Practical Considerations of the Recommendations laid out in Report 'Competition Policy for the Digital Era'

A paper prepared by the European Competition Lawyers Forum[1]

Introduction

1. On 4 April 2019 the European Commission (the 'Commission') published a report on *Competition policy for the digital era* (the 'Report').[2] The Report was prepared by a panel of three special advisers and is intended to contribute to the Commission's ongoing deliberations on how competition policy should develop to ensure pro-consumer innovation in digital markets. In this context, the Commission asked a number of organisations including the ECLF to consider the recommendations put forward in the Report and their practical application.

2. The ECLF considers that the Report conveys a broad message throughout that the specific characteristics of digital platform markets such as extreme returns to scale, network externalities and the role of data influence the manner in which competition takes place therein.[3] This reality warrants certain adjustments to the way in which competition law addresses these aspects as summarised below.

The Consumer Welfare Standard

3. In relation to the consumer welfare standard, the Report recommends that even where consumer harm cannot be precisely measured, strategies employed by dominant platforms aimed at reducing the competitive pressure should be forbidden in the absence of clearly documented consumer welfare gains.

4. The ECLF does not think that the way the consumer welfare standard is applied in EU competition enforcement has been a problem. Indeed, the EU system follows a much more flexible approach than the United States. Besides, EU case law places more importance on maintenance of effective competition on the market.[4] That being said, we agree that price is not the only parameter of competition. As the *Intel* case law recognises, quality, choice and innovation are equally important parameters.[5]

[1] The European Competition Lawyers Forum ('ECLF') is a group of the leading practitioners in competition law from law firms across the European Union. This paper has been compiled by a working group of ECLF members and does not purport to reflect the views of all ECLF members or of their law firms. The views set out in this working paper also do not necessarily reflect the views of each individual member of the working group or of their law firm. A list of working group members is set out at Annex 1.
[2] https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.
[3] Report chapter 2.
[4] For examples Case C-95/04 P *British Airways v Commission* ECLI:EU:C:2007:166 and Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* ECLI:EU:C:2011:83.
[5] Case C-413/14 P *Intel Corp. v Commission* ECLI:EU:C:2017:632, para. 134.

Market Definition

5. The Report recommends that less emphasis should be placed on the analysis of market definition, and more emphasis on theories of harm and identification of anti-competitive strategies.

6. In principle, the ECLF agree with this approach. One way of addressing it could be to adjust the Commission's *Notice on Market Definition* to reduce the weight given to price-based tests. In particular, there should be less emphasis on the small but significant non-transitory increase in prices test (the SSNIP test) to establish demand substitution, not least since there is already certain consensus that traditional price-based methods for assessing substitutability are insufficient in digital ecosystems. In particular, the *Notice on Market Definition* should be adjusted to give more weight to qualitative analysis in order to establish whether there is a discrete group of users having a separate demand on the free side of the market. That being said, the EU case law already allows that.[6]

7. The Commission is currently reviewing its *Notice on Market definition*. The ECLF hopes that the review will allow digital markets to be dealt with in a transparent way with consistency across the different areas of antitrust and mergers.

Market Power Assessment

8. The Report recommends that the assessment of market power has to be case-specific, and it must take into account insights drawn from behavioural economics about the strength of consumers' biases towards default options and short-term gratification.[7]

9. The ECLF agrees that a case-specific approach is good, but stresses the importance of consistency. We further suggest that the assessment should also factor in all the ways in which incumbents are protected (and can protect themselves) from competition. In particular, market power assessment must take into account the condition of 'unavoidable trading partner' of some platforms, and the scope of their data-driven competitive advantage.

10. Moreover, the definition of dominance in the digital environment is not entirely clear. The criteria and methods to be used to identify a dominant position in the digital environment could benefit from guidance, which should take into account the differences in business models adopted by various companies active in the platform economy.

