ETNO response to the call for contributions

"*Shaping Competition Policy in the Era of Digitalization*"

ETNO welcomes the opportunity to respond to the Commission's call for contributions on the implications of digitisation for competition policy. ETNO believes that – while competition rules are in principle flexible enough – digital markets require a critical review of the underlying assumptions and tools. In particular, this contribution addresses the new challenges for the competitive assessment in the digital markets. These are related to a range of issues such as the role of data, market definition and market power assessment as well as the resulting implications for antitrust and merger cases in the digital economy.

Given the growing impact of online platforms on the overall economy and the increasing concentration in the digital markets, ETNO believes that competition law practice needs to adapt to the unique characteristics and dynamics of the digital markets. In particular, the following areas require special attention:

1. Consideration of all competitive aspects of the complex role of data;
2. Examining the competitive role and impact of "gatekeeper" platforms and reassessing conglomerate power;
3. Taking a more holistic and dynamic approach and paying more attention to the impact certain mergers or conducts have on innovation;
4. Adapting speed and effectiveness of enforcement to the dynamics of digital markets.

In the following four sections we will look at each of these issues in more detail, giving a broader context and conveying some preliminary ideas for concrete actions to improve or adapt the competitive assessment to the era of digitalisation.

1. Data, Competition and Privacy

a. Nature and role of data

Data is at the core of the new competitive dynamics of the digital markets. Its generation, collection and use have exponentially grown due to the enormous increase of Internet traffic, the continuous decrease of electronic storage's costs and the extraordinary evolution of computing power[1]. This has shaped business models and transformed all industries and sectors, making competitive dynamics more complex and diverse.

[1] http://www.visualcapitalist.com/visualizing-trillion-fold-increase-computing-power/

Data is a unique asset with a very complex nature[2]. From an economic point of view, data can be qualified as an input, an output or the price to be paid in non-monetary transactions. Data is non-rivalrous as it can be possessed and used by several individuals or entities simultaneously. Data can be made excludable assets when a specific entity has the ability to prevent other stakeholders[3] from generating, collecting or using it with technical means such as not interoperable systems or by contractual means such as exclusivity clauses.

The value of data is related to the insights that may eventually be extracted from it, but is not objective and unique; instead, a different value could be assigned depending on the person/entity providing, generating, collecting or using data[4]. Data subjects have distinct sensitivities about the provision of their data and companies processing data also have diverse views over data value, depending on its generating process[5], its format, etc. For instance, companies might prefer data generated by the provision of their own services rather than third party's data, due to ease of processing.

b. Data and the digital platforms

The general economic model of digital platforms is based on exploiting the direct and indirect network effects[6] and the economies of scale inherent to multi-sided markets. In this model, data is very often at the centre of the economic processes.

Digital platforms typically offer zero priced[7] services to end-users on one side of the market, and monetize the customer data obtained on that side by offering paid services like advertising to business users on the other side. Usually, platforms tie a range of services and, in some cases, restrict the interoperability or compatibility of their technologies. Combining economies of scale and scope on the supply side, direct and indirect network effects, tying and lowered compatibility, often leads to "winner takes all" markets characterized by a high concentration. While these strategies are designed to maximize profits and may have welfare improving effects, they might also provide companies with incentives to engage in anticompetitive practices[8].

Data, the key input of this model, is used in different ways. For example: offering services tailored to specific users, improving the quality and functionality of services, offering business users a more targeted customer profile, selling data in the data-product markets and selling insights from data.

