NEWS MEDIA EUROPE

NME submission to the European Commission: Shaping competition policy in the era of digitisation

News Media Europe (NME) represents the progressive news media industry in Europe – over 2,200 media companies including newspapers, radio, television and internet. News Media Europe is committed to maintaining and promoting the freedom of the press, to upholding and enhancing the freedom to publish, and to championing the news brands, which are one of the most vital parts of Europe's creative industries.

Recommendations

- **NME welcomes the policy dialogue on shaping EU competition policy for the digital era and stresses the need to not overlook competition challenges relating to other policy fields notably as regards taxation, publicly funded entities, consumer protection, privacy, and net neutrality;**
- **Recommends a critical reflection on the current choice and effectiveness of competition remedies used in certain cases involving online platforms, given the observable systemic patterns of anti-competitive behaviour;**
- **Recommends defining a wider market for data to ensure a policy approach that reflects market reality and that the process of defining relevant markets focuses more on threats of potential and future competition;**
- **Recommends that market power be assessed through alternative indicators and that competition authorities be critical of assumptions about contestability in digital markets, and about the role that data can play thereof;**
- **Recommends a critical reflection on whether the commercial practices of certain platforms, related to data and notably in the context of the GDPR, and the creation of walled-gardens, amount to anti-competitive foreclosure;**
- **Recommends that concerns about slow responsiveness by authorities in the assessment of anti-competitive foreclosure be complemented by a greater focus on the preventive arm of competition policy;**
- **Recommends that the control of concentration between undertakings in the digital economy is improved by reviewing how to define markets, assess market power and anti-competitive foreclosure, as per the previous recommendations;**
- **Recommends a critical reflection on the lawful framework for cooperation between otherwise competing undertakings in the digital economy as means to address inherent imbalances in bargaining power in relation to online platforms.**

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The debate viewed from the European news media industry

This submission examines challenges for competition policy in the digital era, with a focus on the rules laid out in Article 102 TFEU as regards abuses of dominance, from the perspective of the European news media industry.

These are difficult times for the European news media industry which, in the adversity of challenging economic and political industry conditions, is resolved to secure a more digital and sustainable future. European news media companies currently face a situation whereby they bear the costs of producing professional journalistic content while being unable to realise the full profits that should also result from such content.

News media companies face anti-competitive pressures linked to the behaviour of certain online technological platforms ("platforms"). Yet, in the case of platforms, it remains excessively onerous for competition authorities to identify and prove abuses of dominance, despite their willingness to test novel approaches. We note that the inherent flexibility of the current competition framework should in fact allow the Commission to develop the right tools to accommodate for the specific dynamics of the markets in which platforms operate.

The status quo enables certain dominant platforms to anti-competitively leverage their market power in adjacent markets with impunity. Certain platforms also face unchallenged success in acquiring smaller platforms to fend off potential future competition, in taking on the role of gatekeepers to data, and in exploiting lock-in effects on consumers and advertisers.

Platforms benefit from strong network effects that promote high levels of concentration in key markets. This notably includes markets related to social media, over-the-top electronic communications, general search, and online advertising. Some of these markets have already reached oligopolistic structures.

While the market for general search has become a de facto monopoly, industry experts refer to the online advertisement market as "the duopoly" because of the overwhelming market dominance of Google and Facebook. The high levels of concentration in these markets calls into question the economic sustainability of present and potential future business models for producers of news content.

Certain platforms not only news distribute content, but also compete for advertising revenue with news organisations, and at times for content itself, while also offering to supply them with a wide range of technological solutions which they control. They include analytics, advertisement, publishing, interoperability, and search ranking.

The dominance of certain platforms in multi-sided markets, combined with growing vertical integration amongst them into news-related activities, is cause for strong

industry concerns about the potential effects on the European news media ecosystem. At the heart of such discussions lies the dominance of certain platforms in the online data economy, where the application of competition law becomes contested.

There are questions about whether, and if so how, a wider market for data should be defined, and about how dominance, and abuse thereof, should accordingly be assessed. With the implementation of the General Data Protection Regulation (GDPR), it has become evident that certain dominant platforms have started using the Regulation to justify measures that allow them to leverage their market power to extend into new markets by restricting the access of news media companies to data.

As regards penalties for breaching competition rules, there are doubts about both the use and the effectiveness of traditional remedies given the continued systemic patterns of anti-competitive behaviour that are observable in certain platforms, notably as regards the use of so-called walled-garden strategies by dominant undertakings.

Dissuasiveness should remain a cornerstone of the existing system of penalties for breaching competition rules, to the benefit of consumers, even if this means making greater use of structural and quasi-structural remedies in digital markets. Functional separation may in particular be useful to tackle anti-competitive behaviour that arise as a result of walled-gardens. Moreover, we also note that excessive caution by regulators when imposing powerful remedies may also motivate abusive behaviour.

