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E-COMMERCE COMPETITION ENFORCEMENT GUIDE

SECOND EDITION

Editor
Claire Jeffs

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This article was first published in November 2019
For further information please contact Natalie.Clarke@lbresearch.com

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Published in the United Kingdom by Global Competition Review

Law Business Research Ltd
Meridian House, 34-35 Farringdon Street, London, EC2A 4HL, UK

www.globalcompetitionreview.com

Second edition

To subscribe contact subscriptions@globalcompetitionreview.com

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – clare.bolton@globalcompetitionreview.com

ISBN 978-1-83862-215-2

Printed in Great Britain by Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following contributors for their learned assistance throughout the preparation of this book:

ALIXPARTNERS UK LLP

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

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Publisher's Note

E-commerce has changed our homes – replacing books, CDs, DVDs and satellite dishes with downloads and streaming; automobiles with app-hailed rides; shopping bags with postal delivery boxes. It is changing our language too, adding terms such as 'phygital' for blending online and offlin business. Yet, as noted by Claire Je s in her introduction, competition authorities are evolving their existing tools to address e-commerce, not revolutionising how they apply antitrust law.

Practical guidance for both practitioners and enforcers in navigating this challenging environment is critical. This second edition of the *E-Commerce Competition Enforcement Guide* – published by Global Competition Review – provides such detailed guidance and analysis. It examines both the current state of law and the direction of travel for the most important jurisdictions in which international businesses operate. The Guide draws not only on the wisdom and expertise of distinguished practitioners from 14 firms, but also the perspectives of the competition authorities in the EU, US, Australia, India, Japan, Singapore and Taiwan. It brings together unparalleled proficiency in the fi ld and provides essential guidance for all competition professionals.

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PART I
EUROPE

08

European Union – Two-Sided Markets, Platforms and Network Effects

Derek Holt and Felix Hammeke[1]

Introduction

Digital platforms are at the forefront of innovation and disruption in various industries across the globe. Some of the most valuable companies in the world – Google, Amazon, Facebook and Apple – all embraced a platform business model for some or all of their activities. Ride-hailing apps like Uber and Lyft have revolutionised the taxi business model. Hotel and restaurant booking platforms like Booking.com and OpenTable changed the way in which we plan holidays and evenings out. While most consumers embrace the 'free' services that these companies offer, concerns have been expressed by traditional media and retail businesses that face disruption from, and others whose market access is increasingly routed through, digital platforms.[2]

These developments have not gone unnoticed by governments and competition authorities around the world. Investigations by the European Commission into Google's behaviour in search, advertising and mobile operating systems have resulted in fines of more than €8.2 billion.[3] It is also investigating business practices of Amazon,[4] and may open a probe into Apple's dual role as an app store and an app developer (prompted by a complaint from Spotify).[5] National

1 Derek Holt is a managing director and Felix Hammeke is a senior vice president at AlixPartners UK LLP. The opinions expressed are those of the authors and do not necessarily reflect the view of AlixPartners UK LLP, its affiliates or any of its or their respective other professionals or clients.

2 See, for example, www.bbc.co.uk/news/uk-england-london-27799938 (accessed on 11 September 2019).

3 See European Commission press releases for Cases Nos. 39740, 40099 and 40411.

4 European Commission Press Release, 17 July 2019. The Commission announced it has decided to initiate proceedings relating to the use of commercially sensitive information available to Amazon's marketplace operations.

