



# The Role of Competition Policy in Protecting Consumers' Well-being in the Digital Era



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## > Preface

A project on “Protecting Consumer Freedoms in the Digital Era” was launched by BEUC in November 2017, under the auspices of the Open Society Foundations. It explores the way in which EU competition law should apply in digital markets as a tool to maximise the well-being of consumers in the European Union.

Through this project, BEUC wants to contribute to the important debates that are shaping the future of our economy and society in the digital era. The notion defended by vested interests that market forces alone can ensure best outcomes for consumers is rapidly losing any credibility it may have had. On the other hand, competition law enforcement, by helping to ensure that consumers can benefit from free and open markets, in which companies compete on their merits, is an important method of improving consumer choice and satisfaction.

To offer an analytical framework for the project, BEUC published in August 2018 a Discussion Paper<sup>1</sup>, authored by Professor Ariel Ezrachi (Oxford University) as the Academic Advisor to this project, on the foundations of European competition law, its multitude of goals, and their significance in a digitalised economy.

Meetings and consultations followed, with competition officials, competition experts and relevant stakeholders, aimed at exploring means to better utilise and enforce EU competition law

in the digital era. A symposium hosted by BEUC in December 2018 offered further opportunities to gather input from competition agencies, academics and representatives of civil society from the EU and the US.

This report summarises the harvest of this iterative process. It outlines the significant challenges for consumers in the digital economy and offers guidance to enforcers and decision makers on how best to use competition law enforcement, complemented where necessary by regulation, to address these challenges and so ensure that consumers enjoy a fair share of the benefits of the digital economy.

It is important to ensure that the European Commission's Competition Directorate-General and EU Member States' competition authorities can build upon the solid foundations established in recent years in terms of antitrust enforcement. In particular, they need the tools and resources adapted to address new and evolving challenges including big data, big analytics, network effects, switching costs and lock-in to controlled eco-systems.

This report forms part of BEUC's ongoing work in this area. Comments on the report and its proposals are welcome and can be sent to:

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<sup>1</sup> [https://www.beuc.eu/publications/beuc-x-2018-071\\_goals\\_of\\_eu\\_competition\\_law\\_and\\_digital\\_economy.pdf](https://www.beuc.eu/publications/beuc-x-2018-071_goals_of_eu_competition_law_and_digital_economy.pdf)



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## ➤ The problem: the rise of digital power and the erosion of consumers' freedoms

The digital economy forms a central driver to future prosperity – delivering waves of innovation, efficiencies and consumer welfare. It has stimulated a shift in market dynamics, paving the way for the emergence of platforms, networks and the proliferation of multi-sided markets, connecting companies with millions of consumers across Europe.

The digital landscape presents several characteristics which differentiate it from many other markets. These include:

**Big data**, which undoubtedly drives much of the innovation of goods and services on offer in the digital economy, has become a key asset. While big data offers many improvements, the fact is that limited access to relevant and timely data may inhibit market entry, expansion and innovation.<sup>2</sup> As noted by the OECD, a positive feedback loop helps the strong become stronger, as the weak get weaker.<sup>3</sup>

A data advantage over rivals can enable leading players to achieve critical economies of scale, which could tilt the data – and competitive balance – in their favour leading to the unhealthy development of dominant market positions.

**Big analytics** offer the power to optimise the use of data, identify patterns, improve the understanding of market dynamics, and open the door to accelerated innovation. Advanced analytics have also been central to companies' ability to identify consumers' needs and wants. Here as well, alongside the clear benefits, one can identify worrying trends. Data mining, data trade, online marketing, pattern recognition, demand estimation and price optimisation have all been used to approximate reservation prices, identify biases and power exploitative practices.

**Network effects** offer unparalleled efficiencies and economies of scale which drive the digital economy.

<sup>2</sup> The themes below are discussed in greater detail in Ezrachi and Stucke *Virtual Competition - The Promise and Perils of the Algorithm Driven Economy* Harvard University Press (2016); Ezrachi and Stucke 'Digitalisation and Its Impact on Innovation - Report Prepared for the European Commission' DG Research & Innovation (2018)

<sup>3</sup> OECD, *Data-Driven Innovation for Growth and Well-Being: Interim Synthesis Report 29* (October 2014), <http://www.oecd.org/sti/inno/data-driven-innovation-interim-synthesis.pdf>; reference within quotation is to Carl Shapiro and Hal R. Varian, *Information Rules: A Strategic Guide to the Network ECONOMY* (Harvard Business Press, 1999).

At the same time, however, network effects may support the rise of significant barriers to entry and limit competitive pressure on the incumbent.<sup>4</sup> Indeed, the combination of network effects, access to data and analytics may tip the market in favour of a leading provider, which may become inefficiently entrenched.<sup>5</sup> This may affect competition on data, competition on user-base and algorithm development, and may influence the nature and scope of innovation.

**Friction and switching** costs are also common in many digital markets. In concentrated markets with network effects, platforms and service providers may seek to limit consumers' ability to switch suppliers and the availability of alternative suppliers by creating friction, and limiting interoperability between systems. Such practices raise barriers to the entry and expansion of smaller competitors.

**Controlled ecosystems** also play a role in this environment. Users face asymmetric information as to costs, benefits and availability of outside options. As users are (de facto) locked into one platform or provider, they are subject to its control and possible use of behavioural techniques ('sludge'<sup>6</sup>). Such environments are ripe for tracking, manipulation and exploitation.<sup>7</sup> The controller of the ecosystem may also invest in means to ensure continued engagement, and to share data within the incumbent's digital ecosystem (often against

the user's own interests).<sup>8</sup> Indeed several reports highlight increased investment by platforms and application providers to foster addiction, aimed at keeping users logged on, to facilitate targeting and data harvesting.<sup>9</sup>

**Increasing permeability between markets and society** – the capacity to monitor, target and manipulate users goes beyond traditional markets and can impact important societal debates and democratic processes. Online tracking and behavioural manipulation can be used to distort the market for ideas so as to influence citizens' attitudes towards elections and public debates beyond the remit of economic activities. Further to this, data collection and processing taking place in controlled ecosystems can undermine data protection and privacy rights enshrined in the EU Charter of Fundamental Rights.

