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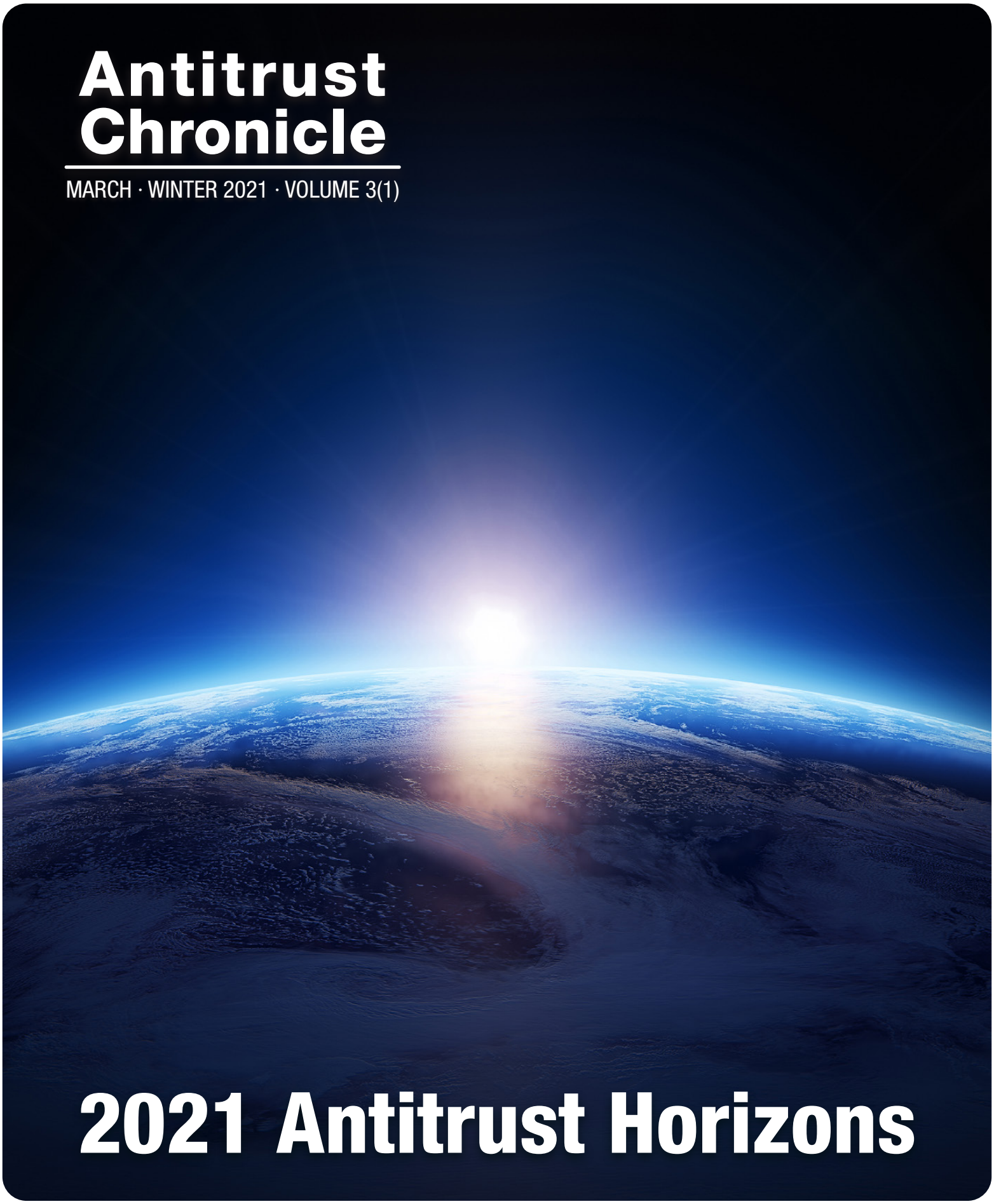

2021 Antitrust Horizons

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

2020 was a year of great turbulence. Society and the world economy were shocked by the COVID-19 pandemic; Brexit came to fruition; and political change occurred across the globe.

Specifically, with relation to antitrust, legislators and policymakers began to come to grips with the calls for change reflected in reports such as the EU Crémer report, the UK Furman Report, and the U.S. House of Representatives Judiciary Committee Report. Moreover, authorities modified guidelines and rules to account for the new world brought about by COVID-19.

2021 promises to be another year of change, as the economy recovers from COVID-19, and legislatures begin to bring the reforms long-discussed in theory, into practice.

The pieces in this Chronicle reflect the experiences and perspectives of practitioners and academics from around the world, as we gaze into the new horizons of 2021.

As always, thank you to our great panel of authors.

Sincerely,

CPI Team

SUMMARIES

2021 ECJ Antitrust Horizons – Selected Key Evolutions and Developments

By Juliane Kokott & Hanna Schröder

In 2021, EU antitrust horizons will be wide and enthralling: EU competition law and the jurisprudence of the Court of Justice of the European Union in this matter have seen many interesting developments in the course of the last years, and there are many exciting developments yet to come. This paper singles out particularly relevant and trendsetting evolutions in three fields that will occupy the Court of Justice and the General Court in 2021 and beyond: private enforcement of EU competition law; the per-object/per-effect-distinction as regards infringements of Article 101 TFEU; and new challenges brought about by the development of new digital markets and distribution channels and the digitalization of commercial practices.

Economic Evidence and Modern Antitrust

By Rebecca Kirk Fair, Emily Cotton & Philipp Tillmann

The question of the continued relevance, persuasiveness, and sufficiency of economic evidence in assessments of antitrust matters in the digital age has become of increasing interest to commentators, academics, and regulatory and legislative bodies. A closely related question is the contention by some commentators that the courts' narrow focus on the consumer welfare standard is ill-suited for dealing with the complexities of today's world. In our view, the consumer welfare standard remains the gold standard for the analysis of antitrust concerns in the digital age. Beyond using consumer welfare as a metric for evaluating potential anticompetitive impact, the use of rigorous, fact-based economic analysis, matched to today's market complexities, is more important than ever in helping develop a better understanding of the evolving digital world. A better understanding, in turn, will be crucial in helping the appropriate authorities legislate and regulate in ways that ensure strong competition without jeopardizing the benefits that result from the digital revolution.

In Comity We Trust: Utilizing International Comity to Strengthen International Cooperation and Enforcement Convergence in Multijurisdictional Matters

By John Pecman & Antonio Di Domenico

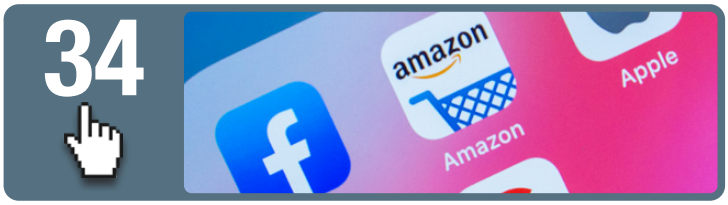
Competition authorities across the world have taken increasingly divergent enforcement approaches, including in respect of the conduct of companies involved in the high technology and digital markets. New regulatory developments may further accentuate such divergence, increasing the risk of inefficient and conflicting regulatory efforts. With these trends, there is a greater need for competition authorities to advance international cooperation efforts and convergence on enforcement, particularly when enforcers with sufficient parallels in competition laws and enforcement principles are involved. This article proposes that the application of international comity principles would helpfully promote international cooperation and convergence on multijurisdictional enforcement, creating a "win-win" for competition authorities and the respondent businesses subject to competition scrutiny in the form of consistency, predictability and efficiency. In advancing this thesis, this article proposes five considerations where international comity can helpfully promote international cooperation and enforcement convergence in multijurisdictional matters.

Do Algorithms Communicate With Each Other and What Does This Mean for the Application of Competition/Antitrust Law?

By Barbora Jedlickova

One of the issues for discussion among scholars of competition law in the digital space is collusion, and the ineffectiveness of competition law to deal with collusion that is driven by algorithms and not humans. This ineffectiveness is based on several assumptions, with the main being that humans, and not algorithms, have the ability to communicate. In this article, I put forward some arguments to challenge this view. I outline how algorithms "communicate," if they communicate, and discuss if such communication can be perceived as communication for the purposes of competition law. Collusion cannot happen without communication and, therefore, communication is the first essential step for anti-competitive collusion to exist. The manner in which we perceive algorithms and their interactions thus determines whether specific legal requirements of anti-competitive collusion can be applied to algorithmic collusion or not.

SUMMARIES



The Antitrust Attack on Big Tech

By George L. Priest

The four major internet platforms – Google, Amazon, Apple, and Facebook – have in recent months been subjected to increasing attacks on antitrust grounds. These attacks have been generated by various entities in the federal legislature and by the threat of individual lawsuits, some by one of the platforms against another. The subject of these attacks is the sheer size of the platforms themselves, though it is also alleged that various of the platforms engage in unfair practices that benefit their own products over those of competitors. This essay argues that these antitrust attacks ignore the character of the platforms as network industries. Network industries are different from well-known monopolies because consumers benefit, rather than are harmed, as the network expands. As a consequence, none of the attacks can demonstrate harm to consumers, the overriding standard of interpretation of the antitrust laws.

Section 19a of the Reformed German Competition Act: A (Too) Powerful Weapon to Tame Big Tech?

By Jens-Uwe Franck & Martin Peitz

Targeted at Big Tech, Section 19a of the Competition Act, Germany's new antitrust tool for dealing with large digital platforms, rebalances power in favor of the German competition authority. Under the new tool, the authority may declare that a firm is of "paramount significance for competition across markets" and prohibit it from certain specified practices presumed to be unlawful. The addressed firms carry the burden of proving the practice's countervailing procompetitive or efficiency-enhancing effects. Decisions by the German competition authority under Section 19a can only be challenged at the German Federal Court of Justice as the first and only avenue of appeal. We identify the advances and shortcomings of this new tool, as well as the opportunities and risks, when it comes to employing it in the field.

2021 Antitrust Horizons: Letting Go While Holding on to Hope

By Alexandre Barreto de Souza & Edson Junio Dias de Sousa

The severe economic crisis resulting from the COVID-19 pandemic required that antitrust authorities worldwide revise parameters and views that guided their performance during the past few decades, and imposed on us the need for procedures and guidelines to be expanded and strengthened amid oversimplified and immediate solutions to the crisis. It is time we double our bets that competitions law can contribute to make it easier to understand economic phenomena and, particularly, the means to handle its more complex recent dilemmas. To which prospects should the antitrust community turn itself this year? It is hard to say it, but we must learn from what is already in front of us: our global and globalized case law, which has succeeded in solving most of the dilemmas we tackle in our daily work as adjudicators; not to mention competition law researchers and scholars everywhere, who truly make up the institutional memory of our century-old antitrust laws — and who, therefore, are the most apt to help renew and expand it.

WHAT'S NEXT?

For April 2021, we will feature Chronicles focused on issues related to (1) **Open Banking**; and (2) **Inclusive Competition**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2021, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLES MAY 2021

For May 2021, we will feature Chronicles focused on issues related to (1) **Section 230**; and (2) **Healthcare**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

2021 ECJ ANTITRUST HORIZONS – SELECTED KEY EVOLUTIONS AND DEVELOPMENTS

BY JULIANE KOKOTT & HANNA SCHRÖDER[1]

Foto: Ortner

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I. INTRODUCTION

In 2021, EU antitrust horizons will be wide and enthralling: EU competition law has indeed seen many interesting developments in the course of the last years, and there are many exciting developments yet to come in 2021. The EU Court of Justice ("ECJ"), in particular, will soon again be called upon to decide on fundamental issues, be it, for instance, the inspection powers of the European Commission and the corresponding rights of the parties to judicial review[2] or the application of the *ne bis in idem* principle in the field of competition law,[3] to name just two outstanding topics currently pending before the ECJ.

As regards current evolutions inscribing in long term continuing trends, recent and ongoing developments in EU jurisprudence in competition law in three fields seem particularly relevant at the moment and shall therefore be addressed in this paper. They are:

- First, the interplay between EU law and national law in the field of private enforcement of EU competition law;
- Second, the per-object/per-effect-distinction as regards infringements of Article 101 TFEU; and
- Third, new challenges brought about by the development of new digital markets and distribution channels and the digitalization of commercial practices.

II. THE INTERPLAY BETWEEN EU LAW AND NATIONAL LAW IN THE FIELD OF PRIVATE ENFORCEMENT OF EU COMPETITION LAW

Actions for damages caused by the infringement of the EU competition rules brought before the courts of the Member States, the so-called private enforcement of EU competition law, are, in addition to public enforcement, the second pillar of the implementation of EU competition law.

Private enforcement is a good example for the complex interplay between EU law and national law, because the right to compensation for cartel damages results directly from the treaty provisions, whereas the enforcement of such actions before the national courts takes place according to national law.

Consequently, the Court has already found in earlier cases such as *Manfredi*[4] that only the question of *how* compensation has to be granted is a matter of national law in combination with the principle of effectiveness. This concerns, in particular, jurisdiction, procedure, time-limits and the furnishing of proof. On the other hand, the upstream question of *whether* compensation actually has to be granted remains one of EU law, because the principle that any individual is entitled to claim compensation for the harm suffered due to an infringement of the competition rules follows from EU law itself.[5]

However, drawing the distinction between questions that are governed by national law in combination with the principle of effectiveness and questions that are governed directly by EU law is never a simple task. Thus, the fine-tuning of the founding principles established by the Court is an ongoing process.

When it comes to compensation for harm suffered due to infringements of EU competition law, the main questions are: *Who* has to compensate *whom* for *what* and *how*?

The question of *who* has to compensate for harm caused by a competition law infringement was at the very heart of the *Skanska* case. In that case, the Court made clear that a parent company who has taken over a company fined for the participation in a cartel can be held liable for damages caused by the latter even if the two companies are, according to national law, distinct legal entities. This follows from the

2 See pending cases C-682/20 P, *Les Mousquetaires et ITM Entreprises v. Commission and Council*, C-690/20 P, *Casino, Guichard-Perrachon and Achats Marchandises Casino v. Commission and Council*, and C-693/20 P, *Intermarché Casino Achats v. Commission and Council.*

3 See pending cases C-117/20, *bpost*, and C-151/20, *Nordzucker e.a.*

4 Judgment of July 13, 2006, *Manfredi and Others* (C-295/04 to C-298/04, EU:C:2006:461, paragraphs 60 and 61); see also judgments of September 20, 2001, *Courage and Crehan* (C-453/99, EU:C:2001:465, paragraphs 25 and 26); of November 6, 2012, *Otis and Others* (C-199/11, EU:C:2012:684, paragraphs 41 and 43) and of June 5, 2014, *Kone and Others* (C-557/12, EU:C:2014:1317, paragraph 24).

5 See opinions of Advocate General Kokott in *Kone and Others* (C-557/12, EU:C:2014:45, point 24), and in *Otis Gesellschaft and Others* (C-435/18, EU:C:2019:651, points 44 et seq.), and the case law cited therein.

principle of economic continuity and the concept of an "undertaking" under EU competition law.[6] The determination of the persons who have to pay compensation for cartel damages relates indeed to the question of whether such compensation is actually granted and not to its technical implementation. Thus, this question is directly governed by EU law. Accordingly, the parent company can be held liable for damages caused by the competition law infringement committed by the overtaken company.

In *Sumal*,[7] currently pending before the Grand Chamber of the Court, the question is whether the doctrine of the single economic unit can, in the context of intra-group relationships, not only lead to the extension of liability from subsidiaries to the parent company, but also, inversely, to the extension of liability from a parent company to its subsidiaries. This question arises in the context of a claim introduced by *Sumal* against *Mercedes Benz Trucks España* for damages caused by the so-called truck cartel, one of the participants of which was *Daimler, Mercedes Benz Trucks España's* parent company. As the referring court points out, this question is practically very relevant because it is easier to sue subsidiaries in the respective country than their parent companies who were found liable for an infringement by competition authorities in another country.

In the same vein, the question of *who is entitled to claim compensation for what kind of harm suffered* entails many tricky details. After *Kone*,[8] this issue was, just a little more than one year ago, again in the center of the *Otis* case. Here, the question was whether a public body who granted promotional loans to purchasers of products covered by a cartel may request compensation for loss caused by that cartel. The answer of the Court was, in principle, affirmative: In earlier case law, the Court had already stated that "*any individual*" is entitled to claim compensation from the members of a cartel for *any type of loss caused by that cartel*.[9] The neuralgic point thus is, and that was made very clear by the Court in *Otis*, whether there is a sufficient *causal link* between the harm suffered by a person and an anticompetitive behavior.[10] This question concerns the very existence of a right to compensation in each individual case and must therefore be answered on the basis of EU law. National law can, in turn, only be decisive for the concrete procedural modalities for actually establishing a causal link between the harmful event and the harm that has allegedly been suffered.

By contrast, national legal concepts cannot be decisive for the very question of *whether* compensation is due under EU law. This was shown in *Otis* where, according to a specific concept in national law, the right to compensation should be restricted to persons operating as customers on the market concerned by a cartel. The overturning of such national law principles can seem quite revolutionary, as is illustrated by that case: The referring Austrian court, after having received the ECJ's answer, consented that the public body who had granted loans to purchasers of cartelized goods was entitled to claim compensation for the harm caused subject to the existence of a causal link between the two. Nevertheless, this was only true for the period during which Austria had been a member of the EU and the question was thus determined by EU law. By contrast, the Austrian court explicitly stated that the public body was not entitled to claim compensation for the harm caused during the previous period, during which the provisions of national law had been decisive for the determination of the right to compensation.[11]

Finally, the currently pending *Stichting* case[12] is worth being mentioned. Here, a Dutch court has asked the ECJ whether it has jurisdiction to find that there has been an infringement of European competition rules during the period before the entry into force of regulation 1/2003,[13] even if neither the Commission nor a national competition authority have adopted a prior decision in that regard. Conversely, in *Daimler*,[14] the scope of such a Commission infringement decision is in question, as the referring court asks whether refuse collection vehicles are covered by the findings of the Commission's decision on the truck cartel.

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6 Judgment of March 14, 2019, *Skanska Industrial Solutions and Others* (C-724/17, EU:C:2019:204, paragraphs 28 et seq.); see, also, opinion of Advocate General Wahl in *Skanska Industrial Solutions and Others* (C-724/17, EU:C:2019:100, points 55 et seq.).

7 Case C-882/19, *Sumal*.

8 Judgment of June 5, 2014, *Kone and Others* (C-557/12, EU:C:2014:1317).

9 Judgment of July 13, 2006, *Manfredi and Others* (C-295/04 to C-298/04, EU:C:2006:461, paragraphs 95 and 96).

10 Judgment of December 12, 2019, *Otis Gesellschaft and Others* (C-435/18, EU:C:2019:1069, paragraphs 23 et seq.); see, also, opinion of Advocate General Kokott in this case (EU:C:2019:651, points 47 et seq.).

11 Supreme Court of Justice of Austria, judgment of October 21, 2020, 9 Ob 86/19s.

12 Case C-819/19, *Stichting Cartel Compensation and Others.*

13 Council Regulation (EC) No 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).

14 Case C-588/20, *Daimler.*

Whereas all these cases seem to need an answer deriving only from EU law, the compliance of national law with the principle of effectiveness currently arises in *Volvo*,[15] with questions on the directive on antitrust damages actions,[16] limitation periods for the bringing of compensation claims and the judicial estimation of harm.