Error Cost Framework

11. According to the Report, in concentrated markets with strong network effects and high barriers to entry, it is best to err on the side of disallowing potentially anti-competitive conduct, and impose on the incumbent the burden of proof for showing the pro-competitiveness of its conduct.[8] In case of expansion into adjacent markets and/or growth

[6] Case T-699/14 *Topps Europe Ltd v Commission* ECLI:EU:T:2017:2, para. 82.
[7] Report pages 4 and 50.
[8] Report pages 4 and 6.

into digital ecosystems, a presumption in favour of a duty to ensure interoperability should be established, especially where dominant platforms control user bases or datasets that competitors cannot access and/or replicate.[9]

12. According to this recommendation, a conduct will be presumed anticompetitive until the digital platform demonstrates pro-competitive effects.

13. The ECLF has a concern that this recommendation does not appear to be reconcilable with the *Intel* ruling and the need to demonstrate a plausible effect on competition before making any 102 TFEU decision.[10] The conduct may be prohibited only if it has, or is likely to have, negative effects on competition.

14. Reversing the burden of proof as a general matter as soon as a measure is seen as 'reducing competitive pressure'[11] or any restriction of third parties' 'ability to compete'[12] seems a risky course of action. First, this cannot be reconciled with (i) the basic presumption of innocence – anti-trust can be seen as quasi-criminal in nature due to the level of antitrust fines; (ii) the obligation on the Commission to prove its cases to the adequate standard under existing case law. Second, revering the burden of proof would require the underlying economic theories to be clear, which do not seem to be the case at the moment. Third, the record at least in respect of Merger Control is that the Commission's willingness and ability to look into efficiencies is limited. Efficiencies are generally very difficult to prove and quantify, and regulators are not necessarily well placed to assess their robustness. The real risk is thus that this prescription will result in not only a reversal of the burden of proof, but a substantial lessening of the level/quality of evidence put forward in order to support an allegation of an abuse.

15. The ECLF believes that reversing the burden of proof is not advisable, as it would represent a redistribution of rights of defence solely depending on the market in which platforms operate. If the Commission has concerns about the structure of digital markets, the solution is not to try to artificially shape the application of the competition rules to this sector in a different manner, but to proactively change the rules of the market through sector-specific regulation.

16. As the ECLF acknowledges that the burden of proof is on the Commission the question is probably more as to when the burden of proof has safely been discharged.

Protecting Competition for the Market

17. The Report is clear that competition for the market must be protected.[13] It looks at the various strategies employed by dominant platforms might use to limit the threat of entry such as MFN, multi-homing and switching, interoperability, platforms as regulators and self-preferencing.

MFN, Multi-homing and switching, and Interoperability

18. The Report argues that due to strong network externalities (especially in multi-sided platforms), incumbency advantage is important and strict scrutiny is appropriate.[14]

[9] Report page 51.
[10] For example *Intel*, supra note 5.
[11] Report page 2.
[12] Report page 71.
[13] Report chapter 4.
[14] Report page 57.

Accordingly, any practice aimed at protecting the investment of a dominant platform should be well targeted. If competition between platforms is sufficiently vigorous, it could be sufficient to forbid clauses that prevent sellers on a platform from price differentiating between platforms (i.e. a ban of 'wide' MFNs) while still allowing clauses preventing the seller from offering lower prices on its own website ('narrow' MFNs). If competition between platforms is weak, then pressure on the dominant platforms can only come from other sales channels (e.g. in the case of hotel booking platforms, direct sales by hotels on their own websites) and it would be appropriate to also prevent 'narrow' MFNs.

19. The Report provides sound guidance on MFN and emphasizes that MFN provisions are neither always anticompetitive, nor always procompetitive and that their effects depend on the particular facts of the relevant market.[15] The Report's focus on a need for a case-by-case assessment and the potential existence of pro- and anti-competitive effects translate into the necessity for regulators and courts to focus on the evidence supporting all aspects of the case, the market definition, the theories of harm and possible efficiencies.

20. The ECLF supports this view of MFN, but recommends the development of a clearer and more coherent legal framework for MFN, notably with regard to the applicability of legal provisions and concepts, e.g. the Vertical Block Exemption Regulation or the ancillary restraints and rule of reason doctrine.