The accumulated result of the above characteristics has been a digital environment which may appear dynamic, but is often characterised by increased concentration and increased market power. An environment in which key players are able to dictate the nature and flow of innovation, the entry into market, the expansion of services and the interface with consumers. These features arguably led many markets to tip in favour of the dominant firm, making disruption less likely. Indeed, some empirical data suggests that markets are becoming

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<sup>4</sup> Germany, in 2017, for example, amended its competition law to specify that direct and indirect network effects be taken into account in assessing a firm's market position. § 18 (3(a)) of the Act against Restraints of Competition (Competition Act – GWB) - Last amended by Article 10(9) of the Act of 30 October 2017, [https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/GWB.pdf?\\_\\_blob=publicationFile&v=6](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/GWB.pdf?__blob=publicationFile&v=6).

<sup>5</sup> See the Report for the Federal Ministry for Economic Affairs and Energy (Germany) Heike Schweitzer, Justus Haucap, Wolfgang Kerber, Robert Welker 'Modernising the law on abuse of market power'

<sup>6</sup> See the report of The Behavioural Insights Team, 'The behaviour of online harm and manipulation, and what to do about it', 15 April 2019, [https://www.bi.team/wp-content/uploads/2019/04/BIT\\_The-behavioural-science-of-online-harm-and-manipulation-and-what-to-do-about-it\\_Single.pdf](https://www.bi.team/wp-content/uploads/2019/04/BIT_The-behavioural-science-of-online-harm-and-manipulation-and-what-to-do-about-it_Single.pdf)

<sup>7</sup> <https://www.wired.com/2016/11/subtle-ways-digital-assistant-might-manipulate/>

<sup>8</sup> Forbrukerrådet, 'Deceived by Design. How tech companies use dark patterns to discourage us from exercising our rights to privacy', <https://fil.forbrukerradet.no/wp-content/uploads/2018/06/2018-06-27-deceived-by-design-final.pdf>

<sup>9</sup> Opinion no. 18-A-03 of 6 March 2018 on data processing in the online advertising sector. [http://www.autoritedelaconurrence.fr/doc/avis18a03\\_en\\_.pdf](http://www.autoritedelaconurrence.fr/doc/avis18a03_en_.pdf); Haley Sweetland Edwards, 'You're Addicted to Your Smartphone. This Company Thinks It Can Change That' TIME (Apr. 13, 2018, 10:28 AM), <http://time.com/5237434/youre-addicted-to-your-smartphone-this-companythinks-it-can-change-that>; Didem Kaya Bayram & Furkan Akyurek, 'How our voices could turn into a weapon of mass, hyper-targeted advertising' TRT WORLD, <https://www.trtworld.com/life/how-our-voices-could-turn-into-a-weapon-of-mass-hyper-targeted-advertising-18681>; Also see: 'Online Exploitation and Addiction' page 41, Report - Committee for the Study of Digital Platforms, Market Structure and Antitrust Subcommittee (01 July 2019) George J. Stigler Center for the Study of the Economy and the State, available online: <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure--report-as-of-24-june-2019.pdf?la=en&hash=872E4CA6B09BAC699EEF7D259BD69AEA717DDCF9>





The Great Wave off Kanagawa, Wikimedia Commons: [https://upload.wikimedia.org/wikipedia/commons/0/0d/Great\\_Wave\\_off\\_Kanagawa2.jpg](https://upload.wikimedia.org/wikipedia/commons/0/0d/Great_Wave_off_Kanagawa2.jpg)

more concentrated<sup>10</sup>, and display lower levels of investment in innovation.<sup>11</sup>

Faced with these changing market characteristics, the dilemma for the competition enforcer is a familiar one. Should one trust market forces to

introduce disruption, so as to ensure dynamism and safeguard the consumer interest? Or, should one take measured action, with the aim of protecting consumer welfare and well-being, and ensure the competitiveness of future markets?

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<sup>10</sup> Germán Gutiérrez & Thomas Philippon, *Declining Competition and Investment in the U.S.*, NBER Working Paper No. 23583 (July 2017), <https://www.nber.org/papers/w23583>.

<sup>11</sup> For example, a 2018 IMF working paper unveils a significant increase of mark-ups between prices and marginal costs of publicly traded firms in developed economies. The rise in measured mark-ups is associated with increased market power and market concentration as "firms have lower incentives to invest in innovation as their market position strengthens." Federico J. Díez, Daniel Leigh & Suchanan Tambunlertchai, *Global Market Power and its Macroeconomic Implications*, IMF Working Paper WP/18/137 (June 2018); Also see: Jan De Loecker & Jan Eeckhout, *Global Market Power*, NBER Working Paper 24768 (June 2018); De Loecker & Jan Eeckhout, *The Rise of Market Power and the Macroeconomic Implications*, NBER Working Paper No. 23687 (2017)

There has been an emerging consensus in recent years that the unique conditions prevalent in digital markets, and the business strategies which have emerged, support the latter proposition. While it is widely agreed that network effects, big data and big analytics are necessary in order to yield greater efficiencies, and as such have the potential to promote consumer welfare, their combination, alongside other business strategies, has led to the rise of exploitative and exclusionary practices which digital market dynamics seem unable to curtail. The practices giving rise to the most concern are:

### **Platform exclusionary practices**

The presence of a handful of gatekeepers that control an ecosystem has bestowed on these select few the power to determine the rules of the game and engage in ongoing self-preferencing. With market power and limited outside options, some platforms are increasingly able to dictate terms and conditions to users, levy increased charges for use, control data flows from sellers to users and distort the competitive process to their advantage.<sup>12</sup>

### **Self-preferencing and search engine manipulation effects**

Linked to the above is the ability of leading platforms and search engines to engage in self-preferencing, in the form of ranking biases, filtering and ordering search suggestions, and search engine manipulation. Manipulation may affect the ability of downstream operators to compete effectively with vertically integrated entities that control the search

parameters and results.<sup>13</sup> Such exclusionary practices may also lead to exploitation and could further impact on users' perception of the market for goods, services and ideas.<sup>14</sup>

### **Exploitation of upstream providers**

Control over key interfaces and platforms may enable a powerful intermediary to exercise market power in its dealings with service and content providers. Such practices may distort upstream markets, have a direct adverse effect on service providers, and have indirect adverse consequences for consumers. These practices may include, among others, margin squeeze, scraping of content and abuse of bargaining power.<sup>15</sup>

### **Data access**

The central role played by data in the digital economy raises challenging questions about the extent to which companies in control of key data should be required to allow others access to raw data. A refusal to grant access to key data, and data pools, may have adverse effects on innovation and market entry.<sup>16</sup> There may be a need for intervention where access to data forms a barrier to entry, expansion and innovation.<sup>17</sup>

### **Excessive data collection and processing**

Data constitutes a key asset in the digital economy, powering advertising, analytics and targeting. Its central role has led to increased efforts, notably through the use of ever more sophisticated techniques, to enable firms to surreptitiously

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<sup>12</sup> For illustration, see: Case 40099 – Google Android; Case 40411 - Google Search (AdSense); Case 40462 - Amazon Marketplace.