5 www.globalcompetitionreview.com/article/1191074/apple-braced-for-eu-probe (accessed on 11 September 2019).

competition authorities in the European Union have also been active in this space; for example, investigations into the practices of Booking.com have led to decisions in Germany,[6] Sweden,[7] Italy and France.[8]

Nevertheless, some policymakers are concerned that competition authorities are not doing enough to contain the market power of digital platforms. Reports on the future of competition law in a digital age have been published in Australia,[9] Germany,[10] the United Kingdom[11] and the United States,[12] as well as at the EU level.[13] While the proposals differ, ranging from swifter implementation of existing competition law to the development of ex ante regulation, there are some common themes. Legislators have also taken steps: a proposal to regulate the behaviour of some platforms across the European Union has already been adopted[14] while an interinstitutional competition for the right to host a new digital unit in the United Kingdom has developed since the announcement that it will go ahead.[15]

This chapter is an overview of the key economic features of digital platforms, which is crucial to the assessment of the proposals for reform noted above. Starting with a definition of different platform models and explaining why so many of them have surfaced in recent years, we then describe some of the potential implications for competition arising from these

6 Federal Cartel Office press release, 'Online hotel portal HRS's "best price" clause violates competition law – Proceedings also initiated against other hotel portals', 20 December 2013, available here: www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/20_12_2013_HRS.html (accessed on 11 September 2019).

7 *GCR*, 'Booking.com ordered to amend Swedish price parity clauses', 31 July 2018, available here: www.globalcompetitionreview.com/article/1172496/bookingcom-ordered-to-amend-swedish-price-parity-clauses (accessed on 11 September 2019).

8 European Competition Network, 'The French, Italian and Swedish Competition Authorities Accept the Commitments Offered by Booking.com', available here: https://webgate.ec.europa.eu/multisite/ecn-brief/en/content/french-italian-and-swedish-competition-authorities-accept-commitments-offered-bookingcom (accessed on 21 July 2019).

9 Australian Competition and Consumer Commission, Digital Platforms Inquiry Final Report (the ACCC Report). June 2019.

10 Germany: Schweitzer, H, Haucap, J Kerber, W and Welker, R, 'Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen – Endbericht', prepared for the Federal Ministry for Economic Affairs and Energy, available here: https://www.bmwi.de/Redaktion/DE/Publikationen/Wirtschaft/modernisierung-der-missbrauchsaufsicht-fuer-marktmaechtige-unternehmen.html (accessed on 11 September 2019).

11 'Unlocking digital competition, Report of the Digital Competition Expert Panel' (the Furman Report), March 2019.

12 Market Structure and Antitrust Subcommittee, Committee for the Study of Digital Platforms, George J Stigler Center for the Study of the Economy and the State. Report May 2019 (the Stigler Report).

13 'Competition policy for the digital era'. Report for European Commission Directorate-General for Competition by Crémer, Jacques, de Montjoye, Yves-Alexandre and Schweitzer, Heike, April 2019 (the Vestager Report).

14 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 (the Platform to Business Regulation).

15 See then-UK Prime Minister Theresa May's speech opening London Tech Week, 10 June 2019, available here: https://www.gov.uk/government/speeches/pm-speech-opening-london-tech-week-10-june-2019 (accessed on 11 September 2019).

business models. Finally, we summarise the proposals put forward by experts to address the resulting competition concerns and highlight some potential unintended consequences of these proposals.

What is a digital platform? What is a multisided market?

Platforms operate in two or multisided markets. These are markets 'in which [a platform] sells different products to different groups of consumers, while recognising that the demand from one group of customers depends on the demand from the other group'.[16] This interdependence of demand between the different sides of the market represents an indirect network externality (INE).[17] This means that platforms need to attract one group of customers to attract the other, and that they need to keep both happy to thrive.

The platform business model is by no means new. Newspapers have long sold the attention of their readers to advertisers, and payment cards, which allow shoppers and merchants to complete transactions, have been in circulation for many decades.[18] INEs play an important role in these platforms. In the case of advertising-supported platforms (attention platforms), INEs are only one sided: advertisers care about the number of readers, but readers do not care about the number of advertisers.[19] In the case of 'transaction markets' or 'matching markets', INEs are positive for both sides: shoppers prefer cards that are accepted by many merchants and merchants like to accept cards that shoppers want to use.[20]

Digital platforms share these features. The definition proposed by Harold Feld[21] describes digital platforms as companies:

- that operate in two or multisided markets, where at least one side is open to the public (e.g., as content creators or consumers);
- whose services are accessed via the internet; and
- that, as a consequence, enjoy particular types of powerful network effects.