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[2]Competition Law and Data Report (2016). Autorité de la Concurrence and Bundeskartellamt http://www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf; Cerre Report: Big Data and Competition Policy: Market power, personalised pricing and advertising http://www.cerre.eu/sites/cerre/files/170216_CERRE_CompData_FinalReport.pdf; H. Schweitzer and M. Peitz (2017), Datenmärkte in der digitalisierten Wirtschaft: Funktionsdefizite und Regelungsbedarf?, ZEW Discussion Paper 17-043

[3]Competition Law and Data Report (2016). Autorité de la Concurrence and Bundeskartellamt http://www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf

[4] See footnote 2

[5]Cerre Report: Big Data and Competition Policy: Market power, personalised pricing and advertising http://www.cerre.eu/sites/cerre/files/170216_CERRE_CompData_FinalReport.pdf

[6] See footnote 3

[7]Herrera-Gonzalez F. (2015), Are "free" markets actually free? CPI Antitrust Journal, November (I)

[8]OECD Report on "Big Data: Bringing Competition Policy to the Digital" http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/M%282016%292/ANN4/FINAL&docLanguage=En

The high concentration of digital markets may lead to feedback loops and unleashes further concentration of data. Both concentration trends reinforce each other: the more concentrated a market, the greater the amount of data obtained by platforms, and so better and more targeted services can be offered, which in turn makes them more competitive and valuable for the user[9].

These data-related effects are strengthened by the use of algorithms and Artificial Intelligence. Indeed, the functioning of platforms is based on the use of algorithms[10], which are fuelled by data. Computing power has increased sharply allowing the platforms to improve the use and growing sophistication of algorithms. This also creates positive feedback loops: with more data, algorithms are improved which in turn provides improved services leading to better data and algorithms that again further improve services. This also can make the learning curve much steeper than before, reinforcing the advantage of the first-movers.

c. Data as competitive parameter in competitive assessments

When trying to disentangle the role of data in competition law in the digital economy, the above-mentioned characteristics and effects should be considered. Since data is crucial for the competitive dynamics, its role should be a relevant part of any competitive assessment, including the analysis of data as:

i) An input: control, excludability, exclusivities over access, ability to do profiling, lever to improve service quality, functionalities, etc. or to extend to other markets, etc.
ii) An output: ability to compete in the provision of data, potential competition on the insights, etc.
iii) Price: competition among platforms with regards the amount of required data, sensibility of users with regards the amount of data required, effects on the amount of data required, etc.

Data protection and privacy concerns as such should be excluded from the competitive assessment[11], but should be taken into account as a quality parameter on which firms may compete[12]. Competitive assessment does not need to differentiate between personal and non-personal data (as the competitive significance does not depends on this characteristic of data). Nevertheless, when the existence of different privacy regulatory standards creates barriers to entry or competitive disadvantages, (as those applying to telecoms, with e.g. the proposed ePrivacy regulation) they should be considered in the competitive assessment.

Data is driving a shift in the competitive paradigm, which should be followed by a shift in the competition law analysis. Focus should turn from prices to quality, innovation and consumer's choice; which, in turn, will require a longer-term analysis of the consumer's welfare or harm.

[9] Lerner A. (2014), "The Role of 'Big Data' in Online Platform Competition"
[10] Ezrachi & Stucke (March 2017), Report on Artificial intelligence & collusion: when computers inhibit competition, https://illinoislawreview.org/wp-content/uploads/2017/10/Ezrachi-Stucke.pdf
[11] Case C-238/05 Asnef-Equifax, ECLI:EU:C:2006:734, para 63.
[12] Case M.8124, Microsoft/LinkedIn.

Actions:

- Consider in the competitive assessments the crucial and complex role of data in digital;
- Shift the focus from prices to innovation and consumers' choice;
- Data protection as such should not be the object of competition policy, but can be analysed as quality parameter on which firms may compete;
- Take into account in the competition analysis the different regulatory frameworks for personal and non-personal data.

2. Digital platforms, Market power and Theories of harm

The digital economy and the online platforms have several characteristics –some of which better understood by economic theories than others –, which should frame the different steps of the competitive assessment: market definition and determination of dominance, as well as theories of harm.

a. Characteristics of the platform economy and market definition

i) Multi-sided markets

Digital platforms use attention and data from customers to derive profits on other markets. Indeed, digital platforms' business models are based on leveraging direct and indirect network externalities by tying complementary products/services, often offered for free on one side and monetized on the other side.