This brief overview shows that the interplay between EU law and national law in the field of private enforcement of EU competition law remains a suspenseful and contested matter in 2021.

III. THE PER-OBJECT/PER-EFFECT-DISTINCTION AS REGARDS INFRINGEMENTS OF ARTICLE 101 TFEU

In the same vein, the per-object/per-effect-distinction as regards infringements of Article 101 TFEU is another classic issue that continues to be of unbroken relevance in EU competition law.

It is well known that, according to Article 101 TFEU, an agreement which has as its object the prevention, restriction or distortion of competition is prohibited, without it being necessary to examine the effects of that agreement. Indeed, the anticompetitive object and effect of an alleged competition law infringement are alternative conditions for the application of the prohibition laid down in Article 101.

However, since the very beginning of the Court's case law on what is now Article 101 TFEU, the question of the distinction between per-object- and per-effect-restrictions of competition has been critical.

According to this case law, an agreement is considered having an anticompetitive object if it has, in itself, a sufficient degree of harm to competition for it to be unnecessary to examine its effects in order to determine whether it is capable of restricting competition.[17]

But how to detect when this can no longer be taken as established, so that it is necessary to switch to the analysis of the effects of an agreement? This delicate question has, notably, been touched upon by two cases lately, that is, *Budapest Bank*[18] and *Generics*.[19] As Advocate General Bobek stated in this regard in his opinion in *Budapest Bank*, it is especially the examination of the context of an agreement that serves to "check that there are no *specific circumstances* that may cast doubt on the presumed harmful nature of the agreement in question."[20]

Yet, when does a situation become one in which doubts arise as to the presumed harmfulness and, therefore, the anticompetitive object of a particular agreement?

According to established case law, in order to find that an agreement has, in itself, a sufficient degree of harm to competition for it to be unnecessary to examine its effects, the agreement and its context must reasonably clearly reveal the potential to harm competition.[21]

This also means that, in order to conclude that an agreement has an anticompetitive object, it must be possible to determine that it is capable of restricting competition without having to examine its effects. Therefore, where it is impossible to determine, despite an analysis of all the relevant inherent contextual factors, whether an agreement is capable of restricting competition, the analysis must switch to the anticompetitive effects of that agreement.[22]

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15 Case C-267/20, *Volvo and DAF Trucks*.

16 Directive 2014/104/EU of the European Parliament and of the Council of November 26, 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L 349, 5.12.2014, p. 1).

17 Judgments of June 30, 1966, *LTM* (56/65, EU:C:1966:38, p. 236); of June 4, 2009, *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:343, paragraph 29); of September 11, 2014, *CB v. Commission* (C-67/13 P, EU:C:2014:2204, paragraphs 49 to 51 and the case-law cited), and of July 16, 2015, *ING Pensii* (C-172/14, EU:C:2015:484, paragraphs 29 to 31); see, also, opinion of Advocate General Kokott in *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:110, points 42 et seq. and the case-law cited).

18 See judgment of April 2, 2020, *Budapest Bank and Others* (C-228/18, EU:C:2020:265).

19 See judgment of January 30, 2020, *Generics (UK) and Others* (C-307/18, EU:C:2020:52).

20 Opinion of Advocate General Bobek in *Budapest Bank and Others* (C-228/18, EU:C:2019:678, points 41 to 49, specifically point 48) (emphasis in the original).

21 See judgment of November 26, 2015, *Maxima Latvija* (C-345/14, EU:C:2015:784, paragraphs 18 to 23); see, also, to that effect, opinion of Advocate General Bobek *in Budapest Bank and Others* (C-228/18, EU:C:2019:678, points 40 et seq.).

22 See, to that effect, judgments of September 11, 2014, *CB v. Commission* (C-67/13 P, EU:C:2014:2204, paragraphs 74 et seq.), and of November 26, 2015, *Maxima Latvija* (C-345/14, EU:C:2015:784, paragraphs 22 to 24); see, also, to that effect, opinions of Advocate General Bobek in *Budapest Bank and Others* (C-228/18, EU:C:2019:678, points 50 and 78 et seq.), and of Advocate General Kokott in *Generics (UK) and Others* (C-307/18, EU:C:2020:28, points 157 et seq.).

Consequently, an agreement which results in certain benefits for consumers may no longer be categorized as restrictive of competition by its object only if those benefits give rise to doubts as to the anticompetitive object of the agreement. This would be the case if the existence of those benefits means that it is no longer possible to know whether the agreement as a whole is capable of restricting competition without analyzing its effects. Conversely, there is no automatic switch to the obligation to carry out an analysis of the effects of an agreement only because that agreement has afforded certain benefits.

This issue is currently relevant in a whole bundle of cases on patent settlement agreements in the pharmaceutical sector.

In the first place, in *Generics*, the patent settlement agreements at issue in the main proceedings certainly gave rise to some pro-competitive effects such as, notably, a slight price reduction of the concerned pharmaceutical product and better labelling of medicine packs. Nevertheless, these effects were minimal and uncertain. Thus, when set against the overall legal and economic background of the agreements in question, they did not give rise to reasonable doubts that those agreements revealed sufficient harm to competition for being qualified as per-object-infringements.[23]

Currently, this question prominently arises again in the pending *Servier* appeal cases.[24] They concern patent settlement agreements concluded by the French medical firm *Servier* with several producers of generic medicinal products. The EU General Court found that one of the agreements in question did not meet the requirements for being qualified as restrictive of competition by its very object.[25] That case is even more interesting because the General Court found that the Commission had not even established restrictive effects of the agreement concerned, which is also contested by the Commission in its appeal.

These are certainly interesting cases to follow this year, alongside with the *Lundbeck* cases,[26] where it is as well in question if the concerned patent settlements qualify as per-object-infringements.

These cases raise new and complex questions. The evolutions outlined above share, however, a common *leitmotif*: They show how new questions in complex legal and economic settings can be resolved on the basis of the well-established concepts and principles of EU competition law. These concepts and principles give the Court a solid base for coping with new questions raised by new legal and economic developments.

23 Judgment of January 30, 2020, *Generics (UK) and Others* (C-307/18, EU:C:2020:52, paragraphs 108-110).

24 Cases C-144/19 P, *Lupin v. Commission*; C-151/19 P, *Commission v. Krka*; C-164/19 P, *Niche Generics v. Commission;* C-166/19 P, *Unichem Laboratories v. Commission;* C-176/19 P, *Commission v. Servier and Others*; C-197/19 P, *Mylan Laboratories and Mylan v. Commission*; C-198/19 P, *Teva UK and Others v. Commission*; C-201/19 P, *Servier and Others v. Commission*; and C-207/19 P, *Biogaran v. Commission*.

25 Judgments of the General Court, currently under appeal, of December 12, 2018, *Krka v. Commission* (T-684/14, not published, EU:T:2018:918; Case C-151/19 P, pending), and *Servier and Others v. Commission* (T-691/14, EU:T:2018:922; Cases C-176/19 P and C-201/19 P, pending).

26 Cases C-586/16 P, *Sun Pharmaceutical Industries and Ranbaxy (UK) v. Commission*; C-588/16 P, *Generics (UK) v. Commission*; C-591/16 P, *Lundbeck v. Commission*; C-601/16 P, *Arrow Group and Arrow Generics v. Commission*; C-611/16 P, *Xellia Pharmaceuticals and Alpharma v. Commission*; and C-614/16 P, *Merck v. Commission*; see, also, opinion of Advocate General Kokott in *Lundbeck v. Commission* (C-591/16 P, EU:C:2020:428).

IV. NEW CHALLENGES BROUGHT ABOUT BY THE DEVELOPMENT OF NEW DIGITAL MARKETS AND DISTRIBUTION CHANNELS AND THE DIGITALIZATION OF COMMERCIAL PRACTICES

Of course, only time will tell whether this is true also for the specific questions raised by the digital economy.

The Commission as well as national regulators all over the world currently search for the right approach to adopt in order to preserve competition and data protection and at the same time enable innovation on digital markets, both via general rulemaking,[27] and single case decision-making.[28] The first cases in these matters have only begun to reach the Union Courts.[29]

It will be interesting to see how new questions in connection with digitalization can be addressed on the basis of the established principles of EU competition law.

In this regard, it seems essential to distinguish data-related practices that only have been modified by the possibilities of digitalization from truly new questions of digitalization. As the Court has demonstrated in the *Coty* judgment on selective distribution via internet sales,[30] cases in which the processing of data and the technical possibilities of the digital economy only serve as a *tool* for the implementation of a traditional practice do not really raise unprecedented questions under competition purposes. Insofar as *Coty* was concerned, whether the prohibition of specific ways of distribution is anti-competitive does indeed not depend on whether it affects internet shops or traditional stores.

Truly new questions of digitalization, by contrast, require a more thorough assessment. This is currently demonstrated in the field of Article 101 by the discussion on the assessment of algorithms for competition purposes. Today, companies increasingly make use of external IT services who offer automatic pricing solutions based on algorithms. These algorithms calculate the "appropriate" price of a certain product at a certain moment and for a certain customer on the basis of a huge amount of data on all relevant market factors. From a competition point of view, it might be problematic when different companies employ the same algorithm provider, who merges the data provided by the clients of all these companies and hands back the same pricing information to all of them. In such a situation, there may indeed be potential for collusion, whether consciously or unconsciously, between the companies because of the exchange and processing of their data via their common IT provider.

However, the Union courts might consider dealing with such practices by applying the jurisprudence on tacit agreements and the well-established principle that passive participation can also constitute collusion.[31] In the same vein, the Court clarified for example in *AC Treuhand* that a facilitator who actively contributes to the implementation of an agreement or concerted practice by other undertakings may be held liable for an infringement of Article 101 TFEU.[32] When such facilitators use algorithms, the analysis of the functioning of these algorithms will be a key factor with regard to the question of whether all concerned operators were aware or ought to have been aware of a potential collusion taking place via the common IT provider.

Insofar as Article 102 TFEU is concerned, new digital markets in the platform economy raise the question of how to assess data related practices under the concept of abuse. The German Competition Authority, for instance, in its *Facebook* decision,[33] pending before the Düsseldorf Higher Regional Court,[34] principally based the violation of competition law on the non-compliance with data protection rules. In its view, the fact

27 See, in this regard, for example, the European Commission's proposals for a Digital Markets Act (COM(2020) 842 final) and a Digital Services Act (COM(2020) 825 final) as well as the recently implemented Section 19a of the German Competition Act.

28 See for example the European Commission's decisions of May 17, 2017 (Case No. M.8228 – *FACEBOOK / WHATSAPP*), of June 27, 2017 (AT.39741 – *Google Search (Shopping)*), of July 18, 2018 (AT.40099 — *Google Android*), of March 20, 2019 (AT.40411 – *Google Search (AdSense)*), or the decision of the German Bundeskartellamt of February 6, 2019 (B6-22/16, *Facebook*).

29 Such as T-612/17, *Google and Alphabet v. Commission (Google Shopping)*, T-604/18, *Google and Alphabet v. Commission (Google Android)*, T-334/19, *Google and Alphabet v. Commission (Google AdSense)*, or T-19/21, *Amazon.com and Others v. Commission*.

30 Judgment of December 6, 2017, *Coty Germany* (C-230/16, EU:C:2017:941).

31 Judgments of June 28, 2005, *Dansk Rørindustri and Others v. Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 142 and 143), of October 22, 2015, *AC-Treuhand v. Commission* (C-194/14 P, EU:C:2015:717, paragraph 31) and of January 21, 2016, *Eturas and Others* (C-74/14, EU:C:2016:42, paragraph 28).

32 Judgment of October 22, 2015, *AC-Treuhand v. Commission*

33 Decision of the German Bundeskartellamt of February 6, 2019 (B6-22/16, *Facebook*).

34 The principal proceedings in this case are still pending. Meanwhile, Facebook's application for a suspensive effect has been rejected by the German Federal Court of Justice (KVR 69/19 – Order of June 23, 2020).

that consumers were pushed into allowing Facebook to collect, use and merge their data stemming not only from their use of Facebook itself but also from their use of other services like WhatsApp or Instagram and third party websites constituted an abuse of Facebook's dominant position on the social media market because this was a condition for being able to use Facebook's services. It remains to be seen if the Union courts agree with such an approach.

Indeed, while there is growing case law on the fundamental importance of data protection rights,[35] further promoted by the entry into force of the General Data Protection Regulation ("GDPR"),[36] the ECJ has to date not had the opportunity to address the role of data in competition law.

In the judgement in *Asnef-Equifax* from 2006, the Court merely stated that "issues relating to the sensitivity of personal data are not, as such, a matter for competition law."[37] It would nonetheless be precipitous to derive a general rule from *Asnef-Equifax* that data protection cannot at all be taken into account in competition cases, as the Court limited its considerations to the extent that data protection is not *as such* a competition matter.

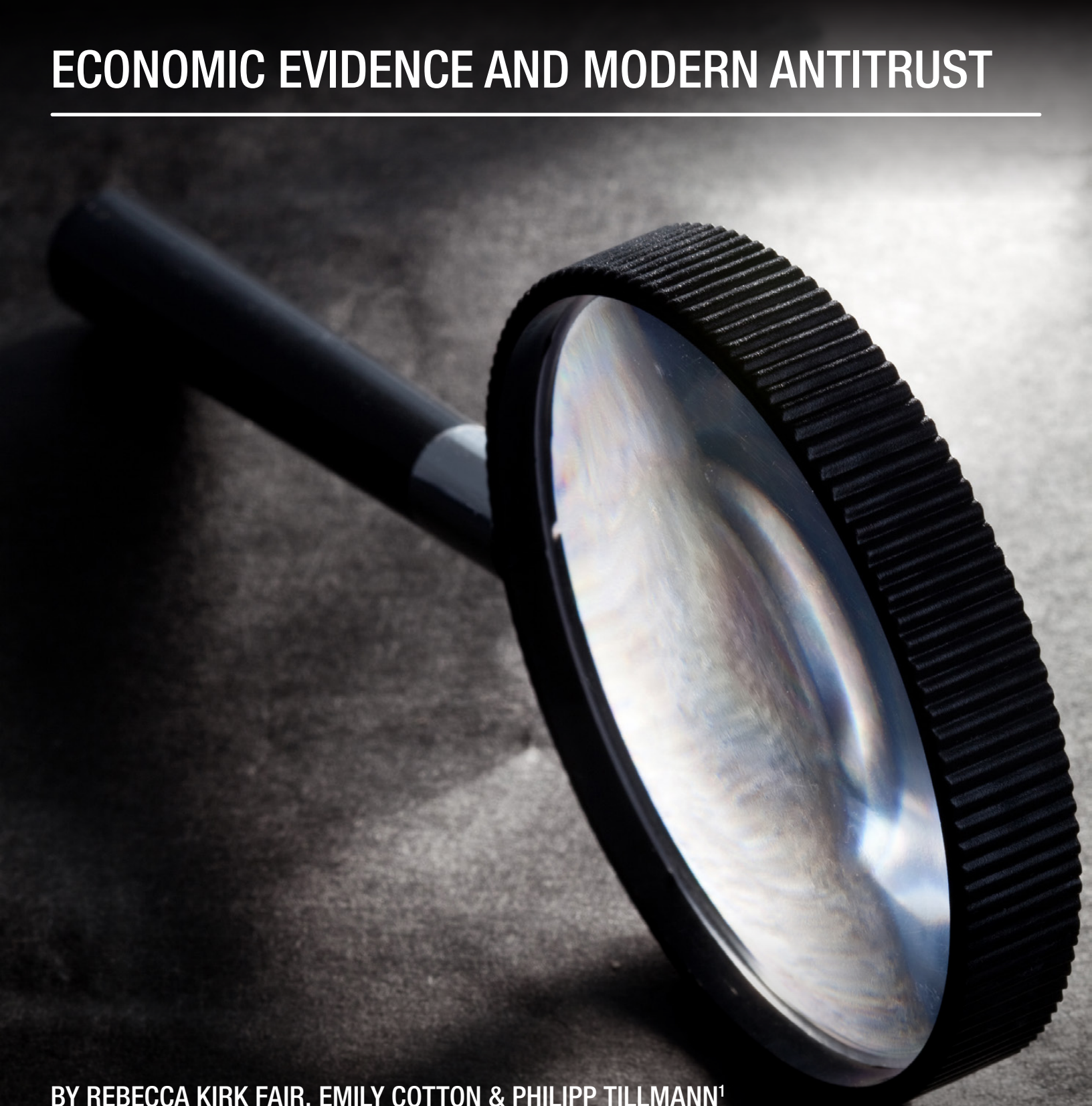
This brings us to the end of this short *tour d'horizon*. To finish, it can be noted that the Court has been shaping EU competition law since the very beginning of its judicial activity and, as the current developments show, there is no shortage of new questions awaiting to be resolved in 2021 and beyond.

35 See, for instance, judgment of May 13, 2014, *Google Spain and Google* (C-131/12, EU:C:2014:317) ("right to be forgotten") or judgment of October 6, 2015, *Schrems* (C-362/14, EU:C:2015:650).

36 General Data Protection Regulation 2016/679 ("GDPR") entered into force on May 25, 2018.

37 Judgment of November 23, 2006, *ASNEF-EQUIFAX* (C-238/05, EU:C:2006:734, paragraph 63).

ECONOMIC EVIDENCE AND MODERN ANTITRUST



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I. INTRODUCTION

Many questions have been raised in the press,[2] by academics,[3] and even by legislative bodies[4] about the continued relevance, persuasiveness, and sufficiency of economic evidence in assessments of antitrust matters in the digital age. These questions cut across both regulation and litigation. Are judges starting to find the discovery record or executive testimony more persuasive than economic analyses? Do the consumer welfare standard and the associated empirical analyses remain sufficient for evaluating competition in the digital economy? Are economists still relevant in helping agencies correctly assess potential competitive effects, for example, in the case of a proposed merger?

Similar questions featured prominently in the report released in October 2020 by the Antitrust Subcommittee of the U.S. House Judiciary Committee, *Investigation of Competition in Digital Markets* (the House report). For example, in castigating Congress for becoming lax in its oversight of antitrust matters, the report's authors write that the legislative body's inaction "has contributed to antitrust becoming 'overly technical and primarily dependent on economics.'"[5]

The fairly overt implication, and one that runs throughout the 400-page report, is that dependency on economics is a bad thing. A closely related argument is that the economic tools and measures used in antitrust analysis, and in particular the courts' narrow, if not exclusive, focus on the consumer welfare standard, are ill-suited for dealing with the complexities of today's world. Again, from the House report: "Through adopting a narrow construction of 'consumer welfare' as the sole goal of the antitrust laws, the Supreme Court has limited the analysis of competitive harm to focus primarily on price and output rather than the competitive process—contravening legislative history and legislative intent."[6] [footnotes omitted]

Ultimately, the underlying theme in all these questions is whether the modern antitrust landscape is structurally different from what it has been over the last 50 or more years and, therefore, whether different tools and analytical methods are needed.