How do business models of digital platforms vary?

Digital platforms employ various operating models. Both Google and Facebook have traditionally been attention platforms. Consumers can use their search or social media services for free (i.e., they 'pay' with their attention and data). The platforms monetise their services on the other

16 OECD Roundtable, 'Rethinking Antitrust Tools for Multi-Sided Platforms', 2018, page 10.

17 An indirect network externality exists when consumers' willingness to pay for a product depends on the number of consumers (or quantity bought) of another product. See OECD Roudtable (2018), page 49.

18 See the UK Cards Association, 'History of cards', available here: http://www.theukcardsassociation.org.uk/history_of_cards/index.asp (accessed on 11 September 2019).

19 In some cases, readers may even dislike advertising, such that there would be negative rather than positive INEs.

20 The markets are called 'transaction markets' because the transaction takes place on the platform – the platform facilitates and charges for the transaction. There are some non-transaction markets where INEs are positive for each side as well. For example, online property portals allow estate agents to list properties, but cannot observe whether the transaction takes place. Some commentators during the OECD roundtable discussion argued that they should be treated as transaction markets for the purpose of market definition (OECD Roundtable (2018), page 13).

21 Feld, Harold, *The Case for the Digital Platform Act: Market Structure and Regulation of Digital Platforms* page 4, May 2019, available here: www.digitalplatformact.com (accessed on 11 September 2019).

side of the market through targeted advertising services (i.e., selling users' attention). In these cases, INEs are positive on the advertiser-side only and any potential transactions between users and advertisers tend to take place outside the platform.[22]

Amazon and Booking.com are examples of transaction platforms. They match shopper or travellers with vendors or hotels, respectively, who both prefer platforms that are more popular on the other side of the market. They further facilitate the transaction on the platform through the development of rules and governance structures.

A separation along the attention versus transaction platform line is not always possible, particularly for large platforms that have evolved into ecosystems. YouTube (owned by Google's parent, Alphabet) operates in a three-sided market (viewers, content creators and advertisers) with INEs between viewers and content creators that go each way, and single-sided INEs between viewers and advertisers. Facebook's Marketplace matches people who want to get rid of things with those who need them and live nearby. This transaction model differs from Facebook's original business model, which was a pure attention platform.

Why are there so many big digital platforms?

As mentioned, platforms are by no means new. Marketplaces in medieval towns already matched shoppers and merchants long before the founders of eBay or Amazon were born, while newspapers and television stations sold eyeballs to advertisers long before the advent of online social media. However, the growth of some digital platforms to become among the largest firms globally may raise new issues concerning the use of data and the potential for market power to be exploited. Some of the key factors that contributed to the swift development of large global digital platforms are the following:

- the internet reduced the cost of communication to almost zero, allowing companies to gain a global reach at limited cost and to maximise network effects;
- the replacement of hardware through software created substantial economies of scale – reducing the marginal cost of serving additional customers – and scope – allowing businesses to roll out complementary services at limited cost; and
- the ability to harvest and process large data sets using more and more sophisticated techniques allowed companies to get better by getting bigger.

These factors generated significant consumer benefits. Consumers can reach a global network of friends or merchants for free and receive recommendations about products that they would never have known about in a world without digital platforms. At the same time, these factors may have the potential to increase barriers to entry, as explored further below.

Business strategies and outcomes in digital platform markets

Digital platforms may adopt different models than other businesses due the factors listed above. For example, the presence of INEs may mean that companies maximise their profits by offering their services for free to one side of the market. Facebook does not charge for its social

22 Facebook further benefits from strong direct network effects. The more social media users it has, the more attractive it becomes for other users. Because the beneficiaries are on the same side of the market, network effects are direct, not indirect.

network services because the additional revenue would be outweighed by the loss in advertising revenues resulting from the loss in usage. Property portals may charge estate agents rather than property seekers if they consider the latter are more likely to switch to competitors if fees increase (i.e., their demand is more elastic). Platforms need to take these indirect effects into account when they decide how to price.