It is therefore clear from our perspective that a number of meaningful changes to the European Commission competition toolbox are needed to modernise competition policy in light of our increasingly digital and data-driven economy. The mandate of the 2019-2024 European Commission offers a timely opportunity to that end by way of, for example, reviewing the Commission's notice on market definition and guidance on enforcement priorities.

Going forward, we also recommend strengthening the preventive arm of competition policy, introducing a more flexible approach to the definition of markets that accounts for changing market structures and updating the methods used to assess market dominance and abuse thereof.

On the definition of the relevant market(s)

When assessing the scope of the relevant market, we believe that the traditional concepts of demand and supply-side substitution should play a less important analytical role in identifying competitive restraints for platforms. This is due to the understanding that a clear competitive relationship can often be established between

platforms, even in the absence of demand or supply substitutability. Instead, the emphasis should be placed on potential competition.

The structural characteristics of digital markets are such that, under certain conditions, the mere threat of entry by a given undertaking into a new market can in itself be sufficient motive to stimulate competitive rivalry and behaviour between undertakings. This is because digital markets can be characterised by strong levels of contestability of market positions if certain conditions are met. A strong user base can in that context be seen as a good proxy for the potential threat that an undertaking can pose to others, notably because of the potential entailed in collecting data and competing on that basis.

Therefore, entry into digital markets is les interlinked with neighbouring markets compared to what we may be used to in more traditional markets. Ultimately, the aim for competition policy should be to incorporate a better and more sophisticated understanding of firm behaviour and strategic management into antitrust analysis, which would yield a more consistent framework.

As such, one key question facing policy makers when defining relevant markets is whether relevant markets for data should be defined, given the increasingly prominent role that data, and especially personal data, plays in the digital competitive landscape. This issue has become even more pressing with the rise of anti-competitive practices by certain platforms in online advertising markets since the entry into force of the GDPR. Data-related abuses of dominance constitute an emergent field for the application of competition law, posing both practical and conceptual challenges.

In our view, it is clear that data underpins the ability to improve products and services, capture early market signals, and fuel innovation. The importance of such data is even more pronounced in zero-priced markets, where it is the key production input used to create value, meaning that data should be seen as a source of market power and analysed as such. The fierce market rivalry around data and the shared reliance of platforms on data as a competitive asset means that data is becoming the common denominator between markets.

As a result, News Media Europe believes that the European Commission should define separate and relevant markets for data, even when data is not necessarily traded as a standalone product. In the case of the online advertising market, we question whether a continued reluctance to accept that companies can have a dominant position with regards to access to data can still be justified on reasonable grounds. The criticism raised in relation the acquisition of DoubleClick by Google in 2007 (Case COMP /M.4731) reflects this issue. The status quo essentially gives “the duopoly” a carte blanche to continue acting as data gatekeepers to the detriment of consumers.

Defining a market for data has so far been argued to be problematic by some under current competition standards because if data is not a product, then there can arguably

be no demand, supply, and substitutability, and therefore no market. Yet, at the same time, we identify markets for search and non-search advertising. The question hence arises as to why there could not be a corresponding set of input markets for data. Substitutability of data could be assessed accordingly as the data-based advertising services offered to advertisers vary in terms of functionality accordingly.

It has also been argued that data could also be recognised under the Horizontal Guidelines as a specialised asset with critical implications for competition in innovation. In any event, it is clear that systemically understating the economic and competitive role of data by ignoring the industrial ecosystem built around it and ignoring the presence of a corresponding market will result in analyses and decisions that are at odds with economic reality.

On the assessment of market power

Much debate has taken place over how market power assessment methods, as laid out in the European Commission's guidance on the enforcement priorities in applying Article 102 TFEU, should be adapted in the context of platforms.

In assessing the constraints imposed by the market position of a dominant undertaking and its competitors, it appears that market shares are not always the best preliminary indicators of dominance in the case of platforms as they can be difficult to compare since they can relate to undertakings operating in different multi-sided markets with different market power on different sides of the market. Often, other indicators such as concentration ratios, price levels and profit margins are also used to determine market power. Yet, some highly successful digital business models have no service price and make little or no profit.

The use of more traditional indicators to assess market power in platforms can therefore lead to conclusions that are at odds with economic reality. Furthermore, they are also a source of concern in the context of merger control because their use to assess vertical power relations can lead to equally flawed conclusions, resulting in possible harm to the market and consumers. As noted earlier, the vertical integration of platforms into news-related services is an important concern for the news media ecosystem from a competition point of view.