In our opinion, the answer is an emphatic "no." As we have written and spoken about on other occasions, the consumer welfare standard is robust to changes in the economy or the emergence of new technologies and, in our view, it remains the gold standard for the analysis of any antitrust concerns.[7] Beyond consumer welfare as a metric to evaluate potential anticompetitive impact, the use of rigorous, fact-based economic analysis is more important than ever in helping develop a better understanding of the evolving digital world. A better understanding, in turn, will be crucial in helping the appropriate authorities legislate and regulate in ways that ensure competition without jeopardizing the benefits that result from the digital revolution.

Interpretations of recent court opinions suggest that we are not alone in this opinion. As we will discuss in the remainder of this article, the claim that economic evidence and the consumer welfare standard have become less relevant is belied by ongoing regulatory activity, merger analyses, and litigation. And beneath the dramatic rhetoric, even the House report rests on a foundation of classical economic analyses of market share and concentration,[8] including a recommendation that the U.S. Federal Trade Commission (FTC) be required to "regularly collect data and report on economic concentration and competition in sectors across the economy."[9]

Rather than asking whether economics, welfare standards, and analytical tools should be thrown out in favor of some yet-to-be-described new framework, we prefer to focus on determining which of the analytical tools we have available to us are most useful, and how best to match them to today's market complexities. This will allow us to develop robust and fact-based assessments of competitive conditions and to present

2 See, for example, https://www.nytimes.com/2020/10/07/technology/congress-big-tech.html.

3 See, for example, https://cdn.vanderbilt.edu/vu-wp0/wp-content/uploads/sites/278/2019/10/11172710/Antitrust-in-Digital-Markets-1.pdf; https://marshallsteinbaum.org/assets/steinbaum-and-stucke-2020-effective-competition-standard-uchicago-law-review-.pdf.

4 See, for example, https://www.nytimes.com/2020/10/07/technology/congress-big-tech.html.

5 U.S. House of Representatives Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, *Investigation of Competition in Digital Markets*, 2020, p. 399 (quoting First and Waller in FN2511).

6 House report, p. 390.

7 See, for example, James Bernard, Rebecca Kirk Fair & D. Daniel Sokol, "Why Does the Consumer Welfare Standard Work? Matching Methods to Markets," *CPI Antitrust Chronicle*, November 2019.

8 For example: "Furthermore, the Subcommittee should examine the creation of a statutory presumption that a market share of 30% or more constitutes a rebuttable presumption of dominance by a seller, and a market share of 25% or more constitute[s] a rebuttable presumption of dominance by a buyer." House report, p. 395.

9 House report, p. 402.

clear, compelling analyses to regulators and courts. The remainder of this article provides examples from agency and court activity underscoring the continuing importance of economic evidence and the specific tools and analytics — some new, many tried and true — used to address antitrust issues.

II. AGENCY ACTIVITIES HIGHLIGHT THE ONGOING RELEVANCE OF ECONOMIC EVIDENCE

We need look no further for support than the numerous hearings, programs, and workshops on antitrust, innovation, big data, and the digital economy that have been hosted over the past couple of years by both the U.S. Department of Justice's ("DOJ's") Antitrust Division and the FTC. In particular, at the FTC's Hearings on Competition and Consumer Protection, held throughout the fall of 2018 and the spring of 2019, prominent academics joined agency officials and industry experts in exploring the economics of multi-sided platforms, discussing the implications of artificial intelligence ("AI") and algorithms (e.g. algorithmic collusion), sharing economic perspectives on innovation, and more.[10]

Importantly, these programs were not mere theoretical exercises. Rather, they explicitly sought to marry economic theory with marketplace facts. For example, some of the sessions explored the effects that fixed costs and network effects have on market concentration, while others assessed contracts and vertical merger review in light of the rapid evolution of business models and distribution chains in the digital economy. These programs and others like them highlight a recognition that economic theory and careful empirical analyses remain fundamental to unpacking how conduct may or may not cause markets to deviate from natural and welfare-enhancing equilibriums. The FTC itself, in pursuing its stated intent "[t]hrough these hearings … to help formulate an enduring approach to current questions about antitrust and consumer protection enforcement,"[11] also acknowledged that one of its key outputs would be "guidance on how the consumer welfare prescription has been interpreted by the courts and whether it is sufficient to prevent anticompetitive mergers and prohibit anticompetitive conduct."[12]

Thus, despite growing concerns regarding the relevance of the consumer welfare standard among some antitrust authorities and scholars, there continues to be support for this method of analysis for antitrust. In fact, it is the flexibility of the consumer welfare standard and the ongoing evolution of economic thinking that makes the standard so well suited to assessing competition and conduct. As the U.S. Supreme Court stated in 2015, "We have therefore felt relatively free to revise our legal analysis as economic understanding evolves and … to reverse antitrust precedents that misperceived a practice's competitive consequences."[13]

Courts' commitment to flexibility in antitrust analysis underscores the importance of economic evidence for evaluating market structure, prospective mergers, and conduct, especially since changes in the economics underlying markets and business models over time may well lead to different and more relevant legal presumptions. For example, as discussed in the next section, the FTC's recently released Vertical Merger Guidelines call out the relevance of economic models, merger simulation, and theory to the assessment of potential competitive effects from an acquisition.

Further, litigation and merger reviews reflect how shifts in economic understanding and market dynamics have led to a reevaluation of legal presumptions and a more nuanced treatment of vertical restraints, such as minimum resale price maintenance, maximum resale price maintenance, and territorial restrictions. With the rule of reason better suited than categorical per se prescriptions to evaluating competition in today's complex business environment, it is even more critical that the economic analysis be done correctly and reflect market outcomes accurately.

10 U.S. Federal Trade Commission (FTC), *Hearings on Competition and Consumer Protection in the 21st Century*, https://www.ftc.gov/policy/hearings-competition-consumer-protection?utm_source=slider.

11 FTC, *Prepared Statement of the Federal Trade Commission Before the Subcommittee on Antitrust, Commercial and Administrative Law of the Judiciary Committee, United States House of Representatives*, "Online Platforms and Market Power, Part 4: Perspectives of the Antitrust Agencies," November 13, 2019.

12 FTC, *Prepared Statement of the Federal Trade Commission Before the U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights*, "Oversight of the Federal Antitrust Laws," September 17, 2019.

13 *Kimble v. Marvel Entertainment*, 135 S. Ct. 2401, 2412-13 (2015).

III. MERGER REVIEW PROCESSES AND GUIDELINES CONTINUE TO REFLECT THE RELEVANCE OF ECONOMIC EVIDENCE

Theoretical and empirical economists have provided a diverse and flexible set of tools and methodologies to be used in examining markets and conduct. The evaluation process for proposed mergers provides a useful illustration. Economists can employ, variously and in combination, market data, survey data, business documents, and natural experiments to assess market concentration and current and future diversion rates, and to forecast price and quantity outcomes to evaluate the competitive effects of any proposed merger.

Importantly, these tools are only as relevant as the inputs and assumptions they rely upon, both of which must match the economics and dynamics of the industry at issue.

While e-commerce, digital advertising, and other facets of modern technology present new challenges to antitrust enforcement, economic models provide bespoke tools and approaches to defining markets, evaluating market power, and weighing the potential procompetitive and anticompetitive effects of particular contractual arrangements or proposed vertical integrations.[14] When they were introduced in June 2020,[15] the new Vertical Merger Guidelines stated that they "detail the techniques and main types of evidence that the agencies typically use to predict whether vertical mergers may substantially lessen competition. The Guidelines will help businesses, antitrust practitioners, and other interested persons by increasing transparency into the agencies' principal analytical techniques, practices, and enforcement policies for evaluating vertical transactions."[16]

Notably, these guidelines emphasize the point that "where sufficient relevant data are available, the Agencies may construct economic models designed to quantify the net effect on competition."[17] The guidelines also acknowledge that simulation models (whether partial or full) cannot be taken in isolation, and that qualitative evidence will also be considered alongside quantitative in evaluating the net effects of a proposed vertical merger. This is one reason, although hardly the only reason, why it is critical to make sure that the economic methods match the empirical evidence provided by the markets.

For instance, efficiencies in vertical integrations have long been studied by economists and recognized as important by regulators. Eliminating double marginalization ("EDM") through vertical integration may allow a merged entity to have access to its inputs at a lower cost than the premerger market price of the inputs. For example, in United Technologies Corporation's ("UTC's") acquisition of Goodrich in 2012, UTC was able to internalize Goodrich's markups and reduce the relative costs of overall input. This should argue in favor of a likely lower market price for customers and higher associated quantity, as long as the elimination of the double marginalization is not outweighed by potential anticompetitive effects. At its heart, this is an economic question as relevant for digital enterprises as it is for good, old-fashioned tire manufacturers.

For the new economy as well as for the old, the economic incentives of the parties, which are largely dependent on market dynamics, will play a critical role in determining the likely procompetitive and anticompetitive effects of a vertical merger. The Vertical Merger Guidelines highlight several prospective anticompetitive considerations, including raising rivals' costs, refusing to supply downstream providers, customer foreclosure, and higher barriers to entry.

Examining each of these questions requires both empirical and qualitative economic and marketplace evidence. Whether assessing the potential procompetitive and anticompetitive effects of either a vertical or a horizontal merger, economic theory, simulation models, and business realities may all provide useful insights. Given that theory suggests that firms in a competitive environment would have an incentive both to pass on efficiencies in the presence of competition and to raise rivals' costs, the net effects given reasonable assumptions, available data, and simulation inputs must be considered alongside the stated objectives for the proposed merger and the nature of competition in the pre- and post-merger marketplaces. Ultimately, the agencies will need to carefully reflect on internal business documents, along with the economic evidence, in their assessments of proposed acquisitions. In the digital sector, the absence of price, the balance of short-term versus long-term

14 Rebecca Kirk Fair, Nikita Piankov & Emmanuel Frot, "United States – E-commerce Economics: Market Power and Enforcement in Vertical Markets," *Global Competition Review E-Commerce Competition Enforcement Guide*, January 2019, Law Business Research Ltd.

15 FTC, *Vertical Merger Guidelines*, June 30, 2020, https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf.

16 FTC, *FTC and DOJ Issue Antitrust Guidelines for Evaluating Vertical Mergers*, June 30, 2020, https://www.ftc.gov/news-events/press-releases/2020/06/ftc-doj-issue-antitrust-guidelines-evaluating-vertical-mergers.

17 *Vertical Merger Guidelines*, p. 6, https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf.

incentives, and the presence of network effects may all affect the analysis, but none of them change the fundamental question and the necessary reliance on well-trodden economic methods. These questions are likely to be carefully examined in the ongoing FTC and DOJ "Big Tech" merger and other antitrust investigations and lawsuits into Facebook, Google, and others. Notably, the issue of platform economics and the impact it has on market definition came up in the past year in the DOJ review of the proposed *Farelogix/Sabre* merger.

This does not mean that assessing the future impact of a vertical or horizontal merger is easy. It often requires a combination of art and science, especially in a highly dynamic industry such as the digital sector. The retrospective assessments of major technology acquisitions, litigations related to consummated mergers, and concerns raised in the popular press prior to acquisitions highlight the challenges any regulator faces in predicting the future.

Such concerns were illustrated by Amazon's vertical acquisition of Kiva Systems. Kiva, a robotics company, provided machines that allowed fulfillment centers to operate in a more automated fashion. Amazon, familiar with the benefits of this automation system following its acquisition of Zappos.com, announced its acquisition of Kiva in 2012. For the first few years following the merger, and as part of its merger assessment, Amazon promised to continue to service its rivals' robots and to sell their aftermarket products. However, by the end of 2015, Amazon had fully integrated Kiva's systems and began offering Amazon Robotics.

This integration has led some critics of Amazon to argue that the changes compelled rivals and customers of Kiva to use Amazon's own fulfillment services, thereby protecting and extending its power over the e-commerce space and raising rivals' cost.[18] On the other hand, a careful examination of investments and innovations following the merger reveals a rush of funding to Kiva's competitors.[19] For that reason, many have asked whether Amazon's leading position in online retail is due in part to its ability to decrease access to a critical input to fulfillment. But it may be just as valid to ask whether the Kiva acquisition reduced Amazon's fulfillment cost while enhancing dynamic investment in innovation throughout the industry. If the latter, were the regulators then right to let the merger through?

Another recent example of a vertical merger for which assessment of the future impact was anything but simple was the 2018 CVS-Aetna transaction. This transaction involved the merger of a health insurer and pharmacy benefits manager ("PBM") on the one hand and a chain of retail pharmacies and minute clinics (as well as other services) on the other.

This merger led some commentators to worry that the merged entity could foreclose both competing insurers and competing retail pharmacies, leading to less competitive markets in this space.[20] However, other commentators emphasized the potential procompetitive effects of this transaction, including better coordination of medical and pharmacy insurance benefits, as well as increased use of lower-priced health care providers, resulting in lower medical spending.[21]

Both of these vertical mergers highlight the challenges involved in forecasting net competitive effects, or even in identifying them in hindsight, in order to understand whether the vertical integration enhanced or reduced competitive conditions and consumer welfare.

18 Lina M. Kahn, "The Separation of Platforms and Commerce," *Columbia Law Review*, Vol. 119, No. 4, May 2019, https://columbialawreview.org/content/the-separation-of-platforms-and-commerce/.

19 Adam Putz, "M&A flashback: Amazon announces $775M Kiva Systems acquisition," Pitchbook.com, March 19, 2018. https://pitchbook.com/news/articles/ma-flashback-amazon-announces-775m-kiva-systems-acquisition.

20 See, for example, https://www.openmarketsinstitute.org/publications/the-corner-net-neutrality-disney-time-warner.

21 See, for example, https://docs.house.gov/meetings/JU/JU05/20180227/106898/HHRG-115-JU05-Wstate-GarthwaiteC-20180227.pdf.

IV. ROBUST AND FACT-BASED ECONOMIC EVIDENCE IS AS RELEVANT AS EVER

History and ongoing statements by regulators affirm that economic evidence and analyses are relevant to the assessment of competitive effects in merger analyses and beyond. What, then, are we to think of the skepticism with respect to economic modeling that is sometimes expressed in courts and in high-profile merger litigation cases? In our view, this skepticism is misdirected if it questions the utility of economic analysis overall. Instead, the real question should be how to ensure that valid economic analyses are appropriately understood and considered when regulators or courts are assessing competition.

Economic evidence is most relevant and most compelling when theory, analyses, and experience converge on the same answer. It is not surprising that testimony that is based on theoretical models, but does not match to factual witness testimony or internal strategic documents, receives little consideration by courts. The model and theory may be perfectly accurate in some circumstances, but the underlying necessary market structure may not be applicable in the industry in question, or the inputs and data may be unreliable.

The 2014 U.S. District Court's ruling on Bazaarvoice's acquisition of PowerReviews highlighted the importance of ensuring that economic modeling is supported by business facts.[22] During the trial, the DOJ presented extensive evidence that "Bazaarvoice executives clearly intended to eliminate competition by acquiring PowerReviews."[23] Thus, while economists both for the DOJ and for Bazaarvoice presented reasonable theoretical interpretations of the market, ultimately, Bazaarvoice's own premerger view of the marketplace mapped best to the economic evidence presented at trial by the DOJ. The analysis of the DOJ expert demonstrated that PowerReviews was a significant threat to Bazaarvoice and the merger, and that the merger would ultimately raise prices, thereby offering an empirical demonstration that matched the *ex ante* expectations of the acquirer.

In other circumstances, the lack of marketplace experience sufficiently comparable to the proposed merger may make mapping economic theory to market realities challenging. For example, Judge Richard J. Leon questioned the models presented in the DOJ's challenge of the *AT&T/Time Warner* merger, in part because the industry had never experienced a blackout of the magnitude considered in the economic models. Ultimately, of course, the blockbuster merger was allowed. However, the passage of time has caused some observers to question whether Judge Leon was right after all. Subscribers to AT&T and to its competitor cable and satellite providers in fact experienced blackouts of some major television channels. As the University of Pennsylvania's Herbert Hovenkamp has explained, "When you start seeing blackouts, it's obvious you're looking at a merger that's not serving consumers very well."[24]

The rapid evolution of markets, competition, and economic thinking in the modern economy requires ongoing assessment of competitive conditions and merger review. It is therefore more important, not less, to bring the best economic evidence to assess competition.[25] This requires that economists, industry participants, and lawyers work together to understand the fundamental relationships in the marketplace, the key nodes of competition, and the dynamics of entry, exit, pricing, production, and innovation. A failure to fully account for the market dynamics will lead to the wrong economic models and a disconnect between market evidence and theoretical outcomes. In such circumstances, courts are right to be skeptical. But such skepticism is not a reflection of a lack of relevance; instead, it may be a failure in exposition or in model specification.

22 U.S. DOJ, *U.S. v. Bazaarvoice Inc., Memorandum Opinion, Public Redacted Version*, January 8, 2014, https://www.justice.gov/atr/case-document/file/488846/download.

23 U.S. DOJ, "Justice Department Issues Statement on U.S. District Court Ruling That Bazaarvoice's Acquisition of PowerReviews Violated Antitrust Laws," January 10, 2014, https://www.justice.gov/opa/pr/justice-department-issues-statement-us-district-court-ruling-bazaarvoice-s-acquisition.

24 David Lazarus, "Consumer Confidential: AT&T's promise of better pay-TV prices and service is 'bordering on the absurd,'" *Los Angeles Times*, August 10, 2019, https://www.latimes.com/business/story/2019-08-05/pay-tv-companies-are-too-powerful.

25 For example, the agencies have continued to highlight the importance of retrospective merger review. As noted by Farrell, Pautler, and Vita (2009), retrospective merger analysis "is [intended] to determine *ex post* how, if at all, a particular merger affected equilibrium behavior in one or more markets." See https://www.ftc.gov/policy/studies/merger-retrospectives/overview; Joseph Farrell, Paul Pautler & Michael Vita, "Economics at the FTC: Retrospective Merger Analysis with a Focus on Hospitals," *Review of Industrial Organization*, 35, 2009, 369-85.

IN COMITY WE TRUST: UTILIZING INTERNATIONAL COMITY TO STRENGTHEN INTERNATIONAL COOPERATION AND ENFORCEMENT CONVERGENCE IN MULTIJURISDICTIONAL MATTERS

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I. INTRODUCTION

In late 2020, the United States appeared to reinvigorate its efforts in antitrust enforcement in the high technology industry, having recently launched two new lawsuits against Google and Facebook.[2] By contrast, the EU, having already established a long and difficult record of antitrust litigation with technology companies, shifted its focus by instituting an entirely new regime of antitrust regulations dedicated to policing anti-competitive behavior in the technology services sector. As noted in a tweet made by EU Commissioner Margrethe Vestager in December 2020, her description of the proposed digital regulations was telling of the EU's "go it alone" type attitude:

> It is one world. So #DigitalServiceAct & #DigitalMarketsAct will …[g]ive new do's & don't to gatekeepers of the digital part of our world - to ensure fair use of data, interoperability & no self-preferences.[3]

While Vestager's tweet attributes the EU's dynamism with providing positive extraterritorial effects through its two proposed regulations, the same claims may also provide precedent to real risks for inconsistent treatment and regulation of common digital markets across different jurisdictions. As strong independent enforcement efforts in the EU may be matched by conflicting and duplicative outcomes in other jurisdictions, this raises potential worries over procedural fairness and increased costs for both enforcement agencies and responding businesses alike. Such concerns are aptly reflected in the words of the OECD, which noted that:

> Globalisation, the increasing significance of emerging economies, the borderless nature of the growing digital economy, and the proliferation of competition regimes have caused a significant increase in the complexity of cross-border competition law enforcement co-operation. This results in a greater need to: avoid inconsistencies and duplication of effort among governments enforcing their competition laws, help multinational businesses comply cost effectively with the competition regimes of multiple jurisdictions, and improve the techniques and tools of competition authorities' co-operation.[4]

Accordingly, this article proposes that the application of international comity principles would be helpful to promote international cooperation and convergence on multijurisdictional enforcement, creating a "win-win" for competition authorities and the respondents subject to competition scrutiny in the form of consistency, predictability and efficiency. The article proposes five considerations where international comity can be helpful in advancing international cooperation and enforcement convergence in multijurisdictional matters.