Stronger competition between platforms may not necessarily lead to lower prices on one side of the market. For example, Graeme Guthrie and Julian Wright (2007)[23] show that competition between payment platforms can lead to higher rather than lower charges for merchants. However, the overall price of the service – the combined price paid by merchants and cardholders – can be expected to decrease as a result of competition.

The presence of INEs also has implications for companies' growth trajectories. Marketplaces need to attract a critical mass of merchants to be of interest for shoppers, but they must also attract a critical mass of shoppers to attract merchants. This is the 'chicken-and-egg' problem. Loss-leading strategies may be adopted, and some platforms have achieved high valuations before earning significant (or any) profits.[24]

These strategies can be further rationalised by the presence of economies of scale and scope, and the value of data. Platforms can enter a virtuous circle of growth once they exceed a critical mass. The cost of writing new code can be shared across a larger user base. The customer relationship allows for the roll-out of complementary services. The availability of large data harvested from the user base and ability to process it allows larger platforms to be better than the smaller competition. Rational firms, therefore, have strong incentives to sacrifice short-term profits for long-term gains.

While there are many examples of digital markets in which multiple operators may flourish, the factors noted above can in some circumstances lead to greater concentration than might be observed in other markets. Some of the potential competition concerns identified in the context of digital markets are discussed below.

What competition concerns may arise in digital markets?

According to the authors of the Furman Report, the presence of the features identified above mean that digital platform markets 'show a tendency to tip towards a single winner'.[25] In the Vestager Report, the experts link the features to high levels of concentration. They consider digital platforms may hold a strong incumbency advantage and argue that this 'changes the principles of enforcement of competition policy'.[26] In particular, the experts find that rivals may be unable to attract a critical mass and that competition 'for' the market could be ineffective.

23 Guthrie, G and Wright, J, 2007 'Competing payment schemes', *Journal of Industrial Economics*, 55, 37–67.

24 For example, Uber is valued at over US$50 billion even if it has incurred operating losses as it builds its user base in countries around the world. See https://investor.uber.com/news-events/news/press-release-details/2019/Uber-Reports-Second-Quarter-2019-Results/default.aspx (accessed on 11 September 2019).

25 Furman Report (2019), paragraph 2.13.

26 Vestager Report (2019), page 54.

Competition could be further weakened by the conduct of platforms, such as the introduction of most favoured nation (MFN) clauses or other actions that limit the ability of consumers to switch or 'multi-home' (i.e., use different platforms for the same purpose).[27]

A word of caution with regard to these findings seems appropriate. First, there is no certainty that markets tip towards a single supplier. Most platform markets count more than one competitor. Limited switching costs and the ability to multi-home at low cost to the consumer means that incumbents may need to continue to innovate and offer good service to maintain their customer base.

Further, platforms in one market may face competition from those in other markets. While Facebook does not compete with YouTube in the social media market, they both compete to attract the attention of consumers. Facebook cannot rely on the existence of network effects alone – a lack of engaging features would translate into a lack of user attention and thus lack of advertising revenue. The incentives to innovate may thus remain strong even for platforms that have reached a large scale.

A commonly expressed view is that the data collected by large platforms may yield market power.[28] However, any assessment of the role of data in yielding market power should recognise the varying forms of data that may be collected, whether individual or aggregated; whether it can be replicated or otherwise collected by rivals; and how much data may be required to profitably enter a market. For example, if the value of additional data decreases when data becomes abundant, this may reduce the extent to which greater access to data for large user bases yields competitive advantage. Geoffrey Manne and Joshua Wright (2011)[29] argue that search engines such as Google, but also Yahoo and Bing, already have more data than they can profitably use to refine their search results. This suggests access to data alone, therefore cannot explain the significant market shares enjoyed by Google.