<sup>13</sup> Case 39740 - Google Search (Shopping)

<sup>14</sup> Cass R Sustein, #Republic: Divided Democracy in the Age of Social Media (Princeton University Press 2017); Tristan Harris 'How a handful of tech companies control billions of minds every day' (2017) <www.ted.com> accessed 10 May 2018.

<sup>15</sup> <https://www.competitionpolicyinternational.com/wp-content/uploads/2017/05/CPI-Stucke-Ezrachi.pdf>

<sup>16</sup> EU Commission special advisors report by Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer on Competition Policy for the Digital Era, available at - <http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>

<sup>17</sup> See, for example, the European Commission's recent investigation into Insurance Ireland data pooling system [http://europa.eu/rapid/press-release\\_IP-19-2509\\_en.htm](http://europa.eu/rapid/press-release_IP-19-2509_en.htm)

harvest user data, merge off-line and online data, and engage in advanced data analysis.<sup>18</sup> The current digital landscape is characterised by increased use of direct and third-party tracking and data collection tools, some utilised without clear user consent and others imposed as a condition of use. Data harvesting, when it does not comply with data protection and privacy legislation, can be viewed as a form of quality degradation by dominant providers.<sup>19</sup> This adversely affect users' autonomy, and exposes them to manipulation and exploitation.<sup>20</sup>

### **Discriminatory practices**

The asymmetry of information and analytical capacity in the digital economy enables data-driven companies to deploy advanced algorithms and machine learning techniques to facilitate targeting, discriminatory practices and behavioural manipulation. These practices may affect patterns of demand and distribution of wealth. For example, personalised pricing or price discrimination in the digital environment can have serious distributional effects where the most vulnerable consumers might end up paying higher prices than under a competitive price scenario (when personalisation is combined with commercial practices seeking to increase the individual consumer's willingness to pay).<sup>21</sup> They may also be used to target biases and reinforce existing or desired viewpoints with the aim of keeping users engaged with the firm's platform so as to generate advertising revenues.<sup>22</sup>



***Data harvesting, when it does not comply with data protection and privacy legislation, can be viewed as a form of quality degradation by dominant providers. This adversely affect users' autonomy, and exposes them to manipulation and exploitation.***



<sup>18</sup> Note the helpful classification of data to three key categories - volunteered, observed, or inferred. See: EU Commission special advisors report (n 15); See for example Facebook's business model which enabled Cambridge Analytica to harvest data from users (eg Zeynep Tufekci, 'Facebook's Surveillance Machine' *New York Times* (19 March 2018) <<https://www.nytimes.com/2018/03/19/opinion/facebook-cambridge-analytica.html>> accessed 30 March 2018).

<sup>19</sup> Stucke, Maurice E. and Ezrachi, Ariel, *When Competition Fails to Optimize Quality: A Look at Search Engines* 18 *Yale Journal of Law & Technology* 70 (2016); On this issue, see amongst others, Wolfgang Kerber, 'Digital Markets, Data and Privacy: Competition Law, Consumer Law and Data Protection' [2016] *GRUR Int* 639. Note that although they are often conflated, data protection and privacy are two distinct rights protected under EU law. See generally Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016).

<sup>20</sup> On the prevalence of tracking, see for example: Reuben Binns, et al. 'Third party Tracking in the Mobile Ecosystem' [2018] *ACM WebSci* 18; Sebastian Schelter and Jérôme Kunegis 'Tracking the Trackers: A Large-Scale Analysis of Embedded Web Trackers' <<https://ssc.io/pdf/trackers.pdf>> ; Ezrachi, Ariel and Robertson, Viktoria H.S.E., 'Competition, Market Power and Third-Party Tracking' *World Competition: Law and Economics Review*, Vol. 42, No. 1, March 2019

<sup>21</sup> BEUC, 'Personalised pricing in the digital era', note for the joint meeting between the OECD Competition Committee and the Committee on Consumer Policy on 28 November 2018, [https://one.oecd.org/document/DAF/COMP/WD\(2018\)129/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)129/en/pdf)

<sup>22</sup> BEUC, 'What is the link between behavioural advertising and fake news', [https://www.beuc.eu/publications/beuc-x-2018-036\\_what\\_is\\_the\\_relation\\_between\\_behavioural\\_advertising\\_and\\_fake\\_news.pdf](https://www.beuc.eu/publications/beuc-x-2018-036_what_is_the_relation_between_behavioural_advertising_and_fake_news.pdf)



## ➤ The scope of European competition law

The above practices may call for intervention, notably when market dynamics are unlikely to safeguard the consumer interest. A first step is to consider whether competition rules provide a relevant and effective enforcement instrument. A second step is whether the above practices constitute a competition problem. In this context, we need to consider the scope and goals of European competition law.

While being mindful of its limits due to its high thresholds of intervention and lengthy procedures, European competition law can nevertheless provide a valuable and flexible instrument to address many of the market failures discussed above. EU competition law seeks to enhance consumer welfare and ensure efficient allocation of resources.<sup>23</sup>



Source: Court of Justice of the European Union

<sup>23</sup> European Commission, 'Guidelines on the Application of Article 81(3) of the Treaty' [2004] OJ C101/97, para.13 (hereinafter 'the General Guidelines').

Furthermore, the law protects “not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such”.<sup>24</sup> Indeed, the goals of European competition law centre around, and are primarily consistent, with consumer welfare, but are not limited to it. It has consistently been applied in a manner to protect consumer well-being<sup>25</sup>, consumer welfare<sup>26</sup>, efficiency<sup>27</sup>, effective competition structure<sup>28</sup>, the protection of input providers<sup>29</sup>, fairness and distributional justice<sup>30</sup>, plurality and the public interest<sup>31</sup>, and market integration.<sup>32</sup> The BEUC Discussion Paper which kick started this consultation offers a detailed review of these goals and values.

In an ever-changing economic reality, EU competition law has the necessary scope to adjust and remain relevant and effective. Indeed, competition law “cannot be pursued in isolation, as an end in itself, without reference to the legal, economic, political and social context”.<sup>33</sup>

Of central importance is the focus of competition law on consumer well-being and welfare. As clearly noted by the Commission, “[t]he aim of the Community competition rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources”.<sup>34</sup> And as noted by the EU Court:



***The ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase the well-being of consumers... Competition law and competition policy... have an undeniable impact on the specific economic interests of final customers who purchase goods or services.***<sup>35</sup>



<sup>24</sup> Case C-501/06 P GlaxoSmithKline Services Unlimited v Commission and Others [2009] ECR I-9291, para 63. See also Case C-8/08 T-Mobile Netherlands and Others [2009] ECR I-4529, paras 31, 36, 38-39; Council Regulation (EC) 1/2003 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, Recital 9; European Commission, ‘Green Paper on Vertical Restraints in EC Competition Policy’ COM(96) 721 final, para 180.