2 Federal Trade Commission, "FTC Sues Facebook for Illegal Monopolization," (December 9, 2020) https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization; Department of Justice, "Justice Department Sues Monopolist Google For Violating Antitrust Laws," October 20, 2020 https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws.

3 Margarethe Vestager, Twitter, (December 15, 2020) https://twitter.com/vestager/status/1338869405329936385?lang=en.

4 OECD, International Cooperation In Competition, (November 3, 2020) https://www.oecd.org/competition/internationalco-operationandcompetition.htm.

II. THE GROWING DIVIDE IN ANTITRUST REGULATION OF THE HIGH TECHNOLOGY INDUSTRY & DIGITAL MARKETS

Divergent approaches to the high technology sector have been a feature of competition enforcement since the emergence and rise of the industry. Early examples were the parallel U.S. and European cases against IBM in the 1970s which resulted in conflicting outcomes. U.S. proceedings against IBM were discontinued in the early 1980s, while the European Commission pursued its investigation and reached a settlement with IBM in 1984.[5] A multi-jurisdictional conflict was also apparent in the different jurisdictional treatments of a landmark Microsoft software bundling case in the early 2000s.[6] The resulting U.S. behavioral order was "criticized as too lenient on Microsoft"[7] while the EU and South Korean resolutions imposed much harsher remedial measures in addition to fines in the millions of dollars.[8] More recently, the EU's multiple lawsuits against Google in regards to their comparison shopping service[9], Android devices[10], and online advertising services[11] have also contrasted the efforts of other agencies which have taken comparatively little enforcement action. As these actions were considered by some commentators as reflective of the EU competition regime's "low bar for anticompetitive effects" when compared to other jurisdictions such as the U.S.,[12] it further illustrates the problematic discordance in approaches which afflict domestic enforcement actions in the often multijurisdictional nature of the technology sector.

International rifts are also evident in the different approaches to merger reviews of technology companies. For example, in December 2020, the EU approved Google's plan to acquire Fitbit on commitments from Google to refrain from leveraging Fitbit's data.[13] The proposed transaction was simultaneously reviewed by many other antitrust agencies, resulting in varying outcomes: the South African authority adopted similar remedies to the EU[14]; however, the Australian Competition and Consumer Commission rejected similar behavioral commitments from Google stating that it was "not satisfied that a long term behavior undertaking of this type in such a complex and dynamic industry could be effectively monitored and enforced in Australia."[15]

The historical trend of divergence does not appear to be abating but increasing as a wave of new sweeping "pro-competition" regulatory reforms in digital markets have been recently announced in various jurisdictions across the globe. In the EU, two new proposed laws, the *Digital Markets Act* and the *Digital Services Act*, would allow the Commission to impose strict measures on large "gatekeeper" digital platforms; apply monetary, behavioral, or structural remedies for non-compliance; and initiate targeted market investigations to regularly update the obligations for such "gatekeepers."[16] In the UK, there are plans for a standalone digital regime within its existing competition laws that serve to regulate

5 See John E Lopatra, "*United States v IBM:* A Monument to Arrogance," Antitrust Law Journal, 68:145 at fn 4; Commission Decision of April 18, 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.849 IBM personal computer), 84/233/EEC https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31984D0233&from=EN.

6 James F. Ponsoldt & Christopher D. David, "A Comparison Between U.S. and E.U. Antitrust Treatment of Tying Claims Against Microsoft: When Should the bundling of Computer Software Be Permitted?," Northwestern Journal of International Law & Business, 27:421 (2007), pp. 421-422.

7 John P. Jennings, Comparing the US and EU Microsoft Antitrust Prosecutions: How Level Is The Playing Field?, Erasmus Law and Economics Review 2, no. 1 (March 2006): 71–85.

8 See Daniel J. Silverthorn, "Microsoft Tying Consumers' Hands – The Windows Vista Problem and the South Korean Solution," Michigan Telecommunications and Technology Law Review 13, no.2 (2007): 620-621.

9 European Commission, "Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service," (June 27, 2017) https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784.

10 European Commission, "Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine," (July 18, 2018) https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581.

11 European Commission, "Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising," (March 20, 2019) https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770.

12 Gregory J. Werden & Luke M. Froeb "Antitrust and Tech: Europe and the United States Differ, and It Matters" CPI Antitrust Chronicle, October 2019.

13 European Commission, "Mergers: Commission clears acquisition of Fitbit by Google, subject to conditions," (December 17, 2020) https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2484.

14 Competition Commission (South Africa), "Competition Commission conditionally approves the Google/Fitbit merger," (December 22, 2020) http://www.compcom.co.za/wp-content/uploads/2020/12/Competition-Commission-conditionally-approves-the-Google-Fitbit-merger.pdf.

15 Australian Competition & Consumer Commission, "ACCC rejects Google behavioural undertakings for Fitbit acquisition," (December 22, 2020) https://www.accc.gov.au/media-release/accc-rejects-google-behavioural-undertakings-for-fitbit-acquisition.

16 European Commission, "The Digital Markets Act: ensuring fair and open digital markets" https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en; European Commission, "The Digital Services Act: ensuring a safe and accountable online environment" https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en;

the alleged market power of specific technology firms and platforms.[17] Germany and France have also taken active steps to review and revise their own domestic competition laws in order to better regulate the digital market.[18] In Australia, following the completion of the Digital Platform Inquiry in 2019, the government has taken proactive steps in establishing a mandatory code of conduct for digital platforms and launching a further inquiry into the digital advertising market.[19] Japan has also recently enacted regulations requiring "Specified Digital Platform Providers" to improve transparency and fairness in trading on their digital platforms.[20] This emerging patchwork of digital regulation further amplifies existing incoherence and uneven application of competition regimes on the technology sector and digital markets across the globe.

III. INTERNATIONAL COMITY – A PATHWAY TO GREATER COOPERATION AND CONVERGENCE?

Despite the incohesive and fractured nature of global competition enforcement in the high technology sector, competition agencies have nonetheless developed a common understanding regarding the increasing need for international cooperation and convergence. Multilateral antitrust organizations such as the International Competition Network ("ICN") and the OECD Competition Policy Committee ("OECD") have made concerted efforts to promote global cooperation. Similarly, the G7 Competition Authorities expressed their commitment to cooperation following high level meetings in Paris on "Competition and the Digital Economy" stating that:

> In light of the global nature of the digital economy and the shared mission of sound application of the competition laws, international cooperation between competition enforcers and policymakers is crucial. There is a growing need for convergent competition enforcement and for effective answers to cross-border practices and multi-jurisdictional cases. International cooperation helps foster a coherent competition landscape, which is also of interest for business stakeholders. Competition enforcers therefore support continued cooperation and experience-sharing through existing fora and networks, as digital issues are already subject to work conducted by competition authorities at the multilateral level.[21]

On a general basis, non-binding and soft law approaches are the primary instruments used by competition enforcement agencies to advance international cooperation and convergence. These methods currently include bilateral and multilateral cooperation agreements usually in the form of MOUs; active participation in multilateral fora such as the ICN and the OECD; and use of Competition Policy chapters contained in international trade agreements.

Another important method of reducing conflicting approaches to cross-border conduct where more than one country seeks to apply its competition law is the principle of international comity. Specifically, the principle of comity "calls for one enforcer to defer to another's decisions, and not take parallel, potentially inconsistent decisions."[22] As early as the 1967 OECD Recommendation on Agency Cooperation, there has been a recognition for agencies, in accordance with the principle of comity, to exercise moderation and self-restraint in the interest of cooperation.[23] This theme of international comity has continued to be represented in more recent recommendations. For example, in a 2007 report prepared by the American Modernization Commission, they supported "prosecutorial or investigative restraint" by advocating for a lead jurisdiction most closely associated with the alleged anti-competitive conduct to take primary responsibility for enforcement.[24]

17 Competition and Markets Authority, "CMA advises government on new regulatory regime for tech giants," (December 8, 2020) https://www.gov.uk/government/news/cma-advises-government-on-new-regulatory-regime-for-tech-giants.

18 Silke Heinz, "Draft German competition rules on powerful digital gatekeepers," Kluwer Competition Law Blog, (December 11, 2020) http://competitionlawblog.kluwercompetitionlaw.com/2020/12/11/draft-german-competition-rules-on-powerful-digital-gatekeepers/; Autorité de la concurrence, "The Autorité de la concurrence's contribution to the debate on competition policy and digital challenges," (February 19, 2020) https://www.autoritedelaconcurrence.fr/sites/default/files/2020-03/2020.03.02_contribution_adlc_enjeux_numeriques_vf_en_0.pdf.

19 Speech by Rod Sims, "The ACCC's Digital Platforms Inquiry and the need for competition, consumer protection and regulatory responses," (August 2020) https://www.accc.gov.au/speech/the-acccs-digital-platforms-inquiry-and-the-need-for-competition-consumer-protection-and-regulatory-responses.

20 Ministry of Economy, Trade and Industry (Japan), "Cabinet Decision on the Bill for the Act on Improvement of Transparency and Fairness in Trading on Specified Digital Platforms," (February 18, 2020) https://www.meti.go.jp/english/press/2020/0218_002.html.

21 Press Release "Common Understanding of G7 Competition Authorities on "Competition and the Digital Economy" Paris, June 5, 2019," https://www.ftc.gov/system/files/attachments/press-releases/ftc-chairman-supports-common-understanding-g7-competition-authorities-competition-digital-economy/g7_common_understanding_7-5-19.pdf.

22 Antitrust Modernization Commission, "Report and Recommendations" (April 2007), pg.220 http://go into.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

23 Deborah Platt Majoras, "Convergence, Conflict, and Comity: The Search for Coherence in International Competition Policy" (Remarks at the Fordham Competition Law Institute 34th Annual Conference on International Antitrust Law & Policy, September 27, 2007) www.ftc.gov/sites/default/files/documents/public_statements/convergence-conflict-and-comity-search-coherence-international-competition-policy/070927fordham_0.pdf.

24 *Id.* pp. 220-221.

Despite the well-intentioned calls for policy makers and enforcement agencies to exercise restraint in the name of international cooperation and efficient enforcement efforts, there have been few examples of comity principles being exercised in the high technology and digital market sphere other than in the case of merger reviews. However, the potential benefits of international comity in promoting and facilitating cooperative multijurisdictional regulatory actions should not be ignored. A rare case of comity was used by the Canadian Competition Bureau ("CCB") in an abuse of dominance investigation in the above noted software bundling case concerning Microsoft, accepted an undertaking from Microsoft that any remedy from U.S. proceedings would also be applied to Canada. This approach allowed the CCB to have its concerns addressed without needlessly duplicating efforts and ensured that the CCB's enforcement action did not conflict with the enforcement action of a jurisdiction that had a significantly greater nexus.[25] Former CCB Commissioner, Sheridan Scott, noted that the CCB elected not to pursue a separate investigation in Microsoft after having concluded that "a global remedy was preferable to a patchwork quilt approach [and that] procedures in Canada would have likely resulted in a duplication of efforts, resources and remedies to achieve the same result."[26]

While the practical application of comity has thus far not been widespread, the underlying principles of comity continue to be a welcomed concept among competition authorities. As noted in the recent OECD/ICN Report on International Cooperation in Competition Enforcement published in January 2021, a vast majority of competition agencies voiced their support for greater multilateral cooperation, noting that this would not only benefit the agencies themselves, but also reduce the administrative burdens on business engaging with multiple authorities on the same matter.[27] The same agencies also agreed that while there are no specific legal provisions concerning the consideration of remedies applied by other jurisdictions, a vast majority already considered the remedies imposed by other authorities[28] and would "always seek to apply similar and non-contradictory remedies," and "consider remedies applied to similar cases…in order to further avoid divergent approaches to similar issues."[29] As the agencies noted their requests for "greater harmonisation and convergence in laws and practices" in the future, it would appear that international comity, if properly structured, administered and exercised, would be an apt and promising approach in pursuance of such a goal.[30]

IV. FIVE CONSIDERATIONS TO PROMOTE INTERNATIONAL COMITY IN MULTIJURISDICTIONAL MATTERS

As noted above, the spirit and principles underlying international comity appear to be generally welcomed by antitrust agencies and respondent businesses based on public statements issued by G7 competition authorities, the ICN, and OECD. Such sentiments are aptly summarized in a recent statement made by the Chief Economist of the UK's Competition and Markets Authority which, speaking on the regulation of digital markets, noted that "it's not in anyone's interest to have substantial regulatory divergence within Europe, so I think we all have an incentive to avoid that … and not just within Europe but also across the Atlantic [as well]."[31]

Accordingly, in aiming to foster a greater application of comity principles across the globe, the following are five considerations that will hopefully provoke further discussion regarding the benefits of international comity for agencies and respondent businesses.

25 John Pecman & Duy Pham, The Next Frontier of International Cooperation in Competition Enforcement, Frèdèric Jenny - Standing Up for Convergence and Relevance in Antitrust, Liber Amicorum, Concurrences, Paris, 2019.

26 See Sheridan Scott, "Canadian Perspectives on the Role of Comity in Competition Law Enforcement in a Globalized World: To Defer or Not To Defer? Is that the question?" (Remarks at American Bar Association's Section of Antitrust Law 2006 Spring Meeting, March 29, 2006).

27 OECD & ICN, OECD/ICN Report On International Co-Operation in Competition Enforcement, p. 119, https://www.internationalcompetitionnetwork.org/portfolio/oecd-icn-report-on-international-co-operation-in-competition-enforcement-2021/.

28 *Id.* p. 147.

29 *Id.* p. 148.

30 *Id.* pp. 181-182.

31 Victoria Ibitoye, "Big Tech regulation efforts should aim for global convergence, CMA chief economist says," MLex Market Insight, January 28, 2021.

A. Competition Agencies Should Publicly Commit to Comity, Where Possible

Competition agencies should publicly commit to actively pursuing comity principles in multijurisdictional matters in order to avoid inconsistent outcomes and, to the extent remedies are necessary, unnecessarily duplicative or inconsistent remedies. The commitment would likely be followed by agency guidelines for co-operation in international competition law enforcement, such as those published by the U.S. agencies in 2017.[32] These guidelines note that "(w)hen multiple authorities are investigating the same transaction or same conduct, the Agencies may cooperate with other authorities, to the extent permitted under U.S. law, to facilitate obtaining effective and non-conflicting remedies" and "(i)n some circumstances, cooperation may result in one authority closing an investigation without remedies after taking another authority's remedies into account."[33] The competition agencies in Australia and Canada have also developed similar, albeit more limited, guidance on their use of comity.[34]

A commitment to comity would aid merger parties or respondents in, where necessary, systematically addressing agency concerns through the most least intrusive means necessary to address competition concerns. This would also create more certainty and confidence in the any multijurisdictional negotiation process. Agency best practices should expressly reference comity considerations in press releases and in published position statements for multijurisdictional matters.

B. Agencies Should be Prepared to Exercise Deference

In the context of multijurisdictional investigations where a remedy may be required and is entered into between a competition agency and a respondent, or where an agency concludes that no remedy is required, agencies should be prepared to exercise deference and avoid inconsistency, where possible, by taking into consideration the principle of imposing the least intrusive remedy necessary to address competition concerns. Furthermore, where a country utilizes regulation to regulate alleged anti-competitive conduct in digital markets and where the remedy has extra-territorial effects, a digital regulator should have regard to competition law enforcement comity principles in shaping a remedy, where a remedy is required, to avoid an inconsistent outcome.

Consider the following hypothetical example: Company Alpha, with a global social media application, is subject to a behavioral remedy in Country X in relation to Alpha-brand products sold on its social media platform for self-preferencing by a digital regulator. In Country Y, the alleged self-preferencing (discriminatory conduct) does not result is a substantial lessening of competition and the investigation is closed by the competition authority with no enforcement action. In this instance, Country X's digital regulator agrees to fashion a remedy against Alpha to minimize its impact on Country Y's market. In Country Z, the competition authority finds that Alpha's discriminatory self-preferencing has caused the exit of a competitor and finds there was a substantial lessening of competition. Country Z usually prefers to use structural remedies in these types of cases but in order to avoid inconsistent remedies against the company agrees to implement the same remedy as was imposed by the digital regulator in Country X.

In this case, the hypothetical example illustrates how comity and deference can be used by the three countries to minimize conflicts where remedies were imposed, or where no enforcement action was taken.

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32 ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION Issued by the: U.S. DEPARTMENT OF JUSTICE and FEDERAL TRADE COMMISSION, January 13, 2017 https://www.justice.gov/atr/internationalguidelines/download.

33 *Id.* pp. 47-48.

34 The Australian Competition and Consumer Commission ("ACCC") applies comity in cases where it has concluded that: (i) the nexus to Australia of the competitive harm being investigated was not sufficient (including considerations of the level of involvement of Australian businesses); and (ii) possible enforcement actions by sister agencies would nevertheless result in the termination of the offending conduct and protection for Australian consumers. The Canadian Competition Bureau set out its approach to comity in merger cases in the "Information Bulletin on Merger Remedies in Canada" (Competition Bureau, "Information Bulletin on Merger Remedies in Canada" (September 22, 2006), www. competitionbureau.gc.ca/eic/site/cb- bc.nsf/eng/02170.html). The Bureau may apply comity and defer to another agency's merger remedies when the following conditions are met: (1) the assets that are subject to divestiture, or the conduct that must be carried out as part of a behavioural remedy, are primarily located in another jurisdiction; (2) the Bureau is confident that the foreign agency's remedy is effective and viable and that it will enforce the remedy; and (3) the Bureau is satisfied that the actions taken by the foreign agency are sufficient to resolve the competition issues in Canada. For international mergers, these conditions provide useful guidance for determining when a local remedy would be required or when another agency's measures would be enough. When considering comity in other areas of competition enforcement, the Bureau would apply the same general principles as it does for mergers. See Vicky Eatrides, "The Competition Bureau's Approach to International Cooperation and Comity" (Remarks at USC Gould's Center for Transnational Law and Business Inaugural Conference on Antitrust Enforcement in a Global Context: Extraterritoriality and Due Process January 23, 2017); OECD, "OECD Developments in international co-operation in competition cases since 2014: monitoring the implementation of the Recommendation of the Council concerning International Co-Operation on Competition Investigations and Proceedings, Note by the Secretariat," (June 4, 2019) http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2019)3&docLanguage=En; John Pecman and Duy Pham, The Next Frontier of International Cooperation in Competition Enforcement, Frèdèric Jenny - Standing Up for Convergence and Relevance in Antitrust, Liber Amicorum, Concurrences, Paris, 2019; Terry Calvani & Justin Stewart-Teitelbaum, "Is There Too Much Traffic on the Competition Law Enforcement Autostrada?" (Draft Paper Presented at the Fordham Competition Law Institute 43rd Annual Conference on International Antitrust Law & Policy, September 22, 2016) https://awards.concurrences.com/IMG/pdf/negative_comity_--_2016.11.30_--_calvani_stewart- te.pdf.