Therefore, the competitive assessment has to consider all sides of the market in a conglomerate way[13].

ii) Absence of monetary transactions

In the analysis of products/services, regarded as interchangeable or substitutable by the consumer, price has so far played a crucial role in assessing demand elasticity through well-established tools (e.g. SSNIP test). Evaluating substitution/interchangeability in zero-priced markets requires adopting new metrics, since zero-priced market players do not actually provide their product/service for "free", but trade them for customer data and attention[14]:

- Data: Business models of zero-price market players (i.e. intermediary platforms) are often based on customer data that are the subject of an economic exchange often without the consumer being aware;

[13] Evans, D.S. & Noel, M. (2005). "Defining Antitrust Markets When Firms Operate Two-Sided Platforms", Columbia Business Law Review 667; Filistrucci et al. (2014)
[14] A. Prat and T. Valletti (2018), Attention Oligopoly

- Attention: Customer attention to advertisements is a key driver of zero-priced markets[15]. Traditional competition analysis generally ignores the role of attention time in the exchange between consumers, platforms, and advertisers[16]. However, digital players' products/services apparently not competing as regards interchangeability/ substitutability might be nonetheless part of the same market as they compete for customer attention.

Market definition therefore needs to consider a variation of metrics other than monetary prices including either non-monetary prices, quality using a SSNIQ (Small but Significant Increase in Quality) test, or costs relying on a SSNIC (Small but Significant Increase in Costs) test[17]. In addition, market definition based on "attention" should also be considered.

iii) Evolving business models

Digital markets evolve very quickly because of fast innovation. Innovation may be 1) sustaining, i.e. taking place within the value network of the established firms, or 2) disruptive, taking place outside the value network of established firms[18].

The pace of innovation implies that market definition should be more dynamic. Regarding sustaining innovation this requires a more thorough consideration of potential competition. To better capture disruptive innovation, market definition should also, to the extent feasible, move up the innovation value chain and focus on the innovation capabilities instead of the current services or innovation results. This is the move that the Commission has initiated with the Dow/DuPont merger[19]. Indeed, digital platforms often expand in adjacent markets, blurring the boundaries and thus requiring market definition to account for potential business models' evolution. An example is the approval of the acquisition of Instagram by Facebook in 2012, where the players were not considered competitors on the advertising market[20]. Instagram, however, later did introduce advertisement, thus strengthening Facebook competitive position on advertising markets.

Actions:

- In multi-sided context, competition analysis should take all sides of the market into account and especially the interactions among the different sides;
- In the specific context of multi-sided markets with free products, market definition could be based on alternative to monetary prices, such as quality, costs or attention;
- To take into account the importance of sustaining and disruptive innovation, market definition should be dynamic, better analyse potential competition and focus, to the extent possible, on innovation capabilities instead of current offered products.

[15] John M. Newman (2015), Antitrust in Zero-Price Markets: Foundations, 164 U. Pa. L. Rev. 149
[16] Evans, David S. (2017),The Economics of Attention Markets .
[17] See proposals in Evans, D.S. (2011), "Antitrust Economics of Free", Competition Policy International; Gal, M.S. & Rubinfeld, D.L (2016). "The hidden costs of free goods: Implications for antitrust enforcement". Antitrust Law Journal; Newman, J. M. (2015). "Antitrust in Zero-Price Markets: Foundations," University of Pennsylvania Law Review, 149-206; Newman, J. M. (2016). "Antitrust in Zero-Price Markets: Applications," Washington University Law Review, 94 (1)
[18] C. Christensen (1997), The Innovator's Dilemma, J. Gans (2016), The Disruption Dilemma, MIT Press
[19] Decision of the Commission of 27 March 2017, Case 7932 Dow/DuPont.
[20] OFT (ME/5525/12): "The parties' revenue models are also very different. While Facebook generates revenue from advertising and users purchasing virtual and digital goods via Facebook, Instagram does not generate any revenue"

b. How to assess market power in the platform economy

Given the specificities of digital markets, even when the markets have been correctly defined, the metrics used to assess the competitive position of market players requires particular attention.