<sup>25</sup> Joined Cases T-213/01 and T-214/01 Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft v Commission [2006] ECR II-1601, para 115.

<sup>26</sup> European Commission, ‘Guidelines on the Application of Article 81(3) of the Treaty’ [2004] OJ C101/97, para.33.

<sup>27</sup> European Commission, ‘Guidelines on the Application of Article 81(3) of the Treaty’ (n 25) para.13; European Commission, ‘Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings’ [2009] OJ C 45/02, paras 1, 5-7; European Commission, ‘Guidelines on Vertical Restraints’ [2010] OJ C 130/1, para 7.

<sup>28</sup> Case C-322/81 Nederlandsche Banden-Industrie Michelin NV v Commission [1983] ECR 3461, para 57, holding that the dominant undertaking has a ‘special responsibility not to allow its conduct to impair genuine undistorted competition on the common market’; Case 6-72 Europemballage Corporation and Continental Can Company Inc. v Commission [1973] ECR-215, para 26; Case C-95/04 British Airways Plc v Commission Court of Justice, [2007] ECR I-2331, para 106; Case T-340/03 France Telecom SA v Commission [2007] ECR II-107, para 266; TeliaSonera (n 20) para 24; Joined Cases C-468 to 478/06 Sot. Lélos kai Sia and Others [2008] ECR I7139, para 68; and Case C-280/08 P Deutsche Telekom v Commission [2010] ECR I-9555, para 176

<sup>29</sup> Raw Tobacco Italy (Case COMP/C.38.238/B.2) Commission Decision of 20 October 2005. Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 AOK Bundesverband and others v Ichthyol-Gesellschaft Cordes and others [2004] ECR I-2493

<sup>30</sup> Case 26/75 General Motors Continental v Commission [1975] ECR 1367; Case 27/76 United Brands v Commission [1978] ECR 207; Case C-177/16 Autortiesību un komunikāciju konsultāciju aģentūra (AKKA)/ Latvijas Autoru apvienība (LAA) [2017] ECLI; Deutsche Post AG (Case COMP/C-1/36.915) Commission Decision 2001/892/EC [2001] OJ L331/40.

<sup>31</sup> Case C-52/09 TeliaSonera Sverige [2011] ECR I-527, para 22.

<sup>32</sup> European Commission, ‘Guidelines on the Application of Article 81(3), (n 25) para 13.; European Commission, ‘Guidance on the Commission’s enforcement priorities in applying Article 82 (n 26), paras 1, 5-7; European Commission, ‘Guidelines on Vertical Restraints’ (n 26), para 7.

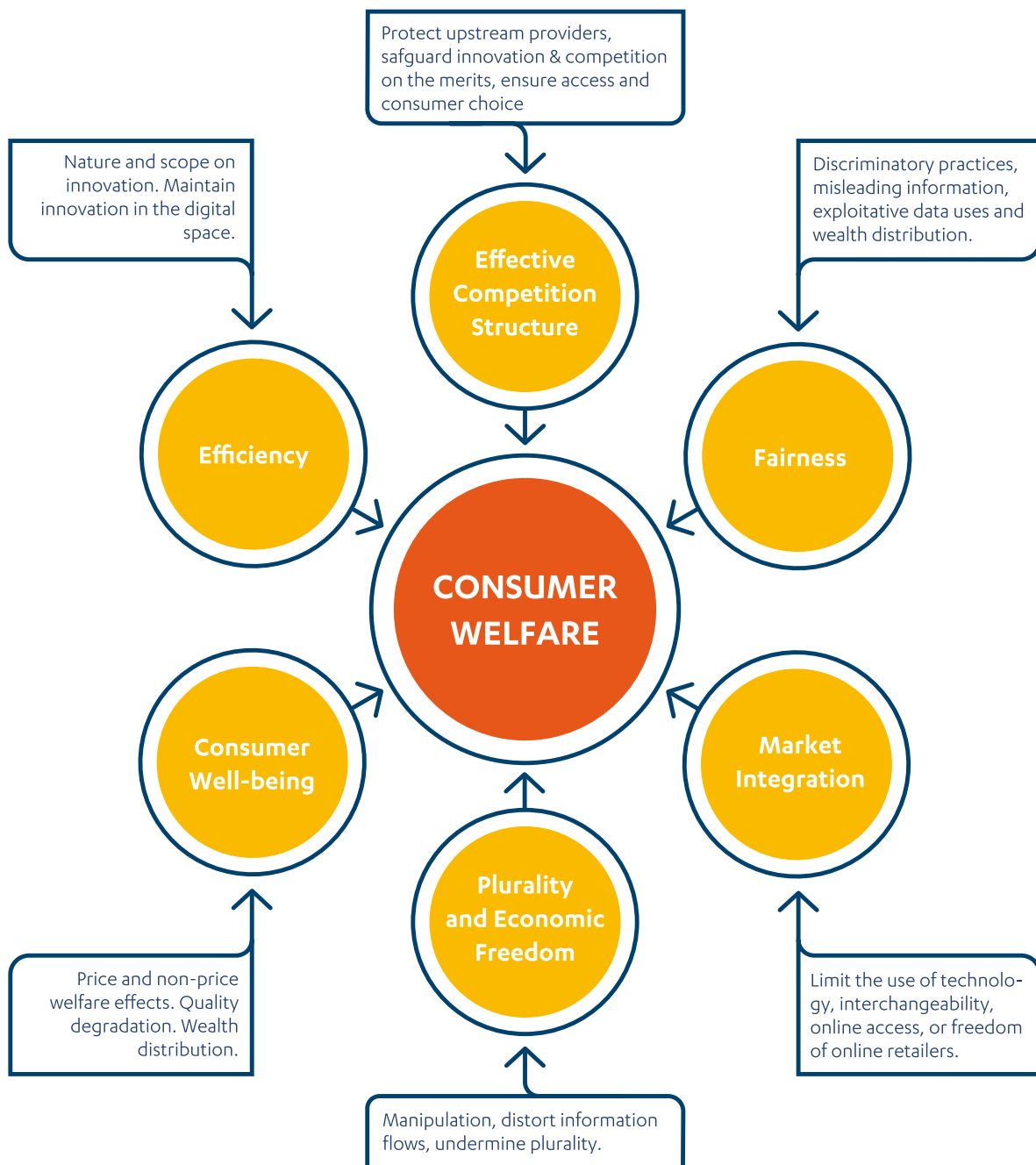
<sup>33</sup> European Commission, ‘XXIIInd Report on Competition Policy’ (1992) 13.