C. OECD Should Strengthen International Comity Recommendations

Further to the OECD's 2014 Challenges of International Co-operation in Competition Law Enforcement report and recommendations,[35] which was recently reinforced by the OECD Secretariat[36], the OECD should strengthen the international comity recommendations including:

a) developing international standards for formal comity, along with clarifying agency comity obligations;

b) allowing (or encouraging) competition agencies to choose decisions of other agencies in the investigation of cross-border cases which could include giving deference to one "lead authority"; and

c) reaching a multi-lateral agreement for comity and deference standards based on jurisdictions opting into the agreement.[37]

D. Building on the ICN Framework for Competition Agency Procedures

The ICN should consider taking-up the OECD international comity recommendations by building on its successful ICN Framework for Competition Agency Procedures ("CAP").[38] With over 70 competition agencies choosing to join, the CAP includes a number of procedural fairness protections, including transparency, impartiality and independent reviews. It also includes notice to respondents of agency investigations, timely agency resolution, agency confidentiality, written decisions from agencies and access to information from agencies. Further, the CAP seeks to protect a respondent's right to defend and to be represented by counsel. Indeed, in the formation of CAP, it was contemplated that its implementation and operation "could lead participants to enhance the CAP working procedures or develop more robust implementation commitments."[39]

Global application of CAP would help ensure consistent, global application of procedural safeguards, giving domestic enforcement agencies and respondents greater confidence to defer to certain jurisdictions.

E. Consolidation Options for Respondents

If and when an International Comity Framework is established by a multi-lateral agreement(s), respondents to cross border investigations could have the option of requesting that agencies consolidate their merger reviews or "like" investigations, to be headed by a lead agency. By way of example, this approach could begin with the G7 competition agencies, with a focus on digital market cases. Other agencies could opt-in to the G7 comity agreement on case by case basis by agreement with the lead agency and the respondent. While there may be some need to account for unique or tailored outcomes in specific jurisdictions and substantive divergences in competition laws, a consolidation for respondents does offer predictability, consistency and fairness for competition agencies and respondents.

35 OECD, Challenges of International Co-operation in Competition Law Enforcement 2014, https://www.oecd.org/competition/challenges-international-coop-competition-2014.htm.

36 OECD Developments in international co-operation in competition cases since 2014: monitoring the implementation of the Recommendation of the Council concerning International Co-Operation on Competition Investigations and Proceedings, Note by the Secretariat June 4, 2019 http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2019)3&docLanguage=En.

37 OECD, Challenges of International Co-operation in Competition Law Enforcement 2014, Pg.53 https://www.oecd.org/competition/challenges-international-coop-competition-2014.htm.

38 ICN Framework for Competition Agency Procedures, 2019 https://www.internationalcompetitionnetwork.org/frameworks/competition-agency-procedures/.

39 Paul O'Brien, ICN's Framework for Competition Agency Procedures, Part 2: What does the CAP mean for the ICN tomorrow? May 2019, CPI Competition Policy International https://www.competitionpolicyinternational.com/icns-framework-for-competition-agency-procedures-part-2-what-does-the-cap-mean-for-the-icn-tomorrow/.

V. CONCLUSION

The prevalence of a fragmented global patchwork approach to regulating the high technology sector and digital markets serves to undermine confidence in competition agencies' commitment to international cooperation and procedural fairness. This raises real concerns of inconsistency and unnecessary duplication of enforcement efforts, both being considerations that serve to unnecessarily complicate matters for both antitrust agencies and respondent businesses alike. To counteract such risks, antitrust agencies should look to proactively embrace opportunities for greater international comity when working with other agencies. This would not only enhance enforcement efficacy and ensure efficient allocation of global enforcement resources,[4041] but would also be welcome approach for merging parties and respondents involved in multijurisdictional enforcement in the form of consistency, predictability and efficiency.

40 Terry Calvani & Justin Stewart-Teitelbaum, "Is There Too Much Traffic on the Competition Law Enforcement Autostrada?" (Draft Paper Presented at the Fordham Competition Law Institute 43rd Annual Conference on International Antitrust Law & Policy, September 22, 2016) pg. 190 https://awards.concurrences.com/IMG/pdf/negative_comity_--_2016.11.30_--_calvani_stewart- te.pdf.

41 Sheridan Scott, "A Canadian Perspective on the Role of Comity in Competition Law Enforcement in a Globalised World" (2012) 1 Competition LRep 103, pg. 113.

DO ALGORITHMS COMMUNICATE WITH EACH OTHER AND WHAT DOES THIS MEAN FOR THE APPLICATION OF COMPETITION/ANTITRUST LAW?

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In recent years we have seen a rich discussion, legislative proposals and even application of competition law[2] with regards to large digital platforms.[3] It is reasonable to assume that this is just the beginning of addressing the existing and potential anticompetitive issues in the digital space. Some scholarly works on competition law and the digital economy also discuss other topics, with various types of algorithmic collusion being one of the most prominent. Considering, first, that innovation occurs at enormous speeds in the digital world; second, that one of the typical major enforcement priorities of competition law agencies are cartels and; third, that large digital platforms are just one of the many hot issues of competition law in the digital space, it is only a matter of time before competition law regulators will study algorithmic collusion profoundly.[4]

When it comes to anticompetitive collusion, the most challenging hurdle for enforcing competition law is having enough evidence to prove anticompetitive conduct. Various competition law regimes require collusion between at least two market participants, with horizontal collusion being recognized as more damaging to competition than vertical collusion.[5] Any collusion requires some form of communication and some minimum evidence to prove it.

When the hurdle of proving anticompetitive collusion is combined with the digital space, most notably, collusion driven by algorithms, the hurdle a competition law regime needs to overcome is even more challenging. Anticompetitive algorithmic collusion, in situations where there is no direct human input other than designing and running particular algorithms, represents this hurdle.

The essential evidence for proving anticompetitive collusion, which can be tacit, almost always involves some form of communication.[6] The kinds of communication that can assist in proving anticompetitive collusion, as opposed to communication that represents normal market conduct, and therefore the determination of the exact boundaries between competitive and anticompetitive multilateral (or bilateral) conduct are questions which continue to be examined and which involve a rich scope of study. These questions are also present in a digital setting. However, the digital world encompasses another layer of complexity, particularly in situations where collusion is reached via algorithms and not humans. How common this algorithmic collusion is or will be in the future is another area for examination. It is alarming enough for now that it is possible.

I look at this possibility (if not already the reality) from one of the most significant hurdles that proving anticompetitive algorithmic collusion represents: Can algorithms "communicate" through the lens of competition law in order to collude?

In other words, the complexity of algorithmic collusion and their artificial, non-human characteristic mean that, before specific requirements for proving anticompetitive collusion are examined, we really need to reach a consensus, at least within a specific competition-law regime, on whether algorithms can communicate among themselves. If they do not communicate, then they cannot collude within the existing rules and principles of competition law, and they cannot, therefore, infringe the current competition law. If this is the case, then competition law rules governing anticompetitive collusion need to be re-examined in order to address collusive behavior in the digital space. However, if the answer is positive, the current competition-law rules can, at least to a certain extent, apply to algorithmic collusion.

In order to answer the question of whether algorithms can communicate with each other for the purposes of competition law, I will investigate the meaning of the term "communication" from both general and competition-law perspectives, and I will discuss how this "communication" occurs among algorithms.

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2 The connotation "competition law" used in this article means both competition law and antitrust law.

3 For instance, the European Union has two legislative proposals targeting large online platforms, the Digital Markets Act and the Digital Services Act, both submitted to the European Parliament and the European Council on 15 December 2020. The European Commission has made a number of decisions on infringements of EU competition law with regards to Big Tech companies. The Australian Competition and Consumer Commission ("ACCC") has conducted several digital-platforms inquiries. The inquiries commenced with the ACCC being directed by the Treasurer to conduct the Digital Platforms Inquiry on December 4, 2017, followed by the Digital Advertising Services Inquiry and Digital Platform Services Inquiry, both announced in February 2020. The recent Australian bill (the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020), aims to address imbalances in bargaining power between digital platforms and news media.

4 Competition law regulators and organizations have been noticing this topic. For instance, the Organisation for Economic Co-operation and Development ("OECD") studied algorithmic collusion, publishing a report on this topic in 2017. (OECD, *Algorithms and Collusion: Competition Policy in the Digital Age*, 51 (2017), available at http://www.oecd.org/daf/competition/Algorithms-and-colllusion-competition-policy-in-the-digital-age.pdf).

5 Some competition law regimes classify vertical restrictions as forms of unilateral conduct (for instance, Australia), while other competition/antitrust law regimes require a proof of anticompetitive collusion (for instance, EU, U.S.).

6 Unless, typically, the circumstantial evidence is based on the market "structure" itself. This was the case in *American Tobacco Co. v. U.S.* 328 U.S. 781, 66 S.Ct. 1125 (1946). Professor Page analyzed anticompetitive tacit agreements and evidence to prove them under Section 1 of the Sherman Act (1890) in the U.S. in his article "*Tacit Agreement Under Section I of the Sherman Act*," (William H. Page, *Tacit Agreement Under Section I of the Sherman Act*, 81 (2017) ANTITRUST L.J. 593.) where he analyzed U.S. cases on tacit agreements. He proposed that these agreements are determined and proven in situations where there is relevant communication and then competitors act upon this in a parallel manner (at 608).

I. WHAT ARE ALGORITHMS? AND HOW DO ALGORITHMS "COMMUNICATE," IF THEY DO?

Algorithms, being "sets of mathematical step designed to solve specific problems or perform specific tasks,"[7] are the essential building blocks of the digital world. The digital world as we know it is about sharing, storing and analyzing information, and all of these functions are possible thanks to algorithms. If the digital world is about information then algorithms are as well.

The most important function of the digital world for the purposes of determining the existence of anticompetitive collusion is sharing, in other words exchanging information, followed by its analysis. This exchange of information can occur either through direct human input, typically exchanging emails, messages, digital meetings etc., or with indirect input, where specific programs and functions of the digital world, their algorithms, are constructed in such a way that they exchange and analyze information (in other words, data) in the digital space. In this situation, direct human input is replaced with algorithmic "acting." This acting can be the result of artificial intelligence (hereinafter, AI), which includes machine learning and deep learning.[8]

Learning algorithms are designed to make their own decisions by learning from the data they receive or collect. They can also be designed to read other algorithms and can be read by other algorithms – they can read each other's "minds."[9] Such "communication" can include the way future prices are determined or the way other business strategies are decided. By making it known to each other, AI can be set in such a way as to allow them to then act upon this information in a collusive manner.

The origin of algorithmic "reading of minds" can be linked to the origin of the internet. When the internet was invented, the idea was that this new digital space would be transparent and free to use.[10] Thus, the algorithms created for these purposes were also set with this idea in mind; meaning that their reading parameters were usually open or transparent, allowing for the reading of minds of other algorithms.

However, this transparent trend has been modified. In the current digital economy, the digital world generates enormous profits for digital platforms, among other entities. This "partial" shift from the original idea of openness, transparency, sharing and free usage and access to profit generating has also impacted the transparency of algorithms and their reading parameters. Although this ability to "read" is still desirable in some situations and by some platforms,[11] others make their reading parameters, and even their data, unavailable to others.

Thus, while Open Web is an example of a free, sharing platform characterized by "visible, findable and linkable" content, interoperability and transparency,[12] other, more recent platforms, such as Facebook and Uber, place limits via Application Programming Interfaces (APIs)[13] on free sharing, thereby creating "walled gardens." The API locks both users and app developers into a landscape defined and controlled by the platform, such as Facebook. The increasing use of APIs by platforms has been removing information from the Open Web.[14] In general, platformization has been moving the digital world from published URIs and open HTTP transactions to "closed applications that undertake hidden transactions."[15]

What does this recent development in the digital space mean for algorithmic "communication" and parallelism? Generally speaking, it means that both algorithmic communication and parallelism are not as easy to achieve in the current digital world.

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7 B. Jedlickova, "Digital Polyopoly," (2019) 42(3) *World Competition*, 309, p. 315.

8 The various forms of algorithmic AI have been well explained in several scholarly works on algorithmic collusion. For instance, see, M. S. Gal, "Algorithms as Illegal Agreements," (2019) 34(1) *Berkeley Tech. L.J.* 67, pp. 77-92.

9 See, e.g. Von Neumann, *First Draft of a Report on the EDVAC*, reproduced in *Origins of Digital Computers: Selected Papers* 383 (Brian Randel led 1982).

10 *Ibid.*

11 For instance, Plantin et al notes that the success of platforms such as Apple's iOS and Google's Android comes from "attracting many independent actors to contribute to their software ecologies, instead of attempting to build and market stand-alone products." Jean-Christophe Plantin et al, "Infrastructure studies meet platform studies in the age of Google and Facebook," (2018) 20(1) *New Media & Society*, 293, 298.

12 The definition of the term "platform" is not absolutely unified, with some experts refereeing to "Open Web" as a platform. See, e.g. Jean-Christophe Plantin et al, "Infrastructure studies meet platform studies in the age of Google and Facebook," (2018) 20(1) *New Media & Society*, 293.

13 "An API is an interface provided by an application that lets users interact with or respond to data or service requests from another program, other applications, or Websites. APIs facilitate data exchange between applications, allow the creation of new applications, and form the foundation for the "Web as a platform" concept." (Anne Helmond, "The Platformization of the Web: Making Web Data Platform Ready," (2015) 11(1) *Social Media + Society*, 2, 4.)

14 Jean-Christophe Plantin et al, "Infrastructure studies meet platform studies in the age of Google and Facebook," (2018) 20(1) *New Media & Society*, 293, 303.

15 *Ibid.*

The more transparent the digital space is, the quicker algorithms react and adjust prices. They can even adjust price and other business decisions, such as output, before a price change occurs simply by precise predictions.[16] In the Open Web, where data are available and accessible, but in situations where algorithms' parameters are not readable, algorithms can "observe" competitors by collecting and analyzing data. With this analysis the algorithms can, for instance, predict a competitor's next step. This can potentially lead to acting in parallel with competitors' algorithms. Unlike a true reading of the mind and despite the sophistication of such algorithms, this is just unilateral acting with potential parallelism as a result.

For parallel conduct to arise from the reading of minds by algorithms, we need both true transparency, where data are accessible and available, as well as readable parameters. Without these conditions we cannot link algorithmic features to algorithmic "communication" unless certain algorithms are sophisticated enough and designed in such a way as to learn how to communicate with each other. Recent developments show that this is possible.

Schwalbe discussed and summarized some recent studies on AI learning to communicate by algorithms in his article, "Algorithms, Machine Learning, and Collusion."[17] These studies show that it is possible, due to communication protocols, for algorithms to learn to communicate and thus share communication codes and that there are various ways that algorithmic communication can be achieved. This communication could even be possible without sharing a common communication protocol.[18] From a competition perspective, what is most disturbing is "that algorithms can also learn to hide their communication from third parties."[19] This means the algorithms can hide any evidence of communication among themselves.

While these forms of algorithmic communication may not be common as yet, there is nothing to suggest that they will not become more common in the future. Therefore, both forms of algorithmic "communication," the reading of minds and direct AI communication among algorithms, need to be considered for the purposes of applying competition law to algorithmic collusion.

II. WHAT DOES "COMMUNICATION" MEAN? AND IS ALGORITHMIC COMMUNICATION A FORM OF COMMUNICATION?

In the first part of the article, I discussed three general ways for multiple algorithms owned by multiple competitors to reach parallel conduct such as parallel pricing. The first, which does not constitute "communication," arises due to transparency and AI, where algorithms "observe" competitors' behavior in the digital space by collecting and analyzing data. The second example occurs where algorithms have readable parameters and thus algorithms can read each other's minds; something that is not possible in a non-digital, human world (unless you believe in telepathy). Finally, the last example is algorithmic communication via AI.

The second and third methods of algorithmic parallelism could be the subject of current competition law if, among other things, their forms of "communication" are perceived as communication for the purposes of competition law.

Various competition-law regimes use various legal terminologies to capture anticompetitive collusion. As I noted at the beginning of this article, it is usually communication that is an important piece of evidence, besides the existence of parallel behavior, which leads to proving anticompetitive collusion. The EU has a very rich "case law" explaining the term "communication" systematically and clearly for this purpose, giving the term "communication" a wide meaning. It includes not only direct communication but also *indirect* forms of communication.[20] Communication which leads to anticompetitive collusion can be two-sided, or even one-sided (usually in the form of signaling) if it is followed by a parallel action of the recipient of such communication. Similarly, the U.S. has a number of antitrust-law cases where one-sided communication was used as important evidence for proving anticompetitive collusion.[21] Therefore, even a situation where one algorithm is readable by (or communicates to) other competitors' algorithms which then act upon that in a parallel way, could fit the competition-law banner of "communication."

16 See, e.g. A Ezrachi and M. E. Stucke, *Virtual Competition - The Promise and Perils of the Algorithm Driven Economy* (Harvard University Press 2016), pp. 72-73.

17 Ulrich Schwalbe, "Algorithms, Machine Learning, and Collusion," (2019) 14(4) *Journal of Competition Law & Economics*, 568, at 594-596.

18 *Ibid.*, p. 595, referring to S. Barrett *et al.*, "Making Friends on the Fly: Cooperating with New Teammates," (2017) 242 *Artificial Intelligence*, 132.

19 *Ibid.*, referring to M. Abadi & D.G. Anderson, "Learning to Protect Communications with Adversarial Neural Cryptography," Working paper, Google Brain, available at https://arxiv.org/pdf/1610.06918v1.pdf.

20 See, e.g. Case 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *European Sugar Cartel, re; Coöperatieve Vereniging 'Suiker Unie' UA v. Commission* [1975] ECR 1663, at ¶ 4; Cases T-25-26/95 etc. *Cimenteries CBR SA and Others v. E.C. Commission*, ECLI:EU:T:2000:77, at ¶ 87.

21 For instance, *Interstate Circuit v. U.S.* 306 U.S. 208, 59 S.Ct. 467 (1939); *U.S. v. Foley* 598 F.2d 1323 (1979); *In re Coordinated Pre-trial Proceedings in Petroleum Products Antitrust Litigation* 906 F.2d 432 (1990).

Under EU competition law, the object or effect of this communication must be "to create conditions of competition which *do not correspond to the normal conditions of the market*."[22] Such communication also leads to *the removal of uncertainties among competitors* "as to their future conduct and, in doing so, also *eliminated a large part of the risk usually inherent in any independent change of conduct* on one or several markets."[23] Surely, communication among algorithms, or reading the minds of other algorithms regarding future conduct, for instance the way future prices are determined, remove uncertainties that would exist without such algorithmic "communication." It also leads to conditions of the market that are other than normal in situations where such communication does not have a legitimate business reason.