Further, the authors of the Vestager Report express concerns about the way in which platforms manage competition on the platform.[30] For example, e-commerce or booking platforms may sell preferential search results or 'monopoly positions' to vendors, leading to competitive distortions. Platforms could even leverage their market power to promote their own products and extend their digital ecosystems (self-preferencing).[31] The authors find that these concerns may not only apply to dominant platforms with significant market shares. They consider that platforms with 'intermediation power' – those that have a set of unique customers that can only be reached through them – may not be sufficiently disciplined by competition in their role as regulators.[32]

However, these concerns should not be generalised but instead considered in light of the facts of each case. The incentives of platforms such as Booking.com to sell monopoly positions may be undermined by potential consumer backlash. Even if only a small proportion of consumers compares prices across booking portals, a perception that choice or quality on one platform is reduced by such policies could lead to reputational damage and a loss of support

27 Vestager Report (2019), pages 55–57.

28 See Furman Report (2019), page 23 and ACCC Report (2019), page 84.

29 Manne, GA, Wright, JD (2011) 'Google and the Limits of Antitrust: The Case Against the Case Against Google'. *Harv J Law Public Policy* 34:171–244

30 Vestager Report (2019), page 60.

31 Vestager Report (2019), page 66.

32 Vestager Report (2019), pages 49, 69.

from consumers on one side of the market. In this sense, digital platforms may be no different than traditional intermediators such as insurance brokers, travel agencies and supermarkets: competition with rivals on other platforms encourages policies that offer good service on the consumer side of the market.

Similarly, concerns about self-preferencing by platforms should not be overstated. Vertical integration, including the provision of complementary services by platform operators, can generate substantial consumer benefits.[33] Further, one needs to be careful regarding the view that intermediation power may lead to competition concerns. It is likely that many platforms have intermediation power insofar as some consumers may tend to use a single platform to book their holidays or restaurants. This does not mean that those platforms truly have market power – consumers may well start to look elsewhere if they are unhappy about the platform's self-promotion. In other words, the ability and incentive to consider other platforms may be important even in relation to consumers who currently tend to single-home.

Some of the recent reports examining digital platforms have expressed more wide-ranging concerns about the implications of the platforms business model for consumers. The Stigler Report highlights the incentives of platforms to develop addictive content resulting from the necessity to sell eyeballs to advertisers.[34] The ACCC Report looks at wider societal implications such as media diversity.[35] These concerns are too complex to be assessed in this chapter.

Promoting competition for the market – contestability

In response to the concerns about tipping and ineffective competition between platforms, the Vestager Report proposes changes to current competition law and enforcement. The authors advocate for a strengthening of merger control to prevent 'killer acquisitions'; stricter intervention against MFNs and other practices that may prevent multi-homing; and obligations for data portability and interoperability.[36]

Some of these proposals may have unintended consequences. The General Data Protection Regulation already introduced requirements regarding data portability – allowing users to transfer their data to other platforms and thus potentially lowering switching costs. The extension of these requirements to include data interoperability – giving competitors real-time access to standardised data through application program interfaces – could create more competition in complementary services. However, it could also dilute the incentives of platforms to gather the data in the first place. The value of a platform operator such as Google in offering free search, navigation and email services, may well be reduced if it is less able to monetise these services in the most efficient way.

33 For example, platforms can use their consumer data to offer more targeted complimentary services. See Furman Report (2019), page 32.

34 Stigler Report (2019), page 37.

35 ACCC Report (2019), Chapter 6.

36 Vestager Report (2019, pages 55, 107, 121.

Our colleagues already raised these concerns with regard to similar data sharing proposals made in the Furman Report.[37] They point out that this approach suffers from 'static bias' – namely it attaches too much weight to the number of competitors 'in the market' at the expense of the drivers of dynamic competition 'for the market'. Given the importance of the latter in terms of explaining economic growth over time, the authors argued that this bias may be detrimental for consumers.

Finally, businesses that advocate for greater inter-platform competition should be careful what they wish for. As discussed above, greater inter-platform competition does not necessarily lead to lower prices on all sides of the market. On the contrary, it may further increase prices charged to merchants as platforms need to extract more revenue to compete successfully on the consumer side of the market.