Indeed, the common metrics used in the competitive assessment (first and foremost, market shares) might not be appropriate indicators when dealing with multi-sided markets with one or more zero-priced sides and where innovation is important[21]. The assessment should here consider the potential sources of market power and focus on the analysis of barriers to entry and market contestability, in particular considering:

i) Direct/indirect network effects leading to market tipping and a "winner takes all", concentrated market structure;
ii) Switching costs for consumers, relating to the dependency on one single platform. The lock-in effect can be balanced by multi-homing to some degree, but the latter should be assessed on the basis of time/attention a consumer spends on similar platforms;
iii) Possession of non-replicable data, especially when a single player can combine data from different markets and has the ability to extract economic value with a proprietary algorithm;
iv) The possibility of leverage, in particular with data, between connected markets[22];
v) Economies of scale, given that platforms benefit from low marginal costs for each additional users therefore having an incentive to invest in the size of the platform itself.

In digital markets competitive concerns with regard to conglomerate effects may be more prominent, also referenced to as conglomerate power of the big digital groups[23]. Clear advantages of combining resources, like data, from different sources, economies of scale of complementary products running on the same infrastructure, and the fact that innovation and expansion of digital platforms often is cross-market, demonstrate the growing importance of conglomerate effects.

In line with this approach, some jurisdictions are starting to recognize the importance of elements other than regular market structure/concentration indexes to assess correctly market power in digital markets. In 2017, Germany introduced in its national competition law a list of criteria that national competition authorities and courts now have to consider when assessing market power: "*In particular in the case of multi-sided markets and networks*"[24]: *1. direct and indirect network effects, 2. the parallel use of services from different providers and the switching costs for users, 3. the undertaking's economies of scale arising in connection with network effects, 4. the undertaking's access to data relevant for competition, 5. innovation-driven competitive pressure*.

[21] Case T-79/12 Cisco and Messaget v. Commission, para 69
[22] J. Prufer and C. Schotmuller (2017), Competiting with Big Data, TILEC Discussion Paper 2017-006
[23] H. Schweitzer, J. Haucap, W. Kerber and R. Welker (2018), Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen", BMWI, p. 83
[24] Act against Restraints of Competition, §18 (3a)

Even though ETNO welcomes these first steps in recognizing that traditional tools must be complemented to account for the specificities of digital markets, the issue of enforcement remains. Indeed, the question of how to measure the impact on the different elements of market power is still an open question and might lead to different approaches in different jurisdictions, therefore affecting legal certainty. Therefore, some additional guidelines on how to factor those indicators in the dominance assessment and to measure them would be welcome.

Actions:

- The assessment of market power should focus more on barriers to entry than market shares on statically defined markets;
- The assessment of market power should also take into account the conglomerate footprint across markets which are different but can be related currently or in the future;
- Focus more on elements that characterise the digital market like network effects, access to data, and develop common tools to better measure those characteristics.

c. Theories of harm

As said, the digital markets characteristics, in particular the strong network externalities fuelled by data-driven innovations and economies of scale and the close connection between some markets, lead to situations of a certain dominance by one or few players, which may lead to "gatekeeping" position *vis-a-vis* markets and consumers as well as conglomerate presence.

The so-called "gatekeepers" control the access to a large part of end-users, enjoying a market position which is increasingly difficult to replicate. Often this is combined with expansion to a "multi-platform" with the supply of various services that allow the "gatekeepers" to obtain almost unique amount and variety of data. Once this "gatekeeper" position is no longer contestable this should raise concerns from a competitive perspective.

Such concerns may arise in particular if the "gatekeeper" position is used to engage in exclusionary and/or exploitative conducts, such as leveraging, tying or price discrimination.