<sup>34</sup> European Commission, ‘Guidelines on the Application of Article 81(3), (n 25) para 33.

<sup>35</sup> Joined Cases T-213/01 and T-214/01 Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft v Commission [2006] ECR II-1601, para 115.

The consumer welfare and well-being benchmarks, as well as the other goals and values, provide a flexible instrument which can address price and non-price welfare effects on multiple groups of customers; can target practices which exploit consumers through profiling, discrimination, use of asymmetric information and asymmetric bargaining powers; can address attempts to distort the competitive landscape; address unfair

practices, including excessive pricing and excessive data collection; address distortion and harm to input providers; address exclusionary practices; target intentional introduction of friction to distort competition, innovation or limit choice; protect freedom of choice; protect economic plurality; and protect the EU's Single Market against contractual, technological and other restrictions.





When considering the concept of consumer welfare, one should be mindful that "the concept of 'consumers' encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers, i.e. natural persons who are acting for purposes which can be regarded as outside their trade or profession".<sup>36</sup> To ensure the effectiveness of the competition regime, agencies should consider the implications of actions on the full spectrum of consumers.

As one considers the scope of EU competition law, one needs to bear in mind that it is rooted in the EU's unique political and social agenda. The legal regime governing the Union includes specific references to the Union's aims to promote, among other things, "the well-being of its peoples"<sup>37</sup> and to ensure "an open market economy with free competition".<sup>38</sup> These aims include "a fair playing field" in which consumers are protected. "This is the social side of competition law. And this is what Europe stands for."<sup>39</sup> And so, the multitude of goals of European competition law embodies trade-offs, echoing the values of the union.

In that context it is important to appreciate that competition laws around the world are framed by different objectives and ideologies. As such they may differ in their scope and mandate. This reality implies that arguments, theories and law

from outside the EU cannot simply be imported and implanted as if they exist in a vacuum.<sup>40</sup> Such implantation would disregard the EU's institutional design and its legal framework and would amount to the imposition of values and norms advanced by the exporter. As such, it would ignore that fact that antitrust is a subcategory of ideology.<sup>41</sup> While competition regimes worldwide share their core mission to advance consumer welfare, they may differ in their scope of protection and approach to distribution of wealth and fairness. They may also be subjected to ongoing changes in policy, affected by their social, economic and political environment. Similarly, while all competition regimes share their reliance on economic theory to ensure measured and effective intervention, they may differ in their focus on price-centric models, qualitative or behavioural dimensions and application on a case by case level.

On that point, there is a potential discrepancy between the goals of EU competition law outlined above and the narrower economic benchmarks of consumer surplus used to approximate them. Clearly, there is a broad consensus as to the crucial role that economics plays in shaping competition enforcement and intervention.<sup>42</sup> The centrality of economic analysis provides a valuable prism which helps ensure that decision-making is compatible with the overall aims of competition law. Importantly, however, economic theory should not eradicate the wider goals of EU competition law, nor

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<sup>36</sup> European Commission, 'Guidelines on the Application of Article 81(3), (n 25) para 84.

<sup>37</sup> Art 3(1) TEU.

<sup>38</sup> Arts 119, 120, 127, 170, 173, Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 202/47 (hereinafter 'the TFEU').

<sup>39</sup> State of the Union 2016, by Jean-Claude Juncker, President of the European Commission; available online: [http://ec.europa.eu/priorities/state-union-2016\\_en](http://ec.europa.eu/priorities/state-union-2016_en), quoted in the 2016 Report on Competition Policy, Id.

<sup>40</sup> For a view from the US, note for example Robert Pitofsky who stated that '[i]t is bad history, bad policy, and bad law to exclude political values in interpreting the antitrust laws' in Robert Pitofsky, 'The Political Content of Antitrust' [1979] U PA LRev 1051, 1051 quoted in Waller, (n 104).

<sup>41</sup> Robert H Bork, *The Antitrust Paradox* (2nd edn, The Free Press 1993), 408.

<sup>42</sup> William E Kovacic, 'The Influence of Economics on Antitrust Law' [1992] Econ Inquiry 294; William E Kovacic and Carl Shapiro, 'Antitrust Policy: A Century of Economic and Legal Thinking' [2000] J Econ Perspectives 43; William E Kovacic, 'The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix' [2007]. Colum Bus LRev 1.

should it strip it from its constitutional values and moral norms.

Competition law's societal role should not be marginalised by means of economics. Not least because narrow economic theories can be subject to normative and political influence and may reflect a political choice and a selective cultivation driven by well-resourced interest groups.<sup>43</sup>

To put it simply, while the international community strives towards convergence, that in itself cannot guarantee full assimilation of thought and enforcement. A narrow view on the scope of enforcement in one jurisdiction, just like a wide view in another, echoes the scope of the law as designed and developed, and as such reflects a political choice.

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<sup>43</sup> While neoclassical (Chicago School) economics is often presented as the only strand of economic theory, it is one of several strands of economic theory. Other schools of economic thought include the Austrian, Ordoliberal, Behaviourist, Classical, Developmentalist, Institutional, Keynesian, Marxist, and Schumpeterian. See Ha-Joon Chang, *Economics: The User's Guide* (Bloomsbury Press 2014), Ch 4; John J Flynn, 'Misuse of Economic Analysis in Antitrust Litigation' [1981] *Sw U LRev* 335, 340-410; See also Ronald M Dworkin, *Taking Rights Seriously*, (Harvard University Press 1977) Ch 6; and C Edwin Baker, 'The Ideology of the Economic Analysis of Law' [1975] *Philosophy and Public Affairs* 37; Maurice E Stucke, 'Occupy Wall Street and Antitrust – Postscript (response)' [2013] *S Cal LRev* 33; Michael E Porter and Mark R Kramer, 'Creating Shared Value: How to Reinvent Capitalism and Unleash a Wave of Innovation and Growth' [2011] *Harv Bus Rev* 89

## ➤ Proposals for optimising enforcement of EU competition law

Having clarified the scope of EU competition law and its ability to address many of the practices characterising the digital economy, we now address the practical challenges involved in such application. Key issues to optimise the enforcement of EU competition law include:

### 1. Identifying the adequate level of intervention

Faced with changing market dynamics, new technologies and business models, competition agencies face the challenging task of identifying and implementing the optimal level of intervention. On the one hand, a dynamic market may be able to self-correct, thus making intervention superfluous and running the risk of chilling investment and innovation. On the other hand, a delayed and timid intervention may fail to protect consumers in the long and short term and could allow distortions to become engrained.