Safeguarding competition in the market

In response to the concerns about the regulatory role of platforms, the Vestager Report sets out various proposals to safeguard fair competition on the platform markets. The authors argue that a 'dominant platform that sets up a marketplace must ensure a level playing field on this marketplace and must not use its rule-setting power to determine the outcome of the competition'.[38] They draw on Article 101 of the Treaty on the Functioning of the European Union case law involving sports organisations that are active in both the setting of rules and the organisation of events to support their conclusions, and argue that similar rules should apply to dominant platforms under Article 102. The authors also find that a lack of transparency by platforms about their regulation – such as how they rank results – could reinforce competition concerns. They argue that dominant platforms could be required to be transparent about their market design under Article 102.[39] The Platform-to-Business Regulation, which was adopted on 20 June 2019, already provides for such transparency obligations on the business side of the market.[40]

Again, these proposals are not without risks. The way in which platforms regulate their marketplaces is an important – potentially the most important – parameter of competition. Platforms set these rules with the aim of maximising the benefits or their users. As highlighted by David Evans (2012),[41] platforms may be much better placed to govern interactions than a public regulator, because they can monitor behaviour more closely and deal with violations more expeditiously. The ability of platforms to exclude agents that behave badly should thus not be undermined by competition authorities that are eager to protect the rights of small businesses.

While increased transparency may not sound controversial, caution is advised as to how any transparency obligations are implemented in practice. For example, an obligation on platforms to reveal their search algorithm – a key parameter of competition – could be detrimental

37 Colley, Liam and Chardouveli, Ksenia, 'Unlocking digital competition… but locking up innovation?', April 2019, available here: www.alixpartners.com/insights-impact/insights/unlocking-digital-competition-locking-up-innovation (accessed on 11 September 2019).

38 Vestager Report (2019), page 62.

39 Vestager Report (2019), page 64.

40 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 (the Platform to Business Regulation).

41 Evans, DS 'Governing Bad Behavior by Users of Multisided Platforms'. *Berkeley Technology Law Journal* 27, 2 (2012).

to innovation.[42] Even if platforms were just required to provide detailed descriptions of their search algorithms, vendors may use this information to game the system. In such a world, the ability of a vendor's marketing team rather than the relevance and quality of its products could determine search results, to the detriment of consumers.

The Vestager Report makes further recommendations with regard to vertically integrated platforms (i.e., platforms that compete with the companies that use them as intermediators).[43] While it acknowledges that self-preferencing by such platforms is not in general prohibited by Article 102 – unless the platform is an essential facility – it suggests that it could constitute an abuse below this threshold.[44] To facilitate the application of these provisions, the authors argue for a shift in the burden of proof. Dominant vertically integrated platforms, which operate marketplaces and want to engage in self-preferencing, would need to demonstrate that there is no long-term exclusionary effect.[45] The same recommendations are made with regard to platforms that provide privileged data access to their subsidiaries.[46]

These proposals also aim to promote inter-platform competition, rather than just promoting fair competition on platforms. Professor Jean Tirole, in a keynote speech in 2019, stressed that entry typically occurs in neighbouring markets to established platforms, allowing for expansion into the market in question at a later point once the entrant has built a user base. Self-preferencing by established platforms in these neighbouring markets could prevent these entry strategies.[47]

The authors of the Vestager Report are cautious about more radical proposals, such as structural remedies, noting that the cost–benefit trade-off is less clear than for traditional infrastructures such as rail or energy networks.[48] However, some commentators, such as the Open Markets Institute, as well as various US politicians, have called for a break-up of large platforms, including Facebook and Amazon.[49]

42 The ACCC Report (2019), page 252, identifies concerns with lack of transparency in algorithms and refers to recommendations that would enable it to investigate and address the consequences of a lack of transparency. For further detail on the risks of mandating algorithm transparency, see Bork, Robert H and Sidak, Gregory J (2012): 'What Does the Chicago School Teach About Internet Search and the Antitrust Treatment of Google?', *Journal of Competition Law and Economics* 8, 1–38 and Argenton, Cedric and Prüfer, Jens (2012): 'Search Engine Competition with Network Externalities', *Journal of Competition Law and Economics* 8 (1), 73–105.