The EU approach to communication used for proving and determining the existence of anticompetitive collusion is well summarized in *Suiker Unie*, where the Court of Justice of the European Union highlights that the provision concerning anticompetitive collusion, Article 101 TFEU, requires that competitors act independently, explaining that:

Although it is correct to say that *this requirement of independence* does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however *strictly preclude any direct or indirect contact between such operators*, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.[24]

Determining whether algorithmic communication and reading of minds should be perceived as direct or indirect forms of communication among competitors is not essential to decide whether both forms of algorithmic "communication" discussed in this article could be covered by the EU approach. It is important to note that the EU approach (like the US approach) includes both direct and indirect forms of communication and that both algorithmic AI communication and reading of minds by algorithms could be perceived as forms of "communication." The general definition(s) of the term "communication" can either support or dismiss this argument.

Looking at the term "communication" through an historical lens, we can see that its meaning has been constantly evolving: from communicating directly, through written communication via messengers such as pigeons, to introducing the telegraph, then telephone to digital communication. Each new invention which connects people and businesses has enriched the meaning of communication and its forms. The newest form, digital communication, is also subject to constant innovation. Digital communication allows us to communicate directly but also indirectly. The digital world is about information and its exchange and, therefore, claiming that algorithms do not communicate does not make sense in an environment which centers around collecting, exchanging and analyzing information. With the existence of AI in the digital world, it is logical to accept the AI algorithmic communication as a new form of communication and a new step on this evolutionary journey of communication.

The current definition of communication endorses this. For instance, the Merriam-Webster Dictionary refers to communication as "a process by which information is exchanged between individuals through common system of symbols, signs or behaviour."[25] The term "individuals" is not necessarily limited to mean "humans" and, considering recent developments in the digital space, nor should it be. Looking at another definition where communication is explained as "[t]he transmission or exchange of information, knowledge, or ideas, by means of speech, writing, mechanical or electronic media, etc.; (occasionally) an instance of this,"[26] we can see how both AI algorithmic communication and algorithmic reading of minds can fit well in such an interpretation. Considering that "telepathy" is defined as a form of communication,[27] the same applies to algorithmic reading minds.

22 Cases T-25-26/95 etc. *Cimenteries CBR SA and Others v. E.C. Commission*, ECLI:EU:T:2000:77, at ¶ 87 (emphasis added). Also see, e.g. Case C-8/08, *T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, ECLI:EU:C:2009:343, at ¶ 33; 114/73 *Suiker Unie*, at ¶ 4.

23 Case 48, 49, and 51-57/69 *Imperial Chemical Industries Ltd. v. Commission of the European Communities* ECLI:EU:C:1972:70 (*Dyestuffs*), at ¶ 101, emphasis added, also see, at ¶ 112, 119.

24 114/73 *Suiker Unie*, at ¶ 4, 173 (emphasis added); also see, e.g. *Dyestuffs*, at ¶ 10; C-49/92 P, *Commission v Anic Partecipazioni*, EU:C:1999:356, at ¶ 116.

25 Merriam-Webster Dictionary (online edition).

26 Oxford English Dictionary (online edition).

27 See, e.g. Cambridge English Dictionary (online edition); Oxford Learner's Dictionaries (online edition).

III. CONCLUSION

How the term "communication" is interpreted is an essential question which assists in the determination of whether a particular competition-law regime could, at least potentially, prohibit algorithmic collusion in situations where it is not humans but their algorithms that collude.

I argue that algorithms communicate among each other if they are programmed to do so, where they learn to communicate and exchange ideas via artificial intelligence or they communicate due to the transparency of their reading parameters, which allows them to read their minds. If algorithms can exchange information and act upon this information, then claiming that "algorithmic communication" is not communication for the purposes of competition law unless humans are directly involved does not make sense.

The same concepts of competition law should apply sufficiently to both the digital and non-digital worlds. The fact that it involves algorithms and their AI should not stop various competition-law regimes from addressing situations where algorithms collude. If we value competition as a great mechanism for enhancing the economy, we need to make sure that competition does not end where the digital world begins.

The ways in which various competition-law regimes address algorithmic collusion in the future will influence the development of algorithmic communication. For instance, if the algorithmic reading of minds is found to be subject to competition law's usage of the term communication, then this could further decrease the transparency of reading parameters. Taking AI algorithmic communication as a second example of algorithmic communication, if covered by competition-law regimes as a form of communication this could increase the tendency to design algorithms in such a way that they hide their communication, thus making potential anticompetitive algorithmic collusion harder to detect.

THE ANTITRUST ATTACK ON BIG TECH

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There is a current effort in the U.S. and abroad to employ the antitrust laws to attack Big Tech firms. "Big Tech" refers to the current four major internet platforms — Google, Amazon, Apple and Facebook. These firms are variously accused of being monopolies and that on that ground should be broken up; of being monopolies illegally acquired by the acquisition of smaller competitors with the demand of divestiture of the previously acquired entities; or of engaging in practices, in particular the preference of their own or related companies through network algorithms, to the harm of competing producers.

The attack is wide-ranging. Late last year, the U.S. House of Representatives Judiciary Committee released an exhaustive report arguing that all four internet platforms should be broken up. Shortly thereafter, the U.S. Justice Department and 11 states filed an antitrust claim against Google alleging attempted monopolization. Various other states soon followed claiming that Google illegally favored its own search engines. Very recently, politicians such as Senator Amy Klobuchar have urged the new Biden Administration to break up the platforms. And even more recently, one of the platforms itself, Facebook, has been rumored to be about to file an antitrust suit against Apple, claiming that Apple gives preferential treatment in its App Stores to its own products imposing restrictions on third-party developers, including Facebook. The European Union has taken a similar approach against some of the platforms though chiefly through the imposition of enormous fines.

Although there are other criticisms of Big Tech platforms — relating to their management of user privacy and to the spread of disinformation, which are not related to antitrust questions of industrial organization — the multiple antitrust claims have an unusual character. These lawsuits do not principally derive from claims nor are based on evidence of harm to consumers. Most consumers know of the extraordinary advantages of search on Google, of shopping on Amazon, of the application developments of Apple, and of connection through Facebook. In contrast, the antitrust claims are based most simply on a distrust of the size of these firms, each of which has grown in different ways to become platforms for internet interaction as well as from a distrust of the practices in which these platforms engage taking advantage of that size.

More precisely, from an antitrust standpoint, there have been two principal claims against (or available against, since not all have faced these claims) the four platforms. The first is that the platforms have gained their dominant impact through illegal acquisitions of nascent competitors or illegal agreements with potential competitors (such as Google's agreement with Apple) to achieve their controlling positions. This is a standard antitrust claim, invoked over the history of the antitrust laws in the U.S., most prominently against Standard Oil, American Tobacco, U.S. Steel and others, leading to the development of tight standards for the acquisition of competing companies.

There is an important difference, however, between the mergers to monopoly of the late 19th and early 20th Centuries — Standard Oil, American Tobacco, U.S. Steel — and of the creation of platforms in the modern era. Standard Oil achieved its near-monopoly over oil refining prior to the Sherman Act by acquiring — usually through profit-sharing agreements — previously competing independent refiners, first in Cleveland, creating a monopoly in that important oil refining center, then expanding it through acquisitions in Pittsburgh and the East Coast. The creation of American Tobacco was similar though more simple: a merger of previously competing tobacco manufacturers. Andrew Carnegie and J.P. Morgan created the U.S. Steel Corporation by the merger of independent steel manufacturers who had previously competed for the sale of steel.

The creation of the dominant four Big Tech platforms has been distinctly different. Their growth has been largely entirely internal or, where accelerated by acquisition, not by the acquisition of serious competitors of the growing platform. Importantly, none of the acquisitions often alleged in these complaints was challenged, when they occurred, by the Justice Department or the FTC as anticompetitive because it was recognized that these acquisitions and agreements served to expand the platform. Again, the Standard Oil, American Tobacco and U.S. Steel industries were not internet platforms, building on the gain from network benefits, but simply the agglomeration of previously independent competing companies.

The second principal antitrust claim is that these platforms have adopted algorithms that give preference — not exclusive preference, but on-screen (such as first-page or top-of-the-list) preference — to their own or related products. This discrimination claim is quite different from the other claims of monopolization. There were no general claims of discrimination in sales against Standard Oil, American Tobacco, or U.S. Steel. There have been more subtle claims in the history of the antitrust laws of differential sales agreements, such as tying arrangements, in conditions of monopoly or semi-monopoly, such as through the possession of patents, but these claims are now largely discredited because of the lack of evidence (or even theory) of consumer harm.

The first principal argument of these antitrust claims — that the size of these platforms is itself grounds for breakup — is deeply problematic. Unlike traditional monopolies such as Standard Oil, American Tobacco and U.S. Steel, the four Big Tech platforms are network industries where the benefits to consumers from participation in the network grows as the network expands. In the American Tobacco and U.S. Steel cases, consumers did not benefit as previously competing tobacco and steel manufacturers merged together eliminating competition and increasing prices. The Standard Oil experience is somewhat different because the principal motivation for Rockefeller's initial merger to monopoly of all

Cleveland refiners and his later expansion to include refineries in Pittsburgh and the East Coast was to create monopsony power against the railroads — the New York Central, the Erie and the Pennsylvania — whose charges for the transport of refined oil from the western Cleveland and Pittsburgh areas to the east were a major element (estimated at 47 percent) of the cost of shipment from the U.S. to Europe, which was then the largest market in the world for refined oil. The Standard Oil monopsony of railroads may have reduced prices to consumers, though not because of network benefits and subsequently offset by Standard Oil's monopoly over refined oil sales.

Quite in contrast, in creating networks, the four Big Tech platforms have increased consumer benefits by expanding their size. Consumers benefit when Google expands its search algorithms and when Amazon expands the retailers made available on its networks.

As a consequence, there can be no confident expectation nor surely proof that there will be any consumer benefit or societal benefit from breaking up these platforms. There is, perhaps, some point, in theory, at which the network benefits from adding additional parties to a network begin to diminish. But no one knows what that size is or when these benefits begin to diminish, and no honest expert could testify to that fact. Even in contexts where greater network size was achieved by Big Tech acquisitions or agreements, such as the agreement between Google and Apple, this fundamental issue remains. One of the states' complaints against Google is that the agreement with Apple resembles a typical merger to monopoly, though neither the Justice Department nor FTC has challenged it. But this claim ignores the network character of the industry where enhanced size provides clear benefits to all participants.

The second principal argument in the antitrust attack on Big Tech is that these platforms discriminate in favor of their own or related products against producers carried on their networks who compete with those products. Thus, Google's search algorithms give preference to Google-related products over others; Amazon's product listings give preference to Amazon products over others; the Apple App Store gives preference to Apple applications, charging a tax to applications of other producers. This alleged discrimination is often subtle. It is not that the platforms refuse to carry or advertise competing products, but that they give competing products less prominence, such as lower placement in product queues.

This subtlety itself is revealing. Why do Google, Amazon or Apple even provide access or carry competing products? Presumably, because the network benefits they provide are greater if consumers can access these competitors, even at a slightly higher cost of search to move down the list of competitors.

Preferences for a monopolist's products have been adjudicated elsewhere in antitrust law, for example, with respect to the practice of tying arrangements. For many years, tying arrangements were prohibited by both the Sherman and Clayton Acts, though without an underlying theory as to how such practices harmed consumers. Since the late 1970s, with the change in the approach in the Supreme Court to U.S. antitrust law, the prohibition of tying arrangements has been largely relaxed requiring a showing of clear consumer harm in order to find a violation.

The question with respect to the practices of these dominant internet platforms is why should there be a prohibition of the preferences given by the platforms? Why shouldn't these preferences — modest though they are and, as mentioned, constrained by consumer demand for choice to achieve maximum value from interconnectivity — be regarded as an appropriate return from the creation and maintenance of the platform, indeed an expected return to provide incentives for the generation of future platforms?

In older antitrust law, preferences such as tying arrangements were viewed as improper because the market power possessed by the firm with the tying product — such as from patents — was created by the government through the grant of patent authority. The Big Tech platforms are different. They have not been created by government patents but have grown basically internally from the successful creation of network benefits. Why shouldn't the gain from these (modest) preferences be viewed as an appropriate return from the creation of the network?

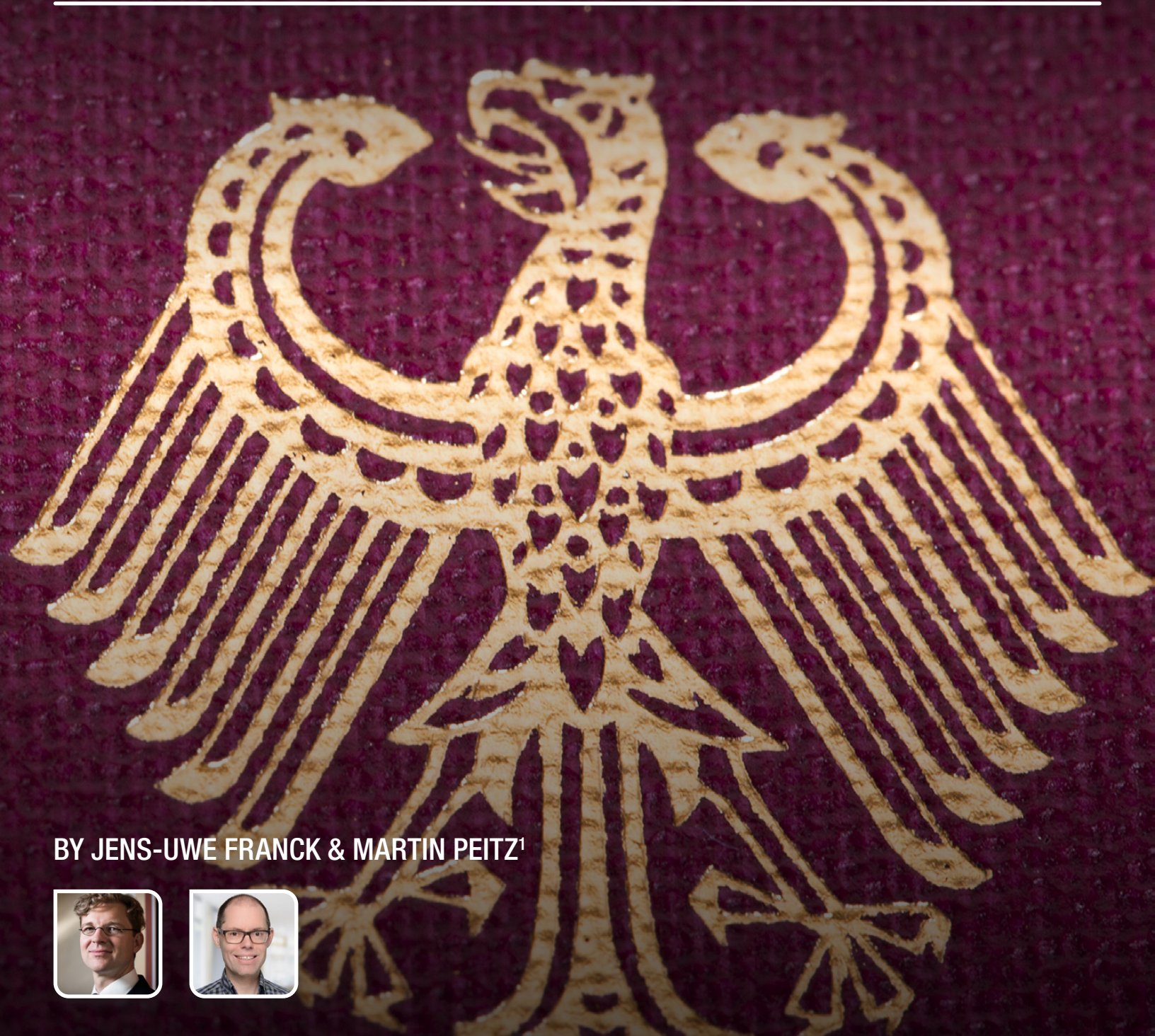
To prohibit preferences of this nature and to require non-discrimination by these platforms is to convert these platforms into public utilities, such as the provision of water supply, gas and electricity, all bound to principles of regulated non-discrimination. But, here again, the Big Tech firms are different. Public utilities such as water, gas and electricity required typically local government support in the granting of rights-of-way along public streets for the delivery of their services.

The Big Tech platforms did not develop their networks through grants of public rights-of-way. Instead, they have grown as the internet has grown and as the benefit of network industries have grown.

The antitrust attack on Big Tech platforms, as a consequence, has no coherent basis. The criticisms of the size of these platforms ignores the great network benefits that they create and that they might enhance by growth into the future. The claim of discrimination ignores its modest character — constrained by consumer demand for greater internet connectivity.

The issue in these and, presumably, forthcoming lawsuits should not derive from the size of these platforms, but should be whether consumers will or will not benefit from any purported remedy.

SECTION 19a OF THE REFORMED GERMAN COMPETITION ACT: A (TOO) POWERFUL WEAPON TO TAME BIG TECH?



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Around the globe, legislatures have become active in providing competition authorities with new tools and resources to curb the market power of Big Tech. Germany is one of the countries at the forefront of these developments. On January 18, 2021, the German legislature finally adopted the Tenth Amendment to the German Competition Act[2] ("Gesetz gegen Wettbewerbsbeschränkungen"), which includes a number of legal changes aimed at protecting competition in times of digitalization. Its major innovation is the competition instrument enshrined in section 19a, which will give new powers to the Bundeskartellamt, the German competition watchdog, when dealing with large digital platforms. The new tool deviates in substance and procedure from traditional competition law and approaches the role of a regulatory instrument targeting the digital platform industry. In essence, section 19a of the Competition Act is the functional equivalent of the Digital Markets Act ("DMA")[3] proposed by the European Commission.

I. THE MECHANICS OF THE NEW "19a TOOL"

As a first step, the Bundeskartellamt needs to decide whether a firm is of "paramount significance for competition across markets."[4] Such a decision will be effective for five years.[5] Once it has done so, it can then prohibit the firm from engaging in certain types of conduct perceived to be anticompetitive.[6] The declaratory decision and the prohibition decision can be combined. The new law contains an exhaustive list of seven types of practices the German competition authority may prohibit:

(1) Self-preferencing by vertically integrated firms;

(2) Hindering supply or sales activities of other firms (even if they are not competitors);

(3) Hindering competitors in markets where the 19a firm is not dominant but where it can rapidly expand its position ("envelopment");

(4) Using collected data to raise market entry barriers or requiring users' permission for such use;

(5) Hindering competition by impeding interoperability or by making data less portable;

(6) Withholding information on the 19a firm's performance — this is particularly relevant for intermediation services, concerning information on consumers' click behavior or parameters determining how the firm ranks goods and services;

(7) Exploiting business customers.

Except for numbers (5) and (6), the descriptions of these types of prohibitable conduct are each complemented by two illustrative examples in the law. For example, tying and bundling may be prohibited to prevent envelopment strategies by a 19a firm. However, the firm can try to demonstrate that behavior that comes under this list is "objectively justified" — it carries the burden of proving this.

The Bundeskartellamt's decisions under section 19a can be challenged before the Bundesgerichtshof ("BGH"), the German Federal Court of Justice. In these cases, the court will decide as the first and only avenue of appeal.[7]

A 19a firm that infringes a prohibition decision commits an administrative offense[8] and may be fined by the Bundeskartellamt. Other market players may bring actions for injunctions[9] or damages.[10]

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2 Bundesgesetzblatt (Federal Law Gazette), January 18, 2021, Part I No. 1 pp. 2 et seq. Available at https://www.bgbl.de/xaver/bgbl/start.xav?start=//*%5B@attr_id=%27%27%5D#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl121001.pdf%27%5D__1611317574622.