Instead of relying on such traditional indicators in the case of platforms, News Media Europe supports an approach focused on alternative indicators to assess market power. For example, they could include the number of users, listings, traffic, company valuations, acquisition patterns, the ability to monetise data, potential or future competition, patterns of single and multi-homing, and the scale and scope of network effects. The Commission could incorporate such indicators in its guidance on

enforcement priorities, or issue separate guidance on the assessment of market power in digital markets, which would legitimise their use.

In assessing the structure of the market and the position of competitors, we believe that the process of identifying competitors should become less reliant on the concepts of demand and supply-substitutability. This would improve the analytical process by allowing for better consideration of undertakings which compete along different lines than product or service functionality. As previously argued, a competitive relationship between undertakings, with meaningful impact on the behaviour of market participants, can be established even in the absence of demand and supply-substitution.

As regards the evaluation of constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors, it is important that the dynamic structures of digital markets are better integrated in the market definition process by accounting for the high contestability of market positions in the digital economy if certain conditions are met. Yet, authorities should also be critical of the notion that the market position of dominant platforms can be radically contested.

We note with caution the need to keep challenging this assumption to avoid taking it for granted. The defining characteristic of some of the platforms operating in the online advertising markets and who form part of “the duopoly”, is that their commercial use of data is taking place to an unprecedented extent and is combined with the creation of walled-gardens, which are essentially economic ecosystems of subordination whereby other undertakings are reliant on the proprietary assets of the dominant entity to operate their business model and forced to “play by the rules”.

We note the sector inquiry of the Bundeskartellamt into online advertising and recommend similar action by the Commission. Walled-garden commercial practices associated with specific products which warrant scrutiny notably include, but are not limited to, Google’s Accelerated Mobile Pages (AMP) and Facebook’s Instant Articles.

It is questionable whether platforms that have such a cemented dominant position, which can make far better and more effective use of data to improve products and services, to predict market behaviour, trends and opportunities before current and potential competitors, have a position that is realistically contestable, especially when the scope and magnitude of the network effects in the relevant markets are considered. Allowing for an informed qualitative analysis to account for such market conditions could have potentially enabled the Commission to reach faster conclusions in the Google Shopping case (Case COMP / AT.39740) and the Google Android case (Case COMP/ AT.40099), for example.

Unlike for most other assets, the value of data increases when it is combined with additional data. It is questionable whether potential competitors will ever be in a position to accumulate sufficient data, both in terms of quantity and quality, to pose

any credible competitive threat to "the duopoly". Taken altogether, these considerations raise the question as to whether certain market conditions can lead to an insuperable competitive advantage. The market for online general search constitutes a good case study for such concerns, but also raises further questions about what should be done in such situations, when the market has effectively and irreversibly tipped, and about how to protect consumers thereof.

Concerning the assessment of constraints imposed by the bargaining strength of the undertaking's customers, doubts have been raised by commentators as to whether such concerns are even of relevance to platforms since they operate in multi-sided markets where value is created through a matching function that provides an economically more efficient alternative for all parties involved, through reduced transaction costs. We find such views to be at odds with economic reality.

In the case of online advertisement, news media companies are concerned about the substance of the standardised terms and conditions which "the duopoly" offer. This is reflected in the ongoing AdSense investigation. Since the entry into force of the GDPR, the use of terms and conditions limiting access to data for news media companies, accompanied by a commensurate shift in the liability for data collection and processing towards those same companies, has become a key concern.

This is aggravating existing industry concerns about Google's walled-garden strategy which informs the AdSense investigation, and about whether this constitutes an abuse of dominant position. The reduced ability for other market participants to collect and process data can have severe consequences in future markets as data is a key production asset for the development of new products and services and in driving innovation. Therefore, there is a concern about how competition policy could also intervene to preserve competition in innovation.

On the assessment of foreclosure leading to consumer harm ("anti-competitive foreclosure")

There is no doubt that the assessment of firm behaviour is more difficult when it comes to platforms. Yet, there is a shared understanding that distinguishing anti-competitive behaviour from normal business strategies can be especially challenging.

The business model of platforms calls into question the fitness of current competition tools. The mere fact that the various cases against certain platforms are so difficult to compile, take a half a decade to put together, and that findings of abuses of dominance are so difficult to prove, all point towards the same conclusion.

Taken altogether, it logically follows that a gradual shift towards a more prominent role for the preventive arm of competition policy is warranted. By “preventive arm”, we mean ex-ante measures, which could alleviate concerns that competition policy is unable to keep pace with market developments in high-tech sectors as by the time regulators issue their decisions, markets have typically already evolved. The development of good indicators warranting ex-ante intervention may prove a challenging exercise but should not prevent such policy recalibration given the tangible benefits thereof.

