
Intergovernmental Group of Experts on Competition Law and Policy

18th SESSION

10-12 July 2019

Room XVII, Palais des Nations, Geneva

Thursday – 11 July, 2019

E-commerce and the Digital Economy

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**Contribution to the 18th session of the
Intergovernmental Group of Experts on E-commerce and the Digital Economy**
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This contribution addresses the following topic: “b. Competition issues in the digital economy”.

It is increasingly evident that concentration in the digital economy is increasing². This is well documented on pp. 80 of the 2018 UNCTAD *Trade Development Report*³. The root causes for such concentration as well known. As UNCTAD puts the matter⁴: “Winner-takes-all dynamics are typical in platform-based economies, where network effects can generate major benefits to first movers. Whoever controls the platform also controls the distribution channel, giving the dominant platform (and data) owner considerable market power. ... As a result of network effects, platforms may gain market power and could abuse their dominant position, for example by imposing exclusivity arrangements on their providers or carrying out predatory pricing against competitors.” See also paragraphs 36-40 and 64-67 of the Note by the UNCTAD Secretariat, *The value and role of data in electronic commerce and the digital economy and its implications for inclusive trade and development* (TD/B/EDE/3/2, 23 January 2019)⁵ and Chapter 2 of the April 2019 report to the European Commission *Competition Policy for the Digital Area*⁶. As that chapter points out, concentration in the Internet arises because of economies of scale and network effects, but also because of the role of data. In fact, the role of data is so important that it has created what a respected Harvard Business School professor has referred to as “Surveillance Capitalism”⁷, which she considers to be a very negative development⁸. It is now well-understood that data can be used to influence political processes⁹.

Thus, as noted scholar Tim Wu points out¹⁰, antitrust law must not be restricted (as it is at present in the USA) “to deal with one very narrow type of harm: higher prices to consumers”. On the contrary, “It needs better tools to assess new forms of market power, to assess macroeconomic arguments, and to take seriously the link between industrial concentration and political influence”. The same has been said by other scholars¹¹, by a newspaper¹², an advocacy group¹³, a commission¹⁴ of the European Parliament,

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² <https://future.internetsociety.org/2019/>

³ <https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=2227>

⁴ UNCTAD, *Making Digital Platforms Work for Development*, Policy Brief no. 73, March 2019,

https://unctad.org/en/PublicationsLibrary/presspb2019d2_en.pdf

⁵ https://unctad.org/meetings/en/SessionalDocuments/tdb_ed3d2_en.pdf

⁶ <http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>

⁷ Zuboff, Shoshana (2019) *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*, Profile

⁸ See for example the review at:

<https://www.theguardian.com/books/2019/feb/02/age-of-surveillance-capitalism-shoshana-zuboff-review>

⁹ <https://science.sciencemag.org/content/338/6106/472>

<https://www.brookings.edu/opinions/ten-ways-social-media-can-improve-campaign-engagement-and-reinvigorate-american-democracy/>

¹⁰ Wu, Tim (2018) *The Curse of Bigness: Antitrust in the New Gilded Age*, Colombia Global Reports. A review is at: <http://www.boundary2.org/2018/10/richard-hill-too-big-to-be-review-of-wu-the-curse-of-bigness-antitrust-in-the-new-gilded-age/>

¹¹ <http://www.yalelawjournal.org/note/amazons-antitrust-paradox>

<http://www.kcl.ac.uk/sspp/policy-institute/CMCP/Tech-Giants-and-Civic-Power.pdf>

<https://promarket.org/wp-content/uploads/2018/04/Digital-Platforms-and-Concentration.pdf>

¹² https://www.washingtonpost.com/business/is-amazon-getting-too-big/2017/07/28/ff38b9ca-722e-11e7-9eac-d56bd5568db8_story.html

a group¹⁵ of European industries, a well-known academic¹⁶, and even by a plutocrat¹⁷ who benefitted from the current regime.

