by dominant companies into multiple adjacent markets).

While structural competition problems can arise in a broad range of different scenarios across markets, they can be generally grouped into two categories - structural risks for competition and structural lack of competition - depending on whether harm is about to affect or has already affected the market.

Structural risks for competition refer to scenarios where certain market characteristics (such as network and scale effects, lack of multi-homing and lock-in effects) and the conduct of the companies operating in the markets concerned create a risk for competition. This applies in particular to markets that are prone to tipping. The ensuing risks for competition can arise through the creation of powerful market players with an entrenched market and/or gatekeeper position, the emergence of which could be prevented by early intervention. Other scenarios falling under this category include unilateral strategies by non-dominant companies to monopolise a market through anti-competitive means.

Structural lack of competition refers to scenarios where a market is not working well and not delivering competitive outcomes due to its structure (i.e. structural market failures). These can include (i) markets displaying systemic failures going beyond the conduct of a particular company with market power due to certain structural features, such as high concentration and entry barriers, consumer lock-in, lack of access to data or data accumulation, and (ii) oligopolistic market structures with an increased risk of tacit collusion, including markets featuring increased transparency due to algorithm-based technological solutions (which are becoming increasingly prevalent across sectors).

While the exact scope and the procedural design of the possible New Competition Tool are subject to our ongoing review, its overall functioning would be based on the following general principles, which correspond to the well-functioning market investigation powers of a number of other competition authorities around the world. First, to establish the existence of a structural competition problem, the Commission would carry out a thorough market investigation into the particular features and dynamics of the market(s) concerned and, if confirmed, design a well-tailored and proportionate remedy package to address the structural competition problems identified. Second, there would be no finding of an infringement against any of the companies active in the market concerned (therefore also no fines nor damages actions), while the principles of fair process and judicial review would be guaranteed.

On this basis, the New Competition Tool would complement both existing case enforcement under Articles 101 and 102 of the EU Treaty, as well as the possible *ex ante* regulation that would apply to digital gatekeeper platforms.

³ Report by Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer on "[Competition policy for the digital era](#)", published in April 2019.

⁴ Staff Working Document, [Single Market Performance Report 2019](#).

Conclusion

During my first mandate as European Commissioner, when my sole responsibility was as Commissioner for Competition, I was already keenly aware of two broad themes: first, that an effective competition policy could play a key role in keeping digital markets competitive; and second, that it was not and should not be for competition policy alone to address all the issues and challenges arising in digital markets - competition policy is of course an important part of our overall policy toolkit, but there also needs to be a coherent and complementary policy response involving other areas of policy. If anything, given my additional, broader responsibilities, I am even more keenly aware of this now, and I hope that I have conveyed the nature of our main ongoing policy reflections in relation to digital platforms in this respect.

As I highlighted in my previous submission, digital markets are generally international, and so I consider it of great value that we can learn from our respective knowledge and experiences in different jurisdictions. We hold regular dialogues with a range of competition enforcers as well as governments and other public bodies from around the world, including of course from the United States, with which we have a long history of close and effective cooperation. Of course, every jurisdiction has its own specific market context, as well as its own legal and policy framework and traditions, and so it is unrealistic to expect that there will be a precise, one-size-fits-all solution to address the range of issues that digital platforms present. Having said that, if we can formulate appropriate policy responses around the world on the basis of shared experiences and knowledge and if possible, common visions, I consider that that can only be beneficial, both for citizens and businesses. Once again, I am grateful for the opportunity to have again been able to share my thoughts with you - I wish you all the best with your ongoing work and look forward to cooperating closely with you on these issues in the future.