21. The Report concludes that it is key to ensure that multi-homing and switching are made possible and dominant platforms do not impede multi-homing and switching to allow entrant platforms to attract them through the offer of targeted services.[16]

22. The ECLF agrees with the Report in this regard. Big platforms benefit from network externalities in a manner that makes it very difficult for consumers to switch from them to other alternative suppliers (as recognised by the Commission in *Google Shopping*). The bigger and more 'sticky' a platform is, the more difficult is to convince users to switch to other platforms. Notwithstanding that reality, difficulty does not necessarily amount to impossibility (for example, nothing prevents iOS from stealing users from Android).

23. Multi-homing and interoperability are good allies to competition. However, interoperability and multi-homing are factors that belong to the business model of a platform or app. Therefore the ECLF view is that it is only in special circumstances in which access to a platform is essential for competing in the markets, in accordance with the *Oscar Bronner* criteria, that the imposition of a wide-ranging multi-homing and interoperability duty on a platform should be considered.

Platforms as Regulators

24. Platforms have incentives to write good rules to make their platform more valuable to users although the Report recognises that this might not always be the case.[17] Because of their function as quasi "regulators", dominant platforms have a responsibility to ensure that their rules do not impede free, undistorted, and vigorous competition without objective justification.

[15] Report pages 55-56.
[16] Report pages 6 and 57.
[17] Report page 6.

25. The ECLF believes that legal uncertainty surrounding online platforms' rule-setting role needs to be addressed. At the moment, it remains unclear which rules are allowed and which are prohibited under EU competition law, which creates some uncertainty for companies. In the ECLF's view, an initiative that could go a long way in terms of addressing the issues and providing much-needed legal certainty in this area would be to formulate codes of conduct for digital platforms (which is proposed in the Furman Report and the ACC Report).

26. The Report suggests that the requirements set out in the law on sport associations and sporting leagues (in particular *ISU* and *Meca-Medina*) serve as a useful precedent for assessing the rule-setting powers of online platforms.[18] However, the ECLF would point out that there are important differences between the two. The following characteristics of sport associations must therefore be recognised before any parallels from sport case law can be drawn: (i) sport governing bodies typically have an absolute monopoly over access to their sport which is often recognised in law or de facto by governments; (ii) sport governing bodies are generally non-profit organisations; (iii) in sport association cases (like *FIA*, *MOTOE* and *ISU*) it was not the dual role *per se*, or some other alleged conflict of interest, but rather clear findings of anti-competitive behaviour and foreclosure effects, that led to the conclusion that competition law had been violated. Similarly, any alleged anti-competitive practices of dominant online platforms must be subject to rigorous factual, economic and legal analysis to determine whether the platform is engaging in competition that is not on its own merits and results in appreciable anticompetitive effects harming consumers.

27. The Report insists that rules on platforms must essentially be 'fair, unbiased, and pro-users'.[19] While the ECLF may agree in principle, it is unclear as to whether/when this constitutes a competition law issue (as opposed to say a consumer or contract law issue). It is particularly important to stay away from cases that do not involve a clear competitive theory of harm. In particular, cases of 'second-line' discrimination (i.e. discrimination exercised by a platform against a third-party which is not actually or potentially a competitor) are notoriously flawed.

Self-Preferencing

28. According to the Report, self-preferencing is not abusive *per se*, but subject to an effects test.[20] However, self-preferencing by a vertically integrated dominant digital platform can be abusive wherever it is likely to result in a leveraging of market power and is not justified by a pro-competitive rationale. In a market with particularly high barriers to entry and where the platform serves as an intermediation infrastructure of particular relevance, it is proposed that, to the extent that the platform performs a regulatory function, it should bear the burden of proving that self-preferencing has no long-run exclusionary effects on product markets. Abusive practices of self-preferencing by digital platforms might pose specific challenges for remedies. Where self-preferencing has significantly benefitted a platform's subsidiary by improving its market position vis-à-vis competitors, remedies might need to include a restorative element.[21]

29. The ECLF would like to stress that self-preferencing was not a practice know before the Google Shopping case, which is currently on appeal. We have had cases on refusal to supply, margin squeeze and tying but always under an effects-based approach and subject to specific tests

[18] Report page 62.
[19] Report page 61.
[20] Report pages 7 and 66.
[21] Report pages 7 and 68.

that the Courts have developed over decades. In addition, aside from Article 106 TFEU cases, we have not had a pure Article 102 TFEU discrimination case in a situation of upstream and downstream market link. Given the lack of case law on this concept, we would encourage caution.