In particular, another scholar¹⁸ has suggested that:

... current doctrine under-appreciates the risk of predatory pricing and how integration across distinct business lines may prove anticompetitive. These concerns are heightened in the context of online platforms for two reasons. First, the economics of platform markets create incentives for a company to pursue growth over profits, a strategy that investors have rewarded. Under these conditions, predatory pricing becomes highly rational—even as existing doctrine treats it as irrational and therefore implausible. Second, because online platforms serve as critical intermediaries, integrating across business lines positions these platforms to control the essential infrastructure on which their rivals depend. This dual role also enables a platform to exploit information collected on companies using its services to undermine them as competitors.

In addition to considering harm to suppliers under current antitrust laws, one can also envisage limiting the ability of large retail platforms to sell their own products in direct competition with products offered on the platform.¹⁹

Further, as pointed out by UNCTAD²⁰, it appears that algorithms and Artificial Intelligence may engage in anti-competitive behaviour, and that anti-trust authorities should be on the watch for such behaviours.²¹ It may be difficult for the national anti-trust/competition authorities in small countries to analyse such algorithms. Thus international cooperation would appear to be beneficial.

Given the role of data as a factor favouring concentration in the Internet, such concentration could be reduced, or at least some of its potentially negative effects could be mitigated, by ensuring data portability and platform interoperability; and, further, by ensuring that, if a company has a very large amount of data, then it would have to make that data accessible to others on some sort of fair terms, or after some period of time²² (while of course still complying with personal data protection/privacy laws).

This is conceptually similar to the time limits that apply to copyright and patents, or to the reasonable and non-discriminatory (RAND) provisions that most standards-making bodies require if patent licenses are required in order to implement a standard.

In light of the above, we offer the following proposals for the consideration of the Intergovernmental Expert Group:

1. States should enact and enforce national competition/anti-trust laws which are not restricted to consumer harm.

¹³ <https://ilsr.org/amazon-stranglehold/>

¹⁴ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONGML+COMPARL+PE-627.635+01+DOC+PDF+V0//EN&language=EN>

¹⁵ <http://www.digitalmusiceurope.com/2018/09/24/hi-world-6-2-4-2/>

¹⁶ <https://www.wired.com/story/tech-swagger-triggered-government-distrust/>

¹⁷ <https://www.politico.com/magazine/story/2014/06/the-pitchforks-are-coming-for-us-plutocrats-108014>

¹⁸ Khan, Lina M. (2017) "Amazon's Antitrust Paradox", *The Yale Law Journal*, vol. 126, no. 3, pp. 564-907, <https://www.yalelawjournal.org/note/amazons-antitrust-paradox>

¹⁹ <https://economictimes.indiatimes.com/industry/services/retail/fdi-rules-may-affect-50-of-amazon-flipkart-businesses/articleshow/67783227.cms>

²⁰ <https://static.ptbl.co/static/attachments/203358/1553863652.pdf?1553863652>

²¹ <https://eweek2019.unctad.org/meetings/953933>

²² <https://www.foreignaffairs.com/articles/world/2018-08-13/big-choice-big-tech>

2. States should apply a heightened degree of control of acquisitions of small start-ups by dominant platforms²³.
3. National anti-trust and competition authorities should monitor the possible anti-competitive behaviour of algorithms and Artificial Intelligence; consequently, they should be empowered to analyze the source code of such systems for enforcement purposes.
4. States should agree global anti-trust rules and an international enforcement mechanism for such rules.
5. States should consider ensuring that retail platforms do not themselves supply goods or services offered for sale on the platform.
6. States should enact data portability and interoperability requirements for dominant platforms²⁴.
7. States should agree data-sharing legislation²⁵.
8. States should consider imposing local presence requirements on dominant international platforms in order to facilitate enforcement of national anti-trust measures.

²³ See pp. 110 ff. of the EC Report at <http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>

²⁴ See for example pp. 81 ff of the EC Report at <http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>

²⁵ See for example pp. 92 ff of the EC Report at <http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>