43 Vestager Report (2019), pages 66–68.

44 Vestager Report (2019), page 66.

45 ibid.

46 Vestager Report (2019), page 69.

47 Tirole, Jean, keynote speech during conference on 'Shaping competition policy in the era of digitisation', Brussels, 17 January 2019, available here: https://webcast.ec.europa.eu/shaping-competition-policy-in-the-era-of-digitisation (accessed on 11 September 2019).

48 Vestager Report (2019), page 67.

49 Open Markets Institute, 'Open Markets Institute Applauds Sen. Warren's Call to Break Up Amazon', 14 September 2018, available here: https://openmarketsinstitute.org/releases/open-markets-institute-applauds-sen-warrens-call-break-amazon; and Open Markets Institute, 'Break up Facebook: Latest hack proves it's a dangerous monopoly that a fine won't fix', 5 October 2018, available here: https://openmarketsinstitute.org/op-eds-and-articles/break-facebook-latest-hack-proves-dangerous-monopoly-fine-wont-fix (both accessed on 11 September 2019).

Even leaving structural options to one side, the idea that the burden of proof should fall to platforms to demonstrate pro-competitive effects of various business practices should be viewed cautiously lest it lead to a reduction in innovation. For example, preventing platforms from using their own data to develop complementary services could not only limit innovation, it could also muddle incentives to invest in the platform business model in the first place. Companies will not enter markets unless they can be sure that they will be able to monetise their investment. Amazon may not have invested in its marketplace to the same degree if it was not able to promote its own products. Taking account of these dynamic factors relating to innovation incentives are crucial to understand the likely overall consequences of a given business practice compared with the counterfactual.

The idea that vertical integration, or vertical agreements between complementary producers in a supply chain, often have pro-competitive effects is consistent with economic theory.[50] These benefits would also arise in the context of digital platforms.[51] In fact, Andrea Amelio and Bruno Jullien (2012)[52] show that there may be additional benefits from vertical integration in two-sided markets. This is the case where platforms wish to charge negative prices on one side of the market and where this would be welfare enhancing, but where platforms are unable to do so as they cannot pay consumers for the use of their platform. Tying of free products to platform usage allows for *de facto* negative prices that could enhance consumer welfare. Independently of where the burden of proof may lie in relation to the assessment of exclusionary effects, it would be important to take account of these factors in any competition assessment.

How might regulation of digital platforms operate?

A need for *ex ante* regulation may be required where the market power of incumbents is immutable and where there is little prospect that markets will self-correct. While an assessment of the case for regulation is beyond the scope of this chapter, on the assumption that some governments appear to be moving in this direction, it is useful to consider what form regulation could take. While one option would be to look to sectors where economic regulation has been applied for decades, such as utility sectors on the basis that fixed costs are a feature in both cases, digital platforms differ in many ways from infrastructure networks. They have limited physical infrastructure that could be clearly defined as being part of a regulated entity, evolve constantly and continue to add new services. It is unclear whether Amazon's own logistics service would be considered as a separate business or part of the marketplace, or whether Facebook's Marketplace would be part of its social media business. A sensible delineation of platform and non-platform business parts may therefore be impossible. This makes regulation significantly harder to implement.

In addition to their complexity, platform business models are also diverse. This means that no easy one-size-fits-all solution is available. Any regulatory intervention would need to take these differences into account, which would be difficult, costly and unpredictable for operators.

50 This is recognised in the European Commission's Guidelines accompanying the Vertical Block Exemption Regulation, para. 6.

51 For a summary discussion see Evans, David S, 'Economics of Vertical Restraints for Multi-Sided Platforms' (Coase-Sandor Institute for Law & Economics Working Paper No. 626, 2013).

52 Amelio, Andrea and Jullien, Bruno (2012). 'Tying and Freebies in Two-Sided Markets'. *International Journal of Industrial Organization*, 30.5, pages 436–446.