3 Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act). COM/2020/842 final.

4 Section 19a(1) 1st and 2nd sentences of the Competition Act.

5 Section 19a(1) 3rd sentence of the Competition Act.

6 Section 19a(2) of the Competition Act.

7 Section 73(5) of the Competition Act.

8 Section 81(2) No 2a) of the Competition Act.

9 Section 33 of the Competition Act.

10 Section 33a of the Competition Act.

II. GETTING TO THE HEART OF THE MATTER: CONCEPTUAL DEVIATIONS FROM TRADITIONAL COMPETITION LAW

If we compare the new competition tool enshrined in section 19a of the Competition Act with traditional instruments of competition law, four distinct features stand out in particular:

(1) Traditionally, competition law has addressed market power. Article 101 TFEU and section 1 of the German Competition Act and other equivalent provisions under Member States' laws prevent the establishment and use of market power through agreements and other forms of coordination between firms that are used to restrict competition. Article 102 TFEU and section 19 of the German Competition Act, as well as other equivalent domestic positions, target the unilateral conduct of firms that dominate a defined market.[11] In contrast, section 19a of the Competition Act addresses unilateral practices by digital ecosystems or platforms because of their specific position as intermediaries and gatekeepers, as firms that control an interface between markets, regardless of whether they actually dominate one defined market.

(2) Pursuant to the general rules for competition enforcement under German law, as a matter of principle,[12] in abuse cases the competition authority is entrusted with the task of determining, measuring, and balancing pro- and anticompetitive effects and/or the efficiency losses and gains of a scrutinized practice. On a case-by-case basis, firms may be obliged to provide information under procedural obligations to cooperate and, if they fail to do so, must accept that the possible procompetitive effects or efficiency gains are not (fully) appreciated by the authority. In contrast, section 19a of the Competition Act provides for an explicit shift of the burden of proof applicable to an extensive list of broadly formulated practices that are presumed to be abusive.

(3) Conventional competition law provides for standards and rules, established by the legislature and refined through authorities' and courts' practice, which are directly binding on the market players that are addressed and which are directly applicable and, therefore, can also be directly invoked and enforced by private parties before the courts. This is different in section 19a of the Competition Act, where the prohibition of the listed practices in an actual case depends on an intervention by the Bundeskartellamt, which enjoys discretion in this regard. The role of the competition authority thus comes close to that of a regulatory authority.

(4) While decisions by the Bundeskartellamt are usually subject to a two-level system of judicial review, the authority's 19a decisions can only be reviewed by the Federal Court of Justice acting as the court of first and last instance.

III. A TOOL ONLY MEANT FOR LARGE DIGITAL PLATFORMS?

Section 19a allows firms that are not (yet) dominant in any market to be targeted. In the legislative memorandum[13] accompanying the finalized version of the Tenth Amendment to the Competition Act, the potential addressees of the 19a tool are described as firms that, "for example due to their financial, technical or data-related resources or as cross-market digital ecosystems or platforms, are particularly capable of extending their position of power across market boundaries or securing their unassailable position." Here and elsewhere, it becomes clear that the legislature introduced the new tool to address risks to competition in digital markets. While some of the aspects listed under section 19(1) of the Competition Act are not specifically linked to the digital economy (dominance on one or several markets; financial strength and access to other resources; vertical integration and activities on otherwise related markets), such a connection is apparent in relation to the "access to data relevant for competition" and "intermediation power" criteria.

11 Note that section 20(1) of the Competition Act extends the applicability of the prohibition of exclusionary practices (as embodied in section 19(1) and (2) no. 1 of the Competition Act) to firms with mere relative market power. Remarkably, due to the recent reform, the provision now applies more broadly against abusive practices by (large) digital practices because: first, the provision can be invoked now by any undertaking and not only by small and medium-sized firms and, second, the concept of relative market power has now been extended to include also the notion of "intermediation power."

12 A reversal of the burden of proof with regard to a possible objective justification also applies in the case of discriminatory practices covered by section 19 of the Competition Act.

13 Deutscher Bundestag, Drucksache 19/25868, 13.11.2021, Beschlussempfehlung und Bericht des Ausschusses für Wirtschaft und Energie (9. Ausschuss), p. 113. See https://dip21.bundestag.de/dip21/btd/19/258/1925868.pdf.

More to the point, the reference to section 18(3a) of the Competition Act clarifies that only firms that are "active to a significant extent" as two-sided platforms or networks may be targeted by the 19a tool. As explained in the memorandum accompanying the original draft, the "criterion of significance" is supposed to ensure that only firms "with a focus on digital business models are subject to the rule."[14] What is more, the legislative memoranda repeatedly emphasize that the provision only targets a "small group of firms" or "digital ecosystems."[15] Ultimately, therefore, one can assume that the legislature indeed had only Big Tech in mind when drafting the 19a tool. Yet, since the criteria are formulated with a certain flexibility, it will be interesting to watch which digital firms will actually find themselves in the crosshairs of the German competition authority over the next few years.

IV. EXTENSIVE LIST OF CONDUCTS PRESUMED TO BE ABUSIVE

The types of behavior that the Bundeskartellamt may prohibit 19a firms from engaging in are deliberately drafted very broadly. They also include scenarios in which these practices may be procompetitive and consumer welfare-enhancing. For instance, final consumers may benefit from vertically integrated offers that are shown prominently and provide a minimum quality of service such as quick delivery, adequate packaging, or authentic products. Thus, self-preferencing may to a certain extent be in the interest of final consumers.

Another example is the use of bundling as a strategy to enter a market. In the presence of network effects, the best hope for limiting dominance by a firm in one market might be that (another) 19a firm challenges it. More specifically, if Microsoft falls under section 19a, its hands may be tied with respect to its search engine, Bing, which in any case has a hard time challenging Google Search in many countries.

Yet another example concerns allegedly exploitative behavior. A search engine that prioritizes news outlets that provide unrestricted access or allow snippets to be placed in conjunction with the search results may be disliked by some media outlets but has clear consumer benefits. It is quite remarkable that in the legislative memoranda these and other potentially procompetitive or pro-consumer scenarios are hardly mentioned or inadequately treated. For instance, with regard to self-preferencing it is acknowledged that exclusive integration of a firm's own offers may be justified if necessary "for the utility of core functions of the hardware," such as the "telephone, camera, message feature or file management of a mobile phone." The example of the mobile phone reveals that consumers' expectations of what constitute a product's "core functions" evolve dynamically and are in fact the result of competition between more- or less-integrated product designs. Therefore, the concept of "core functions" merely begs the question of where to draw the line between consumer welfare-enhancing and procompetitive integration of a firm's own offers and abusive self-preferencing.

Whether the 19a tool will lead to socially desirable outcomes will very much depend on whether the Bundeskartellamt strikes the right balance between the pro- and anticompetitive effects of these behaviors. Ideally, as a result of the authority's practice and the case law of the Federal Court of Justice a subset of rules will develop over the years that specifies which conduct is prohibited under section 19a(2) of the Competition Act, taking into account in particular the considerable differences in the monetization models pursued by the digital platforms addressed.[16] However, we see the risk of a rather mechanical assessment that certain practices fall under the law and will therefore be prohibited based on a quasi–per se rule that does not sufficiently take into account the circumstances of the individual case. The hope is that this will not happen and that the reversal of the burden of proof both opens the door to anticompetitive effects receiving the consideration they deserve and addresses the asymmetric information problem the Bundeskartellamt has faced elsewhere. The law, however, is rather unclear about the basis on which to do the balancing.

In particular, considering the case of two-sided platforms that cater to business users and final consumers — for example, on Amazon Marketplace the business users are the sellers — the question will often be whether or when there should be a netting of countervailing welfare effects for these two groups. The reform is a missed opportunity to address this issue and to provide guidance. The legislature essentially left it at the somewhat vague comment that in the context of "objective justification" a balancing of interests will be required, considering, on the one hand, the goal of protecting free competition and, on the other hand, the legitimate freedom of business and possible procompetitive elements of the conduct in question.

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14 Referentenentwurf des Bundesministeriums für Wirtschaft und Energie, Entwurf eines Zehnten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 (GWB-Digitalisierungsgesetz) of 24.1.2020, pp. 76–77. See https://www.bmwi.de/Redaktion/DE/Downloads/G/gwb-digitalisierungsgesetz-referentenentwurf.pdf?_blob=publicationFile&v=10.

15 See Beschlussempfehlung (n 13), p. 114 and p. 120 (section 19a applies only to a "very small circle of potential addressees"). See also Referentenentwurf (n 14), p. 76.

16 Economic theory has shown that platform incentives with respect to certain practices may well depend on the platform's monetization model (see, e.g. Teh, 2019, "Platform governance," available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3521026). This is reflected by a recent opinion piece by Caffarra & Scott Morton ("The European Commission Digital Markets Act: A translation," voxeu.org, Feb. 5, 2021) in the context of the proposed DMA and also applies to section 19a of the Competition Act.

The memo that accompanied the original draft of the Tenth Amendment had stated more in detail that particular weight should be given to the long-term objectives associated with section 19a — limiting economic power, keeping markets open, and protecting the competitive process — as opposed to, in particular, short-term efficiencies for the benefit of businesses and consumers.[17] Interestingly, this passage was not taken up by the parliamentary committee in its final memorandum on the bill. Nevertheless, there is a widespread perception that 19a firms that put forward procompetitive effects and/or efficiency gains should find it difficult to rebut the presumption of abusiveness. We reiterate that it would be a serious flaw if the practices included in section 19a were to evolve into quasi–per se prohibitions.

V. PROMPT AND EFFECTIVE INTERVENTION: ABRIDGED JUDICIAL REVIEW

In principle, decisions of the Bundeskartellamt can first be challenged before the Düsseldorf Higher Regional Court (Oberlandesgericht), where six specialized divisions have been set up to handle these cases. The Higher Regional Court's decisions may then in turn be appealed against before the BGH.

It is most remarkable that this well-established legal protection mechanism will *not* apply to decisions under section 19a of the Competition Act. Bypassing the Düsseldorf Higher Regional Court, the Federal Court of Justice will decide as a court of appeal in the first and last instance. The legislature has gone to great lengths to justify this abridged judicial review.[18] It is argued that the particularities of digital markets require particularly swift intervention to be effective. It is assumed that not even the Bundeskartellamt's option to order immediate enforceability of its decisions suffices to do justice to this necessity. The legislature refers at this point to the current Facebook litigation: the firm succeeded with its application for an order of suspensive effect before the Higher Regional Court,[19] which, however, was overturned by the Federal Court of Justice.[20] Facebook then initiated a second summary proceeding, whereupon the Higher Regional Court again ordered suspensive effect by an interim decision.[21] After all of that, Facebook has now withdrawn its application, so the Bundeskartellamt's order[22] is temporarily enforceable, albeit after almost two years of interim legal proceedings. In light of this, the legislature saw the risk that, given the options for judicial review currently available, the enforceability of the Bundeskartellamt's future 19a decisions could remain in dispute for a number of years.[23]

The single-tier judicial review of decisions by public authorities is nothing unheard of under German law and appears not to conflict with constitutional law.[24] Yet, what is lost by reducing judicial review to one appeal instance must not be overlooked or underestimated. The Federal Court of Justice will have to rule on decisions of the Bundeskartellamt, which will significantly interfere with the entrepreneurial freedom of the platform operators concerned and which will heavily influence the development of digital markets in Germany and (possibly) beyond. As the legislature itself emphasized, the application of the new competition tool will typically involve complex questions of fact and unresolved legal questions. What is more, the number of cases is expected to remain small.[25] Therefore, for a prudent development of the law under section 19a of the Competition Act, we submit that it would have been fruitful for the Düsseldorf Higher Regional Court, which has been familiar with competition proceedings for many years, to deal with these cases first. In any case, it would not be a good reason to bypass the court just because it has occasionally been quite critical of the competition authority's views, especially in the course of the aforementioned Facebook proceedings.

17 See Referentenentwurf (n 14), p. 80.

18 See Beschlussempfehlung (n 13), pp. 120–122.

19 OLG Düsseldorf August 26, 2019, VI-Kart 1/19(V) – *Facebook I*, Juris.

20 BGH June 23, 2020, KVR 69/19 – *Facebook*, Juris.

21 OLG Düsseldorf November 30, 2020, *Kart* 13/20 (V), Juris.

22 Bundeskartellamt February 6, 2019 B6-22/16, available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5.

23 See Beschlussempfehlung (n 13), p. 121.

24 The German Constitutional Court (Bundesverfassungsgericht–BVerfG) held that the Constitution does not guarantee a multitiered judicial review. See BVerfG April 30, 2003, 1 *PBvU* 1/02, *BVerfGE* 107, 395, 402, Juris, para. 18.

25 *Id.*

VI. TOWARD EVER-INCREASING REGULATORY FRAGMENTATION IN THE EU INTERNAL MARKET?

By moving ahead and enacting section 19a of the Competition Act, the German legislature has deliberately put pressure on the EU to more effectively address the perceived competition problems caused by the big digital platforms. The recently proposed EU Digital Markets Act ("DMA") is intended to be the functional equivalent of Germany's new competition tool. To be sure, it is by no means settled in which form and when or whether at all the DMA will enter into force. Yet, in the EU's legislative process, the Commission's new powers to regulate Big Tech under the DMA will be benchmarked against section 19a of the Competition Act. Suffice it to mention here two differences that seem to be apparent: first, the circle of potential addressees of the DMA appears to be wider, in particular in view of the qualitative criteria, which trigger a (rebuttable) presumption that the firm may be designated as a gatekeeper.[26] Second, the regulatory design of the DMA is much closer to conventional *ex ante* regulation, as a firm that is designated as a gatekeeper is automatically obliged to comply with the obligations laid down in the DMA,[27] while the gatekeeper may apply for a suspension where compliance "would endanger, due to exceptional circumstances beyond the control of the gatekeeper, the economic viability of the operation of the gatekeeper in the Union"[28] or request an exemption for overriding reasons of public interest.[29]

What is more, with the 19a tool, the German lawmakers have opened up a testing ground for digital platform regulation. Ideally, other rule-makers, particularly in the EU, will watch and learn from the wanted and unwanted effects of the Bundeskartellamt's future 19a interventions.

It is foreseeable, however, that national competition enforcement and *ex ante* regulation will lead to increasing differences in digital platform regulation across EU Member States. While the EU could react to such fragmentation by striving for a full harmonization of domestic laws including competition law, this is not to be expected. The EU's DMA proposal aims at harmonizing Member States' gatekeeper regulation, which is adopted "for the purpose of ensuring contestable and fair markets."[30] Pursuant to the proposal, Member States will remain free, however, to adopt stricter gatekeeper regulation to pursue "other legitimate interests."[31] Further, national competition law will also remain unaffected by the DMA.[32] For the foreseeable future, digital platforms and their users will therefore have to bear the costs of fragmented rule-making in the EU's internal market. When deciding in a particular case whether or not to impose a certain rule on a digital platform, national competition authorities cannot be expected to consider these costs in any meaningful way. However, we foresee that, in the medium term, some "soft" EU-wide convergence will result from exercise, exchange, and experience.

VII. CONCLUDING REMARKS

The 19a tool is a revolution in German competition law. It sits between traditional competition law and sector regulation. Targeted at Big Tech, it aims to rebalance the power between the Bundeskartellamt and powerful firms. In particular, the competition authority benefits from a reversal of the burden of proof. We see this a positive innovation in light of the information asymmetry between the watchdog and Big Tech and the resources available to the latter.

However, bypassing the specialized competition law court and making the German Federal Court of Justice the first and only appeal instance does not appear to us to be the last word in wisdom. What is more, drafting the practices covered in wide terms that may be interpreted as per se prohibitions might lead to outcomes that particularly hurt final consumers because special interest groups obtain undue considerations. Whether the tool is employed for good use will mostly depend on the Bundeskartellamt. The authority already took the opportunity to put its new instrument to the test and initiated its first 19a proceedings against Facebook, investigating the linking of Oculus, a subsidiary of Facebook that

26 Article 3(2) of the DMA proposal (n 3).

27 Articles 5 and 6 of the DMA proposal (n 3).

28 Article 8 of the DMA proposal (n 3).

29 Article 9 of the DMA proposal (n 3).

30 Article 1(5) 1st sentence of the DMA proposal (n 3).

31 Article 1(5) 2nd sentence of the DMA proposal (n 3).

32 See Recital 9 of the DMA proposal (n 3). In particular, it is specified that the proposed "Regulation is without prejudice … to other national competition rules regarding unilateral behavior that are based on an individualised assessment of market positions and behavior, including its likely effects and the precise scope of the prohibited behavior, and which provide for the possibility of undertakings to make efficiency and objective justification arguments for the behavior in question." Section 19a of the Competition Act appears to meet these criteria and would therefore be exempt from harmonization through the DMA.

produces virtual reality devices, with Facebook's social network.[33] Only time will tell whether the 19a tool has sharp teeth and to what effect it will be used.

Notably absent from Germany's reform is an update of merger control rules to better meet the challenges posed by digital platforms. The new section 19a aims at prohibiting certain behaviors, but the amended Competition Act does not provide sharpened tools to go against acquisitions by Big Tech firms. While the Commission seems to be equally reluctant to engage in a substantial reform of the EU Merger Regulation, it is remarkable that, under the proposed DMA, designed digital gatekeepers will have an obligation to notify any intended acquisition regardless of whether it is notifiable under the EU Merger Regulation or national merger rules.[34] This fits in with the announcement by Commissioner Vestager that from mid-2021 the Commission will accept referrals by Member States even if the mergers in question would not be notifiable under national law.[35] In the light of this new policy as regards Article 22 of the EU Merger Regulation, it would have made sense to introduce a corresponding information obligation under German competition law. However, one may assume that the Commission will find a way to signal to a Member State when it considers a referral request to be appropriate.

What are the repercussions for platform users in Germany and beyond? On the one hand, Germany as a mid-sized country may well be important enough for the platforms to comply with its legal peculiarities and to adapt their business models instead of simply withdrawing from the market. On the other hand, stricter (and conceivably too far-reaching) regulation in Germany is unlikely to significantly influence platforms' global investments in new services — unless the 19a tool triggers a domino effect in other countries.

33 See the Bundeskartellamt's press release of January 28, 2021, available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2021/28_01_2021_Facebook_Oculus.pdf?__blob=publicationFile&v=2.

34 Article 12 of the DMA proposal (n 3).

35 Commissioner Vestager, "The future of EU Merger Control," International Bar Association 24th Annual Competition Conference, September 11, 2020, available at https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en.

2021 ANTITRUST HORIZONS: LETTING GO WHILE HOLDING ON TO HOPE

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Rather than perspectives, horizons to be explored and broaden. Rather than expectations, new frontiers to be crossed and secured. Competition Law will most definitely face a wide range of possibilities and emergencies in 2021. Some issues will remain as others arise. The severe economic crisis resulting from the COVID-19 pandemic required that antitrust authorities worldwide revise parameters and views that guided their performance during the past few decades, and imposed on us the need for procedures and guidelines to be expanded and strengthened amid oversimplified and immediate solutions to the crisis.