In practice, strengthening the preventive arm could notably involve allowing authorities to request information from dominant undertakings about new products and services before they are launched, with the purpose of creating a system of early signals. For example, strong concerns have been raised as regards the roll-out of the Google Jobs product in the EU. In such a case, it may be therefore argued that a preliminary, non-binding assessment could play a proactive role in preventing possible damage to market participants and consumers alike.

Other interesting proposals could involve establishing a framework for closer monitoring of repeated offenders of anti-trust rules, and to considering whether, and if so how, to best modify the relevant metrics used to determine the threshold values triggering notification requirements for mergers and acquisitions, in accordance with the alternative indicators suggested to assess market power. This would have allowed, for instance, the controversial acquisition clearance of Waze by Google in 2014, cleared by of the Office of Fair Trading (Case ME/6167/13), to have been notified to DG Competition and received appropriate EU-level scrutiny.

Another solution to the issue of slow responsiveness of competition policy combined with fast moving markets could be to assess, in line with the principle of proportionality, whether a better use of reversed burden of proof mechanisms could be employed under specific circumstances. By the same token, the Commission should consider making greater use of interim measures.

On the control of concentrations between undertakings

The debate on whether the right indicators are used to assess market power inevitably has implications for the clearing of mergers and acquisitions. If the traditional indicators do not accurately reflect market power, and if relevant markets are not properly identified, then the entire merger control process becomes flawed since the impact of mergers on future markets and consumers cannot be adequately assessed.

News Media Europe is concerned that under current rules, certain platforms are able to effectively carry out what constitutes pre-emptive mergers with detrimental effects on future competition. By “pre-emptive mergers”, we mean acquisitions by larger

undertakings of smaller and yet competitively threatening competitors or likely future competitor, possibly in the context of a race to acquire such players before competitors.

While predicting the effect of concentrations on future markets is difficult by definition, and while prudent enforcement of merger control and relying on existing antitrust laws remains important, we believe that there are justified concerns about platforms carrying out acquisitions related to companies with many users, which almost invariably implies large quantities of data, and about how this can facilitate tipping in future markets.

This is especially relevant when the case concerns platforms buying out other platforms, or undertakings operating in non-transaction markets with indirect network effects, where the acquired undertaking is in a position to become a competing multi-sided platform in the future. Several cleared mergers can serve as illustration for this issue. We note with particular concern the cleared acquisitions of WhatsApp by Facebook in 2014 (Case COMP /M.7217) and, more recently, of Shazam by Apple in 2018 (Case COMP /M.8788).

The concern not only stems from a concentration of users, but also of data that tends to accompany that of users. Again, the potential for harming competitiveness in the market stems from the increased marginal value that data provides when it is combined more data, and which often can serve to cement an existing dominant position.

The aggressive acquisition patterns linked to “the duopoly” are already well-documented. The application of merger control has not been able to challenge such acquisitions despite strong concerns perceived by market participants about their stifling effect on markets, innovation and consumer choice. The modernisation of market definition and market power assessment tools are therefore also a pressing issue because of their role in triggering notification procedures which would lead to more appropriate scrutiny and assessment of cases at EU-level.

Further reflections on cooperation between otherwise competing undertakings in the digital economy

It is clear that “the duopoly” poses many challenges for competition policy. One of them relates to how the inherently huge difference in bargaining power between certain platforms and the rest of the digital ecosystem, which is often fragmented.

In the case of the news media industry, the sector is increasingly responding to this challenge to its competitiveness by means of selective cooperation between otherwise competing undertakings. It follows that it is becoming increasingly important to identify where the line between cooperation and anti-competitive practices should be drawn.

Such cooperation can involve the sharing of costs relating to technological solutions, administration, production capacity and distribution. However, cooperation could also go further within reason and also involve the collective bargaining of prices relating to the licensing of intellectual property and the selling of advertisement space to help address imbalances in bargaining power between news organisations and platforms.

Yet, such cooperation is typically prohibited under current competition standards and could also have cross-border effects, raising questions about compatibility with Article 101 TFEU, as cooperation could be understood as concerted practices within the meaning of competition law. We see potential for significant economic, social and cultural benefits from further cooperation between news organisations, outweighing the potential negative effects on competition.

If the application of competition rules conflicts with their purpose, then action should taken. Article 101(3) TFEU acknowledges that such conflicts may arise and provides for the possibility to exempt specific agreements from the prohibition of TFEU 101(1) which have as their object the research and development of products, technologies, and provisions regarding intellectual property rights, amongst others.

We therefore recommend that the European Commission makes use of this exemption as regards the news media sector, to allow Member States that wish to support the sustainability of their news media sector by way of allowing cooperation to effectively provide for collective bargaining rights for their industry with full legal certainty.

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