The economic literature recognizes that the ability of large platforms to create linkages and synergies among several markets produces efficiency gains, which can be transferred to consumers[25]. However, "gatekeepers" have an incentive to protect/extend their market position, possibly through behaviours aimed at foreclosing the market or by pre-empting new players' entry in future adjacent markets. In turn, this could, hinder innovation and reduces consumer welfare[26].

As an example, the practice of tying products/service is part of the common business models of digital platforms. However, tying becomes anticompetitive, if used to extend market power from

[25] N. Van Gorp and O. Botura (2015), Challenges for Competition Policy in a Digitalised Economy, Study for the European Parliament

[26] A. de Streel and P. Larouche (2015), Disruptive Innovation and Competition Policy Enforcement, OECD Paper, DAF/COMP/GF(2015)7; H.A. Shelanski (2013) "Information, Innovation, and Competition Policy for the Internet", University of Pennsylvania Law Rev., 161: 1663-1705

one market to another (offensive leveraging) or to protect a dominant position (defensive leveraging).

Given that strategies applied by platforms to gain market power generate efficiency gains, the crucial challenge of competitive analysis is to disentangle legitimate business practices from anticompetitive conducts. In general, it can be concluded that in multi-sided markets, increasing efficiencies in turn increases market power.

Reviewing the relevant microeconomic literature, it can be assumed that:

i) The strategies applied for acquiring and maintaining dominance have efficiency grounds, but at the same time they might foreclose competitors;
ii) Their welfare effects are ambiguous in general, and depend primarily on the size of network externalities, the level of users' switching costs, whether multi-homing is available, the compatibility of technologies;
iii) Even though anticompetitive effects from leveraging market power through tying can potentially be mitigated by multi-homing, this is not always true (e.g. it could also be relevant to evaluate time/attention spent on competing services).

A prominent issue in the debate on the possible "new" abuses linked to digital business models is related to the privacy policy, which can be viewed as a non-price dimension of competition, somehow relating to product quality.

With the development of data-based services and AI, pressures will mount on competition authorities to deal with exploitative abuses in the form of excessively low privacy protection (as in the current German Facebook case[27]) or personalised pricing which may be considered discriminatory. With regard to exploitative abuses the competition authorities should only intervene exceptionally when regulation is ineffective and when the market will not correct itself.

Anti-competitive effects that might derive from the concentration of large quantities of data may reduce the incentive for the dominant undertaking to compete on that specific profile of quality. Also, the privacy policy of a dominant undertaking might become a source of illicit competitive advantage, if terms and contract conditions constitute a means of acquiring/strengthening market power or create barriers to entry. Other strategies to exclude competitors from the access to data could also be considered, under certain conditions, as an anticompetitive conduct.

[27] https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/19_12_2017_Facebook.html;jsessionid=78ED97C6CCDC627C046152898D366225.2_cid362?nn=3591568

Actions:

- Properly measure network externalities, switching, conglomerate effects and contestability when assessing whether monopolizing practices have anticompetitive effects;
- Clarify in which circumstances offensive and defensive leverage, in particular with internal or external discrimination, could constitute an abuse of dominant position;
- Clarify in which circumstances a refusal to inter-operate can constitute an abuse of dominant position;
- Assess dependencies of both companies and end-users on access to platforms and contestability of "gatekeepers"
- Analyse if "gatekeepers" leverage their position to develop exploitative and exclusionary abuses

3. Digital Innovation and Mergers

Multisided platforms have partly built their persistent dominance from their data analytics, the efficiency of which was enhanced by exploiting network externalities. This also has implications on merger control.

Indeed, platforms' entrenched dominance derives from a dynamic strategy: extending the scope of services, either by bundling in-house innovations or bundling acquired smaller innovators. The latter case refers to the so-called "pre-emptive mergers", where a monopoly platform buys a start-up or engages in their systematic buyout.