No doubt, enforcement of competition law needs to be appropriate to the circumstances of each case. Careful consideration should be given to reduce the risk of Type I (over enforcement) and Type II (under enforcement) errors. Importantly, however, the ability of the market to self-correct, which has at times tilted the balance against intervention, should not be assumed in the digital economy.<sup>44</sup> The market characteristics explored above often tilt the market in favour of the incumbent and limit the likelihood of future disruption by market entrants. In such a reality, one should not assume that self-correction justifies limited enforcement.

### 2. Measuring consumer harm

A price-centric approach to consumer welfare is ill-suited to a digital economy in which 'free' has become the norm and users provide value through engagement and data. In the digital environment, where the price is often set at zero, quality forms an

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<sup>44</sup> Report - Committee for the Study of Digital Platforms, Market Structure and Antitrust Subcommittee (01 July 2019) George J. Stigler Center for the Study of the Economy and the State, available online: <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure---report-as-of-24-june-2019.pdf?la=en&hash=872E4CA6B09BAC699EEF7D259BD69AEA717DDCF9>



important dimension of competition. For example, degradation of the quality of services or product characteristics can result in harm to consumer welfare, despite the absence of price effects. A price-centric approach in such a setting fails to identify consumer harm. Enforcers need to adjust their metrics in order to fully identify effects on competition. The digital landscape will increasingly

require enforcers to consider a range of variables that impact on welfare, even when these are not easily quantifiable. As noted by the former Director General of the European Commission's Directorate General for Competition, Johannes Laitenberger:



*We must take an empirically driven view of consumer welfare and recognise that some consumer harm is not readily visible in price and output effects.*<sup>45</sup>



### **3. Adopting a wider economic prism**

As agencies move beyond price-centric analysis, they should engage with other dimensions of competition. In doing so, and in order to fully appreciate the spectrum of effects and the ability to exercise market power, attention should be given to behavioural economics and to empirical observations on user behaviour. Insights from

behavioural economics are particularly valuable when considering friction, operators' ability to affect market entry, consumer choice, autonomy, limits on access and information flows, possible bias and manipulation of user behaviour. For example, firms can use so-called 'dark patterns' to deceive consumers in order to discourage them from exercising their data protection rights in a way that

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<sup>45</sup>[http://ec.europa.eu/competition/speeches/text/sp2018\\_16\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2018_16_en.pdf)

can interfere with privacy-intrusive data collection and processing practices<sup>46</sup>. These insights may help to assess operators' ability to exercise market power and the true impact certain practices may have on competitors and consumers.

#### **4. Assessing dynamic efficiencies**

The ability to assess likely dynamic efficiencies and future disruption is one of the main challenges for competition assessment in digital markets. This assessment has an impact on the likelihood that market dynamics may restore the competitive process, and as such on the need for intervention. It also affects the appraisal of merger transactions. Currently, the scope of analysis of dynamic efficiencies is lacking, making it harder to optimise intervention. Greater emphasis on the analysis of innovation is needed, so as to develop new metrics for assessment and benchmarks for enforcement.

#### **5. Proactive use of information gathering tools for a fact-based enforcement**

Whichever economic theory one uses, the ability to engage in fact-based enforcement is of central importance. Competition agencies should invest in information gathering, using the full spectrum of enforcement tools (including artificial intelligence), to gather information from the relevant undertakings as well as other market participants. Indeed, there is a consensus that agencies should base their actions on accurate evidence and analytical rigour.

The challenge, however, lies with the dynamic nature of many of the markets and the difficulty of predicting future effects. With this in mind, it is important to stress that an unrealistic threshold of proof may result in no action and this lack of action may result in prolonged consumer harm. As they seek to identify the requisite standard of proof, agencies and courts should acknowledge the dynamism of markets, the tipping of many markets, the limited likelihood of self-correction, and the cost of under intervention.

#### **6. Shifting the burden of proof in merger review**

Merger review forms an important enforcement tool which authorities may use to help safeguard the competitive structure of digital markets. Recent transactions and investigations have revealed the difficulties associated with assessment of future effects in a dynamic environment. There is a need to pay greater attention to likely network effects, data consolidation, and possible long-term effects. Concerns as to the elimination of potential competitors, and the ability to distinguish 'killer acquisitions' from those that promote efficiency and innovation, are also important issues.

The difficulty of appraising possible future effects has given rise to calls for a possible shift of the burden of proof in some cases. Such a change may be necessary in order to address the asymmetry of information between the competition agency and the parties concerned. A shift in the burden of proof would put the onus on the merged entities to prove that the acquisition would not distort competition.

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<sup>46</sup> Forbrukerrådet, 'Deceived by Design. How tech companies use dark patterns to discourage us from exercising our rights to privacy, <https://fil.forbrukerradet.no/wp-content/uploads/2018/06/2018-06-27-deceived-by-design-final.pdf>



### **7. Clearly defining theories of harm**

As business strategies evolve, so does competition law enforcement. This process however may lead to the widening of existing ‘categories’ of illicit practices or the creation of new ones. A consensus exists that business and legal certainty require careful development of new theories of harm. In cases where a novel theory has been used, agencies should consider commitment decisions rather than infringement decisions (which carry fines), to reflect the novelty and business uncertainty, and avoid a chilling effect. In particular, enforcers may consider using commitment decisions or refrain from fines when appraising new business strategies and exploring novel theories, which do not form a clear evolution of existing case law.

### **8. Incorporating consumer vulnerability in competition assessments**

As part of the adaptation of competition enforcement to changing market dynamics, the introduction of a new concept of ‘vulnerable consumers’ into the competition analysis should be considered. This could help to identify instances where specific obligations should be placed on companies so as to give enhanced protection to vulnerable customers<sup>47</sup>. Such an approach could incorporate established concepts from consumer law (e.g. in the context of unfair commercial practices legislation) to create an intervention benchmark in competition cases. The aim of such a development would be to offer enhanced

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<sup>47</sup> Andrea Coscelli, “Addressing the challenges that vulnerable consumers face”, <https://www.gov.uk/government/speeches/addressing-the-challenges-that-vulnerable-consumers-face>

protection to vulnerable groups of consumers (e.g. related to a disability, age or financial situation), or in cases where the complexity of markets prevents 'average' consumers from taking informed decisions.<sup>48</sup> Such protection may, for example, be necessary in the fields of energy, financial services and telecommunications.<sup>49</sup> Furthermore, incorporating the concept of consumer vulnerability in competition assessments could play a role in digital markets where big data and big analytics are used to exploit consumer biases and vulnerabilities, to increase switching costs for consumers and to raise barriers to entry.<sup>50</sup> This is because consumers in digital markets lack the expertise to understand how such big data and big analytic processes are used to shape their consumption decisions.