As discussed, policymakers need to be aware of unintended consequences of regulation. Any regulation of marketplaces could lead to distortions of dynamic competition. If potential entrants knew that they would be subject to regulation and unable to self-preference, they may not try to compete for the development of alternative marketplaces, but content themselves with the provision of complementary services. Who would want to develop Facebook 2.0 in a regulated platform market?

The suggestion that regulation can and almost always has unintended consequences should be uncontroversial. Price regulation of natural monopolies such as utilities did limit their monopoly power. However, it has also led to concerns regarding quality and overinvestment. Digital platforms are no different in that respect – the preceding discussion highlights a range of potential unintended consequences.

This does not mean that regulation is bad *per se* – in some cases, the unintended consequences may be more than offset by the benefits of regulation. However, any regulatory proposal must critically assess the trade-off between market failure and regulatory failure. This must be based on a careful evidence-based case-by-case analysis. Given the stakes of the game – digital platforms are likely to transform markets for years to come – we believe that a proper analysis is particularly important in this context.

Conclusion

Digital platforms play an increasingly important role in social and economic life. The large scale and rapid growth of many of these platforms has given rise to a wide range of consumer benefits but has also generated concerns on the part of traditional media and retail businesses, businesses using those platforms to reach their consumers and policymakers. Digital markets, while often sharing economic features such as the presence of indirect network effects across multiple markets, operate a variety of business models. It will be crucial to take these features into account when assessing the likely effects of any competition or regulatory interventions, and to reduce the risk of adverse unintended consequences for consumers.

Appendix 1

About the Authors

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Felix Hammeke has been part of AlixPartners UK LLP's economic consulting practice since 2015. He is an experienced economist with a specialisation in competition and antitrust economics, holding a master of science in economics (with distinction) from the London School of Economics.

His case experience ranges from cartel follow-on claims to stand-alone cases involving both horizontal agreements and abusive practices. He was a core member of the teams that supported Derek Holt in his role as expert for Visa Inc and Network Rail, respectively. In addition, Felix was involved in various mergers and market investigations at the UK and European level. Throughout his time at AlixPartners, he has completed projects in various sectors, including payment systems, pharmaceuticals, automotive components and others.

Before joining AlixPartners, Felix worked as economic adviser for the government of Malawi, advising policymakers on investment climate reforms and other areas of regulatory reform.

Derek Holt
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Derek Holt is a managing director in AlixPartners UK LLP's economics practice. He has 24 years of experience in the fields of competition litigation and regulatory disputes. He has testified in a range of high-profile matters concerning horizontal agreements, abuse of dominance and regulatory pricing matters before the UK and European competition authorities, regulators and courts, including the UK High Court and the UK Competition Appeal Tribunal (CAT).

Recently, he has acted as expert for Visa Inc before the High Court and the European Commission regarding multilateral interchange fees; for Ping in relation to the economic effects of its ban on online sales; for Peugeot in a follow-on damages case before the CAT; and for Network Rail in a recent abuse of dominance claim (on which judgment from the CAT is pending). He is acting on various matters before the High Court for a defendant in an allegation that its selective distribution system breaches competition law; for a memory chip producer in

relation to follow-on claims against it; and for a European bank in relation to an investigation regarding trading activity in various bonds markets.

Derek has featured in *Who's Who Legal Thought Leaders: Competition* as a thought leader and a leading economic expert.

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The growth in the digital economy powerfully drives competition, but also adds to the complexity of global antitrust enforcement. The second edition of the *E-commerce Competition Enforcement Guide*, edited by Claire Jeffs of Slaughter and May, looks at whether established competition tools are sufficient to deal with the challenges of the online world. Drawing on the collective wisdom and expertise of more than 40 distinguished experts from 14 firms and seven competition authorities, the Guide provides insight on the differing approaches adopted by enforcement agencies and whether a balance is being struck between maintaining a vigilant approach to the digital economy and allowing competition to flourish.

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ISBN 978-1-83862-215-2