The purpose of pre-emptive mergers can be twofold:

i) Eliminating a future disruptive competitor;
ii) Foreclosing future markets.

The control over complementary/unique data obtained from merged databases/technologies allows restricting access and provision from alternative suppliers, due to multi-homing withdrawal. Pre-emptive mergers can be viewed as market power leveraging: dominance is used to gain control over technology and data, i.e. new market, in which monopoly platform would not have gained foothold without the buyout.

A renewed Innovation Theory of Harm (ITH), adopted by the European Commission in its recent review of Dow/DuPont merger case, claims that mergers hinder innovation in general, absent efficiencies. This theoretical claim has not been so far supported by any formal consensus in the microeconomic literature[28].

The ITH would suggest that a pre-emptive merger hinders innovation by suppressing a competitive constraint on a dominant platform and phasing out technologies/services, which

[28]Jullien & Lefouilli (2018), "Horizontal Mergers and Innovation". TSE working paper N°18-892; Denicolo & Polo (2018), "The Innovation Theory of Harm: An Appraisal". Bocconi working paper N.103; Haucap (2017), "Merger Effects on Innovation: A Rationale for Stricter Merger Control?" DICE working paper N° 268

would have further developed absent the merger. A monopoly's access to data also reinforces a dominant position, as newly merged datasets enhances algorithms' efficiency. However, a comprehensive view of the competitive effect of a given transaction, should mention non-detrimental effects. For instance, the prospect of being acquired increases mavericks' incentives to innovate. Moreover, larger platforms have by definition wider reach and a more efficient allocation of innovation costs due to larger scale.

Whether persistent dominance is reinforced by competing on the merits or through foreclosure is not always directly observable and welfare effects are ambiguous, as long term effects of mergers on innovation and welfare are uncertain. In particular, the extent to which combining assets (either datasets or datasets with algorithms) from merging parties will provide permanent post-merger market power is not straightforward to assess.

In this sense, challenging mergers on the motive of threat to innovation should be the result of a thorough assessment, which considers also and at the same time the counterbalancing effect of long-term dynamic efficiencies, as improved quality from continuous innovation.

Furthermore, in digital markets, which feature rapid changes in value chains in short time-lapses, antitrust policy and market entry are closely related. The dynamics of digital markets imply that merger policy should consider incentives and disincentives to entry as a crucial assessment parameter. For instance, formal models analysing the impact of mergers on investment and innovation should include endogenous entry barriers, otherwise the model would not accurately represent the market reality. In addition, lenient merger policies could encourage entry due to expected gains from merging with a successful innovator, while more restrictive policies can prevent entry and thus limit competition and innovation[29], in such dynamic markets, high ex-post concentration is compatible with strong ex-ante competition[30]. Reversely, the impact of attempts to foreclose a market on potential entry should also be given high attention.

Another element to consider in the debate on innovation is the relationship between market concentration and innovation. As said, in the market for digital services with dominant multi-sided platforms, dynamic market power leveraging based on tying or pre-emptive mergers tend to increase market concentration. The concentration of market structure increases, either from the monopolization of other markets (through tying) or the elimination of a competitor in horizontal or conglomerate pre-emptive merger. Furthermore, monopolizing new markets or buying smaller innovators expand data held by the dominant platform or newly merged entity, which improves efficiency of its data analytics, thus reinforcing its dominance over time.

[29]Gans (2015), "Mergers and disruptive innovation."Hogan Levels Global Media and Communications Quarterly Autumn 2015

[30]Shapiro (2011), "Competition and Innovation: Did Arrow Hit the Bull's Eye?", in J. Lerner & S. Stern (eds), The Rate and Direction of Inventive Activity Revisited. NBER, pp. 361-404

Actions:

- As innovation is key in digital markets, merger control should analyse the effects of the concentration on the incentives and the possibilities to innovate and assess at the same time both negative and positive effects on a given transaction on innovation;
- Merger control assessment should take into account the value of data, the two-sided market and the conglomerate effects.