Identifying consumer vulnerabilities in competition law assessments could also provide important insights to assess a restrictive practice (e.g. while under a 'average' consumer scenario the practice might not raise concerns, the opposite can be true under a vulnerable consumer scenario). Furthermore, it could help to design consumer-facing remedies where the restoration of competition is subject to consumers' changing behaviour (see recommendation 10).

### 9. Providing guidelines to businesses

To ensure business and legal certainty in a dynamic environment, agencies should publish guidelines in which they outline concerns, the threshold for intervention and benchmarks for assessment. To ensure alignment of enforcement strategies, such guidelines should be developed in collaboration across Europe (e.g. in the European Competition Network comprising the European Commission and national competition authorities), with the participation of stakeholders. Alignment of the analytical approach would help to foster a homogeneous EU-wide policy approach without preventing particularities of specific national markets being taken into account.

### 10. Ensuring the effectiveness of remedies

The nature of digital markets, and the presence of network effects, may undermine the effectiveness of ex-post remedies, in particular in cases in which an abuse led to the market tipping in favour of the incumbent. This may be so in particular when the success of the remedy hinges on changing consumers' behaviour or attitudes (e.g. facilitating switching), or when a behavioural remedy requires prolonged implementation. In the case of abuse, an effective remedy may bring the abuse to an end, but will rarely reinstate the original market conditions.

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<sup>48</sup> European Consumer Consultative Group, 'Opinion on consumers and vulnerability', [https://ec.europa.eu/consumers/archive/empowerment/docs/eccg\\_opinion\\_consumers\\_vulnerability\\_022013\\_en.pdf](https://ec.europa.eu/consumers/archive/empowerment/docs/eccg_opinion_consumers_vulnerability_022013_en.pdf)

<sup>49</sup> London Economics et al., 'Consumer vulnerability across key markets in the European Union', final report for DG JUSTICE, [https://ec.europa.eu/info/sites/info/files/consumers-approved-report\\_en.pdf](https://ec.europa.eu/info/sites/info/files/consumers-approved-report_en.pdf)

<sup>50</sup> Agustin Reyna, 'The choice delusion – addressing consumer behavioural exploitation in digital markets', presentation at the Oxford Antitrust Enforcement Symposium of 29-30 June 2019, <https://www.law.ox.ac.uk/sites/files/oxlaw/reyna.pdf>



With this in mind, agencies should seek to design remedies that take into account the likely tipping of markets, the role of data and networks and the effects on entry and growth. In cases involving user interfaces, agencies should incorporate behavioural insights in remedies to address control over the interface and the ability to create friction and undermine switchability. Behavioural insights have been used in the past by the European Commission e.g. in the Microsoft Internet Explorer case to design behavioural remedies. Considering the similarities between the Internet Explorer case and recent cases (e.g. Google Android), enforcement authorities can rely more on behavioural testing to ensure the effective implementation of the remedy.

### 11. Contemplating structural remedies

The discussion of structural remedies has attracted much attention in recent years, with calls on both sides of the Atlantic for breakups of digital giants. Much of the discussion focused on concerns beyond the scope of competition policy and has been driven by political discourse. Under EU competition law, the role of structural remedies is limited to instances where a behavioural remedy may be deemed ineffective.<sup>51</sup> This may be the case in heavily concentrated digital markets where behavioural changes cannot restore competition or put an end to the infringement. While possible in principle, such structural remedies could trigger political friction when applied in an extraterritorial manner to foreign companies.

### 12. Carrying-out market studies and sector investigations

Market studies and sector investigations offer a complementary instrument to traditional competition enforcement. Depending on the scope of provisions at national level, they may provide the competition agency with a flexible instrument to gather information about a sector, engage the relevant undertakings in discussion, provide a channel for signalling and advocacy, and at times provide flexible remedies to address market failures.

### 13. Advocacy and co-operation with consumer groups

In a digital economy in which stealth, tracking, targeting and asymmetry of information are relevant characteristics, competition agencies should invest in levelling the playing field. Education and dissemination of information as to the costs and risks can have a transformative effect on companies' behaviour. Increased awareness of user rights and outside options, like stimulating certain user behaviour and discouraging harmful business practices preventing consumers from making informed decisions, are key to well-functioning markets.

By working together with consumer organisations, agencies can gain useful insights into how markets are performing for consumers and whether there are market failures that need to be addressed by

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<sup>51</sup> 'Structural remedies should only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy' Recital 12, Regulation 1/2003

means of enforcement. Consumer organisations can point out to competition authorities 'where to dig'<sup>52</sup>. Furthermore, by working together with competition agencies, consumer groups can contribute to creating a culture of compliance in which the interests of agencies, consumer and companies are aligned.

### **14. Increasing the analytical capacity of agencies**

The challenges of the digital economy require competition agencies to invest in capacity building. They should place greater emphasis on hiring computer scientists and economists with insights into behavioural economics and digital markets. Such capacity can enable the agencies to better address issues arising from data gathering, data analytics, and machine learning – both in terms of internal agency work and analysis of market dynamics. This new capacity may be incorporated into existing case teams, or gathered under one roof – creating a task force within the agency which has a mandate to monitor digital markets. For example, DG Competition has recently created an antitrust and e-commerce data unit, and the UK's Competition and Markets Authority has established a Data, Technology and Analytics unit.<sup>53</sup>

### **15. Breaking down enforcement silos**

Digital markets require a multi-disciplinary approach. Anti-competitive conduct can also breach other areas of law such as data protection and consumer laws. The different competent authorities must therefore work together to provide a coherent and efficient response, especially when it comes to identifying the authority best placed to intervene and to designing appropriate behavioural remedies. The European Data Protecting Supervisor Clearing House initiative is a step in the right direction, but a stronger commitment is needed by the authorities concerned.