30. Moreover, the ECLF is not entirely sure whether restorative remedies, as suggested in the Report, are compliant with Article 7 of Regulation 1/2003. If by "restorative" we mean discontinuation of the conduct that has been found anti-competitive, the ECLF has no problem with that, as that seems to be supported in AKZO paragraph 157. In the latter case, the Court is clearly saying there that AKZO must stop meeting its competitors' prices because this was found abusive and adds that this will help the competitor re-establish the status quo ante. In other words, the re-establishment of the competitive situation is seen by the Court as the result of the discontinuation of the problematic conduct. However, if the "restoration" goes over and above and further than the mere discontinuation of conduct, the ECLF sees a problem with the principle of proportionality. It would also lead to never-ending discussions about causality.

31. Additionally, the risk of self-preferencing or the use of know-how/data provided by third parties that interact with a platform is not a new or specific to the digital sector. It does not require any specific policy change in the way competition law is applied. Indeed, there are many examples in the retail sector where suppliers operate as category managers for a retailer, advising and managing the display and positioning of their competitors' brands. Also large retailers compete with their own suppliers through MDD brands. None of these aspects have required an adaptation of the application of competition law in the offline market and does not seem to require it either in the on-line sphere or for on-line platforms in particular. These aspects may be well addressed in the general vertical restraints guidelines.

Data

32. According to the Report, under the risk-based approach embodied in the GDPR, a more stringent data portability regime can be imposed on a dominant firm in order to overcome particularly pronounced lock-in effects.[22]

    1. More demanding regimes of data access, including data interoperability, can be imposed (i) by way of sector-specific regulation (as in the context of the Payment Services Directive 2015/2366/EU) – in particular where data access is meant to open up secondary markets for complementary services; or (ii) under Article 102 TFEU – but then confined to dominant firms.[23]
    2. Also, given that data sharing has the potential to lead to both pro- and anti-competitive outcomes, a scoping exercise of the different types of data pooling and subsequent analysis of their pro- and anti-competitive aspects is therefore necessary to provide more guidance.[24]
    3. It is necessary to distinguish between different forms of data, levels of data access, and data uses. In a number of settings, data access will not be indispensable to compete, and public authorities should then refrain from intervention. There are other settings, however, where duties to ensure data access – and possibly data interoperability – may need to be imposed. This would be the case, in particular, of

[22] Report page 77.
[23] Report page 9.
[24] Ibid.

> data requests for the purpose of serving complementary markets or aftermarkets, that is, markets that are part of the broader ecosystem served by the data controller. However, in these cases competition authorities or courts will need to specify the conditions of access. This, and the concomitant necessity to monitor, may be feasible where access requests are relatively standard and where the conditions of access are relatively stable. Where this is not the case, in particular where a dominant firm is required to grant access to continuous data (i.e. to ensure data interoperability), there may be a need for regulation, which must, at times, be sector specific.[25]

33. In the ECLF's view, if data collection can be reproduced and is 'non-rivalrous' (collection by one party does not prevent another party's ability to replicate the data), it cannot be seen as an 'essential facility' under *Oscar Bronner*. In those circumstances where data can be replicated, forcing access to a platform's data would therefore likely be disproportionate. Ensuring portability and 'multi-homing' in these circumstances is therefore likely the preferable option.

34. According to the ECLF, a way to factor in foreclosure concerns arising from accumulation of data, as well as from restriction of access to such data, must be found. This analysis should take into account not only the breadth of the data accumulation but also the extent to which it is truly indispensable for other companies to compete, for instance, in view of other available sources.

35. In our view, until data markets are defined (currently this approach is only theoretical), foreclosure effects should be assessed narrowly and based on strong economic evidence, as opposed to being based on mere theoretical arguments that concentration of data would allow the merged entity to foster its position in related markets for underlying products or services. Once the theories of harm are clearly defined, acceptable commitments should be adjusted accordingly; for instance, behavioural remedies including data access and portability commitments may prove effective to dispel concerns in digital ecosystems.