4. Remedies and enforcement in the digital economy

The competition dynamics of the digital economy require the competition authorities to assess impact on markets thoroughly to avoid potential gaps in enforcement of competition law. In order to rightly address the issues arising in digital markets, remedies may need to adapt.

a. Remedies

Potential remedies for digital platforms with a dominant position could relate to access in different forms, interoperability and non-discrimination. These conditions should/could be implemented by dominant platforms to prevent further abuses like locking-in users of platforms to certain technical requirements or unfair commercial arrangements as well as refusals to access the platform. Non-discrimination should/could also apply to vertical integrated companies meaning that the entity operating the platform or providing the data should treat all users, whether in or outside the company, in a non-discriminatory way[31].

Another remedy may be the obligation to unbundle the multi-sided platforms' services, or to provide granular choices with regards the privacy policy (to avoid the "take or leave it" dilemma associated with free services), to increase end-user choice. For instance, dominant social networks should be required to enable the consumer to choose by which advertisement network they would like to be served.

Especially in the case of behavioral remedies, it is important that a monitoring system is put in place to evaluate the effectiveness of the obligations. Such remedies may have very far reaching consequences on the business models of the online platforms and they are often very complex to implement and monitor, making them close to regulatory solutions. This points to one of the most fundamental and yet complex issue which is the relative effectiveness and enforceability of competition law and regulation in policing the digital ecosystem. This issue needs to be further reflected upon and then clarified in a close dialogue between competition and regulatory agencies.

b. Enforcement

In the digital economy, with rapid technological developments and fast changing business models, there is a risk of enforcement being ineffective where it is based on long ex post investigations. In addition, may also be ineffective because of the difficulties in determining and monitoring the remedies, which are often behavioural. In this sense, ETNO believes that the Commission should

[31] Commission Decision of 27 June 2017, Case AT.39740 Google Search (Shopping)

provide for faster, limited-in-time, antitrust procedures and for an adequate application of interim measures, given that the requirement of the avoidance of irreversible damages is more easily met in digital (fast and dynamic) markets. Close monitoring is required given the rapid changes of the sector. Guidelines could be introduced to clarify under which situations a platform will act independently of its competitors, its customers and ultimately of its consumers or even control the ecosystem as "gatekeeper". The point of departure that only abuses of dominant position infringe competition law should be maintained in the digital age. Successful platforms should be given room to develop and innovate. As soon as these platforms move into a "gatekeeper" position the assessment should change: given the characteristics of the data economy this "gatekeeper" position will exist even when the traditional market share criteria will not be met (see 2b-2c). Here guidelines could give more detail on criteria that indicate towards an anticompetitive positioning.

Moreover, ETNO believes that merger policy should be reviewed with the aim to catch transactions which has a cross-border effect, but currently do not meet the revenues thresholds, as they generally entail the acquisition by a large digital provider with global reach of a smaller target company. In order to adapt EU merger control to the digital economy, a new framework allowing to catch pre-emptive mergers should be considered.

Given the cross-border nature of most of the services provided by the platforms, a close cooperation between the NCAs and the Commission is important to increase the effectiveness of their actions.

Actions:

- Speed procedures thank to better expertise, use of guidelines (on market definition, market power assessment and abuses in digital economy) and increasing reliance on interim measures (given easier concurrence of the avoidance of irreversible damages requirement);
- Ensure consistent decisions at the national level, with strengthened cooperation between competition agencies and regulatory authorities;
- Ensure close cooperation at the EU level between the national competition agencies and the Commission;
- Increase knowledge and expertise of the competition authorities with the hiring of computer scientists, the drafting expert reports, and market investigations, and the coordination with regulatory authorities;
- In order to adapt EU merger control to the digital economy, a new framework allowing to catch pre-emptive mergers should be considered, with complementary notification threshold based on the value of the transaction and an analysis of the effects of the merger on innovation.