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<sup>52</sup> Commissioner Vestager, 'Competition is a consumer issue' [https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-consumer-issue\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-consumer-issue_en)

<sup>53</sup> <https://competitionandmarkets.blog.gov.uk/2018/10/24/cmas-new-data-unit-exciting-opportunities-for-data-scientists/>

## ➤ Competition law & regulation

While competition law is fundamental to maintaining the competitiveness of the digital economy, it is important to note the complementary role played by regulatory instruments. This is especially so as competition agencies are increasingly feeling the pressure to confront an ever-growing number of cases. Regulatory tools can provide an effective instrument to address data harvesting and handling, the right to privacy, the application of norms of behaviour between powerful platforms, service providers and users, and enforce consumer protection regulations.<sup>54</sup>

Regulation may offer a valuable instrument to design the competitive landscape and clarify the boundaries of legality. Its strength lies in its ability to tackle, ex-ante, a wide range of concerns, and in doing so help prevent behaviour that the competition laws may be able to address ex-post. Regulation may form a superior instrument dealing with systemic market failures, sector specific problems, across the board standard setting and groups of customers in need of special protection. One example in the field of financial services is the EU's Interchange Fees Regulation (2105/751).



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<sup>54</sup> Note for example: *The General Data Protection Regulation (GDPR)*, *the proposed ePrivacy Regulation (ePR)*, and *the Regulation on promoting fairness and transparency for business users of online intermediation services (COM(2018) 238 final)*

Taking into account the limited resources available to competition agencies, the need to prioritise cases and the long duration of investigations, a strong regulatory regime forms an essential part of the enforcement toolbox. This is even more so, given that remedies in competition may terminate the violation, but rarely restore competition to the position before the violation. In some instances, dynamic markets may be better served by ex-ante regulatory measures, which assist in designing the competitive landscape and protecting consumers rights, rather than ex-post competition enforcement and remedies.

To be effective, regulatory agencies should actively engage, utilising the tools at hand. Failure to do so, in itself sends a mixed signal to market participants. It also shifts the burden to the competition agencies as they try to remedy the harm. It is therefore important to continue to develop effective regulatory instruments for the digital economy, while taking due account of the costs associated with regulation and the burden on market participants. To strike the right balance – minimising intrusion while maximising impact – ‘selective’ regulatory regimes could be explored. For example, smart regulation which targets only those likely to be able to generate adverse effects on consumers, while exempting small and medium

size companies. Certain codes of behaviour and regulatory frameworks could be applied, selectively, to companies in gate keeping positions and to situations where customers are vulnerable. Smart regulation could introduce a two-tier regime and so reduce the burden on small and medium size operators.<sup>55</sup>

An effective enforcement approach requires both regulators and competition enforcers to operate alongside each other. Regulation can provide an ex-ante framework to clearly design and fine-tune the rules of the game. Failure to adhere to the regulatory regime should trigger swift enforcement. Competition law enforcement, when called upon, could also rely on the regulatory regime to identify the boundaries of legality.<sup>56</sup>

The overlap in goals and mandate calls for close cooperation between competition agencies, sectoral regulators and other regulatory bodies. Different models of co-operation should be explored, including introducing clear procedures for information sharing and consultative opinions between agencies. Some informal initiatives already exist in the field of energy<sup>57</sup> and data protection<sup>58</sup>, but the lack of an institutional framework is a challenge for the engagement and commitment of the authorities.

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<sup>55</sup> George J. Stigler Center for the Study of the Economy and the State, The University of Chicago Booth School of Business, Committee for the Study of Digital Platforms - Market Structure and Antitrust Subcommittee, Report, 01 July 2019. <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf?la=en&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C>

<sup>56</sup> Case 32/11, Allianz Hungária Biztosító Zrt. and Others v Gazdasági Versenyhivatal, [2013] ECR-I 160, paragraph 47

<sup>57</sup> Under the Partnership for the Enforcement of European Rights (PEER), Europe's energy regulators seek to improve the enforcement of the European consumers' rights through enhanced inter-authority cooperation at EU level. PEER brings together interested authorities responsible for protecting and/or supporting Europe's consumers across a range of sectors including consumer protection authorities; data protection authorities; consumer bodies; ombudsmen; competition authorities; and sectoral (e.g. energy, telecommunications, financial) regulatory authorities, <https://www.ceer.eu/peer>

<sup>58</sup> The European Data Protection Supervisor established in 2017 the 'Big data and Digital Clearing House' bringing together agencies from the areas of competition, consumer and data protection to discuss how best to enforce rules in the interests of protecting individuals in digital markets, <https://www.digitalclearinghouse.org/>

One proposal which has gained traction on both sides of the Atlantic has been the creation of a dedicated body – a digital authority – which would centralise the regulatory powers relevant to the digital economy and develop enforcement capacity in this area.<sup>59</sup> Such an authority could form part of the competition agency or be established as a separate independent entity (benefiting from similar independence as competition agencies, thus reducing its exposure to political and industrial lobbying pressures).

It would benefit from a multidisciplinary team of experts with different backgrounds in computer and data science, economics, behavioural sciences, that can engage in monitoring, data collection, enforcement and policy consultations. A digital authority could provide much needed flexibility so as to enable ongoing adjustments to changing market conditions, at a pace which traditional regulators, competition agencies and courts may find challenging.

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<sup>59</sup> UK expert panel report - *Unlocking digital competition* - <https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel>; George J. Stigler Center for the Study of the Economy and the State, The University of Chicago Booth School of Business, Committee for the Study of Digital Platforms - *Market Structure and Antitrust Subcommittee, Report*, 01 July 2019. <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf?la=en&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C>



## > Conclusions

BEUC's objective is to ensure that consumers, and, ultimately society as a whole, obtain a fair share of the considerable benefits of digitisation of the economy through healthy competition. We must avoid a situation where vested interests protect themselves from potential entry into the market of newcomers. We clearly need free and fair competitive markets in which consumer welfare is optimised; and a level playing field, with symmetric information flows, where companies compete on merit and consumers benefit from autonomy and control.

To achieve this goal, competition agencies and relevant regulatory bodies need to take measured action. The notion that 'the market will self-correct' is no longer credible. The genuine threat to competition in future markets requires enforcers to adapt. Failure to do so may result in the tipping of

markets, consumer harm and long-term distortions. It may also risk undermining consumer confidence in the ability of markets to deliver welfare and prosperity.

BEUC therefore calls for an informed evolution of enforcement priorities, enforcement capacity and substantive theories of harm. A careful evolution, that respects the need to maintain incentives to investment and innovation and to allow the market to flourish. But an evolution which at the same time acknowledges the changing market realities, the need to move beyond narrow price-centric analysis, and to rapidly adapt. An evolution which sees clearly beyond smoke screens and delaying tactics and appreciates that in the dynamic environment in which we operate, failure to take action in a timely manner has the same effect as taking no action at all.



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