36. The Report considers data portability as a proper solution when a gatekeeper impedes access to data.[26]

37. In practice, however, portability is sometimes not viable because the standards applied are not harmonised. On some occasions, the manner in which data is provided to the requesting party makes it impossible to use it. Therefore, the ECLF considers that some guidance of the Commission on possible harmonization would be advisable.

Amendments to Merger Control

38. The Report does not recommend changing the EUMR's jurisdictional thresholds. Instead, it suggests for the time being to monitor the performance of the transaction value-based thresholds recently introduced by certain Member States (such as Germany), as well as the functioning of the referral system.[27]

39. Despite the Report proposing not to change the system as it would entail a lot of administrative work and may be excessive, as minor transactions that do not entail

[25] Report pages 9-10.
[26] Report page 91.
[27] Report pages 10 and 124.

competition risks would be caught by the merger control system, the introduction of EU thresholds specifically for the free side of platforms (not for other sectors/activities) is advised. The ECLF suggest exploring a change in this field and introduce EU thresholds specifically for non-monetary side of platforms. The procedure could be somehow modified or simplified, in line with the proposals made by the EC Commission in its prior consultation of notification of acquisition of minority stakes (for instance, simple notice with no pre-notification phase, fast track and tacit non-opposition approval unless the EC Commission requests a formal filing within a short period after the notice, in which case the formal and general procedure may take place). The reason to introduce this amendment is to ensure that merger control is duly applied in this field and does not depend heavily on national referrals.[28]

40. The ECLF suggests two possible types of thresholds in order to measure the non-monetary side of platforms: a market share threshold, similar to the one existing in some member States, and/or a "user attention" threshold, that would be an absolute value that would somehow mirror the "turnover" threshold.

    (i) A market share threshold may be useful to capture transactions between digital firms with low (or none) turnover but a large customer base showing also certain degree of flexibility on the units to be used depending on the type of transaction. For instance, some precedents point out that market shares for the non- monetary side of the platform can be measured in terms of number of available offerors[29], number of sales/transactions ordered/closed through the platform[30] or number of subscribers[31].

    (ii) An additional threshold (or an alternative threshold) could be established in terms of "user attention", which may be reflected by total number of clicks (and/or revenues generated on a pay-per-click basis) or in number of users. The users' attention is monetised by digital platforms on the other side of the platfrom. Turnover is meant to be a proxy for "*the real economic weight of each entity*",[32] but in digital ecosystems it does no longer reflect the economic power of companies in the markets of the money-free side of platforms.

41. The Report recommends that merger control substantive assessment should be adapted to cases where a dominant platform and/or ecosystem which benefits from strong positive network effects and data access acquires a target with a currently low turnover but a large

[28] Following Brexit, UK referrals by the UK competition authorities (ex art. 22 of EMRC will probably not exist anymore. Important cases such as *Facebook/Instagram* or *Google Waze* reached the Commission thanks to referrals from Member States under this provision, such as the UK. After Brexit, there is only two Member States (Spain and Portugal) with market share thresholds that would reasonably capture transactions in the digital sector (the Austrian/German value thresholds may not be sufficient to capture these transactions with possible low value at the date of purchase but high market shares in the non-monetary side of the platform). Since at least three Member States are needed to make a voluntary referral to the Commission by the notifying parties (art. 4.5 ECMR), it is uncertain that after Brexit there will be many of such voluntary referrals by the parties in the future. Similarly, under art. 22 of ECMR is required that at least one Member States in which the transaction is notifiable proposes the referral to the Commission. The lower the number of Member States that are able to capture this type of transactions the lower the likelihood of referrals to the Commission.

[29] Spanish Competition Authority in cases C-1046/19 *Just Eat/Canary*, C-1061/19 *Takeaway / Just Eat* and C-0730/16 *Just Eat / La Nevera Roja*.

[30] Competition and Markets Authority in Case *Just Eat / Hungryhouse.*

[31] European Commission, case *Apple / Shazam*.