The unexpected impact caused by the pandemic and the measures taken to prevent it from spreading have deeply influenced the functioning of whole markets and economies. Globally, antitrust authorities that had been enforcing their laws in the past decade in a context of stable economic growth had to adapt their enforcement practices not only due to the challenges caused by blockages, but, more importantly, they had to adjust to collapsing markets or markets of essential goods which experienced serious scarcity, in a context of great economic depression, in which many companies were facing rigorous liquidity restrictions or possible bankruptcy.

Antitrust authorities have faced these drastic circumstances by altering their enforcement priorities, allowing certain types of cooperation/collaboration, loosening their efficiency patterns, adopting emergency procedures, allowing government support under certain conditions, and approving mergers and acquisitions given that the target had suddenly turned into a bankrupt or insolvent company. Concurrently, antitrust agencies have constantly emphasized, with all available means and policies, that said changes would mean neither a weakening nor a substantial shift in the basic principles of competition laws that had been previously followed.

CADE's performance, like those of other authorities, was deeply affected by the issues faced by countries, companies and individuals throughout 2020. Thus, CADE had to seek ways to lessen the main and most severe internal and external effects of the crisis, always based on the premise of promptly promoting a competitive environment as healthy as possible in all sectors under our scrutiny, and also throughout the Brazilian economic recovery in the medium and long terms.

Therefore, it is always a delicate balance between renewal and continuity – which needs to be continuously addressed – that drives all public policies in Brazil and abroad. However, in exceptional circumstances, the fundamentals of government intervention in the economy must be examined more carefully, including regarding the interpretation and enforcement of competition laws. What should remain the same and what should be changed need to be defined based on technical criteria, considering the expertise acquired by individuals and institutions. The remedy prescribed to patients must heal them completely and with minimum collateral effects.

The Government, in Brazil and abroad, should weigh in their interference in the economic sphere. Measures taken without proper consideration or which excessively weaken established standards may, under certain circumstances, cause more harm and end up worsening the situation instead of resolving it. As it is said in English, we should never tolerate that the baby be thrown out with the bathwater.

Hence, within their jurisdiction and capabilities, and safeguarding traditional methodologies and review parameters, antitrust authorities need to be allowed freedom and creativity, of course always having parsimony and self-restraint, to find solutions that are feasible, proportional, easy to monitor, quick to implement, and, especially, ones that properly address the competition issues they are intended to solve.

In this regard, I believe antitrust authorities worldwide will be called to action more often than ever in 2021, to put their experience and expertise to good use. We must be prepared to contribute as we can to the economic agenda of our countries by asserting and showing that the answer to the crisis caused by the pandemic is ensuring free competition. Additionally, we need to show that unreasonable, disproportionate or poorly planned economic interventions would wreak havoc in markets that are already so battered. We must be sure to make it clear that only by further exploring some lessons and established models of antitrust law we will be able to rebuild the structures that have deteriorated during the long period of low economic activity and, of course, build new foundations that the crisis proved to be necessary and urgent. It is time we double our bets that competitions law can contribute to make it easier to understand economic phenomena and, particularly, the means to handle its more complex recent dilemmas.

Of course, I speak from CADE's perspective, from our experience with competition laws in Brazil, especially how they have been understood and enforced in the country in the past decades. Still, I believe worldwide we have some converging answers and goals to be achieved in 2021 and beyond: letting go of old ways in order to explore new solutions to new problems, while keeping in mind that we can always resort to established principles to deal with notorious issues. In order to reach beyond 2021, I believe it is essential that, in 2021, we have clarity regarding what it means "going beyond." To do that, it is important that antitrust authorities are heard and consulted about the processes involved in the economic revival and that the traits and characteristics that can make it lasting are thought over. In that sense, nothing lasts longer than establishing structural and behavioral conditions that foster effective competition in different economic sectors, as antitrust experience has shown us.

Our economies, and companies and people, can only recover, especially in developing countries – which inherently have stricter limits on their capacity to invest and obtain funds – if all available means are used properly and in a coordinated manner. To this extent I believe antitrust law, in Brazil and worldwide, can contribute more if we consider its century-old journey: since its origin and throughout its international consolidation, amongst the public policies related to the economy, antitrust has always placed much importance in the technical structuring of a system of institutions and rules aimed at creating incentives and sanctions to foster desired competition practices through decisions and agreements. Moreover, in general, it is essential and perhaps undeniable that, for a remedy to be effective, the measures adopted should involve a range of national and international authorities and agencies, in accordance with its historic role as a mediator between law and economic matters.

Therefore, competition law is unique in its procedures and intentions and, at the same time, is an element that comprehends concerns of all sorts. The worldwide crisis caused by the pandemic made it clear that, when faced with new and old issues, antitrust law needs to take into consideration its own experiences. Letting go while keeping our hopes up, with new lessons and inherited standards, in 2021 antitrust authorities have a lot to develop and contribute to a legacy that will live beyond 2021.

Thus, the Brazilian experience with collaboration/cooperation amongst competitors, which is directly related to its international occurrences, is one of these means and policies of antitrust law that simultaneously and similarly can be considered innovative and conservative, and are good amulets of this in-between place we are at where we must let go and hold on at the same time, and the current antitrust context full of possibilities and perspectives which are obviously primordial for competition authorities to have the ability to handle, understand, and, when deemed necessary, intervene in economic matters.

In cases of extended and overall crises, such as the current one caused by the COVID-19 pandemic, economic agents usually seek to define methods and protocols for collaboration/cooperation between them to overcome serious imbalances and instabilities and preserve their ability to carry on their activities. However, even though these agreements may be beneficial during the crisis, if certain conditions and safeguards are not in place, they may result in potential competition problems along the road in Brazil and abroad. The agreements herein considered are those that establish means of collaboration/cooperation amongst competing companies in a same market. They are adopted in an emergency as a provisional measure, aimed at overcoming adversities resulting from an extensive, non-sectoral crisis, and at mitigating the main immediate effects of the crisis to protect competition in affected sectors.

According to the principle of free competition, economic agents should compete amongst themselves while carrying out their commercial activities, while antitrust authorities, on the other hand, must protect competition and punish harmful conducts. Thus, collaboration/cooperation amongst two or more agents implicate considerable advantages that give cooperating companies more market power while impairing businesses that did not have the same opportunity or privilege. In specific cases, however, a collaboration/cooperation amongst competitors may have a positive effect by ensuring greater efficiency in the distribution of products and services of the economic sectors granted this opportunity. It is, by nature, economic concentration, or, in other words, a practice to be investigated. However, considering the devastating impact of the pandemic and other similar situations, we should be open to discuss the possibility of resorting to it on occasion.

Given this scenario, on May 28, 2020, upon an application for collaboration/cooperation from competing companies (proceeding 08700.002395/2020-51), CADE decided to clear the creation of the project "Movimento NÓS." The agency established guidelines, boundaries, procedures and binding review patterns for the matter in similar discussions. At the time, it was mentioned that the economic agents intending to collaborate/cooperate during the crisis in good faith, should not forget the advisable opportunity to report such agreements to CADE for proper review, even though their reporting is not mandatory.[2]

Furthermore, it was indicated at the time that the companies involved should be aware of possible competition issues that could arise from their agreement could cause. Thus, the companies should take adequate measures to enter risk-free agreements and avoid possible future investigations of antitrust violations by CADE a result of their cooperation.

Moreover, the agency stressed it was not about less strict rules, but a different kind of assessment. We have, thus, made it clear that the Brazilian competition authority will not refrain from addressing competition concerns in its reviews of cooperation agreements/collaboration amongst competitors, even in times of crises; but it will review them with different metrics and procedures. Thus, it cannot be said these (or any other cases) reviewed by the authority are not subject to competition regulation. In order to properly explore the available horizons and opportunities related to this matter, it is important that we clarify the main aspects of the case to understand its unfolding and how CADE reviews this kind of request.

2 Public version available at: https://sei.cade.gov.br/sei/controlador.php?acao=procedimento_trabalhar&acao_origem=protocolo_pesquisa_rapida&id_protocolo=816783&infra_sistema=100000100&infra_unidade_atual=110000955&infra_hash=81c6fcb4b1126752e12cf258cd29f03dba5b77e1825ebe73bfe876ae5f698266.

When submitted to the agency for a review of possible competition effects, these requests are filed as a simple Petition as they do not fulfil the conditions for mandatory reporting nor fall within the scope of a merger or acquisition, a typical agreement amongst competitors, or any other possibility foreseen in Law 12529 or in the Statutes of CADE.

Next, the Office of the Superintendent General of CADE evaluates the potential of the cooperation agreement/collaboration amongst competitors result in anticompetitive effects and issues an opinion suggesting that it be granted or not. Finally, the case is forwarded to the agency's Administrative Tribunal, which assesses it and takes the appropriate measures.

The Tribunal, taking into account what is available in the records and the opinion issued by the Office of the Superintendent General, will grant the request if it is considered that the cooperation agreement/collaboration amongst competitors fulfils the requirements to be reviewed by the agency and if the matters of fact and the law ensure the request is in accordance with competition laws and does not have the potential to negatively affect competition.

There is no time limit for these requests established by law or the Statutes of the CADE, but as they are considered urgent requests, we try to review them as priority issues and on an emergency basis. Both the Office of the Superintendent General and the Tribunal know crises require faster decisions, made on technical grounds; most of all, they should be reviewed timely and in accordance with other requests the agency receive which are heard without delay. In this particular case, the request was received, reviewed by the Office of the Superintendent General, submitted to the Tribunal, and heard within 15 days.

On May 19, 2020, the companies AMBEV, BRF, Coca-Cola, Mondelez, Nestlé, and Pepsico filed a Memorandum of Understanding ("MoU," or "Agreement") with CADE, which was signed within the scope of the Small Trade Activity Recover ("STAR Project") on May 11, 2020, and resulted in the so-called "*Movimento NÓS*."

The COVID-19 pandemic led many commercial and service establishments to temporarily stop their activities as a measure to prevent the disease from spreading. These measures had a severe economic impact on small and medium retailers — which in Brazil are a significant part of the distribution channels for consumer goods such as food, beverages, health care products, and household goods — therefore threatening their own existence.

With the prospect of a prolonged crisis and considering the very nature of the activities carried out by small retailers in the country, we noticed isolated actions could not effectively support these establishments in restarting their economic activities, thus the need for a business coalition with this purpose.

These were the main reasons behind our decision to clear project *Movimento NÓS*, which included some competition safeguards we had established: i) companies' individual actions would not bear results; ii) the business coalition should be time-limited; iii) potential time limit extensions are dependent on the pandemic, and CADE had to be previously notified to consider such requests; iv) in conducting their business activities, the companies should not interact, in the strict sense, but rather conduct such activities individually; and vi) the actions developed by the coalition are pro-competitive and pro-efficiency and, above all, could not be adopted by any of these companies alone.

On June 4, 2020, after adjudication, the Tribunal reached a unanimous decision. They i) chose to examine the request, although the coalition did not fall within the scope of any of the transactions listed in our laws nor did it require previous reporting; ii) ratified the opinion issued by the Office of the Superintendent General concluded, in summary, that the agreement was economically justifiable; iii) concluded the parties adopted protocols to prevent antitrust concerns; iv) saw no indications of anticompetitive practices resulting from, or connected to, the coalition; v) preserved the right to review its position on the coalition if faced with any evidence of anticompetitive practices; and vi) observed the companies showed concern about re-establishing competitiveness and normality in the sector.

Therefore, according to CADE's case law, in examining this kind of request, the agency considers i) the exceptional circumstances faced by the companies, ii) the urgency of the matter, iii) the causal link between the crisis and the intended cooperation, iv) the time limit; and v) the efficiencies produced by the agreement and their benefits to consumers.

Moreover, to ensure requests for cooperation/collaboration amongst competitors are properly received and considered by the agency, it is crucial they include the following: vi) all information and documents required for the Office of the Superintendent General and the Tribunal to review the case (at the moment of the filing); and vii) proof they can be quickly implemented/reverted, and that they are feasible/executable, monitorable, economically reasonable, and proportional to the problems they confront.

Furthermore, as a result of such decision and in order to support companies in filing this type of request, CADE published on its website on July 6, 2020 the Provisional Informative Note on Collaboration amongst Companies to Face the COVID-19 Crisis, in which the agency explains these collaborations in terms of their parameters, scope, time limits, main procedures involved, and other relevant information to help companies have confidence in these agreements and better understand their contours. Thus, CADE has succeeded in gathering tools, rules, and procedures to respond promptly and efficiently to struggling companies in the pandemic and post-crisis period.[3]

The briefly-described Brazilian rules for cooperation/collaboration among competitors are merely an illustration of the beneficial shift I believe is representative of competition law in 2021: in order to remain active — appropriately — competition authorities need to be sufficiently detached so as to better propose inventive and adequate solutions to the current and, especially, unpredictable problems that will stem from the COVID-19 pandemic; and to shield the hope and faith that these institutions are capable of properly responding to these issues as they have done for over a century.

Competition law, with its unique parameters, procedures, value, and techniques can surely offer sound responses to ensure that, in the medium and long run, antitrust authorities' actions produce long-lasting benefits to the majority of a country's population. Thus, it is not desirable or legitimate that, confronted with an opaque and scarcely predictable future, we abandon it as a tool to mediate the relationship between law and economics. What the delicate future of competition law as a public policy holds in store for Brazil and the world requires us to be open, in the sense developed in this text, in this in-between place where we must let go while holding on to hope, simultaneously dealing with innovation and conservatism, while navigating profoundly complex and broad matters. These expectations can only be explored and fulfilled by not dedicating ourselves completely to either of them and actually nourishing this in-between place.

Of course, competition law (nationally and internationally) will have its eyes on a series of cases and markets in 2021. To name a few topics CADE and other competition authorities will be paying attention to: in the digital economy sector, issues such as open banking; 5G's arrival in the Brazilian mobile telephony market; the enforcement of the Brazilian General Personal Data Protection Law (Law 13709/2018); reviews related to large mergers and acquisitions scheduled for the first half of 2021, which involve several sectors significant for the country's economy; as well as the ongoing discussions on the criteria for penalties related to administrative proceedings or the criteria of convenience and enforceability in CADE's successful agreement policies. Nonetheless, I believe rather than being reduced to a few high-priority topics, 2021 will be a year for us to strengthen our conviction about the importance of competition for long-term national development and to once more assert the maturity of this system in Brazil. This will only become true if we are not too attached to our old ways and let go of what does not serve us anymore with courage and keeping our hopes up.

It is with high hopes for the future of competition law that I head towards the end of this text. What is in store for antitrust in 2021? To which prospects should the antitrust community turn itself this year? It is hard for me to say it, but we must learn from what is already in front of us: our global and globalized case law, which has succeeded in solving most of the dilemmas we tackle in our daily work as adjudicators; not to mention competition law researchers and scholars everywhere, who truly make up the institutional memory of our century-old antitrust laws—and who, therefore, are the most apt to help renew and expand it. What we do today has, of course, immediate consequences, but above all it is part of an inheritance we leave for those who will come after us. This inheritance is, mainly, courage, hope, and trust in competition law. Against this background, the prospects of antitrust are endless, as they always move forward and are always redefined; they are unfinished and, hence, can forever develop, evolve, improve.

3 Available at: http://www.cade.gov.br/noticias/cade-divulga-nota-informativa-sobre-colaboracao-entre-concorrentes-para-enfrentamento-da-crise-de-covid-19/nota-informativa-temporaria-sobre-colaboracao-entre-empresas-para-enfrentamento-da-crise-de-covid-19.pdf.

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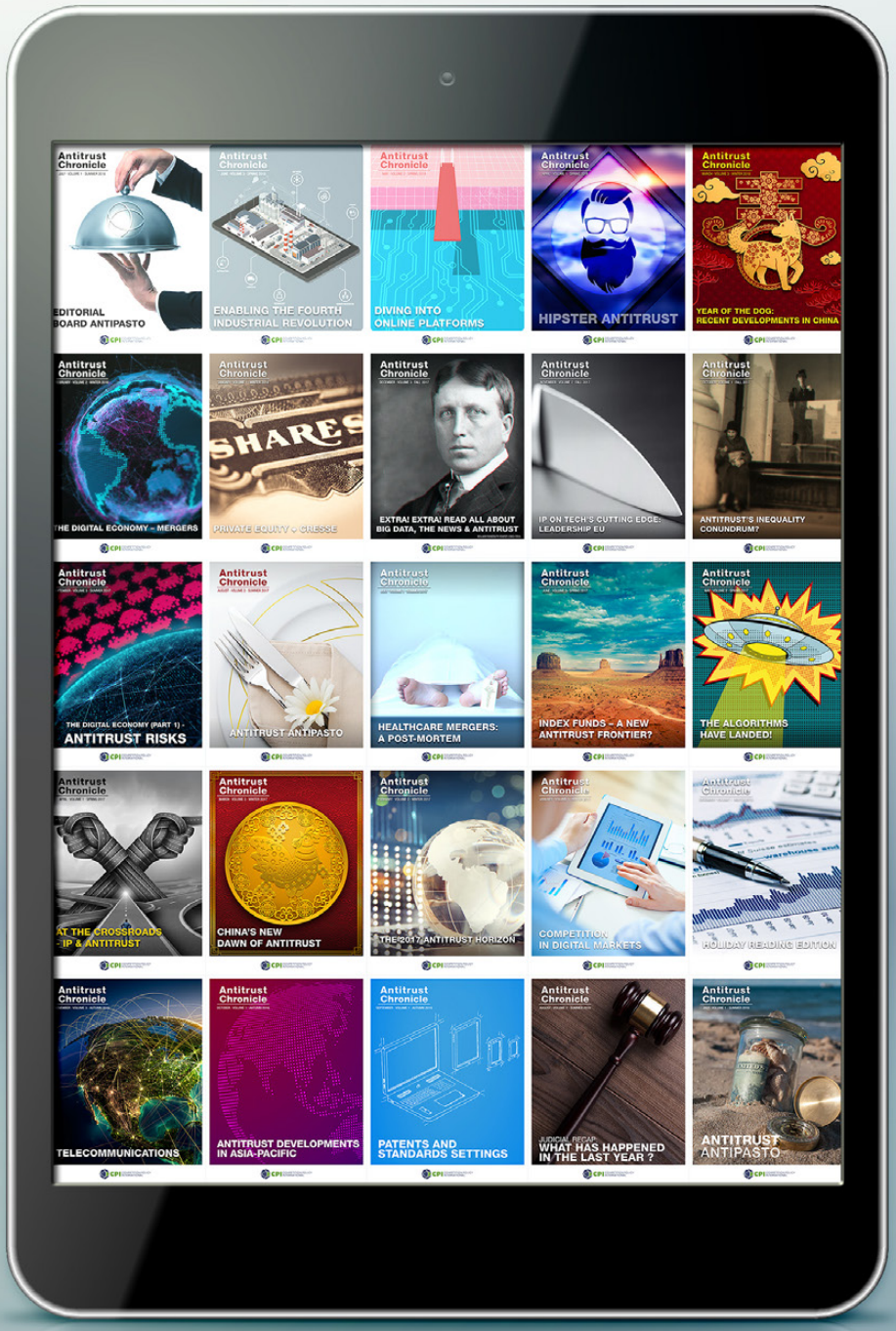


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