[32] Jurisdictional Notice, para. 167.

and/or fast- growing user base and a high future market potential.[33] In such cases, it is proposed to inject some 'horizontal' elements into the 'conglomerate' theories of harm and try to answer the following questions: (i) does the acquirer benefit from barriers to entry linked to network effects or use of data? (ii) is the target a potential or actual competitive constraint within the technological/users space or ecosystem? (iii) does its elimination increase market power within this space notably through increased barriers to entry? (iv) if so, is the merger justified by efficiencies?[34] This proposed test would imply a heightened degree of control of acquisitions of small start-ups by dominant platforms and/or ecosystems, to be analysed as a possible strategy against partial user defection from the ecosystem. Where an acquisition is plausibly part of such a strategy, the notifying parties should bear the burden of showing that the adverse effects on competition are offset by merger-specific efficiencies.

42. The ECLF would point out that this recommendation is not in line with the *Schneider* and *Tetra-Pak* precedents, which justifiably raise the standard for 'conglomerate' mergers to a very demanding level. The Report makes the point that kill-in-the-crib acquisitions may have 'horizontal' effects when they result in increasing the loyalty of the platform's customers, or increase the market barriers protecting the platform. However, measuring these 'horizontal' effects in a convincing way may prove elusive, and in any event require from the regulators a serious investigation (not a presumption, 'by object', approach).

43. Transactions understood by the Report as 'killer acquisitions' do not refer to the classical pharma mergers where a company acquires another one or a specific line investigation precisely to shut down that competing offer. In these cases, the transaction may negatively affect innovation and variety of the offer. However, in the digital sector mergers often have a sound efficiency rationale and are procompetitive, for example, if acquirers, due to their know-how and superior financial possibilities, successfully bring products or services into the market, or improve their availability and quality. These are not really "killer acquisitions" in the sense developed by the scholars that developed this economic theory and analysed the negative effects of these transactions in the pharma sector[35]. Also, innovation is often motivated by the prospect of selling a startup, once it has developed a promising product, to a larger company wishing to expand or improve its offer. Barring or limiting such possibilities may deter startups and innovation beyond the alleged anti-competitive effects of a transaction.

44. Moreover, not every potential competitor succeeds in establishing its market presence, whether in the digital field or otherwise. Thus, it is questionable whether changing and expanding the concept of potential competition would do justice to complex cases and theories of harm.

45. Furthermore, transactions like *Facebook/WhatsApp* or *Microsoft/Skype* have been reviewed by antitrust regulators and often are considered critical only in hindsight. Changing the concept of potential competition is not only a question of catching more competitive concerns so that they can be addressed, but also about applying a sufficient level and standard of proof. Could a transaction actually be prohibited under the SIEC test if we were looking towards an even longer forecasting horizon or if products or services offered by the startup are – at best – partial substitutes at the moment of the transaction? If market entry still requires relatively

[33] Report pages 11 and 116.
[34] Report page 11.
[35] Research of Florian Ederer, Colleen Cunningham, Song Ma. "Killer Acquisition" (https://som.yale.edu/faculty/florian-ederer).

lengthy and complex innovative work, i.e. depends on a series of factors in relation to which it is not certain that they might all occur in the sufficiently near future, the prospective analysis of the effects of the concentration could become purely speculative. Entering into speculations is not the road that antitrust enforcers should take. It would be better to put more resources into post transaction evaluation and to be ready to use existing dominance control powers if needed.

46. The Report displays a negative outlook upon acquisitions of start-ups by dominant platforms, to a great extent on account of the role of network effects.[36]

47. The ECLF does not necessarily see network effects as a monolithic phenomenon as seen in Commission decision in *Microsoft/Skype* and on appeal before the General Court in *Cisco.* The first and main legal test that should be used for analysing concentrations in the digital sector is whether strong market positions are temporary and contestable. For this purpose, the assessment of network effects should not be tantamount to a monolithic analysis of market shares. In particular, positive feedback loops can be countered by low barriers to entry (start-ups can develop new functionalities without incurring important sunk costs), negligible switching costs and swift dissemination of innovation.

48. Furthermore, to assess 'killer acquisitions', an approach based on a 'counterfactual analysis' (would the target have become a competitive constraint in the absence of the merger?) is one option, which is suggested in the Report as an approach to be tested on a case-by-case basis.[37]

Annex 1: Members of the ECLF working group on digitalisation;

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- **Uria Menéndez:** Patricia Vidal Martinez
- **White & Case:** Assimakis Komninos

[36] Report page 111.
[37] Report pages 119 and 123.